www.austlii.edu.au/au/other/hca/transcripts/1998/M35/1.html

The following is a high-lighted version of the transcript of proceedings heard in the ***High Court of Australia****,* ***Melbourne Registry*** *on the 15th of December, 1998.*

The matter is colloquially referred to as ***Joosse's case****.*
This transcript records the individual submissions as to law presented.

Please also note that the court adjourned at ***11:10am*** *and resumed at* ***11:30am*** *whereupon Justice Hayne delivered a judgement taking 29 minutes to read.*

Not bad for only 20 minutes preparation.

High Court of Australia Transcripts

Joosse & ANOR v Australian Securities and Investment Commission M35/1998 (15 December 1998)

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry

Melbourne No M35 of 1998

B e t w e e n -

WOLTER JOOSSE and JACQUELINE YVONNE JOOSSE

Applicants

and

AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION (formerly the AUSTRALIAN SECURITIES COMMISSION)

Respondent

Office of the Registry

Melbourne No M63 of 1998

B e t w e e n -

GAEL BURKE

Applicant

and

THE QUEEN

Respondent

Office of the Registry

Melbourne No M65 of 1998

B e t w e e n -

DR JOHN BOWERS

Applicant

and

J.T.ASKIN and I.R. GEARY

Respondents

Office of the Registry

Melbourne No M93 of 1998

B e t w e e n -

DAVID CHARLES YOUNG

Applicant

and

DEPUTY COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

Respondent

Office of the Registry

Melbourne No M95 of 1998

B e t w e e n -

DAVID KEYS AUSTRALIA PTY LTD and BELLHOP PTY LTD

Applicants

and

TEXTILE CLOTHING AND FOOTWEAR UNION OF AUSTRALIA

Respondent

Applications for removal pursuant to section 40 of the Judiciary Act 1903

HAYNE J

(In Chambers)

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON TUESDAY, 15 DECEMBER 1998, AT 9.35 AM

Joose & Anor v Australian Securities and Investments Commission was called.

MR W. JOOSSE appeared in person.

HIS HONOUR: Does the other applicant, I take it your wife, Mr Joosse, does she proposed to appear?

MR JOOSSE: She is not. She has given me an authority to appear on behalf of her.

MR D.M.J. BENNETT, Solicitor-General for the Commonwealth: If your Honour pleases, I appear with my learned friend, **MR P.J. HILAND**, for the respondent. (instructed by the Australian Government Solicitor).

HIS HONOUR: I will call the other matters in the list first before determining what course is to be taken.

Burke v The Queen was called.

MR J.D. McARDLE, QC: If your Honour pleases, I appear for the respondent in this matter. (instructed by the Australian Government Solicitor)

HIS HONOUR: Mr McArdle, the Registry received yesterday a note from Ms Burke which reads as follows:

As I had intended to represent myself tomorrow, I would ask if I can apply for an adjournment. Last night, Sunday night, I took a turn. This morning I have had an ECG at Frankston Heritage Clinic. I have been told to rest for 2 days, then return to the doctor for more tests. I enclose herewith my medical certificate.

Accompanying it was a certificate from Frankston Heritage Clinics. It may surprise you to know that I cannot read the name of the doctor. It reads:

This is to certify that Mrs Gael Burke attended this clinic on 14/12/98 because of illness and is/was unable to attend work/school from 14/12/98 to 15/12/98 inclusive.

I understand from the Registrar that Ms Burke was told that it may, perhaps, be in her interests to file an affidavit rather than the rather laconic medical certificate that has been provided. What attitude does the respondent take?

MR McARDLE: We would like to go ahead, your Honour.

HIS HONOUR: Yes. Well, perhaps we can deal with that presently. Call the third matter.

Bowers v Askin was called.

MR J. BOWERS appeared in person.

MR W.J. MARTIN, QC: If your Honour pleases, I appear with my learned friend, **MR T.S. MONTI**, for the respondents. (instructed by Berrigan & Doube)

HIS HONOUR: Yes, call the fourth matter.

Young v Deputy Commissioner of Taxation was called.

MR D.C. YOUNG appeared in person.

MR D.M.J. BENNETT, Solicitor-General for the Commonwealth. May it please the Court, I appear with my learned friend, **DR G.L. EBBECK** for the respondent. (instructed by the Australian Government Solicitor)

HIS HONOUR: Yes, thank you, Mr Solicitor. Yes, call the fifth matter.

David Keys Australia Pty Ltd & Anor v Textile Clothing and Footwear Union of Australia was called.

MR I.S. HENKE: I appear on behalf of the Company. Unfortunately, counsel for the company cannot be here today due to the notice we had.

HIS HONOUR: Yes. Now, Mr Henke, what office do you hold in - - -

MR HENKE: I am a director of the Company, sir, and I have an authorisation under the Company seal to appear.

HIS HONOUR: Yes, and is that for both companies, namely David - - -

MR HENKE: For both companies, sir.

HIS HONOUR: Yes, David Keys Australia and Bellhop.

MR HENKE: Yes, sir.

MR D.C. LANGMEAD: If the Court pleases, I appear for the Textile Clothing and Footwear Union of Australia. (instructed by Maurice Blackburn & Co)

HIS HONOUR: Now, subject to what the parties may say, I propose that all of these matters should be heard together; that in each matter I should hear, first, the applicant, thus, I would hear from each of the applicants first. I would then hear from the respondents. In the case of those respondents where you appear, Mr Solicitor, it may be that I will hear you once, not twice. My present inclination is that each party should be limited in the time for which it may make submissions. Subject to what the parties may say about it, I would intend that, given the ample written submissions that have been made and the degree of overlap of the issues that arise, that no party have more than 10 minutes in which to address.

It leaves aside the question of what is to happen in the matter of *Burke v The Queen*, and I will deal with that separately in a moment. But, for the moment, does any party desire to be heard about, first, my hearing the matters together; second, the fashion in which I propose to hear them, namely all applicants first followed by all respondents, then it may be that applicants would have an opportunity to reply; and, thirdly, concerning the limitations of time that I propose? Do any of the applicants wish to be heard to say anything about those proposals. No? Do any of the respondents seek to be heard on those issues? Mr Solicitor?

MR BENNETT: Your Honour, I have a preference for each party having 15 rather than 10 minutes, but subject to that minor detail, we would agree with everything your Honour says.

HIS HONOUR: No doubt, if any party seeks further time, that application can be made and will be dealt with according to the then state of play. For the moment, each party should order its affairs on the basis that 10 minutes is the allotted time.

Now, Mr McArdle, the matter of Ms Burke. What do you say I should do, given the state of correspondence that I have from Ms Burke?

MR McARDLE: Your Honour, if I might offer this, which I do not think is a direct response to your Honour's question: her indisposition is news to me. I knew nothing of it until the Deputy Registrar mentioned it to me this morning. What I would like to do with your Honour's permission is to have someone check and see if there has been further communications with the Office that I represent, which is only a few minutes away, and see if Ms Burke has sent some material there that might throw some further light on the matter. Up until now, I know nothing of that but, subject to your Honour's views, it is worth a check.

HIS HONOUR: Well, then, the course I will adopt, Mr McArdle, is simply to stand No 2 in the list, *Burke v The Queen*, over and deal with matters 1, 3, 4 and 5, in that order. If, in the intervening time, it appears that you can obtain instructions that might bear on it, if you would be good enough to mention it at a convenient time and it may be that the matter can then be brought back into the list as the matters are happening.

MR McARDLE: Yes. In any event, your Honour, if it is your Honour's decision to proceed with the matter, I doubt very much if I would be adding very much to what I anticipate my learned friends will be saying. There is, I suspect, a good deal of overlap, as your Honour has observed in relation to these applications. If your Honour pleases.

HIS HONOUR: Yes. Thank you, Mr McArdle. The parties should also be aware of the facts that I have read the papers that have been filed; I have read the submissions that have been filed. The present inclination of my mind is that although there are differences, I think perhaps slight differences, in the ways that each applicant puts the matter, it may be appropriate - I emphasise "it may be appropriate" - to treat the matters on the basis that any of the arguments made by any of the applicants is open in support of any of the applications. That is to say, my present inclination is that the matter should be treated, in effect, as the highest common factor of all arguments.

I doubt that that imposes unduly on respondents. I suspect that every respondent's representative is presently sitting thinking, "How do I deal with things of which I am unaware?" That is a problem that we will simply have to cope with as best we may, is it not? Now, Mr Joosse.

MR JOOSSE: Your Honour, before I commence, I wish to formally complain once again about the lack of notice that was given to us in regards to the hearing of today. It is surely unfair to suggest that in five working days we can secure senior counsel to appear before this Court. I mean, senior counsel of our choice. We had several QCs willing to argue the matter before your Honour but because of the lack of delay they are detained elsewhere. I do hope that the lack of notice does not reflect the attitude of this honourable Court to the important matters raised in this notice of motion. I respectfully suggest that it would have been in the best interests of all of us here, had we been represented by senior counsel.

HIS HONOUR: Your notice of motion was issued, I believe, on 20 May of this year, was it not, Mr Joosse?

MR JOOSSE: That is right, sir, but we only received notice of this hearing with five working days to give notification of the person that would apply before this honourable Court today.

HIS HONOUR: Yes.

MR JOOSSE: Your Honour, this notice of motion raises a number of very serious questions as a result directly from several historical facts and took place during the history of this great nation. Some of the more significant questions raised are those that relate to the signing of international treaties by the Commonwealth. Pursuant to international law, the signing of these treaties changed the status from a dominion under British colonial law to the sovereign nation and required obvious constitutional changes.

It is our claim that these constitutional changes never took place. In contrast to the respondent's arguments, we do not rely on precedents or opinion only but this notice of motion deals mostly with historical and legal facts. There is no doubt that the Acts to Constitute the Commonwealth of Australia 1900 (UK) which we are gracefully are allowed to cite by its short title as the *Commonwealth of Australia Constitution Act 1900* by section 1 of the Act is an Act of the Parliament of the United Kingdom, and there is no doubt that all the executive powers defined under section 61 of the Act are those of her Majesty, the Queen of the Sovereignty of the United Kingdom as per section 2 of the Act.

Sir, we have here an official copy of the Hansard dated Wednesday 10 September 1919 which is actually the speech that Prime Minister Hughes, at the time, when he addressed the Parliament of Australia in Federal Parliament here in Melbourne, to ask them to assent and to adopt the Treaty of Versailles and the covenant of the League of Nations. Your Honour, I have a spare copy here for you. I would direct you to some paragraphs.

HIS HONOUR: Mr Solicitor, are you content that I have this?

MR BENNETT: Yes, your Honour.

HIS HONOUR: Yes, thank you.

MR JOOSSE: Sir, I direct your attention to page 12169. Here Prime Minister Hughes says:

By this recognition Australia became a nation, and entered into a family of nations on a footing of equality.

This is a direct acknowledgment that Australia was no longer a dominion subservient to the Crown of the United Kingdom.

If I may draw your attention to page 12173, and halfway down the page, on the right side, in the left column, it reads:

We in Australia are not bound by the terms of that Treaty unless we ratify it. I ask this Parliament to ratify it.

He goes on to say - in any event, history shows that Parliament deliberated over the matters put to the Parliament for four days and at the end unanimously adopted both the Peace Treaty and the covenant of the League of Nations, and by doing so the Parliament accepted the terms and conditions that were set out within the covenant.

Your Honour, this notice of motion is of the interest of all and, indeed, the respondent should actually join in support of this notice of motion and allow this honourable Court, which is the only Court that can deal with these issues, the chance to rectify which has been wrong for so long. Under international laws, the laws of one member State of the United Nations cannot apply in another member State without the reciprocal Treaty in place which has been duly registered and advertised and without such Treaty infringing on the sovereignty of the State and such Treaty does not exist.

In fact, any supposed law which contravenes either the covenant of the League of Nations or the United Nations Charter is deemed to be ultra vires since independence of this great nation by way of

emancipation shows no break in continuity of laws and no doctrine such as the law of State succession was ever implemented and the continuation of colonial law is in breach of the UN Charter by definition of Articles 2, 4, 102 and 103, and also with the Geneva Convention 4 of 1945.

HIS HONOUR: And what is the colonial law that you there refer to?

MR JOOSSE: I am talking about the Act of Parliament that is known by its full title as the Act to Constitute the Commonwealth of Australia 1900 (UK) which is allowed to be cited by its short title, the *Commonwealth of Australia Constitution Act* .

Sir, there seems to be a misunderstanding that these events did not take place, but here we have from Hansard a speech which was made on 10 September 1919 by the Prime Minister who was, at the time, also the Attorney-General of the Parliament, a person well-acquainted with the laws of this country and international law and within this quite unique forum of a court, called the Parliament or House of Representative, he asked all members to adopt the terms which are written under the covenant of the United Nations.

Now, under Article X of the United Nations it states that all the signatories are sovereign States.

HIS HONOUR: I think you have referred to the United Nations. Are you, perhaps, referring to the League?

MR JOOSSE: Actually, sir, also there are very, very similar references in the covenant. If I just bring this out for a moment. Anyway, I did not bring a copy, your Honour. Actually, Prime Minister Billy Hughes actually also mentioned to the Parliament - he said, on page 12171:

The League of Nations comprises at the outset some thirty-two nations, including the Dominions of the British Empire and India, and we have signed the covenant as separate nations.

Here, again, is an acknowledgment that we were not a colony but we were a sovereign State.

There is absolutely no doubt that 1919 is the year in which this great nation obtained independence. This is ratified later on in a document which was put to the Parliament - I have an extract here. It comes from a publication called "Trick or Treaty". It is written by the Senate Legal and Constitutional References Committee. It was written in 1995 and passed on to the Parliament which adopted it, and I would draw your attention to paragraph 413:

After the First World War, Australia was separately represented at the Peace Conference, and the Dominions began to exercise greater powers in the area of external affairs. Australia became an independent member of the League of Nations and the International Labour Organisation in 1919.

And it goes on to say:

In both these fora, the Dominions were given separate votes.....This admission to the League and the International Labour Organisation involved recognition by other countries that Australia was now a sovereign nation with the necessary `international personality' to enter into international relationships.

Now, this document was written again and passed through the Parliament some 76 years after with the same conclusion that Australia became sovereign in 1919. Sir, we know the dates; we know the reason why; we can, without a shadow of a doubt, identify the moment when Australia became independent.

HIS HONOUR: Let it be assumed, for the purpose of argument, that 1919 is the first time that the international community dealt separately with Australia. What is the consequence of that fact for Australian domestic law when covering clause 5 of the Constitution says that:

This Act -

that is to say, the Constitution -

and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State -

What is the significance that is to be attached to the international dealing?

MR JOOSSE: Sir, the significance is that the Act actually breaches the Covenant of the League of Nations. Article XX of the covenant states very clearly that if there is any international agreement in place prior to the signing of the Charter, it is the obligation to undo this. Also, I wish to invite your Honour - the Act is an Act of the Parliament of Westminster - - -

HIS HONOUR: Yes, I understand that.

MR JOOSSE: - - - which the High Court has already ruled to be a foreign power.

HIS HONOUR: Well now, your time is moving on, Mr Joosse. I have distracted you in some respects.

MR JOOSSE: Yes. If I may quickly make a comparison to the recent event in Hong Kong where Hong Kong island actually, at all times, was British territory - sovereign British territory - and the only leased areas were the new territories and the Kowloon side. One minute before midnight we had a British Queen, we had a British flag and we had British law. One minute past midnight, all that was gone because by the definition of "international law" you cannot apply the sovereign laws of one nation within the borders of another sovereign nation.

HIS HONOUR: Yes. Is there anything else you wish to add?

MR JOOSSE: I must apologise that we are so badly organised but, as I said, had we had a Queen's Counsel here, it would have been much more convenient for the Court as well.

The only other thing that I want to conclude on, your Honour, is this notice of motion is not anti-government; it is not anti-judiciary; it is not anti-authority, but it is an effort to bring to this honourable Court an opportunity to correct a wrong, a wrong that has been allowed to last for so long for the benefit of so few, an opportunity to allow this wonderful nation to proudly celebrate its date of independence, January 10, 1920 being the date that officially is noted elsewhere, and give this nation its sovereignty and political independence which was won for us by the heroic efforts of our diggers in World War I and give us an open and honest system supported under international law.

HIS HONOUR: Yes. Thank you, Mr Joosse.

Dr Bowers, can you come forward. I wonder if room might be made for Dr Bowers at the table, please.

MR BOWERS: I am quite happy to stand here, your Honour, if that is okay.

HIS HONOUR: Yes, of course, but the members of the Bar will be good enough to make room for a litigant in person.

MR BOWERS: My name is John Bowers and I am appearing before the Court on my own behalf. I also did not have a great amount of time to organise legal counsel and I wish to bring that point to your Honour.

There are three major issues of contention that come from my case. The first being certain events took place which gave Australia independent sovereignty long before legal convention accepts the transformation took place. The argument by my opposition, basically, is that these events did not occur, but if you refer to Hansard, as was reported by Mr Joosse, previously, when as Prime Minister and Attorney-General, William Morris Hughes, in the House of Representatives, on Wednesday 10 September 1919 asked for the assent of the Treaty of Versailles. The salient points were speeches central to the propositions I have placed before this honourable Court today. The same paragraph on page 12169, paragraph 2, the Prime Minister states:

By this recognition Australia became a nation, and entered into a family of nations on a footing of equality.

At page 12170 he cites the fact the Treaty contained:

within itself the covenant of the League of Nations.....and is the foundation upon which the Labour Charter rests -

this being the origin of the ILO.

At page 12171, paragraph 2, the Prime Minister then states:

But there are other guarantees for the world's peace. One of these is the League of Nations. The League of Nations, to which all those who signed this Treaty set their seal, and which, by acceptance of this Treaty, you adopt, is a League of free nations, which bind themselves together to preserve the peace of the world -

and at page 12171, paragraph 3:

The League of Nations comprises at the outset some thirty-two nations, including the Dominions of the British Empire and India, and we have signed the covenant as separate nations.

Page 12173, paragraph 2:

We in Australia are not bound by the terms of that Treaty unless we ratify it. I ask this Parliament to ratify it.

At page 12174, paragraph 2, in reference to the islands of the north of Australia and the granting of a "C" Class mandate over New Guinea and other islands, he said:

Those, of course, were conditions so entirely acceptable to us that they were not limitations at all on the sovereign power which was necessary for our salvation.

HIS HONOUR: Sorry, that is 12174?

MR BOWERS: Yes, 12174, paragraph 2, your Honour.

In the single speech, the Prime Minister clearly lays down the event which made Australia a sovereign nation; that the Parliament in voting to ratify the Treaty agreed to be bound by it. After a debate of four days, the Treaty was ratified unanimously. Yet my opponents have submitted to your Honour that no significant event occurred which substantially or otherwise changed Australia's sovereign status. On this basis they argued there was no legal or political change. However, the Parliament and the executive obviously did not share their view.

Immediately following on their assent to the Treaty, Australia joined the International Labour Organisation as a sovereign State. It passed a New Guinea Bill creating civilian government in that

region and even military rule. It signed a second Treaty, the Washington Naval Treaty, also signed by Great Britain, and it commenced appointment of diplomatic representatives to other nations, an activity not open to the colony we had been until World War I. But within Australia the legal profession insisted that alone, among nations, Australia has gone from colony to independence without any legal change. It is argued that uniquely Australia is and can still be governed by the law of an alien power unmodified by the events of history.

It is in that power which is decreed in the *Immigration Act 1972* in the UK that all Australians are aliens. As I understand it, this honourable Court has never considered the question to the effect of the Treaty of Versailles upon subsequent events. I ask the Court to now carefully consider these issues in the same spirit it considered the question of native title, undeterred by allegiance of precedents based on erroneous concepts which preclude the idea and eventually swept away those erroneous precedents.

Two other things, basically, that I would like to bring to your Honour's attention. There was some argument that the Constitution was derived from the wishes of the Australian people. A quote found in Chambers's Encyclopaedia, volume 6, 1925 edition, and I will quote, if it please the Court. There is a copy here, if your Honour pleases:

Efforts made by the British government in the 1850s to introduce some form of federation failed entirely. During the 1880s problems of external policy which affected most of the colonies equally began to need instant attention. The immigration of Chinese; troubles with France over the convict population of New Caledonia and with Germany over the division of Eastern New Guinea which Queensland had annexed en blanc only to find her action disavowed by the home government and a growing sense of Australia's defensiveness, all enforced a necessity for a unification which was quite impossible to six mutually distrustful colonies.

I think this clearly points out that the United Kingdom was pushing federation, not necessarily the Australian people were doing it. Basically, it was coming from - the Australian people being British subjects at the time anyway.

HIS HONOUR: Central to the Constitution is, of course, that it is the people of the named colonies that agree to unite in one indissoluble federal Commonwealth.

MR BOWERS: Yes, your Honour. Also, I would like to also point out on that point that the actual draft Constitution - the total number for the draft Constitution was 219,712 and against the Constitution was 108,363. This was based on a property - a franchise was on a property basis to British citizens alone. Some voters exercised as many six votes. A total of British citizens casting votes for referendum appears to be in the order 240,000 which, at the time, was 6.4 per cent of the population and excluded Western Australia. So most men and women actually did not vote in the referendum at the time, considering the total population was 3.7 million.

Can I also bring to the Court's attention too, please, in the respondents' summary of arguments presented by the other counsel, on page 5, that they presented to me - it was drawn up on 23 November:

The respondents are of the view that the nature and prospects of the motion are not such as to warrant oral argument.

How does that apply in the Court, sir?

HIS HONOUR: Well, the fact is we are having the oral argument now, are we not, Dr Bowers?

MR BOWERS: Yes.

HIS HONOUR: Yes, thank you. Is there anything else you wish to add?

MR BOWERS: No, thank you.

HIS HONOUR: Thank you very much. Mr McArdle, do you want to mention the position with Ms Burke?

MR McARDLE: Your Honour, simply to report to you, if your Honour has not already heard, that Ms Burke is now represented by Mr Gillespie-Jones of counsel.

HIS HONOUR: Indeed. Is that right, Mr Gillespie-Jones?

MR S. GILLESPIE-JONES: Yes. I got an extremely late brief, your Honour. (on behalf of the applicant Burke)

HIS HONOUR: Are you to argue or to apply for an adjournment or what?

MR GILLESPIE-JONES: What I am instructed to say to your Honour is that my client is ill and wishes to rely on her written submissions and join the other applicants in their submissions. Aside from that, I do not wish to supplement the application by oral argument.

HIS HONOUR: Yes. Thank you, Mr Gillespie-Jones. Now, Mr Young.

MR YOUNG: Your Honour, I am David Young, and today, sir - I have a slight speech problem and I would request the Court that I would like someone else to read my notes if that is at all possible.

HIS HONOUR: Yes, who do you propose should read your notes?

MR VARSZEGHY: Your Honour, my name is Zoltan Varszeghy. I have been asked by Mr Young as his friend to read this document to you, if that is possible?

HIS HONOUR: Mr Varszeghy, you may read the document. I would have, I think, to reconsider the position were you to seek to add to it, supplement it, or take on the role of advocate. Now, what is the position?

MR VARSZEGHY Sir, it is only to merely read the document at Mr Young's request.

HIS HONOUR: Yes. Well, you may have leave to do that. If you seek to do more than that, I expect to be informed.

MR VARSZEGHY: Yes, your Honour.

HIS HONOUR: Yes, do come forward.

MR VARSZEGHY These are Mr Young's notes for the record. The applicant submits that the respondent's argument fails to address the historical and legal precedents cited in support of the removal and that the removal should be allowed. The consequence of Australia's signing of the Treaty of Versailles are set out in the speech of Prime Minister Hughes to the Commonwealth Parliament of 10 September 1919 as set out in Hansard. I present a copy of the speech from the parliamentary record held by the National Library of Australia.

HIS HONOUR: Given that I have it, Mr Varszeghy, I think that is unnecessary if you are referring to the Hansard of 10 September 1919.

MR VARSZEGHY I assume that to be correct, your Honour. The respondent fails to recognise that the events detailed by Prime Minister Hughes had significantly changed the basis on which developments in national law could proceed and this changed basis has not been recognised by the legal profession. The

events of 1919 means that the developments in Australian constitutional jurisprudence concerning popular sovereignty are erroneous and based on a mythical continuance of British law after 28 June 1919.

As a consequence, the respondent clings to views of legal events which are invalidated by historical facts. The speech by Prime Minister Hughes clearly defines the "event" which the respondent claims did not take place. It is now incumbent upon the respondent to produce evidence which shows the Prime Minister, who was also the Attorney-General and a trained lawyer, did not understand the great events which he had taken part and was wrong in his public pronouncements of the meaning of the "event".

Further, the respondent must produce evidence that the Parliament did not agree to be bound by the Treaty and the covenant as evidenced by the Hansard report. Whilst it is clear that imperial statutes continued to apply after Australia attained sovereignty, that the continued application was in fact a breach of that sovereignty and ultra vires.

The vote of the Parliament on 16 September 1919 to specifically adopt the covenant of the League of Nations meant the Parliament had agreed to be bound by all the articles including Articles XVIII and XX. I have already set out the position as an international arrangement of the Statute of Westminster Adoption Act 1942 and its failure to comply with the requirements of Article XVIII.

Since the rest of the civilised world had accepted Australia's position as a sovereign nation and honoured that position by the election of Dr H.V. Evatt as the first President of the General Assembly of the United Nations, they agreed to sign treaties with Australia as a sovereign nation. **The respondent's contention that the United Kingdom retained sovereign authority over Australia's laws until 1986 means that most of the 4,000 treaties signed by Australia are therefore null and void since we possessed no sovereign authority.**

At the very least, the ruling of the International Law Commission applies, ie:

The law of one member State of the United Nations may not apply within the territory of another member State except via a reciprocal treaty. Such a treaty must not infringe the sovereignty of either member State.

Since both Australia and Great Britain are member States and no reciprocal Treaty exists, then the continued application of imperial law in Australia is a breach of the United Nations Charter and renders both countries liable to be ejected from the United Nations under its Article VI.

The Solicitor-General of South Australia, in his discussion paper No 3, titled, "A Minimal Republic and the Role of the Crown", at page 1, paragraph 3 says:

The effect of all this is that the Queen of Australia is a separate legal person and a separate sovereign from the Queen of the United Kingdom, although the same person wears both crowns.

This paper and opinion were published by the Commission set up by the South Australia Government to examine the potential effects of a republic on South Australia. It is therefore clear that eminent legal opinion in Australia does not all agree with the respondent's view. In fact, the *Royal Style and Titles Act 1953* was passed in response to the Royal Style and Titles Act 1953, United Kingdom, which required all dominions which retained a loyalty to the Crown to pass their own Acts since the United Kingdom no longer had sovereign authority to impose the titles on the dominions.

Under the provisions of the Act of Settlement 1701 the title of Sovereign of the United Kingdom was by legislation removed from the rightful heirs and successors merely by reason of their adherence to the Roman Catholic faith. The current sovereign therefore does not hold the throne by right of the divine right of kings but by legislation of the Imperial Parliament and could be removed from the throne simply by repeal of that Act. It therefore follows that the sovereignty

seeking to be inflicted on Australia by the respondent ultimately rests upon a foreign parliament and is in conflict with the undoubted sovereignty of the nation of Australia.

Since two sovereignties cannot exist over the same territory, either that of the people as already ruled by this honourable Court or that of the Imperial Parliament as exercised by the Queen must be removed.

If all the arguments presented by the respondent depend upon the events of 10 September 1919 through to 16 September 1919 not having occurred, the respondent's contention that the Constitution is the instrument by which the Australian people have consented to be governed is a direct lie. The only mechanisms allowed to the Australian people to pass judgment on the Constitution were the referendums of 1898. The historical record is instructive. Across the four colonies taking part, 218,000 votes were cast for the draft Constitution and 110,000 votes were recorded against the proposition. However, the voting laws only gave the vote to persons with land in excess of 121 acres or with an income in excess of certain limits.

Multiple votes were allowed on the basis of larger land holdings or income with some persons having up to six votes. The census of 1901 showed Australia's population to be 3.773 million. The result is that 4 per cent of Australia's population voted for the Constitution, 2 per cent voted against it and 94 per cent were not allowed to vote at all. The contention that the Constitution represents the will of the Australian people is demonstrably false.

Finally, let me turn to the jurisdiction of this honourable High Court. The application for removal submitted by me specifically deals with the "red herring" introduced by article 26 of the respondent's reply. I do not contend, and I have not contended, that all the Constitution is invalidated, simply those parts where either the construction or execution conflict with the undoubted sovereignty of the Australian people. The existence of the Court clearly creates no such conflict.

Whatever the origin of the High Court, its role as a protector of the people's rights remains. However, the people not at any time formally conferred their sovereign rights upon the Parliament or Executive Government but in so far as these bodies do not try to remove or damage these sovereign rights, then their continuance is not an affront to sovereignty.

However, some arms of Executive Government such as the respondent have clearly usurped to themselves rights which belong to the people without lawful authority. There is therefore no question about whether the High Court has jurisdiction in this matter. It is only being asked to pass judgment on the meaning, the continuance and the action of some sections of the Constitution as it has been rightly asked the same questions many times before and has answered. That is the end of the submission, your Honour.

HIS HONOUR: Yes, thank you, Mr Varszeghy. You may return to your seat. Mr Young, is there anything that you wish to add?

MR YOUNG: No, sir.

HIS HONOUR: Yes, thank you, Mr Young. Now, Mr Henke.

MR HENKE: Your Honour, many of the arguments that have been presented to you this morning in fact parallel those which the Company would put before you and would have been put before you by counsel for the Company had they not been otherwise engaged, (a) before another sitting of this Court elsewhere and also before a court in Cairns.

However, there are a number of key points that I would like to add to what has been done already. The first is that none of us are seeking the end of the rule of law or the construct that we have as a nation. Some of us have a very proud history. My own great grandfather was, in fact, the first Australian ever to be given an award for valour in battle on behalf of Australia. The fact of it is, however, that we have

reached a point where there are certain consequences to the events that took place; firstly, at the Imperial Conference of 1917, and this is a matter that has not been mentioned. At the Imperial Conference of 1917 Resolution IX, in fact, called for a rearrangement of the constitutional arrangements of the Empire but deferred so intricate and complex a task until after World War I, and the fact remains that that rearrangement has not been made in accordance with the definition as required by Resolution IX.

Resolution IX went on to define that in fact that rearrangement was to be made on the basis of the autonomy of each of the separate components. So that when the recognition came that has been the subject of this morning and which has been the subject of Prime Minister Hughes' speech on 10 September, it was as a result of a direct ruling and assumption by the Imperial Government that they had decided to do so.

If we look at that period of time we find that the enactment of independence which followed - the pattern which followed World War II was not yet in place. The freeing of colonies had until then been by revolution. In fact, this is probably the first notice of a colony which was freed by emancipation. This brings me to the nature of the Constitution. The writings of Quick and Garran in the Annotated Australian Constitution make it quite clear that the Constitution was a Constitution for a colony. It was not a Constitution for an independent nation.

So, when we reach the end of being a colony, there were, inevitably, certain legal consequences that followed. But what we have had over all of the years is a decision by the legal profession generally that that transition from colony to independent nation had no legal consequences, whatever. Now, I just find that how can Australia, alone amongst 149 of former colonies in the United Nations, be the only country whose legal system suffered no change at all in that transition.

It defies imagination that we alone are the one who when, under the terms of Professor D.P. O'Connell of London University, writing in his International Law volume 1, said that there are five forms in which sovereignty changes: cession, annexation, emancipation, union or federation. But he goes on to say that whatever the form of the change of sovereignty there is a break in legal continuity.

It has been the normal situation in the legal profession in Australia to hold that Australia only became independent somewhere between World War I and World War II and in the light of the clearly identifiable public events which we have cited before the Court this morning, one wonders why that would be so until you recognise that the identification of an event also identifies a time and also identifies the point at which the break in legal continuity occurs.

Now, there is nothing whatever that we believe that the Australian people could not have done. We believe that had the Australian people been asked in 1919 and 1920 to readopt the Constitution with alterations to account for Australia's sovereignty, I personally feel that that would have been done despite the votes of the anti-conscription referenda of 1916 and 1917 which was the reason why we believe, historically, that this was not done. However, the fact of it is the Australian people could have adopted and continued to adopt the laws that they were governed under. But the fact remains is they were not asked and no document of sovereignty empowering the Parliament exists. The people have never been asked to give that permission.

The elections that have been held over the years since have been held without informed consent. They have been held without the people being informed that in fact there were very significant changes that they could demand to safeguard their rights.

This brings us, probably, to the final point. In this context when this Constitution was first published, when it was first written, there was no need within it to safeguard the human rights of Australians. They were safeguarded under other British law and other British legislation. In this context, the change that occurred in 1919 and events subsequently which, in fact, have shown us

that we no longer have the protection of many of those British civil rights, has indicated why such a change was necessary to take place in 1919 when Australia became independent.

It has been the practice, and I believe the very honourable practice of this Court over the last few years to, in fact, go back and look at some of those rights and to re-establish that they in fact do have a prima facie existence but the fact is, is the reason the Court has had to do that because the transition was not made in accordance with the law of State succession to allow this to take place?

There is probably one other matter which was raised in Mr Young's argument and whilst I do not propose to follow it very far here, the question of the 1701 Act of Settlement has already been raised in the United Kingdom as having been contravened by their own Equal Opportunity and Anti-Discrimination Act, and since it discriminates against a line of the Royal Family simply by reason of its Catholicism, there is reason to believe that this recent enactment by the United Kingdom, in fact, may well invalidate that 1701 Act of Settlement. Now, that is not to be argued here.

However, there is one final issue. **If Australia did not become independent in 1919, then the war reparations paid to us as a nation, a sum of [sterling]100 million, according to the Prime Minister, becomes repayable, with interest, at current rates. I am informed that the Commonwealth has already looked at this question and is of the view that in fact it could bankrupt the Commonwealth** were we to go back to a situation where we were to say that the Parliament was wrong, that the Parliament in reaffirming its view was wrong and that Australia was not an independent nation.

In this context, and this context alone, your Honour, we are in a situation where we are agreeing with the Parliament. We are simply taking the view that the Parliament was right. We are simply taking the view that the High Court was right in the *Australian Capital Television Case* when it said that not only that sovereignty was the peoples but when it also said that the Constitution is not a supreme law arising from the inherent right of the people. The argument we put before the Court is that when there is an inherent sovereignty which has been recognised and when a document exists which has its uses but also has its faults, that when there is a clash between sovereignty and that document, then it is the document which must yield. The document is not a supreme document and the High Court has already ruled that that be so.

So, what we are asking in this context is that this principally be recognised yet again and it is my understanding, your Honour, that today in Canberra, before another of your brother Justices, that the very question of Australian sovereignty is being argued yet again in that forum in relation to the ACT Government.**MR HENKE:** So, consequently, there is a considerable amount of evidence which we have produced and there is much more which we have not put before the Court. The events are clear. The denial of the events is the problem. And it seems to us that the reason for the denial is to deny the break in legal continuity and we ask this Court to deal with that matter. Thank you, your Honour.

HIS HONOUR: Thank you, Mr Henke. Mr Solicitor, is there any reason why I should hear you more than once; that is, should you not now present your submissions in relation to both matters in which you are engaged?

MR BENNETT: No reason, your Honour.

HIS HONOUR: Thank you.

MR BENNETT: Your Honour, I propose to make some general submissions as to the course which we ask your Honour to take and then to deal very briefly with each of the six points we have made in our submissions. Your Honour, it will be our submission that the arguments put by the applicants are totally without legal merit and, indeed, not seriously arguable. For that reason alone the applications for removal should be refused. In addition, one of our points is that they do not arise under the Constitution or involve its interpretation of the meaning of section 40. However, the number of these applications, both before your Honour and elsewhere, and the number of cases in which these arguments are being

raised, are such that it is a matter of importance that there be a judgment authoritatively dealing with them. We therefore ask your Honour to take the slightly unusual course of delivering a judgment on the merits, or on the merits of the application, and we ask your Honour to hold that the arguments simply are without legal merit.

The six points in our submissions are numbered (a) to (f) and (a) has two parts.

HIS HONOUR: Yes, I have read those, Mr Solicitor. What is it that you seek to add to them?

MR BENNETT: It is not so much to add, your Honour, as simply to explain a couple of them in a little more detail, if I may. Your Honour, the major point appears in paragraph 9, that is the short simple argument to all these applications. It is based, of course, on the decision of the High Court in *Mabo* and, indeed, also *Fejo*. And it is the very simply proposition that if what is said is correct, if notwithstanding all the other arguments there was a moment in about 1919 when sovereignty was conferred on Australia, it has to be by cession. That has to be the characterisation of the various ways.

HIS HONOUR: If I may say so, Mr Solicitor, that seems to me to be the minor premise of the argument and I am astonished that you should spend time on the minor premise rather than the major premise which is what is meant by sovereignty in this context. Sovereignty relevantly might be thought to be concerned not so much with the status of this country in international relations but the question of what laws govern within this country. This, I would have thought, is an entirely minor premise.

MR BENNETT: Your Honour, we would not dispute what your Honour has just said. But if I could just complete the point, because it is very short, the minor premise is that if that is right, nevertheless the effect of cession is that existing laws continue until repealed, including the Constitution. That is said in the passage in Blackstone quoted by Justice Brennan in *Mabo* at page 34 point 9, it is said by the other Justices in the passages we have cited, and it is in effect adopted in *Fejo*. That really is a short answer, regardless of the major premise.

The other part of (a), of course, is the major premise which is - - -

HIS HONOUR: One would have thought that the Commonwealth would be much more concerned with the major premise than some minor premise, Mr Solicitor, but there we are. That is a matter for you. Go on.

MR BENNETT: It is, your Honour. It was shorter and easier to argue, your Honour; it was nor more important.

In relation to the major premise, it is simply a question of the use of the word "sovereignty" and the argument is circular. We submit that it is quite clear from the legislation and cases we have cited that there was in Australia, as in Canada - Australia is not unique in this respect - a continuum. There were a series of events which cumulatively, without any doubt, by the *Australia Acts* of 1986 conferred sovereignty and which, in 1901 probably did not do so. The exact point at which it occurred is not, we would submit, of significance. But the fact that a person may, by dint of academic argument, take a point and say, "At that point there was sovereignty" - - -

HIS HONOUR: But, again, it turns on what is meant by "sovereignty" in this context and there is a deal of writing. One begins from Hart, one goes through Wade's absolutely seminal piece in 1955 Cambridge Law Journal, Winterton has written on it, and what emerges with stark clarity is that the word "sovereignty" is bandied about by many lawyers without understanding the context in which it is being used. Sovereignty in international law is one thing. But the question we are concerned with, at least at the moment, it seems to me, is not a question of Australia's international status; it is concerned with what laws bind within Australia. The attack that is made, as I understand it, in each of these applications is an attack on the validity of certain laws. The question is: do those laws bind? Now, you can analyse that in terms of sovereignty if you like, but sovereignty is a very slippery concept.

MR BENNETT: Your Honour, I hope that is a more precise way of putting what I was attempting to put. The submission is simply that one cannot take the word "sovereignty" and say, "Because sovereignty in the international sense occurs at a particular point, that has any particular domestic relevance in relation to the validity of laws." Indeed, the question whether true sovereignty in the internal sense occurred at a particular date depends upon the legal continuum and the point at which laws have an effect. Obviously, 1986 was the last removal of the final vestiges. Whether one says that before that there was sovereignty is a matter of political debate and different views are taken. But assuming that sovereignty is being used in the internal sense, one simply does not answer the question by saying it occurred at a particular point, because one has first to ask the question, what was the law and what was the source of law in Australia at that point.

HIS HONOUR: Again, it seems to me at the moment that covering clause 5 assumes a particular significance. Constitutional laws made under the Constitution are binding on, et cetera.

MR BENNETT: Your Honour, that is, we would submit, very clear. The *Royal Styles and Title Act 1958* - all I want to say about that is it is something which is merely like an interpretation Act. It lays down a description rather than change the nature of anything. If your Honour looks - I will not take your Honour to it - but the case we have cited in paragraphs 12 and 13, the *Indian Association Case*, your Honour will see numerous references in that to the fact that although in the 18th century it was assumed that the Crown was one and indivisible, it had become clear by the late 19th century that the Crown was divisible and one could have the Crown in right of Canada, the Crown in right of Australia, and so on, and the *Royal Styles and Title Act* merely recognised that. We simply commend those passages to your Honour pointing out in respect to what Mr Henke said that Australia is not the only country in this position. Canada is in an almost identical position, if one follows through its history.

The third area, the relationship between international and domestic law, again I do not need to adumbrate. The submission is the very obvious one which your Honour has referred to, that international treaties and, indeed, anything in international law, is not part of Australian law. A treaty does not become part of Australian law unless and until it is adopted and given domestic force. Your Honour does not need the authorities on that which we have set out in that section.

The sovereignty of the people, in section 4, is an expression which is used. It has political significance. But one cannot use it in the way it is used against us to say, well, because there was something undemocratic about the manner of elections in 1900 or 1901, by our applying our modern standards to what they probably thought was extremely democratic at that time, that does not have the consequence of in any way invalidating the Constitution. At worst, if the propositions were absolutely right, it might suggest that the original derivation of "sovereignty" was from something other than the people. But that is not what the High Court has said and, in my respectful submission, it would have solely political significance if it was said.

The point in section 5 is simply that the invalidity of electoral laws does not lead to the invalidity of Acts passed by Parliament and there is authority we have given for that.

In relation to jurisdiction we simply say this, that it is not a matter arising under the Constitution to ask whether the Constitution or part of it is in force. That does not arise under it. If one were to apply a preposition it would arise over it. We would submit that it certainly does not involve the interpretation of the Constitution to argue that it is not in force and we would submit it simply is not within section 40. Therefore this is not a matter which is capable of being removed under that section.

Your Honour, for those reasons, we would submit that the appropriate course is to refuse the applications with costs but, in doing so, to deliver reasons which would be capable of being used by magistrates, county court judges and, indeed, officers of the Commissioner of Taxation dealing with objections and other people who have the need to deal with the type of arguments which have been put before your Honour in this case.

HIS HONOUR: You say "with costs". Is the first of the matters a criminal or quasi-criminal matter?

MR BENNETT: Yes, it is, your Honour.

HIS HONOUR: What do you say as to costs in a matter of that kind?

MR BENNETT: It is a summary prosecution, your Honour, under which the - - -

HIS HONOUR: Very little is revealed about the underlying proceedings in, I think, any of the applications, other than Ms Burke's.

MR BENNETT: It is a summary prosecution for offences under the *Corporation Law*.

HIS HONOUR: Failing to help liquidators, in effect. There are several sections mentioned.

MR BENNETT: Yes, failure to submit reports, yes, matters of that sort.

HIS HONOUR: Would it ordinarily be appropriate that costs should follow?

MR BENNETT: I am instructed yes, your Honour. I have not checked that myself. I am instructed that that is the situation.

HIS HONOUR: Yes. Thank you, Mr Solicitor. Mr McArdle.

MR McARDLE: Your Honour, it is submitted, very briefly, that nothing that you have heard or read put on behalf of Ms Burke in particular has undermined or in any way put in doubt the power and authority of either the State of Victoria or the Commonwealth of Australia to make those laws which are under challenge by her application.

HIS HONOUR: There is the further point in her application that it would be to interrupt the criminal process at an interlocutory stage.

MR McARDLE: Yes, and there are authorities to which I have made reference in which this Court has been unreceptive to that course. Your Honour, If I might, I otherwise rely upon what I have filed in writing on an earlier occasion. Thank you, your Honour.

HIS HONOUR: Thank you, Mr McArdle. Mr Martin.

MR MARTIN: Your Honour, the unstated point of substance in our case is whether there is any constitutional point regarding the validity of the *County Court Act*. For the reasons set out in our submission, we say, no. Concerning section 40 of the Judiciary Act 1903 , we want to say that this is a case concerning the negligent treatment of a horse and neither the discretionary elements or the opening phrases of section 40, for the reasons identified in our submission, have been satisfied. Otherwise, we would want to rely on our submission, your Honour.

HIS HONOUR: The relationship between negligent treatment of a horse and section 40 is not instantly apparent. I should warn you that I was party to an argument in the High Court once which concerned a claim made about a certificate that a cow was pregnancy tested in calf. It is not as though veterinary cases cannot go to the High Court, Mr Martin.

MR MARTIN: Indeed, your Honour. I accept that, your Honour, but I suspect it was not via the route of section 40.

HIS HONOUR: No, it was appeal as of right in those days; whether the Glen Nola was properly certified PTIC, but there we are.

MR MARTIN: Yes. Well, those cases still exist in many numbers, your Honour. Otherwise we rely on our submissions, and we have addressed the direct constitutional basis of the *County Court Act*.

HIS HONOUR: Yes, thank you, Mr Martin. Mr Langmead.

MR LANGMEAD: Thank you, your Honour. Your Honour, to the extent that the applicant has raised any arguments, we rely on our written submissions. However, on the question of costs, we are in a slightly different position in that the proceedings before the Federal Court are an application for breach of an award, the imposition of a penalty and recovery of payments, and have been addressed in our written summary as being covered by section 347 of the *Workplace Relations Act*. On reflection, your Honour, it appears to us that that may not be the correct proposition and I handed to the Court this morning a copy of the report of *Re McJannett; Ex parte Australian Workers' Union of Employees [No 2]* 189 CLR 654. That was a case, your Honour, where the litigation was concerned with whether or not the Federal Court had jurisdiction to do what it did and - - -

HIS HONOUR: It was 75(v) proceedings and these are section 40 proceedings.

MR LANGMEAD: Yes, your Honour.

HIS HONOUR: What do you say I should do about costs?

MR LANGMEAD: Your Honour, indicated at page 656:

The test for determining whether a proceeding is in a matter arising under the Act for the purposes of s 347(1) is whether the right or the duty that is sought to be enforced owes its existence to a provision of the Act.

And again at page 657 at about point 7:

But the proceeding in the present case does not. The relief which was sought by way of mandamus owed its form and content to the provisions of the Act which imposed the duty that the respondent was commanded to perform. The relief which is sought in an application for prohibition is not for the enforcement of any right or duty created or conferred by the Act. Accordingly, s 347)(1) has no application to a proceeding for the issue by this Court of prohibition under s 75(v) of the Constitution.

Your Honour, an application, we would say, therefore, under section 40, is not a proceeding in a matter arising under the Act, being the *Workplace Relations Act* but it is a proceeding separately where it is being suggested that the Federal Court does not have jurisdiction to deal with the matter. If the Court pleases.

HIS HONOUR: Yes, thank you. Mr McArdle, you wanted to add something?

MR McARDLE: Yes, your Honour, I apologise for this. I overlooked the matter of costs. I seek costs. I acknowledge, at the very least, it is a quasi-criminal case.

HIS HONOUR: A section 40 removal in relation to an indictable offence: is it appropriate that the Crown seek costs in that matter and, if appropriate, should I order them?

MR McARDLE: By way of analogy Your Honour will recollect a recently delivered judgment of *Reg v East; Ex parte Nguyen*.

HIS HONOUR: Yes. That was a 75(v) proceedings.

MR McARDLE: Yes, it was, and that was a prerogative writ proceedings, although the background of it was a criminal case, of course.

HIS HONOUR: But this is to remove the criminal cause or part of it into this Court which may, perhaps, stand it in a different case.

MR McARDLE: Yes. Very well, your Honour, I will not press it.

HIS HONOUR: Yes, thank you. Now, Mr Joosse, there is an opportunity, if you wish, to say anything in reply that you wish. Do you wish to reply?

MR JOOSSE: May I first ask your Honour: I am the only one that is allowed to - - -

HIS HONOUR: No, each of the applicants will be given a short opportunity for reply.

MR JOOSSE: In that case I wish to take that opportunity. I first wish to sort of reply to the statement of the Solicitor-General. If I understood it correctly, he argued that even after independence there was nothing stopping Australia from using the Constitution as it was. However, we seem to overlook one thing and that is that each and every Act requires assent from the Queen which is then a foreign power.

HIS HONOUR: Well, under the Constitution, section 58 is the governing provision which requires the Governor-General to assent. Section 58 provides that:

When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Relevantly, as I would understand it, what has happened is that the Governor-General has, in each case, assented in the Queen's name.

MR JOOSSE: And such Queen would be then the Queen of a foreign power and it is my submission to this honourable Court that this does not comply with either the covenant of the League of Nations or, indeed, the United Nations. Furthermore, under British law, the Queen of the United Kingdom is actually forbidden to give a.....item or an instruction to any other person but a British subject. Since all Australians are recognised in the United Kingdom as aliens, it is doubtful that the Queen, as defined under section 2 of the *Constitution Act*, can indeed give valid royal assent to any Act.

HIS HONOUR: Yes, I understand, I think, the point that you put.

MR JOOSSE: If I may, there was one little thing that I actually had wished to bring to the attention of this Court and that was in 1929 a Royal Commission was held in the Constitution and in it in appendix C which was the report of the Inter-Imperial Relationship Committee 1920 and in the extracts on page - it is difficult to read the page but it says here:

We refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relations may be readily defined. They are autonomous communities within the British Empire equal in status, in no way subordinate one to another in any respect of the domestic or external affairs. The tendency towards equality status was both right and inevitable. Every self-governing member of the Empire is now the master of its own destiny. In fact, if not always in form, it is subject to no compulsion whatsoever. The equality of status so far as Britain and the Dominions are concerned is just the route principle governing our inter-imperial relationship.

This was, as I said, an extract from a Royal Commission in 1920, indicating that we did not have the colonial sort of relationship with Great Britain any more. In fact, there is a passage further down that actually advises the Australian Government that no longer should the Government of Australia communicate through the colonial office but is directed to forward any communications to its foreign

office which is, again, an indication that as far as the United Kingdom was concerned, we were a foreign or independent nation.

Also, we have a copy here of an extract of the League of Nations, with summary, you know, by Sir Geoffrey Butler, and he claims that arguably Article I of the covenant - here we are. He says:

Item 1. It is arguable that this article is the covenant's most significant single measure. By it, the Dominions, namely, New Zealand, Australia, South Africa and Canada, have their independent nationhood established for the first time.

HIS HONOUR: This, I think, is to repeat a point which you have already made, is it not, namely, that the effect of what happened in 1919 was to recognise sovereignty and independence?

MR JOOSSE: You are quite right. I respectfully ask this Court to accept our notice of motion.

HIS HONOUR: Yes, thank you. Now, Gillespie-Jones, do you seek to add anything?

MR GILLESPIE-JONES: Just two minor matters, your Honour. There was a reference with respect to costs. In my submission, this is an indictable offence.

HIS HONOUR: I did not understand Mr McArdle to press the application.

MR GILLESPIE-JONES: No, I do not think he was either, your Honour. The second matter, your Honour, with respect to the splitting - fracturing of criminal proceedings, the only cases that I can recollect that were removed under the section 40 procedure was *Brown's Case*. I think it was the South Australia case about pleading before a judge alone - not guilty before a judge alone, and *Sankey v Whitlam*, of course. Those are the only two items. Thank you, your Honour.

HIS HONOUR: Thank you, Mr Gillespie-Jones. Dr Bowers, do you wish to add anything in reply?

MR BOWERS: No, thank you, your Honour.

HIS HONOUR: Thank you, Dr Bowers. Mr Young, do you wish to add anything in reply?

MR YOUNG: No, thank you, your Honour.

HIS HONOUR: Thank you. Mr Henke, do you wish to add anything?

MR HENKE: Yes, sir, there are a couple of items I would like to answer.

HIS HONOUR: Yes.

MR HENKE: If I might start with the comments by the Solicitor-General, your Honour, in which he talked about whether this was cession or some other form in which Australia became independent. You will recall that I, in fact, put before the Court that there were five separate forms and it would seem to us that by the wording of Resolution IX of the Imperial Conference of 1917 that the form of change of government was, in fact, emancipation and, therefore, not cession. Therefore, the questions that the Solicitor-General has put before you about the continuance of the law in fact does not carry.

Further, in fact, that under some other aspects of the law of State succession, when there is an emancipation - let us use the example, for instance, of the current German Government following the Third Reich, there was no question about whether the laws should pass from the Third Reich that existed into the current German Government. In fact, it has been explicitly denied that that should happen.

HIS HONOUR: As you may have heard me say to the Solicitor-General, it seems to me that that is the minor premise of the argument and a much more difficult point from your point of view - more difficult from your point of view is the major premise, namely, reliance upon the significance of international dealings as affecting what laws apply within this country.

MR HENKE: But, your Honour, this is precisely the point and this is why I want to come to the question of section 5 which your Honour has mentioned several times, under the initial context of what the Constitution was. That is being a Constitution for a colony and clause 8, in fact, describes the Commonwealth as a "self-governing colony" for the purposes of the *Colonial Boundaries Act.*

HIS HONOUR: And the delegates spent time persuading the British authorities that, in truth, the Constitution was the Constitution for a colony. Yes.

MR HENKE: Quite, your Honour, thank you. The point about it is therefore that when we are coming forward from that point onwards, we are talking about the laws of a colony and then the laws of a free nation. I have no doubt whatever that section 5 did in fact continue the laws post-1901 but whether they continued to continue the laws post-1919 is quite another issue and that is the issue that we are asking the Court to adjudicate upon. The fact that the various imperial laws continuing throughout that first two decades of Australia's nationhood we do not see as any problem at all but that, of course, is what section 5 refers to. So that section 5 in itself does not carry necessarily beyond that context in which it was set up and this is the context in which it was set up. As your Honour just said, the forefathers spent their time in fact convincing the British Government that this was still a colony and a colonial Constitution.

The next point I would like to raise that the Solicitor-General raised was the question of Canada and about Australia not being unique. But Canada, in fact, endeavoured - has put a great deal of effort in attempting to repatriate its Constitution and to deal with these very issues.

HIS HONOUR: Saying that there may be another set of problems elsewhere does not bear upon whether there is a problem here or, if so, how it is to be solved, does it?

MR HENKE: That is right. The other question, and probably the next most important thing was the question raised by counsel for the Union and that was the question about whether the *Workplace Relations Act* was, in fact, still in place. Now, Mr Joosse touched briefly on it but I would like to bring your Honour's attention to the fact that in August 1984 new letters patent were issued for the Governor-General. They were issued not in the name of the Queen of the United Kingdom. In fact, they specifically revoke the letters patent of 1900 which were issued in the name of the Queen of the United Kingdom, and that those letters patent in fact define the Governor-General as the viceroy of the Queen of Australia.

Now, if he is the viceroy of the Queen of Australia and there is no other contention made to, in fact, define the Queen of Australia as the Queen of the United Kingdom - in fact, the Act of Parliament, the *Royal Style and Titles Act* quite deliberately removed the title "Queen of the United Kingdom" that had been in the 1953 *Royal Style and Titles Act.* The fact of it is that viceroy can only give assent in the name of the Queen to whom he is the viceroy and in accordance with the provisions of the Constitution as shown in section 58, that is not the Queen named in that Constitution.

It is our contention therefore that the very Act under which costs are sought, and which were sought to be brought before your Honour, has never been given royal assent.

HIS HONOUR: That, I think, is a point not hitherto made in your papers, at least as far as I can identify it. I do not shut you out from arguing it but it is, I think - - -

MR HENKE: Your Honour, I believe it was made in the original written submissions.

HIS HONOUR: Yes. Well, I will not stay to debate it with you. I will not shut you out from it. Yes.

MR HENKE: The final issues are ones which were touched upon, is questions of domestic law and international law. If we continue to regard imperial law as being applicable in this country and it is not the law of the nation's Parliaments, then it is, by definition, international law. The very items which our friends here have been arguing against in fact they are supporting. They are arguing that international law in the form of British law is applicable here. Now, they are either right or wrong. Either international law does not apply here or international law does apply here. They cannot then decide which parts of international law shall apply here and which parts shall not apply here.

So, we come then finally, I guess, to section 40. The reason that section 40 was chosen was that it allowed us to bring these matters before the Court for decision and it was done so that we would all have a clear understanding of what needed to be done, and how, and when. There are, as your Honour is well aware, some forces in this country that would wish to change these sorts of issues by means other than legal and constitutional means. We do not share that view and we would rather bring the matters to the Court for decision than try to do it by any other measure.

I have been travelling recently in other parts of the country and there is a considerable degree of unrest in some of those parts which could come out in other ways and we would seek to avoid that. Your Honour, I thank you for your time.

HIS HONOUR: Yes, thank you, Mr Henke. It is not quite 11.10. I would expect to be in a position to give judgment in this matter at ll.30. I would be glad if the parties would remain represented until that time. I shall adjourn until that time.

AT 11.10 AM SHORT ADJOURNMENT

UPON RESUMING AT 11.30 AM:

HIS HONOUR: Application is made in each of five separate proceedings for an order removing the cause into this Court pursuant to s 40 of the Judiciary Act (Cth). It is said that each of the causes arises under the Constitution or involves its interpretation.

I have heard the five applications together because they raise similar issues. It is as well to say something shortly about the proceedings that give rise to the present applications.

Joosse & Anor v Australian Securities and Investment Commission

(M35 of 1998)

The applicants were directors of a company, Bellechic Pty Ltd that is now in liquidation. On 2 April 1998, the Australian Securities Investment Commission began proceedings in the Magistrates Court at Melbourne against both applicants alleging breaches of ss 475(1), 530A(1)(a) and (2)(a) of the Corporations Law. The applicants allege that certain Acts - described as "*The Magistrates Court Act 1996* , *The County Court Act & The Supreme Court Act*, *The Police Act*, *The* Corporations Law (Cth), *The Workplace Relations Act* and *The* Taxation Administration Act 1953 (Cth)" are invalid or inoperative.

Burke v The Queen (M63 of 1998)

This application relates to a criminal proceeding pending in the County Court of Victoria. The applicant has been presented on a presentment alleging three counts of using a false document, three counts of attempting to obtain a financial advantage by deception and two counts of obtaining a financial advantage by deception. The applicant has been arraigned but no jury has been empanelled. The trial is presently fixed to begin in April 1999. It would seem that the legislation that is attacked is the Statute of Westminster Adoption Act 1942 (Cth), Australia Act 1986 (Cth), Judiciary Act 1903 (Cth), County

Court Act 1958 , *Legal Profession Practice Act* (Vic), *Police Regulation Act 1958* (Vic), Magistrates Court Act 1989 and the *Supreme Court Act*.

Bowers v Askin & Anor (M65 of 1998)

In 1990, the respondents commenced an action in the County Court of Victoria against the applicant claiming damages for negligence in relation to veterinary care allegedly given by the applicant to a racehorse. The action proceeded through interlocutory stages until 1996 when it was struck out. It has since been reinstated and fixed for trial. The applicant contends that the Magistrates Court Act (Vic), County Court Act 1958 (Vic), Supreme Court Act 1986 (Vic) and what he describes as "the Rules of Tort, Contract, Negligence and damages as arising from the Common Law of the United Kingdom as affects Australia" are invalid or inoperative.

Young v Deputy Commissioner of Taxation (M93 of 1998)

The material that has been filed reveals little about the underlying proceeding. It seems, however, that it is a proceeding instituted by the Deputy Commissioner and is pending in the Federal Court in its bankruptcy jurisdiction. The legislation said to be in issue is the Magistrates Court Act 1989 (Vic), County Court Act 1958 (Vic), Supreme Court Act 1986 (Vic), "Income Tax Assessment Act 1936 /42 (Cth)", Income Tax Assessment Act 1997 (Cth), Taxation Administration Act 1953 (Cth), Crimes (Taxation Offences) Act 1980 (Cth), Fringe Benefits Tax Assessment Act 1986 (Cth), *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* (Cth), *Electoral Act 1918* (Cth) and the Bankruptcy Act 1966 (Cth).

David Keys Australia Pty Ltd & Anor v Textile

Clothing and Footwear Union of Australia (M95 of 1998)

Little about the underlying proceeding is revealed by the material filed in this application other than that it concerns companies in some way associated with the applicants in the first matter (M35 of 1998) and is pending in the Federal Court of Australia. The legislation said to be in issue is the Federal Court of Australia Act 1976 (Cth), the Workplace Relations Act 1996 (Cth), the *Electoral Act 1918* (Cth), the Occupational Superannuation Standards Act 1987 (Cth) and the Occupational Superannuation Standards Regulations 1994 (Cth).

In those cases where I have said little is known about the underlying proceeding, the fact that so little is known would, itself, be reason enough to refuse the application. It is not demonstrated in those cases that the cause, or any part of the cause, arises under the Constitution or involves its interpretation.

In the case of *Burke v The Queen* there is a different but no less important difficulty in the way of granting the application to remove the cause. To grant that application would lead to the fragmentation of the criminal process and that is reason enough to refuse it. This Court has said repeatedly that the criminal process should not be interrupted by testing interlocutory rulings that may be given in the course of proceedings. See, for example, *R v Iorlano,* (1983) 151 CLR 678 at 680 per Gibbs CJ, Murphy, Wilson, Brennan and Dawson JJ; *Re Rozenes; Ex parte Burd* (1994) 68 ALJR 372 at 373 per Dawson J; 120 ALR 193 at 195; *R v Elliott* (1996) 185 CLR 250 at 257 per Brennan CJ, Gummow and Kirby JJ.

It is as well, however, to say something about the substance of the points raised in each of the applications.

In all five proceedings the applicants contend that there has been an unremedied, perhaps even irremediable, "break in sovereignty" in Australia that leads to the conclusion that some (perhaps much) legislation apparently passed by the Parliament of the Commonwealth, or one or more State Parliaments, is invalid. The written arguments that have been submitted (and supplemented orally) are

not always articulated clearly and logically. Nevertheless, the following elements can be identified in the various submissions.

First, the Constitution is an Act of the United Kingdom Parliament. Yet it has been held in this Court that sovereignty rests with the people of Australia: (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 172-3 per Deane J.) This is said to lead to the invalidating of certain of the provisions of the Constitution or, perhaps, to those provisions no longer operating. It is said to lead to the invalidating of some State or Commonwealth legislation. Why this should be so was not spelled out clearly. Secondly, the references in the Constitution to the Queen were intended as references to the Queen in the sovereignty of the United Kingdom (Constitution, covering cl 2.) yet since the Royal Style and Titles Act 1973 (Cth) the Queen has been the Queen of Australia and there has been no alteration to the Constitution. Accordingly, so the argument goes, the Royal Assent has not been validly given to a number of Acts of the Commonwealth Parliament. Thirdly, Australia attained international recognition of its independent and sovereign identity when it signed the Treaty of Versailles or when it became a founding member of the International Labor Organisation. Yet treaties made by Australia, including in particular the arrangements reflected in the Statute of Westminster Adoption Act 1942 (Cth), were not registered as international arrangements as was required by those parts of the Treaty of Versailles establishing the League of Nations. Again this is said to lead in some unspecified way to the invalidating of some legislation.

These three principal themes were developed to varying degrees and in various ways in each of the applications now under consideration. Some, but not all, also sought to develop two other points: first that the *Commonwealth Electoral Act 1942* being affected by the earlier mentioned difficulties, no legislation passed after a particular date was valid for the want of valid election of members of parliament and second that some international treaties concerning human rights have direct operation in Australian domestic law.

Whether or not it is strictly open to me to do so, I am content to deal with the applications on the basis that each advances all of the various points that have been urged in support of any of the particular applications to remove.

Nevertheless, each application should be dismissed. None of the applicants identifies a point having sufficient merit to warrant removal of the cause concerned into this Court. The points that it is sought to agitate are not arguable.

"Sovereignty" is a concept that legal scholars have spent much time examining. It is a word that is sometimes used to refer to very different legal concepts and for that reason alone, care must be taken to identify how it is being used. H L A Hart said of the idea of sovereignty that: (H L A Hart, The Concept of Law, (1961) at 218. See also Wade, "The Basis of Legal Sovereignty", (1955) 13 Cambridge Law Journal 172; Heuston, "Sovereignty", in Guest (ed), Oxford Essays in Jurisprudence, (1961) at 198-222; Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined", (1976) 92 Law Quarterly Review 591)

"It is worth observing that an uncritical use of the idea of sovereignty has spread similar confusion in the theory both of municipal and international law, and demands in both a similar corrective. Under its influence, we are led to believe that there *must* in every municipal legal system be a sovereign legislator subject to no legal limitations; just as we are led to believe that international law *must* be of a certain character because states are sovereign and incapable of legal limitation save by themselves. In both cases, belief in the necessary existence of the legally unlimited sovereign prejudges a question which we can only answer when we examine the actual rules. The question for municipal law is: what is the extent of the supreme legislative authority recognised in this system? For international law it is: what is the maximum area of autonomy which the rules allow to states?"

For present purposes, what is critical is: what is the extent of the supreme legislative authority recognised in this system and what are the rules for recognising what are its valid laws? (Hart, The Concept of Law, (1961) at 97-120)

When one examines the history of Australia since 1788 it is possible to identify the emergence of what is now a sovereign and independent nation. Opinions will differ about when sovereignty or independence was attained. (*China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 181 per Barwick CJ, 194 per Gibbs J, 208-214 per Stephen J, 240 per Aickin J; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ, 192-192 per Gaudron J.) Some steps along that way are of particular importance - not least the people of the colonies agreeing "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution". (Constitution - Preamble) But when it is said that Australia is now a "sovereign and independent nation" the statement is in part a statement about politics and in part about what Stephen J in *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 209 called "the realities of the relationship this century between the United Kingdom and Australia". What those realities were in 1900 can be gauged from the fact that the delegates negotiating with the Imperial authorities in 1900 about the terms in which the Imperial Parliament was to enact the Constitution were well content to seek to persuade the Colonial Office that "the Commonwealth appears to the Delegates to be clearly a 'Colony'" (Quick and Garran, Annotated Constitution of the Australian Commonwealth, (1901) at 352.) As the century moved on, further attention was given to the place of Imperial legislation in the self-governing dominions. The Imperial Parliament enacted the *Statute of Westminster* in 1931 but it was not until 1942 that the Commonwealth Parliament enacted legislation adopting the *Statute of Westminster (Statute of Westminster Adoption Act* (Cth)). And then in 1986 the *Australia Acts* were passed. All these Acts deal with the place of Imperial legislation in Australia. Each can be seen as reflecting the then current view of the relationship between Australia and the United Kingdom. In large part, then, each deals with an aspect of political sovereignty.

Similarly, the way in which Australia has engaged in international dealings can be seen to have changed since federation. And it may be that the Treaty of Versailles or some other international instrument can be seen as according Australia a place in international dealings which it may not have had before the instrument was signed. But what is significant for the disposition of the present applications is not whether the Westminster Parliament could now, or at some earlier time might have been expected to, pass legislation having effect in Australia. Neither is it whether Australia is treated by the international community as having a particular status. The immediate question is what law is to be applied in the courts of Australia. The former questions about the likelihood of Imperial legislation and of international status can be seen as reflecting on whether Australia is an independent and sovereign nation. But they do so in two ways: whether some other polity can or would seek to legislate for this country and whether Australia is treated internationally as having the attributes of sovereignty. Those are not questions that intrude upon the immediate issue of the administration of justice according to law in the courts of Australia. In particular, they do not intrude upon the question of what law is to be applied by the courts.

That question is resolved by covering cl 5 of the Constitution. It provides:

"This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State".

It is, then, to the Constitution and to laws made by the Parliament of the Commonwealth under the Constitution that the courts must look. And necessarily, of course, that will include laws made by the States whose Constitutions are continued, the powers of whose parliaments are continued, and the existing laws of which were continued (subject, in each case, of course, to the Constitution) by ss 106, 107 and 108 of the Constitution. It is not relevant to the enquiry required by covering cl 5 to enquire how Australia has been treated by other nations in its dealings with them or to enquire whether the

Westminster Parliament could or could not pass legislation that has effect in Australia. Covering cl 5 provides that the Constitution and the laws made by the Parliament of the Commonwealth under the Constitution are binding on the courts, judges, and people of every State and of every part of the Commonwealth. None of the points that the applicants seek to make touches the validity of any of the laws that are in question or would make those laws any the less binding on the courts, judges, and people.

As I have noted earlier, the second of the three themes identified by the applicants relies on the Royal Style and Titles Act. As I understand it, the principal burden of the argument is that an Act of Parliament, changing the style or title by which the Queen is to be known in Australia, worked a fundamental constitutional change. The fact is, it did not. So far as Commonwealth legislation is concerned, it is ss 58, 59 and 60 of the Constitution that deal with the ways in which the Royal Assent may be given to bills passed by the other elements of the Federal Parliament. So far as now relevant, s 58 governs. It provides that the Governor-General "shall declare, according to his discretion, but subject to this Constitution that he assents in the Queen's name". And there is no material that would suggest that has not been done in the case of each Commonwealth Act that now is challenged.

The third element in the submissions made by the applicants, and the one to which greatest significance was given in oral argument, asserts that significance is to be attached to certain of Australia's international dealings. These contentions fail to take account of certain basic principles. First, provisions of an international treaty to which Australia is a party do not form part of domestic law unless incorporated by statute. (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 480-481 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.) **It follows that what one of the applicants referred to as various human rights instruments do not of themselves give rights to or impose obligations on persons in Australia. Similarly, the Charter of the United Nations does not have the force of law in Australia.** (*Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 per Barwick CJ and Gibbs J.) Next, in so far as this limb of the argument sought to make some point about "sovereignty" it is again necessary to note the distinction between sovereignty in international law and sovereignty in the sense described by Hart as "the supreme legislative authority recognised in this system" (Hart, The Concept of Law, (1961) at 218.) The points which the applicants seek to make are points touching the first of these matters, not the second. It is the second that is the critical question in the courts and it is the second that is resolved by having regard to covering cl 5.

Lastly, it is necessary to deal with the contentions about the *Commonwealth Electoral Act*. These contentions depend entirely upon acceptance of one or other of what I have earlier called the three main themes of argument. Because I consider that they are not arguable, no separate question arises about the *Commonwealth Electoral Act*. Nevertheless, it may be noted that it was established very early in the life of the federation that if there are any defects in the election of a member of a house of the Parliament the proceedings of that house are not invalidated by the presence of a member without title. (*Vardon v O'Loughlin* (1907) 5 CLR 201 at 208 per Griffith CJ, Barton and Higgins JJ.) Moreover, there are at least some circumstances in which invalidating defects in the *Commonwealth Electoral Act* will not invalidate the elections held under it. (*Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 53 per Gibbs J. (See also the statement as to the effect of the order in these matters recorded at (1975) 7 ALR 593 at 651.))

For these reasons, the points which it is sought to agitate in this Court have insufficient merit to warrant the orders that are sought. Each application is dismissed. In each of matters M65 of 1998, M93 and M95 of 1998 the applicants will pay the respondent's costs. I make no order for costs in either M35 of 1998 or M63 of 1998 as each arises out of a criminal or quasi-criminal matter. I certify for counsel.

I will adjourn.

AT 11.59 AM THE MATTER WAS CONCLUDED