IN THE MATTER OF THE STATUS OF

NORFOLK ISLAND AS A NON-SELF-GOVERNING TERRITORY

JOINT OPINION

6 MAY 2016

Dr Christopher Ward SC

Dr Stephen Tully

6 St James' Hall Chambers
6/169 Phillip Street
Sydney NSW 2000
Australia

Professor Vaughan Lowe QC

Richard Hoyle

Essex Court Chambers
24-28 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Introduction

1. In this matter our instructing solicitor acts for 'Norfolk Island People for Democracy' (the "**NIPD**"). The NIPD is an unincorporated association with 1195 registered supporters. Of those, 746 are "residents" of Norfolk Island within the meaning of the Immigration Act 1980 (NI) as it stood at 1 July 2015.

2. The NIPD has requested this advice in the context of recent changes to Australian law, as it purports to apply to Norfolk Island, which have abolished the Norfolk Island Legislative Assembly and Executive Council and established a local government-style Advisory Council as an interim consultative body. In July 2016 further very significant changes are to take effect.

3. From 1 July 2016, a suite of federal Australian legislative measures takes effect, including the Norfolk Island Legislation Amendment Act 2015 (Cth). Federal legislation with respect to taxation, social security, biosecurity, customs, immigration and health arrangements will apply to Norfolk Island from 1 July 2016. A proposed Norfolk Island Regional Council will deal with local government-type matters. The Commonwealth Electoral Act will also be amended to incorporate Norfolk Island into one of the federal divisions of the Australian Capital Territory (a mainland Territory of Australia which is geographically located some 1,900km from Norfolk Island) and make it compulsory for residents of Norfolk Island to vote in Federal elections. These steps follow the adoption in March 2016 of the Territories Legislation Amendment Act 2016 (Cth) and accompanying Passenger Movement Charge Amendment (Norfolk Island) Act 2016 (Cth). Essentially, the effect of these measures is to reverse the substantial autonomy which had previously been enjoyed by Norfolk Island.

4. We are now asked to advise on the following questions:

    a. Is Norfolk Island a Non-Self-Governing territory within the meaning of Article 73 of the Charter of the United Nations?

b. Is United Nations General Assembly Resolution 1514 of 14 December 1960 applicable to Norfolk Island having regard to the Principles expressed in Resolution 1541?

c. What, if any, mechanisms are available to 'inscribe' the Island under Article 73(e) of the Charter?

5. For the detailed reasons that we set out below, we answer the questions posed of us as follows:

a. Norfolk Island is a Non-Self-Governing Territory within the meaning of Article 73 of the Charter of the United Nations;

b. As the answer to question (a) is affirmative, yes; and

c. By petitioning the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (the "**Special Committee**"), followed by the subsequent approval of the General Assembly, or more directly, by a resolution of the General Assembly.

6. We wish to emphasize that the ability of a Non-Self Governing Territory to reach a full measure of self-government does not require the territory to become an independent State. Where very small territories are concerned, other forms of relationship such as free association with a State may be more appropriate (as, for example, with the Cook Islands and New Zealand). The crucial point is that the non-self-governing territory has the right to determine its own political status.

7. Finally, we understand that, since receiving our instructions, a Petition accompanied by supporting evidence has been submitted on behalf of, *inter alia*, the NIPD, to the Special

Committee. We have had sight of these materials, which are reproduced as **Annex 1**, and we cross-refer to them as appropriate below.

Is Norfolk Island a non-self-governing territory within the meaning of Article 73 of the Charter of the United Nations?

8. Article 73 appears in Chapter XI of the UN Charter, which is entitled 'Declaration regarding Non-Self-Governing Territories'. Article 73 reads as follows:

> **"Article 73**
>
> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> **a.** to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> **b.** to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
>
> **c.** to further international peace and security;
>
> **d.** to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
>
> **e.** to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the

territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply[1].

9. Article 73 sets out obligations, which were assumed by each State when it became a Member of the United Nations. The main focus in the present context is upon the duty, set out in Article 73(e), of every State to make regular reports to the United Nations Secretary General on the conditions in non-self-governing territories for which it is responsible. This recognizes the fact that the treatment of non-self-governing territories is a matter of concern to the international community as a whole, and not only to the States that administer them.

10. The obligation to report to the UN is unqualified. It applies to every UN Member State; and it applies in respect of every 'Non-Self-Governing Territory' within the meaning of Article 73 for which the State is responsible. The role of the administering State is described as a 'sacred trust', with the well-being of the inhabitants of the territory paramount.

11. The term 'Non-Self-Governing Territory' is not defined in the UN Charter. Indeed, the term is not actually used in Article 73 itself: that Article refers to "*territories whose peoples have not yet attained a full measure of self-government.*" It is interpreted to include all forms "*by which a territory is subjected to or integrated into another State without the status of equal rights or without its free decision*."[2]

12. The status of the territory under the municipal law of the administering State is not determinative of the question whether the territory is a Non-Self-Governing Territory for the purposes of Article 73. That is a matter of international law. In the early days of the United Nations it was argued by Administering States that they had the exclusive right to

[1] Chapters XII and XIII of the UN Charter apply to "trust territories", i.e., territories that were held under Mandates from the League of Nations, territories detached from enemy States as a result of the Second World War, and territories voluntarily placed under the trusteeship system by States responsible for their administration. Norfolk Island is not a trust territory.
[2] Bruno Simma et al., *The Charter of the United Nations. A Commentary*, (3rd ed., 2012), vol. II, p. 1830.

designate territories as 'non-self-governing'; but those arguments were not accepted.[3] There is now no doubt that the UN General Assembly is competent to determine whether a territory is or is not a Non-Self-Governing Territory within the meaning of Article 73.[4] The status of the territory under the municipal law of the Administering State is thus of very limited relevance.[5]

13. For example, Portugal and Spain each regarded certain of their respective territories as "overseas provinces" of the metropolitan state, and claimed that Article 73 was not engaged in relation to those territories. Although Spain quickly reversed this position, Portugal did not. This lead to the General Assembly declaring in 1960, in the face of the Portuguese objections, that the relevant Portuguese territories were Non-Self-Governing Territories in respect of which Portugal was required to comply with Article 73.[6]

14. The criteria that are applied in making that determination are set out in an Annex to UN General Assembly resolution 1541, entitled 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 of the Charter of the United Nations'. That resolution is attached to this Opinion as **Annex 2**. Principle IV stipulates that

> "*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."

15. As set out further below, Norfolk Island is both geographically separate from all areas of Australia, and it is ethnically and culturally distinct from all areas of Australia.

16. Principle V provides that:

[3] J R Crawford, *The Creation of States in International Law*, (2d ed., 2006), pp. 607-608.
[4] J R Crawford, *The Creation of States in International Law*, (2d ed., 2006), p. 608., citing *inter alia* UN GA resolutions 334 (IV) paragraph 1, and 1467 (XIV) paragraph 1.
[5] The position of Norfolk Island in relation to Australia is in any case not entirely clear as a matter of the case law of the High Court of Australia: see **Appendix B**.
[6] General Assembly Resolution 1542 (XV).

> "Once it has been established that such a prima facie case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be inter alia of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subrogation, they support the presumption that there is an obligation to transmit information under Article 73(e) of the Charter."

17. As is more fully explained in the following paragraphs, having regard to these criteria Norfolk Island is a Non-Self-Governing Territory within the meaning of Article 73 of the United Nations Charter.

(a) Geographically separate

18. The geographical separation between Norfolk Island and Australia, almost 1500 kilometres distant, is self-evident. A more detailed analysis, (which we do not in fact believe to be necessary), was provided by Dr Ceaira Cottle in support of the Petition (see **Annex 1**).

(b) Ethnically and culturally distinct

19. The ethnic and cultural separateness of Norfolk Island from Australia is similarly beyond doubt. It has its own language and, because of its unusual history in which it was originally populated by immigrants from Pitcairn Island, an ethnic base that is quite separate from that of the indigenous and the immigrant populations of Australia.

20. The particular details of this distinctiveness have been analysed and explained in the expert report of Emeritus Professor Peter Mühlhäusler which accompanies the Petition (see **Annex 1**). Amongst the essential distinguishing characteristics, the following may be mentioned. The population of Norfolk Island now numbers around 1,700 – which makes it more populous than Pitcairn and Tokelau, and smaller than the Falkland Islands, in terms of its immediate neighbours in the category of Non-Self-Governing Territories when considered by size of population. The inhabitants are descended from people

(including some of Polynesian descent) who came to the island in the eighteenth and nineteenth centuries from Pitcairn Island (which is itself a Non-Self-Governing Territory under the supervision of the UN Special Committee). The community on Norfolk Island, governed by a concise code of criminal law derived from the 'thirty-nine laws' of Pitcairn Island, has a distinctive and self-sustaining culture, as might be expected in such an isolated location. Its political structure was also distinctive, and tailored to the needs of a community of the size and location of Norfolk Island. It had female suffrage long before it was established in Australia. Although English is also spoken, there is a native language, Norf'k, which is quite distinct from the Australian aboriginal languages and from English.

(c) Not currently self-governing

21. The question whether Norfolk Island is currently self-governing is readily answered. As was noted above, this Opinion was requested in the wake of Australian measures[7] that abolished the Norfolk Island Legislative Assembly and Executive Council. Indeed, the Australian Federal Register of Legislation website states that "*Norfolk Island became a non self-governing territory on 18 June 2015 on commencement of the Norfolk Island Legislation Amendment Act 2015...*"[8] It follows that the people of Norfolk Island have not yet attained a full measure of self-government.

(d) 'Other Elements' for the Purposes of Principle V

22. Other elements which may be relevant to the consideration of Non-Self-Governing status can be seen from a review of the further materials attached in support of the Petition (see **Annex 1**). Of particular importance is the fact that the previous (now repealed) framework, established by the Norfolk Island Act 1979, provided for a significant degree of autonomy and recognised in its preamble that:

[7] In particular, the Norfolk Island Legislation Amendment Act 2015 (Cth). For a convenient overview of the operation and effect of its provisions, see Australian Parliamentary Library, Norfolk Island Legislation Amendment Bill 2015, Bills Digest No. 102 (12 May 2015). For an overview of the effect of the range of legislative measures affecting Norfolk Island, see http://regional.gov.au/territories/norfolk_island/reforms/arrangements.aspx (last accessed on 6 May 2016).
[8] https://www.legislation.gov.au/content/SGTerritories/ (last accessed on 6 May 2016).

> "Parliament considers it to be desirable and to be the wish of the people of Norfolk Island that Norfolk Island achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth and, to that end, to provide, among other things for the establishment of a representative Legislative Assembly and of other separate political and administrative institutions on Norfolk Island".

23. For much of its period of administration, Australia has accorded separate taxation and immigration treatment of Norfolk Island citizens, and has permitted largely independent governance on Norfolk Island. Australia has not provided the full range of Australian services (in particular social security) to the citizens of Norfolk Island. That fact could legitimately be the subject of criticism, as Australia was arguably required to ensure the well-being of the citizens of the territory under its administration. For present purposes, however, it is a further indication that Australia treated Norfolk Island as a separate and distinct territory.

24. A concise history of Norfolk Island in modern times which makes reference to its status within the British Empire and vis-à-vis Australia is set out at **Appendix A** of this Opinion.

Potential Objections to the Foregoing Analysis

25. We have identified three potentially applicable objections to the conclusion that Norfolk Island is a Non-Self Governing Territory. These are that:

    a. Norfolk Island is a part of Australia, in particular, part of the metropolitan area of Australia;

    b. It is too late to inscribe Norfolk Island onto the list of Non-Self Governing Territories;

    c. Norfolk Island is not a viable independent state; in essence, it is not in the interests of the people of Norfolk Island to dissociate themselves from Australia.

26. We do not believe that any of these objections, properly understood, are sustainable.

(a) Objection 1: Norfolk Island is a part of Australia, in particular, part of the metropolitan area of Australia

27. For completeness, it should be noted that Article 74 of the United Nations Charter distinguishes between "Non-Self-Governing Territories" and "their metropolitan areas", so that regions *within* a State are not regarded as "Non-Self-Governing Territories" for the purposes of Chapter XI of the UN Charter. Whether Norfolk Island is or is not a Non-Self-Governing Territory for the purposes of Article 73 accordingly depends upon whether it is or is not part of the "metropolitan area" of Australia.

28. Undoubtedly, a difficult question may someday arise about how close a nexus an island must have with the mainland in order to be regarded as metropolitan, but we do not consider that this issue is seriously in question in the present case.

29. Given the geographical, ethnic and cultural separateness of Norfolk Island from Australia, it is in our view quite clear that Norfolk Island cannot be said to be part of "the metropolitan area" of Australia. It cannot reasonably be said to be part of metropolitan Australia physically or ethnically or culturally; and there is no other sense in which Norfolk Island can reasonably be said to be a part of metropolitan Australia.

30. Even constitutionally speaking, Norfolk Island is referred to by Australia as an 'external territory' of Australia, which in our view suggests that it is not part of the metropolitan area of Australia. Indeed, Papua (also known as British New Guinea), which was the sole Non-Self-Governing Territory which Australia placed voluntarily onto the list in 1946 (but is now part of the independent Papua New Guinea), is geographically closer to mainland Australia than Norfolk Island, and its constitutional position vis-à-vis Australia

appears to have been practically identical to that of Norfolk Island[9], such that an objection on this basis does not seem realistic.

31. This conclusion is reinforced by Australia's treatment of Norfolk Island as legally distinct from Australia, both internally and internationally (although the example of Portugal given above demonstrates that the internal position does not have determinative effect in international law for the purposes of classification as a Non-Self-Governing Territory).

32. A case in point is Australia's adhesion to the United Nations Charter. As a matter of internal Australian law, when Australia became a Member of the United Nations it enacted the Charter of the United Nations Act 1945. Section 3 of that Act provided that "*This Act extends to every external Territory*" whilst Section 4(1) stipulated that "*This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.*" It is apparent that Australia regarded Norfolk Island, for the purposes of Australia's membership of the United Nations, as separate both from the Commonwealth itself, and the constituent elements of the Commonwealth on mainland Australia. Equally, on the international plane, Professor Crawford observed in an earlier opinion concerning Norfolk Island that "*Australia's ratification as deposited on 1 November 1945 was*

[9] See the Opinion of Sir Robert Garran (1905) (then Secretary to the Attorney General's department and later Solicitor General of Australia) "*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 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*": http://legalopinions.ags.gov.au/legalopinion/opinion-225 . It should be noted that the Opinion also uses the language of annexation, although this appears to be meant in a non-technical sense rather than a precise international law meaning. The Papua Act 1905 and the Norfolk Island Act 1913 ultimately followed this course. See for example the Opinion of Sir George Knowles (Secretary to the Attorney General's Department and Solicitor General) (1933) "*The Territories of Norfolk Island and Papua are not parts of the Commonwealth and section 4 of the Extradition Act 1903 would not apply with respect to either of these Territories … It would appear that Norfolk Island and Papua are 'British Possessions' within the meaning of the Extradition Acts 1870–1895. In this connexion I would point out that section 3 of the Norfolk Island Act enacts that Norfolk Island is accepted by the Commonwealth as a Territory under the authority of the Commonwealth, and section 5 of the Papua Act provides that the possession of British New Guinea is declared to be accepted by the Commonwealth as a territory under the authority of the Commonwealth*": http://legalopinions.ags.gov.au/legalopinion/opinion-1525 . The relevant cases of the High Court of Australia, which do not directly address the present question), are briefly analysed by Dr Ward SC and Dr Tully in **Appendix B**.

recorded to apply to the Commonwealth and separately to the Territories of Papua and Norfolk Island and the Trust Territories of New Guinea and Nauru."

33. By way of further example, the Basic Treaty of Friendship and Co-operation between Australia and Japan (1976) recorded by Exchange of Notes that "*the Treaty will apply only to the metropolitan area of Australia and not to any of the non-metropolitan areas for the international relations of which Australia is responsible*"[10], which the Department of Foreign Affairs in April 1976 apparently considered "*confirms that the undertakings given by Australia shall not apply within Australia's non-metropolitan areas such as Cocos Islands, Christmas Island and Norfolk Island.*"[11] We consider that this view is entirely correct.

(b) Objection 2: It is too late to inscribe Norfolk Island onto the list of Non-Self Governing Territories

34. It is sometimes suggested that Chapter XI was intended to apply only to territories known as colonies at the time of the passing of the Charter, from which it might be inferred that a territory that had not been inscribed in the list of Non-Self-Governing Territories at the outset, when the United Nations began its monitoring of those territories, cannot be inscribed in the list now. In our view any such inference would be mistaken and incorrect.

35. Nothing in Chapter XI of the Charter suggests that it was intended to be temporally limited, applicable to a closed category of territories in existence either in 1945, when Article 73 was adopted, or in the 1960s, when UN General Assembly resolutions 1514 and 1541 were adopted. General Assembly resolutions 1514 and 1541, which implement the principles set out in Chapter XI, are framed in general terms. Although Principle I in the Annex to General Assembly resolution 1541 states that "*The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which*

[10] AUSTRALIAN TREATY SERIES 1977 No. 19.
[11] Australian Foreign Affairs Record, April 1976, reproduced in ***Treaties***, (1977) 7 Australian Yearbook of International Law, 498 at 521 (http://www.austlii.edu.au/au/journals/AUYrBkIntLaw/1977/26.html).

were then known to be of the colonial type…", there is nothing to suggest that the authors of the Charter regarded the category of such territories as closed, (although in any case, Norfolk Island should be regarded as within that definition[12]). Indeed, Principles IV and V (set out above) are extremely open ended. Their express language, the general principles of the United Nations, and the logic of the concept of decolonization, all point to a continuing obligation of reporting, applicable to all States in respect of all Non-Self-Governing Territories that they are administering at any given time.

36. For practical purposes it may be necessary to identify the Non-Self-Governing Territories formally, by including them in the list of territories to be considered by the Special Committee. That is, of course, precisely what Norfolk Island now requests. This procedural aspect is considered further below, in paragraphs 47 – 48. Inclusion in the list is, however, an act that recognizes, rather than creates, the status of a territory as a Non-Self-Governing Territory within the meaning of Article 73 of the Charter.

37. Moreover, this view is supported by the practice of the General Assembly with respect to Non-Self-Governing Territories. The Portuguese example, set out above at [13], demonstrates that the determination is an objective one, that it is not somehow precluded by the past failure by the Administering State to list the relevant territory, and that it is not limited to the time when the Charter was signed in 1945 (as Portugal was not then a Member of the United Nations).

38. Moreover, the examples of New Caledonia and French Polynesia (referred to below at [47]-[48]) show that it is the status of a territory as it exists from time to time that

[12] The Instructions of George III to the Governor of New South Wales in 1787 include the statement in respect of Norfolk Island that "*you are, as soon as circumstances will admit of it, to send a small Establishment thither to secure the same to us, and prevent its being occupied by the subjects of any other European Power*". In the ***Countess of Limerick v the Earl of Limerick*** 164 E.R. 1512; (1863) 4 Sw. & Tr. 252, the English High Court of Admiralty held that "*Norfolk Island is a Colony planted by this country, and the Common Law, therefore is in force in it…*" and Sir Kenneth Roberts Wray's **Commonwealth and Colonial Law** (1966) states at p. 885 that "*colonised as a penal settlement in 1788 by an expedition which took possession in the name of King George III; abandoned in 1814; but reoccupied in 1825…*" and refers under the heading 'Constitutional Status' to "*Originally a Colony acquired by settlement but never within the British Settlements Acts*".

matters. Each of these territories were originally listed in 1946, after which France declined to send information and they were no longer part of the list. However, in 1986 and 2013 respectively, those territories were relisted by the United Nations. As has been observed "*territories can still find themselves in a new state of dependence. The importance of Chapter XI therefore remains, albeit latently; in addition, it has a lasting preventive effect in that the political damage likely to be caused dissuades administering authorities from tampering with self government once it has been achieved in a dependent territory.*"[13] That sentiment applies just as powerfully to Norfolk Island, which, having enjoyed a substantial degree of autonomy, now finds that status reversed.

39. It follows from the foregoing that Australia should, from the outset, have reported to the United Nations on Norfolk Island, pursuant to Article 73 of the Charter.

40. The fact that Australia failed in that duty cannot now deprive Norfolk Island of its right to recognition of its status as a Non-Self-Governing Territory. It would be quite perverse if the failure of an Administering State to fulfil its reporting obligations in some way released the State from those obligations and from the supervision by the United Nations of those very obligations. That position must be correct in principle; and it has a particular appropriateness in respect of a tiny community such as Norfolk Island, whose 1,700 or so non-self-governing residents can scarcely be blamed – or held to be internationally responsible – for not monitoring closely the compliance by the State that was supposed to be administering them in accordance with its obligations under Chapter XI of the United Nations Charter.

41. However, even if for some reason that conclusion were not correct, in light of the dynamic and objective view which the General Assembly takes towards the question of Non-Self Governing Territories, we consider that Norfolk Island should be listed following the recent measures taken by Australia.

[13] Bruno Simma et al., *The Charter of the United Nations. A Commentary*, (3rd ed., 2012), vol. II, p. 1837.

(c) Objection 3: Norfolk Island is not a viable independent state; in essence, it is not in the interests of the people of Norfolk Island to dissociate themselves from Australia

42. It is practically certain that Norfolk Island is not a viable independent state. Such a suggestion, however, would miss the point. The ability of a Non-Self-Governing Territory to reach a full measure of self-government does not require the territory to ultimately become an independent State. Thus, Principle VI of General Assembly Resolution 1541 states that:

> "A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State."

43. Thus, although independent statehood may have been the original goal of the decolonisation movement, UN practice has demonstrated that this is not necessary in every case. Where very small territories are concerned, other forms of relationship may be more appropriate. One example of free, non-independent, association is the relationship between the Cook Islands and New Zealand.

44. In summary, it may well be correct that Norfolk Island is not a viable independent state, or that it would not be in the interests of the people of Norfolk Island to disassociate themselves from Australia. We do not offer an opinion in that regard. However, recognising the status of Norfolk Island as a Non-Self Governing Territory permits those questions to be decided by the Islanders, as is their right under international law, rather than forcing a particular result upon them. The basis of the relationship between the people of Norfolk Island and Australia is a matter to be agreed and determined by them.

Is United Nations General Assembly Resolution 1514 of 14 December 1960 applicable to Norfolk Island having regard to the Principles expressed in Resolution 1541?

45. As will be evident from our responses to question 1, we are in no doubt that United Nations General Assembly Resolution 1514 of 14 December 1960 is applicable to Norfolk Island, having regard to the Principles expressed in Resolution 1541.

46. We note that this conclusion is entirely consistent with the views taken in a series of expert opinions on the legal status of Norfolk Island in recent years. We refer in particular to the Opinions of R J Ellicott QC and M H McLelland dated 11 August 1975, of M H McLelland QC dated 11 August 1975, of J R Crawford SC dated 9 August 1999 (referred to above), of R J Ellicott QC and J R Crawford SC dated 24 November 2004, and of R J Ellicott QC and J R Crawford SC dated 21 February 2006.

What, if any, mechanisms are available to 'inscribe' Norfolk Island under Article 73(e) of the Charter?

47. There appear to be two methods by which a territory can in practice be inscribed onto the list of Non-Self-Governing Territories:

    a. The first method is considered in a Legal Opinion of the UN Office of Legal Affairs in 1968[14], which we consider to be an accurate statement of international law. As that Legal Opinion makes clear, the General Assembly has not delegated to the Special Committee the ability to make a final decision as to inclusion on the list. As a result, it is not open to the Special Committee to proceed to consider substantive questions concerning conditions within a territory before its inclusion on the list of Non-Self-Governing Territories has been approved by the General Assembly. However, a petition may be made to the Special Committee, after which the Special Committee in its report to the General Assembly identifies the

[14] "*Question whether the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples could examine the Conditions in a Territory before the Decision of the Special Committee to include that Territory in the List of Territories to which the Declaration applies was approved by the General Assembly*", Memorandum to the Secretary of the Special Committee, (1968) UNJYB, p. 207.

territories which it proposes to examine. The approval by the General Assembly of the inclusion of a territory on the list may subsequently take place by means of the approval of the Special Committee's programme of work for the forthcoming year.

b. The second method, which has been adopted in more recent practice, is that the General Assembly has by resolution directly inscribed a territory onto the list of Non-Self Governing Territories. Thus, New Caledonia was reinscribed onto the list in 1986 by this method[15] and French Polynesia was also reinscribed onto the list in 2013 using this method[16]. This approach will therefore involve following the usual procedures for passing a resolution in the General Assembly.

48. Each of the above methods is permissible and there does not seem to be any hierarchy or preference as between the two (in fact, the New Caledonia resolution also approved the Special Committee's programme of work as part of the same text).

Conclusion

49. In summary, it is our view that:

a. in light of the relevant criteria set out in UN General Assembly resolution 1541 and the evidence provided to us, Norfolk Island is properly regarded as a Non-Self-Governing Territory within the meaning of Article 73 of the UN Charter;

b. The hypothetical objections considered above do not provide a proper basis to disturb that conclusion. In particular, inscription onto the list does not have to lead to independent statehood, as, context depending, there are other ways of realizing self-governing status, such as free association;

[15] General Assembly Resolution A/RES/41/41.
[16] General Assembly Resolution A/RES/67/265.

c. Norfolk Island can be inscribed onto the list of Non-Self-Governing Territories by either of the methods outlined above and the Petition which has been delivered appears to be effective to initiate the process.

Dr Christopher Ward SC

Dr Stephen Tully

6 St James' Hall Chambers

Sydney

Professor Vaughan Lowe QC

Richard Hoyle

Essex Court Chambers

London

APPENDIX A: Brief History of Norfolk Island

1. We have been briefed with a great deal of material relating to the history of Norfolk Island. This Annex merely summarises the more significant features – a fuller treatment can be found in the Petition and its supporting materials.

2. Norfolk Island was discovered for the purposes of modern history by Captain James Cook in October 1774.

3. Following its discovery by Captain Cook in 1774, in 1788, by an act of State of Great Britain (the designation of Norfolk Island in Governor Phillip's Commissions), Norfolk Island was placed within the scope of the territory governed by Britain as a British Colony.

4. In 1788 Lieutenant Phillip Gidley King landed on Norfolk Island (under orders from Governor Arthur Phillip) and the period of Norfolk Island as a penal colony of Great Britain began.

5. From 1788, with the legislative history that we describe below, Norfolk Island was considered to be associated with New South Wales.

6. In 1795, the Statute 35 Geo III cap 18 provided that Norfolk Island was within the authority of the Governor or Lieutenant Governor of the Eastern Coast of New South Wales and the Islands adjacent thereto.

7. In 1843, Queen Victoria declared that from September 1844 Norfolk Island "*shall cease to belong to the colony of New South Wales and shall be taken to be part of the colony of Van Diemen's Land*".

8. The later history of Norfolk Island is inexorably tied to the events surrounding the mutiny on the *Bounty* and the travails of some of the crew.

9. The *Bounty,* captained by William Bligh, was on a trip between Tahiti and the West Indies in 1787. During the vessel's stay of some 5 months in Tahiti, many of the crew formed relationships in Tahiti, and perhaps understandably, were reluctant to leave.

10. Once on the return voyage, Fletcher Christian led a mutiny against Captain Bligh. Captain Bligh and some of the crew were placed in an open boat. Meanwhile the *Bounty* under the command of Fletcher Christian, returned to Tahiti. There some of the remaining crew chose to stay in Tahiti. Fletcher Christian and nine others set sail with 25 Tahitian men and women. They ultimately landed in Pitcairn Island in 1790 and established a community there.

11. From the 1840's Pitcairn Island became less suitable for the settlement. Poor harvests and disease affected the population. The Pitcairn Islanders apparently expressed a view in the mid 1800's to relocate the settlement to a more appropriate island. Co-incidentally, in 1846 the British Government had resolved to terminate the penal settlement on Norfolk Island.

12. In 1853 the Pitcairn Islanders formally requested that the British Government relocate them to Norfolk Island (or Sunday Island). Approval for that relocation to Norfolk Island was given by the British Government in 1854.

13. On 8 June 1856 the Pitcairn settlers landed on Norfolk Island after a voyage of 5 weeks on the *Morayshire*. There is debate as to the status of the Islanders on Norfolk Island at that time. Some have asserted that the Island was ceded to them. That proposition was not accepted by Great Britain, and the materials with which we are briefed suggest that there is little support for the argument in contemporary British Parliamentary papers.

14. It is in that context that the legal status of Norfolk Island, and the effect of the various Orders-in-Council must be considered.

15. In 1855 the Australian Waste Lands Act (18 & 19 Vict cap 56) provided that Her Majesty was empowered, 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.*"

16. An Order-in-Council was made on 24 June 1856. By that Order-in Council, Queen Victoria ordered that Norfolk Island was no longer part of the Colony of Van Diemen's Land. Norfolk Island was "*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.*"

17. As our instructing solicitors point out, there is a distinct difference between the terms of the annexation of Norfolk Island to Van Diemen's Land in 1843, and the Order in Council of 1856.

18. The Order in Council of 1856 is obviously critical. It is by that Order in Council that the concept of "*distinct and separate settlement*" became legally recognised. The genesis of the 1856 Order in Council is the 1856 reply to the suggestion of Sir William Denison in 1854 that Norfolk Island be again annexed to New South Wales. The correspondence of 1856 made clear that the intention was for the Governor of New South Wales to exercise supervision over Norfolk Island but that it not be annexed as part of New South Wales. Sir William Denison had, in 1856, apparently independently reached the same conclusion as to the preferable status of Norfolk Island as a relatively independent territory.

19. It appears that from 1856 until the end of the 19th century, Norfolk Island was essentially self-governed. A code of 39 laws, which formed the legal system applicable to the islanders, was made by the Governor of Norfolk Island. We are instructed that the code of 39 was made after consultation with the Island's Chief Magistrate.

20. In 1857, Sir William Denison travelled to Norfolk Island. He apparently understood his mission as one of the provision of assistance and advice to the community, rather than

one of governance. Significantly, he described the islanders as a "*small community*" or "*large family*", thus confirming the distinct nature of the island population.

21. By this time there were also significant divergences between the laws of Norfolk Island and those of mainland New South Wales. For example, of significance is the fact that Norfolk Island recognised suffragettes well in advance of mainland New South Wales. At the time of his visit to Norfolk Island in 1857, Sir William Denison found that the female vote was well established on the Island.

22. Although he did not visit Norfolk Island with a view to exercising powers of governance, Sir William apparently believed that the Order in Council had provided him with authority to make laws to take effect within the Island.

23. That is because the Australian Waste Lands Act and the Order-in-Council made pursuant to it, empowered the Governor to make laws "*for the order, peace and good government*" of the Island, subject to "*such rules and regulations as Her Majesty…may see fit to prescribe.*"

24. Sir William was apparently following the letter and spirit of the royal instructions, which expressly noted that the islanders:

> "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."

25. The Royal Instructions went on to direct that Sir William was as far as practicable to preserve those customs and usages, and to adapt the power granted by the order-in-Council for the preservation and maintenance of those customs and usages.

26. It is significant that in the years 1856 to 1895 there had been several suggestions by authority figures that the administration of Norfolk Island would be more efficient if

annexed or absorbed by New South Wales. Viscount Hampden went so far as to propose a draft Order in Council which would have the effect of annexing Norfolk Island to New South Wales in 1895.

27. Finally, on 15 January 1897, a further Order-in-Council was made under the Australian Waste Lands Act 1855. The 1897 Order-in-Council effected fundamental change to the governance of Norfolk Island. The 1897 Order revoked the Order of 1856. The office of Governor of Norfolk Island was abolished. The affairs of Norfolk Island were to be administered by the Governor of the Colony of New South Wales. The Order empowered the Governor of New South Wales to make orders for the peace, order and good government of Norfolk Island.

28. As our instructing solicitors have observed, and in our view also, it is clear that the Order of 1897 did not annex Norfolk Island to the colony of New South Wales, despite the exhortations of some that such annexation should have occurred. The 1897 Order instead adopted a middle ground, seeking administrative efficiency, but not full annexation.

29. Similarly, in 1900, Norfolk Island lay outside the boundaries of the proposed New South Wales and it did not form part of Australia at Federation.

30. In 1913, the Commonwealth passed the Norfolk Island Act 1913 (Cth). That Act provided that Norfolk Island was "*accepted by the Commonwealth as a Territory under the authority of the Commonwealth by the name of Norfolk Island*." The effect of that Act was necessarily subject to a further Order-in-Council. That Order-in-Council was made in March 1914, under the Australian Waste Lands Act 1855.

31. The March 1914 Order-in-Council (which took effect on 1 July 1914) provided that "*Norfolk Island is hereby placed under the authority of the Commonwealth of Australia*."

It follows that on 1 July 1914, Norfolk Island became an external territory for the purposes of the Constitution, and was under the authority of the Commonwealth of Australia.

32. Imperial Orders in Council adopted after 1914 continued to distinguish between the Commonwealth of Australia and Norfolk Island.

33. Norfolk Island also enjoyed relative autonomy at this time. The Norfolk Island Act 1913 (Cth) provided that Commonwealth legislation would not automatically be in force in Norfolk Island unless expressly extended thereto as an external Territory. The extension of federal legislation to Norfolk Island between 1914 and 1979 was very limited, numbering some 121 laws (compared with some 6,090 passed by the Commonwealth Parliament over the same period). Federal legislation either did not apply to Norfolk Island at all, or applied subject to modification. The subject-matter was not comprehensive but limited to, for example, navigation, aviation, intellectual property, banking and criminal law.

34. A series of federal Norfolk Island Acts (eg 1913, 1935, 1957) and associated Ordinances established an Executive Council of Norfolk Island (and its successor body, the Norfolk Island Council). This Council was initially responsible for maintaining public infrastructure, but its functions included considering and advising the Administrator on any matter affecting peace, order and good government. The Ordinances also contained franchise provisions which imposed residency requirements for eligibility for election.

35. Like its predecessors, the Norfolk Island Act 1979 (Cth) provided that Commonwealth legislation was not in force in Norfolk Island unless expressed to extend to that territory. That legislation established among other matters an Administrator, an Executive Council and a Legislative Assembly. These existing governance arrangements, which provided substantial autonomy to Norfolk Island, will be altered and largely reversed by the pending changes in Commonwealth law.

APPENDIX B: Previous Legal Opinions and the Constitutional Position of Norfolk Island vis a vis Australia

1. The Constitutional status of Norfolk Island has been the subject of previous attention, both by those advising Norfolk Islanders, and by the High Court of Australia. We have been briefed with a number of previous opinions dealing with the issue as already mentioned.

2. In August 1975, Mr Ellicott QC and Mr McLelland QC opined that, by the 1914 Order-in-Council,

> "Norfolk Island was placed under the authority of the Commonwealth and was accepted by the Commonwealth under s122 as a separate and distinct settlement…and its status as such cannot be altered except by or pursuant to an Imperial Act."

3. Mr Ellicott and Mr McLelland continued:

> "Norfolk Island is, in effect, a Crown Colony of Australia. The Crown in right of the United Kingdom has no surviving powers emanating from Section 5 of the 1855 Act."

4. They went on to say:

> "The fact that it was accepted as a distinct and separate settlement is however relevant in a political sense to an Inquiry as to the constitutional status of Norfolk Island. It recognises that the Commonwealth Parliament's relationship to it 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…It at least anticipates that the sovereign's exercise of power though plenary in quality will be directed solely to the benefit of the committed territory and its inhabitants."

5. In a separate opinion, Mr McLelland QC concluded that:

> "Norfolk Island is a territory whose people have not yet attained a full measure of self-government, for the administration of which Australia has responsibility. Accordingly, in my view Australia is obliged to carry

out the provisions of Article 73 with respect to Norfolk Island."

6. Mr McLelland QC did note that Australia had submitted information to the United Nations pursuant to Article 73(e) in relation to Papua and Cocos (Keeling) Islands, but had not done so in relation to Norfolk Island.

7. The views expressed by Mr Ellicott QC and Mr McLelland QC in their joint opinion were considered by Professor James Crawford SC (as his Excellency then was). Professor Crawford said:

"But Norfolk Island is not an internal territory and thus it is not an integral part of the Commonwealth of Australia. The Parliament has consistently treated Norfolk Island as an external territory of Australia, and this conforms with its position as a 'distinct and separate' territory…"

8. The status of Norfolk Island has also been considered by the High Court on more than one occasion.

9. The first decision is that of *Berwick Ltd v Gray* (1976) 133 CLR 603. All members of the Court agreed with the proposition that Norfolk Island was a part of the Commonwealth, although arguably that position was not essential to the decision.

10. Mason J, who wrote the leading judgment, considered the legislative history of Norfolk Island. His Honour held (at p.607) that the territories power (s122) was a broad plenary power capable of sustaining the regulation that was impugned by the plaintiff in the case. His Honour went on to say (at p.608) that:

"I consider that the history and the historical documents also support the conclusion that Norfolk Island forms part of the Commonwealth of Australia."

11. Murphy and McTiernan JJ agreed with Mason J. Chief Justice Barwick separately expressed the view that Norfolk Island was part of the Commonwealth. (at p.605).

Jacobs J did not express a view on the point.

12. However, in light of the more recent decisions set out below, Dr Ward SC and Dr Tully[17] do not consider that the view of Mason J in *Berwick Ltd* (with whom Barwick CJ, McTiernan, Mason, Jacobs and Murphy JJ agreed) continues to represent good law, if it was ever anything other than *obiter.*

13. In *Capital Duplicators Pty Limited v Australian Capital Territory* (1992) 177 CLR 248, three members of the High Court suggested that there remained an open question of whether an external territory could become part of the Commonwealth without being admitted as a State. Notably, the Court referred to the views expressed by Barwick CJ in *Spratt v Hermes* (1965) 114 CLR 242 at 247-248 where the Chief Justice noted that the constitutional power to make laws for the government of any territory (Constitution, s122) was capable of extending both to non-self-governing territories and to self-governing territories.

14. The High Court again had occasion to consider the matter in 2007 in *Bennett v Commonwealth* (2007) 234 ALR 204.

15. In *Bennett*, the question was whether Commonwealth laws which required Australian citizenship to vote for and be a member of the Legislative Assembly of Norfolk Island were a valid exercise of the territories power conferred by s122 of the Constitution. Section 3 of the Norfolk Island Amendment Act 2004 (Cth) ("the 2004 Act") amended s38 of the Norfolk Island Act 1979 (Cth) by introducing provisions making Australian citizenship a necessary qualification for both voters and candidates.

16. In holding that the law in question was a valid exercise of the territories power, Chief Justice Gleeson, with Gummow, Hayne, Heydon and Crennan JJ, described Norfolk

[17] Professor Lowe QC and Mr Hoyle, as barristers qualified in England & Wales, are not competent to advise upon the state of Australian constitutional law, although they find the arguments advanced by Dr Ward SC and Dr Tully to be persuasive.

Island as "a territory that was placed under the authority of and accepted by the Commonwealth, within s 122 of the Constitution."

17. Their Honours expressly noted that the validity of the legislation was an entirely different question to the status of Norfolk Island and its people: "The entire legal situation of the territory may be determined by the authority of the Parliament."

18. Although there is discussion in *Bennett* about the separate identity of the citizens of Norfolk Island, the comments are *obiter* and do not advance the position.

19. In conclusion, there are High Court *dicta* to the effect that Norfolk Island is a part of the Commonwealth and regulated as an external territory under the Australian Constitution and for the purposes of Australian law. But the Court has itself more recently recognised that the status of Norfolk Island and its people raises different issues. The Court has not considered the question whether Norfolk Island is a non-self-governing territory under international law and in any event, for the reasons given in this joint opinion, the view of the High Court in that regard would not be determinative of the position at international law.