SUPREME COURT OF QUEENSLAND

CITATION:	*Sharples v Arnison & Ors* [2001] QCA 518
PARTIES:	**TERRY PATRICK SHARPLES** (plaintiff/appellant) **v** **MAJOR GENERAL PETER ARNISON** (first defendant/first respondent) **PETER DOUGLAS BEATTIE** (second defendant/second respondent) **DESMOND JOSEPH O'SHEA** (third defendant/third respondent)
FILE NO/S:	Appeal No 2972 of 2001 SC No 1182 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for leave/judicial review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 November 2001
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2001
JUDGES:	McMurdo P, McPherson and Davies JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeals dismissed with costs**
CATCHWORDS:	CONSTITUTIONAL LAW – CONSTITUTIONAL AMENDMENT – STATES – whether the *Constitution Act Amendment Act* 1977 (Qld) is invalid – whether that Act expressly or impliedly provided for the abolition of or alteration in the office of Governor as described in s 53 *Constitution Act* 1867 (Qld) – whether a referendum was required to validly enact the amending Act CONSTITUTIONAL LAW – IMPERIAL, COLONIAL, STATE AND COMONWEALTH CONSTITUTIONAL RELATIONSHIPS – GENERALLY – MATTERS RELATING TO CREATION OF COLONIES – GENERAL PRINCIPLES STATUTES – ACTS OF PARLIAMENT – VALIDITY OF LEGISLATION Australia Act 1986 (UK), s 7, s 8, s 9, s 13(3) Australian Constitution Act 1842; 5 & 6 Vict c 76 (Imp), s 40 Australian States Constitution Act 1907 (Imp), s 1 Colonial Laws Validity Act 1865 (Imp), s 4, s 7 Statute of Westminster 1931; 22 Geo 5, c 4 (UK), s 9(2) *Australia Act* 1986 (Cth)

Australia (Request and Consent) Act 1986 (Cth), s 3
Australian Citizenship Act 1948 (Cth)
Constitution of the Commonwealth of Australia (Cth), s 51(xxxviii), s 92
Extradition (Foreign States) Act 1966 (Cth)
Statute of Westminster Adoption Act 1942 (Cth)

Australia Acts (Request) Act 1985 (Qld), s 3
Constitution Act 1867 (Qld), s 11A, s 11B, s 53
Constitution Act Amendment Act 1934 (Qld)
Constitution Act Amendment Act 1977 (Qld)
Constitution (Office of Governor) Act 1987 (Qld), s 3(1), s 3(2), s 8(c)(i), s 14, s 15

Attorney-General for New South Wales v Trethowan (1931) 44 CLR 394, considered
Attorney-General for New South Wales v Trethowan [1932] AC 526, considered
Cameron v Kyte (1835) 3 Knapp 332; 12 ER 678, considered
Dooney v Henry (2000) 74 ALJR 1289, considered
Durham Holdings Pty Ltd v New South Wales (2001) 75 ALJR 501, applied
Hazelwood v Webber (1934) 52 CLR 268, distinguished
Hennessy v Wright (1888) 21 QBD 509, considered
Musgrave v Pulido (1879) 5 App Cas 102, considered
Port MacDonnell Professional Fishermen's Association Inc v South Australia (1989) 168 CLR 340, considered
R v Smithers, ex p Benson (1912) 16 CLR 99
Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong [1970] AC 1136, considered
Smiles v Belford (1877) 1 OAR 436, considered
Sue v Hill (1999) 199 CLR 462, considered
W R Moran Proprietary Limited v Deputy Commissioner of Taxation (NSW) [1940] AC 838, considered
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, applied
Yougarla v Western Australia (2001) 75 ALJR 1316, considered

COUNSEL: The appellant appeared on his own behalf
P A Keane QC, with G R Cooper, for the respondents

SOLICITORS: The appellant appeared on his own behalf
Crown Solicitor for the respondents

[1] **McMURDO P:** I agree with McPherson JA that, generally for the scholarly reasons he gives, the *Constitution (Office of Governor) Act* 1987 (Qld) did not alter the office of Governor and that consequently there was no requirement to submit that Act when a Bill to a referendum of electors under s 53 *Constitution Act* 1867 (Qld). The appeal on this ground must fail and consequently so must the ground of appeal alleging, effectively, that the learned trial judge's salary and remuneration had been unlawfully paid since 1987 and that therefore his Honour lacked impartiality.

[2] The learned trial judge's orders as to costs were unexceptional and plainly within the proper exercise of discretion in such matters. Furthermore, the order made on 8 February 2001 under s 49 *Judicial Review Act* 1991 (Qld) reserving the costs for

the determination of the judge who was to give final relief in the review can only be subject to an appeal by leave: s 49(5) of that Act. The appellant has not demonstrated any reason justifying the grant of leave. The appeals against the costs orders must fail.

[3] His Honour's application of the appropriate principles in determining whether to grant the appellant's preliminary claim for an interlocutory injunction to restrain the Electoral Commissioner of Queensland from holding the State election subsequently held on 17 February this year, did not constitute bias nor prejudgment and nor did it preclude his Honour from subsequently hearing the substantive application for judicial review. This ground of appeal must also fail.

[4] Nor has the appellant established that the learned trial judge erred in setting aside the subpoenas served on Matthew Skoien or Matthew Joseph Foley; in any case any appeals from these orders were brought out of time; the appellant has neither given an adequate explanation for his delay in lodging these appeals nor established any error on the part of the learned trial judge in setting aside the subpoenas.

[5] In the hearing of the appellant's substantive application, which was brought and heard only days before the scheduled State election, his Honour acted properly in attempting to confine the appellant's contentions to the issue for determination; whether the *Constitution (Office of Governor) Act* 1987 (Qld) effected a change in the office of Governor, breaching the manner and form requirements of s 53 *Constitution Act* 1867 (Qld). His Honour was entitled to place time constraints on the appellant's oral submissions. The court transcript demonstrates that more transcribed pages were produced from the appellant's oral submissions than from the respondent's; the appellant exercised his right of reply; the appellant was not disadvantaged in the presentation of his case and his Honour did or said nothing to suggest bias or prejudgment. The appellant has not demonstrated any bias, unfairness or prejudgment on the part of the learned trial judge and the numerous grounds of appeal which contend otherwise are completely without substance.

[6] I agree with McPherson JA that the appeals should be dismissed with costs.

[7] **McPHERSON JA**: This is an appeal against an order of Ambrose J in the Supreme Court dismissing an application for a statutory order for the review of decisions of the respondents leading to a general election for the Legislative Assembly of Queensland on 17 February 2001. The writ for that election was issued by the first respondent His Excellency Major-General Peter Arnison, who was and is the Governor of the State. It was issued on the advice of Hon Peter Douglas Beattie, who was and is the Premier of the State. The third respondent is the Electoral Commissioner of Queensland, whose function it was to ensure that the election was carried out according to law. The applicant below, who is the appellant in this Court, was formerly named Terry Patrick Sharples. He has, we were informed, recently changed his name by deed poll to Ned Kelly. No steps have been taken to amend the title to the proceedings in order to reflect this change, and it is convenient to refer to him in these reasons simply as the appellant.

[8] In the course of its progress to this Court, the appellant's claim for relief or the submissions in support of it appear to have undergone some convolutions; but, as identified by Ambrose J when it was before him, the proceedings were directed to establishing that the general election held in February 2001 was invalid, with the consequence that various things done since then are of no effect. The ramifications of the appellant's submissions are not, however, confined to the last general State election, but take as their starting point the alleged invalidity of the *Constitution*

(Office of Governor) Act 1987 (the 1987 Act); and, if accepted, they extend consequentially to invalidate many other acts done, appointments made, and powers exercised since that Act was assented to and commenced its operation on 1 December 1987.

[9] So far as relevant here, the sequence begins with the *Constitution Act Amendment Act* 1977 (the 1977 Act), which was, in accordance with s 1 of the Australian States Constitution Act 1907, reserved to Her Majesty and to which the assent was proclaimed on 5 April 1977. The 1977 Act amended the *Constitution Act 1867* by inserting new sections 11A and 11B. Among the recited objects of the 1977 Act was to amend the Constitution Act by establishing certain specific offices, to regulate the powers of the holders of those offices, to confirm the existing constitutional position, and to regulate the manner and form in which the power of the Parliament of Queensland might be exercised in relation to those offices and powers. In the form in which the 1977 Act inserted it into the *Constitution Act 1867*, s 11A was originally as follows:

> "**11A. Office of Governor**. (1) The Queen's representative in Queensland is the Governor who shall hold office during Her Majesty's pleasure.
>
> (2) Abolition of or alteration in the office of Governor shall not be effected by an Act of the Parliament except in accordance with section 53.
>
> (3) In this Act and in every other Act a reference to the Governor shall be taken –
>
> (a) to be a reference to the person appointed for the time being by the Queen by Commission under Her Majesty's Royal Sign Manual and Signet to the office of Governor of the State of Queensland constituted under Letters Patent under the Great Seal of the United Kingdom; and
>
> (b) to include any other person appointed by dormant or other Commission under the Royal Sign Manual and Signet to administer the Government of the State of Queensland whenever and so long as the office of Governor is vacant or the Governor is incapable of discharging the duties of administration or has departed from Queensland."

[10] Section 11B in its original form as enacted in 1977 and inserted in the *Constitution Act* was:

> "**11B. Governor to conform to instructions**. (1) It is the duty of the Governor to act in obedience to instructions conveyed to him by the Queen with the advice of Her Privy Council or under Her Majesty's Royal Sign Manual and Signet or through one of Her Majesty's principal Secretaries of State in the United Kingdom for his guidance, for the exercise of the powers vested in him by law of assenting to or dissenting from or for reserving for the signification of Her Majesty's pleasure Bills to be passed by the Legislative Assembly.
>
> (2) In this section and in section 11A the expression 'Royal Sign Manual' means the signature or royal hand of the Sovereign and the expression 'Signet' means the seal commonly used for the sign manual of the Sovereign or the seal with which documents are sealed by the Secretary of State in the United Kingdom on behalf of the Sovereign."

[11] The critical step in the process of constitutional amendment effected by the 1977 Act was the insertion in the *Constitution Act 1867* of a new s 53, which in

s 53(1) required the approval at a referendum of a voting majority of electors as a prerequisite to presentation for assent of a Bill that either "expressly or impliedly provides for the abolition of or alteration in the office of Governor", or that "expressly or impliedly in any way affects" any of the sections specified in s 53(1), which includes ss 11A and 11B. A Bill assented to in contravention of that requirement is declared by s 53(1) to be "of no effect as an Act". The legislative technique adopted in s 53, which is commonly known as "entrenching" a constitutional provision, was first used in Queensland in the *Constitution Act Amendment Act 1934* simultaneously to entrench the abolition of the Legislative Council in this State and also the current triennial duration of the Legislative Assembly. By 1934, the legislative or constitutional validity of that device had been established by the decision in *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394, affirmed by the Privy Council at [1932] AC 526. It was well known and understood as a procedure for imparting rigidity to certain provisions of a constitution which, like that of Queensland, was, apart from imperial statutes, otherwise completely flexible. See *McCawley v The King* [1920] AC 691.

[12] Section 53 as it was enacted and inserted in the *Constitution Act* in 1977 was and still is in the following terms:

> "**53.(1) Certain measures to be supported by referendum.** A Bill that expressly or impliedly provides for the abolition of or alteration in the office of Governor or that expressly or impliedly in any way affects any of the following sections of this Act namely –
>
> sections 1, 2, 2A, 11A, 11B, 14; and
>
> this section 53
>
> shall not be presented for assent by or in the name of the Queen unless it has first been approved by the electors in accordance with this section and a Bill so assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an Act.
>
> **(2)** On a day not sooner than two months after the passage through the Legislative Assembly of a Bill of a kind referred to in subsection (1) the question for the approval or otherwise of the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly according to the provisions of the *Elections Act* 1915-1973 and of any Act amending the same or of any Act in substitution thereof.
>
> Such day shall be appointed by the Governor in Council by Order in Council.
>
> **(3)** When the Bill is submitted to the electors the vote shall be taken in such manner as the Parliament of Queensland prescribes.
>
> **(4)** If a majority of the electors voting approve the Bill, it shall be presented to the Governor for reservation thereof for the signification of the Queen's pleasure.
>
> **(5)** Any person entitled to vote at a general election of members of the Legislative Assembly is entitled to bring proceedings in the Supreme Court for a declaration, injunction or other remedy to enforce the provisions of this section either before or after a Bill of a kind referred to in subsection (1) is presented for assent by or in the name of the Queen.
>
> **Act 24 Geo 5 No 35 preserved**
>
> **(6)** The provisions of this section shall in no way affect the operation of *The Constitution Act Amendment Act of* 1934."

[13] The thrust of the appellant's contention is that the *Constitution (Office of Governor) Act 1987* was (as is the fact) enacted without satisfying the prerequisite under s 53 of the *Constitution Act 1867* of first submitting the Bill, which resulted in that Act, for the approval of the voting majority of the electors of the State at a referendum before presenting it for assent; and that, having been presented without first complying with that procedure, the Act of 1987 was and is, so it is submitted, of no effect as an Act. Whether or not that is so in law depends on whether the Act of 1987 proceeded from a Bill that, within the terms of s 53(1) of the *Constitution Act*, expressly or impliedly provided for the abolition of or alteration in the office of Governor, or that expressly or impliedly in any way affected any of the sections designated in s 53(1), of which ss 11A and 11B are those that are relevant here.

[14] Dealing first with the office of Governor, there can be no doubt that the *Constitution (Office of Governor) Act 1987* did not abolish the office of State Governor. Section 3(1) of the Act expressly provides: "There shall be a Governor in and over the State". Section 3(2) describes the method of appointment of the Governor by Her Majesty and the duration and means of terminating it. The appointment is to be during pleasure by commission under the Sign Manual: s 3(1)(a); and is determinable by instrument under the Sign Manual, which takes effect on publication in the Gazette. Section 4 of the 1987 Act is as follows:

> "**4(1) Authorities and powers of Governor**. The Governor is authorised and required to do and execute all things that belong to the Governor's office according to the laws that are now or shall hereafter be in force in the State.
>
> **(2)** The Governor is authorised, and has always had authority, to keep and use the Public Seal of the State for sealing all public instruments made and passed in Her Majesty's name."

None of these provisions effects any alteration in the office of Governor. All that s 4(1) does is to require the Governor to act according to law in the execution of that office, which is what one would expect in a society governed by the rule of law. Other sections in the Act of 1987 provide for publication of the Governor's commission and the taking of the oath of allegiance (s 5), the Executive Council (s 6), meetings of the Executive Council (s 7), and the specific power of the Governor to remove certain office holders and to exercise the royal prerogative of mercy (s 8). Two further provisions in ss 9 and 10 are concerned with administering the government of the State during a vacancy in office or during the Governor's absence, and with the appointment of a deputy during temporary absences.

[15] These provisions are not novel or controversial, and it is not possible to identify among them any section of the 1987 Act that "altered" the office of Governor. For this purpose, what is required is a comparison between the nature, and also to some extent the powers of office, of the Governor of Queensland as they were before and after that Act was passed. The powers of the Governor are relevant because it is scarcely possible to identify or describe an office without some reference to the powers associated with it. The "office of Governor" referred to in s 53(1) of the *Constitution Act* is one of considerable antiquity, the title of Governor being derived from early charters or letters patent, such as those issued to the East India Company in 1600, which, in designating the office, used the description "governor" rather than "president" appearing in some other contemporary royal charters. Unless Calais is included, the first governor appointed by the Crown to any English overseas colony was probably Sir Francis Wyatt in Virginia; but governors had by that name previously been appointed there by the Virginia Company in the period before its charter was revoked in 1625. See Warren M Billings, *The Old Dominion in the Seventeenth Century*, 39-40.

[16] There is a remarkable degree of continuity in the history of the office over the centuries. Decisions of the Privy Council have settled that a colonial governor is not a viceroy having general sovereign power, but is the king's or queen's representative for or within a specified territory, whose authority derives from his commission and is limited to the powers expressly or impliedly entrusted to him. See *Cameron v Kyte* (1835) 3 Knapp 332, 343-344; 12 ER 678, 682-683; and *Musgrave v Pulido* (1879) 5 App Cas 102, 109-111. The early practice, which survived pretty well to the end of the imperial period, was to issue to a royal governor a commission, usually in the form of letters patent, accompanied by a set of instructions. The letters patent were granted under the Great Seal of England; the instructions, which issued under the royal sign manual, meaning the personal signature of the monarch, were usually authenticated by being countersigned by the Secretary of State and by the imprint of the royal signet. See L. W. Labaree, *Royal Government in America*, at 9-18. Professor Labaree, who knew more about these matters than others, explains that the commission was a formal document which conveyed or conferred powers of government, whereas the instructions were "expressions of the king's will as to the manner in which the powers granted in the commission were to be exercised" (Labaree, at 14). Commissions were granted only for the duration of the royal pleasure, and so could be revoked by instrument under seal. Until the Demise of the Crown Acts, they lapsed on the death of the sovereign. By contrast, instructions, which were informal and intended to be confidential (see *Hennessy v Wright* (1888) 21 QBD 509), could be varied or withdrawn at any time.

[17] The purpose is to determine what is meant by the "office of Governor". This historical digression is intended to emphasise the distinction between, on one hand, the office of colonial governor and the powers associated with it, which were granted by the letters patent or commission; and, on the other hand, royal instructions about the way in which those powers were to be used. The last royal instructions to a Governor to have been published in Queensland are those dated 10 June 1925 (*Queensland Statutes Reprints*, vol 2, at 812-814); but, judging by their contents, alterations must have been made to them after that date. However that may be, it is the commission and not the instructions by which the office of governor is constituted. There is still, it seems, a difference of opinion whether royal instructions had the force of law; but, ever since the decision in *Campbell v Hall* (1774) Lofft 655; 98 ER 848, the view that they took effect as law cannot prevail in a colony or State with representative government over which the crown had, by granting a constitution, lost its prerogative power of legislating. See D B Swinfen, *Imperial Control*, at 79-82, and [1968] *Juridical Review* 21, 32-33.

[18] The impression that royal instructions to a governor had the effect of law was one of the matters that led Boothby J into error in South Australia in the unreported case of *McEllister v Fenn* in 1861. In that particular instance, his Honour's opinion was rejected in the advice given by the imperial Law Officers to the Colonial Secretary on 12 April 1862, which was that royal instructions were a matter "between the Crown and the Governor, and … directory only". See O'Connor & Riordan, *Opinions on Imperial Constitutional Law*, at 60, 64. In reaching the opposite conclusion in *McEllister v Fenn* (1861), Boothby J was basing himself on s 40 of the Australian Constitutions Act 1842; 5 & 6 Vict c 76 (Imperial), the terms of which were almost literally transcribed into s 11B of the Queensland *Constitution Act 1867* by the Act of 1977. The point at issue was shortly afterwards resolved by s 4 and s 7 of the Colonial Laws Validity Act 1865, of which s 7 deemed colonial laws or legislation to be valid and effectual "for all purposes whatsoever" from the date of assent to the legislation, saving only the royal power of disallowance or repeal after their enactment. See *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136, 1157; and *Winfat Enterprise (HK) Co Ltd v*

Attorney-General [1984] HKLR 32, 48-50; affirmed [1985] AC 733, holding that colonial legislation was not invalidated by the Governor's failure to conform to instructions requiring him to reserve it for royal assent.

[19] In his reasons for judgment in the present matter, Ambrose J made a detailed comparison of the provisions of the *Constitution (Office of Governor) Act 1987* with the earlier Letters Patent published on 8 March 1986 constituting the office of Governor of Queensland. His Honour undertook that comparison himself because the appellant had not referred him to any specific provision of the 1987 Act that might have had the effect of altering the office of Governor or of affecting ss 11A or 11B in any way. The Letters Patent of 8 March 1986 were the instrument with which his Honour considered that comparison was required because they were in force at the time when the 1987 Act was passed. Any alteration in the office of Governor effected by that Act therefore fell to be determined by the contrast, if any, between the provisions of those two instruments.

[20] The process yielded only one slight difference, which concerned the royal prerogative of mercy. It was the result of enacting s 8(c)(i) of the 1987 Act. Both that provision and cl VII(b) of the Letters Patent of 8 March 1986 conferred a power to pardon an offender, but with the distinction that cl VII embodied a proviso that, where the offence was "of a political nature", the Governor should not make it a condition of exercising his power under cl VII(b) that the offender "shall absent himself or be removed from the State". His Honour rightly, as I see it, considered this difference to be referable to the law relating to extradition, which at that time was regulated by the *Extradition (Foreign States) Act 1966* (Cth), since replaced by the *Extradition Act 1988*. As between the States of Australia, the omission of that provision in 1987 is, I consider, also explicable by reference to s 92 of the Australian Constitution and the decision in *R v Smithers, ex p Benson* (1912) 16 CLR 99. On any view of it, the royal prerogative of mercy was not lawfully exercisable subject to a condition of the kind in question, and the omission in s 8(c)(i) of the Act of 1987 simply served to reflect the law as it was and is now. It effected no change in the office or powers of the Governor as they were before 8 March 1987 and was therefore not enacted in contravention of s 53(1) of the *Constitution Act* 1867. I respectfully agree with the analysis undertaken by his Honour and with the conclusion he reached in respect of it.

[21] From what has been said, it is evident that the office of Governor was not altered by the passing of the *Constitution (Office of Governor) Act* in 1987. By s 3 of that Act, there is still in and over the State a Governor who is appointed during Her Majesty's pleasure by commission under the royal sign manual. In that respect the office does not differ from what it was and still is under s 11A of the *Constitution Act 1867* or under the law as it has been from early times. It is true that s 3 of the 1987 Act omitted reference to the fact that the Governor is the Queen's representative in Queensland; but that does not in any way detract from the statement to that effect which continues to appear in s 11A(1) of the *Constitution Act 1867*. The two provisions are not inconsistent and s 3 of the Act of 1987 did not, in that or any other respect, repeal s 11A(1) or affect to do so. See also s 7(1) of the Australia Act 1986 (UK), which expressly provides that "Her Majesty's representative in each State shall be the Governor". The form of appointment of the Governor provided for under s 3(2) of the 1987 Act is, in law, as efficacious as it ever was under s 11A(3) in its original form and under the old law relating to colonial governors. There was therefore no requirement arising out of s 11A that the Bill, which later became the *Constitution (Office of Governor) Act 1987*, be submitted to a referendum of electors before being presented for assent.

[22] From this I turn to s 11B and the question whether it was "affected" by the Bill that became the 1987 Act so as to require it to be submitted to a referendum. As I have already said, in the form in which it was originally introduced into the *Constitution Act* by the 1977 Act, s 11B was for the most part a rescript of s 40 of the Australian Constitutions Act 1842; 5 & 6 Vict c 76, which was a provision of an imperial statute requiring a colonial Governor to conform to his instructions in relation to assenting to the Bills. There must surely be a question whether it was competent for a colony or State like Queensland in 1977 to reproduce in local legislation the provisions of an imperial Act which of its own force applied in and bound the State. Locally re-enacting an English statute ordinarily has the effect of impliedly repealing it if the two are in the same terms. See *Hazelwood v Webber* (1934) 52 CLR 268, 275-276; but the statute in that instance, which was the *Fires Prevention (Metropolis) Act* 1774, was one that was received as part of the general law of England introduced as the local legal system "so far as the same can be applied" in eastern Australian by s 24 of the *Australian Courts Act* 1828. It was not, like s 40 of the Act 5 & 6 Vict c 76, a provision of an imperial Act expressly extending by paramount force to New South Wales (of which Queensland was then a part) which, as a colonial or State statute, the 1977 Act was powerless to repeal. The fact that the 1977 Act received the personal assent of the Queen herself did not transform it into an imperial Act capable of effecting such a repeal. If needed, there is Canadian authority to that effect: see *Smiles v Belford* (1877) 1 OAR 436.

[23] It still remains an open question whether colonial legislation is excluded by an imperial statute that covers the field: see *Yougarla v Western Australia* (2001) 75 ALJR 1316, 1321. If, however, s 40 of the Australian Constitutions Act 1842 already extended to and applied in Queensland as an imperial Act of paramount force, it is not altogether easy to see what was achieved in 1977 by inserting a locally enacted version of it in s 11B of the *Constitution Act*. It could not and did not effect an implied repeal of the imperial provision, and, for as long as it survived, the process of incorporating it as a locally enacted Queensland statute gave no additional force or effect to s 11B which the imperial provision did not already possess. The process of entrenching it by referendum under s 53 might, on one view, conceivably even have created a repugnance rendering it "absolutely void and inoperative" within the meaning of s 2 of the Colonial Laws Validity Act 1865. It could in no way bind the imperial Parliament not to repeal s 11B if it chose to do so. On the assumption that there was no such repugnance, s 11B and s 53 presumably awaited the day when the imperial Parliament would take the step of repealing s 40. It may have been envisaged that as 11A and 11B of the *Constitution Act* would then spring into operation to preserve as State law the requirement that the State Governor conform to the royal instructions regulating the matter of assent to Bills passed by the Legislative Assembly.

[24] If that was the intention underlying s 11B, it never came to fruition. The imperial Parliament of the United Kingdom did not repeal s 40 of the Act of 1842. Instead, by s 13(3) of the Australia Act 1986 (UK), it repealed s 11B of the *Constitution Act 1867* and substituted for it the innocuous definition of the Royal Sign Manual that now occupies its place in the *Constitution Act*. In 1986 the legislative competence of the imperial Parliament of the United Kingdom to effect such a repeal of Queensland legislation was not open to doubt. As to that matter, but, subject to the Statute of Westminster 1931, it retained in Queensland its imperial legislative omnipotence, which was exercisable without the concurrence of the Parliament or Government of the Commonwealth of Australia: Statute of Westminster 1931, s 9(2); 22 Geo 5, c 4 (UK), as adopted by the *Statute of Westminster Adoption Act 1942* (Cth). In so far as existing constitutional convention required that imperial legislation not be enacted without the prior request or consent of the legislature or government of Queensland, the requisite request and

consent to the enactment of s 13(3) of the Australia Act 1986 (UK) was given by s 3 of the *Australia Acts (Request) Act 1985* (Qld). It was assented to on 16 October 1985 and commenced its operation on the date of that assent. For good measure, the Commonwealth Parliament, acting under s 51(xxxviii) of the Constitution at the request or with the concurrence of the Parliament of all the States, including Queensland, enacted the *Australia (Request and Consent) Act 1986* (Cth). It was assented to and came into force on 4 December 1985, and by s 3 also requested the imperial Parliament of the United Kingdom to pass the Act that became the Australia Act 1986 (UK). To make assurance doubly sure, the *Australia Act 1986* (Cth) was also enacted at the request of the States. Its provisions were in the same form as those of the Australia Act 1986 (UK), and it too was assented to on 4 December 1985. It may be that the *Australia Act 1986* (Cth) alone would have sufficed for that purpose; but, out of an abundance of caution, legislation was also sought and passed in the United Kingdom. *Sue v Hill* (1999) 199 CLR 462, 491.

[25] The combined effect of these enactments, which joined together the legislative powers of the Parliament of the United Kingdom, the Commonwealth, and Queensland, had, through the force of what in each of them was numbered as s 13(3), the effect of repealing s 11B in the form in which it had been enacted in the 1977 Act, and simultaneously of substituting a new s 11B in the limited form in which it now appears in the *Constitution Act 1867*. The result unquestionably was to "affect" s 11B in its original form; but the referendum requirement imposed by s 53 was not set in motion by what was done. There never has at any time been a Bill in the Queensland Parliament to repeal, amend or otherwise "affect" s 11B. The *Australia Acts (Request) Act 1985* (Qld) did not do so. Instead, it requested that the United Kingdom Parliament and the Commonwealth Parliament take that step. Neither of those legislative bodies was bound by s 53(1) of the *Constitution Act 1867* (Qld) as amended by the 1977 Act to submit the Bills which would become those Acts to a referendum of the voting electors of Queensland before they were presented for assent. The Parliament of Queensland would have been bound by s 53(1) to do so; but the Bill that became the *Australia Acts (Request) Act 1985* (Qld) did not "affect" s 11B. It simply asked the Parliaments of the United Kingdom and the Commonwealth to take that step.

[26] The appellant complains that this combination of legislative enactments perpetrated a fraud on the Queensland electors, who were deprived of the constitutional safeguard afforded by the entrenchment of s 11B without having the benefit of the referendum contemplated by s 53(1). The decision in *W R Moran Proprietary Limited v Deputy Commissioner of Taxation (NSW)* [1940] AC 838, affirming (1939) 61 CLR 735, is, however, authority that such a legislative scheme is not illegitimate or invalid, provided, of course that, as is the case here, no step in the legislative process is itself constitutionally prohibited. See also *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340. As an alternative, the appellant submits that in 1986 the United Kingdom had became a "foreign power", whose Parliament possessed no legislative power over or in respect of Queensland. He ascribes the final act of severance of the historic legislative ties between Great Britain and Australia to the *Australian Citizenship Act 1948* (Cth), which is, he suggests, when Australia gained its independence: cf *Sue v Hill* (1999) 199 CLR 462. That is yet another of the many hypotheses about the "true" date on which Australia is said to have attained independent status. What matters is, however, not when, in relation to Australia, Great Britain became a "foreign power", but when its legislative authority came to an end. As to that, the competence of the Parliament of the United Kingdom to legislate for Queensland continued to be recognised as a subsisting constitutional and legal fact until it was validly terminated by the action of one or more or all of the law-making bodies involved, which it may fairly be accepted took place at latest at

5.00 am GMT on 3 March 1986, when the Australia Act 1986 (UK) came into force. The final legislative action of that Parliament included amending the provisions of s 11A and to repeal those of s 11B of the *Constitution Act 1867*. It was those provisions in s 13 of the United Kingdom Act of 1986 and not any provision of the *Constitution Office of Governor Act 1987* (Qld) that altered the office of Governor in s 11A and "affected" s 11B of the *Constitution Act*. As Queen of Australia, Her Majesty had authority under that Act to issue the Letters Patent to the Governor that were published in Queensland on 8 March 1986. See *Dooney v Henry* (2000) 74 ALJR 1289, 1295.

[27] Even that was not quite the last chapter in the history of Queensland's progress from colonial to independent legislative status as a member State of the Commonwealth of Australia under the Commonwealth Constitution. Among the other legislative provisions of the Australia Act 1986 (UK), but subject to the Commonwealth of Australia, s 1 of that Act terminated the legislative power of the Parliament of the United Kingdom over the States of the Australian Commonwealth. Section 2(2) simultaneously enlarged the powers of each State so as to include all the legislative powers that the Parliament of the United kingdom might have exercised before that Act for the peace, order and good government of that State. By s 3(1), the Colonial Laws Validity Act 1865 ceased to apply to future legislation of a Parliament of a State; and by s 3(2) no law made by such a Parliament was in future to be void or inoperative on the ground of repugnance to the law of England or to the provisions of any existing or future Act of the Parliament of the Untied Kingdom, while the powers of a State Parliament were enlarged to include the power to repeal any such Act. By s 8, an Act of State Parliament assented to by the Governor was expressed not to be subject to disallowance by Her Majesty; and by s 9, no law or instrument was to be of any force or effect in so far as it purported to require the Governor to withhold assent from any Bill or to reserve it for the signification of Her Majesty's pleasure.

[28] Those provisions did not of their own force specifically amend or repeal s 11B in the form in which it had originally become part of the of the *Constitution Act* by force of the 1977 Act. The decisive step was, as we have seen, specifically taken by s 13(3) of the Australia Act 1986 (UK). The last stage in the process of constitutional devolution was taken by the *Constitution (Office of Governor) Act 1987* (Qld) making use of the powers conferred by the Australia Act 1986 (UK), and in particular by s 2(2) of that Act. The Parliament of Queensland by ss 14 and 15 of the 1987 Act repealed s 40 of the Australian Constitution Act 1842 as well as the whole of the Australian States Constitution Act 1907, in so far as either of those statutes remained a part of the law of Queensland. Section 40 was, it will be recalled, the provision on which (for what it was worth) s 11B had been modelled. I say "for what it was worth", because if the Law Officers were correct in their opinion in 1862, it afforded no legal obstacle to the validity of colonial legislation which ought to have been, but was not, reserved, or as to which assent ought to have been withheld by the Governor in conformity with the royal instructions. Whatever the true character of the royal instructions, ss 8 and 9, and 13(3) of the Australia Act 1986 (Imp) and ss 14 and 15 of the 1987 Act finally removed any hindrance they might have presented to the valid enactment of legislation by the Queensland Parliament.

[29] The operation of s 9(1) is expressed to be conditional upon the Bill for any Act of a State "being passed in such manner and form as may from time to time be required by a law made by the Parliament of a State". There was some discussion on this appeal about whether, given the repeal of the Colonial Laws Validity Act 1865 in its application to the Australian States, it was now open to a Queensland Parliament to ignore manner and form provisions which had previously been

imposed by one of its predecessors. It is, in my view, neither necessary nor desirable to attempt to determine a matter of such constitutional importance in a case like this in which it does not directly arise. At the time of the *Constitutional (Office of Governor) Act 1987*, which commenced on the date of assent on 1 December 1987, the relevant portions of s 11A and s 11B had already been repealed by force of the Australia Act 1986 (UK) or of the *Australia Act 1986* (Cth). No special manner or form was therefore required of the enactment of the 1987 Act, which in my opinion was consequently not touched by s 53 of the *Constitution Act 1867.*

[30] With respect to the appellant's passing reliance on Magna Carta, I need do no more than refer to the decision of the High Court in *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501. As to the extent of the power to make laws for the peace, order (or welfare) and good government of a territory, the authoritative exposition of the law of Australia on that subject is to be found in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9-10, and *Durham Holdings Pty Ltd v New South Wales* (2001 75 ALJR 501, 503. The decision of the English Court of Appeal in *R (Bancoult) v Secretary of State* [2001] 2 WLR 1219, if not inconsistent with the Australian authorities, was concerned with an exercise of legislative power that was quite unlike anything involved in this case. The appellant, it may be added, also submitted that this Court had no jurisdiction to determine this appeal; but that assertion is so obviously wrong that no demonstration of its error is called for.

[31] The result is that the appeal against the principal order made by Ambrose J dismissing the appellant's application for a statutory order for review should itself be dismissed, as also must the cognate appeal against the order refusing the appellant's application for an interlocutory injunction to restrain the third respondent from conducting the election, which was in fact held as long ago as 17 February 2001. The same applies to his Honour's order setting aside the subpoena issued at the instance of the appellant. The questions raised on this appeal have already been the subject of determination, either directly or indirectly and with the same result, on a number of occasions in the Supreme Court. See *Skyring v Electoral Commission of Queensland & Anor* [2001] QSC 280, Muir J; 17 May 2001). *Sharples v Arnison & Ors* [2001] QCA 274, 16 July 2001), which concerned the costs of this application before Ambrose J; and *Skyring v Lohe* [2001] QSC 350, Phillippides J; 27 Sept 2001). In view of the consistent course of judicial opinion on the subject in this State, there is no rational justification for this appeal capable of displacing the ordinary rule that an unsuccessful appellant should pay the respondents' costs of appeal. The appeal should be dismissed with costs.

[32] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the orders he proposes.