Kruger v Commonwealth [1997] HCA 27; (1997) 190 CLR 1; (1997) 146 ALR 126; (1997) 71 ALJR 991 (31 July 1997)

HIGH COURT OF AUSTRALIA

BRENNAN CJ,

DAWSON, TOOHEY, GAUDRON, McHUGH AND GUMMOW JJ

Matter No M21 of 1995

ALEC KRUGER & ORS PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

Matter No D5 of 1995

GEORGE ERNEST BRAY & ORS PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

ORDER

Matter No M21 of 1995

1. The questions reserved for the consideration of the Full Court be answered as follows:

"Q.1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the Ordinances and regulations referred to in paragraphs 7-12 inclusive of the Amended Statement of Claim so restricted by any and which of the rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 29 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations referred to in paragraphs A, B, C and D of the claim to the extent pleaded in those paragraphs?"

A. No.

"Q.2. Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 29 of the Amended Statement of Claim, a breach of which by -

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?"

A. No.

"Q.3. If yes to question 1 or question 2, are any and which of the matters pleaded in subparagraphs (d) and (e) of paragraph 29 of the Amended Defence relevant to the existence, scope or operation at any material time of any and which of the rights, guarantees, immunities, freedoms and provisions?"

A. Unnecessary to answer.

"Q.4. If yes to question 2 -

(a) on the facts pleaded in paragraphs 1 to 6 of the Amended Statement of Claim, are the Plaintiffs' claims (or any of them) for damages for breach of a constitutional right, guarantee, immunity, freedom or provision statute barred?

(b) by what statute?"

A. Unnecessary to answer.

"Q.5. If yes to question 2, on the facts pleaded in -

(a) paragraphs 1 to 6 of the Amended Statement of Claim, paragraph 36B(a) and (c) of the Amended Defence and paragraph 7 of the Amended Reply;

(b) paragraphs 1 to 6 of the Amended Statement of Claim, paragraph 36B(c) of the Amended Defence and paragraphs 6 and 7 of the Amended Reply,

are the Plaintiffs' claims (or any of them) for damages for breach of a constitutional right, guarantee, immunity, freedom or provision barred, or capable of being barred, by an implied constitutional time limitation requiring that the claims be instituted within a reasonable time?"

A. Unnecessary to answer.

"Q.6. If yes to question 2, on the facts pleaded in -

(a) paragraphs 1 to 6 of the Amended Statement of Claim, paragraph 36B(a) and (c) of the Amended Defence and paragraph 7 of the Amended Reply;

(b) paragraphs 1 to 6 of the Amended Statement of Claim, paragraph 36B(c) of the Amended Defence and paragraphs 6 and 7 of the Amended Reply,

are the Plaintiffs' claims (or any of them) for declaratory relief and/or damages for breach of a constitutional right, guarantee, immunity, freedom or provision -

(i) capable of being barred by laches or other analogous equitable principles?

(ii) barred by laches or other analogous equitable principles?"

A. Unnecessary to answer.

"Q.7. On the facts pleaded in paragraphs 1 to 6 of the Amended Statement of Claim -

(a) are the Plaintiffs' claims (or any of them) for damages for wrongful imprisonment and deprivation of liberty statute barred?

(b) by what statute?"

A. Unnecessary to answer.

2. The plaintiffs pay the defendant's costs.

Matter No D5 of 1995

1. The questions reserved for the consideration of the Full Court be answered as follows:

"Q.1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the Ordinances and regulations referred to in paragraphs 4-9 inclusive of the Amended Statement of Claim so restricted by any and which of the rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 26 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations referred to in paragraphs A, B, C and D of the claim to the extent pleaded in those paragraphs?"

A. No.

"Q.2. Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 26 of the Amended Statement of Claim, a breach of which by -

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?"

A. No.

"Q.3. If yes to question 1 or question 2, are any and which of the matters pleaded in subparagraphs (d) and (e) of paragraph 26 of the Amended Defence relevant to the existence, scope or operation at any material time of any and which of the rights, guarantees, immunities, freedoms and provisions?"

A. Unnecessary to answer.

"Q.4. If yes to question 2 -

(a) on the facts pleaded in paragraphs 1 to 3 of the Amended Statement of Claim, are the Plaintiffs' claims (or any of them) for damages for breach of a constitutional right, guarantee, immunity, freedom or provision statute barred?

(b) by what statute?"

A. Unnecessary to answer.

"Q.5. If yes to question 2, on the facts pleaded in -

(a) paragraphs 1 to 3 of the Amended Statement of Claim, paragraph 33B(a) and (c) of the Amended Defence and paragraph 7 of the Amended Reply;

(b) paragraphs 1 to 3 of the Amended Statement of Claim, paragraph 33B(c) of the Amended Defence and paragraphs 6 and 7 of the Amended Reply,

are the Plaintiffs' claims (or any of them) for damages for breach of a constitutional right, guarantee, immunity, freedom or provision barred, or capable of being barred, by an implied constitutional time limitation requiring that the claims be instituted within a reasonable time?"

A. Unnecessary to answer.

"Q.6. If yes to question 2, on the facts pleaded in -

(a) paragraphs 1 to 3 of the Amended Statement of Claim, paragraph 33B(a) and (c) of the Amended Defence and paragraph 7 of the Amended Reply;

(b) paragraphs 1 to 3 of the Amended Statement of Claim, paragraph 33B(c) of the Amended Defence and paragraphs 6 and 7 of the Amended Reply,

are the Plaintiffs' claims (or any of them) for declaratory relief and/or damages for breach of a constitutional right, guarantee, immunity, freedom or provision -

(i) capable of being barred by laches or other analogous equitable principles?

(ii) barred by laches or other analogous equitable principles?"

A. Unnecessary to answer.

"Q.7. On the facts pleaded in paragraphs 1 to 3 of the Amended Statement of Claim -

(a) are the Plaintiffs' claims (or any of them) for damages for wrongful imprisonment and deprivation of liberty statute barred?

(b) by what statute?"

A. Unnecessary to answer.

2. The plaintiffs pay the defendant's costs.

31 July 1997

FC 97/023

Representation in both matters:

N H M Forsyth QC with R A Finkelstein QC for the plaintiffs (instructed by North Australian Aboriginal Legal Aid Service Inc)

G Griffith QC with S J Gageler, M A Perry and C R Staker for the defendant (instructed by Australian Government Solicitor)

Interveners:

K Mason QC with L S Katz SC intervening on behalf of the Attorney-General for New South Wales (instructed by the Australian Government Solicitor)

R J Meadows with R M Mitchell intervening on behalf of the Attorney-General for Western Australia (instructed by the Crown Solicitor for Western Australia)

B M Selway QC with N A Manetta intervening on behalf of the Attorney-General for South Australia (instructed by the Crown Solicitor for South Australia)

CATCHWORDS

Kruger & Ors v The Commonwealth of Australia

Bray & Ors v The Commonwealth of Australia

Constitutional law - Purported invalidity of *Aboriginals Ordinance* 1918 (NT) - Whether beyond the power which could be conferred to the Governor-General of the Commonwealth and the Legislative Council of the Northern Territory under s 122 - Method of characterisation applied to laws purported to be supported by s 122.

Constitutional law - Existence of implied constitutional immunity from removal and subsequent detention without due process of law in the exercise of the judicial power of the Commonwealth - Whether Ordinance is contrary to such immunity - Whether s 122 is subject to Ch III - Whether deprivation of liberty can occur without exercise of judicial power.

Constitutional law - Existence of implied constitutional principle of legal equality - Whether Ordinance is contrary to such principle.

Constitutional law - Existence of constitutional implication of freedom of movement and association - Whether Ordinance is contrary to such freedom - Whether s 122 is subject to implied freedoms.

Constitutional law - Convention on the Prevention and Punishment of the Crime of Genocide - Existence of implied constitutional immunity from any law authorising acts of genocide - Whether Ordinance is contrary to such immunity.

Constitutional law - Whether Ordinance is a law for prohibiting the free exercise of religion contrary to s 116 - Whether s 122 is subject to s 116.

Constitutional law - Availability of damages from Commonwealth for breach of the Constitution by an officer of the Commonwealth.

Limitation laws - Commonwealth and Territory laws - Application of *Judiciary Act* 1903 (Cth).

Aboriginals Ordinance 1918 (NT).

Constitution ss 116, 122.

Judiciary Act 1903 (Cth), ss 56(1), 64 and 79.

Convention on the Prevention and Punishment of the Crime of Genocide.

BRENNAN CJ. The plaintiffs are Aboriginal Australians. All but one of them were children of tender years living in the Northern Territory when they were allegedly "removed into and detained and kept in the care, custody and/or control" of the Chief Protector of Aborigines (or of his successor in function, the Director of Native Affairs) "and thereafter detained and kept away from his [or her] mother and family in aboriginal institutions and/or reserves". The other plaintiff, Rosie Napangardi McClary, is the mother of a child who, without the mother's consent, allegedly suffered the same fate as

the other plaintiffs. The plaintiffs seek, inter alia, a declaration that the provisions of the Ordinances of the Northern Territory under which these alleged actions were taken were invalid and that the Acts of the Commonwealth under which those provisions were enacted were invalid in so far as they might be found to have authorised the impugned provisions of the Ordinances.

The relevant provisions[1] are to be found in ss 6, 7, 16 and 67 of the *Aboriginals Ordinance* ("the Ordinance") which commenced operation on 13 June 1918. That Ordinance was made by the Governor-General pursuant to powers conferred by s 7(3) of the *Northern Territory Acceptance Act* 1910 (Cth) ("the Acceptance Act") and by s 13 of the *Northern Territory (Administration) Act* 1910 (Cth) ("the Administration Act"). The Ordinance was amended from time to time by the Governor-General pursuant to the same statutory powers or, in one instance, pursuant to powers conferred by the *Northern Australia Act* 1926 (Cth). In 1953, a further amendment was made to the Ordinance by the Legislative Council of the Northern Territory which had acquired the requisite powers under the Administration Act. Nothing turns on the terms of the amendments made and it is sufficient to set out the terms of the impugned provisions of the Ordinance as they stood in 1918.

The Ordinance provided:

" 6. (1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.

(2) Any person on whose premises any aboriginal or half-caste is, shall, on demand by the Chief Protector, or by any one acting on behalf of the Chief Protector on production of his authority, facilitate by all reasonable means in his power the taking into custody of the aboriginal or half-caste.

(3) The powers of the Chief Protector under this section may be exercised whether the aboriginal or half-caste is under a contract of employment or not.

7. (1) The Chief Protector shall be the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living, until the child attains the age of eighteen years, except while the child is a State child within the meaning of the Act of the State of South Australia in force in the Northern Territory entitled *The State Children Act* 1895, or any Act of that State or Ordinance amending or substituted for that Act.

(2) Every Protector shall, within his district, be the local guardian of every such child within his district, and as such shall have and may exercise such powers and duties as are prescribed."

The Chief Protector and Protectors of Aboriginals were appointed under the Ordinance. After an amendment of the Ordinance[2] in 1939, the Director of Native Affairs became the successor in function to the Chief Protector. In 1953[3], s 7 was amended to read:

" 7. The Director is the legal guardian of all aboriginals."

Each of the plaintiffs is an "Aboriginal" as defined in s 3 of the Ordinance. Section 16 reads:

" 16. (1) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein.

(2) Any aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance.

(3) Sub-section (1) of this section shall not apply to any aboriginal or half-caste -

(a) who is lawfully employed by any person; or

(b) who is the holder of a permit to be absent from the reserve or aboriginal institution in question; or

(c) who is a female lawfully married to and residing with a husband who is substantially of European origin or descent; or

(d) for whom, in the opinion of the Chief Protector, satisfactory provision is otherwise made.

...

67. (1) The Administrator may make regulations, not inconsistent with this Ordinance, prescribing all matters and things which by this Ordinance are required or permitted to be prescribed, or which may be necessary or convenient to be prescribed for the effectual carrying out of this Ordinance, and in particular -

(a) ...

(b) providing for the care, custody and eduction of the children of aboriginals and half-castes;

(c) enabling any aboriginal or half-caste child to be sent to and detained in an Aboriginal Institution or Industrial School;

(d) providing for the control, care and education of aboriginals or half-castes in aboriginal institutions and for the supervision of such institutions;

(e) providing for the control and prevention of communicable diseases amongst aboriginals or half-castes;

(f) prescribing the conditions on which aboriginal and half-caste children may be apprenticed to or placed in the service of suitable people;

..."

Regulations (described in the amended statements of claim as the "removal regulations") made in purported pursuance of s 67 conferred on Protectors "at their discretion" the power to "forward any aboriginal or half-caste children to the nearest aboriginal institution or school, reporting the reason for such action to the Chief Protector"[4] or, from 17 October 1940, to the Director[5].

Sections 6 and 16 are the principal provisions of the Ordinance which are material to the alleged removal and detention of the Aboriginal children referred to in the amended statements of claim. Those children, including the child of the plaintiff Rosie Napangardi McClary, are hereafter referred to collectively as "the plaintiff children". Section 6 conferred on the Chief Protector a power "to undertake the care, custody, or control" of the plaintiff children but that power was conditioned upon the Protector's opinion that "it [was] necessary or desirable in the interests of the aboriginal or half-caste for him to do so". This is a power which in terms is conferred to serve the interests of those whose care, custody or control might be undertaken. It is not a power to be exercised adversely to those individual interests. And, as s 67 required the regulations made thereunder to be "for the effectual carrying out" of the Ordinance, a valid exercise of the powers conferred by the removal regulations would have to be intended to serve the interests of the "aboriginals and half-castes" to whom those regulations applied in any case in which the power was being exercised in performance of the function of care, custody or control. The several paragraphs of s 67 indicate that the regulations are to facilitate the serving of the interests of the "aboriginals and half-castes" to whom the regulations might be applied. The requirement prescribed by the removal regulations that a Protector report to the Chief Protector or Director the reasons for forwarding Aboriginal or half-caste children to an Aboriginal institution or school also suggests that the Chief Protector or Director should supervise the Protectors' exercise of authority to ensure that the duties of guardianship are properly discharged.

Of course, a power which is to be exercised in the interests of another may be misused. Revelation of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation, but the susceptibility of a power to its misuse is not an indicium of its invalidity[6]. It may be that in the cases of the plaintiff

children, the Chief Protector or the Director formed an opinion about their interests which would not be accepted today as a reasonable opinion having regard to contemporary community standards and the interests of those children in being kept together with their families. The practice of enforced separations is now seen to be unacceptable as a general policy. However, the erroneous formation of an opinion by the Chief Protector which purported to enliven the exercise of the power conferred by s 6 or by the removal regulations does not deny the validity of s 6 or of those regulations, though it may deny the validity of the exercise of the power[7].

Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised[8]. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention. Therefore, it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken. However that may be, even if the powers conferred by s 6 of the Ordinance and by the removal regulations were misused in the cases of the plaintiff children, the fact of misuse would not affect the validity of those provisions.

Sections 6 and 7 of the Ordinance and the removal regulations, so far as those regulations effectually carry out ss 6 and 7, were laws which were calculated to advance the interests of the "aboriginals and half-castes" of the Northern Territory. They are clearly supportable as laws made for the government of the Northern Territory, finding their constitutional authority in s 122 of the Constitution.

Section 16 is a provision of a different kind. On its face, it is not simply intended to serve the interests of the persons over whom the power might be exercised. In *Waters v The Commonwealth*[9] Fullagar J considered whether there had been an abuse of power or an absence of bona fides in the exercise of power by the Director who in effect had authorised the taking into custody at Darwin of the plaintiff and his removal to and detention in the Haast Bluff Aboriginal Reserve. Fullagar J, who was of the opinion that the Director was empowered by s 16 to authorise these steps to be taken, said[10]:

"The powers which the Director wields are vast, and those over whom he wields them are likely often to be weak and helpless. His responsibility is heavy. When he acts, every presumption has to be made in his favour. He must often act on his own opinion in circumstances of difficulty, and no court can substitute its opinion for his. But, on the other hand, the courts must be alert to see that, if that which is not expected does happen and he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed. The material before me in this case, however, fails completely, in my opinion, to make even a prima-facie case of abuse of power.

It was argued that, both under s 6 and under s 16, the only consideration which should affect the discretion of the Director was the welfare of the particular aboriginal concerned.

This may be so under s 6, but, so far as s 16 is concerned, it is, in my opinion, by no means the only legitimate consideration. Unlike s 6, s 16 contains no reference to the formation of any particular opinion on the part of the Director. The discretion given is in terms absolute. I have no intention, on such an application as this, of laying down any rules for the guidance of the Director. But I think I should say that, in my opinion, he may legitimately take into consideration a number of other factors in addition to the welfare of the particular aboriginal concerned, and that these include the welfare of other aboriginals and the general interests of the community in which the particular aboriginal dwells."

The conferring of a power which was capable of use so as to compel the removal of a person from one place to another and to confine that person in the other place must find clear support in the legislative power relied upon to support the provisions which confer the power. In the present case, the legislative power relied on to support the Ordinance and the removal regulations is s 122 of the Constitution.

Although the impugned provisions of the Ordinance and of the removal regulations were made in purported pursuance of the Acceptance Act, the Administration Act and the Northern Australia Act, the plaintiffs contended that s 122 of the Constitution was incapable of authorising the conferral of power on the Governor-General or on the Legislative Council to make those provisions. The amended statements of claim advanced reasons for alleging the invalidity of the Ordinance and in particular ss 6, 7 and 16 and, in so far as it purported to confer power to make or amend the removal regulations, s 67. The reasons were stated in six sub-paragraphs of a paragraph drawn in identical terms in the amended statements of claim in each of the two actions[11]:

"(i) A. it was contrary to an implied constitutional right to freedom from and/or immunity from removal and subsequent detention without due process of law in the exercise of the judicial power of the Commonwealth conferred in accordance with Ch III of the *Constitution* or of judicial power under laws of the Commonwealth;

B. it purported to confer judicial power of the Commonwealth -

(1) on persons who were not appointed under or obliged or entitled to exercise the judicial power of the Commonwealth in accordance with Ch III of the *Constitution* or judicial power under laws of the Commonwealth;

(2) other than on Courts established under or in accordance with Ch III of the *Constitution* or under laws of the Commonwealth;

(ii) it was contrary to an implied constitutional right to and/or guarantee of legal equality including equality before and under, and equal protection of, the law, and in particular, laws of the Commonwealth and laws made pursuant to or under the authority of laws of the Commonwealth;

(iii) it was contrary to an implied constitutional right to and/or guarantee of freedom of movement and association;

(iv) it was contrary to an implied constitutional right to freedom from and/or immunity from any law, purported law or executive act:

A. providing for or having a purpose, the effect or the likely effect of the destruction in whole or in part of a racial or ethnic group, or the language and culture of such a group;

B. subjecting the children of a racial or ethnic group, solely by reason of their membership of that group, to the legal disability of removal and detention away from the group; or

C. constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising:

(i) the removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group's physical destruction in whole or in part;

(ii) actions which had the purpose, the effect or the likely effect of causing serious mental harm to members of a racial or ethnic group; and

(iii) the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part;

(v) the *Aboriginals Ordinance*, and, insofar as they purported to authorise the enactment or amendment of the *Aboriginals Ordinance* or provisions thereof, the *Administration Act*, the *Acceptance Act* and the *Northern Australia Act*, were not laws for the government of the Northern Territory.

(vi) it was a law for prohibiting the free exercise of a religion contrary to section 116 of the Constitution."

The factual issues in these actions have not been tried but, for reasons which I have earlier given[12], I reserved certain questions of law arising on the pleadings in each of the cases for the opinion of the Full Court. In each case, the first of those questions was in the following terms[13]:

"1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the Ordinances and regulations referred to in paragraphs 7-12 inclusive of the Amended Statement of Claim so restricted by any and which of the rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 29 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations referred to in paragraphs A, B, C and D of the claim to the extent pleaded in those paragraphs?"

This question looks to the effect of the "rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 29" on the Acceptance Act, the Administration Act, the *Northern Australia Act*, the Ordinance and the removal regulations. Unless some one or more of these provisions arguably authorises the taking of action which is inconsistent with one or more of the proposed grounds of constitutional protection referred to in par 29, it is unnecessary to consider whether those grounds restrict the scope of s 122 of the Constitution.

It can be accepted that the detention of Aboriginal children and keeping them away from their mothers and families in Aboriginal institutions or reserves might well have caused mental harm in at least some cases but, as a matter of statutory interpretation, none of the impugned provisions can be taken to have authorised or purportedly authorised acts done for the purpose or with the intention of causing mental harm as alleged in sub-par (iv). If the impugned laws authorised the keeping of a plaintiff child in Aboriginal institutions or reserves "in the interests" of the child or for some other legitimate purpose under s 16, they did not thereby authorise an intentional or purposeful infliction of mental harm. In retrospect, many would say that the risk of a child suffering mental harm by being kept away from its mother or family was too great to permit even a well-intentioned policy of separation to be implemented, but the existence of that risk did not deny the legislative power to make the laws which permitted the implementation of that policy. It is therefore unnecessary to consider sub-par (iv).

Similarly, none of the impugned laws on its proper construction can be seen as a law for prohibiting the free exercise of a religion, contrary to the pleading in sub-par (vi). To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids[14]. None of the impugned laws has such a purpose. That leaves for consideration the questions whether s 122 would support the impugned laws (sub-par (v)) and whether the scope of s 122 is limited by restrictions arising from the terms or structure of the Constitution affecting the judicial power of the Commonwealth (sub-par (i)), equality under the law (sub-par (ii)), or freedom of movement and association (sub-par (iii)).

The scope of the legislative power conferred by s 122 of the Constitution

Section 122 reads as follows:

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

This section confers on the Parliament a legislative power that has been described in the broadest terms: Isaacs J in *R v Bernasconi*[15] described it as "an unqualified grant complete in itself"; Barwick CJ in *Spratt v Hermes*[16] described it as a legislative power "as large and universal ... as can be granted" and the Court described it in *Teori Tau v The*

Commonwealth[17] as "unlimited and unqualified in point of subject matter". The power "to make laws for the government" of a territory can be divided into two broad categories, namely, a power to make laws defining the form and institutions of a government for a territory of the Commonwealth[18] and a power to enact the domestic laws of the territory other than laws with respect to the form and institutions of its government. An exercise of the power conferred by s 122 may both define the power of a territory legislature and enact the laws which, irrespective of laws enacted by that legislature, are to be the laws of that territory. All that is needed to attract the support of s 122 to a law enacted by the Parliament is "a sufficient nexus or connexion between the law and the Territory"[19]. In the present case, the impugned laws were expressed to operate in the Northern Territory and to be applied to persons within that Territory. They were laws which fell clearly within the prima facie scope of s 122. The ground of alleged invalidity contained in sub-par (v) is without substance.

However, s 122 must be construed in its context and, having regard to the structure of the Constitution and some of its particular provisions, some restrictions on the generality of its grant of legislative power appear[20].

The Constitution, though in form and substance a statute of the Parliament of the United Kingdom, was a compact among the peoples of the federating Colonies, as the preamble to the Constitution declares. In *Capital Duplicators Pty Ltd v Australian Capital Territory*[21] Brennan, Deane and Toohey JJ said:

" The Constitution was enacted to give effect to the agreement reached by the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia to unite 'in one indissoluble Federal Commonwealth'[22]. The Constitution is no ordinary statute; it is the instrument designed to fulfil the objectives of the federal compact".

The leading object of the Constitution was the creation of the Federation. The Constitution prescribed the institutions and powers of the Commonwealth and, by ss 106 and 107, conferred upon the States their constitutions and powers subject to the Constitution. The Constitution thus prescribed the charter of the respective powers of the Commonwealth and States. The federal compact was expressed in the distribution of legislative, executive and judicial power to be exercised throughout the federating States by the Commonwealth on the one hand and the respective States on the other. The boundaries of the Commonwealth of Federation were coterminous with the aggregate of the boundaries of the federating Colonies except the Commonwealth's rights in and power over the territorial sea, seabed and airspace and continental shelf and incline which were acquired by the new polity in virtue of its international personality[23]. There were in fact no internal Commonwealth territories when the Commonwealth was established. Section 122 conferred on the Commonwealth an additional, non-federal function: the government of territories external to the Commonwealth and, by cession from the States, of other territories within the boundaries of the Commonwealth. This function was non-federal in the sense that the governmental powers to be exercised in the territories were not shared in any way with the States[24]. At the time of Federation, the only territories

which were foreseen as territories of the Commonwealth were the Northern Territory of South Australia, the Fiji Islands and British New Guinea[25]. The legislative powers conferred by s 122 were the powers available for exercise by the Commonwealth in and for the internal territories, as well as for the external territories. Section 122 is found in Ch VI of the Constitution - "New States". It stands outside Chs I to V which govern the relationship between the Commonwealth and the States. It stands in a Chapter that confers on the Parliament of the Commonwealth the powers required to vary the constituent polities of the federal compact and to govern the territories of the Commonwealth that are not, or not yet, a constituent polity of that compact. The scope of s 122 is not confined by limitations or restrictions derived from provisions of the Constitution that are designed merely to distribute powers as between the Commonwealth and the States. But neither does s 122 impair or distort the distribution of powers as between the Commonwealth and the States which is expressed in the federal compact[26]. Therefore, when limitations or restrictions on Commonwealth legislative power are implied from the text or structure of the Constitution and are said to qualify the legislative powers conferred by s 122, it is necessary to consider whence the proposed limitation or restriction is derived. The position was stated by Barwick CJ in *Spratt v Hermes*[27]:

"It may also be granted that the powers which were given to the Commonwealth were of different orders, some federal, limited by subject matter, some complete and given expressly, and some no doubt derived by implication from the very creation or existence of the body politic. Consequently, the need to observe the nature of the powers sought to be exercised at any time by the Commonwealth is ever present. But, the Constitution brought into existence but one Commonwealth which was, in turn, destined to become the nation. 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."

Accordingly, although Ch III of the Constitution contains exclusively the legislative power to confer judicial power for exercise throughout the federal Commonwealth[28], the Privy Council said in *Attorney-General of the Commonwealth of Australia v The Queen* ("the *Boilermakers' Case*" (PC))[29] that Ch III is regarded

"as exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part. There appears to be no reason why the Parliament having plenary power under s 122 should not invest the High Court or any other court with appellate jurisdiction from the courts of the Territories. The legislative power in respect of the Territories is a disparate and non-federal matter."

This is the accepted doctrine of the relationship between Ch III and s 122[30]. As Kitto J said in *Spratt v Hermes*[31]:

"But it has been the doctrine of this Court for fifty years, consistently maintained notwithstanding criticism, that Chap III is directed to a limited topic and accordingly has a limited application. The doctrine arises from a consideration of the framework of the Constitution and from many indications, to be found by working through the *Constitution Act* (63 and 64 Vict c 12) and the Constitution itself, that the first five Chapters of the Constitution belong to a special universe of discourse, namely that of the creation and the working of a federation of States, with all the safeguards, inducements, checks and balances that had to be negotiated and carefully expressed in order to secure the assent of the peoples of the several Colonies, with their divers interests, sentiments, prejudices, ambitions and apprehensions, to unite in the federation. When Chap VI is reached, and it is found that s 122 gives the Parliament a general power to make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed under the authority of the Commonwealth or otherwise acquired by it, a change to a fundamentally different topic is perceived. The change is from provisions for the self-government of the new federal polity to a provision for the government by that polity of any community which comes under its authority while not being 'a part of the Commonwealth': cf Harrison Moore, *The Commonwealth of Australia*, 2nd ed (1910) p 589."

It follows that the ground advanced by the plaintiffs in sub-par (i) for restricting the scope of s 122 fails.

Sub-paragraph (ii) asserts that the legislative power conferred by s 122 is restricted by a requirement of "legal equality" including equality under laws of the Commonwealth. The proposition, if accepted, would invalidate the laws purportedly enacted under s 122 which treated Aboriginal children differently from other children. Whatever may be said of the policy which underlay the impugned provisions, it is impossible to derive a restriction of substantive equality to control the legislative power conferred by s 122. Even in the federal provisions of the Constitution, some legislative inequality is contemplated by s 51(xix) and (xxvi). Without attempting to ascertain the operation of these sub-paragraphs, they destroy the argument[32] that all laws of the Commonwealth must accord substantive equality to all people irrespective of race. In any event, there is nothing in the text or structure of the Constitution which purports so to restrict the power conferred by s 122 as to require substantive equality in the treatment of all persons within the territory. Indeed, prior to 1967[33], s 127 of the Constitution expressly discriminated against "aboriginal natives" in the taking of the census. The ground advanced by the plaintiffs in sub-par (ii) also fails.

Sub-paragraph (iii) asserts the existence of "an implied constitutional right to ... freedom of movement and association" which restricts the scope of s 122. No such right has hitherto been held to be implied in the Constitution and no textual or structural foundation for the implication has been demonstrated in this case. The freedom contended for is advanced as a corollary of that freedom of communication about government and political matters which is implied in the Constitution, especially by reason of ss 7 and 24. But the impugned provisions in this case were not directed to the impeding of protected communications and, if action taken under those provisions could

have had that effect, the invalidity would strike at the action taken, not at the provision which purported to authorise the action.

Actions taken under the Ordinance or the removal regulations in the interests of an Aboriginal child could not be attacked on the ground that the interests of the child infringed an implied freedom of movement or association. And if actions were taken under, for example, s 16 of the Ordinance to achieve some other purpose and the action had the effect of impeding the freedom of communications about government or political matters implied in the Constitution, a question could arise as to the validity of the action. The discretion to take action would be confined by the requirement not to impair the freedom unreasonably or needlessly and the impugned provision would be construed conformably with the constitutional requirement. The constitutional requirement would not invalidate the impugned provision, but would confine the power which it confers.

It follows that, whether or not some such implication as that contended for in sub-par (iii) is to be found in the Constitution, its existence would not have invalidated any of the provisions impugned by the plaintiffs.

For these reasons, question 1 must be answered: No.

Question 2: Action for breach of a constitutional guarantee

In addition to seeking declarations of invalidity of the Acts, Ordinance and regulations referred to in the amended statements of claim, the plaintiffs seek damages for the removal and detention of the plaintiff children. Apart from any common law cause of action which may have accrued to the plaintiffs, they assert a right to damages by reason of a breach of "the constitutional rights, guarantees, immunities, freedoms and provisions" referred to in the sub-paragraphs which I have set out above. To raise the question whether a cause of action arises by reason of such a breach, question 2 was stated in the following terms:

"Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 29 of the Amended Statement of Claim, a breach of which by -

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?"

The Constitution creates no private rights enforceable directly by an action for damages. It "is concerned with the powers and functions of government and the restraints upon their exercise", as Dixon J said of s 92 in *James v The Commonwealth*[34]. The Constitution reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes

of action enforceable by awards of damages are created by the common law (including for this purpose the doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions. If a government does or omits to do anything which, under the general law, would expose it or its servants or agents to a liability in damages, an attempt to deny or to escape that liability fails when justification for the act done or omission made depends on a statute or an action that is invalid for want of constitutional support. In such a case, liability is not incurred for breach of a constitutional right but by operation of the general law. But if a government does or omits to do something the doing or omission of which attracts no liability under the general law, no liability in damages for doing or omitting to do that thing is imposed on the government by the Constitution.

It follows that no right of action distinct from a right of action in tort or for breach of contract arises by reason of any breach of the protections claimed by the plaintiffs in the paragraphs of the respective amended statements of claim referred to in question 2. That question must be answered: No.

The remaining questions

As the remaining questions are posited on the condition that an affirmative answer is given to question 2 or, in the case of question 3, an affirmative answer to question 1 or 2, no answer to the remaining questions is required.

The plaintiffs must pay the defendant's costs.

DAWSON J. The plaintiffs in these two matters are Aboriginal Australians who at the time of the events in question resided in the Northern Territory. Each of the first five plaintiffs in the first action and each of the plaintiffs in the second action complain that, when a child, he or she was "removed into and detained and kept in the care, custody and/or control of" the Chief Protector of Aboriginals of the Northern Territory or the Director appointed under the *Aboriginals Ordinance* 1918 (NT) ("the 1918 Ordinance") and thereafter kept in institutions or reserves away from his or her mother and family. The sixth plaintiff in the first action is alleged to be the mother of a child who was so treated. The first removal is alleged to have occurred in approximately 1925, the last in approximately 1949, and the last detention is said to have ended in 1960.

The plaintiffs contend that the 1918 Ordinance, to the extent that it authorised the actions complained of and the making of regulations empowering nominated officers to take the actions complained of, was beyond power and invalid. To the extent that Commonwealth statutes authorised the subordinate legislation (and the plaintiffs specify the *Northern Territory Acceptance Act* 1910 (Cth), the *Northern Territory (Administration) Act* 1910 (Cth) and the *Northern Australia Act* 1926 (Cth)), the plaintiffs say that those statutes were beyond power and invalid.

The basis upon which the plaintiffs allege invalidity is that the course of conduct of which they complain infringed certain constitutional rights or freedoms. Those rights or

freedoms appear from par 29 of the amended statement of claim in the first action. It is there alleged of that course of conduct that:

"(i) A. it was contrary to an implied constitutional right to freedom from and/or immunity from removal and subsequent detention without due process of law in the exercise of the judicial power of the Commonwealth conferred in accordance with Ch III of the Constitution or of judicial power under laws of the Commonwealth;

B. it purported to confer judicial power of the Commonwealth -

(1) on persons who were not appointed under or obliged or entitled to exercise the judicial power of the Commonwealth in accordance with Ch III of the Constitution or judicial power under laws of the Commonwealth;

(2) other than on Courts established under or in accordance with Ch III of the Constitution or under laws of the Commonwealth;

(ii) it was contrary to an implied constitutional right to and/or guarantee of legal equality including equality before and under, and equal protection of, the law, and in particular, laws of the Commonwealth and laws made pursuant to or under the authority of laws of the Commonwealth;

(iii) it was contrary to an implied constitutional right to and/or guarantee of freedom of movement and association;

(iv) it was contrary to an implied constitutional right to freedom from and/or immunity from any law, purported law or executive act:

A. providing for or having a purpose, the effect or the likely effect of the destruction in whole or in part of a racial or ethnic group, or the language and culture of such a group;

B. subjecting the children of a racial or ethnic group, solely by reason of their membership of that group, to the legal disability of removal and detention away from the group; or

C. constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising:

(i) the removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group's physical destruction in whole or in part;

(ii) actions which had the purpose, the effect or the likely effect of causing serious mental harm to members of a racial or ethnic group; and

(iii) the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part;

...

(vi) it was a law for prohibiting the free exercise of a religion contrary to section 116 of the Constitution."

The plaintiffs also allege that the 1918 Ordinance and any laws authorising its enactment, to the extent that they authorised the conduct complained of, were not laws for the government of the Northern Territory. All of the laws have long since been repealed.

Brennan CJ, whilst recognising that, as a general rule, it is inappropriate to reserve any point of law for the opinion of the Full Court before a determination of the facts which evoke consideration of that point of law or of the facts on which the answer to the question reserved may depend, held that the manifest preponderance of convenience required such a course to be taken in these cases[35]. He reserved a number of questions, but it is necessary for present purposes to set out only the first two of them because the need to answer the others depends upon an affirmative answer to those questions or one or other of them. The first two questions in the first action are:

"1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the Ordinances and regulations referred to in paragraphs 7-12 inclusive of the Amended Statement of Claim so restricted by any and which of the rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 29 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations referred to in paragraphs A, B, C and D of the claim to the extent pleaded in those paragraphs?

2. Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 29 of the Amended Statement of Claim, a breach of which by -

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?"

The questions in the second action are not materially different.

Under s 122 of the Constitution, the parliament may make laws "for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth". The Northern Territory was surrendered to and accepted by the Commonwealth pursuant to an agreement with South Australia in 1907. That agreement was ratified and approved by the *Northern Territory Acceptance Act* 1910 (Cth). Pursuant to s 111 of the Constitution, the Northern Territory thereupon became, and remains, "subject to the exclusive jurisdiction of the Commonwealth".

Upon acquiring exclusive jurisdiction over the Northern Territory, the Commonwealth enacted the *Northern Territory (Administration) Act* 1910 (Cth). Section 13(1) of that Act empowered the Governor-General to make Ordinances having the force of law in the Northern Territory. Under s 13(2) and (3) Ordinances were required to be laid before the Houses of Parliament, either of which had the power of disallowance. Until 1947, the powers of the Governor-General remained essentially unchanged, although under the *Northern Australia Act* 1926 (Cth) the Northern Territory was divided into two territories (known as North and Central Australia) which were separately administered. In 1947 the *Northern Territory (Administration) Act* 1947 (Cth) amended the earlier Act of the same name to create a legislative council for the Northern Territory. A new section, s 4U, provided that "[s]ubject to this Act, the Council may make Ordinances for the peace, order and good government of the Territory." Further sections were added which provided that such Ordinances had no effect until assented to by the Administrator of the Northern Territory according to his discretion[36], and that the Governor-General had power to disallow any Ordinance within six months of the Administrator's assent[37]. The Administrator was not to assent to any Ordinance relating to "aboriginals or aboriginal labour" unless the Ordinance contained a clause suspending its operation until the signification of the Governor-General thereon[38].

It was pursuant to s 13(1) of the *Northern Territory (Administration) Act* 1910 (Cth) that the Governor-General made the 1918 Ordinance. The Ordinance was amended by the Governor-General before 1947 and by the legislative council after 1947 but little appears to turn on these amendments. The Ordinance was repealed by the *Welfare Ordinance* 1953 (NT), with effect from 13 May 1957. Whilst the plaintiffs also complain of regulations made under the regulation-making power in the 1918 Ordinance[39], it became clear in oral argument that their attack was upon ss 6, 7 and 16 of the 1918 Ordinance itself. Because, save possibly for s 7, no significance for present purposes attaches to the amendments to the 1918 Ordinance, it is convenient to deal with its provisions as they originally stood.

Section 6(1) provided:

"The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody."

The section went on in sub-ss (2) and (3) to require persons upon whose premises an Aboriginal or "half-caste"[40] was present to facilitate his being taken into custody and to allow the powers of the Chief Protector to be exercised whether the Aboriginal or "half-caste" was under a contract of employment or not.

Section 7 provided:

"(1) The Chief Protector shall be the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living, until the child attains the age of eighteen years, except while the child is a State child within the meaning of the Act of the State of South Australia in force in the Northern Territory entitled *The State Children Act* 1895, or any Act of that State or Ordinance amending or substituted for that Act.

(2) Every Protector shall, within his district, be the local guardian of every such child within his district, and as such shall have and may exercise such powers and duties as are prescribed."

Section 7 was repealed by s 7 of the *Aboriginals Ordinance (No 2)* 1953 (NT) and replaced with the following:

"The Director is the legal guardian of all aboriginals."

Section 16 provided:

"(1) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein.

(2) Any aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance.

(3) Sub-section (1) of this section shall not apply to any aboriginal or half-caste -

(a) who is lawfully employed by any person; or

(b) who is the holder of a permit to be absent from the reserve or aboriginal institution in question; or

(c) who is a female lawfully married to and residing with a husband who is substantially of European origin or descent; or

(d) for whom, in the opinion of the Chief Protector, satisfactory provision is otherwise made."

Part III of the 1918 Ordinance established a system of aboriginal reserves and institutions and the effect of ss 6, 7 and 16, particularly s 16, was to enable the Chief Protector to place Aboriginals in those reserves or institutions, if necessary against their will, and thereby to restrict their freedom of movement. Moreover, under s 11 of the 1918

Ordinance, the Administrator could declare any place to be a prohibited area so that it would be an offence for an Aboriginal or "half-caste" to be or remain within it. It was in purported exercise of the powers conferred by these provisions that the events of which the plaintiffs complain took place. However, s 6 made it clear that the powers of the Chief Protector under that section were to be exercised in the interests of Aboriginals and "half-castes" and whilst s 16 did not contain any explicit requirement that the powers which it conferred were to be exercised for the welfare of Aboriginals or "half-castes", it is clear enough that it was so circumscribed. In *Waters v The Commonwealth*[41], Fullagar J described the powers of the Director (as they had then become) under s 16 as "vast" and as likely to be exercised over those who are "weak and helpless". His Honour continued:

"He must often act on his own opinion in circumstances of difficulty, and no court can substitute its opinion for his. But, on the other hand, the courts must be alert to see that, if that which is not expected does happen and he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed."

Fullagar J was of the view that under s 6 of the 1918 Ordinance the welfare of the Aboriginal concerned may have been the sole consideration, but that under s 16 it was not the only legitimate consideration[42]. It was his Honour's view that under that section the Director was entitled to have regard, not only to the welfare of the particular Aboriginal, but also to "the welfare of other aboriginals and the general interests of the community in which the particular aboriginal dwells"[43].

The precise scope of s 7 in constituting the Chief Protector (and then the Director) the legal guardian of Aboriginals is far from clear as was recognised by the Supreme Court of the Northern Territory in *Ross & Ors v Chambers*[44]. In that case Kriewaldt J expressed the view that the guardianship for which the section provided could not, as regards adult Aboriginals, embrace all the incidents which normally attach to the relationship of guardian and ward. However, it does not appear that anything turns upon that point in these cases.

The predecessor to the 1918 Ordinance was the *Northern Territory Aboriginals Act* 1910 (SA) which was continued in force by s 7 of the *Northern Territory Acceptance Act* 1910 (Cth) until repealed by the 1918 Ordinance. In relevant respects the 1918 Ordinance does not differ from the Act which it repealed. That Act was prompted by the plight of Aboriginals in the Northern Territory who were said to be "rapidly decreasing through disease, neglect, and insanitary conditions"[45]. The 1918 Ordinance would appear to have been motivated by similar concerns. The measures contemplated by the legislation of which the plaintiffs complain would appear to have been ill-advised or mistaken, particularly by contemporary standards. However, a shift in view upon the justice or morality of those measures taken under an Ordinance which was repealed over 40 years ago does not of itself point to the constitutional invalidity of that legislation and it is to the legal basis of the plaintiffs' claims that I now must turn. The legal basis of those claims concerns the constitutional validity of the provisions in issue, and does not raise the question whether the actions complained of were authorised by those provisions.

Section 122

Section 122 of the Constitution provides:

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

The 1918 Ordinance was made under legislation which was reliant upon s 122 for its validity. The plaintiffs claim that, to the extent that it authorised the making of the 1918 Ordinance, or at least those parts of it of which they complain, the legislation did not constitute a law "for the government of any territory" within the meaning of s 122 and was invalid. The basis upon which they make that submission is that for a law to be for the government of a territory it must be reasonably capable of being seen as appropriate and adapted to the end of governing the territory. The plaintiffs argue that the 1918 Ordinance constituted an extraordinary intrusion upon fundamental rights and common law liberties, exhibiting "such callous disregard for familial unity and cultural cohesion in the Aboriginal community" that its purpose can only be seen as the arbitrary executive detention of Aboriginal citizens and the cultural and physical extinguishment or disintegration of that racial minority. The plaintiffs submit that such a law cannot be seen as appropriate and adapted to the government of the Northern Territory and for that reason is outside the scope of s 122.

That submission must be rejected. I have elsewhere expressed my view that no real assistance is to be gained by asking whether legislation is appropriate and adapted to some end when testing its validity under s 51 of the Constitution, at all events where a non-purposive power under that section is involved[46]. That test can have even less application where the power in question is, like s 122, a power to legislate for the government of a territory and where, unlike the powers conferred by s 51, the power is not confined by reference to subject matter. In *Teori Tau v The Commonwealth*[47] the Court described the legislative power conferred by s 122 as "plenary in quality and unlimited and unqualified in point of subject matter". That statement was approved by the whole Court in *Northern Land Council v The Commonwealth*[48]. It is in accordance with the view expressed by Barwick CJ in *Spratt v Hermes*[49] where he said:

"Section 122 gives to the Parliament legislative power of a different order to those given by s 51. That power is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory - an expression condensed in s 122 to 'for the government of the Territory'. This is as large and universal a power of legislation as can be granted. It is non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any wise with the States."

And in *Capital Duplicators Pty Ltd v Australian Capital Territory*[50] Brennan, Deane and Toohey JJ described the power as "no less than the power which would have been conferred if the 'peace, order and good government' formula had been used". The result is that "all that need be shown to support an exercise of the power is that there should be a sufficient nexus or connection between the law and the Territory"[51]. There can be no doubt of the existence of that nexus or connection in this case.

It is true that in *Lamshed v Lake*[52] Dixon CJ appears to have thought that s 122 may be viewed as conferring a power to legislate with respect to a subject matter. He said that it "is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the Territory". He continued: "The words 'the government of any territory' of course describe the subject matter of the power." Perhaps Dixon CJ was there using the expression "subject matter" in a different sense. If, as is incontrovertible, the power of the Parliament to legislate under s 122 is not confined to particular heads as it is under s 51, to speak of subject matter in that context can only be to advert to the requirement of some territorial nexus such as has been said to exist in the case of a State legislature which has power to legislate for the peace, order and good government of the State[53]. Nevertheless, it is unusual for the legislative power of a State to be described as a power with respect to a subject matter, namely, the State, and, setting to one side such qualifications as may possibly be found elsewhere in the Constitution, the scope of the legislative power conferred upon the Parliament by s 122 with respect to the territories is no less than that possessed by the State legislatures with respect to the States. As Mason J said in *Berwick Ltd v Gray*[54], it is:

"a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions ... yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions".

The Commonwealth Parliament is, with respect to the territories, a completely sovereign legislature[55].

However, it seems clear that Dixon CJ had something else in mind when he spoke of the power under s 122 as being a legislative power with respect to a subject matter. The view which Dixon CJ expressed in *Lamshed v Lake* first appeared in *Australian National Airways Pty Ltd v The Commonwealth*[56]. There he indicated that in his opinion s 122 extended beyond conferring power to make laws for the government of a territory as a geographical or local unit and conferred power to legislate upon a national basis with respect to territories. It was in that sense that he viewed territories as the subject matter of a legislative power, apparently thinking that it was impossible to regard the national Parliament as being confined, even in relation to a territory, to the making of laws with only a local application. That is why in the passage in *Lamshed v Lake* to which I have already referred he used, and placed emphasis upon, the term "national Parliament". He did so in order to reject an argument that the legislative function which s 122 confers

upon the Parliament is essentially that of a local legislature in and for a territory with a power territorially restricted to the territory. The latter was a view which had been accepted by Latham CJ and Williams J in *Australian National Airways Pty Ltd v The Commonwealth*[57] and was consonant with the earlier cases of *Buchanan v The Commonwealth*[58] and *R v Bernasconi*[59]. The view expressed by Dixon CJ would seem, with respect, to beg the question by referring to the Parliament in the context of s 122 as the "national Parliament", for in speaking of the power to make laws for the government of any territory, s 122 is referring to the government of a geographical unit and not of the nation as a whole. Moreover, the view taken by Dixon CJ in *Lamshed v Lake* regards the power conferred by s 122 as if it were the equivalent of a head of power under s 51 so that it becomes a power to make laws for the peace, order and good government of the Commonwealth with respect to territories. In accordance with this view, Dixon J in *Australian National Airways Pty Ltd v The Commonwealth*[60] thought that the incidental power under s 51(xxxix) might be invoked in aid of the power under s 122. Section 122 is not, however, expressed in the same terms as s 51 and is not made subject to the Constitution, as is s 51.

The only separate judgments, other than that of Dixon CJ, which were delivered in *Lamshed v Lake* were those of McTiernan, Williams and Kitto JJ. McTiernan J dissented due to the construction he placed on the statutory provision in question, and did not appear to accept the view of s 122 taken by Dixon CJ. Williams J, who also dissented, adhered to the view which he had expressed in *Australian National Airways Pty Ltd v The Commonwealth*. Kitto J, a member of the majority, appeared to accept the line of reasoning adopted by Dixon CJ.

However, in *Spratt v Hermes*[61] Kitto J recanted the opinion he had expressed in *Lamshed v Lake*. He pointed out that the first five chapters of the Constitution are concerned with working out the federal compact and belong to "a special universe of discourse". When one comes to Ch VI and s 122 "a fundamentally different topic is perceived". To Kitto J the change was "from provisions for the self-government of the new federal polity to a provision for the government by that polity of any community which comes under its authority while not being 'a part of the Commonwealth'." Of course, as Kitto J recognised, in some senses a territory is part of the Commonwealth, but that term is of variable meaning and where it is used to describe the federation of States, a territory lies outside its concept. Kitto J continued[62]:

"Whether or not one or two of the miscellaneous provisions in Chap V apply to the territories - ss 116 and 118 have been suggested, eg in *Lamshed v Lake*[63], though further consideration has made me more doubtful than I was about them - it seems clear enough that the limitations which Chap I puts upon legislative power in the working of the federal system, anxiously contrived as they are with the object of keeping the Parliament to the course intended for it, are thrown aside as irrelevant when the point is reached of enabling laws to be made for the government of territories which stand outside that system; for s 122 uses terms apt to authorise the Parliament to make what provision it will for every aspect and every organ of territory government. The exercise of the judicial power which is a function of government of a territory is within the unrestricted authority

thus in terms conferred. The Court decided quite early, in *Buchanan v The Commonwealth*[64], that the Constitution, addressing itself here to something different from that to which its first five chapters have been devoted, makes on the new topic a provision which is appropriately free from all concern with problems of federalism. The concern here is not only with 'a new consideration', as *Isaacs* J called it in *R v Bernasconi*[65], but with 'a disparate non-federal matter' as Viscount *Simonds* called it in *Attorney-General of the Commonwealth of Australia v The Queen*[66]."

The difficulties to which Kitto J adverted were not considered in *Attorney-General (WA) v Australian National Airlines Commission*[67]. *Lamshed v Lake* was applied in that case but, although the majority may not have intended as much, the result of its application appears to suggest that any law having a beneficial effect in a territory falls within the power conferred by s 122. Gibbs J[68], in dissent, was provoked to remark that to give s 122 such an operation would "elevate it to a position of importance, even dominance, which it cannot possibly have been intended to occupy in the Constitution", an observation which went unanswered in the majority judgments.

Whilst the judgment of Kitto J in *Spratt v Hermes* does not reject the result in *Lamshed v Lake*, much of his reasoning is inconsistent with the reasoning which led to that decision. *Lamshed v Lake*, and the later decision in *Attorney-General (WA) v Australian National Airlines Commission*, stand, of course, as authorities of this Court, but it is possible at the same time to question whether they require the conclusion that Ch V of the Constitution has any application to the territories. Kitto J doubted whether ss 116 and 118 had any such application and they, along with s 109, are the only sections of Ch V that could possibly do so, because the other sections are confined to the States in express terms.

The application of s 118 to the territories would involve a somewhat curious construction. That section requires full faith and credit to be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State. It is, of course, possible to apply s 118 to the territories but to do so immediately raises the question why, if it was intended to apply to them, full faith and credit should not have been required to be accorded in the States to the laws, etc, of the territories. The answer, upon the view expressed by Dixon CJ, is that it was unnecessary because territory laws are national laws. But the more convincing answer is that the territories do not enter the province of Ch V which is, after all, headed "The States". A construction of s 118 which required that full faith and credit be given in the territories to the laws, etc, of every State would rob that section of the mutuality or reciprocity it was obviously intended to have, for on no construction could s 118 require that full faith and credit be given in the States to the laws, etc, of the territories[69].

Similarly, s 109, which deals with inconsistency between State and Commonwealth laws, would appear to be dealing with inconsistency between State and federal laws and not to have in contemplation inconsistency between State and territory laws. And if, contrary to *Lamshed v Lake*, territory laws were confined to a territorial operation there would be no more need for a s 109 in relation to territory laws than there is need for such a section to resolve conflict between the laws of different States.

Section 116

When one comes to s 116 different considerations apply. That section provides:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

Various views have been expressed about the character of s 116 and its application to the legislative power of the Commonwealth under s 122[70]. However, there has been no real examination of the question or any attempt to reconcile the existing authorities, save perhaps in the judgment of Gibbs J in *Attorney-General (Vict); Ex rel Black v The Commonwealth*[71]. Gibbs J expressed his doubts, notwithstanding dicta to the contrary, whether s 116 had any application to laws made under s 122. He pointed out that the dicta are very difficult to reconcile with the decision in *R v Bernasconi*[72] and that if s 122 is limited by s 116, the latter section will have a much larger operation in the territories than in the States since s 116 is not expressed to bind the States.

In *R v Bernasconi* it was held that s 80 of the Constitution, which requires the trial on indictment of any offence against "any law of the Commonwealth" to be by jury, does not restrict the power of the Commonwealth to make laws under s 122. Section 80 is to be found in Ch III of the Constitution dealing with "The Judicature". Griffith CJ said[73]:

"In my judgment, 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. Sec 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as 'laws of the Commonwealth.' The same term is used in that sense in sec 5 of the *Constitution Act* itself, and in secs 41, 61 and 109 of the Constitution. In the last mentioned section it is used in contradistinction to the law of a State. I do not think that in this respect the law of a territory can be put on any different footing from that of a law of a State."

Isaacs J said of s 80[74]:

"But the provision is clearly enacted as a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community. And that is its sole operation.

When the Constitution, however, reaches a new consideration, namely, the government of territories, not as constituent parts of the self-governing body, not 'fused with it' as I expressed it in *Buchanan's Case*[75], but rather as parts annexed to the Commonwealth and subordinate to it, then sec 122 provides the appropriate grant of power."

Gavan Duffy and Rich JJ adopted the view of Griffith CJ.

R v Bernasconi was not overruled in *Lamshed v Lake* nor in any other decision of this Court. Its reasoning is plainly inconsistent with a great deal that was said in *Lamshed v Lake* but there is much that is open to doubt in the latter decision as was recognised by Kitto J in *Spratt v Hermes*. There is even more that is open to doubt in *Attorney-General (WA) v Australian National Airlines Commission*. Section 80 imposes a requirement upon the Commonwealth in what would appear to be absolute terms, as does s 116. Section 80 appears in Ch III in general terms. Section 116 appears in Ch V which, at least by its heading, is confined in its application to the States. In my opinion, what was said of s 80 in *R v Bernasconi* applies a fortiori to s 116. I do not think that it is possible while *R v Bernasconi* stands to hold that s 116 restricts s 122. Nor do I think that the reasoning in *Lamshed v Lake* is necessarily to be preferred to that in *R v Bernasconi*.

The explanation why s 116, unlike the other sections in Ch V, is directed to the Commonwealth is that ultimately the matter with which those responsible for its drafting were concerned was the possibility that, because of the reference to "Almighty God" in the preamble to the Constitution, there might be a perception that the Commonwealth had the power to interfere in matters of religion. The clause which eventually became s 116 was originally drafted to include the States, but in order to emphasise the prohibition imposed upon the Commonwealth, the States were excluded. The amendment in that form was moved by Mr Higgins who said[76]:

"My idea is to make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken, and to make it clear that in framing this Constitution there is no intention whatever to give to the Federal Parliament the power to interfere in these matters. My object is to leave the reserved rights to the states where they are, to leave the existing law as it is."

The appearance of s 116 in a chapter headed "The States" has often been regarded as anomalous, but in fact the section deals with the division of legislative power between the Commonwealth and the States within the federation. There is no suggestion of any desire to extend the restriction imposed upon Commonwealth federal power to the "disparate and non-federal matter"[77] dealt with in s 122. The States are not precluded by s 116 from doing those things which the Commonwealth is prohibited from doing and there is no reason to suppose that the Commonwealth was to be inhibited in a way in which the States are not in its capacity to legislate for the government of any territory.

For these reasons, I am of the opinion that the power of the Commonwealth Parliament to legislate under s 122 for the government of the territories is not restricted by s 116. I should add that, if I am wrong in that conclusion, I would agree with Gummow J, for the reasons given by him, that the 1918 Ordinance contains nothing which would enable it to be said that it is a law for prohibiting the free exercise of any religion.

Due Process of Law and the Judicial Power

of the Commonwealth

In a number of recent cases it has been pointed out that the Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power[78]. Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus the Constitution deals, almost without exception, with the structure and relationship of government rather than with individual rights. The fetters which are placed upon legislative action are, for the most part, for the purpose of distributing power between the federal government on the one hand and State governments on the other, rather than for the purpose of placing certain matters beyond the reach of any parliament. The Constitution does not contain a Bill of Rights. Indeed, the 1898 Constitutional Convention rejected a proposal to include an express guarantee of individual rights based largely upon the 14th Amendment to the United States Constitution and including a right to due process of law and the equal protection of laws[79]. The framers preferred to place their faith in the democratic process for the protection of individual rights and saw constitutional guarantees as restricting that process. Thus the Constitution contains no general guarantee of the due process of law. The few provisions contained in the Constitution which afford protection against governmental action in disregard of individual rights do not amount to such a general guarantee[80]. It follows that, in so far as the plaintiffs' claim is reliant upon a constitutional right to the due process of law, it must fail.

The plaintiffs contend that the actions of which they complain amounted to the exercise of judicial power otherwise than by courts constituted in accordance with Ch III of the Constitution and hence could not be validly authorised by the 1918 Ordinance. That contention is dependent upon acceptance of the view that the removal and detention of Aboriginal children pursuant to the powers conferred by the 1918 Ordinance were of a penal character and hence constituted judicial rather than executive functions. It is by no means apparent that this view can be sustained. However much one may with hindsight debate the appropriateness of the actions authorised by the 1918 Ordinance, those actions may legitimately be seen as non-punitive[81]. The Chief Protector (and then the Director) was the legal guardian of Aboriginals and that position, although its precise scope was uncertain, clearly imposed an obligation to act in the interests of the Aboriginal community but did not involve the performance of judicial functions. No relevant decision could legitimately be taken under the 1918 Ordinance without regard to the interests of Aboriginals involved and those of the wider Aboriginal population. No doubt it may be said with justification that the events in question did not promote the welfare of Aboriginals, but that does not mean that the decisions made and the actions taken were of a judicial rather than an executive character.

However, this aspect of the plaintiffs' claim must fail even assuming that which is not apparent, namely, that those decisions or actions were of a judicial rather than an executive character. Chapter III of the Constitution does, of course, require the separation of the judicial power of the Commonwealth from its executive and legislative functions[82]. The judicial power of the Commonwealth may only be exercised by federal courts constituted in accordance with the requirements of Ch III and State courts

which are invested with federal jurisdiction. Federal courts may only perform judicial functions and such other functions as are ancillary to the exercise of judicial power. But the judicial power exercised in the territories is not the judicial power of the Commonwealth within the meaning of Ch III. Courts created under s 122 are not federal courts nor do they exercise federal jurisdiction. They are not required to be constituted in accordance with Ch III and, since it is from the terms of Ch III and the position which it occupies in the constitutional structure that the requirement of a separation of powers flows, it follows that that doctrine has no application in the territories[83]. The consequence is that, even if the decisions or actions taken under the 1918 Ordinance were of a judicial rather than an executive character, no requirement of the Constitution would have been infringed.

Legal Equality

The plaintiffs contend that by implication the Constitution guarantees legal equality before and under the law. There is reason to think that such a guarantee, if it existed, would not prevail against the legislative power conferred by s 122, but it is convenient to proceed directly to the question whether any such implication can be made.

The separation of judicial power from the other powers of government precludes the legislature from investing a court created by or under Ch III of the Constitution with non-judicial powers that are not ancillary but are directed to some non-judicial purpose. A Ch III court cannot be made to perform a function which is of a non-judicial nature or is required to be performed in a non-judicial manner. Chapter III may, perhaps, be regarded in this way as affording a measure of due process, but it is due process of a procedural rather than substantive nature. As was pointed out in *Leeth v The Commonwealth*[84], "to speak of judicial power in this context is to speak of the function of a court rather than the law which a court is to apply". However, for the reasons which I have already given, the plaintiffs are unable to resort to the separation of powers so far as the territories are concerned and in any event their argument goes much further than the requirements of Ch III in asserting a guarantee of equality before and under the law.

The plaintiffs encounter difficulty at the outset by reason of the decision of this Court in *Leeth*. In that case, a majority (Mason CJ, Brennan J, McHugh J and myself) held that a law of the Commonwealth which did not operate uniformly throughout the Commonwealth was not in breach of any constitutional requirement. Deane and Toohey JJ, and Gaudron J in a separate judgment, held the law to be invalid but they were in a minority in so doing. Nevertheless, the plaintiffs base their argument upon the line of reasoning adopted by Deane and Toohey JJ in their joint judgment.

It is true that Deane and Toohey JJ found a doctrine of legal equality in the Constitution, but the reasoning which led to that conclusion did not commend itself to other members of the Court nor, with the greatest of respect, does it now commend itself to me. An analogy for the doctrine of equality was, it was said, to be discerned in the implied prohibition against Commonwealth legislation which discriminates against the States or subjects them or their instrumentalities to special burdens or disabilities. It would be

surprising, it was suggested, if the Constitution "embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment but provided no similar protection of the people who constitute the Commonwealth and the States"[85]. With respect, I do not find that

situation surprising at all. The limitation upon the powers of the Commonwealth Parliament which prevent it from discriminating against the States is derived from different considerations entirely, which were articulated by Dixon J in *Melbourne Corporation v The Commonwealth*[86] when he said:

"The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities."

That principle does not spring from any notion of equality. Moreover the Constitution is in many respects inconsistent with a doctrine of legal equality.

Section 51 (xxvi), as Deane J recognised in *The Tasmanian Dam Case*[87], "remains a general power to pass laws discriminating against or benefiting the people of any race". Similarly, s 51(xix) enables the Commonwealth Parliament to make laws which discriminate in favour of or against aliens. Discrimination in relation to the qualification to vote in federal elections is clearly envisaged by the Constitution[88] and equality of voting power is not guaranteed[89]. And until 1967 (which is after the last alleged act of detention ended), ss 51(xxvi) and 127 excluded Aboriginals for specified purposes. It is unnecessary to provide an exhaustive list of those respects in which the Constitution does not support the suggested doctrine of equality, for Deane and Toohey JJ recognised in *Leeth* that "the nature of the particular grant of legislative power may be such as to rebut the assumption that such discrimination was unauthorised by the relevant provision of the Constitution"[90] or may need to be "adjusted to the extent necessary to accommodate discriminatory treatment which other provisions of the Constitution clearly contemplate"[91]. To recognise as much is surely to undermine any basis for asserting that the Constitution assumes a doctrine of equality.

Not only that, but where the Constitution requires equality it does not leave it to implication. It makes provision for it by prohibiting discrimination, preference or lack of uniformity in specific instances. For example, the power of the Commonwealth Parliament to make laws with respect to taxation conferred

by s 51(ii) must not be exercised so as to discriminate between States or parts of States. Section 88 provides for uniform customs duties and s 51(iii) provides for uniform bounties. Section 92, in requiring trade, commerce and intercourse among the States to be absolutely free, prohibits discrimination of a protectionist kind. Section 99 forbids the Parliament to give preference to one State or any part thereof over another State or any part thereof by any law or regulation of trade, commerce or revenue. And s 117 provides that a subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were

a subject of the Queen resident in such other State. In *Leeth*, Deane and Toohey JJ said that the existence of these specific provisions "which reflect the doctrine of legal equality serves to make manifest rather than undermine the status of that doctrine as an underlying principle of the Constitution as a whole"[92]. That statement not only denies the accepted canon of construction expressed in the maxim *expressio unius, exclusio alterius*; it turns it on its head. And as one commentator has observed[93]:

"If various provisions aimed at preventing discrimination, preference and lack of uniformity are merely reflections of a general principle of equality, it can be similarly reasoned that the specific powers given to the Commonwealth Parliament are merely examples of a general principle, mentioned from time to time by delegates, that the Commonwealth Parliament was to be given power over all subjects which could not be as effectively dealt with by the States."

The inappropriateness of the *expressio unius* maxim arose, in their Honours' view, from what was said to be the "ordinary approach of the Constitution not to spell out the fundamental common law principles upon which it is structured"[94] because "the general approach of the framers of the Constitution ... was to incorporate underlying doctrines or principles by implication"[95]. With respect, that is not the case. Guarantees of equality before the law and due process were specifically rejected, not because they were already implicit and therefore unnecessary, but because they were not wanted. Indeed, if there was a need to make specific provision for equality where that was intended, it would suggest that there is no principle of equality underlying the Constitution and that were such a doctrine intended, specific provision would have been made for it. But to be fair to Deane and Toohey JJ, they did not, I think, base a doctrine of equality

principally upon the existence of these specific provisions. They referred to considerations of a more fundamental kind.

The ultimate source of the doctrine was said to lie in the common law. Thus Deane and Toohey JJ said[96]:

"The common law may discriminate between individuals by reference to relevant differences and distinctions, such as infancy or incapacity, or by reason of conduct which it proscribes, punishes or penalises. It may have failed adequately to acknowledge or address the fact that, in some circumstances, theoretical equality under the law sustains rather than alleviates the practical reality of social and economic inequality. Nonetheless, and putting to one side the position of the Crown and some past anomalies, notably, discriminatory treatment of women, the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government."

However, whilst the rule of law requires the law to be applied to all without reference to rank or status, the plain matter of fact is that the common law has never required as a

necessary outcome the equal, or non-discriminatory, operation of laws. It is not possible, in my view, to dismiss the discriminatory treatment of women at common law or such matters as the attainder of felons[97] as "past anomalies". To do so is to treat the doctrines of the common law with selectivity. Moreover, the supremacy of parliament, which is itself a principle of the common law[98], necessarily leaves the common law subject to alteration without reference to notions of equality. The common law thus provides no foundation for a doctrine of equality, at all events substantive equality as opposed to the kind of procedural equality envisaged by the rule of law.

But even if a doctrine of substantive equality were discernible in the common law, it would not appear that it was a doctrine which was adopted in the

drafting of the Constitution. Apart from anything else, it is clear that the Commonwealth Parliament was intended to have the capacity, in the exercise of its legislative powers, to alter the common law. If it were not so, the scope of

those powers would be less than the scope of the concurrent powers of the States. There is no reason to suppose that such a capacity would not extend to a common law doctrine of equality if such a doctrine were to exist. Nevertheless, in *Leeth* Deane and Toohey JJ expressed the view that such a doctrine had been adopted in the Constitution by necessary implication by reason of its conceptual basis and because it is "implicit in the Constitution's separation of judicial power from legislative and executive powers and the vesting of judicial power in designated 'courts'"[99].

In referring to the conceptual basis of the Constitution, Deane and Toohey JJ had in mind the preamble and covering cl 3 of the *Commonwealth of Australia Constitution Act* which refer to the agreement of the people of the various colonies to unite in a Federal Commonwealth. Their Honours took the view[100] that "[i]mplicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact." It may be observed that a degree of equality was lacking in the free agreement of which their Honours spoke, in that the referendum expressing that agreement excluded most women and many Aboriginals. But the important thing is that the Constitution to which the people agreed plainly envisages inequality in the operation of laws made under it. Moreover, those who framed the Constitution deliberately chose not to include a provision guaranteeing due process or the equal protection of the laws and it was with those omissions that the people agreed to the Constitution. It is not possible, in my view, to read into the fact of agreement any implications which do not appear from the document upon which agreement was reached. Not only does a doctrine of equality in the operation of laws made under the Constitution not appear from the Constitution, but the very basis upon which it was drafted was that matters such as that were better left to parliament and the democratic process.

The view taken of Ch III of the Constitution by Deane and Toohey JJ was as follows[101]:

"Thus, in Ch III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially. At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds."

As I read that passage, it does not draw any distinction between procedural equality and substantive equality, that is to say, between procedural equality and the equality of laws in their operation. As I have said, it is possible to regard the separation of judicial power from the other powers of government as affording a measure of due process but it is due process of an essentially procedural rather than a substantive kind. What is clear is that Ch III says nothing, either expressly or by implication, requiring equality in the operation of laws which courts created by or under that Chapter must administer. Those courts have an obligation to administer justice according to law. No doubt that duty is to do justice according to valid law, but Ch III contains no warrant for regarding a law as invalid because the substantive rights which it confers or the substantive obligations which it imposes are conferred or imposed in an unequal fashion. The passage which I have reproduced appears to me to contemplate a guarantee of what American jurisprudence calls substantive due process, but that conception is not to be found in Ch III or elsewhere in the Australian Constitution.

For these reasons, I would respectfully reject the conclusion reached by Deane and Toohey JJ that there is a doctrine of equality to be found by implication in the Constitution. For the same reasons I would reject the plaintiffs' claim based upon that doctrine. I would affirm the proposition contained in the judgment of Mason CJ, McHugh J and myself in *Leeth*[102] that there is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.

Freedom of Movement and Association

In attacking the validity of the 1918 Ordinance, the plaintiffs rely upon an implied constitutional right to, or guarantee of, freedom of movement and association for political, cultural and familial purposes and say that, in authorising the removal and detention of Aboriginals, the 1918 Ordinance denied that right or offended against that guarantee.

To the extent that the right or guarantee which is asserted is founded upon an implied right to freedom of communication for political purposes, it is now established[103] that such protection as the Constitution affords to freedom of communication is relevantly derived from the requirement that members of the Commonwealth Parliament be directly chosen by the people at periodic elections[104]. The choice envisaged in each instance is a true or genuine choice

with "an opportunity to gain an appreciation of the available alternatives"[105]. That requires freedom of communication about those matters which may properly influence the outcome of those elections. Laws which purport to inhibit that freedom of communication will be inconsistent with the requirements of the Constitution and invalid. If there is an implication it is not of any "right" and is of a negative kind. It precludes laws which would inhibit the required freedom of communication. The freedom owes its existence to the absence of laws curtailing it and it is reinforced by the restriction upon legislative power.

The freedom of communication protected by the Constitution relevantly arises from the system of representative government for which the Constitution specifically provides. In *Australian Capital Television Pty Ltd v The Commonwealth* McHugh J observed[106]:

"There is nothing in s 122 or anywhere else in the Constitution which suggests that laws made by the Commonwealth for the government of a territory are subject to prohibitions or limitations arising from the concepts of representative government, responsible government or freedom of communication."

I respectfully agree with that observation and would extend its application to such other rights to freedom of movement and association as may be suggested as constitutional requirements. I have in mind, in particular, the suggestion made by Griffith CJ and Barton J in *R v Smithers; Ex parte Benson*[107] that there is a right of access to the seat of government[108]. Of course, s 92 of the Constitution restricts its guarantee of freedom of intercourse to intercourse among the States[109]. I also have in mind the suggestion of Gaudron J in *Australian Capital Television Pty Ltd v The Commonwealth*[110] that "[t]he notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association". In any event, that suggestion appears to be based on the nature of our society, which to my mind cannot legitimately be used as a source of constitutional implications[111].

No system of government, elected or otherwise, is prescribed for the territories. Sovereign legislative power is conferred by s 122 upon the Commonwealth Parliament to make laws for the government of the territories but there need be no representation of a territory in either House of the Parliament, nor is there any requirement that institutions of representative government exist within the territories. There is nothing to be found in the Constitution which would support an implied constitutional right to, or guarantee of, freedom of movement and association for political or other purposes that might limit the powers conferred by s 122. This aspect of the plaintiffs' claim must fail.

Fundamental Rights and Genocide

In this part of their claim the plaintiffs invoke international law and, in particular, the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention"). The Genocide Convention was ratified by Australia on 8 July 1949 and entered into force on 12 January 1951. The 1918 Ordinance therefore pre-dates it by more than three decades. The *Genocide Convention Act* 1949 (Cth) gave parliamentary

approval to the ratification by Australia of the Genocide Convention, but there is no legislation implementing the Genocide Convention in this country.

The definition of "genocide" in the Genocide Convention is as follows:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

The first thing that may be said is there is nothing in the 1918 Ordinance, even if the acts authorised by it otherwise fell within the definition of genocide, which authorises acts committed with intent to destroy in whole or in part any Aboriginal group. On the contrary, as has already been observed, the powers conferred by the 1918 Ordinance were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally. The acts authorised do not, therefore, fall within the definition of genocide contained in the Genocide Convention.

In any event, the Convention has not at any time formed part of Australian domestic law. As was recently pointed out in *Minister for Immigration and Ethnic Affairs v Teoh*[112], it is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. Where such provisions have not been incorporated they cannot operate as a direct source of individual rights and obligations. However, because of a presumption that the legislature intends to give effect to Australia's obligations under international law, where a statute or subordinate legislation is ambiguous it should be construed in accordance with those obligations, particularly where they are undertaken in a treaty to which Australia is a party[113]. Such a construction is not, however, required by the presumption where the obligations arise only under a treaty and the legislation in question was enacted before the treaty, as is the situation in the present case.

On the other hand, there is another principle that legislation is to be interpreted and applied, so far as its language admits, in accordance with established rules of international law[114]. It was suggested in *Teoh*[115] that perhaps the two principles should be merged so as to require courts to favour a construction, to the extent that the

language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. The rule as so stated would still admit of an exception, logically necessary, where the relevant obligations are under a treaty which had not been entered into at the time the legislation came into force.

Presumably for this reason, the plaintiffs rely principally upon a pre-existing rule of international law involving a prohibition upon genocide, rather than upon the provisions of the treaty. Even assuming the existence of such a rule, it is to my mind not possible to conceive of any acceptable definition of genocide which would embrace the actions authorised by the 1918 Ordinance, given that they were required to be performed in the best interests of the Aboriginals concerned or of the Aboriginal population. But more importantly, the applicable principle amounts to no more than a canon of construction and reading the relevant provisions of the 1918 Ordinance in a manner which is consistent with a rule of international law prohibiting genocide would yield no different result from reading those provisions, as Fullagar J did in *Waters v The Commonwealth*[116], in their particular context. It certainly would not invalidate those provisions of the 1918 Ordinance which purportedly authorised the acts of which the plaintiffs complain.

But the plaintiffs say that it is beyond the constitutional power of the Commonwealth Parliament to authorise acts of genocide, in which they include acts of "cultural genocide", and hence those parts of the 1918 Ordinance which authorise such acts are beyond power and invalid. As I have said, in my view nothing which appears in the 1918 Ordinance confers authority to commit acts of genocide within the meaning of the Genocide Convention. The Genocide Convention is not concerned with cultural genocide, references to cultural genocide being expressly deleted from it in the course of its being drafted[117], but whatever the form of genocide which the plaintiffs assert was authorised by the 1918 Ordinance, it cannot be said that the provisions of the 1918 Ordinance were beyond the sovereign power of the Parliament to enact laws under s 122 for the government of the territories.

The plaintiffs' submission amounts to an argument that there are some rights at common law which are so fundamental that it is beyond the sovereign power of parliament to destroy them. It is an argument which would seek to avail itself of the reservation expressed by this Court in *Union Steamship Co of Australia Pty Ltd v King*[118] when, having recognised that the words "for the peace, order and good government" contained in a grant of legislative power are not words of limitation, the Court said:

"They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in

our democratic system of government and the common law (see *Drivers v Road Carriers*[119]; *Fraser v State Services Commission*[120]; *Taylor v New Zealand Poultry Board*[121]), a view which Lord Reid firmly rejected in *Pickin v British Railways Board*[122], is another question which we need not explore."

That question was, however, raised in *Kable v DPP (NSW)*[123], and there I expressed the view that the doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law and that it is of its essence that a court, once it has ascertained the true scope and effect of valid legislation, should give unquestioned effect to it accordingly[124]. I need not here repeat the reasoning or refer to the authorities which support that view.

The power of the Commonwealth Parliament under s 122 of the Constitution is, if anything, wider than its power to make laws for the peace, order, and good government of the Commonwealth under s 51. That power is, of course, more restricted in geographical terms, but it is, unlike the parliament's power under s 51, unlimited in terms of subject matter. In that sense, the legislative power of the parliament to make laws for the government of the territories is sovereign and, subject to the possibility of any specific limitation to be found elsewhere in the Constitution, there is nothing which places rights of any description beyond its reach. Accordingly, this aspect of the plaintiffs' claim must fail.

Conclusion

For all of these reasons, I would answer the first question in each case in the negative. Since my conclusion is that the Constitution does not afford the rights upon which the plaintiffs base their claims, it is unnecessary to answer the second question, which asks whether a breach of any such rights would give rise to a right of action against the Commonwealth sounding in damages. It is unnecessary to answer the other questions.

TOOHEY J. In these actions each plaintiff claims against the Commonwealth declaratory relief and damages by reason of his or her removal from mother and family while a child and detention in a "reserve or aboriginal institution"[125]. The matters came before the Court by way of questions reserved, pursuant to O 35 r 2 of the High Court Rules. Those questions appear in other judgments and it is unnecessary to set them out. In the Commonwealth's submission, the questions arise solely on the pleadings and it is both inappropriate and impermissible, in the absence of the agreement of the parties, to rely on assertions of fact or to invite the Court to make or proceed on assumptions or inferences of fact. This approach to the task the Court is required to perform is undoubtedly correct. The Court's role is accordingly circumscribed. It has the consequence that some of those questions may remain unanswered until factual issues have been resolved. This is not uncommonly the fate of the procedure that has been adopted.

Aboriginals Ordinance

To understand the enactment of the *Aboriginals Ordinance* 1918 (NT) ("the Ordinance"), it must be remembered that, by the *Northern Territory Acceptance Act* 1910 (Cth) ("the Acceptance Act"), the Commonwealth accepted the Northern Territory from South Australia "as a Territory under the authority of the Commonwealth, by the name of the Northern Territory of Australia"[126]. The *Northern Territory (Administration) Act* 1910 (Cth) ("the Administration Act") was passed, according to its long title, "to provide for the Provisional Government of the Northern Territory". The Administration Act provided that, until the Parliament made other provision for the government of the Territory, the Governor-General might make Ordinances having the force of law in the Territory[127]. The Ordinance was made pursuant to that authority. Section 67 of the Ordinance empowered the Administrator (appointed by the Governor-General under s 4 of the Administration Act) to make regulations for its carrying out. The Ordinance was repealed on 13 May 1957[128]. The plaintiffs' principal attack was on the validity of ss 6, 7 and 16, together with s 67. They also challenged the Administration Act and the Acceptance Act in so far as those Acts authorised those sections of the Ordinance. However, they did not challenge any particular exercise of power under the Ordinance if the Ordinance was held to be valid.

Section 6(1) of the Ordinance read:

"The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion, it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody."

Each plaintiff pleads that he or she "is and was, at all material times, an 'aboriginal' and/or a 'half-caste' within the meaning of the definition of those terms" in the Ordinance.

Section 7 appointed the Chief Protector "the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living". In 1953 s 7 was repealed and replaced with a provision which read simply:

"The Director is the legal guardian of all aboriginals."[129]

Section 16(1) empowered the Chief Protector to

"cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein".

By force of sub-s (2), any aboriginal or half-caste who refused or resisted removal or who refused to remain in or attempted to depart from a reserve or institution was guilty of an offence. The operation of s 16 was qualified by sub-s (3) whereby the section was expressed not to apply to any such person

"(a) who is lawfully employed by any person; or

(b) who is the holder of a permit to be absent from the reserve or aboriginal institution in question; or

(c) who is a female lawfully married to and residing with a husband who is substantially of European origin or descent; or

(d) for whom, in the opinion of the Chief Protector, satisfactory provision is otherwise made".

Two definitions should be noted, particularly having regard to s 16[130]. "Reserve" was defined, following an amendment to the Ordinance in 1939, to mean

"any lands ... reserved for the use and benefit of the aboriginal native inhabitants".

"Aboriginal institution" was defined to mean

"any mission station, reformatory, orphanage, school, home or other institution for the benefit, care or protection of the aboriginal or half-caste inhabitants of the Northern Territory, declared by the Administrator to be an aboriginal institution for the purposes of this Ordinance".

The significance of these definitions is for the Commonwealth's argument that reserves and institutions were established for the benefit, care or protection of Aboriginals[131]. Hence, it was submitted, the sections under challenge should be seen as having a welfare and protection purpose. It followed that the Ordinance should not be treated as bringing about the "detention" of Aboriginals in the sense that the term is generally understood. This view of the Ordinance is discussed later in these reasons.

Legislative history

The provenance of the legislation plays a part in identifying its object. The Ordinance had been preceded by the *Northern Territory Aboriginals Act* 1910 (SA), which was continued in force by the Acceptance Act until its repeal by the Ordinance. The 1910 Act was expressed to be "An Act to make Provision for the better Protection and Control of the Aboriginal Inhabitants of the Northern Territory, and for other purposes". It contained provisions similar to ss 7 and 16 of the Ordinance[132].

The Solicitor-General for Western Australia suggested that the Ordinance had its genesis in legislation from Western Australia, in particular the *Aborigines Act* 1897 (WA). That Act was expressed to be "for the better Protection of the Aboriginal Race of Western Australia". However it was the *Aborigines Act* 1905 (WA), it was submitted, from which the Ordinance was derived. The 1905 Act was expressed as "An Act to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia". Section 4 of the 1905 Act set up an Aborigines Department, "charged with the duty of

promoting the welfare of the aborigines". Section 8 appointed the Chief Protector "the legal guardian of every aboriginal and half-caste child". Sections 12 and 13 established a power of removal to a reserve, subject to exemptions in s 13 in terms which s 16 of the Ordinance closely resembles. The regulation-making power was similar in the two enactments. The power of removal contained in s 12 of the 1905 Act seems to have been borrowed from s 9 of *The Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (Q).

Drummond J has pointed out that it was the Report of the House of Commons Select Committee on Aboriginal Rights[133] "which recommended the appointment in Australia of protectors of Aborigines, invested with both coronial and magisterial powers, to cultivate relations with the local tribes and to secure the maintenance and protection of their rights"[134]. The point of this legislative history is that it lends force to the submission that the Ordinance was seen at the time as serving a welfare purpose. While the means adopted to achieve such a purpose would now be regarded as entirely unacceptable, there is a question as to how far any assessment can be divorced from the perceptions of the time. And there is a more basic question, to be discussed later, whether the terms of the legislation went beyond what was necessary to secure its purpose.

In *Namatjira v Raabe*[135] the Court considered the provision of the *Welfare Ordinance* 1953 (NT) which empowered the Administrator to declare a person a ward in certain circumstances. While the Welfare Ordinance was of general operation, the Court held that, with a few exceptions, the very large category of persons excluded from its operation "must cover everybody but aboriginals"[136]. The Court spoke of the legislation as conferring a status which was substantially the same as that conferred by the Ordinance and "almost confined in its application to aboriginals ... persons who might be regarded as being as a class in such need [of special care and assistance] ... and the status given is protective in its nature"[137].

It must again be stressed that it is the validity of the Ordinance the plaintiffs challenge and which is the basis of their claim for damages, not the exercise of power under an enactment accepted as valid. This is in contrast to *Waters v The Commonwealth*[138] which concerned an alleged abuse of power by the Director under s 16 of the Ordinance. In that regard Fullagar J said[139]:

"[T]he courts must be alert to see that, if that which is not expected does happen and he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed".

But in these proceedings it is not abuse of power upon which the plaintiffs rely.

The challenge

The plaintiffs' challenge to the legislation involved, as a first step, the submission that the Parliament could not confer on another, in this case the executive, the power to make laws which the Parliament itself could not validly enact. This is an uncontroversial

proposition. The second step was to identify why the Parliament could not itself validly have enacted the legislation in question. Broadly speaking, the obstacles to direct enactment were said to exist by reason of a constitutional prohibition against detention without due process, the existence of s 116 of the Constitution and various implications arising from the Constitution, coupled with a general assertion that the legislation was not a law for the government of the Northern Territory within s 122 of the Constitution.

In its defence to each action the Commonwealth pleaded that the legislation under challenge in each case was a valid law for the government of the Northern Territory and denied that the legislative power conferred by s 122 was constrained by s 116 or by any of the constitutional implications relied upon by the plaintiffs. By way of alternative defence the Commonwealth pleaded[140] that if the legislative power conferred by s 122 is so restricted, the Ordinance was not in breach of s 116 or any such implication because it was "enacted and amended for the purpose of the protection and preservation of persons of the Aboriginal race" and was "capable of being reasonably considered to be or alternatively was appropriate and adapted to the achievement of that purpose". The Commonwealth further argued that if the Ordinance did not necessarily answer the description in each defence, no final view could be expressed on these matters without an inquiry into the standards and perceptions prevailing at the time of enactment of the Ordinance, not by reference to current standards and perceptions. Such an inquiry, it was said, was not open at this stage of the proceedings.

It is necessary to look now at the basic questions raised by the questions reserved.

Section 122 of the Constitution

Section 122 of the Australian Constitution empowers the Parliament to "make laws for the government of any territory ... acquired by the Commonwealth". The formula employed differs from that in s 51 which empowers the Parliament to "make laws for the peace, order, and good government of the Commonwealth with respect to" the matters identified in the section. Nevertheless, "the power is no less than the power which would have been conferred if the 'peace, order and good government' formula had been used"[141].

In *Berwick Ltd v Gray*[142] it was said that

"all that need be shown to support an exercise of the power is that there should be a sufficient nexus or connexion between the law and the Territory".

The Commonwealth relied upon this statement and also upon the earlier statement by Barwick CJ in *Spratt v Hermes*[143] that the power conferred by s 122 "is not only plenary but is unlimited by reference to subject matter".

The Commonwealth submitted that a sufficient connexion exists where a law operates upon persons or things within a territory. On this footing it argued that s 122 authorised the Ordinance, whether or not it answered the description of welfare legislation. On the

other hand the plaintiffs contended that s 122 demands more than a law having some general or remote connexion with a territory. The law must be "for the government" of the territory in some meaningful sense[144].

In the course of argument on this aspect it was submitted by the plaintiffs that a test of proportionality was appropriate to assess whether a law was one for the government of a territory. I would reject this test, generally for the reasons I gave in *Leask v Commonwealth*[145]. I shall not repeat those reasons except to say that they assigned proportionality to a particular aspect of constitutional interpretation which is not relevant to the characterisation of s 122. Proportionality does have relevance at a later stage of these reasons. It is hard to see why the Ordinance does not answer the description of a law for the government of the Northern Territory since it relates to an aspect of government and since it bears directly and only on certain inhabitants of the Territory, by reference only to places and circumstances within the Territory. It is in my view a law for the government of the Territory.

But to say that does not answer the place of s 122 in the Constitution and its relationship with other sections. In *Spratt v Hermes* Barwick CJ observed of the section[146]:

"It is non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any wise with the States.

But this does not mean that the power is not controlled in any respect by other parts of the Constitution or that none of the provisions to be found in chapters other than Chap VI are applicable to the making of laws for the Territory or to its government."

It will be necessary to explore this aspect later in these reasons. It is enough at this stage to say that the plenary nature of the power will not necessarily exclude such express provisions as s 116 nor will it necessarily exclude implications which may fairly be drawn from the Constitution if relevant to the operation of the law in question[147].

It is also necessary to bear in mind the comment of the Court in *Union Steamship Co of Australia Pty Ltd v King*[148] in relation to the words "for the peace, order and good government":

"Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... is another question which we need not explore."

Separation of powers and due process

The plaintiffs argued that even if the Ordinance was otherwise a law for the government of the Northern Territory, s 122 of the Constitution does not support a law which confers judicial power upon a body which is not a court within Ch III of the Constitution. They further said that the powers exercisable by the Chief Protector (later Director) under the impugned sections of the Ordinance constituted judicial power.

The focus of the attack in this respect was on s 16 of the Ordinance, the provision which empowered the Chief Protector to keep an aboriginal or half-caste within a reserve or aboriginal institution. Certainly the power is one to detain against the wishes of the person concerned. And, so far as the section itself is concerned, the power is expressed in absolute terms, subject of course to the exemptions in sub-s (3). That is not to say that when the Ordinance is read as a whole a purpose does not emerge which controls the exercise of the power. However, as already noted, it is not the exercise of power which is before the Court.

The plaintiffs' case in this regard wears two faces which, as argued, could be taken as independent of each other or as linked in some way. The first is that Ch III confers the judicial power of the Commonwealth exclusively on "courts", that neither the Chief Protector nor Director answered that description, that the power conferred by s 16 was judicial, hence the conferral of power was invalid. That argument cannot succeed unless Ch III operates in respect of a territory. The second involves the proposition that, even if Ch III is not applicable to a territory, the separation of powers dictates that punitive powers of detention cannot be conferred upon the executive without prior adjudication or due process of law.

In *R v Bernasconi* Griffith CJ made his views clear when he said[149] that "the power conferred by sec 122 is not restricted by the provisions of Chapter III of the Constitution". However, *Bernasconi* itself is not authority for that broad proposition. The decision was that the power conferred by s 122 is not restricted by the provision in s 80 of the Constitution that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. As Windeyer J observed in *Spratt v Hermes*[150]:

"Recognition of the decision does not necessarily involve acceptance of the statement that Chap III as a whole has no application to the territories."

In *Spratt v Hermes* Barwick CJ spoke of the relationship between s 122 and the Constitution generally in these terms[151]:

"It must remain ... a question of construction as the matter arises whether any particular provision has such an operation [that is whether the power is controlled by other parts of the Constitution], the construction being resolved upon a consideration of the text and of the purpose of the Constitution as a whole."

At its narrowest, this part of the argument turns on whether courts of a territory established pursuant to s 122 are "federal courts" within the meaning of s 71 of the Constitution which vests the judicial power of the Commonwealth in the High Court "and in such other federal courts as the Parliament creates". In *R v Kirby; Ex parte Boilermakers' Society of Australia* Dixon CJ, McTiernan, Fullagar and Kitto JJ said[152]:

"It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws

made by the Parliament ... But an entirely different interpretation has been adopted, one which brings its own difficulties".

As indicated in this passage, and in line with decisions of this Court, the courts of the Northern Territory established pursuant to s 122 have been held not to be "federal courts" as referred to in s 71. Whether the doctrine of separation of powers nevertheless applies to the Territory is another question, to be mentioned later in these reasons. Among the decisions of this Court, two command particular attention.

In *Spratt v Hermes* the Court held that the Parliament may, pursuant to s 122, create or authorise the creation of courts with jurisdiction in respect of occurrences in or concerning a territory, without observing the requirements of s 72 of the Constitution in the appointment of the judicial officers constituting such courts. The members of the Court reached this conclusion by somewhat different routes but largely by reference to the concern of s 71 with "the Commonwealth considered in its federal aspect, and with courts created or invested with federal jurisdiction in that sense"[153].

Capital TV and Appliances Pty Ltd v Falconer held that the Supreme Court of the Australian Capital Territory is not a federal court or a court exercising federal jurisdiction within the meaning of s 73 of the Constitution. Owen J said[154]:

"It is a territorial court created by the Parliament pursuant to s 122 of the Constitution and not a 'federal court' within the meaning of Ch III".

Barwick CJ reconsidered the consequences of the reasoning in *Bernasconi*, saying[155]:

"But in the end, I have come to the same conclusion, namely that ... the judicial power to which s 71 refers is that part of the totality of judicial power which the Commonwealth may exert which can be called 'federal judicial power'."

The Chief Justice held that "the doctrine of the duality of the judicial power was so deeply entrenched that it ought not now to be overturned"[156].

Faced with *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer*, the plaintiffs submitted that the Court should now reject the correctness of the approach taken in those cases. They made that submission as only one of the courses the Court might take. Primarily, they submitted that this step was not required for their argument to succeed. They contended that the proper understanding of the federal structure and nature of the Commonwealth offered no ground on which to exclude the operation of Ch III from laws enacted pursuant to s 122. Indeed they contended that the decisions referred to were authority only for the operation of ss 72 and 73(ii) of the Constitution. As they put it, the decisions can be "shorn of their supporting reasoning".

Central to the plaintiffs' argument was the submission that the territories form an integral part of the Commonwealth and of a single federal system. The point was made by Menzies J in *Spratt v Hermes* when he said[157]:

"To me, it seems inescapable that Territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of 'the Federal System' ... It cannot, therefore, be said that the territories are governed by 'territorial laws' as distinct from laws of the Commonwealth."

Certainly that statement finds support in the preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp) which recites that "the people ... have agreed to unite in one indissoluble Federal Commonwealth ... under the Constitution hereby established". It followed from these considerations, the plaintiffs submitted, that with the Constitution established to govern a system of which the territories formed part there was no reason to exclude the territories from the separation of powers implicit in Ch III.

As noted, there are judgments of this Court in which the relationship of s 122 to the Constitution generally has been discussed. Thus in *Spratt v Hermes* Windeyer J said[158]:

"[T]he power to make laws for the territories under s 122 is not independent of and uncontrolled by other provisions of the Constitution ... The Constitution must be read as a whole, an instrument of government for a nation and its people, the Commonwealth of Australia".

In *Australian Capital Television Pty Ltd v The Commonwealth*[159] Gaudron J said of *Spratt v Hermes* and *Bernasconi*:

"[I]t does not follow from those or any of the other cases decided with respect to s 122 that it stands apart from other provisions of the Constitution with its meaning and operation uninfluenced by them".

In *Capital Duplicators Pty Ltd v Australian Capital Territory*[160] Brennan, Deane and Toohey JJ referred to the judgment of Kitto J in *Lamshed v Lake*[161] and concluded:

"It would therefore be erroneous to construe s 122 as though it stood isolated from other provisions of the Constitution which might qualify its scope."

The plaintiffs' argument, in short, is that separation of powers is an element of the Constitution, that laws enacted pursuant to s 122 are exercises of the legislative power of the Commonwealth and are laws of the Commonwealth and that an exercise of judicial power conferred by any law made by the Parliament is an exercise of the judicial power of the Commonwealth. Consequently a law of the Commonwealth, including a law made pursuant to s 122 conferring judicial power, must comply with the requirements of Ch III.

There is another way of approaching this question and that is to see the Constitution as vesting legislative power exclusively in the Parliament, executive power exclusively in the Governor-General and judicial power exclusively in the courts created by the Parliament. Chapter III then is seen as a manifestation of the separation of powers which the Constitution mandates. In *Leeth v Commonwealth*[162] Deane J and I said:

"Again, the Constitution contains no detailed statement of the content or implications of the doctrine of the separation of judicial power from executive and legislative powers which it implements by expressly vesting the judicial power of the Commonwealth in Ch III courts (s 71), the legislative power of the Commonwealth in the Parliament (s 51) and the executive power of the Commonwealth in the Crown (s 61). The adoption of that doctrine of the common law as part of the very structure of the Constitution is, however, apparent." (footnote omitted)

The argument in support of the proposition that Ch III of the Constitution does extend to the Territories is very persuasive. But the plaintiffs still face a formidable obstacle in the path of their argument. In general terms, the power to order involuntary detention is an incident of judicial power. In *Chu Kheng Lim v Minister for Immigration*[163] Brennan, Deane and Dawson JJ spoke of

"the general proposition that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of ... powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts".

That proposition was affirmed by a majority of the Court in *Kable v DPP (NSW)*[164].

However, both decisions recognise that there are qualifications to the general proposition that involuntary detention is necessarily an incident of the judicial function of adjudging and punishing criminal guilt. The qualifications to which Brennan, Deane and Dawson JJ referred include detention in cases of mental illness or infectious disease and committal to custody awaiting trial. Their Honours left open "whether the defence power in times of war will support an executive power to make detention orders"[165]. And in *Lim* itself the Court upheld a law conferring upon the executive authority to detain an alien in custody for the purposes of expulsion or deportation. The point is that there are qualifications to the general proposition so that it cannot be said in absolute terms that the power to detain in custody is necessarily an incident of judicial power.

Judged by current standards, the involuntary detention of an Aboriginal pursuant to such a provision as s 16 of the Ordinance could hardly be brought within any of the recognised exceptions to the general proposition. Conscious of this, the Commonwealth submitted that the welfare and protection object of the legislation must be judged by the values and standards prevailing at the time. The plaintiffs' reply was that, even by the standards prevailing in 1918, the Ordinance was one which expressly contemplated permanent institutionalisation and carried an unqualified power of indefinite detention, unlimited by the objects or circumstances of necessity said to justify that power.

A welfare purpose is evident in the legislation, emphasised by the legislative history to which reference has been made. The Chief Protector (and later the Director) was the legal guardian of Aboriginals. His duties, identified in s 5(1), included the distribution of forms of "relief or assistance to the aboriginals", the supply of food and shelter, medicine, provision for custody, maintenance and education and

"(f) to exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud".

Section 6(1) empowered the Chief Protector

"to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so".

The responsibility for welfare cast upon the Chief Protector is at odds with the notion that the powers conferred by the Ordinance are of themselves punitive and necessarily involve the exercise of judicial power[166]. And this is the argument with which we are presently concerned. While this does not necessarily provide an answer to other bases of the plaintiffs' claim, the argument based on judicial power cannot succeed.

Free exercise of religion

Section 116 of the Constitution provides inter alia:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion".

There are statements in several decisions of the Court in support of the proposition that s 116 is applicable to an exercise of power under s 122. In *Lamshed v Lake* Dixon CJ, with whom Webb, Kitto and Taylor JJ agreed said[167] that he did not "see why s 116 should not apply to laws made under s 122"[168]. There is nothing in the nature of s 116 that bears only upon the relationship between the Commonwealth and the States. And this is so even though the provision is found in Ch V "The States". For instance, s 118, which is also in Ch V, requires that full faith and credit shall be given throughout the Commonwealth "to the laws, the public Acts and records, and the judicial proceedings of every State". It is not concerned with the position of the Commonwealth vis-à-vis the States.

The real problem for the plaintiffs in this aspect of their claim lies in demonstrating that the Ordinance is a law "for prohibiting the free exercise of any religion". Section 116 "is directed to the *making* of law. It is not dealing with the administration of a law"[169]. The use of the word "for" indicates that "the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character"[170]. "Purpose" in this context "refers to an end or object which legislation may serve ... it is the Court which must decide whether the measure possesses the requisite character"[171]. It does not follow that there is only one purpose to be discerned in a law; there may be more than one. The question should therefore be asked: was a purpose of the Ordinance to prohibit the free exercise of the religion of the Aboriginals, to whom the Ordinance was directed? It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the

Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose.

The Commonwealth points to the fact that the plaintiffs have not pleaded that, at the relevant time, they or their parents held religious beliefs or that the detention of the plaintiffs deprived them of the capacity to exercise those beliefs. It may be that this shortcoming only precludes a claim for damages by the plaintiffs. In any event, it does not stand in the way of a declaration that the Ordinance was invalid if the Court is satisfied that it was for a purpose of prohibiting the free exercise of religion.

In their written submissions the plaintiffs have referred to official reports and correspondence which, they say, evidence the very purpose of the policy embodied in the Ordinance as the removal of half-caste children to prevent them from assimilating the "habits, customs and superstitions of the full-blooded aboriginals". Assuming that the material in question is admissible in the construction of the Ordinance[172], it cannot be relied upon in the proceedings as they are now before the Court. The possibility of sustaining the claim by reference to extrinsic material does not warrant giving a qualified answer to so much of Question 1 as is relevant to this head of the plaintiffs' claim. As the matter has come before the Court, the claim under "free exercise of religion" must fail and the question answered accordingly.

Genocide

In their amended statements of claim the plaintiffs plead that the Ordinance, in particular ss 6, 7, 16 and 67 in so far as the latter purported to confer power to make relevant regulations, was invalid because

" it was contrary to an implied constitutional right to freedom from and/or immunity from any law, purported law or executive act:

A. providing for or having a purpose, the effect or the likely effect of the destruction in whole or in part of a racial or ethnic group, or the language and culture of such a group;

B. subjecting the children of a racial or ethnic group, solely by reason of their membership of that group, to the legal disability of removal and detention away from the group; or

C. constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising:

(i) the removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group's physical destruction in whole or in part;

(ii) actions which had the purpose, the effect or the likely effect of causing serious mental harm to members of a racial or ethnic group; and

(iii) the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part".

On its face then the claim to invalidity is anchored firmly in the Constitution. However, the arguments presented to the Court on behalf of the plaintiffs were confined to the submission that the Ordinance was invalid because it authorised acts of genocide contrary to Art II(d) and (e) of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention").

The Genocide Convention was not ratified by Australia until 8 July 1949 and did not enter into force until 12 January 1951, more than 30 years after the Ordinance was enacted. The provisions of the Genocide Convention do not form part of Australian municipal law since they have not been incorporated by statute[173]. At the same time, resort may be had to the Convention, as with any international instrument to which Australia is party, to throw light on the proper construction of a statute or subordinate legislation which is ambiguous[174].

No doubt because of the relationship in time between the Ordinance and the ratification of the Genocide Convention, the plaintiffs also argued that the latter reflected a norm of international law and that the Ordinance should be construed on the footing that s 122 was not intended to confer power to make a law authorising acts in conflict with that norm.

On its face the relevant paragraph of each statement of claim gives rise to difficult questions of implied constitutional freedoms and immunities. But because of the way in which this part of the claim was argued, the focus must be on Art II of the Genocide Convention in which, relevantly, genocide is defined inter alia to mean

" any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

...

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group".

Each of the "acts" which spells out genocide is qualified by the opening words "with intent to destroy". There is nothing in the Ordinance, according to it the ordinary principles of construction, which would justify a conclusion that it authorised acts "with intent to destroy, in whole or in part" the plaintiffs' racial group.

Once again, at the risk of undue repetition, it is necessary to keep in mind that it is the validity of the Ordinance, not any exercise of power under the Ordinance, which is the subject of these proceedings.

Freedom of movement and association

The plaintiffs plead, in each statement of claim, that the Ordinance was

"contrary to an implied constitutional right to and/or guarantee of freedom of movement and association".

This was reformulated in argument to a

"constitutional right to and immunity from legislative and executive restrictions on freedom of movement and association for political, cultural and familial purposes".

In *Cole v Whitfield*[175] the Court said that to give content to the words "intercourse" and "absolutely free" in s 92, there must be a guarantee of personal freedom "to pass to and fro among the States without burden, hindrance or restriction"[176]. The plaintiffs do not rely upon s 92 or upon the express language of any other section of the Constitution. The freedom upon which they rely is said to be implicit in the Constitution, rather in the way in which Murphy J, in *Buck v Bavone*[177], spoke of the right of persons to move freely across or within State borders as "a fundamental right arising from the union of the people in an indissoluble Commonwealth". It is true that this observation was disapproved in *Miller v TCN Channel Nine Pty Ltd*[178] but the trend of more recent authority calls for further consideration of the matter in an appropriate context.

In *Nationwide News Pty Ltd v Wills*[179] Deane J and I spoke of "three main general doctrines of government which underlie the Constitution and are implemented by its provisions". The third of these we described as

"the doctrine of representative government, that is to say, of government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth. The rational basis of that doctrine is the thesis that all powers of government ultimately belong to, and are derived from, the governed".

Later we said[180]:

" The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person."

In *McGinty v Western Australia*[181] I said:

" Recent decisions of the Court have held that the Australian Constitution prescribes a system of representative democracy or representative government. The terms have been used somewhat interchangeably".

The "recent decisions" included *Nationwide News Pty Ltd v Wills* and also *Australian Capital Television Pty Ltd v The Commonwealth*[182], *Theophanous v Herald & Weekly*

Times Ltd[183] and *Stephens v West Australian Newspapers Ltd*[184]. Notwithstanding differences of opinion expressed by Justices in those cases, the Court's recognition of a freedom of communication and discussion of political matters derived from the Constitution is beyond question in the light of *Lange v Australian Broadcasting Corporation*[185].

The plaintiffs identify a freedom of movement and association "for political, cultural and familial purposes". Although their argument was directed to these broad purposes, its focus was on the prohibition of or restrictions on political communication. That is not surprising, given the recent trend of authority in this Court. However the preponderance of recent decisions should not conceal the early recognition by the Court of the rights of the citizens of a federation. In *R v Smithers; Ex parte Benson*[186] Barton J said of the judgment of Miller J in *Crandall v State of Nevada*[187]:

"The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation."

To speak of political communication is in some ways to understate the true nature of the freedom which it entails. As Mason CJ commented in *Australian Capital Television Pty Ltd v The Commonwealth*[188]:

" Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community."

And, as Brennan J observed in *Nationwide News Pty Ltd v Wills*[189]:

"But where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government."

In *Theophanous v Herald & Weekly Times Ltd*[190] Mason CJ, Toohey and Gaudron JJ adopted the observation of Barendt[191] that

"'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".

Nothing said in *Lange* diminishes the scope of the implied freedom as I have identified it; rather the decision reinforces it. Certainly *Lange* endorsed what had been said in earlier decisions, namely, that the freedom of communication which the Constitution protects is not absolute.

"It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."[192]

In *Re Public Service Employee Relations Act*[193] McIntyre J described freedom of association as "one of the most fundamental rights in a free society". Although that case was decided under the Canadian *Charter of Rights and Freedoms*, it is apparent from the judgment that the importance of freedom of association was recognised by Canadian law prior to the Charter. While the freedom has many facets, it is an essential ingredient of political communication, a freedom which extends not only to communications by political representatives to those whom they represent but also to communications from the represented to the representatives and between the represented[194]. Indeed, the freedom necessarily extends to all the people of the Commonwealth[195].

I agree with Gaudron J that in order for the residents of the Northern Territory to comment on the way in which they were governed they had to be free to provide other members of the body politic with their views on all matters relevant to their government and to discuss those matters amongst themselves. As her Honour observed in *Australian Capital Television Pty Ltd v The Commonwealth*[196]:

"[A]s the matters entrusted to the Commonwealth include the power conferred by s 122 to make laws for the government of its Territories, the freedom of political discourse necessarily extends to every aspect of Territory government."

Comment and discussion by all those who are governed is essential for the people to make an informed choice as electors[197]. It is in this context that issues relating to the freedom of communication will ordinarily arise since a system of universal adult franchise now exists. And, so far as the Northern Territory is concerned, its residents are now called upon to make an informed choice for the House of Representatives and the Senate. But the freedom of communication is not so confined. As McTiernan and Jacobs JJ observed in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[198]:

" The people is the body of subjects of the Crown inhabiting the Commonwealth regarded collectively as a unity or whole, and the sum of those subjects regarded individually."

For these reasons it is no answer to the claim based on the implied freedom of political communication to point out that during the currency of the Ordinance the residents of the Northern Territory were not eligible to cast a vote for either the Senate or the House of Representatives. That is to take an impermissibly narrow view. The freedom does not ebb and flow in that way. Similarly, the freedom does not turn upon the electoral status of individuals. In other words, it is not answered by the capacity or incapacity of Aboriginals to register a vote during the currency of the Ordinance. I shall, when dealing with the concept of legal equality, say something about the position of Aboriginals as citizens.

Although the plaintiffs assert a "right of association", in truth they claim a limitation on legislative power to restrict the freedom of association which political communication demands. For the reasons stated above, and for the reasons advanced by Gaudron J with which I respectfully agree, s 122 is confined by the freedom of political communication identified in the authorities.

In the light of these conclusions it is necessary to consider the Commonwealth's alternative defence[199] that

" (i) the *Aboriginals Ordinance* was enacted and amended for the purpose of the protection and preservation of persons of the Aboriginal race; and

(ii) at all material times the *Aboriginals Ordinance* was capable of being reasonably considered to be or alternatively was appropriate and adapted to the achievement of that purpose".

Earlier in these reasons I referred to the question of proportionality as I had discussed it in *Leask v Commonwealth*. In the context of that case I rejected proportionality as a relevant test. However, in the present context it is relevant because of the tension between the implied freedom of political communication and the express grant of power for the government of the Northern Territory[200]. Put another way, the relevant provisions of the Ordinance must not be disproportionate to what was reasonably necessary for the protection and preservation of the Aboriginal people of the Northern Territory.

Whether the inquiry is in the terms as I have just expressed it, or whether it be in terms of reasonably appropriate and adapted to serve a legitimate end[201], it is relevant to consider the standards and perceptions prevailing at the time of the Ordinance. That is not to say that those standards and perceptions necessarily conclude the matter; the infringement of a relevant freedom may be so fundamental that justification cannot be found in the views of the time. But the Ordinance does have a welfare character and questions of proportionality and adaptedness cannot exclude the prevailing perceptions. That, I think, is clear from the views expressed in *Cheatle v The Queen*[202] where the Court said of the unchanging elements of trial by jury:

"The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions."

Again, in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[203] McTiernan and Jacobs JJ said of s 24 of the Constitution:

" The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times ... It depends in part upon the common understanding of the time".

Powerful arguments can be mounted for saying that the powers conferred on the Chief Protector (and Director) were so extensive that reference to prevailing perceptions cannot

save them. But, in my view, the manner in which these issues come before the Court means that an inquiry into those perceptions cannot be excluded. It follows that while the legislative power conferred by s 122 of the Constitution is restricted by the freedom of movement and association implied in the Constitution, it is not possible to say at this stage of the proceedings that the impugned provisions of the Ordinance are necessarily invalid on that account. No question arises independently as to the validity of the Administration Act.

If any of the provisions of the Ordinance were held invalid, it does not follow that the conclusion would ground a right of action in damages against the Commonwealth which is distinct from a right of action in tort or for breach of contract[204]. The implied limitation operates as a restriction on legislative power, not as grounding a cause of action[205]. It means that, in response to any common law claim for trespass or false imprisonment, the authority conferred by the Ordinance to take Aboriginals into custody must yield to the freedom of association implied by the Constitution.

Legal equality

In *Leeth v The Commonwealth*[206] Deane J and I spoke of a doctrine of legal equality, having two distinct but related aspects.

The first is the subjection of all persons to the law. The second, that upon which the plaintiffs relied to impugn provisions of the Ordinance, involves the underlying or theoretical equality of all persons under the law and before the courts. In *Leeth* we concluded, for the reasons there given, that while the Constitution did not spell out such a doctrine in express words, it adopted it as a matter of necessary implication. Those reasons included "the conceptual basis of the Constitution", that is, the free agreement of the people of the federating Colonies to unite in the Commonwealth under the Constitution. In *Street v Queensland Bar Association*[207] I said, in relation to s 117 of the Constitution, that while the section was the product of compromise, "there is nothing to suggest that it represented any compromise of the principle that Australia was to be a commonwealth in which the law was to apply equally to all its citizens".

In *Leeth* we added[208]:

" The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment. In one sense, almost all laws discriminate against some people since almost all laws operate to punish, penalize or advantage some, but not all, persons by reference to whether their commands are breached or observed. While such laws discriminate against those whom they punish or penalize or do not advantage, they do not infringe the doctrine of the equality of all persons under the law and before the courts. To the contrary, they assume that underlying legal equality in that they discriminate by reference to relevant differences. Again, laws which distinguish between the different needs or responsibilities of different people or different localities

may necessarily be directed to some, but not all, of the people of the Commonwealth." (footnote omitted)

In the same case Brennan J accepted a principle of equality, though in terms which led him to join the majority in upholding the validity of the sentencing legislation under challenge. His Honour distinguished between the judicial power to send an offender to prison and the executive power to release a prisoner. As to the former his Honour said[209]:

"It would be offensive to the constitutional unity of the Australian people 'in one indissoluble Federal Commonwealth' ... to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and sentenced."

Gaudron J spoke in terms of judicial power, saying[210]:

" It is an essential feature of judicial power that it should be exercised in accordance with the judicial process ...

All are equal before the law. And the concept of equal justice - a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such - is fundamental to the judicial process."

It follows that a view of *Leeth* which confines any doctrine of equality to the joint judgment of Deane J and myself does less than justice to the reasons of Brennan J and Gaudron J.

Because equality is derived from the Constitution, it is no answer to refer to laws in which Aboriginals or other groups have been treated unequally. However, a particular law may not infringe the principle, for the reasons Deane J and I identified in *Leeth*. The Constitution mentioned Aboriginals only twice; one of those provisions has been amended, the other repealed. Section 51 of the Constitution empowered the Parliament to make laws with respect to:

"(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws".

The words "other than the aboriginal race in any State" were later deleted[211]. Section 127, which was repealed by s 3 of the same Act, read:

"In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

Referring to par (xxvi) before it was amended, Professor Sawer commented[212]:

" The exclusion of the aborigines may not necessarily have been against their interests in accordance with the ideas of the time; while they might have lost the possibility of Commonwealth laws for their protection and advancement, so far as such laws had to depend on (xxvi), they were also saved from the sort of laws *against* their interests which were uppermost in the minds of the delegates as likely to be passed pursuant to the placitum."

Both provisions are negative and, as Professor Sawer further observed[213]:

"It is contrary to common sense to attribute to them any more significance than they possess considered individually and in relation to the disparate considerations with which history suggests they were intended to deal."

In particular there is nothing in the Constitution which excludes Aboriginals from citizenship. Their exclusion from citizenship rights, in particular voting rights, was the result of legislation[214]. It is unnecessary to pursue the steps that were taken in this regard; the matter is explored in a recent article by Professors Galligan and Chesterman who conclude that nothing in the Constitution excluded Aboriginals from Australian citizenship[215]. There is nothing that excludes Aboriginals from the principle of equality save the qualification that the principle is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment. Indeed, in *Leeth*[216] Deane J and I spoke of the fact that

"a legislative power to make special laws with respect to a particular class of persons, such as aliens (Constitution, s 51(xix)) or persons of a particular race (s 51(xxvi)), necessarily authorizes discriminatory treatment of members of that class to the extent which is reasonably capable of being seen as appropriate and adapted to the circumstance of that membership".

Of course, during the period of the Ordinance s 51(xxvi) excluded "the aboriginal race in any State". It is not that sub-section with which we are directly concerned[217]. It may be noted however that the "discriminatory treatment" referred to in *Leeth* does not stand in necessary contradistinction to laws which are beneficial to a particular class of persons; it may include such laws.

The preamble to the Constitution recites that "the people ... have agreed to unite in one indissoluble Federal Commonwealth"[218]. These words "proclaim that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern"[219]. To repeat what Deane J and I said in *Leeth*[220]:

"Implicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact."

In other words, the equality derives from the very existence of a Constitution brought into existence by the will of the people, save to the extent that the Constitution itself permits discriminatory treatment in the sense discussed in these reasons.

When the Ordinance is analysed and placed in its historical setting, is it reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment of persons answering the description of "aboriginal or half-caste"? No such basis would survive analysis today. But, for the reasons advanced earlier in this judgment, the Ordinance must be assessed by reference to what was reasonably capable of being seen by the legislature at the time as a rational and relevant means of protecting Aboriginal people against the inroads of European settlement. That is a matter of evidence. It cannot be determined by reference to the pleadings. Hence the answer to this component of the question can only be a qualified one.

Again, if by reason of the application of this doctrine of legal equality any of the impugned provisions were held invalid, this would serve to meet a defence founded on the Ordinance to a common law claim for trespass or false imprisonment.

Application of Limitation Laws

I have read what Gaudron J has written on this aspect. It is unnecessary to express any view on the matters canvassed by her Honour, save to agree that because the Commonwealth has not enacted any statute of limitations relevant to the plaintiffs' claims and because the *Limitation Act* 1981 (NT) confers power to extend the limitation periods it fixes, it is inappropriate to answer Question 7(a). Question 7(b) therefore does not arise.

Conclusion

It follows from these reasons that I would in each matter answer the questions reserved as follows:

Q 1 The legislative power conferred by s 122 of the Constitution is restricted by an implied freedom of movement and association as identified in these reasons and by the principle of legal equality. But it is not possible, at this stage of the proceedings, to say whether the Ordinance or any of its provisions was thereby invalid.

Q 2 No.

Q 3 Each of the matters pleaded in par 29(d) and (e) of the amended defence (Kruger) and par 26(d) and (e) of the amended defence (Bray) is relevant.

Q 4 Does not arise.

Q 5 Does not arise.

Q 6 Does not arise.

Q 7 (a) Inappropriate to answer.

(b) Does not arise.

GAUDRON J. The plaintiffs in these actions are Aboriginal Australians. All but one, Rosie Napangardi McClary, claim that, as children, they were removed from their mothers and families and kept in Aboriginal reserves or institutions. Rosie Napangardi McClary is a mother who claims that her child, Queenie Rose, was taken from her.

The acts of which the plaintiffs complain are said to have occurred in the Northern Territory between 1925 and 1960. It is alleged that they were carried out by Protectors appointed under the *Aboriginals Ordinance* 1918 (NT) ("the Ordinance"), and, after May 1957, officers appointed under the *Welfare Ordinance* 1953 (NT) ("the Welfare Ordinance") with the authority or purported authority of the Chief Protector of Aboriginals of the Northern Territory ("the Chief Protector") or, after 5 April 1939, the Director of Native Affairs of the Northern Territory ("the Director") and their delegates.

The Ordinance was made by the Governor-General pursuant to s 13(1) of the *Northern Territory (Administration) Act* 1910 (Cth) ("the Administration Act")[221]. It was amended from time to time, including by enactments of the Legislative Council for the Northern Territory. It was repealed by the Welfare Ordinance with effect from May 1957.

Relevant provisions of the Ordinance and of the Welfare Ordinance

It is convenient to refer to the Ordinance in its original form and to refer to specific amendments only when necessary.

Section 4 of the Ordinance provided for the appointment of a Chief Protector and Protectors to exercise powers and duties conferred on them by the Ordinance and by regulations made pursuant to s 67. By s 6(1), the Chief Protector was empowered "at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it [was] necessary or desirable in the interests of the aboriginal or half-caste ... to do so". He could, for that purpose, take that person into custody[222]. Until 1953, the Chief Protector, was, by s 7(1), the legal guardian of every Aboriginal and every half-caste child. As a result of amendments in 1953, the Director became the legal guardian of all Aboriginal persons.

The Ordinance provided, in s 10[223], for Crown Lands to be made Aboriginal reserves and, in s 13, for the licensing of mission stations, reformatories, orphanages, schools, homes and other institutions established by private contributions as Aboriginal institutions[224]. Section 16(1) of the Ordinance authorised the removal of Aboriginals to and their detention in reserves and institutions in these terms:

"The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve

or aboriginal institution to another reserve or aboriginal institution, and to be kept therein".

Those who refused to be moved or resisted the operation of s 16(1) were, by s 16(2), guilty of an offence. By s 16(3), persons who were lawfully employed, those who held permits to be absent from a reserve or Aboriginal institution, females married to and residing with husbands "substantially of European origin or descent" and those for whom, in the opinion of the Chief Protector, other satisfactory arrangements existed were exempt from the operation of s 16(1).

It is necessary to mention s 67(1) of the Ordinance. It authorised the making of regulations, including, by par (c), regulations "enabling any aboriginal or half-caste child to be sent to and detained in an Aboriginal Institution or Industrial School"[225].

With the repeal of the Ordinance in 1957, procedures were established by the Welfare Ordinance allowing for Aboriginals to be made wards. And by s 17(1) of the Welfare Ordinance, the Director was empowered, if he considered it in the best interest of a ward, to make orders for his or her removal to and detention in a reserve or institution[226].

Constitutional challenge to the validity of the Ordinance and claims for damages

The plaintiffs claim that the Ordinance was at all times invalid. Alternatively, they claim that ss 6, 7, 16 and 67, so far as the latter provision conferred power to make or amend removal regulations, were at all times invalid. If need be, they also claim that s 13(1) of the Administration Act was invalid to the extent that it purported to authorise the Ordinance or alternatively, to the extent that it authorised ss 6, 7, 16 and the challenged operation of s 67. No challenge is made to the validity of the Welfare Ordinance or any of its provisions.

In par 29 of their Amended Statement of Claim, the plaintiffs in the first action assert that the Ordinance was invalid by reason of seven distinct considerations which may be summarised as follows:

. the Ordinance was not a law for the government of the Northern Territory and, thus, not authorised by s 122 of the Constitution;

. it exceeded the legislative power of the Commonwealth in that that power, whether conferred by s 122 or otherwise, does not extend to laws destroying racial or ethnic groups, their language or culture or to laws authorising genocide and crimes against humanity;

. it purportedly conferred judicial power contrary to the provisions of Ch III of the Constitution;

. it was contrary to an implied constitutional freedom from removal and detention without due process of law;

. it was contrary to an implied constitutional right and/or guarantee of equality;

. it was contrary to an implied constitutional right to and/or guarantee of freedom of movement and association;

. it was contrary to s 116 of the Constitution.

The same assertions are made in par 26 of the Amended Statement of Claim in the second action.

The plaintiffs further contend that, by reason of the invalidity which they assert, they are entitled to recover damages from the Commonwealth. They say they are entitled to damages for causes of action recognised by the common law and, also, for breach of their constitutional rights.

The Commonwealth's answer

So far as is presently relevant, the Commonwealth denies that the plaintiffs have any claim to damages. It also asserts, in par 29(d) of its Amended Defence in the first action, that, if there are constitutional freedoms as claimed by the plaintiffs, the Ordinance was not contrary to those freedoms in that:

"(i) The *Aboriginals Ordinance* was enacted and amended for the purpose of the protection and preservation of persons of the Aboriginal race; and

(ii) at all material times the *Aboriginals Ordinance* was capable of being reasonably considered to be or alternatively was appropriate and adapted to the achievement of that purpose".

The Commonwealth further asserts, in par 29(e) of its Amended Defence in the first action, that "the constitutional validity of the *Aboriginals Ordinance* must be considered by reference to standards and perceptions prevailing at the time of its enactment or operation and not by reference to contemporary standards and perceptions".

The same matters are pleaded by the Commonwealth in its Amended Defence in the second action.

Questions reserved

In each action, the Chief Justice has reserved seven questions for the consideration of the Full Court. In each action, questions 4, 5 and 6 only arise if question 2 is answered in favour of the plaintiffs. As will later appear, I am of the view that question 2 must be answered against them in each action and, thus, it is unnecessary to make further reference to questions 4, 5 and 6.

In the first action, questions 1, 2, 3 and 7 are as follows:

"1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the [Aboriginals] Ordinances and regulations ... [made thereunder] so restricted by any and which of the rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 29 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations ... [which purportedly authorised the acts of which the plaintiffs complain]?

2. Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 29 of the Amended Statement of Claim, a breach of which by-

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?

3. If yes to question 1 or question 2, are any and which of the matters pleaded in subparagraphs (d) and (e) of paragraph 29 of the Amended Defence relevant to the existence, scope or operation at any material time of any and which of the rights, guarantees, immunities, freedoms and provisions?

7. On the facts pleaded in paragraphs 1 to 6 of the Amended Statement of Claim-

(a) are the Plaintiffs' claims (or any of them) for damages for wrongful imprisonment and deprivation of liberty statute barred?

(b) by what statute?"

Paragraphs 1 to 6 of the Amended Statement of Claim record details of the removal of the plaintiffs in the first action and, in the case of Rosie Napangardi McClary, her daughter and their detention in specified Aboriginal reserves and institutions.

The questions reserved by the Chief Justice in the second action are the same as those reserved in the first, save for references to different paragraph numbers in the plaintiffs' Amended Statement of Claim and in the Commonwealth's Amended Defence.

Section 122 of the Constitution

It is convenient to deal first with the argument that the Ordinance was not a law "for the government of [a] territory" and thus not authorised by s 122 of the Constitution. The argument proceeds from the clearly correct premise that the Ordinance authorised gross violations of the rights and liberties of Aboriginal Australians to the proposition that, on that account, it was disproportionate to anything that might reasonably be required for the government of the Northern Territory and, then, to the conclusion that it was not a law authorised by s 122.

There are occasions when it is necessary to identify the purpose of a law, either because purpose is the criterion of its validity (for example, if it is said to be a law for defence)[227] or invalidity (for example, if the purpose of a State law is to discriminate against a resident of another State)[228] or because some specified purpose is said to provide the requisite connection with a head of legislative power[229]. Purpose is "ascertained by considering the true nature and operation of the law and the facts with which it deals"[230]. And in that exercise, it is sometimes convenient to ask whether the law in question is appropriate and adapted or, which is, in effect, the same thing, whether it is proportionate to the purpose which it is said to serve[231]. At least that is so where the issue is whether the law in question offends a constitutional prohibition[232]. On the other hand, where the issue is whether it has a purpose providing a relevant connection with a head of legislative power, the question is whether it is reasonably capable of being viewed as appropriate and adapted to some purpose connected with the subject-matter of that power[233]. If it is not appropriate and adapted to the purpose in question or, if it is not reasonably capable of being so viewed, where that is the relevant test, it can be taken that it has some other and different purpose[234]. However, that is an exercise which is undertaken only if purpose is in issue and, then, only if the purpose of the law is not discernible from its terms or its context.

It may be taken that s 122 of the Constitution has a purposive element in that it authorises laws "for the government of [a] territory"[235]. That purposive element has the consequence that not every law that operates in a territory is, to that extent, a law for the government of that territory. And that is so notwithstanding that a law may have a dual character, in the sense that it is enacted pursuant to two separate heads of legislative power[236]. It may be that a law which serves some distinct constitutional purpose (for example, defence) may prove, on analysis, to have no other purpose and, thus, not to be a law for the government of a territory, notwithstanding that it operates in a territory or, indeed, only in a territory. Similarly, it may be that a law which operates throughout Australia with respect to some specific matter, for example, tax, is not sufficiently connected with the Australian Capital Territory or the Northern Territory to be properly classified as a law for their government.

The purposive element of s 122 notwithstanding, no question arises in this case with respect to proportionality. Whatever the precise nature of the power conferred by s 122[237] and whatever the differences between that power and the power conferred by s 51 of the Constitution[238], a law which operates on and operates only on people, places and events in a territory and which serves no distinct constitutional purpose apart from the government of a territory is, in my view, clearly a law for the government of that territory. The Ordinance was a law of that kind and, thus, it was authorised by s 122 unless that provision is subject to one or other of the constitutional limitations for which the plaintiffs contend.

Immunity from laws authorising acts of genocide: reading down of s 122

Although they asserted a somewhat wider immunity in their Statements of Claim, the plaintiffs' oral and written arguments were limited to the contention that the Ordinance

was invalid in that it authorised acts of genocide contrary to Art II(d) and (e) of the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention"). They argued that the Genocide Convention gives expression to an enduring peremptory norm of international law and that s 122 and other constitutional grants of legislative power must be construed on the basis that they were not intended to confer power to make laws authorising acts contrary to that norm.

"Genocide" is defined in Art II of the Genocide Convention as follows:

"... genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

The notion of genocide embodied in the definition in Art II of the Genocide Convention is so fundamentally repugnant to basic human rights acknowledged by the common law that, by reason of well settled principles of statutory interpretation, an intention to authorise acts falling within that definition needs to be clear beyond doubt before a legislative provision can be construed as having that effect[239]. Ordinarily, however, different considerations apply to the interpretation of constitutional documents.

It is settled doctrine that a constitutional grant of power is to be "construed with all the generality which the words used admit."[240] Moreover because of the democratic principles enshrined in the Constitution, constitutional powers are not to be read down to prevent the possibility of abuse[241]. At least that is so in relation to the powers conferred by s 51 of the Constitution. It was said with reference to those powers, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("*the Engineers' Case*")[242], that:

"If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done."

If territories are put to one side, it may be reasonable to say, as was said by Professor Harrison Moore[243] and as has often been repeated[244] that, under the Australian Constitution, "the rights of individuals are sufficiently secured by ensuring, as far as

possible, to each a share, and an equal share, in political power". However, the Constitution ensures no share in political power to the people of a territory. They have no constitutional right to participate in elections for either House of Parliament; they have no constitutional right to self-government. Such rights as they have in these respects are purely statutory and, so far as the Northern Territory is concerned, were of a lesser order than those enjoyed by other Australians during the period with which these cases are concerned[245]. And only since 1977[246] have persons resident in a Territory had the right to vote in a referendum and, then, only if there is a law in force allowing for the Territory's representation in the House of Representatives[247].

At least to the extent that the Constitution makes no distinct provision for the participation of the people of a territory in any electoral processes, it may fairly be said that it allows for territories to be ruled as Commonwealth fiefdoms. That being so, the considerations which require that other grants of legislative power be construed without regard to possible abuse have no part to play in the construction of s 122. Rather, I would consider it much the better view that s 122 is to be construed in light of the fact that, unlike other Australians, persons resident in a Territory have no constitutional right to participate in the democratic processes and, thus, have no protection on that account in the event of an abuse of power. And, I would consider that that approach requires that s 122 should be construed on the basis that it was not intended to extend to laws authorising gross violations of human rights and dignity contrary to established principles of the common law.

As will later appear, I am not persuaded that it is correct to say that s 122 stands wholly apart from Ch III. Nor do I think it correct to say that, either because s 122 confers power of a different order from that conferred by s 51 or because it is not made subject to the Constitution, it is not subject to any of the express or implied constitutional limitations which confine the legislative power conferred by s 51. However, if either of those propositions is, to any extent, correct that is an additional reason for construing s 122 on the basis that it does not extend to laws authorising gross violations of human rights and dignity.

Were it necessary to decide the matter, I would hold that, whatever the position with respect to other heads of legislative power, s 122 does not confer power to pass laws authorising acts of genocide as defined in Art II of the Genocide Convention. The acts encompassed in that definition are so fundamentally abhorrent to the principles of the common law that, on the approach which I favour, it is impossible to construe the general words of s 122 as extending to laws of that kind. However, the question whether s 122 is so confined does not and cannot arise in this case.

Although it may be taken that the Ordinance authorised the forcible transfer of Aboriginal children from their racial group, the settled principles of statutory construction, to which reference has been made, compel the conclusion that it did not authorise persons to remove those children "with intent to destroy, in whole or in part, ... [their] racial ... group, as such". It follows that the Ordinance did not authorise acts of genocide as defined in the Genocide Convention and, if there is a limitation of the kind which I

favour, it was not infringed by the Ordinance. It also follows that, subject to a consideration of the existence of a time bar, if acts were committed with the intention of destroying the plaintiffs' racial group, they may be the subject of an action for damages whether or not the Ordinance was valid.

Chapter III of the Constitution and the claimed guarantee of due process

The argument with respect to Ch III of the Constitution and that with respect to the asserted freedom from detention except pursuant to due process are closely related. It is convenient that they be dealt with together.

The argument based on Ch III starts with the proposition that, subject to certain exceptions which do not include powers of the kind here in issue, the power to deprive people of their liberty is judicial power. It is then said that, as the Ordinance was made pursuant to a law of the Commonwealth, its attempt to confer power on the Chief Protector or his delegate to deprive Aboriginal people of their liberty was an attempt to confer on them the judicial power of the Commonwealth. If that is so, the plaintiffs are correct in their claim that the Ordinance was, to that extent, invalid. In this regard, it is sufficient to note that it is well settled that Ch III requires that the judicial power of the Commonwealth be vested only in the courts named and specified in s 71 of the Constitution[248]. However, the plaintiffs face considerable difficulty in making good the two propositions on which they rest their claim that the Ordinance offended the requirements of Ch III.

It was held in *R v Bernasconi*[249] that s 80, which is in Ch III and which requires trial by jury for indictable offences "against any law of the Commonwealth", does not apply to offences created by a law or by an Ordinance made pursuant to a law enacted under s 122 of the Constitution. Similarly, it was held in *Spratt v Hermes*[250] that courts may be created under s 122 to exercise jurisdiction with respect to events in or concerning a territory without satisfying the requirements of s 72 of the Constitution. Those decisions have sometimes been said to rest on the proposition that Ch III "has no application to the territories" or "does not extend to the Territories"[251].

In *Spratt*, Barwick CJ declined to accept the full extent of the proposition that Ch III has no application to territories[252]. Instead, he was of the view that the decision in *Bernasconi* was correct, but on the ground that s 80 applies only to offences against laws enacted pursuant to s 51 of the Constitution[253]. And in *Spratt* his Honour held that s 72 applies only to federal courts, that is "courts created by laws made in pursuance of the `federal' legislative powers contained in s 51 of the Constitution", not courts created pursuant to s 122[254]. There are difficulties with his Honour's approach to ss 72 and 80 in that it involves reading limitations into those provisions which their terms do not require.

There are, however, even greater difficulties with the view that Ch III does not extend to the Territories. In my view, there is no convincing reason for treating the words "[t]he judicial power of the Commonwealth" in s 71 of the Constitution as not extending to the

determination of justiciable conflicts by application of laws enacted by the Parliament of the Commonwealth pursuant to s 122. However, it may be that different considerations apply to laws enacted by the legislature of a self-governing Territory[255]. And I do not see why the expression "courts created by the Parliament" in s 72 of the Constitution does not include courts created by the exercise of legislative power conferred by s 122. Again, different considerations may apply to courts created by laws enacted by the legislature of a self-governing Territory. However, it is unnecessary for me to express a concluded view on these matters for I am of the view that the plaintiffs cannot make good their first proposition, namely, that the power to deprive people of their liberty is necessarily judicial power.

The plaintiffs rely for their argument with respect to Ch III on statements in *Chu Kheng Lim v Minister for Immigration*[256] which point in favour of a broad immunity from detention in custody save by order of a court in consequence of a determination of criminal guilt. Thus, it was said in the joint judgment of Brennan, Deane and Dawson JJ that[257]:

"It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt."

And subject to certain exceptions, their Honours expressed the view that "the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."[258] Their Honours explained the immunity on the basis that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."[259]

Arrest and custody pursuant to warrant pending trial, detention by reason of mental illness or infectious disease, and punishment for contempt of Parliament and for breach of military discipline were recognised by Brennan, Deane and Dawson JJ in *Lim* as exceptions to the immunity which their Honours would there acknowledge[260]. And of course, it was held in *Lim* that aliens might lawfully be detained in custody for the purposes of expulsion and deportation and, also, for the purposes of the receipt, investigation and determination of applications for admission to this country[261].

At one level, the existence of so many acknowledged exceptions to the immunity for which the plaintiffs contend and the fact that those exceptions serve so many different purposes tell against the implication of a constitutional rule that involuntary detention can only result from a court order. And that is so even if the supposed rule is one that is subject to exceptions. Of greater significance, however, is the consideration that it cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions. I say clear exceptions because it is difficult to assert exclusivity except

within a defined area and, if the area is to be defined by reference to exceptions, the exceptions should be clear or should fall within precise and confined categories.

The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. For example, the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating, respectively, to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.

Once exceptions are expressed in terms involving the welfare of the individual or that of the community, it is not possible to say that they are clear or fall within precise and confined categories. More to the point, it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III[262].

Moreover, the acknowledgment by Brennan, Deane and Dawson JJ in *Lim* that the immunity there enunciated does or may not operate in war time is, in my view, inconsistent with the notion of a general immunity from involuntary detention deriving from Ch III of the Constitution. The defence power, as with the power to legislate with respect to the other matters specified in s 51, is "subject to [the] Constitution". It is, thus, equally subject to the limitations deriving from Ch III as is the power to legislate with respect to those other matters.

I do not doubt that there is a broad immunity similar to, but not precisely identical with that enunciated by Brennan, Deane and Dawson JJ in *Lim.* In my view, however, it does not derive from Ch III. Rather, I am of the view that the true constitutional position is that, subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power. The defence power may be an exception to that proposition[263]. And the proposition does not extend to laws with respect to quarantine[264] or laws with respect to aliens[265] and the influx of criminals[266]. It may be that an exception should also be acknowledged with respect to the race power[267]. It is however arguable that that power only authorises laws for the benefit of "the people of [a] race for whom it is deemed necessary to make special laws"[268].

If, as I think, the legislative power conferred by s 51 of the Constitution does not extend to authorise laws conferring a power of detention divorced from criminal guilt, unless they are laws with respect to the topics or, perhaps, some of the topics to which reference has been made, that is another reason for concluding that there is no similar immunity deriving from Ch III. On that basis, there is no necessity for any such implication. At least that is so with respect to the powers conferred by s 51. However and no matter the position with respect to s 51, it can only be said that s 122 does not authorise laws for the detention of persons in custody, divorced from a breach of the law, if that provision is

subject to some express or implied limitation in that regard. Because, in my view, the power to authorise detention in custody is not exclusively judicial in character, Ch III is not the source of any such limitation. It follows that the Ordinance was not invalid by reason that it purportedly conferred judicial power contrary to Ch III of the Constitution.

The plaintiffs' argument with respect to an implied right of due process is closely related to their argument based on Ch III of the Constitution. The right to due process is asserted in the Amended Statements of Claim as "an implied constitutional right to freedom from and/or immunity from removal and subsequent detention without due process of law in the exercise of the judicial power of the Commonwealth conferred in accordance with Ch III of the *Constitution* or of judicial power under laws of the Commonwealth".

There are two aspects to the asserted right of due process. The first is, in essence, another way of putting the argument based on Ch III. Accordingly, it need not be further considered. The second is an alternative to the argument based on Ch III. It proceeds on the basis that, subject to exceptions which do not extend to the Ordinance, the power to order involuntary detention is necessarily judicial power, but is not the judicial power of the Commonwealth if conferred pursuant to s 122 of the Constitution. For the reasons given with respect to the argument based on Ch III, it cannot be said that the power to order involuntary detention is necessarily judicial power, whether or not subject to exceptions, and, thus, s 122 is not subject to an implied right of due process, as contended by the plaintiffs. There being no such right, the Ordinance was not invalid by reason of its infringement.

Implied guarantee of equality

The plaintiffs rest their argument in support of an implied guarantee of legal equality on what was said by Deane and Toohey JJ in *Leeth v The Commonwealth*[269]. In that case, their Honours expressed the view, in a dissenting judgment, that, as a matter of necessary implication and subject to certain exceptions, the Constitution provides a guarantee of legal equality. Their Honours allowed for exceptions where the grant of legislative power expressly authorises discriminatory laws and where the subject-matter of the grant is "such as to rebut the assumption that such discrimination was unauthorized by the relevant provision of the Constitution"[270].

In *Leeth*, I expressed the view, to which I still adhere, that Ch III operates to preclude the conferral on courts of discretionary powers which are conditioned in such a way that they must be exercised in a discriminatory manner[271]. If that view is correct, there is a limited constitutional guarantee of equality before the courts, not an immunity from discriminatory laws which, in essence, is what is involved in the argument that there is an implied constitutional guarantee of equality.

Several provisions of the Constitution are expressly concerned to prevent discrimination: the power to legislate with respect to taxation is subject to the requirement that laws on that topic "not ... discriminate between States or parts of States"[272]; the power to legislate with respect to bounties is subject to the requirement that they "be uniform

throughout the Commonwealth"[273]; customs duties are to be uniform[274]; trade, commerce and intercourse among the States are to be absolutely free[275], by which is meant free from "discriminatory burdens of a protectionist kind"[276]. And by s 117, "[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

There is a dual aspect to s 117: it operates to prevent discrimination; it also sanctions discrimination so far as concerns persons who are not subjects of the Queen. It is not the only provision of the Constitution which sanctions different treatment for different people. Thus, as Deane and Toohey JJ acknowledged in *Leeth*, the power to make laws with respect to aliens and persons of a particular race necessarily allows for different treatment for different classes of people[277]. And their Honours also acknowledged that "the nature of a Commonwealth legislative power may be such as to authorize laws which discriminate between persons in different geographical areas", giving defence, quarantine and medical services as possible examples[278].

Section 25 of the Constitution also sanctions discriminatory laws and allows that, for the purposes of determining the number of members of the House of Representatives to be chosen in each State, "if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted." Moreover, until 1967, the Constitution, itself, was blatantly discriminatory. Until repealed in that year, s 127 provided, in terms completely contrary to any notion of equality, that "[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives [should] not be counted". That latter provision precludes any implication of equality benefiting Aboriginal Australians in respect of events which occurred before its repeal in 1967.

Quite apart from the discriminatory provisions of s 127, the Constitutional provisions which sanction and those which operate to prevent discriminatory laws so combine, in my view, that there is no room for any implication of a constitutional right of equality beyond that deriving from Ch III. That deriving from Ch III has no bearing on the validity of the Ordinance. It follows that the Ordinance was not invalid by reason that it was contrary to an implied constitutional right to or guarantee of equality.

Implied freedom of movement and of association

It is settled constitutional doctrine that the Constitution provides for a system of government which entails representative government and representative democracy[279]. It is also settled constitutional doctrine that the system of democratic government for which the Constitution provides depends for its maintenance on freedom of communication and discussion of political matters. Thus, it was held in *Nationwide News Pty Ltd v Wills*[280] and in *Australian Capital Television Pty Ltd v The Commonwealth*[281] that the legislative power conferred by s 51 does not extend to laws

which impermissibly impede the free flow of information and ideas on matters which may come under consideration in the political process. And it was held in *Theophanous v Herald & Weekly Times Ltd*[282] and in *Stephens v West Australian Newspapers Ltd*[283] that that freedom impacts upon the law of defamation.

The implied constitutional freedom of political communication was recognised in cases concerned with laws which, in one way or another, restricted the freedom to communicate information, ideas or opinions with respect to matters which might fall for consideration in the political process. Those cases do not hold that the freedom is confined to political communications and discussions. Rather, the position is that the Constitution mandates whatever is necessary for the maintenance of the democratic processes for which it provides[284].

The fundamental elements of the system of government for which the Constitution provides were described by Mason CJ, in terms with which I agree, in *Australian Capital Television*. His Honour said[285]:

"... the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act."

It is clear, and it has been so held, that the fundamental elements of the system of government mandated by the Constitution require that there be freedom of political communication between citizens and their elected representatives and also between citizen and citizen[286]. However, just as communication would be impossible if "each person was an island"[287], so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others[288]. And freedom of association necessarily entails freedom of movement[289].

Modern means of communication notwithstanding, freedom of political communication between citizen and citizen and between citizens and their elected representatives entails, at the very least, freedom on the part of citizens to associate with those who wish to communicate information and ideas with respect to political matters and those who wish to listen. It also entails the right to communicate with elected representatives who "have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters."[290]

Again modern methods of communication notwithstanding, freedom of political communication between citizen and citizen and between citizens and their elected representatives entails, at the very least, freedom to move within society, freedom of

access to the institutions of government and, as was early recognised in *R v Smithers; Ex parte Benson*[291], freedom of access to the seat of government.

As already mentioned, the Commonwealth's power to legislate with respect to the matters specified in s 51 of the Constitution is limited by and subject to the implied freedom of political communication necessary for the maintenance of the system of government for which the Constitution provides. And because freedom of movement and freedom of association are, at least in the respects mentioned, aspects of freedom of political communication, they, too, are implicit in the Constitution and constrain the power conferred by s 51. It is, however, another question whether the power conferred by s 122 is subject to the same freedoms. That question, so far as it concerns freedom of political communication, was referred to in *Nationwide News* and in *Australian Capital Television*, but not decided[292].

There are two matters which might be thought to provide some support for the view that the power to legislate pursuant to s 122 is not constrained by the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television*. They are both matters to which some reference has already been made. First, s 122 is, at least in some respects, a power of a "different order" from that conferred by s 51[293]. The second is that the system of representative government which the Constitution requires has no application to the Territories.

There can be no doubt that s 122 is different from s 51 in that it is not expressed to be "subject to [the] Constitution". Moreover, it is clear that s 122 is a "non-federal" power, in the sense that, unlike the power conferred by s 51, it is not shared between the Commonwealth and the States. It may be taken, by reason of these considerations, that it is not subject to limitations derived by implication from the federal structure of the Constitution[294]. However, a number of decisions of this Court have held that s 122 is not subject to or limited by certain other provisions of the Constitution which clearly confine other Commonwealth powers. It has been held, for example, that a law enacted under s 122 for the compulsory acquisition of property is not subject to the requirement for just terms in s 51(xxxi) of the Constitution[295]. And as already mentioned, it has been held in a number of cases that the provisions of Ch III, or at least some of those provisions, do not limit the power conferred by s 122[296]. It has also been held that a territory legislature, created pursuant to s 122, may enact laws with respect to Commonwealth places notwithstanding that, by s 52(i), the power to legislate with respect to those places is conferred exclusively on the Commonwealth[297].

It does not follow that, because s 122 is not expressed to be subject to the Constitution or because it is not subject to some constitutional prohibitions or restrictions, its meaning and operation are not affected by other constitutional provisions. Indeed, *Capital Duplicators Pty Ltd v Australian Capital Territory*[298] establishes to the contrary. It was held in that case that s 122 does not authorise territory legislatures to impose duties of excise, the power to impose which is, by s 90, conferred exclusively on the Commonwealth.

Nor, in my view, does it follow that, because the system of representative government for which the Constitution provides has no application to territories, s 122 is unaffected by the implied freedom of political communication identified in *Nationwide News* and in *Australian Capital Television*. In this regard, it is sufficient to note that the Constitution contemplates that territories will be governed by laws enacted by a Parliament comprised of persons elected by and responsible to the people; it most certainly does not contemplate that they are to be governed by an executive unanswerable either to the Parliament or to the people.

Accordingly, the question whether s 122 is subject to the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* is one that must be answered by ascertaining the meaning and operation of that provision in its constitutional setting. In particular, its meaning and operation must be ascertained by having regard to the Constitution as a whole. In this respect, I adopt what was said by Kitto J in *Lamshed v Lake*[299]:

"... the fact that the section is found embedded in the agreed terms of federation, with every appearance of having been regarded in the process of drafting as a provision upon a matter germane to the working of the federation, seems to me to underline the necessity of adopting an interpretation which will treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories."

When regard is had to the Constitution as a whole, there are two features which, in my view, necessitate the conclusion that s 122 is confined by the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* and by the subsidiary freedoms of association and movement to which reference has already been made. The first is the nature and scope of the freedom of political communication identified in those cases. The second is the special position of territories in our Constitutional arrangements.

Freedom of political communication is a freedom which extends to all matters which may fall for consideration in the political process. The government of the Australian territories is one such matter. Hence, the freedom extends to all matters that bear upon territory government as well as those which bear upon the actual government of the Territories[300].

Moreover, the nature of the freedom is such that it extends to members of society generally[301]. In *Australian Capital Television*, Mason CJ pointed out that "individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion."[302] However, informed judgment does not depend simply on media discussion. At base, it depends on public discussion, that is discussion in which all are free to participate, or, as was put by Mason CJ in *Australian Capital Television*, "[t]he efficacy of representative

government depends ... upon free communication ... between all persons, groups and other bodies in the community."[303]

The nature and extent of the freedom identified in *Nationwide News* and in *Australian Capital Television* assume particular significance in the context of the constitutional arrangements made with respect to territories. It may be true to say that the Territories do not form part of the federation. Even so, s 111 of the Constitution provides that the Commonwealth, which is constituted by the federating States, has "exclusive jurisdiction" over surrendered territory, as is the case with the Northern Territory[304]. And given the terms of ss 111 and 122 and, so far as concerns the Australian Capital Territory, ss 52[305] and 125[306], it must be acknowledged that neither Territory is "a *quasi* foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament but ... a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction."[307]

Although it is for the Parliament to make proper provision for the government of the territories of the Commonwealth, responsibility for their government and, thus, for the welfare of those who reside in them ultimately rests with the people to whom the Constitution entrusts the responsibility of choosing the Members of Parliament[308]. Clearly, the proper discharge of that responsibility depends upon the free flow of information with respect to all matters bearing upon territory government and, also, those matters which bear upon the actual government of the Territories.

Moreover, the proper discharge of the responsibility which the people of Australia ultimately bear for the government of the Territories depends on freedom of political communication between them and persons resident in those Territories: there could hardly be informed judgment on matters relevant to their government if residents were not free to provide other members of the body politic with information as to the affairs of the Territories. And although persons resident in the Territories have no constitutional right to participate in the electoral processes for which the Constitution provides, the discharge by elected representatives and Ministers of State of their responsibilities requires that there be freedom of communication between them and persons residing in the Territories. And for discussion between persons resident in the Territories and other members of the body politic, including elected representatives and Ministers of State, to be properly informed, it is necessary that there be freedom of political communication between the persons who reside in the Territories.

It follows that, if Parliament is to remain accountable to the Australian people, the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* must extend to persons resident in the Territories and that, in that regard, s 122 stands in the same position as s 51. That being so, the power to legislate pursuant to s 122 is confined by the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* and, also, by the subsidiary freedoms of movement and association which, as I have explained, are essential for the

maintenance and integrity of the system of representative government for which the Constitution provides.

The freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* is not absolute[309]. Similarly, freedom of association and freedom of movement are not absolute. Obviously, they must yield to valid laws of the Commonwealth on topics which clearly comprehend restrictions on movement and association, as is certainly the case, for example, with s 51(vi) which authorises laws with respect to defence, s 51(ix) which authorises laws with respect to quarantine and s 51(xix), so far as it is concerned with aliens. It is equally obvious that freedom of association and freedom of movement must yield to court orders for the detention of persons in custody upon conviction for criminal offences. So to state is not to mark out the boundaries of these freedoms: it is simply to illustrate that they are not absolute.

Because freedom of movement and freedom of association are not absolute, the question whether the Ordinance impermissibly restricted those freedoms is one that necessitates consideration of the issues raised by the Commonwealth in its plea that the Ordinance was enacted "for the purpose of the protection and preservation of persons of the Aboriginal race". That plea is the subject of Q 3. Until that question is answered, it is not possible to answer that part of Q 1 which asks whether the Ordinance was invalid because it impermissibly restricted freedom of movement and of association.

Freedom of Religion

Section 116 of the Constitution provides:

" The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

Clearly, s 116 is, in terms, wide enough to extend to laws enacted pursuant to s 122. However, in *Attorney-General (Vict); Ex rel Black v The Commonwealth*[310], Gibbs J doubted whether that was so.

Before turning to the question whether s 122 is confined by s 116, it is necessary to note the Commonwealth's submission that the plaintiffs "have not pleaded that, at the relevant time, they or their parents held a religion; nor that the taking of [the plaintiffs and Rosie Napangardi McClary] into custody and care deprived them of the ability to exercise that religion". That submission is relevant to the extent that the plaintiffs claim damages for breach of their rights to religious freedom, assuming it can be said that they have such rights and that their breach sounds in damages. It is not, however, relevant to a determination whether the Ordinance was invalid because it was, in terms of s 116, a "law ... for prohibiting the free exercise of ... religion".

In *Lamshed v Lake*, Dixon CJ, with whom Webb and Taylor JJ agreed, said that he did not "see why s 116 should not apply to laws made under s 122."[311] Similar statements were made in *Teori Tau v The Commonwealth*[312], in *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth*[313] and in *Attorney-General (Vict); Ex rel Black v The Commonwealth*[314]. However and as already noted, in that latter case Gibbs J expressed some reluctance to accept that proposition. His Honour acknowledged the strength of the dicta in the decided cases but said[315]:

"... those dicta are in my opinion very difficult to reconcile with the decision in *R v Bernasconi* where it was held that the power given by s 122 is not restricted by s 80 of the Constitution - see also *Spratt v Hermes*" (citations omitted).

His Honour added[316]:

"If s 122 is limited by s 116, the latter section will have a much larger operation in the Territories than in the States, for although s 116 is contained in Ch V of the Constitution which is headed 'The States' it is not expressed to bind the States."

The cases to which Gibbs J referred, namely, *Bernasconi* and *Spratt v Hermes*, are cases concerned with provisions found in Ch III of the Constitution. I have already indicated that I see no reason why there should be read into those provisions limitations which their terms do not require. Moreover, if, to any extent, s 122 stands free of Ch III it can, in my view, only be by reason of the critical significance of Ch III for the maintenance of the federal compact[317]. There is nothing which warrants special federal significance being attributed to s 116.

Nor, in my view, should s 116 be read down by reference to the consideration that it is not expressed to bind the States. Rather, the consideration that, unlike other Australians, residents of the Territories have neither a constitutional right to participate in the electoral processes for which the Constitution provides nor a constitutional right to self-government is, in itself, a strong reason for reading s 122 as subject to express constitutional guarantees and freedoms unless their terms clearly indicate otherwise. And, it may not be entirely accurate to say that, if s 122 is limited by s 116, the latter has "a much larger operation in the Territories than in the States"[318]. Rather, it may be that, so far as concerns self-governing territories, the position is the same. In this respect, it is sufficient to observe that s 116 is directed to laws made by the Commonwealth, not laws enacted by the legislature of a self-governing territory.

As already mentioned, the accepted approach to constitutional interpretation is that constitutional provisions "should be construed with all the generality which the words used admit."[319] There may be special considerations which require that approach to be modified in relation to particular provisions, as I think is necessary with s 122. But there is no reason for modification in the case of constitutional guarantees. On the contrary, to adopt any but the general approach in relation to constitutional guarantees is to rob those guarantees of their efficacy and to depreciate rights which they serve to protect[320]. Accordingly, in my view, s 116 is to be given full effect according to its terms. When

given that effect it is, as Latham CJ said in *Adelaide Company of Jehovah's Witnesses Inc*[321]:

"... a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws."

The question whether the Ordinance infringed the prohibition effected by s 116 was argued by reference only to that aspect of its prohibition concerned with the free exercise of religion. There are two issues involved in the question whether the Ordinance infringed that aspect of s 116, namely, whether the Ordinance was a law "prohibiting the free exercise of any religion" and, if so, whether it was a law "for prohibiting" it (emphasis added). These issues may conveniently be considered in conjunction with the Commonwealth's plea that the purpose of the Ordinance was to protect and preserve Aboriginal people. That plea will be considered later in these reasons.

An action for damages for infringement of Constitutional rights

The plaintiffs contend that there is or, perhaps, that there should now be recognised a cause of action sounding in damages for breach of constitutional guarantees and freedoms. They argue that "the integrity of constitutional entitlements, whether articulated as restrictions on legislative or executive power, privileges or immunities or positive rights, and whether express or implied, can only be preserved if appropriate and effective remedies are available for their breach." And they contend, by reference to decisions in other jurisdictions, notably the decision of the United States Supreme Court in *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*[322], that, in all such cases, damages are the only appropriate remedy.

There are two matters which should be noted with respect to the plaintiffs' argument. First, it is only necessary to consider the argument as it relates to s 116 and to the implied constitutional freedoms of movement and association, they being, in my view, the only relevant limitations on the legislative power conferred by s 122 and, thus, the only freedoms which could conceivably have been infringed by the actions of which the plaintiffs complain. The second matter to be noted is that, as a matter of logic, the plaintiffs' argument can only succeed if and to the extent that the Constitutional prohibition in question can only be vindicated by an award of damages and, then, only by an award made in an action for breach of that constitutional prohibition rather than in an action for infringement of common law rights.

It is convenient to turn first to s 116. By its terms, s 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, "in form, a constitutional guarantee of the rights of individuals"[323]. It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom

in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation on Commonwealth legislative power. More precisely, it cannot be construed as impliedly conferring an independent or free-standing right which, if breached, sounds in damages at the suit of the individual whose interests are thereby affected.

Freedom of movement and of political communication stand in a somewhat different position from the limited guarantee of religious freedom effected by s 116 of the Constitution. They are freedoms which, of their nature are universal, in the sense that they necessarily operate without restriction as to time or place[324]. That being so, they necessarily restrict State legislative power and thus, may be described as giving rise to general, although as earlier indicated, not absolute freedoms. Even so, it does not follow that the Constitution gives an independent or free standing right to move in society and to associate with one's fellow citizens which, if breached, sounds in damages.

The right to move in society and to associate with one's fellow citizens is an aspect of personal liberty which is jealously guarded by the common law and which is abridged only to the extent that it is inconsistent with positive rights, including property rights, or to the extent that statute law validly provides to the contrary[325]. Personal liberty is protected by the Constitution to the extent that freedom of movement and association are impliedly mandated by it. However, there is no basis, in my view, for construing the Constitution as conferring an additional right over and above those provided by the common law. Moreover, the relevant rights provided by the common law are properly vindicated by actions for trespass to the person and for false imprisonment, actions which sound in damages, including, in appropriate cases, exemplary damages[326]. There is, thus, no necessity to invent a new cause of action.

The Commonwealth plea: purpose and proportionality of the Ordinance in relation to freedom of movement and of association

It is necessary now to turn to so much of Q 1 as asks whether the Ordinance was invalid by reason that it impermissibly restricted freedom of movement or of association. As already indicated, that raises the issue involved in Q 3, namely, whether the Ordinance was consistent with those freedoms by reason that its purpose was to protect and preserve Aboriginal people. It is in support of the proposition that protection and preservation were the purpose of the Ordinance, that the Commonwealth pleads that it is reasonably capable of being viewed as appropriate and adapted[327], or, alternatively, that it was appropriate and adapted to achieving that purpose. And in this regard, the Commonwealth contends that issues of appropriate adaptation are to be determined by reference to the standards and perceptions of the period in which the Ordinance operated, not those of the present day.

I have earlier described the freedoms of movement and of association as subsidiary to the freedom of political communication required for the maintenance of the system of representative government for which the Constitution provides. They are subsidiary only

in the sense that they support and supplement that latter freedom and not in the sense that they are inferior to or less robust than it. On the contrary, their nature is such that, although, as will later appear, the test which determines whether or not they have been infringed is the same as that applicable in the case of the implied freedom of political discussion, the circumstances in which a law may validly restrict freedom of movement and discussion are, to some extent, more circumscribed than is the case with the implied freedom of political discussion. In this respect, it is to be noted that not every restriction on communication is a restriction on the communication of political ideas and information. On the other hand, any abridgment of the right to move in society and to associate with one's fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters.

In *Australian Capital Television*, Mason CJ drew a distinction, in relation to the implied freedom of political communication, between "restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted."[328] Of the former, his Honour said that, "only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication."[329] He allowed a less stringent test in the case of restrictions imposed on an activity or mode of communication, requiring only that "the restriction [be] reasonably necessary to achieve the competing public interest."

Similarly, Deane and Toohey JJ expressed the view in *Australian Capital Television* that "a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications."[330] And a like dichotomy was recognised by McHugh J who drew a distinction between "laws which restrict the freedom of electoral communications by prohibiting or regulating their contents and laws which incidentally limit that freedom by regulating the time, place or manner of communication."[331] As to the former, his Honour said that they "[could] only be upheld on grounds of compelling justification", whereas the latter could be upheld if "designed to protect some competing aspect of the public interest and the restraint ... [was] not disproportionate to the end sought to be achieved."[332]

In *Nationwide News*, I expressed the view, by reference to what I said in *Australian Capital Television*, that a law which restricts political communication is valid "only if its purpose is not to impair freedom [of political communication], but to secure some end within power in a manner which, having regard to the general law as it has developed in relation to the written and spoken word, is reasonably and appropriately adapted to that end."[333]

The various formulations in *Australian Capital Television* and in *Nationwide News* point to but one test of a law which restricts political communication; namely, whether the purpose of the law in question is to prohibit or restrict political communication.

Questions directed to compelling justification, necessity and proportionality are, at base, questions directed to ascertaining the purpose of the law in question.

As earlier indicated, the purpose of a law is to be ascertained by its nature, its operation and the facts with which it deals. In ascertaining that purpose, a law which is, in terms, a prohibition or restriction on political communication or which operates directly to prevent or curtail discussion of political matters is, in my view, to be taken to have that purpose unless the prohibition or restriction is necessary for the attainment of some overriding public purpose (for example, to prevent criminal conspiracies) or, in terms used by Deane J in *Cunliffe v The Commonwealth*, to satisfy some "pressing social need"[334] (for example, to prevent sedition). Whether a law is necessary for some such purpose depends on whether it is "no more than is proportionate to the legitimate aim pursued"[335]. That in turn depends on whether less drastic measures are available[336]. On the other hand, a law with respect to some subject-matter unconnected with the discussion of political matters and which only incidentally impinges on the freedom of that discussion, is not to be taken to be a law for the purpose of restricting that freedom if it is reasonably appropriate and adapted or, which is the same thing, proportionate to some legitimate purpose connected with that other subject-matter.

In my view, the test applicable in the case of the implied freedom of political communication is equally applicable to the subsidiary freedoms of movement and association which support that freedom, namely, whether the purpose of the law in question is to restrict those freedoms. Although the test is the same, it may involve different considerations in the sense that the matters of public importance or pressing social need which will justify a law restricting freedom of movement or of association will ordinarily be of a different nature from those which justify a law restricting political communication. Similarly, different considerations may be brought into play where the question is one of proportionality.

It is necessary now to turn to the terms and operation of the Ordinance. Sections 6 and 16 conferred powers on the Chief Protector and, later, the Director which, if exercised, operated directly to prevent freedom of movement and of association. Moreover, they were couched in terms directly contrary to those freedoms, s 6 conferring a power to take people into custody and s 16 conferring power to cause Aboriginal people to be "kept within the boundaries of ... reserve[s] or aboriginal institution[s]". Similarly, the power conferred by s 67(1)(c) to make regulations "enabling any aboriginal or half-caste child to be sent to and detained in an Aboriginal Institution or Industrial School" permitted regulations which directly prevented freedom of movement and of association. Indeed, it only permitted regulations of that kind. Accordingly, in my view, s 6 (to the extent that it authorised the taking of people into custody), and ss 16 and 67(1)(c) were only valid if necessary for the attainment of some overriding public purpose or for the satisfaction of some pressing social need.

Because s 6 (to the extent that it authorised the taking of people into custody) and ss 16 and 67(1)(c) were only valid if necessary for the attainment of some overriding public purpose or the satisfaction of some public need, the Commonwealth's plea that the

Ordinance is or is reasonably capable of being viewed as appropriate and adapted to preserving and protecting Aboriginal people provides no answer to the question whether it infringed constitutional freedoms.

If it could be said that the Ordinance was necessary for the preservation or protection of Aboriginal people, it would follow that it was valid in its entirety. However, the Commonwealth asserts no such necessity. Moreover, there is no basis on which it could be said that those provisions of the Ordinance which authorised action impairing the rights of Aboriginal people to move in society and to associate with their fellow citizens, including their fellow Aboriginal Australians, were in any way necessary for the protection or preservation of Aboriginal people or, indeed, those Aboriginal people whose rights in that regard were, in fact, curtailed. Certainly, the powers conferred on the Chief Protector and, later, the Director by ss 6 and 16 were not conditioned on any necessity to take Aboriginal people into custody or to keep and detain them in reserves and institutions for their protection or preservation.

Nor were the powers conferred by ss 6 and 16 of the Ordinance conditioned on the formation of an opinion that their exercise was necessary to protect or preserve Aboriginal people. On the contrary, the power conferred by s 16 extended to all Aboriginals, except those falling within the limited categories specified in sub-s (3), and was entirely at large; the exercise of the power conferred by s 6(1) to take people into custody was subject only to the formation of an opinion by the Chief Protector and, later, the Director that it was "necessary or desirable in the interests of the aboriginal or half-caste for him to do so". Interesting questions might have arisen had the power been conditioned on the formation of an opinion that it was necessary to undertake the custody of the person concerned for his or her welfare. However s 6(1) cannot be read in that way. Nor can it be read down to operate in that way: that would be to give it an entirely different operation. Further, the regulation making power conferred by s 67(1)(c) was not conditioned by reference to any necessity to protect or preserve any of the Aboriginal people of the Northern Territory.

It follows in my view that s 6, so far as it conferred authority to take people into custody, and ss 16 and 67(1)(c) were at all times invalid. As the plaintiffs complain only of their forced removal and detention in Aboriginal reserves and institutions, it is unnecessary to consider whether other provisions of the Ordinance which did not impinge on their freedom of movement and association were also invalid. So far as concerns the Administration Act, its general provisions can and should be read as conferring power subject to the Constitution. So read, no question arises as to its validity.

The Commonwealth's plea: purpose and proportionality of the Ordinance in relation to s 116 of the Constitution

As earlier indicated there are two questions which arise with respect to this aspect of the case. The first is whether, in terms of s 116, the Ordinance was a law "prohibiting the free exercise of any religion". The second is whether it was a law made for that purpose. Both questions assume that the Aboriginal people of the Northern Territory, or at least some of

them, had beliefs or practices which are properly classified as a religion for the purposes of s 116. Although there are some statements in the decided cases to the effect that Aboriginal beliefs are properly classified as religious beliefs[337], that is a question which involves factual considerations and cannot be determined at this stage of the proceedings. For present purposes, however, that issue may be assumed in favour of the plaintiffs. On the basis of that assumption, it is possible to turn to the first question of law raised by s 116, namely, whether the Ordinance was a law "prohibiting" the exercise of religion.

The expression "prohibiting the free exercise of any religion" suggests that, in that respect, s 116 is concerned only with laws which, in terms, ban religious practices or otherwise forbid the free exercise of religion. Some support for that view is to be found in the statement of Griffith CJ in *Krygger v Williams* that "a law requiring a man to do an act which his religion forbids [might] be objectionable on moral grounds, but it does not come within the prohibition of s 116"[338]. Moreover, as Barwick CJ pointed out in *Attorney-General (Vict); Ex rel Black v The Commonwealth*, s 116 is directed to "the *making* of law", not "the administration of a law"[339].

There are two matters, one textual, the other contextual, which in my view, tell against construing s 116 as applying only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion. First, s 116 speaks of the exercise of religion, and it follows, as Latham CJ pointed out in *Adelaide Company of Jehovah's Witnesses Inc*, that "it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion."[340] The contextual consideration is that, putting s 122 to one side, the Commonwealth has no power to legislate with respect to religion[341], and, thus, a law which, in terms, prohibits religious practice would, ordinarily, not be a law on a subject-matter with respect to which the Commonwealth has any power to legislate. These considerations provide powerful support for the view that s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it.

Another matter which points in favour of construing s 116 as extending to laws which prevent the free exercise of religion, not merely those which, in terms, effect a prohibition in that regard, is the need to construe constitutional guarantees liberally, even limited guarantees of the kind effected by s 116. In this respect, it is inconsistent with established principles of constitutional construction to construe constitutional guarantees as concerned with form rather than substance[342]. So too, it is inconsistent with established principle to interpret constitutional guarantees "pedantically"[343] so that they may be circumvented by legislative provisions which purport to do indirectly what cannot be done directly[344].

The matters to which reference has been made compel the conclusion that s 116 extends to laws which prevent the free exercise of religion. And the need to construe guarantees so that they are not circumvented by allowing to be done indirectly what cannot be done directly has the consequence that s 116 extends to provisions which authorise acts which

prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.

Again, the question whether the Ordinance authorised acts which prevented the free exercise of religion involves factual issues which cannot presently be determined. However, if Aboriginal people had practices and beliefs which are properly characterised as a religion for the purposes of s 116, and if, as would seem likely, those practices were carried out in association with other members of the Aboriginal community to which they belonged or at sacred sites or other places on their traditional lands, removal from their communities and their traditional lands would, necessarily, have prevented the free exercise of their religion. Whether or not that was the case remains to be decided. But on the assumption that it was, the question arises whether the Ordinance was a law "for prohibiting the free exercise of any religion".

In *Adelaide Company of Jehovah's Witnesses Inc*, Latham CJ observed in relation to s 116 that "[t]he word `for' shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character."[345] In my view, that is not entirely accurate. The use of the word "for" indicates that purpose is the criterion and the sole criterion selected by s 116 for invalidity. Thus, purpose must be taken into account. Further, it is the only matter to be taken into account in determining whether a law infringes s 116.

In emphasising that purpose is the criterion selected by s 116, I do not overlook observations to the effect, for example, that s 116 is not infringed by laws which "prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of the war"[346] or that "[i]t is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community."[347] Those statements are undoubtedly correct. However, they do not state the criterion of invalidity selected by s 116. It is purpose, not the continued existence of society, which that provision selects as the mechanism by which "to reconcile religious freedom with ordered government."[348]

In *Attorney-General (Vict); Ex rel Black*, Barwick CJ expressed the view, in relation to that part of s 116 which protects against laws "for establishing any religion", that for "[a] law to satisfy [that] description [it] must have that objective as its express and ... single purpose."[349] If that is correct, it is because of what is involved in the notion of "establishing [a] religion". Certainly, that notion involves something conceptually different from "imposing ... religious observance", "prohibiting the free exercise of any religion" or requiring religious tests "as a qualification for ... office or public trust under the Commonwealth", they being the other matters against which s 116 protects. Moreover, s 116 is not, in terms, directed to laws the express and single purpose of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass any law which has a proscribed purpose. And the principles of construction to which

reference has been made require that, save, perhaps, in its application to laws "for establishing [a] religion", s 116 be so interpreted lest it be robbed of its efficacy.

It is convenient now to turn to the Commonwealth's plea that the purpose of the Ordinance was "the protection and preservation of persons of the Aboriginal race" and the issues raised by Q 3. Clearly, a law may have more than one purpose. Similarly, a particular purpose may be subsumed in a larger or more general purpose. That latter proposition is well illustrated by the present case. It is clear from the terms of the Ordinance that one of its purposes, evident from the terms of s 16, was to remove Aboriginal and half-caste people to and keep them in Aboriginal reserves and institutions. That purpose is not necessarily inconsistent with the more general purpose which the Commonwealth asserts. And neither purpose is necessarily inconsistent with the purpose of removing Aboriginal children from their families and communities, thereby preventing them from participating in community practices. Indeed, in the absence of some overriding social or humanitarian need - and none is asserted - it might well be concluded that one purpose of the power conferred by s 16 of the Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, that purpose necessarily extended to prohibiting the free exercise of religion.

As with the implied freedom of political communication and the implied freedoms of movement and association, a law will not be a law for "prohibiting the free exercise of any religion", notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need. Nor will it have that purpose if it is a law for some specific purpose unconnected with the free exercise of religion and only incidentally affects that freedom. It is not pleaded in the present case either that the Ordinance was necessary for the protection or preservation of Aboriginal people or that its purpose was a purpose unconnected with the free exercise of religion. The plea is, thus, no answer to the plaintiffs' claim that the Ordinance was invalid by reason that it infringed s 116.

Were the Commonwealth to further amend its Defence to assert that the purpose of protecting and preserving Aboriginal people was unconnected with the purpose of prohibiting the free exercise of religion, a question might arise, if the plea were to be made good, whether the interference with religious freedom, if any, effected by the Ordinance was appropriate and adapted or, which is the same thing, proportionate to the protection and preservation of those people. And as the purpose of a law is to be determined by reference to "the facts with which it deals"[350], that question would necessarily have to be answered by reference to the conditions of the time in which it operated. However, the answer to the question depends on an analysis of the law's operation, not on subjective views and perceptions.

It follows that the matters pleaded by the Commonwealth and referred to in Q 3 are not relevant to the question whether the Ordinance infringed s 116. Whether the Ordinance was invalid on that account is not a matter that can presently be determined.

Application of Limitation Laws

The seventh question reserved by the Chief Justice asks whether the plaintiffs' claims for damages are statute-barred and, if so, by what statute. I have earlier indicated that, in my view, there is no constitutional cause of action as asserted by the plaintiffs and, thus, Q 7 only arises in relation to their common law claims.

There are certain matters which should be noted at the outset. First, although the Parliament has power, pursuant to s 78 of the Constitution, to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power [of the Commonwealth]", it has not at any stage enacted a general statute of limitations with respect to those matters. Nor has it exercised the express incidental power conferred by s 51(xxxix) of the Constitution to enact a general statute of limitations with respect to those or other matters falling within the judicial power of the Commonwealth. Further, no general limitation law has been enacted pursuant to s 122 of the Constitution, whether by the Parliament of the Commonwealth or by the legislatures of the Australian Capital Territory or the Northern Territory, which purports, in terms, to apply to actions brought against the Commonwealth in this Court with respect to acts or events occurring in a Territory. Moreover, it is well settled that State laws cannot apply of their own force to proceedings in this Court[351]. Thus, it is common ground that, if there is a limitation provision applicable in this case, it is one that is made applicable by the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

The relevant provisions of the Judiciary Act are ss 56(1), 64, 79 and 80. Section 56(1) allows that a suit may be brought against the Commonwealth in this Court, in a court of the State or Territory in which the claim arose or, if it did not arise in a State or Territory, any other court of competent jurisdiction of a State or Territory. It was suggested by Windeyer J in *Suehle v The Commonwealth* that s 56 of the Judiciary Act directs that an action against the Commonwealth "is to be tried according to the lex loci delicti; and when the action is brought in this Court that becomes the lex fori."[352] However, the Commonwealth does not contend that s 56 has any relevant operation in this case. Nor does it argue that s 80 is relevant. It does argue, however, that ss 64 and 79 of the Judiciary Act operate so as to make the *Limitation Act* 1981 (NT) ("the NT Limitation Act") applicable to the plaintiffs' claims.

Before turning to ss 64 and 79 of the Judiciary Act, it is convenient that I indicate my view with respect to ss 56 and 80. Despite the observation of Windeyer J in *Suehle v The Commonwealth*[353], s 56 does not, in my view, operate to require application of the laws of the State or Territory in which the events giving rise to a claim against the Commonwealth occur. As the parties do not contend otherwise, it is unnecessary to state the reasons which lead me to that view[354]. I do, however, think that, in the absence of Commonwealth legislation on the subject, it is the common law in Australia that determines the body of law, including limitation provisions, to be applied in matters of federal jurisdiction and that the effect of s 80 is to require application of that body of law before resort is had to s 79[355]. In this respect, it should be noted that s 79 operates "except as otherwise provided by the Constitution [and] the laws of the Commonwealth"

which, necessarily include s 80[356]. However, as the view which I take with respect to s 80 does not lead to any different result in this case, it is convenient to proceed on the basis that it has no application and that the question whether the plaintiffs' actions are statute-barred is to be answered by resort to ss 64 and 79.

Section 64 of the Judiciary Act relevantly provides that, in any suit to which the Commonwealth is a party, "the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject." Section 79 of the Judiciary Act provides:

"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

It is convenient to set out the steps in the Commonwealth's argument that the NT Limitation Act applies to the plaintiffs' claims. The first step is to argue that s 79 of the Judiciary Act applies to this Court; the second is to contend that s 79 "picks up" for each action the laws of the State or Territory in which is located the Registry of the Court in which that particular action was commenced; the third step is to say that in the first action, which was commenced in the Melbourne Registry, s 79 picks up the *Choice of Law (Limitation Periods) Act* 1993 (Vic) and that that Act requires that the NT Limitation Act be applied; the fourth step is to claim that in the second action, commenced in the Darwin Registry, s 79 operates directly to pick up the NT Limitation Act. The fifth and final step is to argue that s 64 requires that the provisions of the NT Limitation Act be applied as they would be in "a suit between subject and subject." There is no doubt that if s 79 operates, either itself or by means of another law to "pick up" a limitation provision, s 64 requires that that limitation provision be applied in proceedings to which the Commonwealth is a party[357]. However, the earlier steps in the Commonwealth's argument require analysis.

It is clear that, in terms of s 79 of the Judiciary Act, this Court is a court "exercising federal jurisdiction"[358]. It is, however, difficult to say that it exercises jurisdiction in a State or Territory. Rather, it exercises its jurisdiction throughout Australia, sitting for that purpose in Canberra, the nation's capital, and sometimes in the States. The plaintiffs contend that because this Court exercises jurisdiction throughout Australia, the words of s 79 are not apt to apply to it. And in support of that proposition, they contend that there is no construction which can guarantee against anomalous consequences.

It cannot be denied that there are difficulties involved in the application of s 79 to proceedings in this Court. Those difficulties have, on occasions, led to the view that s 79 operates to "pick up" the laws of the State or Territory in which is located the Registry in which proceedings are commenced[359]. Certainly, that approach has or may have anomalous consequences, as noted by Deane J in *McKain v RW Miller & Co (SA) Pty Ltd*[360]. In that case, his Honour said of the circumstances involved in *Pedersen v Young*[361] that "[i]f, for example, the defendant [in that case] had sued the plaintiff in negligence in proceedings instituted in the Registry of this Court in the prima facie

appropriate place (ie Queensland) on the day on which the plaintiff instituted the proceedings against him in New South Wales and the proceedings had been heard in Chambers, the defendant's action would have been barred but the plaintiff's would not, notwithstanding that both actions arose out of the same accident and had been instituted in the same court on the same day."

It may be that the anomalous consequences adverted to by Deane J in *McKain v RW Miller & Co (SA) Pty Ltd* have now been avoided, if not completely, to a very significant extent, by the enactment, in recent years, of uniform State and Territory laws directing that, if the substantive law of another State or Territory applies to a claim before a court, the limitation laws of that other State or Territory are to be treated as part of its substantive law and are to be applied accordingly[362]. At least that would seem to be the case if those laws are capable of being "picked up" by s 79 - a question which remains to be considered. However, even if they are "picked up", other anomalies may well arise if s 79 is construed as "picking up" State and Territory laws by reference to the location of the Registry in which proceedings are commenced.

It has also been suggested that s 79 of the Judiciary Act operates to "pick up" the laws of the State or Territory in which an action is "heard and determined"[363]. And, because actions may be heard in one State or Territory and judgment delivered in another, it has been said that s 79 operates to pick up the laws of the State or Territory in which the Court sits to hear the matter[364]. And, in *Parker v The Commonwealth*, Windeyer J seems to have entertained the possibility that s 79 might operate to pick up the laws of the State or Territory in which judgment is delivered[365]. It cannot be doubted that, if s 79 operates in any of these ways, it may well produce "capricious result[s]"[366]. Moreover, as Windeyer J remarked in *Pedersen v Young*, answers to the various questions raised with respect to s 79 in its application to proceedings in this Court which are "logically satisfying [are] not readily apparent"[367]. Even so, to construe s 79 as not applying to this Court would be to risk greater anomalies and, perhaps, more capricious consequences than those which result from its application. At least that is so if, as has been assumed, s 80 has no role to play in determining whether an action is statute-barred.

As already indicated, s 56 of the Judiciary Act does not, in my view, impliedly direct that the law of the State or Territory in which the events in question occurred should be applied in actions against the Commonwealth. But even if it does, there is no like implication to be drawn in cases in which the events did not occur in a State or Territory, a possibility acknowledged by the terms of s 56(1)(c). And there is no provision giving rise to an implication of that kind in an action between subject and subject, as occurs when proceedings are brought in this Court between residents of different States[368]. Putting s 118 of the Constitution to one side[369], no provision of the Constitution and no law of the Commonwealth provides directly as to the law to be applied in such cases. And, of course, that was the case when the Judiciary Act was enacted in 1903. In that context and on the assumption that s 80 has no role to play in determining the law to be applied in matters such as the present, s 79 must, in my view, be construed as intended to apply to this Court, notwithstanding that its language does not adequately reflect the

nature of its jurisdiction or the manner of its exercise and notwithstanding the difficulties inevitably involved in its application.

As appears from what has been said with respect to the application of s 79, there are various problems associated with the meaning to be attributed to the phrase "exercising federal jurisdiction in [a] State or Territory". In its application to this Court, that phrase does not, as a matter of ordinary language, direct attention to the State or Territory in which is located the Registry in which proceedings are commenced. Of the various possibilities to which reference has been made, the hearing and determination of the matter in issue most nearly equates with the expression "exercising federal jurisdiction". Accordingly, I would interpret s 79, in its application to this Court, as "picking up" the laws of the State or Territory in which a matter is heard and determined.

Should it occur that a matter is heard in one place and is to be determined in another, pragmatic considerations dictate that, in its application to this Court, s 79 operates to pick up the laws of the State or Territory in which the matter is heard. How else can the parties know on what basis their case should be conducted? And, if the Court were to hear the matter in more than one State or Territory, the same pragmatic considerations require that s 79 be applied to pick up the law of the State or Territory in which the Court first sits to hear the substance of the matter, unless it is clear that the Court will later sit in a State or Territory more closely connected with the matter.

This matter was heard and, so far as concerns the questions reserved by the Chief Justice, will be determined in Canberra. Thus, s 79 operates to pick up the relevant laws of the Australian Capital Territory, including its choice of law rules[370]. It is not in issue that, in actions in tort, the choice of law rules of all States and Territories direct application of the lex loci delicti. In this regard, it is sufficient to note that that is the effect of the decision in *Breavington v Godleman*[371] and there is nothing in the judgments in *McKain v RW Miller & Co (SA) Pty Ltd*[372] to suggest that, in that respect, *Breavington v Godleman* was wrongly decided[373]. Thus, the substantive law to be applied in this case is the law of the Northern Territory, as required by the choice of law rules of the Australian Capital Territory which are "picked up" by s 79 of the Judiciary Act. And prima facie, at least, s 79 also "picks up" s 56 of the *Limitation Act* 1985 (ACT) ("the ACT Limitation Act") which provides that:

"If the substantive law of another place being a State, another Territory or New Zealand, is to govern a claim before a court of the Territory, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court."

The plaintiffs contend, by reason of the reference in s 56 of the ACT Limitation Act to "a court of the Territory", that that provision relates to courts of the Australian Capital Territory and, thus, cannot be applied to proceedings in this Court. In support of that proposition they rely on the statement by Kitto J in *Pedersen v Young* that s 79 "does not purport to do more than pick up State laws with their meaning unchanged"[374]. They also rely on *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[375] in which it was said:

" Whether or not s 79 applies to the appellate jurisdiction of this Court, it is no part of its purpose to pick up, so to speak, a provision of State law imposing on State courts such a function as that assigned to them by s 6(1) [of the *Suitors' Fund Act* 1951 (NSW)] and convert it into a provision imposing a like function on federal courts."

There may be statutory provisions couched in terms which make it impossible for them to be "picked up" by s 79 of the Judiciary Act. Similarly, there may be provisions which impose functions which are beyond the reach of s 79. Even so, I see no reason why s 79 cannot "pick up" limitation laws or other statutory provisions merely because they are expressed in terms applying specifically to State or Territory Courts. Rather, as Gibbs J noted in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[376]:

"If the laws of a State could not apply if, upon their true construction ... they related only to the courts of the State, it would seem impossible ever to find a State law relating to procedure, evidence or the competency of witnesses that could be rendered binding on courts exercising federal jurisdiction, because most, if not all, of such laws, upon their proper construction, would be intended to apply in courts exercising jurisdiction under State law."

The reference in s 79 of the Judiciary Act to State and Territory "laws relating to procedure, evidence, and the competency of witnesses" compels the conclusion that s 79 requires State and Territory laws to be applied "[on] the hypothesis that federal courts do not necessarily lie outside their field of application."[377] On that hypothesis, s 56 of the ACT Limitation Act is capable of being "picked up" by s 79. It thus applies in these proceedings and, when applied, it renders the NT Limitation Act applicable to the plaintiffs' claims.

It is necessary to mention that, in certain circumstances, s 44 of the NT Limitation Act confers power to extend the limitation periods fixed by that Act. No argument was directed to the question whether s 44 applies to these cases and, if so, whether the power to extend time should be exercised in favour of the plaintiffs. It is, thus, inappropriate to consider whether the plaintiffs' actions are statute-barred.

Answers to Questions

In each matter, the questions reserved by the Chief Justice should be answered as follows:

Q 1 The legislative power conferred by s 122 of the Constitution is so restricted by implied freedoms of movement and association as to invalidate s 6(1), (so far as it conferred power to take people into custody), and ss 16 and 67(1)(c) of the *Aboriginals Ordinance* 1918 (NT). It is also restricted by s 116 of the Constitution, although it is not possible to say at this stage of the proceedings whether the Ordinance was also invalid on that account.

Q 2 No.

Q 3 None of the matters are relevant.

Q 4 Does not arise.

Q 5 Does not arise.

Q 6 Does not arise.

Q 7 (a) Inappropriate to answer.

(b) Strictly does not arise, but the *Limitation Act* 1981 (NT) is made applicable to the plaintiffs' actions by operation of ss 64 and 79 of the *Judiciary Act* 1903.

McHUGH J. For the reasons given by Dawson J :

(1) the *Aboriginals Ordinance* (1918) NT ("the 1918 Ordinance") was authorised by s 122 of the Constitution;

(2) the actions of which the plaintiffs complain were not an exercise of judicial power by the Executive government contrary to Chapter III of the Constitution;

(3) the Constitution contains no general guarantee of due process of law or of legal equality before or under the law; and

(4) the power to legislate under s 122 of the Constitution is not restricted by s 116 of the Constitution.

I would also reject the plaintiffs' claim that the 1918 Ordinance was invalid because it infringed an implied constitutional right of freedom of movement and association for political, cultural and familial purposes. Nothing in s 122 of the Constitution gives any support for this claim[378]. Nor is there any implication in the Constitution as a whole that supports the claim.

Because ss 7, 24, 64 and 128 and related sections of the Constitution provide for a system of representative and responsible government and a procedure for amending the Constitution by referendum, the Constitution necessarily implies that "the people" must be free from laws that prevent them from communicating with each other with respect to government and political matters[379]. The freedom arises from the constitutional mandate "that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively."[380] It exists for the protection of "the people of the Commonwealth" in the case of the House of Representatives and for "the people of the State[s]" in respect of the Senate. As a matter of construction, the constitutional implication cannot protect those who are not part of "the people" in either of those senses.

The reasons that led to the drawing of the implication of freedom of communication lead me to the conclusion that the Constitution also necessarily implies that "the people" must be free from laws that prevent them from associating with other persons, and from travelling, inside and outside Australia for the purposes of the constitutionally prescribed system of government and referendum procedure. The implication of freedom from laws preventing association and travel must extend, at the very least, to such matters as voting for, or supporting or opposing the election of, candidates for membership of the Senate and the House of Representatives, monitoring the performance of and petitioning federal Ministers and parliamentarians and voting in referenda.

However, from the time when the 1918 Ordinance was enacted until it was repealed in 1957[381], the residents of the Northern Territory had no part to play in the constitutionally prescribed system of government or in the procedure for amending the Constitution. The right of the Territories to elect senators or members of the House of Representatives was, as it is today, dependent on federal legislation, not constitutional entitlement. The Northern Territory had no constitutional right during the period 1918 to 1957 to elect or vote for a member of the Senate or the House of Representatives.

It was not until 1922 that the Northern Territory had any representation in the House of Representatives[382]. Moreover, its member was not given a vote on any question arising in that House. In 1936, the member was given the right to vote on any motion for the disallowance of any Ordinance of the Northern Territory and on any amendment of such motion[383]. In 1959, this right was extended to any question "on or in connexion with" a proposed law that was determined to relate solely to the Northern Territory[384]. It was not until 1968 that the member for the Northern Territory was given the same "powers, immunities and privileges" as those enjoyed by members representing State Electoral Divisions[385]. Furthermore, the Northern Territory had no Senate representation until the enactment of the *Senate (Representation of Territories) Act* 1973 (Cth), which came into force on 7 August 1974. Indeed, it was not until 1977 that the residents of the Northern Territory finally received constitutional as well as democratic recognition by being given the right to vote in a referendum to amend the Constitution[386]. By then the 1918 Ordinance had long been repealed.

As the foregoing account shows, at no relevant time were the residents of the Northern Territory part of the constitutionally prescribed system of government. Nor, as the second paragraph of s 24 and ss 25 and 26 of the Constitution and s 15 of the *Commonwealth Electoral Act* 1918 (Cth) made plain, were the residents of the Territories "people of the Commonwealth" for the purpose of s 24[387]. Moreover, at no time during the life of the 1918 Ordinance did an "aboriginal native of Australia", who was resident in the Northern Territory and subject to the 1918 Ordinance, have any right to vote in federal elections[388].

For these reasons, nothing in the Constitution implied that the plaintiffs had any freedom or immunity from laws affecting their common law rights of association or travel during the life of the 1918 Ordinance.

Accordingly, I reject the plaintiffs' claim that the 1918 Ordinance is invalid because it burdened their constitutionally protected freedom of association and travel.

In their Statement of Claim, the plaintiffs also claim that ss 6, 7 and 16 of the 1918 Ordinance and s 67, in so far as it conferred power to make or amend relevant regulations, were invalid because those sections authorised acts which were contrary to an implied constitutional right to freedom or immunity from any law or executive act that constituted or authorised the crime against humanity of genocide. The plaintiffs claim that the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide[389] ("the Genocide Convention") gave effect to a fundamental rule of international law and that s 122 of the Constitution does not authorise a law that would breach such a rule.

However, it is unnecessary to deal with the constitutional point. The 1918 Ordinance did not authorise genocide. Art II of the Genocide Convention relevantly defines genocide to mean certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The acts include "[i]mposing measures intended to prevent births within the group" and "[f]orcibly transferring children of the group to another group". There is, however, nothing in the 1918 Ordinance that could possibly justify a construction of its provisions that would authorise the doing of acts "with intent to destroy, in whole or in part" the aboriginal race.

Accordingly, I would also reject the plaintiffs' claim based on the Genocide Convention.

The questions in the actions should be answered in the manner indicated in the judgment of Dawson J.

GUMMOW J. By order of the Chief Justice, certain questions were reserved for the consideration of a Full Court. The questions arise in two actions against the Commonwealth which are pending in this Court. In each action the pleadings have closed. By its defence in each action, the Commonwealth does not admit the allegations of fact pleaded by the plaintiffs.

By their statements of claim, the plaintiffs allege their removal from mother and family whilst infants and their subsequent detention (and in the case of the sixth plaintiff in *Kruger & Ors v The Commonwealth*, the removal and detention of her infant child). These acts are said to have been committed against them in the Northern Territory ("the Territory") and to have been tortious and in breach of what are asserted to be individual constitutional rights. The tort upon which the plaintiffs rely is identified in the statements of claim as wrongful imprisonment and deprivation of liberty. There is no pleading of any other action in tort. The first alleged act of wrongful removal was in 1925 and the last in 1949. The alleged wrongful detentions are said to have continued for various periods, the last ending in 1960. The law relied upon by the Commonwealth in answer to the tortious acts complained of is the Aboriginals Ordinance 1918 (NT) ("the 1918 Ordinance"). The 1918 Ordinance was amended on numerous occasions[390] and repealed by s 4 of the Welfare Ordinance 1953 (NT) ("the 1953 Ordinance").

By the *Northern Territory (Administration) Act* 1910 (Cth) ("the Administration Act"), the Parliament created a regime for the administration by the Commonwealth of the Territory. In particular, s 13(1) of the Administration Act provided that, until the Parliament made other provision for the government of the Territory, the Governor-General might make Ordinances having the force of law in the Territory[391]. The designation of the Governor-General meant the Governor-General acting with the advice of the Federal Executive Council (*Acts Interpretation Act* 1901 (Cth), s 17(f)). It was pursuant to this authority that the 1918 Ordinance was made by the Governor-General on 12 June 1918.

Section 67 of the 1918 Ordinance empowered the Administrator appointed under s 4 of the Administration Act to make regulations for the effectual carrying out of the 1918 Ordinance.

The plaintiffs seek damages and declaratory relief. In particular, they seek a declaration of invalidity of ss 6, 7 and 16 of the 1918 Ordinance and, in so far as it is purported to confer power to make or amend certain regulations of which they complain, of s 67 thereof. They also seek a declaration of the invalidity of s 13(1) of the Administration Act, to the extent that it purported to authorise those provisions of the 1918 Ordinance.

Section 18 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") states that a member of the Court sitting alone may "reserve any question for the consideration of a Full Court". Order 35 r 2 of the High Court Rules provides that, if it appears to the Court or to a Justice that in a proceeding there is a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact determined, the Court or Justice may direct that question of law to be reserved for the opinion of the Full Court. The Chief Justice reserved the present questions expressly on the footing that the terms thereof do not call for the ascertainment of any facts, proof of which depends on evidence[392]. Accordingly, in the absence of any further agreement between both sides to the litigation, it is impermissible for either side to rely on assertions of fact or to invite the Full Court to make or to proceed on assumptions or inferences of fact[393].

The first two of the questions reserved are in the following terms[394]:

"1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the Ordinances and regulations referred to in paragraphs 7-12 inclusive of the Amended Statement of Claim so restricted by any and which of the rights, guarantees, immunities, freedoms, or provisions referred to in paragraph 29 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations referred to in paragraphs A, B, C and D of the claim to the extent pleaded in those paragraphs?

2. Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 29 of the Amended Statement of Claim, a breach of which by -

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?"

The plaintiffs seek an affirmative answer to question 2 by urging the existence in Australia of what in the United States is an action for damages arising from violation of constitutional rights by employees of the federal government. The United States doctrine has been developed since 1971 and derives from *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*[395]. *Bivens* has received some favourable attention in New Zealand[396]. However, current authority in this Court suggests there is no such doctrine in Australia in respect of executive action in excess of constitutional authority or in contravention of a constitutional prohibition beyond liability under the common law for tortious or other wrongful acts[397]. On the other hand, s 84 of the Constitution directly creates an obligation in the Commonwealth enforceable in this Court to pay certain pensions and retiring allowances to certain State public servants transferred to and retained by the Commonwealth[398].

The reasoning in the Australian authorities has not proceeded on the footing that, because a constitutional guarantee operates to impose a restraint upon legislative power (as does s 51(xxxi)[399]) or to confer an immunity upon the individual in respect of certain activity (as does s 117[400]), it follows that the guarantee confers a "right" which must have a remedy in the form of substantive relief upon a personal cause of action[401]. Such a conclusion does not necessarily follow from the premise.

Moreover, *Bivens* has attracted much unfavourable comment in the United States, including the statement that the *Bivens* doctrine is "so devoid of constitutional legitimacy ... and so harmful in its consequences" that the Supreme Court itself should consider overruling *Bivens*[402]. The decision is only to be understood against the limited waiver of the tort immunity of the United States by the *Federal Torts Claims Act of 1946*[403], and by the limitation of the *Civil Rights Act of 1871*[404] to deprivation of federal rights by State or local officials acting under colour of State law. The Supreme Court recently declared that[405]:

"[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." (emphasis in original)

The treatment by the Judiciary Act of the tort liability of the Commonwealth has been quite different to that of the United States. So also is the relationship between the common law and the federal Constitution[406]. Moreover, the plaintiffs' claim that their *Bivens* actions against the Commonwealth would escape any time limitation period would not hold in the United States. It has been held that *Bivens* creates no such class of perpetual federal liabilities[407].

The plaintiffs thus face formidable obstacles in propounding an affirmative answer to question 2.

The questions are so drawn that question 3 only arises if there is an affirmative answer to question 1 or question 2, and questions 4, 5 and 6 only arise if there is an affirmative answer to question 2. The remaining question, question 7, is as follows:

"7. On the facts pleaded in paragraphs 1 to 6 of the Amended Statement of Claim -

(a) are the Plaintiffs' claims (or any of them) for damages for wrongful imprisonment and deprivation of liberty statute barred?

(b) by what statute?"

The focus of the attack by the plaintiffs is on the validity of ss 6, 7 and 16 of the 1918 Ordinance. As the argument developed in oral submissions, it became apparent that little, if any, importance attached to any of the regulations made under the power conferred by s 67 thereof. If the attack on validity fails then it would follow that the acts complained of were not wrongful. The consequence then would be that question 1 would be answered in the negative and that, in due course, each action would be dismissed. The remaining questions either would not arise or be moot and so not permit of an answer by this Court[408].

The 1918 Ordinance

Provision was made by s 4(1) of the 1918 Ordinance for the appointment by the Administrator of an officer styled "Chief Protector of Aboriginals" ("the Chief Protector") to have, under the Administrator, responsibility for the administration and execution of the Ordinance[409]. The Administrator also was empowered by s 4(2) to appoint "Protectors of Aboriginals" to have and exercise (s 4(3)) such powers and duties as were prescribed. The Chief Protector thus played the central role in the operation of the regime established by the 1918 Ordinance, of which ss 6, 7 and 16 formed part. Section 5(1) specified certain duties of the Chief Protector as follows:

"(a) to apportion, distribute, and apply, as seems most fit, under the direction of the Administrator, the moneys at his disposal for the purpose of carrying out this Ordinance;

(b) to distribute blankets, clothing, provisions, and other relief or assistance to the aboriginals;

(c) to provide, as far as practicable, for the supply of food, medical attendance, medicines, and shelter for the sick, aged and infirm aboriginals;

(d) to provide, when possible, for the custody, maintenance, and education of the children of aboriginals;

(e) to manage and regulate the use of all reserves for aboriginals; and

(f) to exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud."

Section 6 conferred upon the Chief Protector substantial powers to undertake care and control of "any aboriginal or half-caste" (terms defined in s 3)[410]. Section 6 provided:

"(1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.

(2) Any person on whose premises any aboriginal or half-caste is, shall, on demand by the Chief Protector, or by any one acting on behalf of the Chief Protector on production of his authority, facilitate by all reasonable means in his power the taking into custody of the aboriginal or half-caste.

(3) The powers of the Chief Protector under this section may be exercised whether the aboriginal or half-caste is under a contract of employment or not."

Section 16 conferred upon the Chief Protector powers of removal to any reserve declared by the Administrator to be a reserve for Aboriginals for the purposes of the 1918 Ordinance and powers of removal to any "aboriginal institution". That term was defined in s 3 as meaning:

"any mission station, reformatory, orphanage, school, home or other institution for the benefit, care or protection of the aboriginal or half-caste inhabitants of the Northern Territory, declared by the Administrator to be an aboriginal institution for the purposes of this Ordinance".

These powers did not (s 16(3)) apply to those who were lawfully employed pursuant to the provisions of Pt IV (ss 22-34), who were holders of a permit to be absent from the reserve or aboriginal institution in question; who, being female, were lawfully married to and residing with a husband of substantially European origin or descent; or for whom, in the opinion of the Chief Protector, "satisfactory provision is otherwise made". The balance of s 16 provided:

"(1) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein.

(2) Any aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or

aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance."

Moreover, with an exception not presently material, s 7 created the Chief Protector the legal guardian of every Aboriginal and half-caste child. Section 7 relevantly provided:

"(1) The Chief Protector shall be the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living, until the child attains the age of eighteen years ...

(2) Every Protector shall, within his district, be the local guardian of every such child within his district, and as such shall have and may exercise such powers and duties as are prescribed."

Section 7 of the 1918 Ordinance was not reproduced in the 1953 Ordinance. This provided (s 14) for a declaration by the Administrator of certain persons to be a ward if by reason of enumerated matters that person stood "in need of such special care or assistance as is provided for by this Ordinance" and there was (ss 30-37) a system of judicial review in respect of declarations made under s 14.

The wardship system established by the 1953 Ordinance was considered by this Court in *Namatjira v Raabe*[411]. The Court held that it gave to Aboriginal people "a status substantially the same as that which they occupied under the [1918] Ordinance" and concluded[412]:

"To sum the matter up, the legislation takes the place of prior legislation under which a large body of aboriginals had a particular status analogous to that which is given here; it confers a power to give a similar status to persons who stand in need of special care and assistance; the power is almost confined in its application to aboriginals, having regard to the ambit of the exclusions; they are persons who might be regarded as being as a class in such need and on the grounds enumerated; the power is reposed in the Administrator of the Territory; a person declared a ward has a right of appeal should he choose to exercise it and be in a position to exercise it; and the status given is protective in its nature."[413]

The exercise of the powers of the Chief Protector under s 6 and s 16 of the 1918 Ordinance was subject to judicial review, whether by prerogative writ or in a suit for an injunction. Speaking of s 16, Fullagar J declared in *Waters v The Commonwealth*[414]:

"[T]he courts must be alert to see that, if that which is not expected does happen and he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed".

Implications

In essence, the plaintiffs submit that the power conferred by s 13(1) of the Administration Act did not authorise the making of the 1918 Ordinance in so far as it contained the

sections I have set out above. This, as I understand the submissions, was because (i) the power conferred by this provision upon the Executive to make Ordinances having the force of law could not exceed the constitutional competence of the Parliament itself directly so to legislate under s 122 of the Constitution and (ii) a law made by the Parliament in terms of ss 6, 7 and 16 of the 1918 Ordinance would have been invalid as exceeding one or other of various restraints upon its legislative power which were, as they still are, imposed as a matter of necessary implication from the text of the Constitution.

Before turning to consider these implied restraints, it is convenient to refer to certain remarks in *McGinty v Western Australia*[415]. Brennan CJ said:

"Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis[416]. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure[417]. However, as an implication will be applied in a particular case to a specific factual situation, it may be expressed in terms relevant to that situation[418]. Although the Court was divided in *Australian Capital Television Pty Ltd v The Commonwealth* ... there was nothing in any judgment to cast doubt on the approach then taken by Mason CJ[419]:

'It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.'"

Legal equality

The plaintiffs contend that a law made by the Parliament in terms of the impugned provisions of the 1918 Ordinance would exceed the restraint upon legislative competence imposed by a doctrine of legal equality. They referred to the affirmative answer given in *Leeth v The Commonwealth*[420] by Deane and Toohey JJ to the question whether the Constitution, as a matter of necessary implication, adopts what their Honours had identified as a "general doctrine of legal equality" which existed as a "fundamental and generally beneficial doctrine of the common law". The doctrine was stated to have two distinct but related aspects[421]:

"The first is the subjection of all persons to the law: 'every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals'[422]. The second involves the underlying or inherent theoretical equality of all persons under the law and before the courts[423]."

As to this, four things may be said. First, no such doctrine was accepted by the other members of the Court in *Leeth*. It should also be noted that Gaudron J, the other member

of the minority in *Leeth*, approached that case from a more particular standpoint, namely the proposition that[424]:

"[w]hen exercising [federal] jurisdiction, State courts are part of the Australian judicial system created by Ch III of the Constitution and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States",

and the further proposition that[425]:

"[i]t is an essential feature of judicial power that it should be exercised in accordance with the judicial process."

Secondly, the decision in *Leeth*, by which the validity of s 4(1) of the *Commonwealth Prisoners Act* 1967 (Cth) was upheld, was inconsistent with any "general doctrine of legal equality". State laws relating to the fixing of non-parole periods differed, with the result that the minimum term of imprisonment imposed upon a person convicted of an offence against the law of the Commonwealth might vary significantly according to the State in which that person was tried.

In their joint judgment, Mason CJ, Dawson and McHugh JJ said[426]:

"There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth. There is, of course, the implication drawn from the federal structure erected by the Constitution that prevents the Commonwealth from legislating in a way which discriminates against the States by imposing special burdens or disabilities upon them or in a way which curtails their capacity to exercise for themselves their constitutional functions[427]."

Their Honours went on to refer to specific provisions such as ss 51(ii), 92, 99 and 117 which prohibit discrimination or preference of one kind or another but are confined in their operation.

Thirdly, before federation the common law as it applied in the Australian colonies had been, as the common law in Australia is now, in continuing development by the courts administering it. In the nature of things, from time to time legislatures perceive the common law as unsatisfactory and as requiring, in a particular aspect, abrogation or modification. Thus the doctrines of common employment and of contributory negligence propounded in English nineteenth century decisions[428] and the state of the law before the *Married Women's Property Act* 1882 (UK) invited and received legislative intervention. Other instances might readily be given.

Fourthly, to some extent, for example in the provision in s 80 for trial by jury, the Constitution adopts and preserves institutions of the common law as they existed in 1900, or at least what are perceived to be the essential features of those institutions[429]. In addition, contemporary development of the common law in Australia must conform to the Constitution and the common law and the Constitution cannot be at odds[430]. But in

the absence of an anchor in the constitutional text it is a large step to extract from the whole corpus of the common law a "general doctrine of legal equality" and treat it as constitutionally entrenched.

Finally, caution is required in dealing with what was said by nineteenth century English legal writers as to equality of persons under or before the law. In so far as this referred to statute abrogating or amending the common law or creating novel rights and liabilities, it was said in the context of a fluid rather than a fixed constitution. Thus allowance had to be made for what was then perceived as the basal principles of parliamentary supremacy, and of the inability of any British Parliament to bind its successors. Dicey saw his doctrine of "parliamentary sovereignty" as an explanation of political reality in Great Britain[431].

It also is significant that certain provisions of s 51 of the Constitution itself support legislation which operates to the detriment of particular groups of persons, as well as beneficial legislation. This is true of par (xix) ("aliens") and also of par (xxvi)[432], at least in its original form which read:

"The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws"[433].

Moreover, s 117 sanctions different treatment for different classes of people, namely those who are subjects of the Queen and those who are not[434]. The text of the Constitution thus serves to emphasise the point that, at the time of federation, concern with freedom under the law was directed not so much at achieving an even distribution of benefit and burden conferred or imposed by the substantive provisions of statute law, as an even-handed administration of those laws, whether by the executive or judicial branch of government.

Persons who were, within the meaning of the 1918 Ordinance, Aboriginals and half-castes were subjected in the Territory to the most acute interference with family relationships and freedom of movement and with the displacement of the ordinary incidents of guardianship in respect of infant children. These laws did not operate at all upon other persons. Nevertheless, the legislative power from which the authority to make these laws was derived was not limited by any doctrine of legal equality, implied as a matter of logical or practical necessity for the preservation of the integrity of the structure established by the Constitution.

Other implications

The plaintiffs also assert that the legislative power from which was derived the authority to make the impugned provisions of the Ordinance was restricted by other constitutional implications. These were identified as a "constitutional right to, and immunity from legislative and executive restrictions on, freedom of movement and association for political, cultural and familial purposes".

The problem is in knowing what "rights" are to be identified as constitutionally based and protected, albeit they are not stated in the text, and what methods are to be employed in discovering such "rights". Recognition is required of the limits imposed by the constitutional text, the importance of the democratic process and the wisdom of judicial restraint[435].

In *Pioneer Express Pty Ltd v Hotchkiss*[436], Dixon CJ identified as resting upon a solid foundation the claim to a constitutional implication protecting the citizens of Australia "from attempts on the part of State legislatures to prevent or control access to the Capital Territory and communications and intercourse with it on the part of persons within the States, and to hamper or restrain the full use of the federal capital for the purposes for which it was called into existence". His Honour referred to considerations which "necessarily imply the most complete immunity from State interference with all that is involved in [the Territory's] existence as the centre of national government", and continued that that implication certainly meant "an absence of State legislative power to forbid, restrain or impede access to it[437]. More recent decisions have emphasised the central importance to the efficacious working of the system of responsible and representative government established by the Constitution for the Commonwealth of communication of information respecting, and discussion of, matters of political interest[438].

In *ACTV*[439], it was said that the "notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement [and] freedom of association". However, with the delivery, after argument in the present case, of judgment in *McGinty v Western Australia*[440] and *Lange v Australian Broadcasting Corporation*[441], it has become apparent that *ACTV* and the decisions in *Nationwide News Pty Ltd v Wills*[442], *Theophanous v Herald & Weekly Times Ltd*[443], and *Stephens v West Australian Newspapers Ltd*[444] are not authority for any proposition of this width.

In *Cunliffe v The Commonwealth*[445], Brennan J, with reference to the decision of the United States Supreme Court in *Crandall v Nevada*[446], said it was unnecessary on the instant occasion to determine whether the Constitution implies a right of access to government or to the repository of statutory power. However, if such an implication did exist, then s 16 of the 1918 Ordinance was susceptible of construction according full operation to the relevant restraint upon legislative power. The removal and the restraint upon freedom of movement imposed by s 16(1) did not apply to the holder of a permit to be absent from the reserve or aboriginal institution in question. Paragraph (b) of s 16(3) so provided. In accordance with the reasoning exemplified in such decisions as *Minister for Immigration and Ethnic Affairs v Mayer*[447], s 16(3)(b) would be construed as impliedly conferring upon the Chief Protector the function of granting permits to be absent from the reserve or institution in question. Moreover, discretion attending the exercise of that function would be constrained so as to deny the efficacy of the exercise of the discretion inconsistently with any implied constitutional restriction[448]. The position would be likewise with any broader constitutional implication as to freedom of movement, if such an implication existed.

That the structure established by the Constitution has as essential elements a system of responsible government and representative government does not bring with it, as an implication of logical or practical necessity for the preservation of the integrity of that structure, an implied restriction upon federal legislative power, as regards "freedom of association" in any general sense of that expression. There is, no doubt, much room for debate as to the content of the phrase "freedom of association"[449]. For the present purpose of denying the existence of the relevant implication, I have taken the expression as containing at least those familial associations which would be impaired or indeed destroyed by the legal guardianship conferred upon the Chief Protector by s 7 of the 1918 Ordinance or by steps taken by the Chief Protector in exercise of powers conferred by ss 6 or 16 thereof.

The plaintiffs rely also upon the freedom or immunity from any law or executive act providing for or having a purpose, effect or likely effect of the destruction in whole or part of a racial or ethnic group or of the language and culture of such a group. In their submissions, the plaintiffs sought to supply a factual substratum showing the intention of the Commonwealth to commit "genocide". Issues of fact are presented. They are not to be assumed, before trial, in the proceeding presently before the Full Court.

Furthermore, the power conferred upon the Chief Protector by s 6 was conditioned upon the holding by the Chief Protector of an opinion that it was necessary or desirable in the interests of the Aboriginal or half-caste in question for the Chief Protector to undertake the care, custody or control of that person. It was the duty of the Chief Protector to exercise a general supervision and care over all matters affecting the welfare of the Aboriginals and to protect them against "immorality, injustice, imposition and fraud" (s 5(1)(f)). These provisions are indicative of a concern by the Executive, in making the Ordinance in exercise of the power conferred by s 13(1) of the Administration Act, to assist survival rather than destruction.

The philosophy given expression in the specific provisions to which I have referred now may appear entirely outmoded and unacceptable. Nevertheless, in its time, the 1918 Ordinance expressed a response to what then for at least 80 years had been perceived, initially by the Imperial Government, as the plight of the indigenous inhabitants of Australia as a consequence of the expansion of European settlement and land occupation[450]. Officials styled "Protector of Aborigines" were first appointed by the Imperial Government following a recommendation in a Report of the Select Committee on Aboriginal Tribes, which had been appointed by the House of Commons in 1836. In his Despatch of 31 January 1838 to Governor Gipps of New South Wales, the Colonial Secretary (Lord Glenelg) included in his "general view of the duties, which will devolve upon the Protectors" the following[451]:

"2. He must watch over the rights and interests of the Natives, protect them, as far as his personal exertions and influence, from any encroachment on their property, and from acts of Cruelty, of oppression or injustice, and faithfully represent their wants, wishes or grievances, if such representation be found necessary, thro' the Chief Protector, to the

Government of the Colony. For this purpose, it will be desirable to invest each Protector with a Commission as Magistrate."

Thereafter, there was substantial colonial and State legislation on the subject. In South Australia, this had commenced with an Ordinance passed by the Governor and Legislative Council in 1844 "to provide for the Protection, Maintenance and Up-bringing of Orphans and other Destitute Children of the Aborigines"[452], in Victoria with an 1869 statute, "to provide for the Protection and Management of the Aboriginal Natives of Victoria"[453], in Western Australia with the *Aborigines Protection Act* 1886 (WA)[454], in Queensland with the *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (Q)[455], and in New South Wales with the *Supply of Liquors to Aborigines Prevention Act* 1867 (NSW)[456].

Against this background, it is little short of inconceivable that when the Administration Act was passed in 1910 the power conferred by s 13(1) was restrained as a matter of necessary inference from the structure of the Constitution in the way contended for by the plaintiffs.

Genocide

The plaintiffs rely upon the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"), approval to the ratification of which by Australia was given by the *Genocide Convention Act* 1949 (Cth). The text of the Convention is set out in the Schedule to the statute. There is no further legislation which goes on to implement the Convention in Australian municipal law.

I have referred to the footing upon which this proceeding is before the Full Court. On that footing, I agree with Dawson J that acts authorised by the 1918 Ordinance which took place after the ratification became effective on 12 January 1951 did not fall within the definition of "genocide" contained in the Convention. I further agree, again for the reasons given by Dawson J, that reliance by the plaintiffs upon customary international law is misplaced.

There remain for consideration those grounds which the plaintiffs seek to base upon the specific provision in s 116 of the Constitution and the considerations flowing from the separation of federal judicial power by Ch III of the Constitution. It is convenient to deal first with these grounds on the footing that nothing turns upon considerations flowing from s 122. I will then deal with the more difficult, and logically anterior, issues whether s 116 applies to laws supported solely by s 122 and of the interrelation between Ch III and s 122.

The free exercise of religion

The plaintiffs submit that the power conferred by s 13(1) of the Administration Act did not authorise the making of an Ordinance which, in conferring or providing for powers of detention and removal, was a law "for prohibiting the free exercise of any religion"

within the meaning of s 116 of the Constitution. They submit that, if the Administration Act itself had contained such provisions, it would have contravened the prohibition in s 116 and that this would follow even if such a law were passed in exercise of powers otherwise conferred upon the Parliament by s 122 of the Constitution.

In *Attorney-General (Vict); Ex rel Black v The Commonwealth*[457], Gibbs J described that limb of s 116 which forbids the making of any law for prohibiting the free exercise of any religion as imposing a fetter on legislative power "for the purpose of protecting a fundamental human right". The constitutional expression "any religion" extends to the systems of faith and worship of Aboriginal people[458]. On the other hand, it is as well to remember that in *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth*[459], Latham CJ said that s 116 proclaims not only the principle of toleration of all religions, "but also the principle of toleration of absence of religion". Moreover, freedom to act in accordance with religious beliefs is not co-extensive with freedom of religious belief[460]. Action in pursuance of a particular religious belief that is both monotheistic and eager to proselytise may conflict impermissibly with toleration both of other religions and of an absence of religion. Further, a law which protects or regulates the personal or property rights of others will not ordinarily offend s 116, despite curtailment by the general operation of that law of overt activity which in respect of some persons may give expression to their religious beliefs[461].

The use of the preposition "for" in the expression in s 116 of the Constitution "for prohibiting the free exercise of any religion" directs attention to the objective or purpose of the law in issue. The question becomes whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved[462]. "Purpose" refers not to underlying motive but to the end or object the legislation serves[463].

The definition of "aboriginal institution" in s 3 of the 1918 Ordinance included a "mission station" but also any "reformatory, orphanage, school, home or other institution". The impugned provisions of the 1918 Ordinance, and the general duties of the Chief Protector set out in s 5(1), imposed no duty upon any officer charged with the administration of the 1918 Ordinance to bring up infants in any particular religion or to educate them in schools affiliated with any particular religion. No conduct of a religious nature was proscribed or sought to be regulated in any way. The withdrawal of infants, in exercise of powers conferred by the 1918 Ordinance, from the communities in which they would otherwise have been reared, no doubt may have had the effect, as a practical matter, of denying their instruction in the religious beliefs of their community. Nevertheless, there is nothing apparent in the 1918 Ordinance which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion, as the objective to be achieved by the implementation of the law.

In the written submissions, by reference to extrinsic materials, the relevance and admissibility of which would be an issue at trial, the plaintiffs seek to place such a construction upon the 1918 Ordinance. I have referred to the particular nature of the proceeding before the Full Court. This does not permit, by submission, denial of the

character with which the legislation otherwise is stamped. It may be that a particular law is disclosed as having a purpose prohibited by s 116 only upon consideration of extraneous matters indicating a concealed means or circuitous device to attain that end, and that it is permissible to apply s 116 in that fashion[464]. But these can only be matters for another day.

Judicial power

The plaintiffs contend that the impugned provisions of the 1918 Ordinance conferred upon the Chief Protector powers which, consistently with the Constitution, in the Territory might be conferred only upon courts exercising the judicial power of the Commonwealth in accordance with Ch III of the Constitution. They further submit that these laws purported to confer judicial power other than on a court established under a law of the Commonwealth. The proposition here is that, even if the plaintiffs are wrong in their submission that Ch III applies in the Territory, nevertheless what might be called the judicial power of the Territory might be vested only in a body which answers the description of a court, and thus not in the Chief Protector. A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth[465].

The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective[466]. The categories of non-punitive, involuntary detention are not closed[467].

The powers of the Chief Protector to take persons into custody and care under the 1918 Ordinance were, whilst that law was in force, and are now, reasonably capable of being seen as necessary for a legitimate non-punitive purpose (namely the welfare and protection of those persons) rather than the attainment of any punitive objective.

This is apparent from various matters. There is the creation of legal guardianship in the Chief Protector by s 7, the specification in s 5(1) of the duties of the Chief Protector, the conditioning of the power under s 6 by an opinion as to exercise of the power being necessary or desirable in the interests of the persons in question for the Chief Protector to take them into care and custody, the exclusion from the operation of s 16 of those persons for whom, in the opinion of the Chief Protector, "satisfactory provision is otherwise made", and the existence before 1918 of long-established statutory regimes in the colonies and States which were directed to the welfare and protection of other indigenous persons.

Section 122 of the Constitution

Therefore, it is unnecessary to decide the logically anterior questions raised by the plaintiffs as to the relationship between s 122 on the one hand and s 116 and Ch III on the other.

However, I should express my firm view that s 122 is not disjoined from s 116. Also, were the matter *res integra*, it would be my tentative view, as regards the Territory, that the provisions of Ch III are applicable but that existing authority in this Court would require reconsideration before that conclusion could be reached and applied.

I turn first to the constitutional text which provides the foundation for the existence of the Territory. The relevant provisions in the covering clauses of the *Commonwealth of Australia Constitution Act*[468] were identified as follows by Dixon CJ in *Lamshed v Lake*[469]:

"At the establishment of the Commonwealth the Northern Territory formed part of South Australia. In the definition of 'The States' contained in s 6 of the covering clauses of the *Commonwealth of Australia Constitution Act*, it is particularly mentioned, and after the reference to South Australia as a colony there occur the words 'including the northern territory of South Australia'. It formed part of a colony whose people agreed with the other colonies 'to unite in one indissoluble Commonwealth'. It formed part of the Commonwealth mentioned in the preamble and the subject of the Queen's proclamation by which pursuant to ss 3 and 4 of the covering clauses the Commonwealth was established. In fact the Northern Territory had been annexed to the Province of South Australia by Letters Patent in 1863. On 7th December 1907 an agreement was entered into between the State of South Australia and the Commonwealth for the surrender to the latter by the former of the Northern Territory on certain terms which are not material. The agreement was ratified by the Parliaments of State and Commonwealth. The Parliament of the Commonwealth ratified the agreement by the *Northern Territory (Acceptance) Act* 1910, s 6 of which declared that it was accepted by the Commonwealth as a Territory under the authority of the Commonwealth by the name of the Northern Territory of Australia. This declaration follows the language of s 122 of the Constitution."

The legislative power given by s 122 is necessarily not one to make laws with respect to particular subject-matters defined with reference to descriptions of conduct, activity or heads of law which are considered suitable for control by a central as distinguished from a State legislature[470]. Nevertheless, the Parliament takes this power in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia. Covering cl 5 of the Constitution renders it and the laws made by the Parliament under the Constitution binding on "the courts, judges, and people" not only of every State but also "of every part of the Commonwealth".

The scheme of the Constitution is that the Territory be governed, as Sir Owen Dixon put it, "not as a *quasi* foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament but as a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction"[471].

The formulation of this point by Kitto J in *Lamshed v Lake* has since received a strong measure of acceptance in this Court[472]. This has been so notwithstanding his Honour's

later doubts in *Spratt v Hermes*[473] as to what he had said in the earlier judgment. In *Lamshed v Lake* Kitto J said[474]:

"It has sometimes been remarked that the placing of s 122 in a late and not altogether appropriate position in the Constitution does less than justice to the far-reaching importance of the subject with which it deals. But the fact that the section is found embedded in the agreed terms of federation, with every appearance of having been regarded in the process of drafting as a provision upon a matter germane to the working of the federation, seems to me to underline the necessity of adopting an interpretation which will treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories."

The reasoning of Dixon CJ and Kitto J has led to acceptance of the propositions that (i) the Parliament may legislate for Australia as a whole when making laws with respect to various heads of power in s 51 of the Constitution and (ii) a law made by the Parliament in exercise of the power conferred by s 122 is a "law of the Commonwealth" within the meaning of s 109 of the Constitution so that it prevails over an inconsistent State law.

Whilst s 122 confers upon the Parliament law-making power for the government of any territory surrendered by any State to, and accepted by, the Commonwealth, it is s 111 which provides authority for such surrender and acceptance and specifies the status of the part of the State so surrendered. In particular, unlike the provision in s 123 for the alteration of the limits of States, s 111 does not require any approval at a referendum of the electors of the State in question. The steps taken in relation to the Territory were taken pursuant to s 111[475].

Section 111 of the Constitution states:

"The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth."

The phrase "exclusive jurisdiction of the Commonwealth" is apt to identify the legislative, executive and judicial organs of government through which authority is exercised over what was previously part of a State. In *Svikart v Stewart*[476], Brennan J said:

"Territories surrendered by a State and accepted by the Commonwealth pursuant to s 111 were declared to be 'subject to the exclusive jurisdiction of the Commonwealth'. They were taken out of the boundaries of the surrendering State[477]. The Commonwealth acquired, subject to the Constitution, full sovereignty over a s 111 territory[478]. Not only did a surrendering State lose legislative power over the s 111 territory; it lost all 'jurisdiction' over it, including executive and judicial power."

The executive authority there identified is that executive power of the Commonwealth provided for in Ch II of the Constitution and vested by s 61 of the Constitution in the

Queen and exercisable by the Governor-General. This power extends to the doing of acts within a territory surrendered by a State to the Commonwealth without any statutory authority (other than the necessary appropriation of funds under s 83 of the Constitution) if those acts are of a kind which lie within the prerogative of the Crown. So much was established by the decision of this Court in *Johnson v Kent*[479].

As with executive power, there is no express statement in the Constitution with respect to the operation of judicial power in the Territories. However, s 51(xxxix) speaks of "[m]atters incidental to the execution of any power vested by this Constitution ... in the Federal Judicature". And, the terms of Ch III are apt to encompass in all its aspects the judicial power for the Commonwealth. Express provision as to the legislative power of the Parliament is made by s 122. But s 122 stands outside Ch I. From that circumstance considerable difficulty has arisen. On one reading of the decisions in this Court, as regards the Territories, no power is vested by the Constitution in any court and the creation and exercise of such judicial power is left entirely to the choice of the Parliament in deciding to legislate under s 122. Yet, covering cl 5 of the Constitution assumes the existence of courts and judges of every part of the Commonwealth.

Before further examining the position as regards legislative and judicial authority in the Territory, it is appropriate to note that it would be surprising if the surrender of a part of a State to the Commonwealth and its acceptance by the Commonwealth pursuant to s 111 removed it, and the residents from time to time therein, from the protection of those provisions of the Constitution which applied to the people of the Commonwealth as members of the one body politic established by the Constitution[480].

Thus, it has been held that s 90 operated for the protection of the people of the Commonwealth including those who resided in an area of a State which subsequently became an internal Territory; those residents were and remained entitled to the maintenance of the free trade area throughout the Commonwealth which s 90 was intended to ensure[481]. Likewise, s 118 mandates as to the whole of the Commonwealth a state of affairs wherein full faith and credit must be given to the laws, public Acts and records, and the judicial proceedings of every State[482].

Another protection to which those residents had been entitled was that conferred by s 116 against the making by the Parliament of the Commonwealth of any law, inter alia, "for prohibiting the free exercise of any religion". Further, these residents had the benefits which flow from Ch III of the Constitution.

Sections 116 and 122 of the Constitution

Section 116 states:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The weight of authority, albeit none of it determinative of the issue, supports the proposition that s 116 operates to restrict the exercise of the legislative power conferred by s 122[483].

It is true that s 122, in stating that the Parliament may make laws for the government of the Territories, does not include the expression "subject to this Constitution" or a like form of words. But that does not mean that s 122 is to be construed as though it stood isolated from other provisions of the Constitution - of which s 90 certainly is one[484] - which might qualify its scope. The bar imposed by s 116 upon the making of certain laws by the Commonwealth is imposed in general terms. Moreover, it would be a capricious result if the application of s 116 to a law made by the Parliament and operating in the Territories depended upon the circumstance that the source of the power of the Parliament to make the particular law was to be found in s 51 rather than s 122. The reasoning of Dixon CJ and Kitto J in *Lamshed v Lake*[485] is responsive to what otherwise would be a constitutional anomaly.

The reading of the Constitution, in the manner indicated by Dixon CJ and Kitto J, as a coherent instrument of national government, inevitably leads to the conclusion that the bar imposed by s 116 applies to the making by the Commonwealth of any law of the relevant description, whatever otherwise be the authority under the Constitution for the Parliament to pass that law. Added support for that construction, in the case of internal Territories, is supplied by the considerations which I have mentioned as flowing from the operation of s 111.

Accordingly, I would reject the submission by the Commonwealth that the case the plaintiffs sought to make in reliance upon s 116 failed at the outset because the Administration Act was a law supported by s 122 of the Constitution.

The judicial power and the Territories

Chapter III operates to achieve the independence of the judiciary for two related ends: (i) the institutional separation of the judicial power so that the courts might operate as a check, according to law, on the other arms of government; and (ii) protection of the independence of the judiciary to ensure the determination of controversies free from domination or improper influence by other branches of government and in accordance with judicial process[486]. Chapter III gives effect to the doctrines of the separation of the judicial power from other functions of government and of judicial review which are essential integers of the federal structure of government[487]. It also serves the personal interests of litigants (individual, corporate and government) in having their controversies resolved by an independent judiciary[488].

Certain decisions of this Court have sought, explicitly or otherwise, to explain the content and nature of that part of "the exclusive jurisdiction of the Commonwealth", within the meaning of s 111 of the Constitution, as pertains to the judicial power. Provision as to the legislative aspect of the "exclusive jurisdiction of the Commonwealth" in relation to the Territory is made by s 122 and, in some respects, by s 51 of the Constitution[489].

Section 61 embraces the executive power in relation to such a Territory. An answer both simple and close to the text would have been given by a decision that, conformably with s 61 as to the executive power of the Commonwealth, provision was made by s 71 as to the judicial power of the Commonwealth in relation to the Territories.

In *R v Kirby; Ex parte Boilermakers' Society of Australia*[490], Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

"It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament."

Later, after referring to *R v Bernasconi*[491] and *Buchanan v The Commonwealth*[492], Windeyer J said[493]:

"Nevertheless and although, because of the eminence of those who gave the judgments and of their close knowledge of the genesis of phrases of the Constitution, it may seem boldly unbecoming to say so, I do not think that the conclusion that Chap III, as a whole, can be put on one side as inapplicable to matters arising in the territories is warranted by its actual language."

In my view, there is much to be said for the proposition that the text of the Constitution, which must be controlling, places the territorial courts within the scheme and structure of Ch III. However, as will appear, at least two subsequent decisions of this Court stand in the way of acceptance of that proposition.

It is true that controversies arising in the Territories might involve wholly or exclusively disputes as to rights and liabilities conferred or imposed pursuant to the general law rather than federal statute law. But s 7(1) of the *Northern Territory Acceptance Act* 1910 (Cth) provided:

"All laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth."

Such a provision excluded the possibilities of a legal vacuum and of the surrender and acceptance of the Territory being equivalent to the cession of territory by one power to another by treaty, so that the ceded territory became part of the nation to which it was annexed[494]. Further, in the Province of South Australia, it had been regarded as axiomatic that from the beginning of European occupation the common law and English and Imperial legislation would apply under the common law principles on the reception of law in settled colonies[495]. Finally, there may be a "matter [a]rising under" a law made by the Parliament, within the meaning of s 76(ii) of the Constitution, although its interpretation is not involved; it is sufficient that the right or duty in question in the matter owes its existence to federal law or depends upon it for its enforcement[496].

Hence, the force in the statement, with reference to the position in the Australian Capital Territory, made by Dixon J in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*[497]:

"It may well be that all claims of right arising under the law in force in the Territory come within this description [ie, within s 76(ii)], because they arise indirectly as the result of the *Seat of Government Acceptance Act* 1909 (see s 6), and the *Seat of Government (Administration) Act* 1910 (see ss 4 to 7 and 12)."

However, on the appeal in *Attorney-General of the Commonwealth of Australia v The Queen*[498], the Privy Council for the time being foreclosed any development to implement these views by a dogmatic statement that Ch III was to be regarded as "exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part". That obliged Dixon CJ, in *Lamshed v Lake*[499], to accept that Ch III "may be treated as inapplicable so that laws made mediately or immediately under s 122 are *primarily* not within the operation of the Chapter" (emphasis added).

Then, in *Spratt v Hermes*[500], although many aspects of the subject were discussed, two points were decided. The first was that the Commonwealth legislation supported by s 122 may create or authorise the creation of courts with jurisdiction with respect to occurrences in or concerning a Territory without observance of the requirements of s 72 of the Constitution, so that the stipendiary magistrate hearing the charge in question under the *Post and Telegraph Act* 1901 (Cth) was validly appointed. Secondly, a court of a Territory having the appropriate local jurisdiction may enforce in relation to acts occurring within the Territory a law made by the Parliament upon a subject-matter falling within s 51 of the Constitution and, as was the case with the 1901 statute, intended to operate throughout the Commonwealth. This is so, even though the Territory court is not one in which the judicial power of the Commonwealth is vested within the meaning of s 71 of the Constitution[501].

Capital TV and Appliances Pty Ltd v Falconer[502] is authority for the proposition that the Supreme Court of the Australian Capital Territory, created and constituted by the *Australian Capital Territory Supreme Court Act* 1933 (Cth), was not a federal court nor a court exercising federal jurisdiction within the meaning of s 73 of the Constitution[503]. The consequence was that no appeal lay by force of s 73 of the Constitution. A law passed under s 122 of the Constitution might confer a right of appeal to the High Court from territorial courts, whether or not the matter in issue otherwise was one of federal jurisdiction. However, no such law applied to the instant case and the appeal was dismissed as incompetent. Nor was there any legislation conferring jurisdiction to grant special leave[504].

As it presently appears to me, and contrary to the submissions for the plaintiffs, it would be necessary at least to reopen these decisions if Ch III were to be given that operation in relation to the Territories described in *Boilermakers* by Dixon CJ, McTiernan, Fullagar and Kitto JJ[505]. This operation would follow from the "simple" reading of Ch III such

that the courts and laws in force in a Territory were federal courts and laws made by the Parliament or made pursuant to such laws.

The treatment in some of the earlier decisions of the constitutional footing for the exercise of judicial power in the territories appears to have been blighted in several respects. First, there is the proposition that controversies which arise under some laws made by the Parliament will involve the exercise of federal jurisdiction whilst others will involve the exercise of jurisdiction which is "territorial" and "non-federal". This does not sit well with the established doctrine that the Constitution is to be read as one coherent instrument, so that s 122 should not be treated as "disjoined" from the rest of the Constitution[506].

Secondly, to treat the scope of Ch III as reflecting the division of legislative power between the Parliament and the legislatures of the States gives insufficient weight to the heading of Ch III. This is simply "THE JUDICATURE". It also gives the term "federal" in the phrase "federal courts" as it appears in s 71 and in succeeding provisions too narrow a meaning. Many heads of federal jurisdiction embrace justiciable controversies of a nature and character unknown in the anterior body of general jurisprudence in the Australian colonies. Griffith CJ pointed to this early in the history of this Court, with reference to the then disputed border between South Australia and Victoria[507]. In addition to actions between States, the controversies include those arising under the Constitution or involving the interpretation of its provisions (including s 122 itself), and those where an injunction, prohibition or mandamus is sought against a Commonwealth officer[508]. This renders inapt any analogy to the division of legislative power effected by s 51.

Thirdly, the absence, save in covering cl 5, in the Constitution of reference specifically to territorial courts and, in particular, the absence of specific identification thereof in Ch III have encouraged the belief that the creation and composition of territorial courts and the exercise of jurisdiction by them is a matter entirely for the legislature; yet, as was pointed out by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *Boilermakers* (in the passage set out before in these reasons), the terms of s 122 and ss 71, 73 and 76(ii) are consistent with a contrary view.

Fourthly, there has been, at least before the amendments made in 1977 to s 72 of the Constitution, some apprehension lest the life tenure previously provided for in s 72 be requisite in all courts exercising jurisdiction in relation to the Territories.

At a time when the external Territories included or were expected to include populations then regarded as being in a backward state of development, there was an evident apprehension as to what would be involved in the extension there of the Australian legal system in all its incidents, including trial by jury. Further, both in this country[509] and the United States[510], it has become clear that delegation of some part of the jurisdiction, powers and functions of a federal court to its officers is, upon certain conditions, permissible and consistent with the federal judicature provisions made by the respective Constitutions.

The first consideration is nowhere more evident than in the judgment of Isaacs J in *R v Bernasconi*. The Court there decided, on a case reserved by the Central Court of Papua, that the accused's deemed request for a jury had been rightly refused and that s 80 of the Constitution was inapplicable. Isaacs J said[511]:

"[Section 122] implies that a 'territory' is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers. It is in a state of dependency or tutelage, and the special regulations proper for its government until, if ever, it shall be admitted as a member of the family of States, are left to the discretion of the Commonwealth Parliament. If, for instance, any of the recently conquered territories were attached to Australia by act of the King and acceptance by the Commonwealth, the population there, whether German or Polynesian, would come within s 122, and not within s 80. Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system."

Section 80 of the Constitution states:

"The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

In its terms s 80 thus contemplates that the offence in question may not have been committed within any State. Accordingly, an offence to which s 80 applies may have been committed within a Territory or elsewhere in the world in contravention of a law of the Commonwealth having a valid extraterritorial effect[512]. In either case, the trial is, pursuant to s 80, to be held at such place or places as the Parliament prescribes. Furthermore, the "offence against any law of the Commonwealth" referred to in s 80 may be an offence against a law applicable only to a Territory. This is a matter adverted to by Evatt J in *Ffrost v Stevenson*[513]. If a law made in pursuance of the power conferred by s 122 is a "law of the Commonwealth" for the purposes of s 109 of the Constitution, as established by *Lamshed v Lake*, it is difficult to maintain the proposition that such a law is not a "law of the Commonwealth" within the meaning of s 80. It was considerations such as these which led Evatt J in *Ffrost v Stevenson* to decline to support what his Honour described as "the at first sight surprising generalisation that no part of chapter III of the Constitution can have any application to territories under s 122".

A further consequence of this generalisation, before the passage of the *Privy Council (Limitation of Appeals) Act* 1968 (Cth), s 4, was that, although no appeal lay from the courts of a Territory under s 73 of the Constitution to the High Court of Australia, nevertheless an appeal from such a court lay directly to the Privy Council. It was stated by the then Solicitor-General for the Commonwealth[514]:

"It is accepted that an appeal by special leave lies to the Privy Council from the decisions of other federal courts and the Supreme Courts of the Territories, although the jurisdiction is rarely invoked."

Accordingly, s 4 of the statute states:

"Leave of appeal to Her Majesty in Council, whether special leave or otherwise, shall not be asked from a decision of a Federal Court (not being the High Court) or of the Supreme Court of a Territory."[515]

The point is that the need for such a provision in relation to the Territories only arose from the particular view that had been taken which disjoined those courts from the Australian appellate structure, at the apex of which this Court was placed by s 73 of the Constitution. The provision would have been unnecessary if the view had been taken that the courts and laws of the Territories were federal courts and the matters litigated there arose under laws made by the Parliament within the meaning of s 76(ii) of the Constitution.

Sections 10 and 19 of the *Territories Law Reform Act* 1992 (Cth) confer upon certain courts of the State of Western Australia jurisdiction previously vested in or exercisable by respectively the Supreme Court of Christmas Island and the Supreme Court of the Cocos (Keeling) Islands. If the views indicated above were presently authoritative, there would be no difficulty in classifying those laws as supported by s 77(iii) of the Constitution. As it is, reliance apparently must be placed on s 122 as conferring authority upon the Parliament to confer jurisdiction upon State courts.

Territorial courts

As matters now stand, the existing dislocation, if not disjunction, of the territorial courts produces several consequences, of daily importance, which appear to be adverse to the scheme and structure of the Constitution. This is nonetheless so in the light of changes made to the territorial court structure by legislation such as the *Northern Territory Supreme Court (Repeal) Act* 1979 (Cth) and the *Supreme Court Act* 1979 (NT) ("the NT Act"). The first statute repealed the *Northern Territory Supreme Court Act* 1961 (Cth) but provided (s 5) that the Supreme Court as established by the second, territorial, statute is to be deemed as to be a continuation in existence "without any change in identity" of the Supreme Court as established by the 1961 statute. Section 40 of the NT Act provides for the removal from office of a judge of the Supreme Court by the Administrator upon an address from the Legislative Assembly praying for removal on the ground of proved misbehaviour or incapacity[516].

Matters which are within the original jurisdiction of this Court, including matters arising under the Constitution or involving its interpretation, have been entrusted by the Parliament to courts which, under received doctrine, are neither federal courts nor courts of a State within the meaning of s 77 of the Constitution. Sections 78A, 78B and 40 of the Judiciary Act operate upon that premise. However, save for the possible availability of

review under s 75(v) of the Constitution (on the footing that a judge of a "territorial court" is an "officer of the Commonwealth"), there is no constitutionally entrenched avenue for access to the High Court in such matters.

In *Capital TV and Appliances Pty Ltd v Falconer*[517], Windeyer J said:

"When this Court hears appeals from courts in the territories, pursuant to a power to do so given by Parliament, it does not do so in a federal capacity. It does so as the supreme court of the Australian nation, exercising a jurisdiction conferred by the Parliament not pursuant to its federal powers but as a sovereign legislature having plenary powers over Australia's territories. The Parliament can authorise an appeal to this Court, on such conditions and subject to such limitation as it thinks fit, from any court that it was within its power as a sovereign legislature to create, although it is not a court within the federal system and governed by the provisions of Ch III of the Constitution."

There are two difficulties with the propositions in that passage. The first concerns the situation where the territorial court has been exercising what otherwise would be considered federal jurisdiction, for example, by determining a matter arising under or involving the interpretation of s 122 itself, or a matter arising under a law made by the Parliament. The received doctrine, strikingly applied in *The Commonwealth v Queensland*[518], is that the judicial power delineated in Ch III is exhaustive of the manner in and the extent to which judicial power may be conferred on, or exercised by, any court in respect of the subject-matters set forth in ss 75 and 76, "matters" in those sections meaning "subject-matters"[519].

Secondly, it is fundamental that the Constitution creates an "integrated system of law"[520], and a "single system of jurisprudence"[521]. The entrusting by Ch III, in particular by s 73, to this Court of the superintendence of the whole of the Australian judicial structure, its position as ultimate interpreter of the common law of Australia[522] and as guardian of the Constitution are undermined, if not contradicted, by acceptance, as mandated by the Constitution, of the proposition that it is wholly within the power of the Parliament to grant or withhold any right of appeal from a territorial court to this Court.

These conclusions are the more remarkable when it is remembered that there is denied, under present doctrine, to the judicial officers of the courts of the Territories the constitutionally entrenched security of tenure otherwise provided by s 72 of the Constitution. The result is the dilution of the protection otherwise afforded to citizens by the countenancing of determination of their disputes by two levels of courts created by or pursuant to laws of the Parliament of Australia. Such a situation sits ill with the general requirement that the Constitution binds the courts, judges and people of every State and of every part of the Commonwealth (covering cl 5).

The plaintiffs submitted that "in the light of contemporary understanding of the federal structure" it is difficult to see any basis for excluding the application of the requirements of Ch III from the exercise of legislative power under s 122. It will be apparent that I see the force in that submission. However, in the present state of the authorities, the plaintiffs

cannot make good their submission that all laws of the Commonwealth, including those supported by s 122, must comply with the doctrine of the separation of powers found in Ch III of the Constitution. Moreover, and as I have indicated, even if the plaintiffs were correct, that would not produce invalidity of any of the laws they impugn in these actions.

Conclusion

Question 1 of the questions reserved in each action should be answered by saying that none of the legislation in respect of which a declaration of invalidity is sought in that action is invalid by reason of any of the rights, guarantees, immunities, freedoms or provisions pleaded in par 29 of the amended statement of claim. There should be no answer to any of the remaining questions reserved. The plaintiffs must pay the costs of the defendant of the questions reserved for the Full Court.

[1] The titles of the Ordinance and the amending Ordinances and of the Acts under which they were purportedly made are set out in pars 7-12 of the amended statement of claim in the first action and in pars 4-9 of the amended statement of claim in the second action.

[2] *Aboriginals Ordinance* 1939 (NT).

[3] *Aboriginals Ordinance (No 2)* 1953 (NT).

[4] Regulations (General) under the *Aboriginals Ordinance* 1918, s 3 and the Aboriginal Regulations 1933, s 6.

[5] Schedule to Amending Regulations of 3 October 1940.

[6] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd [1920] HCA 54;* (1920) 28 CLR 129 at 151-152.

[7] *Airlines of NSW Pty Ltd v New South Wales [No 2]* [1965] HCA 3; (1965) 113 CLR 54 at 112.

[8] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1;* [1948] 1 KB 223 at 234; *Water Conservation and Irrigation Commission (NSW) v Browning [1947] HCA 21;* (1947) 74 CLR 492 at 505.

[9] [1951] HCA 9; (1951) 82 CLR 188.

[10] [1951] HCA 9; (1951) 82 CLR 188 at 194-195.

[11] Paragraph 29 of the amended statement of claim in the first action and paragraph 26 of the amended statement of claim in the second action.

[12] *Kruger v The Commonwealth* (1995) 69 ALJR 885.

[13] In the second action, *Bray & Ors v The Commonwealth*, the paragraph numbers mentioned in the question were 4-9 and 26.

[14] *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 579, 615-616, 653.

[15] [1915] HCA 13; (1915) 19 CLR 629 at 637.

[16] [1965] HCA 66; (1965) 114 CLR 226 at 242. See also *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 272.

[17] [1969] HCA 62; (1969) 119 CLR 564 at 570. See also *Northern Land Council v The Commonwealth [1986] HCA 18;* (1986) 161 CLR 1 at 6.

[18] *Berwick Ltd v Gray [1976] HCA 12;* (1976) 133 CLR 603 at 607; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 264.

[19] *Berwick Ltd v Gray [1976] HCA 12;* (1976) 133 CLR 603 at 607; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 242; *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 271.

[20] *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 271-272, 288; *Svikart v Stewart [1994] HCA 62;* (1994) 181 CLR 548 at 561.

[21] [1992] HCA 51; (1992) 177 CLR 248 at 274.

[22] Preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp) and Covering cl 3.

[23] *New South Wales v Commonwealth [1975] HCA 58;* (1975) 135 CLR 337 at 373, 469-470, 505 ("*Seas and Submerged Lands Case*").

[24] *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 242; *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 272.

[25] *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 271.

[26] *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248.

[27] [1965] HCA 66; (1965) 114 CLR 226 at 247.

[28] *R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10;* (1956) 94 CLR 254 at 270.

[29] [1957] HCA 12; (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

[30] *R v Bernasconi [1915] HCA 13;* (1915) 19 CLR 629 at 637-638; *Porter v The King; Ex parte Yee [1926] HCA 9;* (1926) 37 CLR 432 at 440.

[31] [1965] HCA 66; (1965) 114 CLR 226 at 250.

[32] Based on *Leeth v The Commonwealth [1992] HCA 29;* (1992) 174 CLR 455 at 486 per Deane and Toohey JJ.

[33] Section 127 was repealed by the *Constitution Alteration (Aboriginals) Act* 1967 (Cth).

[34] [1939] HCA 9; (1939) 62 CLR 339 at 362.

[35] See *Kruger v The Commonwealth* (1995) 69 ALJR 885.

[36] s 4V.

[37] s 4W.

[38] s 4Y(c).

[39] s 67.

[40] The terms "Aboriginal" and "half-caste" were defined in s 3.

[41] [1951] HCA 9; (1951) 82 CLR 188 at 194.

[42] [1951] HCA 9; (1951) 82 CLR 188 at 195.

[43] [1951] HCA 9; (1951) 82 CLR 188 at 195.

[44] Unreported, 5 April 1956.

[45] See Second Reading Speech to the *Northern Territory Aborigines Bill*, South Australia, Legislative Assembly, 5 October 1910 at 672.

[46] See *Leask v The Commonwealth [1996] HCA 29;* (1996) 70 ALJR 995; 140 ALR 1.

[47] [1969] HCA 62; (1969) 119 CLR 564 at 570.

[48] [1986] HCA 18; (1986) 161 CLR 1 at 6.

[49] [1965] HCA 66; (1965) 114 CLR 226 at 241-242.

[50] [1992] HCA 51; (1992) 177 CLR 248 at 271.

[51] See *Berwick Ltd v Gray [1976] HCA 12;* (1976) 133 CLR 603 at 607.

[52] [1958] HCA 14; (1958) 99 CLR 132 at 141. See also *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591 at 605 per Menzies J; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 222-223 per Gaudron J.

[53] See *Union Steamship Co of Australia Pty Ltd v King [1988] HCA 55;* (1988) 166 CLR 1 at 12-14.

[54] [1976] HCA 12; (1976) 133 CLR 603 at 607.

[55] See *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591 at 611 per Windeyer J.

[56] [1945] HCA 41; (1945) 71 CLR 29 at 84-85.

[57] [1945] HCA 41; (1945) 71 CLR 29 at 62, 102-103.

[58] [1913] HCA 29; (1913) 16 CLR 315.

[59] [1915] HCA 13; (1915) 19 CLR 629.

[60] [1945] HCA 41; (1945) 71 CLR 29 at 84.

[61] [1965] HCA 66; (1965) 114 CLR 226 at 250.

[62] [1965] HCA 66; (1965) 114 CLR 226 at 250-251.

[63] [1958] HCA 14; (1958) 99 CLR 132 at 142, 143.

[64] [1913] HCA 29; (1913) 16 CLR 315.

[65] [1915] HCA 13; (1915) 19 CLR 629 at 637.

[66] [1957] AC 288 at 320; [1957] HCA 12; (1957) 95 CLR 529 at 545.

[67] [1976] HCA 66; (1976) 138 CLR 492.

[68] [1976] HCA 66; (1976) 138 CLR 492 at 504.

[69] See *Anderson v Eric Anderson Radio & TV Pty Ltd [1965] HCA 61;* (1965) 114 CLR 20 at 31 per Kitto J.

[70] See *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 123, 156-157; *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 143; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 250; *Teori Tau v The Commonwealth [1969] HCA 62;* (1969) 119 CLR 564 at 570; *Coe v The Commonwealth [1978] HCA 41;* (1979) 53 ALJR 403 at 408; [1978] HCA 41; 24 ALR 118 at 129; *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 576-577, 593-594, 618, 621, 649.

[71] [1981] HCA 2; (1981) 146 CLR 559 at 593-594.

[72] [1915] HCA 13; (1915) 19 CLR 629.

[73] [1915] HCA 13; (1915) 19 CLR 629 at 635.

[74] [1915] HCA 13; (1915) 19 CLR 629 at 637.

[75] [1913] HCA 29; (1913) 16 CLR 315 at 335.

[76] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898, vol V at 1769.

[77] See *Attorney-General of the Commonwealth of Australia v The Queen [1957] HCA 12;* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

[78] See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth [1975] HCA 53;* (1975) 135 CLR 1 at 24; *Brown v The Queen [1986] HCA 11;* (1986) 160 CLR 171 at 208, 214; *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 43-44; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 135-136, 186; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 193; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 361-362.

[79] See *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 43 per Brennan J; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898, vol IV at 664-691; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 614-615; La Nauze, *The Making of the Australian Constitution*, (1972) at 227.

[80] See, for example, ss 41, 51(xxiiiA), 51(xxxi), 80, 116, 117; cf *Re Tracey; Ex parte Ryan [1989] HCA 12;* (1989) 166 CLR 518 at 580 per Deane J.

[81] See *Chu Kheng Lim v Minister for Immigration [1992] HCA 64;* (1992) 176 CLR 1 at 28.

[82] See *R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10;* (1956) 94 CLR 254.

[83] See *Porter v The King; Ex parte Yee [1926] HCA 9;* (1926) 37 CLR 432; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591; *Kable v DPP (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

[84] [1992] HCA 29; (1992) 174 CLR 455 at 469.

[85] [1992] HCA 29; (1992) 174 CLR 455 at 484.

[86] [1947] HCA 26; (1947) 74 CLR 31 at 82.

[87] *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) [1983] HCA 21; (1983) 158 CLR 1 at 273. See also *Koowarta v Bjelke-Petersen [1982] HCA 27;* (1982) 153 CLR 168 at 186, 209, 244, 261.

[88] See ss 25 and 30.

[89] See *McGinty v Western Australia [1995] HCA 46;* (1996) 186 CLR 140.

[90] [1992] HCA 29; (1992) 174 CLR 455 at 489.

[91] [1992] HCA 29; (1992) 174 CLR 455 at 490.

[92] [1992] HCA 29; (1992) 174 CLR 455 at 487.

[93] Zines, "A Judicially Created Bill of Rights?", (1994) 16 *Sydney Law Review* 166 at 182.

[94] [1992] HCA 29; (1992) 174 CLR 455 at 487.

[95] [1992] HCA 29; (1992) 174 CLR 455 at 484.

[96] [1992] HCA 29; (1992) 174 CLR 455 at 485-486.

[97] See *Dugan v Mirror Newspapers Ltd [1978] HCA 54;* (1978) 142 CLR 583; see also Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in Lindell (ed), *Future Directions in Australian Constitutional Law*, (1994) 185 at 205.

[98] See Dixon, "The Common Law as an Ultimate Constitutional Foundation", *Jesting Pilate*, (1965) 203 at 206; *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 824; 138 ALR 577 at 590.

[99] [1992] HCA 29; (1992) 174 CLR 455 at 486.

[100] [1992] HCA 29; (1992) 174 CLR 455 at 486.

[101] [1992] HCA 29; (1992) 174 CLR 455 at 487.

[102] [1992] HCA 29; (1992) 174 CLR 455 at 467.

[103] See *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997.

[104] See ss 1, 4, 12, 24, 28, 32. The amendment to s 128 of the Constitution to add Territory electors did not occur until 1977: see *Constitution Alteration (Referendums)* 1977.

[105] See *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 187; *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 14.

[106] [1992] HCA 45; (1992) 177 CLR 106 at 246.

[107] [1912] HCA 92; (1912) 16 CLR 99 at 108, 109, 110; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 328 per Brennan J.

[108] See also *Pioneer Express Pty Ltd v Hotchkiss [1958] HCA 45;* (1958) 101 CLR 536 at 550 per Dixon CJ; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 166, 169 per Deane J.

[109] See *Pioneer Express Pty Ltd v Hotchkiss [1958] HCA 45;* (1958) 101 CLR 536.

[110] [1992] HCA 45; (1992) 177 CLR 106 at 212.

[111] See *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 193. See also *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 23.

[112] [1995] HCA 20; (1995) 183 CLR 273 at 286-287, 298, 304, 315**.**

[113] See *Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20;* (1995) 183 CLR 273 at 287, 315**.**

[114] See *Polites v The Commonwealth [1945] HCA 3;* (1945) 70 CLR 60 at 68-69, 77, 80-81.

[115] [1995] HCA 20; (1995) 183 CLR 273 at 287-288**.**

[116] [1951] HCA 9; (1951) 82 CLR 188.

[117] See Kunz, "The United Nations Convention on Genocide", (1949) 43 *American Journal of International Law* 738 at 742; Cassese, *Human Rights in a Changing World*, (1990) at 76.

[118] [1988] HCA 55; (1988) 166 CLR 1 at 10.

[119] [1982] 1 NZLR 374 at 390.

[120] [1984] 1 NZLR 116 at 121.

[121] [1984] 1 NZLR 394 at 398.

[122] [1974] UKHL 1; [1974] AC 765 at 782.

[123] (1996) 70 ALJR 814; 138 ALR 577.

[124] (1996) 70 ALJR 814 at 824; 138 ALR 577 at 590.

[125] In the Kruger action the sixth plaintiff alleges the removal and detention of her child.

[126] s 6(1).

[127] s 13(1). By reason of the *Acts Interpretation Act* 1901 (Cth), s 17(f) and (g), the reference to the Governor-General was a reference to that person acting with the advice of the Federal Executive Council.

[128] Welfare Ordinance 1953 (NT), s 4.

[129] Aboriginals Ordinance (No 2) 1953 (NT), s 7. Although the Ordinance was amended on a number of occasions, this is the only significant amendment of relevance to these proceedings.

[130] The definition provision was s 3.

[131] Unless quoting from the Ordinance or referring directly to its terms, I speak of "Aboriginals".

[132] See ss 9, 16 and 17 of the 1910 Act.

[133] 26 June 1837.

[134] *Wik Peoples v State of Queensland* (1996) 63 FCR 450 at 460; 134 ALR 637 at 647-648.

[135] [1959] HCA 13; (1959) 100 CLR 664.

[136] [1959] HCA 13; (1959) 100 CLR 664 at 667.

[137] [1959] HCA 13; (1959) 100 CLR 664 at 669-670.

[138] [1951] HCA 9; (1951) 82 CLR 188.

[139] [1951] HCA 9; (1951) 82 CLR 188 at 194.

[140] Amended defence par 29(d) (Kruger), par 26(d) (Bray).

[141] *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 271 per Brennan, Deane and Toohey JJ.

[142] [1976] HCA 12; (1976) 133 CLR 603 at 607 per Mason J.

[143] [1965] HCA 66; (1965) 114 CLR 226 at 242.

[144] See *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 223-224 per Gaudron J.

[145] [1996] HCA 29; (1996) 70 ALJR 995 at 1011-1013; [1996] HCA 29; 140 ALR 1 at 24-26.

[146] [1965] HCA 66; (1965) 114 CLR 226 at 242; see also *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 272 per Brennan, Deane and Toohey JJ.

[147] *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 176.

[148] [1988] HCA 55; (1988) 166 CLR 1 at 10.

[149] [1915] HCA 13; (1915) 19 CLR 629 at 635.

[150] [1965] HCA 66; (1965) 114 CLR 226 at 275.

[151] [1965] HCA 66; (1965) 114 CLR 226 at 242.

[152] [1956] HCA 10; (1956) 94 CLR 254 at 290.

[153] [1965] HCA 66; (1965) 114 CLR 226 at 274 per Windeyer J. See also at 243 per Barwick CJ, 251 per Kitto J, 264 per Taylor J and 280-281 per Owen J.

[154] [1971] HCA 10; (1971) 125 CLR 591 at 613-614.

[155] [1971] HCA 10; (1971) 125 CLR 591 at 599.

[156] [1971] HCA 10; (1971) 125 CLR 591 at 598.

[157] [1965] HCA 66; (1965) 114 CLR 226 at 270-271.

[158] [1965] HCA 66; (1965) 114 CLR 226 at 277-278.

[159] [1992] HCA 45; (1992) 177 CLR 106 at 222.

[160] [1992] HCA 51; (1992) 177 CLR 248 at 272.

[161] [1958] HCA 14; (1958) 99 CLR 132 at 154.

[162] [1992] HCA 29; (1992) 174 CLR 455 at 485. See also *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 818; 138 ALR 577 at 583.

[163] [1992] HCA 64; (1992) 176 CLR 1 at 28.

[164] (1996) 70 ALJR 814; 138 ALR 577.

[165] [1992] HCA 64; (1992) 176 CLR 1 at 28, n (66).

[166] *Chu Kheng Lim v Minister for Immigration [1992] HCA 64;* (1992) 176 CLR 1 at 32-33, 71.

[167] [1958] HCA 14; (1958) 99 CLR 132 at 143.

[168] See also *Teori Tau v The Commonwealth [1969] HCA 62;* (1969) 119 CLR 564 at 570; *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 123 per Latham CJ, 156-157 per McTiernan J; *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 576 per Barwick CJ, 618 per Mason J, 621 per Murphy J, 649 per Wilson J, cf 593-594 per Gibbs J.

[169] *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 580-581 per Barwick CJ.

[170] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 132 per Latham CJ.

[171] *Australian Communist Party v The Commonwealth [1951] HCA 5;* (1951) 83 CLR 1 at 273 per Kitto J.

[172] See *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee [1945] HCA 48;* (1945) 72 CLR 37 at 68.

[173] *Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20;* (1995) 183 CLR 273 at 286-287, 298, 304, 315.

[174] *Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20;* (1995) 183 CLR 273 at 287, 315.

[175] [1988] HCA 18; (1988) 165 CLR 360 at 393.

[176] A quotation from *Gratwick v Johnson [1945] HCA 7;* (1945) 70 CLR 1 at 17.

[177] [1976] HCA 24; (1976) 135 CLR 110 at 137.

[178] [1986] HCA 60; (1986) 161 CLR 556.

[179] [1992] HCA 46; (1992) 177 CLR 1 at 69-70.

[180] [1992] HCA 46; (1992) 177 CLR 1 at 72.

[181] [1995] HCA 46; (1996) 186 CLR 140 at 198.

[182] [1992] HCA 45; (1992) 177 CLR 106.

[183] [1994] HCA 46; (1994) 182 CLR 104.

[184] [1994] HCA 45; (1994) 182 CLR 211.

[185] Unreported, High Court of Australia, 8 July 1997.

[186] [1912] HCA 92; (1912) 16 CLR 99 at 109-110.

[187] 73 US 35 (1867).

[188] [1992] HCA 45; (1992) 177 CLR 106 at 139.

[189] [1992] HCA 46; (1992) 177 CLR 1 at 48.

[190] [1994] HCA 46; (1994) 182 CLR 104 at 124.

[191] *Freedom of Speech*, (1985) at 152.

[192] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 16.

[193] [1987] 1 SCR 313 at 393.

[194] *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 139 per Mason CJ, 174 per Deane and Toohey JJ, 212 per Gaudron J. See also *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 391.

[195] *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 142 per Mason CJ, 168-169 per Deane and Toohey JJ.

[196] [1992] HCA 45; (1992) 177 CLR 106 at 215.

[197] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 14-15.

[198] [1975] HCA 53; (1975) 135 CLR 1 at 35.

[199] par 29(d) (Kruger), par 26(d) (Bray).

[200] See [1996] HCA 29; (1996) 70 ALJR 995 at 1011-1013; [1996] HCA 29; 140 ALR 1 at 24-26.

[201] See *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 16, 24.

[202] [1993] HCA 44; (1993) 177 CLR 541 at 560.

[203] [1975] HCA 53; (1975) 135 CLR 1 at 36.

[204] See Question 2.

[205] *Northern Territory v Mengel [1994] HCA 37;* (1995) 185 CLR 307 at 350-353, 372-373.

[206] [1992] HCA 29; (1992) 174 CLR 455 at 485-490.

[207] [1989] HCA 53; (1989) 168 CLR 461 at 554.

[208] [1992] HCA 29; (1992) 174 CLR 455 at 488-489.

[209] [1992] HCA 29; (1992) 174 CLR 455 at 475.

[210] [1992] HCA 29; (1992) 174 CLR 455 at 502.

[211] *Constitution Alteration (Aboriginals)* 1967 (Cth), s 2.

[212] Sawer, "The Australian Constitution and the Australian Aborigine", (1966) 2 *Federal Law Review* 17 at 23.

[213] (1966) 2 *Federal Law Review* 17 at 35.

[214] The *Commonwealth Franchise Act* 1902 (Cth), s 4 provided:

"No aboriginal native of Australia ... shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution."

[215] Galligan and Chesterman, "Aborigines, Citizenship and the Australian Constitution: Did the Constitution Exclude Aboriginal People from Citizenship?", (1997) 8 *Public Law Review* 45.

[216] [1992] HCA 29; (1992) 174 CLR 455 at 489.

[217] See *Koowarta v Bjelke-Petersen [1982] HCA 27;* (1982) 153 CLR 168 for a discussion of the scope and operation of s 51(xxvi).

[218] See *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 274 per Brennan, Deane and Toohey JJ.

[219] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* (1901) at 285.

[220] [1992] HCA 29; (1992) 174 CLR 455 at 486.

[221] Section 13(1) of the *Northern Territory (Administration) Act* 1910 (Cth) provided: " Until the Parliament makes other provision for the government of the Territory, the Governor-General may make Ordinances having the force of law in the Territory."

[222] Section 6(1).

[223] Section 10 was repealed by the *Aboriginals Ordinance* 1924. However, the definitions of "Reserve" and "Aboriginal Institution" remained, they being defined by s 3 of the Ordinance respectively, as follows: "'Reserve' means any lands which, in pursuance of any Ordinance or other law now, heretofore or hereafter in force in the Territory, are declared to be a reserve for aboriginals or are reserved for the use and benefit of the aboriginal native inhabitants of the Territory or for the use and benefit of the aboriginal inhabitants of the territory."

"'Aboriginal Institution' means any mission station, reformatory, orphanage, school, home or other institution for the benefit, care or protection of the aboriginals declared by the Administrator to be an institution for the purposes of this Ordinance." These definitions were amended from time to time, but not in any respect relevant to the issues in these matters.

[224] Note that s 13 was amended by the *Aboriginals Ordinance* 1941 such that the reference to "established by private contributions" was removed.

[225] The Ordinance was amended by the *Aboriginals Ordinance (No 2)* 1953 and the words "or half-caste" were omitted from s 67(1)(c).

[226] Section 17(1) provided: "Where the Director considers that it is in the best interests of a ward, he may- (a) take the ward into his custody;

(b) authorize a person to take the ward into custody on behalf of the Director;

(c) order that the ward be removed to, and kept within, a reserve or institution;

(d) order that the ward be kept within a reserve or institution; and

(e) order that the ward be removed from one reserve or institution to another reserve or institution."

[227] Constitution, s 51(vi). See, for example, *Stenhouse v Coleman [1944] HCA 36;* (1944) 69 CLR 457 at 471.

[228] Constitution, s 117. Note that it is arguable that s 117 is not restricted to State laws.

[229] See, for example, *Bank of NSW v The Commonwealth [1948] HCA 7;* (1948) 76 CLR 1 at 354 per Dixon J; *The State of Victoria v The Commonwealth [1957] HCA 54;* (1957) 99 CLR 575 at 614 per Dixon CJ; *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 27-28 per Mason CJ, 93 per Gaudron J, 101 per McHugh J.

[230] *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee [1945] HCA 48;* (1945) 72 CLR 37 at 68 per Latham CJ.

[231] *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 93 per Gaudron J.

[232] *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 95 per Gaudron J; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 143 per Mason CJ, 150-151, 157 per Brennan J, 217-218 per Gaudron J; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 152 per Brennan J; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 16-17.

[233] *South Australia v Tanner [1989] HCA 3;* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ; *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 30 per Mason CJ; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 300 per Mason CJ, 388 per Gaudron J.

[234] See *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 388 per Gaudron J.

[235] cf *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 141 per Dixon CJ, where it is said that "[t]he words `the government of any territory' of course describe the subject matter of the power."

[236] See *Actors and Announcers Equity Association v Fontana Films Pty Ltd [1982] HCA 23;* (1982) 150 CLR 169 at 192-194 per Stephen J; *Re F; Ex parte F [1986] HCA 41;* (1986) 161 CLR 376 at 387 per Mason and Deane JJ; *Leask v The Commonwealth [1996] HCA 29;* (1996) 70 ALJR 995 at 1016 per Gummow J; [1996] HCA 29; 140 ALR 1 at 31.

[237] As to which, see *Australian National Airways Pty Ltd v The Commonwealth [1945] HCA 41;* (1945) 71 CLR 29; *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226; *Teori Tau v The Commonwealth [1969] HCA 62;* (1969) 119 CLR 564; *Capital TV & Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591; *Berwick Ltd v Gray [1976] HCA 12;* (1976) 133 CLR 603; *Northern Land Council v The Commonwealth [1986] HCA 18;* (1986) 161 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106.

[238] Compare, for example, the view of Dixon CJ in *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 with that expressed by Barwick CJ in *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591 at 599-600. See, generally, *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 222-223 per Gaudron J.

[239] See *Potter v Minahan [1908] HCA 63;* (1908) 7 CLR 277 at 304-305 per O'Connor J; *Ex parte Walsh and Johnson; In re Yates [1925] HCA 53;* (1925) 37 CLR 36 at 93 per Isaacs J; *Sorby v The Commonwealth [1983] HCA 10;* (1983) 152 CLR 281 at 289-290 per Gibbs CJ, 309, 311 per Mason, Wilson and Dawson JJ; *Balog v Independent Commission Against Corruption [1990] HCA 28;* (1990) 169 CLR 625 at 635-636; *Bropho v Western Australia [1990] HCA 24;* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Corporate Affairs Commission (NSW) v Yuill [1991] HCA 28;* (1991) 172 CLR 319 at 322 per Brennan J, 331 per Dawson J, 338 per Gaudron J, 348 per McHugh J; *Coco v The Queen [1994] HCA 15;* (1994) 179 CLR 427 at 437-438 per Mason CJ, Brennan, Gaudron and McHugh JJ, 446 per Deane and Dawson JJ.

[240] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd [1964] HCA 15;* (1964) 113 CLR 207 at 225. See also *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association [1908] HCA 87;* (1908) 6 CLR 309 at 367-368 per O'Connor J; *R v Coldham; Ex parte Australian Social Welfare Union [1983] HCA 19;* (1983) 153 CLR 297 at 313-314; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) [1983] HCA 21; (1983) 158 CLR 1 at 127 per Mason J.

[241] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd [1920] HCA 54;* (1920) 28 CLR 129 at 151-152 per Knox CJ, Isaacs, Rich and Starke JJ.

[242] [1920] HCA 54; (1920) 28 CLR 129 at 151-152 per Knox CJ, Isaacs, Rich and Starke JJ.

[243] *The Constitution of the Commonwealth of Australia*, 1st ed (1902) at 329.

[244] See, for example, *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth [1975] HCA 53;* (1975) 135 CLR 1 at 24 per Barwick CJ, 46 per Gibbs J; *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 43 per Brennan J; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 139-140 per Mason CJ, 182 per Dawson J; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 193 per Dawson J.

[245] Notwithstanding that the *Northern Territory Representation Act* 1922 (Cth) provided for the election of a representative to the House of Representatives, it was not until 1968, when that Act was amended by s 4 of the *Northern Territory Representation Act* 1968 (Cth), that "[t]he member representing the Northern Territory [was given] all the powers, immunities and privileges of a member representing an Electoral Division of a State and the representation of the Northern Territory [was to] be on the same terms as the representation of such an Electoral Division": see s 6 of the *Northern Territory Representation Act* 1922 (Cth). There was no Senate representation at all for the Northern Territory prior to the commencement of the *Senate (Representation of Territories) Act* 1973 (Cth). (Section 6 of the *Northern Territory Representation Act* 1922 (Cth) and the *Senate (Representation of Territories) Act* 1973 (Cth) were held to be constitutionally valid in *Queensland v Commonwealth [1977] HCA 60;* (1977) 139 CLR 585.) The entitlement of the people of the Northern Territory to participate in federal elections is now regulated by ss 40-54 of the *Commonwealth Electoral Act* 1918 (Cth).

Self-government was granted to the Northern Territory by the *Northern Territory (Self-Government) Act* 1978 (Cth).

[246] Section 2(a) of the *Constitution Alteration (Referendums) Act* 1977 (Cth) altered s 128 by inserting the words "and Territory" in both places to which reference is made to the electors "in each State".

[247] The final paragraph of s 128 of the Constitution, inserted by s 2(b) of the *Constitution Alteration (Referendums) Act* 1977 (Cth) is as follows: "In this section, 'Territory' means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives."

[248] *R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10;* (1956) 94 CLR 254.

[249] [1915] HCA 13; (1915) 19 CLR 629.

[250] [1965] HCA 66; (1965) 114 CLR 226.

[251] *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 243 per Barwick CJ, 253 per Kitto J referring to *R v Bernasconi [1915] HCA 13;* (1915) 19 CLR 629. See also *Porter v The King; Ex parte Yee [1926] HCA 9;* (1926) 37 CLR 432; *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd [1929] HCA 36;* (1929) 42 CLR 582; *Waters v The Commonwealth [1951] HCA 9;* (1951) 82 CLR 188.

[252] [1965] HCA 66; (1965) 114 CLR 226 at 245.

[253] [1965] HCA 66; (1965) 114 CLR 226 at 244.

[254] [1965] HCA 66; (1965) 114 CLR 226 at 242-243.

[255] See *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248.

[256] [1992] HCA 64; (1992) 176 CLR 1.

[257] [1992] HCA 64; (1992) 176 CLR 1 at 27.

[258] [1992] HCA 64; (1992) 176 CLR 1 at 28-29.

[259] [1992] HCA 64; (1992) 176 CLR 1 at 27.

[260] [1992] HCA 64; (1992) 176 CLR 1 at 28.

[261] [1992] HCA 64; (1992) 176 CLR 1.

[262] [1992] HCA 64; (1992) 176 CLR 1 at 55.

[263] Constitution, s 51(vi).

[264] Constitution, s 51(ix).

[265] Constitution, s 51(xix).

[266] Constitution, s 51(xxviii).

[267] Constitution, s 51(xxvi).

[268] See *Koowarta v Bjelke-Petersen [1982] HCA 27;* (1982) 153 CLR 168 at 242 per Murphy J; cf at 186 per Gibbs CJ, 209 per Stephen J, 244 per Wilson J. See also *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) [1983] HCA 21; (1983) 158 CLR 1 at 242 per Brennan J, 273 per Deane J; *Chu Kheng Lim v Minister for Immigration [1992] HCA 64;* (1992) 176 CLR 1 at 56 per Gaudron J. Note, also, the view, expressed by Deane and Toohey JJ in *Leeth v The Commonwealth [1992] HCA 29;* (1992) 174 CLR 455 at 489, that "a legislative power to make special laws with respect to

a particular class of persons, such as aliens (Constitution, s 51(xix)) or persons of a particular race (s 51(xxvi)), necessarily authorizes discriminatory treatment of members of that class to the extent which is reasonably capable of being seen as appropriate and adapted to the circumstance of that membership."

[269] [1992] HCA 29; (1992) 174 CLR 455.

[270] [1992] HCA 29; (1992) 174 CLR 455 at 489.

[271] [1992] HCA 29; (1992) 174 CLR 455 at 502-503.

[272] Constitution, s 51(ii).

[273] Constitution, s 51(iii).

[274] Constitution, s 88.

[275] Constitution, s 92.

[276] *Cole v Whitfield [1988] HCA 18;* (1988) 165 CLR 360 at 394.

[277] [1992] HCA 29; (1992) 174 CLR 455 at 489. Note, however, that different treatment does not constitute discrimination if referable to a relevant difference pertaining to the persons concerned.

[278] [1992] HCA 29; (1992) 174 CLR 455 at 489.

[279] See generally, *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd [1994] HCA 45;* (1994) 182 CLR 211; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 10-13. Note that the terms "representative government" and "representative democracy" have been "used somewhat interchangeably": *McGinty v State of Western Australia [1995] HCA 46;* (1996) 186 CLR 140 at 198 per Toohey J; cf *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 189 per Dawson J, 199-201 per McHugh J.

[280] [1992] HCA 46; (1992) 177 CLR 1.

[281] [1992] HCA 45; (1992) 177 CLR 106.

[282] [1994] HCA 46; (1994) 182 CLR 104.

[283] [1994] HCA 45; (1994) 182 CLR 211.

[284] See *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 48 per Brennan J where it is said that "where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government."

[285] [1992] HCA 45; (1992) 177 CLR 106 at 138.

[286] See *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 139 per Mason CJ, 174 per Deane and Toohey JJ, 212 per Gaudron J, 231 per McHugh J; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 13-14.

[287] *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ.

[288] That freedom of communication depends on freedom of association has been noted in the United States and Canada. See *De Jonge v Oregon* 299 US 353 at 364 (1937); *National Association for the Advancement of Colored People v Alabama* 357 US 449 at 460 (1958); *Shelton v Tucker* 364 US 479 at 486 (1960); *Gibson v Florida Legislative Investigation Committee* 372 US 539 at 562 per Douglas J (1963); *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 391 per LeDain J (with whom Beetz and La Forest JJ concurred), 397 per McIntrye J.

[289] Note, however, that the American authorities treat freedom of movement as an incident of national citizenship, protected by the Fourteenth Amendment which prohibits the States from abridging the privileges and immunities of United States citizens and from depriving any person of life, liberty or property without due process of law. See *Crandall v Nevada* (1867) 6 Wall 35 at 43-44; *Williams v Fears* 179 US 270 at 274 (1900); *Twining v New Jersey* 211 US 78 at 97 (1908); *Edwards v California* 314 US 160 at 178 per Douglas J (1941). Prior to the enactment of the Canadian Charter of Rights and Freedoms, which expressly provides for mobility rights, Canada followed a similar approach. See *Winner v SMT (Eastern) Ltd* [1951] 4 DLR 529 at 558-559 per Rand J.

[290] *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 139 per Mason CJ.

[291] [1912] HCA 92; (1912) 16 CLR 99 at 108-109 per Griffith CJ, 109-110 per Barton J. See also *Pioneer Express Pty Ltd v Hotchkiss [1958] HCA 45;* (1958) 101 CLR 536 at 550 per Dixon CJ; *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 73-74 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 213-214 per Gaudron J; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 169 per Deane J. In *Theophanous* at 166, Deane J characterised *Smithers* as having affirmed the "constitutional implication of freedom of access by the represented to the organs and instrumentalities of their representative government".

[292] In *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 176 Deane and Toohey JJ noted that they were "not presently persuaded that s 122's power to make laws `for the government of any territory surrendered by any State' is immune from the implications to be discerned in the Constitution as a whole, including the implication of freedom of political communication." McHugh J, however, was of the view that "[t]here is nothing in s 122 or anywhere else in the Constitution which suggests that laws made by the Commonwealth for the government of a territory are subject to prohibitions or limitations arising from the concepts of representative government, responsible government or freedom of communication": [1992] HCA 45; (1992) 177 CLR 106 at 246.

[293] *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591 at 599 per Barwick CJ.

[294] As to which, see *West v Commissioner of Taxation (NSW) [1937] HCA 26;* (1937) 56 CLR 657; *Essendon Corporation v Criterion Theatres Ltd [1947] HCA 15;* (1947) 74 CLR 1; *Melbourne Corporation v The Commonwealth [1947] HCA 26;* (1947) 74 CLR 31; *Victoria v The Commonwealth ("the Payroll Tax Case") [1971] HCA 16;* (1971) 122 CLR 353; *Queensland Electricity Commission v The Commonwealth [1985] HCA 56;* (1985) 159 CLR 192; *State Chamber of Commerce and Industry v The Commonwealth ("the Second Fringe Benefits Tax Case") [1987] HCA 38;* (1987) 163 CLR 329.

[295] *Teori Tau v The Commonwealth [1969] HCA 62;* (1969) 119 CLR 564.

[296] See, for example, *R v Bernasconi [1915] HCA 13;* (1915) 19 CLR 629; *Porter v The King; Ex parte Yee [1926] HCA 9;* (1926) 37 CLR 432; *Waters v The Commonwealth [1951] HCA 9;* (1951) 82 CLR 188; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591.

[297] *Svikart v Stewart [1994] HCA 62;* (1994) 181 CLR 548.

[298] [1992] HCA 51; (1992) 177 CLR 248.

[299] [1958] HCA 14; (1958) 99 CLR 132 at 153-154.

[300] See *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 142 per Mason CJ, 168-169 per Deane and Toohey JJ, 215-217 per Gaudron J, see also at 231 per McHugh J.

[301] See *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 122 per Mason CJ, Toohey and Gaudron JJ referring to *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 139 per Mason CJ, 174 per Deane and Toohey JJ, 212 per Gaudron J.

[302] [1992] HCA 45; (1992) 177 CLR 106 at 139.

[303] [1992] HCA 45; (1992) 177 CLR 106 at 139.

[304] The Northern Territory was "annexed to the Province of South Australia by Letters Patent in 1863" (*Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 140) and owes its existence as a Territory to the surrender of territory by the State of South Australia and the acceptance of that territory by the Commonwealth. See *Northern Territory Surrender Act* 1907 (SA); *Northern Territory Acceptance Act* 1910 (Cth).

[305] Section 52(i) relevantly confers exclusive power on the Parliament to make laws with respect to "the seat of government of the Commonwealth".

[306] Section 125 relevantly provides for the seat of Government to be within "territory ... granted to or acquired by the Commonwealth".

[307] *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 144 per Dixon CJ.

[308] Constitution, ss 7 and 24.

[309] See *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 50-51 per Brennan J, 76-77 per Deane and Toohey JJ, 94-95 per Gaudron J; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ, 217-218 per Gaudron J, 234 per McHugh J. See also *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 126 per Mason CJ, Toohey and Gaudron JJ, 146 per Brennan J, 178-179 per Deane J; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 299 per Mason CJ, 336-337 per Deane J, 387 per Gaudron J; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 16.

[310] [1981] HCA 2; (1981) 146 CLR 559 at 593-594. See also *Coe v Commonwealth of Australia [1978] HCA 41;* (1979) 53 ALJR 403 at 408 per Gibbs J; [1978] HCA 41; 24 ALR 118 at 129.

[311] [1958] HCA 14; (1958) 99 CLR 132 at 143 and see at 153-154 per Kitto J. Note, however, Kitto J's equivocation in relation to this question in *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 250.

[312] [1969] HCA 62; (1969) 119 CLR 564 at 570.

[313] [1943] HCA 12; (1943) 67 CLR 116 at 123 per Latham CJ, 156-157 per McTiernan J.

[314] [1981] HCA 2; (1981) 146 CLR 559 at 576 per Barwick CJ, 618 per Mason J, 621 per Murphy J and 649 per Wilson J.

[315] [1981] HCA 2; (1981) 146 CLR 559 at 593-594.

[316] [1981] HCA 2; (1981) 146 CLR 559 at 594.

[317] As to which, see *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 70 ALJR 743; 138 ALR 220; *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

[318] *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 594 per Gibbs J.

[319] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd [1964] HCA 15;* (1964) 113 CLR 207 at 225.

[320] See *Boyd v United States* 116 US 616 at 635 (1886). See also *Street v Queensland Bar Association [1989] HCA 53;* (1989) 168 CLR 461 at 527-528 per Deane J, 554 per Toohey J and 569 per Gaudron J. And see as to the need to interpret constitutional guarantees liberally, *Bank of NSW v The Commonwealth [1948] HCA 7;* (1948) 76 CLR 1 at 349 per Dixon J; *Clunies-Ross v The Commonwealth [1984] HCA 65;* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Australian Tape Manufacturers Association Ltd v The Commonwealth [1993] HCA 10;* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v The Commonwealth [1994] HCA 9;* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation [1994] HCA 6;* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ, 320 per Toohey J.

[321] [1943] HCA 12; (1943) 67 CLR 116 at 123. See also at 156 per McTiernan J where it is said that s 116 "imposes a restriction on all the legislative powers of Parliament".

[322] 403 US 388 (1971). Note that a *Bivens* action cannot be brought against a federal agency, only individual agents: *Federal Deposit Insurance Corporation v Meyer* (1994) 127 L Ed 2d 308 at 322-323. As to the position in Ireland and New Zealand, where neither the Irish Constitution nor the New Zealand Bill of Rights expressly provides for remedies, see, respectively, *The State (Quinn) v Ryan* [1965] IR 70, and *Simpson v Attorney-General ["Baigent's Case"]* [1994] 3 NZLR 667.

[323] *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 605 per Stephen J.

[324] See as to the operation of the freedom of political discussion at all times and throughout the Commonwealth, *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 75-76 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 142 per Mason CJ, 168-169 per Deane and Toohey JJ, 215-217 per Gaudron J; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 122 per Mason CJ, Toohey and Gaudron JJ, 164-166 per Deane J; *Stephens v West Australian Newspapers Ltd [1994]*

HCA 45; (1994) 182 CLR 211 at 232 per Mason CJ, Toohey and Gaudron JJ, 257 per Deane J.

[325] See *Cox v Hakes* (1890) 15 App Cas 506 at 527 per Lord Herschell; *R v Cannon Row Police Station (Inspector)* (1922) 91 LJKB 98 at 106; *Re Bolton; Ex parte Beane [1987] HCA 12;* (1987) 162 CLR 514 at 523 per Brennan J.

[326] See generally with respect to the award of exemplary damages, *Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40;* (1966) 117 CLR 118 at 129, 138-139 per Taylor J, 147 per Menzies J, 154 per Windeyer J, 160-161 per Owen J; *Australian Consolidated Press v Uren [1966] HCA 37;* (1966) 117 CLR 185. For cases where exemplary damages have been awarded in actions of trespass to the person see: *Fontin v Katapodis [1962] HCA 63;* (1962) 108 CLR 177; *Lamb v Cotogno [1987] HCA 47;* (1987) 164 CLR 1 and for false imprisonment see: *Huckle v Money* (1763) 95 ER 768; 2 Wils KB 205; *Watson v Marshall and Cade [1971] HCA 33;* (1971) 124 CLR 621.

[327] This alternative must be rejected, it relating to the test of characterisation rather than to testing whether a law infringes the implied freedom. See *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 300 per Mason CJ, 388 per Gaudron J.

[328] [1992] HCA 45; (1992) 177 CLR 106 at 143.

[329] [1992] HCA 45; (1992) 177 CLR 106 at 143. See also at 235 per McHugh J; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 299 per Mason CJ.

[330] [1992] HCA 45; (1992) 177 CLR 106 at 169. See also *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 76-77 per Deane and Toohey JJ; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 337 per Deane J.

[331] *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 234-235.

[332] [1992] HCA 45; (1992) 177 CLR 106 at 235.

[333] [1992] HCA 46; (1992) 177 CLR 1 at 95. See also *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 217-218; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 387.

[334] [1994] HCA 44; (1994) 182 CLR 272 at 340 referring to *Attorney-General v Guardian Newspapers (No 2) [1988] UKHL 6;* [1990] 1 AC 109 at 283-284 per Lord Goff of Chieveley. See also *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 179 per Deane J.

[335] *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272 at 340 per Deane J. See also *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 179.

[336] See *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 51 per Brennan J.

[337] See, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167 per Blackburn J; *Aboriginal Legal Rights Movement Inc v South Australia* (*"Hindmarsh Island Case"*) (1995) 64 SASR 551 at 555 per Debelle J.

[338] [1912] HCA 65; (1912) 15 CLR 366 at 369.

[339] [1981] HCA 2; (1981) 146 CLR 559 at 580-581.

[340] [1943] HCA 12; (1943) 67 CLR 116 at 124.

[341] See *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 154 per Starke J.

[342] See *Street v Queensland Bar Association [1989] HCA 53;* (1989) 168 CLR 461 at 527-528 per Deane J, 569 per Gaudron J; *Mutual Pools & Staff Pty Ltd v The Commonwealth [1994] HCA 9;* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation [1994] HCA 6;* (1994) 179 CLR 297 at 305 per Mason CJ, Deane and Gaudron JJ, 320 per Toohey J.

[343] See *Bank of NSW v The Commonwealth [1948] HCA 7;* (1948) 76 CLR 1 at 349 per Dixon J. See also *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) [1983] HCA 21; (1983) 158 CLR 1 at 145 per Mason J, 282-283 per Deane J; *Mutual Pools & Staff Pty Ltd v The Commonwealth [1994] HCA 9;* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ, 200 per Dawson and Toohey JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation [1994] HCA 6;* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ.

[344] See *Bank of NSW v The Commonwealth [1948] HCA 7;* (1948) 76 CLR 1 at 349-350 per Dixon J; *Georgiadis v Australian and Overseas Telecommunications Corporation [1994] HCA 6;* (1994) 179 CLR 297 at 305 per Mason CJ, Deane and Gaudron JJ.

[345] [1943] HCA 12; (1943) 67 CLR 116 at 132.

[346] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 149 per Rich J. See also at 132 per Latham CJ, 155 per Starke J, 160-161 per Williams J.

[347] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 131 per Latham CJ.

[348] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 132 per Latham CJ.

[349] [1981] HCA 2; (1981) 146 CLR 559 at 579.

[350] *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee [1945] HCA 48;* (1945) 72 CLR 37 at 68 per Latham CJ.

[351] *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd [1973] HCA 21;* (1973) 129 CLR 65 at 79 per Menzies J, 87 per Gibbs J, 93 per Mason J.

[352] [1967] HCA 13; (1967) 116 CLR 353 at 355-356. See also *Musgrave v The Commonwealth [1936] HCA 80;* (1937) 57 CLR 514 at 547-548 per Dixon J, 550-551 per Evatt and McTiernan JJ; *Breavington v Godleman [1988] HCA 40;* (1988) 169 CLR 41 at 118 per Brennan J, 151-152 per Dawson J.

[353] [1967] HCA 13; (1967) 116 CLR 353 at 355-356.

[354] However, on this point see *The Commonwealth v Mewett* unreported, High Court of Australia, 31 July 1997 per Gaudron J.

[355] Section 80 provides: "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

[356] See *The Commonwealth v Mewett* unreported, High Court of Australia, 31 July 1997 per Gaudron J.

[357] See *Maguire v Simpson [1977] HCA 63;* (1977) 139 CLR 362.

[358] See s 26(c) of the *Acts Interpretation Act* 1901 (Cth) which defines "Court exercising federal jurisdiction" to mean "any court when exercising federal jurisdiction" and to include "federal courts"; s 26(b) defines "Federal Court" to mean "the High Court or any court created by the Parliament". See also *Cohen v Cohen [1929] HCA 15;* (1929) 42 CLR 91 at 99 per Dixon J; *Musgrave v The Commonwealth [1936] HCA 80;* (1937) 57 CLR 514 at 531-532 per Latham CJ; *Bainbridge-Hawker v The Minister of State for Trade and Customs [1957] HCA 56;* (1958) 99 CLR 521 at 536-537 per Williams J; *Pedersen v Young [1964] HCA 28;* (1964) 110 CLR 162 at 165 per Kitto J, 167-168 per Menzies J, 169 per Windeyer J, 171 per Owen J.

[359] See, for example, *Pedersen v Young [1964] HCA 28;* (1964) 110 CLR 162 at 165-166 per Kitto J, 166 per Taylor J, 170-171 per Owen J; *Bargen v State Government Insurance Office (Q) [1982] HCA 22;* (1982) 154 CLR 318 at 322-323 per Stephen J; *Fielding v Doran* (1984) 59 ALJR 511 at 514 per Dawson J; 60 ALR 342 at 346.

[360] [1991] HCA 56; (1991) 174 CLR 1 at 51-52.

[361] [1964] HCA 28; (1964) 110 CLR 162.

[362] See *Limitation Act* 1969 (NSW), s 78 and *Choice of Law (Limitation Periods) Act* 1993 (NSW); *Choice of Law (Limitation Periods) Act* 1993 (Vic); *Limitation of Actions Act* 1936 (SA), s 38A; *Limitation of Actions Act* 1974 (Q), s 43A and *Choice of Law (Limitation Periods) Act* 1996 (Q); *Choice of Law (Limitation Periods) Act* 1994 (WA); *Limitation Act* 1974 (Tas), ss 32A-32D; *Choice of Law (Limitation Periods) Act* 1994 (NT); *Limitation Act* 1985 (ACT), ss 55-57.

[363] *Pedersen v Young [1964] HCA 28;* (1964) 110 CLR 162 at 167 per Menzies J.

[364] See *Deputy Federal Commissioner of Taxation v Brown [1958] HCA 2;* (1958) 100 CLR 32 at 39 per Dixon CJ; *Parker v The Commonwealth [1965] HCA 12;* (1965) 112 CLR 295 at 306 per Windeyer J; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd [1973] HCA 21;* (1973) 129 CLR 65 at 80-81 per Menzies J, 88 per Gibbs J, 95 per Mason J.

[365] [1965] HCA 12; (1965) 112 CLR 295 at 306.

[366] *Breavington v Godleman [1988] HCA 40;* (1988) 169 CLR 41 at 151 per Dawson J.

[367] [1964] HCA 28; (1964) 110 CLR 162 at 170.

[368] Constitution, s 75(iv).

[369] See, with respect to the different views as to the operation and effect of s 118 of the Constitution, *Breavington v Godleman [1988] HCA 40;* (1988) 169 CLR 41.

[370] See *Deputy Federal Commissioner of Taxation v Brown [1958] HCA 2;* (1958) 100 CLR 32 at 39 per Dixon J; *Pedersen v Young [1964] HCA 28;* (1964) 110 CLR 162 at 169-170 per Windeyer J and *Breavington v Godleman [1988] HCA 40;* (1988) 169 CLR 41 at 87-88 per Wilson and Gaudron JJ and the cases there cited.

[371] [1988] HCA 40; (1988) 169 CLR 41.

[372] [1991] HCA 56; (1991) 174 CLR 1.

[373] cf *Gardner v Wallace [1995] HCA 61;* (1995) 184 CLR 95.

[374] [1964] HCA 28; (1964) 110 CLR 162 at 165. However, contrast the statement at 168 per Menzies J where it was said: "It may well be a part of the office of ss 79 and 80 to make applicable in this Court some State statutes which, upon their true construction, apply of their own force only to courts governed by the laws of the State in which the Court is exercising its federal jurisdiction".

[375] [1953] HCA 62; (1953) 88 CLR 168 at 170.

[376] [1973] HCA 21; (1973) 129 CLR 65 at 88.

[377] *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd [1973] HCA 21;* (1973) 129 CLR 65 at 95 per Mason J.

[378] *Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45;* (1992) 177 CLR 106 at 246.

[379] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 14-16.

[380] *Lange*, unreported, High Court of Australia, 8 July 1997 at 13.

[381] The 1918 Ordinance was repealed by the *Welfare Ordinance* 1953 (NT) with effect from 13 May 1957.

[382] *Northern Territory Representation Act* 1922 (Cth), s 5.

[383] *Northern Territory Representation Act* 1936 (Cth), s 2.

[384] *Northern Territory Representation Act* 1959 (Cth), s 3.

[385] *Northern Territory Representation Act* 1968 (Cth), s 4.

[386] *Constitution Alteration (Referendums)* 1977.

[387] cf *Attorney-General (NSW); Ex rel McKellar v The Commonwealth [1977] HCA 1;* (1977) 139 CLR 527.

[388] See *Commonwealth Electoral Act* 1918, s 39(5), as amended by *Commonwealth Electoral Act* 1925 (Cth), s 2; *Commonwealth Electoral Act* 1949 (Cth), s 3; *Commonwealth Electoral Act* 1961 (Cth) s 4; *Commonwealth Electoral Act* 1962 (Cth), s 2; see also Northern Territory Electoral Regulations (SR No 154/1922), reg 22, as amended by Northern Territory Electoral Regulations (SR No 61/1949), reg 3.

[389] UN Gen Ass, Off Rec, 3rd Sess, Resolution 174 (A/180) (1948). The Convention was ratified by Australia on 8 July 1949 and entered into force on 12 January 1951. No legislation enacts the Convention as part of Australian law.

[390] Aboriginals Ordinance 1923 (NT), Aboriginals Ordinance 1924 (NT), Aboriginals Ordinance (No 2) 1924 (NT), Aboriginals Ordinance 1925 (NT), Aboriginals Ordinance 1927 (NT), Aboriginals Ordinance 1928 (NT), Aboriginals Ordinance (No 2) 1928 (NT), Aboriginals Ordinance 1930 (NT), Aboriginals Ordinance 1933 (NT), Aboriginals Ordinance 1936 (NT), Aboriginals Ordinance 1937 (NT), Aboriginals Ordinance (No 2) 1937 (NT), Aboriginals Ordinance 1939 (NT), Aboriginals Ordinance 1941 (NT), Aboriginals Ordinance 1943 (NT), Aboriginals Ordinance 1947 (NT), Aboriginals Ordinance 1953 (NT), Aboriginals Ordinance (No 2) 1953 (NT).

[391] The Administration Act was amended significantly by the *Northern Territory (Administration) Act* 1947 (Cth). This established a Legislative Council for the Territory and endowed it with the power to make Ordinances for the peace, order and good government of the Territory. Assent of the Administrator was required and the Governor-General had the power of disallowance. Subsequent amendments to the 1918 Ordinance and the 1953 Ordinance were made under this new system.

[392] *Kruger v The Commonwealth* (1995) 69 ALJR 885 at 889.

[393] See *A v Hayden [(1984) HCA 67;* (1984) 156 CLR 532 at 584.

[394] Reproduced here are the questions reserved in *Kruger & Ors v The Commonwealth*. The questions in *Bray & Ors v The Commonwealth* are not materially different.

[395] 403 US 388 (1971).

[396] *Simpson v Attorney-General* (*Baigent's Case*) [1994] 3 NZLR 667 at 702; cf at 705.

[397] *James v The Commonwealth [(1939) HCA 9;* (1939) 62 CLR 339 at 369-370; *McClintock v The Commonwealth [(1947) HCA 39;* (1947) 75 CLR 1 at 19; *Nelungaloo Pty Ltd v The Commonwealth [(1952) HCA 11;* (1952) 85 CLR 545 at 567-568; *Northern Territory v Mengel [(1994) HCA 37;* (1995) 185 CLR 307 at 350-353, 372-373. In certain circumstances member states may be liable to provide reparation for damage sustained by individuals by reason of breach by member states of European Union law: see *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 558 at 622-625.

[398] See *Flint v The Commonwealth [(1932) HCA 49;* (1932) 47 CLR 274; *McDonald v Victoria [(1937) HCA 60;* (1937) 58 CLR 146.

[399] *Bank of NSW v The Commonwealth [(1948) HCA 7;* (1948) 76 CLR 1 at 349-350.

[400] *Street v Queensland Bar Association [(1989) HCA 53;* (1989) 168 CLR 461 at 485-486, 502-503, 541. See also *Cunliffe v The Commonwealth [(1994) HCA 44;* (1994) 182 CLR 272 at 326-327. It has yet to be settled whether s 117 imposes a restraint upon federal legislative or executive action, and whether State action includes the enforcement of common law rules in a private action; cf *New York Times Co v Sullivan* 376 US 254 at 265 (1964); Tribe, *American Constitutional Law*, 2nd ed (1988), SS18-6.

[401] cf Amar, "Of Sovereignty and Federalism", (1987) 96 *Yale Law Journal* 1425 at 1485-1486.

[402] Davis and Pierce, *Administrative Law Treatise*, 3rd ed (1994), vol 3, SS19.5. Previous criticisms by Professor Davis appear throughout his work, *Constitutional Torts*, (1984), esp at 181-210.

[403] 28 USC SSSS1346, 2671-2680.

[404] 42 USC SS1983.

[405] *Federal Deposit Insurance Corporation v Meyer* 127 L Ed 2d 308 at 323 (1994). This case holds that *Bivens* actions run against individuals not federal agencies. In the present actions the plaintiffs sue the Commonwealth itself, not any officers of the Commonwealth.

[406] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 17-19.

[407] *Leonhard v United States* 633 F 2d 599 at 612-613 (1980); *McSurely v Hutchison* 823 F 2d 1002 (1987); *Seber v Unger* 881 F Supp 323 at 327 (1995).

[408] *North Ganalanja Aboriginal Corporation v Queensland [1996] HCA 2;* (1996) 185 CLR 595 at 612-613, 642-643.

[409] The office of Chief Protector of Aboriginals was replaced, by the Aboriginals Ordinance 1939 (NT), by that of the Director of Native Affairs. Nothing for present purposes turns upon this change.

[410] These definitions were amended on several occasions, lastly by s 3 of the Aboriginals Ordinance (No 2) 1953 (NT) which omitted any definitions of "half-caste" and substituted a new definition of "aboriginal".

[411] [1959] HCA 13; (1959) 100 CLR 664 at 669.

[412] [1959] HCA 13; (1959) 100 CLR 664 at 669-670.

[413] The judgment of this Court was upon a refusal of leave to appeal from a decision of Kriewaldt J reported [1958] NTJ 612. In *R v Silvester Pilimapitjimiri* [1965] NTJ 776, Bridge J discharged an order nisi for habeas corpus directing delivery of three Aboriginal children to their natural parents, from the custody of the respondents as foster parents. His Honour was exercising the equity jurisdiction of the Northern Territory of the Supreme Court in respect of infant custody and considered ([1965] NTJ 776 at 785-787) the accommodation in that jurisdiction of special considerations relating to the Aboriginal culture of the parties.

[414] [1951] HCA 9; (1951) 82 CLR 188 at 194.

[415] [1995] HCA 46; (1996) 186 CLR 140 at 168-169; see also at 188 per Dawson J, 230-232 per McHugh J, 291 per Gummow J.

[416] See *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1 at 41-45 and *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*") [1992] HCA 45; (1992) 177 CLR 106 at 133-136 and the cases cited in those passages.

[417] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd [1920] HCA 54;* (1920) 28 CLR 129 at 145, 155; *Melbourne Corporation v The Commonwealth [1947] HCA 26;* (1947) 74 CLR 31 at 83; *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 135, 209-210.

[418] *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 158-159.

[419] *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 135.

[420] [1992] HCA 29; (1992) 174 CLR 455 at 485-490.

[421] [1992] HCA 29; (1992) 174 CLR 455 at 485.

[422] Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 193.

[423] See, eg, Holdsworth, *A History of English Law*, (1938), vol 10 at 649.

[424] [1992] HCA 29; (1992) 174 CLR 455 at 498-499. See now *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814 at 837, 839, 844-846, 859-860; 138 ALR 577 at 609, 611-612, 619-622, 639-641.

[425] [1992] HCA 29; (1992) 174 CLR 455 at 502.

[426] [1992] HCA 29; (1992) 174 CLR 455 at 467.

[427] See *Queensland Electricity Commission v The Commonwealth [1985] HCA 56;* (1985) 159 CLR 192.

[428] Notably *Priestley v Fowler* (1837) 3 M & W 1 [150 ER 1030] (common employment) and *Butterfield v Forrester* (1809) 11 East 60 [103 ER 926] (contributory negligence).

[429] *Cheatle v The Queen [1993] HCA 44;* (1993) 177 CLR 541 at 560-561.

[430] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997.

[431] Provisions such as s 1 of the *Australia Act* 1986 (Imp), s 2 of the *European Communities Act* 1972 (UK) and s 1 of the *European Communities (Amendment) Act* 1993 (UK) call into question the continuation of this as current reality: see Winterton, "The British Grundnorm: Parliamentary Supremacy Re-Examined", (1976) 92 *Law Quarterly Review* 591 at 604-608; Zines, *Constitutional Change in the Commonwealth*, (1991), Ch 3; and *R v Transport Secretary; Ex p Factortame Ltd (No 2)* [1990] EUECJ C21389; [1991] 1 AC 603.

[432] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 622-623.

[433] The words "other than the aboriginal race in any State" were omitted after carriage of a referendum by s 52 of the *Constitution Alteration (Aboriginals)* 1967 (Cth).

[434] See also s 25 of the Constitution.

[435] Crump, "How Do The Courts *Really* Discover Unenumerated Fundamental Rights? Cataloguing The Methods of Judicial Alchemy", (1996) 19 *Harvard Journal of Law and Public Policy* 795 at 837-838.

[436] [1958] HCA 45; (1958) 101 CLR 536 at 550.

[437] See also *R v Smithers; Ex parte Benson [1912] HCA 92;* (1912) 16 CLR 99 at 108-109, 109-110; *Theophanous v Herald & Weekly Times Ltd [1994] HCA 46;* (1994) 182 CLR 104 at 166, 169.

[438] *Nationwide News* [1992] HCA 46; (1992) 177 CLR 1; *ACTV* [1992] HCA 45; (1992) 177 CLR 106.

[439] [1992] HCA 45; (1992) 177 CLR 106 at 212.

[440] [1995] HCA 46; (1996) 186 CLR 140.

[441] Unreported, High Court of Australia, 8 July 1997.

[442] [1992] HCA 46; (1992) 177 CLR 1.

[443] [1994] HCA 46; (1994) 182 CLR 104.

[444] [1994] HCA 45; (1994) 182 CLR 211.

[445] [1994] HCA 44; (1994) 182 CLR 272 at 328.

[446] 73 US 35 (1867).

[447] [1985] HCA 70; (1985) 157 CLR 290 at 303.

[448] *Miller v TCN Channel Nine Pty Ltd [1986] HCA 60;* (1986) 161 CLR 556 at 614-615.

[449] cf *Australian Communist Party v The Commonwealth [1951] HCA 5;* (1951) 83 CLR 1 at 175-176, 183-184.

[450] See *Wik Peoples v Queensland* (1996) 63 FCR 450 at 460-461.

[451] *Historical Records of Australia*, Series I, vol 19 (1923) at 252-255.

[452] Repealed by s 2 of and replaced by the other provisions of *The Aborigines Act* 1911 (SA).

[453] Amended by the *Aborigines Protection Act* 1886 (Vic) and repealed by the *Aborigines Act* 1890 (Vic).

[454] Repealed and replaced by the *Aborigines Act* 1897 (WA) and further replaced by the *Aborigines Act* 1905 (WA).

[455] Amended by the *Aboriginals Protection and Restriction of the Sale of Opium Act* 1901 (Q).

[456] Repealed and replaced by the *Aborigines Protection Act* 1909 (NSW).

[457] [1981] HCA 2; (1981) 146 CLR 559 at 603.

[458] See Cumbrae-Stewart, "Section 116 of the Constitution", (1946) 20 *Australian Law Journal* 207 at 211.

[459] [1943] HCA 12; (1943) 67 CLR 116 at 123.

[460] *Church of the New Faith v Commissioner of Pay-roll Tax (Vict) [1983] HCA 40;* (1983) 154 CLR 120 at 135-136.

[461] cf *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 at 878-880 (1990).

[462] cf *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 653; *Krygger v Williams [1912] HCA 65;* (1912) 15 CLR 366 at 369.

[463] *Australian Communist Party v The Commonwealth [1951] HCA 5;* (1951) 83 CLR 1 at 273.

[464] cf *Bank of NSW v The Commonwealth [1948] HCA 7;* (1948) 76 CLR 1 at 349; *Cole v Whitfield [1988] HCA 18;* (1988) 165 CLR 360 at 401; *Castlemaine Tooheys Ltd v South Australia [1990] HCA 1;* (1990) 169 CLR 436 at 472-474.

[465] *Kable* (1996) 70 ALJR 814; 138 ALR 577.

[466] *Chu Kheng Lim v Minister for Immigration [1992] HCA 64;* (1992) 176 CLR 1 at 33, 46, 58, 65, 71.

[467] *Chu Kheng Lim* [1992] HCA 64; (1992) 176 CLR 1 at 55.

[468] 63 & 64 Vict c 12 (Imp).

[469] [1958] HCA 14; (1958) 99 CLR 132 at 140-141. The distinction between those territories which were once parts of a State and thus addressed by covering cl 5, and external territories was also drawn by Fullagar J in *Waters v The Commonwealth [1951] HCA 9;* (1951) 82 CLR 188 at 192.

[470] *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 142 per Dixon CJ.

[471] *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 144. Webb and Taylor JJ agreed with Dixon CJ.

[472] *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 272 per Brennan, Deane and Toohey JJ; *Svikart v Stewart [1994] HCA 62;* (1994) 181 CLR 548 at 572-573 per Toohey J, 581 per Gaudron J; see also *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 242 per Barwick CJ.

473 [1965] HCA 66; (1965) 114 CLR 226 at 250.

[474] [1958] HCA 14; (1958) 99 CLR 132 at 153-154.

475 *Paterson v O'Brien [1978] HCA 2;* (1978) 138 CLR 276.

[476] [1994] HCA 62; (1994) 181 CLR 548 at 566.

[477] *The Commonwealth v Woodhill [1917] HCA 43;* (1917) 23 CLR 482 at 486-487; *Worthing v Rowell & Muston Pty Ltd [1970] HCA 19;* (1970) 123 CLR 89 at 124-125.

[478] *R v Phillips [1970] HCA 50;* (1970) 125 CLR 93 at 126; *Worthing v Rowell & Muston Pty Ltd [1970] HCA 19;* (1970) 123 CLR 89 at 126; and see *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898, vol 4 at 259.

[479] [1975] HCA 4; (1975) 132 CLR 164 at 169-170, 174.

[480] cf *Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51;* (1992) 177 CLR 248 at 276, 279, 286-287.

[481] *Capital Duplicators* [1992] HCA 51; (1992) 177 CLR 248 at 279.

[482] *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 142.

[483] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth [1943] HCA 12;* (1943) 67 CLR 116 at 123, 156-157; *Lamshed v Lake [1958] HCA 14;* (1958) 99 CLR 132 at 143; *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 250; *Teori Tau v The Commonwealth [1969] HCA 62;* (1969) 119 CLR 564 at 570; *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 576, 618, 621, 649; cf *Coe v Commonwealth of Australia [1978] HCA 41;* (1979) 53 ALJR 403 at 408; [1978] HCA 41; 24 ALR 118 at 129 and *Attorney-General (Vict); Ex rel Black v The Commonwealth [1981] HCA 2;* (1981) 146 CLR 559 at 593-594.

[484] *Capital Duplicators* [1992] HCA 51; (1992) 177 CLR 248 at 272, 279, 288, 290.

[485] [1958] HCA 14; (1958) 99 CLR 132 at 141-144, 153-154. Webb and Taylor JJ agreed with Dixon CJ.

[486] *Polyukhovich v The Commonwealth [1991] HCA 32;* (1991) 172 CLR 501 at 684-685.

[487] *Australian Communist Party* [1951] HCA 5; (1951) 83 CLR 1 at 193, 262-263; *R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10;* (1956) 94 CLR 254 at 275-276.

[488] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743 at 747, 750, 755-756, 764-765; 138 ALR 220 at 226, 230, 237, 249.

[489] In *Ffrost v Stevenson [1937] HCA 41;* (1937) 58 CLR 528 at 558, Latham CJ expressed the view that the effect of s 122 is that the Parliament has "exclusive power" within the meaning of s 52(iii), so that, by the operation of s 52(iii) in relation to s 122, the Parliament "would appear to have power to make laws for the Commonwealth with respect to the government of New Guinea". It is unnecessary to pursue this question in the present case.

[490] [1956] HCA 10; (1956) 94 CLR 254 at 290. The decision of the High Court was followed by the enactment of the *Conciliation and Arbitration Act* 1956 (Cth). Section 49 thereof deemed certain orders of the old Commonwealth Court of Conciliation and Arbitration to be orders of the new Commonwealth Industrial Court.

[491] [1915] HCA 13; (1915) 19 CLR 629.

[492] [1913] HCA 29; (1913) 16 CLR 315.

[493] *Spratt v Hermes [1965] HCA 66;* (1965) 114 CLR 226 at 275.

[494] See *Buchanan v The Commonwealth [1913] HCA 29;* (1913) 16 CLR 315 at 324, 333-334.

[495] *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd [1995] HCA 44;* (1995) 184 CLR 453 at 466-467.

[496] *LNC Industries Ltd v BMW (Australia) Ltd [1983] HCA 31;* (1983) 151 CLR 575 at 581.

[497] [1929] HCA 36; (1929) 42 CLR 582 at 585. See also Dixon CJ's remarks in *Chapman v Suttie [1963] HCA 9;* (1963) 110 CLR 321 at 329-330. Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 161-162 conclude that all the common law (including private international law) operating in a territory has a statutory basis.

[498] [1957] HCA 12; (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

[499] [1958] HCA 14; (1958) 99 CLR 132 at 142.

[500] [1965] HCA 66; (1965) 114 CLR 226.

[501] The authorities supporting that conclusion were later collected by Gibbs J in *Capital TV and Appliances Pty Ltd v Falconer [1971] HCA 10;* (1971) 125 CLR 591 at 627.

[502] [1971] HCA 10; (1971) 125 CLR 591.

[503] cf *Harris v The Queen [1954] HCA 51;* (1954) 90 CLR 652 at 655, where Dixon CJ, Fullagar, Kitto and Taylor JJ said:

"The jurisdiction of this Court to entertain the appeal arises, if not under the Constitution, at all events under s 64 of the *Papua and New Guinea Act* 1949-1950."

[504] [1971] HCA 10; (1971) 125 CLR 591 at 628 per Gibbs J; cf at 597, 600 per Barwick CJ, 602 per McTiernan J, 624 per Walsh J.

[505] [1956] HCA 10; (1956) 94 CLR 254 at 290.

[506] *Berwick Ltd v Gray [1976] HCA 12;* (1976) 133 CLR 603 at 608; see also *Capital Duplicators* [1992] HCA 51; (1992) 177 CLR 248 at 272, 288.

[507] *The State of South Australia v The State of Victoria [1911] HCA 17;* (1911) 12 CLR 667 at 676.

[508] See *Ex parte Goldring* (1903) 3 SR (NSW) 260, in which it was held, before the establishment of the High Court, that a State court had no power to grant mandamus against a federal officer.

[509] *Harris v Caladine [(1991) HCA 9;* (1991) 172 CLR 84.

[510] See *Harris v Caladine [(1991) HCA 9;* (1991) 172 CLR 84 at 139-140; Chemerinsky, *Federal Jurisdiction*, 2nd ed (1994), *SS*4.5.2.

[511] [1915] HCA 13; (1915) 19 CLR 629 at 637-638.

[512] *Leeth v The Commonwealth [(1992) HCA 29;* (1992) 174 CLR 455 at 469, 475, 486, 501 and see, generally, *Polyukhovich v The Commonwealth [(1991) HCA 32;* (1991) 172 CLR 501.

[513] [1937] HCA 41; (1937) 58 CLR 528 at 592.

[514] Mason, "The Limitation of Appeals to the Privy Council from the High Court of Australia, from Federal Courts other than the High Court, from the Supreme Courts of the Territories and from Courts exercising Federal Jurisdiction", (1968) 3 *Federal Law Review* 1 at 17. This followed from the view taken in *Parkin and Cowper v James [(1905) HCA 63;* (1905) 2 CLR 315 at 330-332 of the scope of the *Judicial Committee Act* 1844 (Imp) (7 & 8 Vict c 69); see *Carson v John Fairfax & Sons Ltd [(1991) HCA 43;* (1991) 173 CLR 194 at 212-213.

[515] The section thus dealt also with appeals from federal courts other than the High Court. The reasoning in the later decision *The Commonwealth v Queensland [(1975) HCA 43;* (1975) 134 CLR 298 at 314-316, 328, indicates that Ch III operated to limit the prerogative by extinguishing it in respect of matters arising thereunder, save for the preservation thereof in respect only of certain High Court appeals.

[516] The *ACT Supreme Court (Transfer) Act* 1992 (Cth) provided for the transfer of responsibility for the Supreme Court of the Australian Capital Territory from the Commonwealth to the Territory. Section 8 thereof inserted s 48D in the *Australian Capital Territory (Self-Government) Act* 1988 (Cth). The effect of this is that any enactment of the Legislative Assembly of the Territory relating to removal from office of a judicial officer must follow the particular procedures therein specified, including an adverse report by a judicial commission and determination by the Assembly that the facts so found by the commission amount to misbehaviour or physical or mental incapacity identified by the commission.

[517] [1971] HCA 10; (1971) 125 CLR 591 at 612.

[518] [1975] HCA 43; (1975) 134 CLR 298.

[519] *The Commonwealth v Queensland [1975] HCA 43;* (1975) 134 CLR 298 at 313-315, 327-329. See also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan [1931] HCA 34;* (1931) 46 CLR 73 at 116; *Harris v Caladine [1991] HCA 9;* (1991) 172 CLR 84 at 109, 120.

[520] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 141. See also *Kable* (1996) 70 ALJR 814 at 839, 844-846, 859-860; 138 ALR 577 at 611-612, 619-622, 639-641.

[521] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 19.

[522] *Western Australia v The Commonwealth* (*Native Title Act Case*) [1995] HCA 47; (1995) 183 CLR 373 at 486.