

SUPREME COURT OF QUEENSLAND

CITATION: *Local Government Assoc of Qld (Inc) v State of Qld*
[2001] QCA 517

PARTIES: **LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND (INCORPORATED)**
(applicant)
v
STATE OF QUEENSLAND
(respondent)
COMMONWEALTH ATTORNEY-GENERAL
(intervenor)

FILE NO/S: Appeal No 9726 of 2001
SC No 8801 of 2001

DIVISION: Court of Appeal

PROCEEDING: Case Stated

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 November 2001

DELIVERED AT: Brisbane

HEARING DATE: 15 November 2001

JUDGES: McMurdo P, Davies and Williams JJA
Separate reasons for judgment of each member of the Court, McMurdo P and Williams JA concurring as to the orders made; Davies JA dissenting in part.

ORDER: **The answers to the questions reserved for the determination of this Court are as follows:**
**(a) is s 224A(b) of the *Local Government Act 1993 (Qld)* invalid as being inconsistent with s 327(1) of the *Commonwealth Electoral Act 1918 (Cth)*?
Yes.**
**(b) Is s 224A(b) of the *Local Government Act 1993 (Qld)* invalid as being inconsistent with s 163 and s 164 of the *Commonwealth Electoral Act 1918 (Cth)*?
Yes.**
**(c) Is s 224A(b) of the *Local Government Act 1993 (Qld)* invalid as being beyond the legislative competence of the Queensland Parliament?
Yes.**
**(d) How should the costs of and incidental to stating this case and of the action be borne and paid?
The State of Queensland should pay the costs of the applicant.**

CATCHWORDS: CONSTITUTIONAL LAW - THE NON-JUDICIAL ORGANS OF GOVERNMENT - THE LEGISLATURE - GENERALLY - POWERS AND PRIVILEGES - GENERAL LEGISLATIVE POWERS - examination of exclusive powers

of the Commonwealth Parliament

CONSTITUTIONAL LAW - THE NON-JUDICIAL ORGANS OF GOVERNMENT - THE LEGISLATURE - ELECTIONS AND RELATED MATTERS - COMMONWEALTH - NOMINATIONS - qualifications and disqualifications of candidates for election to the Commonwealth Parliament

CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION - GENERAL MATTERS - RELATIONSHIP BETWEEN COMMONWEALTH AND STATES GENERALLY - EFFECT OF STATE LAWS ON THE COMMONWEALTH AND ITS INSTRUMENTALITIES - where under s 224A(b) of the *Local Government Act* 1993 (Qld) a local government councillor ceases to be a councillor on becoming a candidate for the Commonwealth Parliament - whether s 224A(b) is invalid as being beyond the legislative competence of the Queensland Parliament - whether the Commonwealth power to legislate with respect to the qualification and disqualification of candidates for an election to the Commonwealth Parliament is exclusive - examination of exclusive powers of the Commonwealth - where certain provisions including s 16 and s 34 of the Constitution relate to matters in which the States have no concern - *Smith v Oldham* and *Nelungaloo* considered - principle in *Melbourne Corporation* discussed - whether s 224A(b) denies or alters the executive capacity of the Commonwealth - *Cigamatic* considered

CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION - INCONSISTENCY OF LAWS (CONSTITUTION, S 109) - PARTICULAR CASES - OTHER MATTERS - whether s 224A(b) of the *Local Government Act* 1993 (Qld) is invalid as being inconsistent with s 327(1) or s 163 and s 164 of the *Commonwealth Electoral Act* 1918 (Cth) - whether by s 163, s 164, s 165 and s 327(1) the Commonwealth Parliament has indicated its intention to cover the fields of nominations for federal elections, the qualifications and disqualifications of members of the Commonwealth Parliament and the capacity of qualified persons to stand for election without hindrance - whether s 224A(b) is a law which operates in one or more of those fields - where s 224A(b) imposes on a person standing as a candidate at a Federal election the immediate burden of loss of office as councillor - s 224A(b) indirectly affects who may, without hindrance or burden, nominate for candidacy at a Federal election

Commonwealth Electoral Act 1918 (Cth), Part XIV, Part

XXI, s 163, s 164, s 165, s 327(1),
Constitution of the Commonwealth of Australia 1901, s 10,
s 16, s 31, s 34, s 43, s 44, s 45, s 51(xxxvi), s 52
Judiciary Act 1903 (Cth), s 40, s 42
Local Government Act 1993 (Qld), s 1194, s 221, s 224A(b)
Commonwealth v Cigamatic Pty Ltd (1962) 108 CLR 372,
distinguished
Ex parte Elliot; re Mowle & Anor (1936) 53 WN(NSW) 88,
referred to
Fabre v Ley (1973) 127 CLR 665, referred to
*In re Foreman & Sons Pty Ltd; Uther v Federal
Commissioner of Taxation* (1947) 74 CLR 508, referred
to
Langer v The Commonwealth (1996) 186 CLR 302,
considered
McGinty v Western Australia (1996) 186 CLR 140, applied
Melbourne Corporation v The Commonwealth (1947) 74
CLR 31, followed
Nelungaloo Pty Ltd v The Commonwealth (1952) 85 CLR
545, followed
Oklahoma State Elections Board v Coats (1980) Ok 65; 610
P 2d 776, referred to
Smith v Oldham (1912) 15 CLR 355, followed
Sykes v Cleary (1992) 176 CLR 77, referred to
R v Phillips (1971) 125 CLR 93, referred to
Roughley v New South Wales; Ex parte Beavis (1928) 42
CLR 163, referred to
Telstra Corporation Limited v Worthing (1999) 197 CLR 61,
applied
Victoria v The Commonwealth (1937) 58 CLR 618, applied

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SOLICITORS: King and Company for applicant
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Australian Government Solicitor for intervenor

- [1] **McMURDO P:** The questions for determination in this Case Stated, the contentions of the parties and the intervenor, the relevant legislative provisions and the issues are fully set out in the reasons for judgment of Davies JA.
- [2] I agree with Davies JA that, for the reasons he has given, the questions (a), (b) and (d) reserved for the determination of this Court should be answered "yes".
- [3] Although it seems logical to decide reserved question (c) before reserved questions (a) and (b),¹ once it is determined to answer reserved questions (a) and (b) affirmatively, in my view it then becomes unnecessary in this case to determine

¹ See *R v Phillips* (1971) 125 CLR 93, 109; *Victoria v Commonwealth* (1937) 58 CLR 618, 630; *Telstra Corporation v Worthing* (1999) 197 CLR 61, 76.

reserved question (c). But, as here, that question has been answered differently by Davies JA and Williams JA, it seems that I, too, should answer reserved question (c).

- [4] Section 51(xxxvi) of the Constitution provides:
 "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
 ...
 (xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;"
- [5] Section 31 of the Constitution provides:
 "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives."
- [6] Section 34 of the Constitution sets out the qualifications of members of the House of Representatives "until the Parliament otherwise provides ...".²
- [7] Part XIV *Commonwealth Electoral Act* 1918 (Cth), ss 162-181 inclusive deals with nominations of Commonwealth electoral candidates. Of particular relevance are ss 163 (Qualifications for nomination) and 164 (State and Territory members not entitled to be nominated).
- [8] There is no doubt the federal Parliament has plenary power to make laws for the regulation of federal elections: see, for example, Brennan CJ's comments in *Langer v The Commonwealth*.³
- [9] In *Smith v Oldham*⁴ Griffith CJ expressed the view that the federal Parliament's power to make laws for the regulation of federal elections was an exclusive power.⁵ Barton J explained the effect of s 51(xxxvi) and ss 31 and 10 of the Constitution:
 "No power was given to any State to make laws with regard to federal elections, but existing State laws as to State elections were made applicable to federal elections during the time which necessarily intervened before the Federal Parliament could legislate on the subject. That is all. Since the Federal Parliament has legislated upon the subject its legislation relating to elections has displaced that of the States and its power to pass such legislation is exclusive, because no State Parliament had under its own Constitution power to legislate as to federal elections. Parliament

² Although s 34 of the Constitution only refers to the male pronoun, the *Interpretation Act* 1889 (Imp), 52 and 53 Vic. c 63 provided that "... in every Act passed after the year 1850, ... unless the contrary intention appears, words importing the masculine gender shall include females;" the Constitution of the Commonwealth was embodied in an Imperial Act.

³ (1996) 186 CLR 302, 317.

⁴ (1912) 15 CLR 355.

⁵ *Ibid*, 358.

has 'otherwise' provided, and the only authority that can legislate upon the subject is the Parliament of the Commonwealth."⁶

- [10] That view was also supported by comments of Dixon J (as he then was) in *Nelungaloo Pty Ltd v The Commonwealth*⁷ and see also Lumb and Moens, "The Constitution of the Commonwealth of Australia".⁸
- [11] In *McGinty v Western Australia*⁹ McHugh J noted:
 "The ordinary principles of statutory interpretation require that the text be the starting point of any interpretation of the Constitution. Part of the ordinary and natural meaning of the text is any implication which is 'manifested according to the accepted principles of interpretation'. Implications derived from the structure of the Constitution are also part of the Constitution's meaning but such implications may be drawn only when they are 'logically or practically necessary for the preservation of the integrity of that structure'. Thus, because the Constitution has prescribed a system for elections to the Houses of the federal Parliament, no Australian government can pass laws which would undermine the efficacy of that system."
- [12] Applying those principles of statutory interpretation to ss 10, 31, 34 and 51(xxxvi) of the Constitution I am satisfied that the regulation of federal elections is an issue in which the States could have no legitimate interest and a topic on which the federal Parliament is given exclusive power once the federal Parliament "otherwise provides". Federal Parliament has otherwise provided in the *Commonwealth Electoral Act* 1918. Eligibility for nomination is a matter relating to the regulation of federal elections¹⁰ and in which the Commonwealth government has exclusive power. In enacting s 224A(b) *Local Government Act* 1993, the Queensland Parliament imposed a disincentive or sanction for a local government councillor who nominates for election as a Senator or Member of the House of Representatives; this sanction or disincentive undermines the exclusive Commonwealth legislative scheme under the *Commonwealth Electoral Act* 1918.
- [13] It follows that I would answer the reserved question (c), "yes".
- [14] In doing so, I recognise that there are substantial considerations why the occupation of an office such as local government councillor during the period of a federal election campaign may be undesirable: some of these considerations are raised in the Second Reading Speech of the *Local Government and Other Legislation Bill*.¹¹ See also *Ex parte Elliot; Re Mowle & anor*.¹² Although it is not contended that s 44(iv) Constitution applies to local government councillors,¹³ some analogy can be

⁶ At 359-360.

⁷ (1952) 85 CLR 545, 564.

⁸ Butterworths 2001 6th ed 354-356, [762]-[763].

⁹ (1996) 186 CLR 140, 231.

¹⁰ *Sykes v Cleary* (1992) 176 CLR 77, 100; *Langer v The Commonwealth* (1996) 186 CLR 302, 334; *Fabre v Ley* (1973) 127 CLR 665, 669.

¹¹ Hansard, 2 May 2001, 607.

¹² (1936) 53 WN (NSW) 88.

¹³ *Sydney City Council v Reid* (1994) 34 NSWLR 506.

drawn between a local government councillor and the class of persons referred to in s 44(iv) Constitution: see *Sykes v Cleary*¹⁴ and *Oklahoma State Elections Board v Coats*.¹⁵ I note that it is not contended in this case that s 221(f) *Local Government Act* 1993 (Qld), which disqualifies a person who is a member of an Australian Parliament from being qualified to be or become a councillor, is invalid. Regardless of the merits of these considerations, it remains exclusively for the Commonwealth Parliament to decide whether it wishes to add to s 164 of the *Commonwealth Electoral Act* 1918 a fourth category of persons not entitled to be nominated as a Senator or Member of the House of Representatives, namely local government councillors.

[15] I would answer the questions reserved for the determination of this Court as follows:

(a) Is s 224A(b) of the *Local Government Act* 1993 (Qld) invalid as being inconsistent with s 327(1) of the *Commonwealth Electoral Act* 1918 (Cth)?

Yes.

(b) Is s 224A(b) of the *Local Government Act* 1993 (Qld) invalid as being inconsistent with s 163 and s 164 of the *Commonwealth Electoral Act* 1918 (Cth)?

Yes.

(c) Is s 224A(b) of the *Local Government Act* 1993 (Qld) invalid as being beyond the legislative competence of the Queensland Parliament?

Yes.

(d) How should the costs of and incidental to stating this case and of the action be borne and paid?

The State of Queensland should pay the costs of the applicant.

DAVIES JA:

1. The questions and the opposing contentions

[16] The Local Government Association of Queensland (Incorporated), by action against the respondent, the State of Queensland, seeks the following declarations:

- "(a) a declaration that s 224A(b) *Local Government Act* 1993 (Qld) is invalid as being:
 - (i) inconsistent with s 327(1) *Commonwealth Electoral Act*;
 - (ii) inconsistent with ss 163 and 164 *Commonwealth Electoral Act*;
 - (iii) beyond the legislative competence of the parliament of Queensland;
- (b) a declaration that those councillors who nominate, or have nominated, for election to the Commonwealth parliament at the forthcoming general election have not ceased to be

¹⁴ At 96.

¹⁵ (1980) Ok 65; 610 P 2d 776, 778.

councillors under the *Local Government Act 1993* (Qld) unless and until such person is elected to the Commonwealth parliament and s 221(f) of the Act applies."

- [17] The reference to the forthcoming general election is, of course, a reference to the general election held on Saturday 10 November last. The applicant is a body corporate constituted by s 1194 of the *Local Government Act 1993* and has brought this action for the benefit of and in the interest of local government in Queensland. No question arises as to its standing in that respect.
- [18] The action was commenced by originating application in the Supreme Court on 1 October 2001. It was removed into the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth) on 12 October 2001. On the same day Kirby J remitted the matter to the Supreme Court pursuant to s 42 of the *Judiciary Act* because, it seems, there was no prospect of the High Court being able to hear the matter on or before 20 November 2001 the date by which the applicant sought a hearing. Then on 19 October 2001 a judge of the Supreme Court reserved a case for consideration of this Court.
- [19] The reason why the applicant sought an early hearing and determination of this matter is that, if s 224A(b) is valid, some councillors who, in consequence of being declared to be candidates for the election on 10 November last, ceased to be councillors, but failed or are likely to fail to be elected, have lost or will soon lose their right to nominate for the office of councillor in a by-election for that office. That is because of a combination of the operation of s 270(2), s 298 and s 301(2)(b) of the *Local Government Act* and s 283 and s 284 of the *Commonwealth Electoral Act*. And even if s 224A(b) is invalid some may have lost or may soon lose that right because they have assumed that, in accordance with s 298, they could not nominate for a by-election until the result of the Federal election is declared. Accordingly this Court heard the matter on 15 November and gives this judgment on 20 November 2001.
- [20] The Attorney-General for the Commonwealth has intervened in support of the applicant. No other Attorneys have intervened.
- [21] The questions which are reserved for determination by this Court are:
- (a) is s 224A(b) of the *Local Government Act 1993* (Qld) invalid as being inconsistent with s 327(1) of the *Commonwealth Electoral Act 1918* (Cth)?
 - (b) Is s 224A(b) of the *Local Government Act 1993* (Qld) invalid as being inconsistent with s 163 and s 164 of the *Commonwealth Electoral Act 1918*?
 - (c) Is s 224A(b) of the *Local Government Act 1993* (Qld) invalid as being beyond the legislative competence of the Queensland Parliament?
 - (d) How should the costs of and incidental to stating this case and of the action be borne and paid?
- [22] The provision under challenge, s 224A of the *Local Government Act 1993*, was inserted by an amending Act which commenced operation on 25 May 2001. It is in the following terms:

"224A Councillor ceases to be councillor on becoming candidate for an Australian Parliament

A councillor ceases to be a councillor if -

- (a) under the *Electoral Act 1992*, section 88(3), the councillor becomes a candidate for an election as a member of the Legislative Assembly; or
- (b) under the *Commonwealth Electoral Act 1918* (Cwlth), section 176, the councillor is declared to be a candidate for an election."

- [23] The submission of the applicant that s 224A(b) is beyond the legislative competence of the Queensland Parliament is based on the propositions that:
- (a) by stating what the qualifications are of members of the Senate and the House of Representatives "until the Parliament otherwise provides", in s 16 and s 34 and by stating what their disqualifications are in s 43, s 44 and s 45 of the Commonwealth Constitution, the Constitution implicitly provided that State parliaments may not so provide; and
 - (b) because s 224A(b) is a law with respect to "the nomination process for federal elections",¹⁶ "federal elections"¹⁷ or "the qualification and disqualification of members of the Commonwealth Parliament and the capacity of qualified persons to stand for election without hindrance"¹⁸ it is a law with respect to the qualification or disqualification of members of the Commonwealth Parliament.
- [24] The submission of the Commonwealth Attorney-General that s 224A(b) is beyond the legislative competence of the Queensland Parliament is based on the proposition that it is a law which affects the functioning of the Commonwealth legislature and is therefore invalid on a "reverse *Melbourne Corporation*" principle.
- [25] The alternative submission that s 224A(b) is invalid because it is inconsistent with a Commonwealth law is based on the propositions that:
- (a) by s 163, s 164, s 165 and s 327(1) of the *Commonwealth Electoral Act* the Commonwealth Parliament has indicated its intention to cover the fields of nominations for Federal elections, the qualifications and disqualifications of members of the Commonwealth Parliament and the capacity of qualified persons to stand for election without hindrance;
 - (b) section 224A(b) is a law which, if valid, operates in one or more of those fields; or
 - (c) even if it does not, it alters, impairs or detracts from the operation of those Commonwealth provisions.¹⁹

¹⁶ Applicant's submissions par 19.

¹⁷ Applicant's submissions par 28.

¹⁸ Submissions of the Attorney-General for the Commonwealth par 1.2.2.

¹⁹ *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; *Telstra Corporation Limited v Worthing* (1999) 197 CLR 61 at [28], [32].

- [26] The respondent, whilst not advancing any argument against the contention that the Commonwealth power to enact law with respect to the qualification of members of the Commonwealth Parliament is exclusive, submits that:
- (a) section 224A(b) is not a law with respect to the qualification or disqualification of members of the Commonwealth Parliament but about the effect that declaration as a candidate for election to the Commonwealth Parliament has upon the office of local government councillor; in other words, about the holding of an office created under State law. It is therefore a law with respect to the peace, welfare and good government of the State;
 - (b) section 224A(b) is not a law which burdens a nominee for Federal election, either directly or indirectly; consequently it does not impair or detract from the operation of s 163, s 164, s 165 or s 327(1) of the *Commonwealth Electoral Act*; and
 - (c) the field marked out by the Constitution and the *Commonwealth Electoral Act*, insofar as it is relevant for present purposes, is the qualification and disqualification for nomination, election and sitting as a senator or member of the House of Representatives; and s 224A(b) does not intrude into that field because it simply brings about the cessation of the office of local government councillor upon that councillor being declared to be a candidate.²⁰

2. The constitutional and Commonwealth provisions

- [27] Section 34 of the Constitution provides that "until the Parliament otherwise provides" the qualifications of a member of the House of Representatives are that he must be of the full age of 21 and a qualified elector; and be a subject of the Queen. By s 16 the qualifications of a senator are the same as those of a member of the House of Representatives.
- [28] Section 43 to s 45 of the Constitution then set out some bases for disqualification. They are membership of the other House,²¹ foreign allegiance,²² criminal conviction,²³ bankruptcy,²⁴ the holder of any office of profit under the Crown,²⁵ a government contractor²⁶ and receipt of fees or honoraria for services rendered to the Commonwealth or for services rendered in the Parliament to any person or State.²⁷

²⁰ The declaration of a person as a candidate at a Federal election is 12 noon on the day after the day on which nominations for the election close: *Commonwealth Electoral Act* s 175(2).

²¹ Section 43.

²² Section 44(i).

²³ Section 44(ii).

²⁴ Section 44(iii) and s 45(ii).

²⁵ Section 44(iv).

²⁶ Section 44(v).

²⁷ Section 45(iii).

- [29] The relevant provisions of the *Commonwealth Electoral Act*, Part XIV headed "The nominations", which includes s 162 to s 181, and Part XXI headed "Electoral offences", which includes s 327, were enacted pursuant to the power conferred by s 51(xxxvi) of the Constitution. Section 163(1) provides that a person is qualified to be a member of the Commonwealth Parliament if he or she is 18 years or over, is an Australian citizen and is either entitled to vote at a House of Representatives election or qualified to become such an elector. Subsection (2) then provides that a person is not entitled to be nominated for an election as a senator or a member of the House of Representatives unless he or she is qualified under subsection (1).
- [30] Section 164 then provides that a person who is a member of a State parliament²⁸ or a Territory legislative assembly²⁹ is not capable of being nominated and s 165 provides that a person cannot nominate more than once. Section 170 then provides that a nomination is not valid unless the person declares that he or she is qualified under the Constitution and the laws of the Commonwealth to be elected.
- [31] Section 327(1) provides that a person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under the *Commonwealth Electoral Act*. It is no longer submitted by the applicant or the Commonwealth Attorney that this section affects the legislative power of the State; rather it is submitted that it indicates the field covered by the Commonwealth Act.

3. The issues

- [32] The issues raised by the competing arguments appear to be:
- whether the Commonwealth power to legislate with respect to the qualification and disqualification of candidates for an election for Commonwealth Parliament, including any hindrance or interference with the right to stand as a candidate, is exclusive;
 - if so, whether s 224A(b) is a law with respect to any of those matters or one which purports to restrict or modify that power;
 - if not whether it is nevertheless inconsistent with the Constitutional provisions and the provisions of the *Commonwealth Electoral Act* already referred to.

4. Whether the Commonwealth power is exclusive

- [33] The power conferred by s 16 and s 51(xxxvi), and by s 34 and s 51(xxxvi) of the Constitution, and implemented by the provisions to which I have referred of the *Commonwealth Electoral Act*, is not declared by the Constitution to be exclusive. Those which are so declared are laws with respect to Commonwealth places,³⁰

²⁸ Section 164(a).

²⁹ Section 164(b).

³⁰ Section 52(i); and see s 111.

matters relating to the Commonwealth Public Service,³¹ customs and excise,³² bounties³³ and Commonwealth territories.³⁴

- [34] In addition s 51(vi) and s 114 together appear effectively to grant to the Commonwealth and withdraw from States the power to legislate with respect to the raising or maintaining of any naval or military force and s 51(xii) and s 115 together appear effectively to grant to the Commonwealth and withdraw from the States the power to legislate with respect to coinage or making anything but gold or silver coin a legal tender. In both of these cases it seems that the Constitution has, by this combination of provisions, declared the matters to be within the exclusive power of the Commonwealth Parliament.³⁵
- [35] These then, are the only Commonwealth powers which are made exclusive by s 52 of the Constitution. There is, in my view, much to commend the view that, subject to the effect upon State legislative power of the implication in the Constitution predicated upon the continued existence of the Commonwealth and the States as bodies politic, s 52 states exhaustively the exclusive legislative power of the Commonwealth Parliament. Indeed that was the opinion of Higgins J, the only member of the High Court who, to my knowledge, has expressed an opinion on this question, in *Roughley v New South Wales; Ex parte Beavis*.³⁶
- [36] There are, however, a number of provisions in the Constitution which permit State laws to apply until the Commonwealth Parliament otherwise provides³⁷ or which make provision in the Constitution until the Commonwealth Parliament otherwise provides.³⁸ Section 16 and s 34 are in the second of those categories. None of those provisions relates to a matter in which the States have any concern. However, for reasons which I shall mention later, in my opinion that, alone, would not be sufficient, consistently with s 52, to make them matters with respect to which the Commonwealth had exclusive power to legislate.
- [37] Mr Hanger QC who, with Mr Wilson, appeared for the applicant, submitted that the legislative power exercised by s 224A(b) was within the exclusive power of the Commonwealth because of the implication which he submitted arose from the words "until the Parliament otherwise provides" in s 34. He sought to rely upon dicta of Griffith CJ, Barton and Isaacs JJ in *Smith v Oldham*³⁹ a case concerning

³¹ Section 52(ii); and see s 69.

³² Section 51(ii) and s 90. See also s 88.

³³ Section 51(iii) and s 90.

³⁴ Section 111 and s 122.

³⁵ Within the meaning of s 52(iii).

³⁶ (1928) 42 CLR 162 at 198.

³⁷ Section 7 par 2, s 8 (by reason of s 30), s 10, s 29, s 30, s 31, s 73 and s 97.

³⁸ Section 3, s 7 par 3, s 16, s 22, s 24, s 34, s 39, s 46, s 47, s 48, s 65, s 66, s 67, s 87 and s 96.

³⁹ (1912) 15 CLR 355 at 358, 359 - 360, 365.

the validity of a section of the *Commonwealth Electoral Act* which required that every article, report, letter or other matter commenting upon any candidate or political party or the issues being submitted to electors, printed and published in any newspaper, circular, pamphlet or dodger, be signed by the author or authors giving their name and address. The dicta relied on, to the extent that they said that Commonwealth legislative power was exclusive, were therefore obiter.

[38] Griffith CJ said:

"It is not disputed that [the Federal] Parliament has power to make laws for the regulation of federal elections. In my opinion that power is an exclusive power. The matter is one in which the States as such have no concern."

His Honour did not elaborate further on why that power is exclusive.

[39] Barton J said:

"No power was given to any State to make laws with regard to federal elections, but existing State laws as to State elections were made applicable to federal elections during the time which necessarily intervened before the Federal Parliament could legislate on the subject. That is all. Since the Federal Parliament has legislated upon the subject its legislation relating to elections has displaced that of the States, and its power to pass such legislation is exclusive, because no State Parliament had under its own Constitution power to legislate as to federal elections. Parliament has 'otherwise' provided, and the only authority that can legislate upon the subject is the Parliament of the Commonwealth."

His Honour appeared to base the lack of State power to legislate on that matter on an historical basis: it was not a legislative power which the Colonies had⁴⁰ or one conferred on the States by the Constitution. This was a basis which, as I shall endeavour to show, was later taken up by Sir Owen Dixon.

[40] Isaacs J relevantly said:

"The subject matter of the present enactment is transparently beyond the competency of the State to control. It was the Constitution itself, and not the State Parliament, that applied even as an interim provision the State laws to federal elections. So it necessarily falls within the scope of the Commonwealth legislative authorities to regulate those elections."

It is unclear whether his Honour was merely explaining why the matter was within Commonwealth power and that, once the Commonwealth had enacted legislation on the matter, it was beyond State legislative power to do so because of s 109 or whether he was saying something more than this.

[41] *Smith v Oldham* was decided in 1912 at a time when it is likely that both Griffith CJ and Barton J were adhering to a view that Commonwealth and State instrumentalities were each immune from the operation of legislation of the other, a

⁴⁰ See s 106 and s 107 of the Constitution.

view which was not overturned until the *Engineers Case*⁴¹ in 1920. This view may well have underlain their Honours' expressed reasons.

- [42] To those dicta the Commonwealth Solicitor-General added that of Dixon J in *Nelungaloo Pty Ltd v The Commonwealth*,⁴² a case which concerned the circumstances in which an inter se question arose, the specific context being the validity of a regulation under the *National Security (Wheat Acquisition) Regulations* of the Commonwealth, regulations which had been enacted under s 51(xxxi) of the Constitution. However his Honour, referring to matters the subject of both categories of Constitutional provisions to which I have referred, which, as I have said, include s 16 and s 34, said:

"They are not matters with which the States could have any concern and, if a common boundary between the Federal power over them and State power is conceivable at all, it would, I suppose, be found to be a boundary between a State power and a Federal exclusive power."

- [43] Apart from saying that these are matters with which States could have no concern, his Honour did not explain why Commonwealth power in respect of them must be exclusive. However the explanation can, I think, be found in his Honour's earlier dissenting judgment in *Uther v Federal Commissioner of Taxation*⁴³ where his Honour said:

"The Colony of New South Wales could not be said at the establishment of the Commonwealth to have any power at all with reference to the Commonwealth. Like the goddess of wisdom the Commonwealth *uno ictu* sprang from the brain of its begetters armed and of full stature. At the same instant the Colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal constitution does not give it."

- [44] As is well known, his Honour's dissenting view in that case prevailed in *Commonwealth v Cigamic Pty Ltd*⁴⁴ where his Honour, by then Chief Justice, said:

"...[the conclusion in *Uther*] seems to me now as it seemed to me then to imply a fundamental proposition about the power of legislatures of the States which ought not to be entertained. The proposition that is implied is that an exercise of State legislative power may directly derogate from the rights of the Commonwealth with respects to its people. It is a proposition which must go deep in the nature and operation of the Federal system."

His Honour went on to say that *Uther's Case* should not be regarded as binding.

⁴¹ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁴² (1952) 85 CLR 545 at 564.

⁴³ *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 530.

⁴⁴ (1962) 108 CLR 372 at 377.

- [45] The principle in *Cigamatic* is that a State cannot legislate so as to deny or alter any executive capacity of the Commonwealth, but it can legislate so as to regulate activities carried out in the exercise of that capacity.⁴⁵ Seen in the light of his Honour's later statement in *Cigamatic*, Dixon J's statement in *Nelungaloo* can be seen to say no more than that a State cannot legislate so as to deny or alter the executive, the judicial or possibly even the legislative capacity of the Commonwealth.⁴⁶ It will be necessary to return to the application of the *Cigamatic* principle to this case. But first I should turn to the submission of the Commonwealth Solicitor-General.
- [46] The Commonwealth Solicitor-General described the basis upon which the Commonwealth power here was exclusive as "a reverse *Melbourne Corporation* situation". He submitted that the whole area of the election of Commonwealth Parliamentarians and their disqualification and the conditions on which they serve, and impositions upon them as parliamentarians, is concerned with the functioning of the Commonwealth legislature as such. It was, he therefore submitted without elaboration, an area into which a State legislature cannot go.
- [47] The principle underlying *Melbourne Corporation v The Commonwealth*,⁴⁷ and also *Cigamatic*, is that the Constitution is predicated upon the continued separate existence of the Commonwealth and the States as bodies politic. However in the application of that principle it is necessary to differentiate between the legislative power of the Commonwealth and that of the States. Because States are given no specific legislative powers which might be construed as authorizing them to restrict or modify the executive capacity of the Commonwealth, the application of this principle to State legislative power is, as explained earlier, that a State cannot legislate so as to deny or alter the executive capacity of the Commonwealth. However, because the Commonwealth is given enumerated legislative powers which, by reason of their content or subject matter may authorize it to affect the executive capacity of a State, the principle does not, in such a case, afford the State any protection from the exercise of those powers. But States, or a State, are protected from the exercise of Commonwealth legislative power which imposes a special burden on them or inhibits or impairs their continued existence or their capacity to function.⁴⁸
- [48] What the Commonwealth Solicitor-General must therefore have meant by "a reverse *Melbourne Corporation* situation" is the *Cigamatic* principle; and that s 224A(b) denies or alters the executive capacity of the Commonwealth. But s 224A(b) does no such thing. Its direct effect and practical operation is plainly

⁴⁵ *Re Residential Tenancies Tribunal of New South Wales & Ors; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438 - 439, 424.

⁴⁶ The provisions to which his Honour referred in *Nelungaloo* appear to relate not only to the executive capacity (s 3, s 65, s 66, s 87 and s 97) but also to the legislative capacity (s 7, s 10, s 22, s 24, s 29, s 30, s 31, s 34, s 39, s 46, s 47, s 48 and s 96). As to State laws affecting the judicial capacity of the Commonwealth, see *Gould v Brown* (1998) 193 CLR 346; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.

⁴⁷ (1947) 74 CLR 31.

⁴⁸ *Re Residential Tenancies Tribunal of New South Wales* fn 45 at 440.

only upon councillors of a State local government. And a legitimate purpose of it may be seen in the need to ensure that such councillors are not distracted from their duties as such or placed in a position of conflict with those duties by standing as a candidate for some other office.⁴⁹ It is true that, by disqualifying from office a councillor who stands for Federal election, the section may indirectly limit the choice of candidates available to electors at a Federal election. But even that indirect effect is not one on the executive capacity of the Commonwealth government. For those reasons, in my opinion, s 224A(b) is not invalid on the basis advanced by the Commonwealth Solicitor-General.

[49] Nor does section 224A(b) deny or alter any legislative capacity of the Commonwealth government. On the contrary, as appears from what I say below, it can have no operation in the field covered by the *Commonwealth Electoral Act*: s 109. Indeed, because of s 109, it is difficult to see how a State law could ever effectively deny or alter Commonwealth legislative capacity. There is, in my opinion, no need to imply a limitation upon State legislative capacity, on the basis of a denial or alteration of Commonwealth legislative capacity, where the only law by which a State could purport to deny or alter Commonwealth legislative capacity must be inconsistent either with an express constitutional provision or with a Commonwealth law.

[50] Nor is there any wider basis for invalidity of the section as contended for by the applicant. A State has power to make laws, such as this is, for the peace, welfare and good government of the State subject only to express limitations imposed by the Constitution or, relevantly,⁵⁰ the implied limitation discussed above. In my opinion it is not invalid as being beyond the legislative competence of the Queensland Parliament.

5. Inconsistency

[51] The principles relevant to the application of s 109 of the Constitution are not in doubt although their application has, from time to time, caused some difficulty. As the High Court emphasized in *Telstra v Worthing*⁵¹ there are two relevant but distinct propositions. The first is that where a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. And the second is that, if it appears from the terms, nature or subject matter of the Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then a State law that regulates or applies to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent.

⁴⁹ Cf s 44(i), (iv) and (v) of the Constitution and *Sykes v Cleary* (1992) 176 CLR 77 at 96. It was not argued by the respondent that the office of local government councillor was an office of profit under the Crown within the meaning of s 44(iv) and the case reserved in par 5 appears to accept that it is not. That seems to be correct. See *Sydney City Council v Reid* (1994) 34 NSWLR 506 and equivalent provisions of the *Local Government Act*.

⁵⁰ Of course, the Constitution may invalidate either Commonwealth or State legislation which infringes the implied freedom of political communication: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁵¹ Fn 19 supra.

- [52] There does not appear to be any doubt that the Commonwealth legislature intended, by enacting the *Commonwealth Electoral Act*, in particular s 163, s 164 and s 165, together with the relevant provisions of the Constitution, in particular s 43, s 44 and s 45, to deal comprehensively with the qualification and disqualification of members of the Commonwealth Parliament. And s 327(1) indicates that that field of operation extends to the prevention of any interference with a right under the Constitution and the Act to stand for election as such.
- [53] All of that seems plain from the scheme of those provisions. But if there were any doubt, that should be resolved by the nature of the subject matter, which, as was said by Griffith CJ and Dixon J, is one with which State legislatures could have no concern; from which it may more readily be inferred that the Commonwealth legislature, having enacted legislation on the matter, contemplated that its would be the only legislation affecting that matter.⁵²
- [54] The contrary does not appear to have been argued by the Solicitor-General for Queensland. However the respondent submits that s 224A(b) does not enter that field of operation. In order to determine whether it does it is necessary to see the operation of that section, including its indirect operation.
- [55] As the stated case accepts, s 224A(b) does not disqualify a councillor under the *Local Government Act*, by virtue of his office, from nominating for election to the Commonwealth Parliament or affect his right to nominate for election to the Commonwealth Parliament. It takes effect only after such nomination, albeit shortly after and in consequence of that nomination.⁵³ For these reasons, the respondent submits, the section does not affect in any way the operation of s 163, s 164 or s 327 or, for that matter, s 43 to s 45 of the Constitution.
- [56] However in order to see its full operation, including its indirect operation, it is necessary to see the context of s 224A(b) which is Division 2 of Part 1 of Chapter 4 of the *Local Government Act*. Chapter 4 is headed "LOCAL GOVERNMENT COUNCILLORS", Part 1 is headed "MEMBERSHIP OF LOCAL GOVERNMENTS" and Division 2 is headed "**Qualifications and disqualifications**". That Division contains s 220 to s 226.
- [57] Section 220 contains what are described as general qualifications for membership. Section 221 contains what are described as general disqualifications. These include bankruptcy or equivalent, being a prisoner, not being entitled to be elected as a member of the Legislative Assembly and, in par (f), being a member of an Australian parliament. Section 222 disqualifies a person who is convicted of a number of defined offences. Section 224 is in the following terms:

⁵² Cf the prevention of collisions at sea (*Hume v Palmer* (1926) 38 CLR 441 at 462, *Victoria v The Commonwealth* (1937) 58 CLR 618 at 628), preference in employment for former members of the armed forces (*Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 112), bankruptcy, patents and trademarks (*Victoria v The Commonwealth* at 638), the protection of Commonwealth property (*R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 342 - 343) and the fulfilment of international treaty obligations (*Viskauskas v Niland* (1983) 153 CLR 280).

⁵³ See fn 20.

"If a member of the Legislative Assembly is elected or appointed as a councillor, the person is taken to have resigned as a member of the Legislative Assembly on the day the person becomes a councillor."

Section 225 provides that, on a councillor becoming a director of a significant business entity contrary to another section of the Act, the councillor ceases to be a councillor and s 226 provides that if a local government employee is elected or appointed as a councillor the person is taken to have resigned as an employee on the day the person becomes a councillor.

- [58] Speaking generally, leaving aside s 224A, these provisions disqualify a person from being a councillor because of unfitness; or terminate his office as a councillor or some other competing position upon his acquiring both the office and the competing position. Section 221(f) which is of the latter kind, may, in particular, be contrasted with s 224A(b). The former section is not concerned with who may, without hindrance or burden, stand as a candidate at a Federal election. Its effect is only to ensure that, in the end, he or she does not occupy both offices of councillor and Federal member or Senator. The latter section, by contrast, at least indirectly affects who may, without hindrance or burden, so stand because it imposes on a person so standing the immediate burden of loss of office as a councillor.
- [59] That loss of such an office is a substantial financial loss is self evident; it includes not only loss of remuneration but also loss of superannuation benefits. And there is, in addition the loss of an important public office. These losses are imposed by s 224A(b) almost immediately upon and in consequence of a councillor⁵⁴ undertaking the risk of candidacy. The prospect of losing these benefits in that event is likely to hinder councillors from undertaking that risk.
- [60] Because of that the indirect effect of s 224A(b) may even arguably be, in effect, to add to the categories of those persons stated in s 164 of the *Commonwealth Electoral Act* to be incapable of being nominated for Commonwealth Parliament the further category of a councillor of a local government. Indeed the Second Reading Speech of the Minister introducing the amending Bill for s 224A(b) described its aim as "to bring greater consistency between the requirements on councillors and the requirements of members of the Legislative Assembly seeking higher office"; a clear reference to s 164(a).
- [61] In any event because, in my opinion s 224A(b) has the indirect effect of impairing the right of local government councillors, along with all other persons, subject to the limitations imposed by s 163, s 164, s 165 and s 327 of the *Commonwealth Electoral Act* and s 43, s 44 and s 45 of the Constitution, to nominate for candidacy at a Federal election free from hindrance of any kind, it enters the field occupied by those sections and detracts from their full operation. I would therefore conclude that s 224A(b) is inconsistent with the Commonwealth scheme for qualification and disqualification of candidates for election to the Commonwealth Parliament contained in these provisions.
- [62] On this question both the Commonwealth Solicitor-General and the Queensland Solicitor-General referred to some United States decisions and one Canadian

⁵⁴ *Local Government Act* s 237 to s 240.

decision on somewhat similar but materially different legislation.⁵⁵ I did not find these decisions of assistance in resolving this question, in particular because none of them concerned a question whether a law of a subordinate legislature affects the scope of a comprehensive statement by a paramount legislature on a matter otherwise within the legislative power of each.

6. The answers to the questions reserved

[63] I would therefore answer the questions reserved for the determination of this Court as follows:

(a) is s 224A(b) of the *Local Government Act* 1993 (Qld) invalid as being inconsistent with s 327(1) of the *Commonwealth Electoral Act* 1918 (Cth)?

Yes.

(b) Is s 224A(b) of the *Local Government Act* 1993 (Qld) invalid as being inconsistent with s 163 and s 164 of the *Commonwealth Electoral Act* 1918 (Cth)?

Yes.

(c) Is s 224A(b) of the *Local Government Act* 1993 (Qld) invalid as being beyond the legislative competence of the Queensland Parliament?

No.

(d) How should the costs of and incidental to stating this case and of the action be borne and paid?

The State of Queensland should pay the costs of the applicant.

[64] **WILLIAMS JA:** The questions for determination by this Court, and the legislation relevant thereto, are fully set out in the reasons for judgment of Davies JA and it is not necessary for me to re-state those matters.

[65] The first question to be determined by this Court is whether or not the enactment of s 224A(b) of the *Local Government Act* 1993 (Qld) was beyond the legislative competence of the Parliament of Queensland. In order to resolve that it is necessary, in my view, to address two issues. Is the power to legislate with respect to Federal elections now an exclusive power vested in the Commonwealth Parliament, and is s 224A(b) to be categorised as a law relating to Federal elections.

[66] Section 52 of the Constitution expressly provides that the Commonwealth Parliament shall have exclusive power to make laws with respect to the matters defined therein. Laws relating to the conduct of Federal elections are not caught by the provisions of s 52, but that does not necessarily mean that the power to enact such laws is not exclusive to the Commonwealth Parliament.

[67] Each of the judges in *Smith v Oldham* (1912) 15 CLR 355, considered that the power to make laws for the regulation of Federal elections was an exclusive power of the Commonwealth Parliament. The relevant quotations from the judgments of

⁵⁵ The Commonwealth Solicitor-General referred to *Cook v Galike* 531 US 510 (2001); 121 S Ct 1029 and *Moore v Knightdale Board of Elections* 413 SE 2d 541 (NC 1992) and the Queensland Solicitor-General referred, in addition, to *Mulholland v Ayers* 109 Mon 558; 99 P 2d 234, *Holley v Adams* 238 So2d 401 (Fla 1970), *McClung v McCauley* 238 So2d 667 (1970 Fla App), *Oklahoma State Election Board v Coats* 1980 Ok 65; 610 P 2d 776 and *Nunziata v Wong* (2000-09-15) ONCA C34606.

Griffith CJ, Barton J and Isaacs J are set out in the reasons of Davies JA and I will not repeat them here. Of particular significance is the observation of Barton J at 360, that a State Parliament had under its own constitution no power to legislate as to Federal elections. The Commonwealth Parliament was an entity created by the Constitution and the Constitution did not confer any power on the States to legislate with respect to Federal elections, at least after the Commonwealth Parliament had enacted legislation dealing with that topic. That was also the view of Dixon J in *In re Richard Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 530; the passage in question is cited in the reasons of Davies JA and again I will not repeat it here. That Sir Owen Dixon considered the power to make laws for the regulation of Federal elections an exclusive Commonwealth power is made clear by a passage in his judgment in *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 564:

"For it is not all powers conferred by s 51 that are in every respect paramount. Paragraph (xxxvi) confers a power by reference to a number of sections of the Constitution concerning matters with respect to which the Parliament may provide: see ss 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 87, 96, 97. They are not matters with which the States could have any concern and, if a common boundary between the Federal power over them and State power is conceivable at all, it would, I suppose, be found to be a boundary between a State power and a Federal exclusive power".

To my mind the reason why the power to make laws for the regulation of Federal elections should be held to be an exclusive power of the Commonwealth is to be discerned from the reasoning of the majority in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. In the course of submissions the Commonwealth Solicitor-General described the case with which this Court is now concerned as a "reverse *Melbourne Corporation* situation".

[68] The question in *Melbourne Corporation* was whether a Federal law providing that a bank should not conduct any banking business for a State without the consent of the Treasurer was a valid exercise of the power conferred by s 51(xiii) of the Constitution on the Commonwealth Parliament, that is to enact laws in relation to banking. In broad terms the court held that the law was not valid because the Commonwealth Parliament had no power to enact legislation directed to the control or hindrance of the States in the execution of their governmental functions. But, significantly for present purposes, members of the court considered the fundamental question, namely whether a State or Federal Government could enact legislation regulating or interfering with an essential government power or function of the other.

[69] The following passages from the reasons of the majority are relevant for present purposes. At 52, Latham CJ said:

"The proposition upon which the plaintiff relies is that the Commonwealth Parliament cannot, even under a legislative power expressly conferred upon it, make a 'discriminatory' as distinct from a general, law, which is aimed at or directed against an essential governmental power or function of a State.

It may be difficult to determine in some cases whether a function in fact undertaken by a Government is a governmental function which,

under a Federal Constitution, cannot be controlled by another Government established under the constitution".

Ultimately the Chief Justice concluded that the "Commonwealth Parliament has no power to make laws with respect to State governmental functions as such, and the State Parliaments have no power to make laws with respect to Commonwealth governmental functions as such" (61). Dixon J discusses issues relevant for present purposes in his judgment at 78-80. He concluded that the Commonwealth Parliament could not validly enact "a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its Constitutional powers". Significantly, he was of the view that the *Engineers Case* (1920) 28 CLR 129 did not affect that proposition. He went on to say: "Legislation of that nature discloses an immediate object of controlling the State in the course which otherwise the Executive Government of the State might adopt, if that Government were left free to exercise its authority". Critical to his reasoning is the proposition that a Federal power may not be used "for a purpose of restricting or burdening the State in the exercise of its constitutional powers". Starke J used much the same language. At 74, he said: "So we may start from the proposition that neither Federal nor State Governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations'." To broad similar effect was the observation of Williams J at 99-100: "... if the law is in pith and substance a law which seeks to give directions to the States as to the manner in which they shall exercise their executive, legislative or judicial governmental functions it is not a law for the peace, order and good government of the Commonwealth, but an unlawful intervention in the constitutional affairs of the States".

- [70] What, in my view, one derives from *Melbourne Corporation* for present purposes is that State Parliaments have no power to legislate with respect to the functioning of the Commonwealth Parliament and, in my view, that must extend to laws regulating the conduct of elections for the Commonwealth Parliament.
- [71] Particularly given the passages in the judgments of Dixon J in *Uther, Melbourne Corporation* and *Nelungaloo* to which I have referred, there is no basis for concluding that the reasoning in *Smith v Oldham* has been in any way affected by the decision in the *Engineers Case*.
- [72] Against that background I have come to the conclusion that the power to make laws regulating the conduct of a Federal election is an exclusive power of the Commonwealth.
- [73] That leads to the question whether or not s 224A(b) of the *Local Government Act* (Qld) should be characterised as a law regulating the conduct of a Federal election or relating to it.
- [74] The Solicitor-General for Queensland in his submissions contended that the provision in question was not a law characterised as a law relating to Federal elections, but rather a law relating to a State office and the terms on which it could be held. In that regard it is instructive to note s 221(f) of the Queensland Act which provides that a person is not qualified to be a councillor if "the person is a member of an Australian Parliament". All parties agreed that s 221(f) was a valid enactment

because it was properly characterised as a law relating to the terms on which a person could hold the office of councillor under the Queensland Act. But counsel for the applicant, and the Solicitor-General for the Commonwealth, submitted that there was a distinction to be drawn between s 221(f) and s 224A(b). There can to my mind be no doubt that s 221(f) is a valid enactment because it is properly characterised as a law relating to the terms on which the office in question may be held; there are obviously good reasons for concluding that a person should not hold the office of councillor and be a member of Federal Parliament at the same time.

[75] The reasoning of Davies JA on the question of inconsistency between the Queensland and Commonwealth legislative provisions demonstrates to my mind that s 224A(b) should properly be characterised as a law relating to the conduct of Federal elections. That is so primarily because it places a burden on particular candidates at a Federal election and impairs the right of local government councillors to stand for Federal election. Section 164 of the *Commonwealth Electoral Act* 1918 (Cth) details who is not entitled to nominate as a candidate for a Federal election and effectively s 224A(b) adds an additional category to that list. In this context the reasoning of Dixon J in *Melbourne Corporation* at 79 is apposite. In circumstances such as this the law under consideration will generally wear "two aspects". Looked at from one aspect the law may be categorised as a valid exercise of legislative power, but in the other aspect it may be categorised as beyond power. As Starke J said in *Melbourne Corporation* at 75, it is a "practical question" whether the legislation in question should be categorised in the aspect which would place it beyond power. If in a practical sense the connection with the subject matter which would characterise the legislation as within power was "insubstantial, tenuous or distant" (cf. Dixon J in *Melbourne Corporation* at 79) as compared with the operation of the law which would result in a characterisation resulting in the enactment being beyond power then the conclusion must be that the legislation bore the latter characterisation. Applying that approach to the facts of the present case the connection s 224A(b) has with the holding of a State office is insubstantial, tenuous and distant when compared with its effect upon a person's right otherwise to stand as a candidate at a Federal election.

[76] That s 224A(b) should be characterised as a law relating to qualification to stand for election to Federal parliament, rather than a law relating to the terms and conditions upon which a person may hold the State office of councillor, is demonstrated by considering the following hypothetical, but not unrealistic, factual situation. After a Federal election is called, A nominates as a candidate for a particular seat. B, a councillor within that area, believes that A is not a fit and proper person to be elected and decides that in consequence he should nominate. Upon the declaration of nominations s 224A(b) operates to terminate B's office as councillor. The following day A dies. By virtue of s 180 of the *Commonwealth Electoral Act* 1918 (Cth) the election for that seat is deemed to have wholly failed and pursuant to s 181 there would have to be a new writ and fresh nominations. On the calling of new nominations C nominates for election. B considers that C would be an ideal candidate and in consequence he does not renominate. As a result of all that B would have lost the office of councillor merely because he nominated as a candidate for a Federal election and without ever having actively campaigned or had the chance of being elected to Federal Parliament. That factual scenario demonstrates that the law in question is essentially one placing a burden or impairment upon a person standing as a candidate for Federal election, rather than a

law protecting in some substantial way the privilege or entitlement or burden of the office as a councillor.

- [77] It was submitted by the Solicitor-General for Queensland that a justification for s 224A(b) was the possibility that the candidate would use prestige or power emanating from the office of councillor to enhance electoral prospects. Again, to my mind, that demonstrates why this is really a law primarily concerned with elections, rather than a law primarily concerned with the office of councillor.
- [78] For all of those reasons I am of the view that s 224A(b) should be categorised as a law relating to Federal elections in that it imposes an additional burden on potential candidates for election; in effect it provides as an additional qualification for eligibility to nominate that the person is not a councillor. Because it is so categorised it is beyond the legislative competence of the Queensland Parliament to enact such a law.
- [79] For those reasons I would conclude that s 224A(b) of the *Local Government Act 1993* (Qld) was invalid as being beyond the legislative competence of the Queensland Parliament.
- [80] But if I am wrong in the reasoning that leads to that conclusion, I would agree with Davies JA, for the reasons which he has given, that s 224A(b) of the *Local Government Act 1993* (Qld) is invalid as being inconsistent with s 163, s 164 and s 327(1) of the *Commonwealth Electoral Act 1918* (Cth).
- [81] I would therefore answer the questions reserved for the determination of this Court as follows:
- (a) Is s 224A(b) of the *Local Government Act 1993* (Qld) invalid as being inconsistent with s 327(1) of the *Commonwealth Electoral Act 1918* (Cth)?
Yes.
 - (b) Is s 224A(b) of the *Local Government Act 1993* (Qld) invalid as being inconsistent with s 163 and s 164 of the *Commonwealth Electoral Act 1918* (Cth)?
Yes.
 - (c) Is s 224A(b) of the *Local Government Act 1993* (Qld) invalid as being beyond the legislative competence of the Queensland Parliament?
Yes.
 - (d) How should the costs of and incidental to stating this case and of the action be borne and paid?
The State of Queensland should pay the costs of the applicant.