**SUBMISSIONS**

**OF THE**

**GOVERNMENT OF NORFOLK ISLAND**

**to the**

**JOINT SELECT COMMITTEE**

**ON THE**

**REPUBLIC REFERENDUM**

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**REVIEW OF**

**CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) 1999**

**and**

**PRESIDENTIAL NOMINATIONS COMMITTEE BILL 1999**

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**JULY 1999**

**[GNI LETTERHEAD]**

12 July 1999

Ms Claressa Surtees
Secretary
Joint Select Committee on the
Republic Referendum
Parliament House
CANBERRA ACT 2600

Dear Madam

I present the Submissions of the Government of Norfolk Island to the Joint Select Committee on the Republic Referendum's review of the Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999.

Yours faithfully

Hon G C Smith MLA
Chief Minister

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## SUMMARY OF SUBMISSIONS

The Submissions which follow reflect the views, not only of the Government of Norfolk Island, but of members of the Norfolk Island Legislative Assembly.

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- The people of Norfolk Island did not have any constitutional relationship with the Commonwealth of Australia at the time the Constitution came into operation in 1901. Norfolk Island was not a party to the federal compact, with the result (as Justice Gaudron suggested in 1992) that:

  "The agreement recited in the preamble to the Constitution, namely 'to unite in one indissoluble Federal Commonwealth' may well require that some distinction be made for the purposes of section 122 between territory which, geographically and politically, is a constituent part of the Commonwealth and territory which is not".

- In 1901, Norfolk Island was a separate Crown Colony. In 1856, the Island had been constituted as "a distinct and separate settlement". The Island was not subsequently annexed to any of the adjacent Australasian or Pacific Colonies.

- The people of Norfolk Island did not participate in the referendums which preceded Federation.

- In 1914, Norfolk Island became a "territory", within the meaning of section 122 of the Constitution. At that time, it was accepted by all concerned in the matter (including the Federal Minister, the Secretary to the Attorney-General's Department and Imperial authorities) that Norfolk Island was not thereby annexed to the Commonwealth, and therefore did not become integrated into Australia.

- Although different views have been expressed (most notably by Justice Mason in 1976) passages in more recent High Court judgments tend to indicate that the question of Norfolk Island's constitutional status remains open.

- For the Norfolk Island community, the issue of whether the Island is "part of" the Commonwealth – or instead bears some other relationship to the Commonwealth – is not an arcane question of constitutional law. For 143 years - from 1856 to the present day – Norfolk Island has been a semi-autonomous polity. To the present day, there is an unbroken tradition of overwhelming local opposition to "integration" into the Commonwealth (and, before that, into New South Wales). That tradition is as strong now as it was in 1856 – perhaps more so now.

- The Norfolk Island people, at the end of the twentieth century, seek a more durable constitutional understanding with the Commonwealth, which will be less hostage to political fortune than in the past.

- For that reason, the Government of Norfolk Island opposes the proposed Constitution Alteration (Establishment of Republic) in its present form: we believe that it is inappropriate for the Australian electorate to determine Norfolk Island's ultimate

allegiance, and that the Norfolk Island community is entitled to decide whether the Island's links with the Crown should or should not be retained.

- In order to retain scope for Norfolk Island to develop a distinct constitutional relationship with Australia, the proposed Constitution Alteration should be amended to make it clear that, if the Alteration is made, that fact does not itself alter the present constitutional relationship between Norfolk Island and the Commonwealth.

- To achieve that aim, a savings provision, in respect of the proposed change to section 122 of the Constitution, is set out in our Submissions.

- Whilst acknowledging that the Committee's task does not include an inquiry into constitutional change in general, the point must be made that the development of a special constitutional relationship between Norfolk Island and the Commonwealth is not at present precluded by the Constitution. Therefore, any alteration to the Constitution should be framed so as to preserve the opportunity to develop such a special relationship.

Government of Norfolk Island
July 1999

## NORFOLK ISLAND AND THE CONSTITUTION

The Preamble to the Commonwealth of Australia Constitution Act, which was assented to on 9 July 1900, reflects the historical fact that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania:

> "… have agreed to unite in one indissoluble Federal Commonwealth".

2. The Proclamation issued by Queen Victoria on 17 September 1900, which fixed 1 January 1901 as the date for the establishment of the Commonwealth of Australia, referred to the fact that "the people of Western Australia" had also agreed to so unite. Accordingly, the establishment of the Commonwealth and the commencement of its Constitution was expressed to be in accordance with the agreement of the people of all six of what became the Original States.

3. Only the States formed part of the Commonwealth at the time of Federation. Norfolk Island was not a State then, and is not a State now. Nor was it part of any of the States. Norfolk Island had no constitutional relationship with the Commonwealth of Australia in 1901.

4. In 1901, Norfolk Island was a separate British Crown Colony. Its status at that time derived from the circumstances set out below.

## OVERVIEW OF CONSTITUTIONAL HISTORY OF NORFOLK ISLAND TO 1901

5. Norfolk Island was discovered by Captain Cook on 10 October 1774. The word "discovered" is used advisedly: "We found it uninhabited and were undoubtedly the first that ever set foot on it" [1]. Cook was almost certainly wrong about the latter proposition, but it has never been suggested that the Island was inhabited in 1774. Whatever may have been the precise consequences in public international law of Cook's discovery of Norfolk Island, by the time of British settlement of the Island in 1788 Norfolk Island was subject to the sovereignty of the British Crown. As was said by the High Court in 1992:

> "Under British law in 1788, it lay within the prerogative power of the Crown to extend its sovereignty and jurisdiction to territory over which it had not previously claimed or exercised sovereignty or jurisdiction. The assertion by the Crown of an exercise of that prerogative to establish a new Colony by 'settlement' was an act of State whose primary operation lay not in the municipal arena but in international politics or law. The validity of such an act of State … could not be challenged in British Courts. … The result is that, in a case such as the present where no question of constitutional power is involved, it must be accepted in this Court that the whole of the territory designated in Phillip's commissions was, by 7 February 1788, validly established as a 'settled' British Colony" [2].

6. Norfolk Island was included in Governor Phillip’s commissions, and was later referred to in an Imperial enactment of 1795 [3] as being within the authority of the Governor or Lieutenant Governor "of the Eastern Coast of New South Wales, and the Islands adjacent thereto". Norfolk Island was thus at that time either part of, or attached to, New South Wales, and that remained the position until 1843. In that year, under powers conferred by 6 & 7 Vict

c 35, Queen Victoria appointed by commission that from 29 September 1844 Norfolk Island "shall cease to belong to the Colony of New South Wales, and shall be taken to be a part of the colony of Van Diemen's Land". This step was taken for reasons connected with the organisation of the penal establishment at Norfolk Island.

7. The next relevant step was not taken until after the termination of the penal settlement and the arrival in Norfolk of the settlers from Pitcairn Island in 1856.

8. The Australian Waste Lands Act 1855 (Imperial) [4] had empowered Her Majesty "by Order-in-Council to separate Norfolk Island from the Colony of Van Diemen's Land, and to make such provision for the Government of Norfolk Island as may seem expedient". By an Order-in-Council made in June 1856, at the time of the arrival of the Pitcairn settlers, Queen Victoria separated Norfolk Island from the Colony of Van Diemen's Land and from the jurisdiction of the Governor of that Colony and ordered that the Island:

> "… shall be a distinct and separate settlement, the affairs of which shall, until further order is made in that behalf by Her Majesty, be administered by a Governor, to be for that purpose appointed by Her Majesty …".

It was further ordered that the Governor of New South Wales for the time being should also hold the separate office of Governor of Norfolk Island.

9. The 1843 Order-in-Council expressly used the language of annexation, whereas the 1856 Order clearly did not. The 1856 Order separated Norfolk Island from any other Colony, and made it “a distinct and separate settlement” under the Crown.

10. The historical record supports this conclusion. For example, Governor Denison's despatch to the Home Government of 27 February 1856 (before the Order was made) included the following passage:

> "I wish … to suggest that Norfolk Island should not form part of any of the adjacent colonies, but should be kept altogether distinct from and independent of them. The effect of making it a part of any of these Colonies would be to confer upon the legislatures the right of dealing with the people and the land according to their will and pleasure, and thus an opportunity would be afforded for interfering with the experiment which is now about to be made. Such interference could not be useful, and would, probably, be injurious. I would, therefore, press most earnestly upon your notice the propriety of withdrawing the island from the jurisdiction of the adjoining Colonies" [5].

The Colonial Office had independently reached the same conclusion [6]. So the terms of the 1856 Order-in-Council reflected the intention of the authorities.

11. Vice-Regal views had changed by the final decades of the nineteenth century, but those of the Colonial Office had not. Following a number of external inquiries into the Island's affairs in the 1880s and 1890s, and a case of alleged infanticide, the Governor, Viscount Hampden, took steps in the late 1890s to establish a greater degree of Crown control over the Island. A further Order-in-Council under the Australian Waste Lands Act 1855, made on 15 January 1897, accordingly provided that:

> "the affairs of Norfolk Island shall henceforth, and until further order is made in that behalf by Her Majesty, be administered by the Governor and Commander-in-Chief for the time being of the Colony of New South Wales and its dependencies".

The separate office of Governor of Norfolk Island was abolished, and the Governor of New South Wales was personally empowered to make laws for the peace, order and good government of the Island. In the meantime, existing laws continued in force.

12. The recitals to the 1897 Order-in-Council expressed that:

> "… whereas it is expedient that other provision should be made for the Government of Norfolk Island, and that, in prospect of the *future annexation* of that Island to the Colony of New South Wales, or to any Federal body of which that Colony may hereafter form part, *in the meantime* the affairs of the Island should be administered by the Governor of New South Wales as herein provided".

13. The effect of the 1897 Order-in-Council was considered by Sir Robert Garran in 1905: in his opinion Norfolk Island's constitutional status was that of "a separate settlement", and this position was unaffected by the 1897 Order-in-Council [7]. This view is consistent with the fact that the plain words of the 1897 Order-in-Council did not annex Norfolk Island to New South Wales, and this was a considered position reached after lengthy consideration and much correspondence [8]. For example, on 13 October 1896, the Premier of New South Wales advised the Governor that:

> "We propose, therefore, that the Island should not be annexed formally to New South Wales, and that our services should be administrative only, legislation being conducted as formerly …" [9].

14. A further Order-in-Council under the Australian Waste Lands Act was made on 18 October 1900, and came into force on 24 July 1901. The only difference between the 1897 Order and the 1900 Order was terminological: the former referred to the Governor of the *Colony* of New South Wales, whereas the latter referred to the Governor of the *State* of New South Wales, reflecting the differences in title arising from the fulfilment of Federation. Accordingly the 1900 Order, like the 1897 Order, did not annex the Island to, or integrate it with, any other polity.

15. In summary, when the Commonwealth of Australia was established Norfolk Island had not been annexed to, or incorporated within the boundaries of, any of the Original States. Nor did it form part of the Commonwealth in any other sense. This was authoritatively confirmed by Sir Robert Garran, who stated in 1905 that:

> "Norfolk Island is therefore a separate settlement, for the government of which the King may provide by Order-in-Council under the Act of 1855, and which is at present administered by the Governor of New South Wales under the Order-in-Council of 1897" [10].

**NORFOLK ISLAND BECOMES A TERRITORY UNDER THE AUTHORITY OF THE COMMONWEALTH**

16. In 1913, the Commonwealth Parliament enacted the Norfolk Island Act, which declared Norfolk Island "to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth by the name of Norfolk Island". The Act was not to come into force until "the King has been pleased to place Norfolk Island under the authority of the Commonwealth". As the recitals to the Norfolk Island Act 1913 express, the language used in the Act reflects that of section 122 of the Constitution, which provides:

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

17. On 30 March 1914, a fourth Order-in-Council was made under the Australian Waste Lands Act 1855. The Order, after reciting the relevant provisions of the Waste Lands Act, the 1856 and 1900 Orders-in-Council (but not the 1897 Order), the Commonwealth Constitution and the Norfolk Island Act 1913, provided that "Norfolk Island is hereby placed under the authority of the Commonwealth of Australia". The Order-in-Council of 18 October 1900 was revoked. The new Order-in-Council was to come into force on the date fixed by the Governor-General for commencement of the Norfolk Island Act 1913, which was 1 July 1914. Norfolk Island therefore became, on 1 July 1914, a "territory" within the meaning of section 122 of the Constitution, which it remains.

18. But did Norfolk Island thereby become a "part of" the Commonwealth? During the Parliamentary debate on the second reading of the Norfolk Island Bill 1913, the responsible Minister thought not:

> "In 1897, the question was raised as to what should be done with the island, and it was pointed out that there could be no annexation by New South Wales or the Commonwealth except by an Act of the Imperial Parliament. But, by an Order-in-Council, the island can be placed under the control of the Commonwealth. When that Order-in-Council is issued, the administration of Norfolk Island will be transferred from the Governor of New South Wales to the Commonwealth, and become a Territory which will be administered by the Commonwealth in accordance with section 121 [sic] of the Constitution" [11].

19. Those views were consistent with those of Sir Robert Garran, who had said in 1905 that:

> "The Island could apparently be made a territory under the control of the Commonwealth by the joint operation of an Imperial Order-in-Council and a Commonwealth Act [the mode adopted]. *The effect of this would be that the Parliament could make laws for its government, and that it would be a dependency of the Commonwealth, not a part of the Commonwealth itself, and the general laws of the Commonwealth would not be in force in the Island to any further extent than the Parliament thought fit to provide - nor would it necessarily be within the*

> *Commonwealth tariff fence. In other words, it would be in the same relation to the Commonwealth as British New Guinea will be if the Papua Bill is passed*" [12].

20. The views of Sir Robert Garran, expressed above, were in turn consistent with opinions expressed by the Imperial Law Officers at the turn of the century. In 1896 the Law Officers (Webster and Finlay) advised the Colonial Office that Imperial legislation, not an Order-in-Council, would be required to annex the Island to the Colony of New South Wales, but that the proposal "that the Island should not be formally annexed to New South Wales; [but] that the services of the Government of that Colony should be administrative only" could be effected by Order-in-Council. That was what was done in 1897. In 1902, the Law Officers (Finlay and Carson) advised the Colonial Office that, in view of the enactment of the Commonwealth of Australia Constitution Act, Norfolk Island *could* be annexed to the Commonwealth without Imperial legislation: unlike in the case of the Colony of New South Wales, there was no statutory restriction to the extension of its boundaries under the Colonial Boundaries Act 1895 [13]. This conclusion was based on the fact that, after the 1896 opinion and before the 1902 opinion, the Commonwealth of Australia Constitution Act had been enacted, section 8 of which provided that:

> "After the passing of this Act, the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act".

Accordingly, the 1902 opinion advised that annexation of the Island "should be effected under the Colonial Boundaries Act, 1895", by means of an Imperial Order-in-Council extending "the boundaries of the Commonwealth".

21. In fact, however, no such boundary extension occurred. Instead, the course ultimately adopted was foreshadowed in the 1902 opinion, but, in view of the conclusion that had already been reached in that opinion that the available mechanism arose under the Colonial Boundaries Act, its legal effect was not expressly advised on:

> "If annexation without an Imperial act of parliament was impossible, whether there were any, and, if so, what objections to transferring the administration of Norfolk Island from the Government of New South Wales to the Government of the Commonwealth by revoking the Order-in-Council of 15 January 1897 [under the Waste Lands Act] and substituting for it an Order-in-Council placing the Island under the authority of the Commonwealth under the provisions of section 122 of the Constitution?" [14]

22. The clear implication is that this course (which was the course followed) would not be effective to annex the Island to the Commonwealth, whereas an Order-in-Council under the Colonial Boundaries Act would have been.

23. It follows that "…the Commonwealth Parliament's relationship to [Norfolk Island] is not that of a sovereign exercising power over part of its own territory, but that of a sovereign exercising power over territory committed to its government but not as part of its territory" [15]. That principle is reflected in paragraph 17(a) of the Acts Interpretation Act 1901, which provides that:

> " 'Australia' or 'the Commonwealth' means the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory".

The Norfolk Island Act 1979, like the Norfolk Island Act 1913, provides that Commonwealth Acts do not extend to the Island unless specially expressed to do so. All this is consistent with Sir Robert Garran's view that "... the general laws of the Commonwealth would not be in force in the Island to any further extent than the Parliament thought fit to provide".

24. Norfolk Island is therefore a dependency of the Commonwealth of Australia, and has not been integrated into Australia so as to become a part of the Commonwealth. This conclusion is consistent with the historical record and with the views expressed, by those who participated in the relevant events, about their intentions.

25. It is true that the contrary view was expressed, *obiter*, by Mason J in *Berwick v Gray* [16]. But other, more recent, expressions of judicial opinion by Justices of the High Court indicate that the question is still open. For example, the 1992 joint judgment of Brennan, Deane and Toohey JJ in *Capital Duplicators Pty Limited v Australian Capital Territory* [17] noted that:

> "One of the objectives of the Federation was the creation of a free trade area embracing the geographical territory of the uniting Colonies, ie, the territory of the Colonies which became the Original States of the Commonwealth on its establishment on 1 January 1901. The territory of the Commonwealth at that time embraced the whole of the territory of those States, including the northern territory of South Australia. *The Commonwealth of Australia Constitution Act ensured that the territory of the Commonwealth was coterminous with the aggregate of the territories of the Original States.* A colony or territory which was not then part of a State did not become part of the Commonwealth. *It is unnecessary to consider whether an external colony or territory which was not then a part of a State can become part of the Commonwealth unless it be admitted into or established by the Commonwealth as a State pursuant to section 121 of the Constitution or is included within the limits of a State pursuant to section 123 of the Constitution.* However, it is clear that the geographical areas which have become mainland Commonwealth territories were parts of States as at 1 January 1901 and are parts of the Commonwealth now".

26. To like effect, the remarks in the joint judgment directed to the question of the exclusivity of power secured by section 90 are carefully circumscribed by five express references to "internal territories" in the relevant passage [18].

27. The nature of the Federal compact (to which Norfolk Island and its people were not party) is significant in this context. Gaudron J explained in her separate judgment in *Capital Duplicators* that:

> "The agreement recited in the preamble to the Constitution, namely 'to unite in one indissoluble Federal Commonwealth' may well require that some distinction be made for the purposes of section 122 between territory which, geographically and politically, is a constituent part of the Commonwealth and territory which is not" [19].

28. Her Honour again drew this distinction in her 1994 minority judgment in *Svikart v Stewart* [20]:

> "… although there are differences between a territory and a State and, although the power to legislate for the government of a territory conferred by section 122 of the Constitution is different from the power to legislate with respect to identified topics conferred by section 51, the *internal* territories are part of the Commonwealth of Australia and the Australians resident in those territories are part of its body politic".

29. Further, in argument before the Court in *Attorney-General (Commonwealth) v Tse* [21] on 5 March 1998 the following exchange occurred:

> "*Mr Jackson* [counsel]: Well, your Honour has a lot of territories of a disparate kind in relation to which not even the members of the Court agree sometimes about whether, for example, the mainland territories of Australia, ACT, Jervis Bay Territory and the Northern Territory, are or are not part of the Commonwealth. Sorry, I should put it the other way around: they are part of the Commonwealth, but whether other territories are or are not seems to be a matter of dispute. *Capital Duplicators (No. 1),* I think, was the case where Your Honour, Justice Gaudron, dealt with that some …
>
> *Gaudron J*: I think there is some dispute to whether they are part of the Commonwealth anyway, still.
>
> *Mr Jackson*: Yes.
>
> *McHugh J*: There certainly is.
>
> *Mr Jackson*: The dicta in *Berwick Limited v Gray* do not seem to have commanded universal acceptance since then" [22].

30. The tentative conclusion to be derived from cases such as *Capital Duplicators, Australian Capital Television v Commonwealth* [23], *Svikart v Stewart* [24] and the *Newcrest Mining* [25] litigation is that there is in the process of development a new doctrine as to the incidents of the relationship between section 122 and the other provisions of the Constitution; and that this emerging doctrine rests on much the same foundation as was expressed in 1905 by Sir Robert Garran, namely that the "Commonwealth" is constituted by, and is coterminous with, the territory of the six founding States as at 1900 (absent the admission of new States or the incorporation of additional territory into existing States). And it seems to be recognised by at least some members of the High Court that the specific question of Norfolk Island's status remains to be determined. The argument that the Island is not part of the Commonwealth, but a dependency of it, is therefore not closed.

31. So much seems to have been accepted by some Federal instrumentalities. For example, this passage appeared in a recent report:

> "The constitutional status of Norfolk Island has not been the subject of definitive decision by the High Court of Australia" [26].

**NORFOLK ISLAND'S SELF-IDENTITY**

32. The material set out above shows that the precise nature of Norfolk Island's constitutional relationship with the Commonwealth remains - at least - an open question, and also that there is much legal and historical material which supports the proposition that the Island has not been integrated so as to become a part of the Commonwealth, but remains a dependency of it.

33. Norfolk Island has been a semi-autonomous community for 143 years. Its degree of political autonomy has varied. The Island was substantially self-governing from 1856, when the Pitcairn settlers arrived, until 1896. From 1896 until 1914, when the Island became a territory under the authority of the Commonwealth, NSW authorities took a more active role in the government of the Island, though there was still considerable autonomy. From 1914 until 1979 the Island was directly administered by the Commonwealth, but still there was an acceptance that integration was not appropriate. During that period, there were local representative institutions with advisory (but not legislative or executive) functions, and their views were given weight. In 1979, the Island gained a measure of self-government which has subsequently been significantly expanded.

34. Throughout this history there has been a dynamism, or tension, arising from the equivocal nature of the Island's status. In general, mainland authorities have tended to argue in favour of "integration" with Australian political units, whereas Islanders have consistently resisted such an approach.

35. This dynamism has consistently existed since 1856, and continues today to be a very important factor in the Island's self-identity. It is a factor which is neither obsolete nor obsolescent. If anything, and because the Island is at present under greater integrationist pressure than it has been for 20 years, it is a factor which is more relevant and live today than it was in the past. The past 20 years have seen a gradually increasing scale and pace of integrationist proposals by Federal bodies, culminating in six Federal inquiries or other major Federal proposals since 1997 alone.

36. Examples of this Norfolk Island political tradition include:

**1856** Governor Denison: "I went with Mr Nobbs and the magistrate carefully over the laws which I intended to propose to the public meeting of the inhabitants. I had drawn these out on my way from New Zealand, taking care to make the code as simple and as short as possible. *I based it upon the rules which had been found to suit the habits of the people at Pitcairn's Island. ...* I left untouched the rule which gave the women, as well as the men, a vote in the annual election of the Chief Magistrate".

**1856** Royal Instructions of 24 June 1856 to the Governor of Norfolk Island: "And whereas the inhabitants of the said Island are chiefly emigrants from Pitcairn's Island in the Pacific Ocean, who have been established in Norfolk Island under our authority, *and who have been accustomed in the territory from which they have removed to govern themselves by laws and usages adapted to their own state of society, you are, as far as practicable ... to preserve such laws and usages, and to adapt the authority vested in you by the said recited Order-in-Council to their preservation and maintenance*".

**1896** Oliver Commission (NSW): "As to the future of the Island, we have no hesitation in saying that an immediate change in the system of local administration is absolutely necessary. *It may be here stated that the unanimous feeling of the Islanders is that annexation, as they understand it, to the Colony of New South Wales is most undesirable. ... we would respectfully point out that the application of the laws and system of Government in the Colony of New South Wales would not prove suitable to the Island community*, and further, that it is desirable to introduce a form of government which, while being effective, will not be altogether dissimilar to what the people have been accustomed to".

**1903** Commission of Inquiry (NSW): "Among the more thoughtful and intelligent Islanders I found the idea of annexation very favourably entertained; but the majority of the community seemed to regard the matter with characteristic apathy, while many desired nothing more than that the present status quo should be maintained. *What result a referendum of the entire community would produce on the question of cession, whether to the Commonwealth or to New South Wales, none with whom I conversed hazarded an opinion, unless that cession to New South Wales would certainly not have many advocates"*.

**1905** Opinion of the Secretary to the Federal Attorney-General's Department (Sir Robert Garran): "The Island could apparently be made a territory under the control of the Commonwealth by the joint operation of an Imperial Order-in-Council and a Commonwealth Act. *The effect of this would be that the Parliament could make laws for its government, and that it would be a dependency of the Commonwealth, not a part of the Commonwealth itself*, and the general laws of the Commonwealth would not be in force in the Island to any further extent than the Parliament though fit to provide – nor would it necessarily be within the Commonwealth tariff fence. In other words, it would be in the same relation to the Commonwealth as British New Guinea will be if the Papua Bill is passed".

**1913** Debate on second reading of Norfolk Island Bill 1913. Mr Glynn (Minister for External Affairs): "In 1897, the question was raised as to what should be done with the Island, and it was pointed out that there could be no annexation by New South Wales or the Commonwealth except by an Act of the Imperial Parliament. But, by an Order-in-Council, the island can be placed under the control of the Commonwealth...

Mr Laird Smith: Have the people of the Island been consulted?

Mr Glynn: They know what is going on; but they have not been consulted by the Government.

Mr Laird Smith: They strongly resented it being taken over by New South Wales".

**1914** Attlee Hunt (Secretary to the Department of External Affairs) Report: "For some years there has been considerable uncertainty among the inhabitants as to

what action the Federal Government and Parliament would take with respect to them. Strong statements as to their antipathy to the suggested transfer to the Commonwealth have been made".

**1926** Royal Commission received representations from 12 of the 19 then surviving original settlers from Pitcairn Island, that the Government's original promises to the Pitcairners had not been honoured. Administrator recalled because of adverse findings of Commission.

**1955** Petition signed by 375 of the Island's 583 adults, addressed to Her Majesty, asking for the restoration of "the democratic right of control over our domestic affairs".

**1976** Nimmo Royal Commission recommended:

- That if the Commonwealth Government continued to accept responsibility for Norfolk Island then it should remain a Territory for at least 5 years.

- That residents should vote in Federal elections, and for this purpose the Island should be included in the electorate of Canberra.

- That the advisory Norfolk Island Council should be replaced by a Legislative Assembly.

- That Commonwealth social security and taxation should apply to the Island.

**1977** Response of the Norfolk Island Council to the Nimmo Report:

- Federal Parliamentary representation – "The people of Norfolk Island do not seek or wish to be included ... in a mainland electorate".

- Extension of Commonwealth social security and taxation legislation – "Council does not accept this recommendation and, instead, proposes that the Norfolk Island Assembly have authority to institute its own form and levels of social security payments... and suggests that the Assembly should have authority to conduct its own tax system on the Island and to retain that tax for local needs".

**1978** Federal Government announcement as to its response to the Nimmo Recommendations:

- "The Federal Government is prepared over a period to move towards a substantial measure of self-government for the Island, and is also of the view that, although Norfolk Island is part of Australia and will remain so, *this does not require Norfolk Island to be regulated by the same laws as regulate other parts of Australia*".

- "The present situation under which laws of the Australian Parliament only apply to the Island if special provision is made in the particular law, would continue".

- "For the present Australian taxation and Australian social security benefits would not be extended to the Island".

- "The Government would see if the Island can develop an appropriate form of Government involving its elected representatives under which the revenue necessary to sustain that Government will be raised internally under its own system of law".

- "There would be no decisions taken on the question of representation in the Commonwealth Parliament until after consultations have been held with the Legislative Assembly".

**1987** Report of the Constitutional Commission's Advisory Committee on the Distribution of Powers:

- "The Government of Norfolk Island proposed several amendments to the Constitution in order to formally recognise the special status of the Island".

- "The Norfolk Island Government seeks a special relationship with the Commonwealth. We point out that machinery does exist which could accommodate the island having a 'free-association' status with Australia, similar to the relationship of the Cook Islands with New Zealand. This could be provided under sections 51(xxix) [external affairs] and 122, with Australia having responsibility for the Island's external affairs and defence".

**1991** Federal Parliament's Islands in the Sun Report recommends:

- The Commonwealth Parliament amend the Commonwealth Electoral Act to give *optional* Federal electoral enrolment rights to the people of Norfolk Island, the electorate to which the voters would be attached to be determined on the advice of the Australian Electoral Commission.

- Australian citizenship be a requirement for eligibility to stand for election or to vote in Norfolk Island Legislative Assembly elections, for all new enrollees registering on the Norfolk Island electoral roll on or after a commencement date to be determined before the end of 1991.

- The Department of Social Security establish a formal review mechanism to monitor the adequacy of social security provisions on Norfolk Island.

- The Commonwealth Grants Commission undertake a review of living standards, social security provisions and economic base of Norfolk Island.

**1991** Norfolk Island Government calls referendum to ascertain the opinion of the electors on the question: "With respect to matters discussed by the Legal Regimes Inquiry, including the question of Federal representation, should the constitutional position of Norfolk Island be changed?". 82.3% vote "no"; 16.9% vote "yes"; 0.8% of votes are informal.

**1992** After consultation with the Government of Norfolk Island (and a further Norfolk Island referendum), the Commonwealth Electoral Act was amended to provide for optional enrolment for Norfolk Island residents. However in accordance with the Government of Norfolk Island's views, the Island is not placed within a particular electorate – instead, and broadly speaking, persons are entitled to enrol in a mainland electorate with which the person has a connection.

Federal Government does not proceed with implementation of recommendations relating to Australian citizenship for Norfolk Island elections.

**1997** Commonwealth Grants Commission Report on Norfolk Island finds that:

- "Norfolk Island is unique. In judging the services, infrastructure needs and revenue raising on the Island, account must be taken of the demographic, social and cultural aspects of the community ...".
- "Norfolk Island's financial dependence on the Commonwealth is comparatively low".
- Taking over additional powers suggested during the inquiry should be within the financial capacity of the Norfolk Island Government provided it increased its revenue raising effort".
- "There is a need for improved communication between the Commonwealth and Norfolk Island Governments".
- "A review of the Norfolk Island Act 1979 is needed to clarify responsibilities, make the Act more administratively useful and strengthen accountability ...".

**1997** Norfolk Island's legislative powers over euthanasia are removed by the Commonwealth.

**1998** Minister Somlyay announces revival of proposal for Australian citizenship qualification for Norfolk Island elections, coupled with a new proposal to radically shorten the residence qualification for enrolment.

**1998** Norfolk Island referendum rejects Minister's proposal.

**1999** *January*. Minister Macdonald re-affirms Minister Somlyay's proposal.

**1999** *March*. Island to Islands Report tabled (Joint Standing Committee on the National Capital and External Territories' report into Communications with Australia's External Territories).

Recommends that "... in the twentieth year of its operation, the Government initiate a review of the Norfolk Island Act with particular reference to the anomalies that arise as a result of the Act as far as the citizens of Norfolk Island are concerned". The "anomalies" referred to appear to be the non-application of the Trade Practices Act and (Federal) Telecommunications Act to Norfolk Island.

**1999** *March*. Human Rights and Equal Opportunity Commission recommends to the Federal Attorney-General in its "Territorial Limits" Report that the (Federal) Migration Act 1958 be extended to Norfolk Island, that the Island's own immigration legislation be repealed and that the Legislative Assembly's power to legislate for immigration be revoked.

**1999** *March*. Norfolk Island Amendment Bill 1999 introduced into the Federal Parliament to give effect to the electoral proposals referred to above.

**1999** *May*. Electoral proposals in Bill again rejected by Norfolk Island referendum.

**1999** *May*. Senate resolves to note the referendum result and calls on Federal Government to enter into formal negotiations with the Government of Norfolk Island.

**1999** *June*. Republic Bill introduced into the Federal Parliament.

37. This chronology is not exhaustive. It shows a consistent tension between a continuing Island effort to preserve the distinctive character of the community and to retain a real measure of autonomy for its institutions, and a continuing metropolitan endeavour to remove "anomalies" by treating the Island as if it were an integral part of Australia. The latter will have the effect of "swamping" the local community, destroying its separate identity and self-sufficiency, without substituting anything substantial in its place.

**NORFOLK ISLAND AS PART OF THE AUSTRALIAN REPUBLIC?**

38. As the Norfolk Island Government recently stated in a letter to the Prime Minister (Annexure 1), there is a convergence of events constituted by the proposed Establishment of Republic Bill (and the contemplated Preamble Bill), the Norfolk Island Amendment Bill, the proposals of the Human Rights and Equal Opportunity Commission, the imminent twentieth anniversary of self-government in Norfolk Island (which will occur in August of this year) and - more generally - a desire on the part of Island residents to see out the twentieth century having achieved a more durable constitutional understanding with the Commonwealth, which will be less hostage to political fortune than at present, and which will enhance the self-government of Norfolk Island without the recurrent distractions occasioned by the present lack of clarity as to the Island's constitutional status.

39. Against that background, in the view of the Government of Norfolk Island:

- The question of the retention, or otherwise, of Norfolk Island's links with the Crown is properly one for the Norfolk Island community itself, and should not be predetermined

by the Australian electorate by processes in which the people of Norfolk Island have no effective voice.

- The Norfolk Island Government is prepared to take steps to ascertain the views of Norfolk Island residents on that question, by referendum under its own Referendum Act 1964.

40. Over and above the specific matter of the retention (or otherwise) of links with the Crown, the proposed Constitution Alteration raises issues of fundamental significance to the present relationship between Norfolk Island and the Commonwealth.

41. As is argued at paragraphs 18-31 above, Norfolk Island was never annexed to or integrated with the Commonwealth of Australia and the precise nature of its constitutional relationship with the Commonwealth remains to be determined. In particular, there are substantial and credible arguments available that the Island remains a separate possession of the Crown. The reference to "the Crown" means in this context the Crown in right of the Commonwealth of Australia [27].

42. Such a conclusion would be consistent with:

- The views expressed in 1975 by R J Ellicott QC and M H McLelland QC that:

> "Norfolk Island is, in effect, a Crown Colony of Australia" [28].

- The fact that the United Kingdom has renounced legislative power over any "Territory", within the meaning of section 122 of the Constitution: section 1 of the UK's Australia Act 1986 states that:

> "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State *or to a Territory* as part of the law of the Commonwealth, of the State *or of the Territory*" (emphasis added).

- The likelihood that the High Court would not recognise any future UK legislation which purported to legislate for a Territory. The High Court would instead recognise and give effect to the Commonwealth's version of the Australia Act [29].

43. In the light of those propositions, an unintended effect of the proposed Constitution Alteration may be that the Alteration will in future be interpreted as having abolished not only the notion of the Crown in right of the Commonwealth, but also the status of Norfolk Island as a separate possession of that Crown.

44. There is therefore a risk that the Constitution Alteration might be interpreted as resulting in Norfolk Island's integration into the Commonwealth, even if that result were unintended.

45. In view of the political tradition outlined at paragraphs 32-37 above, such a result would be highly unwelcome to the Island's community and would be resisted by that community as improper. Such a result would also frustrate future developments aimed at forging a more durable constitutional understanding with the Commonwealth, as referred to at

paragraph 38 above, and as put to the Prime Minister in the Norfolk Island Government's letter to him of 30 April 1999 (Annexure 1). It is disappointing, in this context, that the Federal Government has not replied to the Norfolk Island Government's letters of 30 April 1999 (Annexures 1 and 2).

46. The realisation of a more durable constitutional understanding is practicable, and for the Island's part is open to discussion and negotiation with the Commonwealth. There is thus ample scope for Australia to develop a distinct constitutional relationship with Norfolk Island, as have other nation states with territories having a distinctive heritage.

47. In the view of the Government of Norfolk Island, the Committee should not countenance any alteration to the Constitution which may be interpreted as preventing the development and achievement of such a relationship. We wish to make it clear that we do not expect the Committee to make recommendations about whether or not the development of such a relationship is desirable, but simply ask the Committee to ensure that nothing be done which might prevent or frustrate that process.

48. For these reasons, the Norfolk Island Government submits that the presently-proposed alteration to section 122 of the Constitution (item 40 of Schedule 2) should be made subject to a savings provision, analogous to item 6 of Schedule 3 [30], to the following effect:

> "The alterations of this Constitution made upon the commencement of the *Constitution Alteration (Establishment of Republic) 1999* do not affect the system of government and law that, had the alterations not been made, would have applied in relation to a territory which, before that commencement, was placed by the Queen under the authority of and accepted by the Commonwealth in accordance with section 122 of this Constitution."

49. **Annexed** to these Submissions are copies of:

- The Government of Norfolk Island's letter of 30 April 1999 to the Prime Minister about the proposed Constitution Alteration (Preamble) 1999.

- The Government of Norfolk Island's letter of 30 April 1999 to the Federal Attorney-General and Special Minister of State about the proposed Constitution Alteration (Establishment of Republic) 1999.

**ANNEXURE 1**

**GOVERNMENT OF NORFOLK ISLAND'S**

**LETTER OF**

**30 APRIL 1999**

**TO THE PRIME MINISTER, ABOUT THE**

**CONSTITUTION ALTERATION (PREAMBLE) 1999**

**ANNEXURE 2**

**GOVERNMENT OF NORFOLK ISLAND'S**

**LETTER OF**

**30 APRIL 1999**

**TO THE FEDERAL ATTORNEY-GENERAL**

**AND SPECIAL MINISTER OF STATE, ABOUT THE**

**CONSTITUTION ALTERATION**

**(ESTABLISHMENT OF REPUBLIC) 1999**

## SOURCE NOTES

1. Cook, *A Voyage Towards the South Pole and Round the World*, Vol II, pages 147-148.

2. *Mabo v Queensland* (1992) 107 ALR 1, per Deane & Gaudron JJ at 58.

3. 35 Geo III c 18.

4. 18 & 19 Vict c 56.

5. British Parliamentary Papers, *Correspondence on the Subject of Removal of Inhabitants of Pitcairn's Island*, London, HMSO, 1857, page 29.

6. Ibid, page 25 (Despatch dated 21 January 1856).

7. *Opinions of the Attorneys-General of the Commonwealth of Australia*, Volume 1, 1901-1914, AGPS, Canberra, 1981, pages 267-268.

8. British Parliamentary Papers, *Correspondence Relating to the Transfer of Norfolk Island to the Government of New South Wales*, London, HMSO, 1897, pages 3-26.

9. Ibid, page 26.

10. See note 7 above.

11. House of Representatives, *Hansard*, 16 September 1913, 1241.

12. See note 7 above.

13. O'Connell and Riordan, *Opinions on Imperial Constitutional Law*, Law Book Company, 1971, pages 306-308, 429-430.

14. Ibid.

15. *Norfolk Island - Constitutional and Legal Status*, joint opinion by R J Ellicott QC and M H McLelland QC, 11 August 1975.

16. *Berwick Ltd v Deputy Commissioner of Taxation (Gray)* (1976) 8 ALR 580, at 584.

17. (1992) 109 ALR 1, at 16 (emphasis added).

18. 109 ALR 1, at 19-20.

19. 109 ALR 1, at 27.

20. (1994) 125 ALR 554, at 575. Emphasis added.

21. Transcript of argument in *Attorney-General for the Commonwealth v Tse & Anor*, 5 March 1998, High Court, Australian Legal Information Institute web site (www.austlii.edu.au)

22. Ibid, at 38.

23. (1992) 177 CLR 106.

24. See note 20 above.

25. (1997) 147 ALR 42.

26. *Territorial Limits: Norfolk Island's Immigration Act and human rights*, Human Rights and Equal Opportunity Commission, March 1999, page 36.

27. *Sue v Hill* [1999] HCA 30 (23 June 1999), at paragraphs 54-58, 78.

28. See note 15 above.

29. [1999] HCA 30, at paragraphs 59, 63-64.

30. Item 6 of Schedule 3 to the proposed *Constitution Alteration (Establishment of Republic) 1999* reads as follows:

"The alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 1999* do not affect the unity of the federal system of government and law established under this Constitution".