

a **Nauru****Constitutional Reference No 1 of 2008**

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Supreme Court
Millhouse CJ
4–5, 7 April 2008

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(1) *Constitutional law – Parliament – Proceedings – Judicial review – Privilege of non-impeachment – Constitution conferring power on Parliament to declare powers, privileges and immunities of Parliament and its members – Constitution and statute granting Parliament powers, privileges and immunities of UK House of Commons – Whether courts having jurisdiction to review parliamentary proceedings – Whether*

d *Parliament having exclusive authority to regulate its own proceedings – Parliamentary Powers, Privileges and Immunities Act 1976, s 21.*

(2) *Constitutional law – Parliament – Proceedings – Quorum – Constitution requiring quorum for sitting of Parliament – Parliament purporting to sit and transact business in absence of quorum – Whether such action valid – Constitution of Nauru 1968, arts 2, 45.*

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(3) *Constitutional law – Parliament – Membership – Citizenship – Constitution imposing citizenship qualification for membership of Parliament – Constitution containing no bar on member of Parliament having dual citizenship – Statutory provision and standing order purporting to disqualify dual citizens from membership – Whether such disqualification invalid – Constitution of Nauru 1968, arts 30, 36.*

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(4) *Constitutional law – Parliament – Sessions – Speaker – Powers – Constitution providing for Speaker to appoint place and time of parliamentary sessions, in accordance with advice of President – Whether Speaker bound to act only on such prior advice – Constitution of Nauru 1968, art 40.*

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A sitting of Parliament was suspended but resumed a few days later. Only certain members of Parliament were informed of the resumption of the sitting; nine were never informed of the resumption of the sitting and so were absent for the duration of the resumed sitting. Those members of Parliament present at the resumed sitting purported to carry out certain parliamentary business. The Speaker then suspended the House. The Minister for Justice, acting under art 55 of the Constitution, referred to the Supreme Court for its opinion a number of questions as to the validity of the actions taken at the resumed sitting. The Supreme Court had to consider a number of provisions of the Constitution in determining the matter, including art 2 ('(1) This Constitution is the supreme law of Nauru ...'), art 30 ('A person is qualified to be elected a member of Parliament if ... he ... is a Nauruan citizen and has

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attained the age of twenty years ...'), art 36 ('Any question ... concerning the right of a person to be ... or to remain a Member of Parliament shall be ... determined by the Supreme Court.'). art 37 ('The powers, privileges and immunities of Parliament and of its members and committees are such as are declared by Parliament.'). art 40 ('Each session of Parliament shall be held at such a place and shall begin at such time ... as the Speaker in accordance with the advice of the President appoints ...'). art 45 ('No business shall be transacted at a sitting of Parliament if the number of its members present, other than the person presiding at the sittings, is less than one-half of the total number of members of Parliament.'). and art 90 ('Until otherwise declared by Parliament, the powers, privileges and immunities of Parliament and of its members and committees shall be those of the House of Commons of the Parliament of the United Kingdom of Great Britain and Northern Ireland and of its members and committees as at the commencement of this Constitution.'). The Supreme Court also considered s 21 of the Parliamentary Powers, Privileges and Immunities Act 1976, which provided that 'Parliament and members shall have all the powers, privileges and immunities ... [of] the House of Commons of the Parliament of the United Kingdom and its members ... except any of such powers, privileges and immunities as are inconsistent with or repugnant to the Constitution'. At the hearing before the Supreme Court, the judge admitted affidavits from nine members of Parliament, each of whom swore he was not present in Parliament on the day of the resumed sitting. The first point for decision was the extent, if any, of jurisdiction in the Supreme Court to review proceedings in Parliament.

HELD: Jurisdiction of court to review proceedings in Parliament upheld. Reference answered to the effect that (i) parliamentary business purportedly transacted at resumed sitting ultra vires, null and void for lack of quorum, (ii) it was unlawful for the Speaker to call or to refuse to call a sitting of Parliament in direct contravention of the advice of the President and (iii) only the Supreme Court had the authority to decide whether a person could be or remain a Member of Parliament.

(1) Parliament was not a sovereign Parliament but was bound by the Constitution which, under art 2(1), was the supreme law. In addition to the powers, privileges and immunities provided by the Parliamentary Powers, Privileges and Immunities Act 1976, art 90 of the Constitution conferred on Parliament the powers, privileges and immunities of the UK House of Commons. However, Parliament, unlike the House of Commons, was burdened and bound by a Constitution and the common law privilege of non-impeachment protecting parliamentary proceedings from judicial review could not obstruct the jurisdiction of the court to ensure that constitutionally provided methods of law-making were observed. Section 21 of the 1976 Act, in repeating the conferment on Parliament and its members of the powers, privileges and immunities of the House of Commons, expressly excepted any powers, privileges or immunities inconsistent with, or repugnant to, the Constitution; although that exception was technically surplusage, it was an acknowledgment by Parliament that it was bound by the Constitution (see pp 458, 461, below). Dicta of Barwick CJ in *Cormack v Cope* (1974) 131 CLR 432 at

a 454, of Hardie Boys, Tompkins and Fisher JJA in *Teangana v Tong* [2005] 3 LRC 588 at [26]–[27], *Constitutional Reference No 1 of 2003*, Nauru SC, applied. *Harris v Secretary for Justice* (Civil Action 13/1997, unreported), Nauru SC not followed. MacSporrán *The Constitution* (2007) approved.

b (2) Article 45 of the Constitution, which required that for the valid transaction of business there had to be at least one-half of the members present as well as the presiding officer, was mandatory. There was no rule for consideration of the spirit and intention of art 45, the wording of which was plain. On the facts, besides the Speaker, ‘less than one-half of the total number of members of Parliament’ were present. It followed that the business purported to be done at the resumed sitting of Parliament when a quorum was not present was a nullity (see p 463, below). *Harris v Secretary for Justice* (Civil Action 13/1997, unreported), Nauru SC not followed.

c (3) There was no bar in art 30 of the Constitution either to the election of a person as a member of Parliament or to his (or her) sitting because of dual citizenship. It followed from the absence of that bar in the Constitution that Parliament could not enact one. Under art 36 it was for the court alone, not for the Speaker or Parliament, to determine ‘the powers, privileges and immunities’, ie ‘membership’, of a member of Parliament (see p 464, below).

d (4) Under art 40 of the Constitution, the Speaker could appoint the place and date of sittings of Parliament only in accordance with the advice of the President. He could not do so on his own initiative but had to have the advice of the President first (see p 464, below).

e [Editors’ note: Articles 30, 36, 37, 40, 45 and 90 of the Constitution of Nauru, so far as material, are set out at pp 463, 464, 459, 464, 462, 458, below. Section 21 of the Parliamentary Powers, Privileges and Immunities Act 1976, so far as material, is set out at p 459, below.]

f **Cases referred to in judgments**

Constitutional Reference No 1 of 2003, Nauru SC

Cormack v Cope (1974) 131 CLR 432, Aus HC

Harris v Secretary for Justice (Civil Action 13/1997, unreported), Nauru SC (Full Ct)

Huata v Prebble [2004] 3 NZLR 382, NZ CA

g *Huniehu v A-G* (24 April 1997, unreported), Sol Is CA

Teangana v Tong [2005] 3 LRC 588, Kiribati CA

Legislation referred to in judgments

Constitution of Nauru 1968, arts 2; 30, 36–37, 40, 45, 47, 54–55, 90

h Naoero Citizenship Act 2005

Parliamentary Powers, Privileges and Immunities Act 1976, s 21

Other sources referred to in judgments

Erskine May’s Treatise upon the law, privileges, proceedings, and usage of Parliament (19th edn, 1976), p 200

i MacSporrán *The Constitution* (2007)

Naoero Citizenship (Amendment) Bill 2008, s 7(b)

Parliament Standing Orders, Standing Order 21(b)

Reference

The Hon Mathew Batsiua, Minister for Justice, on 26 March 2008 referred certain questions to the Supreme Court for its opinion as to the validity of actions taken at a resumed sitting of Parliament on 22 March 2008. The facts are set out in the judgment.

Kristen Walker for the minister.
Pres Nimes Ekwona for eight members of Parliament.

7 April 2008. The following judgment was delivered.

MILLHOUSE CJ.

ARTICLE 2—SUPREME LAW OF NAURU

‘2(1) This Constitution is the supreme law of Nauru ...’

‘What does the Constitution say?’ (per Sir Robert Menzies, quoting his leader in an early Australian constitutional case.)

ARTICLE 55—THE CABINET MAY REFER QUESTIONS ON THE CONSTITUTION TO THE SUPREME COURT

‘55. The President or a Minister may in accordance with the approval of the Cabinet, refer to the Supreme Court for its opinion any question concerning the interpretation or effect of any provision of this Constitution which has arisen or appears to the Cabinet likely to arise, and the Supreme Court shall pronounce in open court its opinion on the question.’

Pursuant to art 55, the Honourable Mathew Batsiua, Minister for Justice, on 26 March 2008 referred certain questions to the Supreme Court for its opinion:

‘In the Matter of Article 55 of the Constitution and In the Matter of Article 45 of the Constitution [and Articles 36 and 40]

1. Pursuant to Article 55 of the Constitution of Nauru, the Minister for Justice with the approval of the Cabinet, refers to the Supreme Court for its opinion questions concerning the interpretation or effect of any provision of the Constitution of Nauru, which have arisen from events and occurrences within the Parliament of Nauru.

Background

2. The events in Parliament that gives rise to the questions in this Reference may be summarised as follows.

a. A sitting of Parliament started on Thursday March 20, 2008 at 10am was suspended by the Speaker at approximately 11am, March 20th, and was later resumed by the Speaker on March 22, 2008 at 7.20pm.

b. Only the members present within the Parliamentary precincts on the evening of March 22 were verbally informed by the Clerk of the resumption of the sitting, on the verbal advice of the Speaker.

a c. Nine Members of Parliament were never informed of the resumption of the sitting and hence were absent for the duration of the sitting held on March 22.

b d. The first business conducted at the sitting of 22 March, was to fill a vacancy that existed in the Privileges Committee, a Standing Committee of Parliament. The Members present in the House resolved to appoint Hon. Shadlog Bernicke.

c e. The Members present in the House then proceeded to grant leave to Hon. Rene Harris to move a motion to refer alleged breaches of privilege and contempt of the House by His Excellency the President to the Committee of Privileges. This motion was moved by Hon. Rene Harris and the Members present in the House resolved to accept the motion.

d f. The Members present in the House then proceeded to grant leave to Hon. Rene Harris to present the Naoero Citizenship (Amendment) Bill 2008. Hon. Rene Harris presented the Bill. The Members present in the House then resolved to adopt the Naoero Citizenship (Amendment) Bill 2008.

e g. The Members present in the House then proceeded to grant leave to Hon. Rene Harris to move a motion to insert a new Standing Order 21(b). Hon. Rene Harris moved the motion.

f h. The Members present resolved to adopt the motion thereby creating a new Standing Order 21(b) which reads: *"No Member holding the citizenship of one or more country, other than Nauru, shall be permitted to sit in Chamber, unless the Speaker is satisfied that such other citizenship(s) has been revoked or otherwise foregone."*

g i. The Members present then granted leave and subsequently accepted a motion moved by Hon. Dantes Tsitsi to remove Hon. Mathew Batsiua from the Standing Orders Committee, a Standing Committee of Parliament, and replace him with Hon. Shadlog Bernicke.

h j. The Speaker then suspended the House at 8pm to resume "when the bells ring".

Questions Referred to the Supreme Court

3. The following questions are referred to the Supreme Court for an Opinion:

g "A. In light of Article 45 of the Constitution, can Parliament validly transact any business if the number of its members present, other than the person presiding at the sitting, is less than one-half of the total number of Members of Parliament?

h B. Given that there are 18 members of the Parliament and that 9 members represents one half of the membership of the House, did a sitting at which only 8 members in addition to the Speaker were present constitute a sitting of Parliament that could validly transact business?

i C. If the answer to Questions A and B is 'No', does it follow that the businesses of the House transacted on March 22, 2008, is ultra vires, and therefore null and void?

D. If the answer to Questions A and B is 'No', does it follow that all Acts and motions, constituting the business of Parliament, purported to be passed by Parliament in the absence of quorum and purporting to have legal effect, are invalid? a

E. Is the Parliamentary Practice of the Speaker not to declare the House of Parliament to be without a quorum unless a member of the Parliament brings it to the Speaker's attention contrary to the spirit and intention of Article 45 of the Constitution and therefore unconstitutional? b

F. Does Article 45 impose on the person presiding at a sitting of Parliament a constitutional responsibility to ensure that quorum is present before commencing to transact parliamentary business or at any time during a sitting before allowing any parliamentary business to continue? c

G. If the answer to Questions E and/or F is 'Yes', does it follow that the Speaker has breached the provisions of Article 45 of the Constitution by allowing the House of Parliament to continue to transact business in the absence of the constitutionally required quorum? d

H. In light of the requirement in Article 40 for the Speaker to act in accordance with the advice of the President, is it lawful for the Speaker to call or to refuse to call a sitting of Parliament in direct contravention of the advice of the President?

I. Does Article 36 mean that only the Supreme Court has the authority to decide whether a person can be or remain a Member of Parliament and that therefore neither the Speaker, nor any other person or institution, has such power? e

J. Is the answer to Question I is 'Yes', then is Standing Order 21(b) inconsistent with Article 36 and therefore invalid?" (My emphasis.) f

Ms Kristen Walker of the Victorian Bar was granted admission to the Nauruan Bar and represented the minister. f

Eight members of Parliament wrote to the court requesting to make submissions. Mr Pres Nimes Ekwona made the submissions on their behalf.

The first point for decision is to what extent, if at all, the Supreme Court of Nauru may review what Parliament has done, is doing or may do. g

ARTICLE 90—POWERS, PRIVILEGES AND IMMUNITIES OF PARLIAMENT

'90. Until otherwise declared by Parliament, the powers, privileges and immunities of Parliament and of its members and committees shall be those of the House of Commons of the Parliament of the United Kingdom of Great Britain and Northern Ireland and of its members and committees as at the commencement of this Constitution.' h

The House of Commons has consistently asserted its own privileges. As *Erskine May's Treatise upon the law, privileges, proceedings, and usage of Parliament* (19th edn, 1976), p 200 puts it: i

"The House of Commons claims that its admitted right to adjudicate on breaches of privilege implies in theory the right to determine the

- a* existence and extent of the privileges themselves. It has never expressly abandoned its claim to treat as a breach of privilege the institution of proceedings for the purpose of bringing its privileges into discussion or decision before any court or tribunal elsewhere than in Parliament. In other words, it claims to be the absolute and exclusive judge of its own privileges, and that its judgements are not examinable by any other court or subject to appeal.'
- b*

Erskine May goes on to point out that:

- 'On the other hand, the courts regard the privileges of Parliament as part of the law of the land, of which they are bound to take judicial notice.'
- c*

ARTICLE 37—POWERS, PRIVILEGES AND IMMUNITIES OF PARLIAMENT

'37. The powers, privileges and immunities of Parliament and of its members and committees are such as are declared by Parliament.'

- d* Mr Peter MacSporran in his excellent commentary on the Constitution published last year—a work which has been most useful in my coming to conclusions on this reference: I have consulted it constantly—refers in his commentary on art 90 to s 21 of the Parliamentary Powers, Privileges and Immunities Act 1976:

- e* '21. In addition to the powers, privileges and immunities expressly provided for in this Act, the Parliament and members shall have all the powers, privileges and immunities which the House of Commons of the Parliament of the United Kingdom and its members have for the time being, except any of such powers, privileges and immunities as are inconsistent with or repugnant to the Constitution or the express provisions of this Act.'
- f*

Mr MacSporran goes on:

- 'This is of course, an unfortunate provision as it raises more questions than it answers. It encourages members to think they have more powers than they do and experience shows that the view of Westminster tends to come with blinkers that blot out the Constitution. The House of Commons is not burdened by a Constitution and many of its powers and privileges cannot survive consideration of the provisions of this Constitution.'
- g*

- h* He hits the nail on the head: 'The House of Commons is not burdened by a Constitution.' The Parliament of Nauru is. What difference does it make? Perhaps the most direct way of answering that question is by referring to a passage from the judgment of Barwick CJ in *Cormack v Cope* (1974) 131 CLR 432 at 454 (the Parliament of the Commonwealth of Australia, like the Parliament of Nauru, is 'burdened by a Constitution'):

- i* '... it is not the case in Australia, as it is in the United Kingdom, that the Judiciary will restrain itself from interference in any part of the law-making process of the Parliament. Whilst the Court will not interfere

in what I have called the intra-mural deliberative activities of the House, including what Isaacs J. called "intermediate procedure" and the "order of events between Houses", there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law-making are observed.' a

The same point has been made many times since in many different jurisdictions. I give an example. In *Teangana v Tong* [2005] 3 LRC 588 at [26]-[27] the Court of Appeal in Kiribati discussed 'internal proceedings privilege of Parliament': b

[26] ... The New Zealand Court of Appeal has explained that privilege in this way in its recent majority decision in *Huata v Prebble* [2004] 3 NZLR 382 at [44]: "There is a well established rule ... that it is exclusively for the House itself to administer that part of statute law which relates to its internal proceedings. The Courts will not exercise jurisdiction over legislation of that kind." c

[27] This quotation, taken out of context, must be qualified by adding that, in a country with a written Constitution, the courts always have jurisdiction to remedy breaches of that Constitution.' d

If it were not for one impediment I would go ahead immediately to answer the questions, secure in the belief that the court has the power and duty to answer them.

The impediment is the judgment of the Full Court of the Supreme Court of Nauru (Donne CJ and Dillon J) in *Harris v Secretary for Justice* (Civil Action 13/1997, unreported). If I follow that decision, which as a single judge I am most inclined to do, then I may not interfere. It is a grave thing for a single judge of the court to fail to follow a previous decision of the same court, the more so when it is a decision of two most eminent and experienced judges sitting as a Full Court. Ms Walker suggested I could distinguish *Harris* as it was a reference under art 54 and this is a reference under art 55. Perhaps so, but I am more inclined to another of her submissions, that if I conclude the decision is wrong I should say it and why so as to correct the misunderstanding of the relationship between the Parliament and the judiciary. e

I have come to the conclusion that *Harris v Secretary for Justice* was wrongly decided. In the course of giving reasons I shall be able to canvass several points requiring consideration on the present reference. Donne CJ set out the fact in *Harris*: f

"The facts upon which the action is founded arise from the meeting of Parliament of the 12th June 1997 to which the Plaintiffs, as Members, were summoned. For reasons, which are not here relevant, they and one other Member, in all 8, did not attend the sitting. Parliament consists of 18 Members including the Speaker. Eight members and the Speaker attended the sitting. One other Member, who had been granted leave of absence on the ground of illness, was also absent. The business of Parliament that day, according to the Plaintiffs, consisted of, a statement by the Speaker complaining about their actions, a resolution to refer the g h i

- a complaint to the Privileges Committee of Parliament and the introduction of and subsequent enactment of 18 Bills which on the 13th June 1997 were certified by the Speaker pursuant to Article 47 of the Constitution and in consequence thereof are now laws of the Republic ... The defence admits the sitting of Parliament of which the Plaintiffs are Members but denies that there was no quorum. The main defence is the plea that the issue is not justiciable since to consider it would require the Court to inquire into the practice and procedure of Parliament which is, solely within the province of Parliament.'
- b

The court refused to grant relief and dismissed the action. Each learned judge wrote a judgment. I shall refer to them in turn.

- c First I consider the judgement of Donne CJ. With respect, it seems that the whole is informed by the learned Chief Justice's conviction (as he puts it towards the end of his reasons) that—

- d 'it is the business of Parliament not of the Court to review any irregularity in the proceedings of its House. Parliament has the sovereign power to regulate its affairs.'

With great respect, this is so extreme a proposition as to be in error. This conviction has led the learned Chief Justice into several other errors. The first concerns his conclusion that:

- e 'The common law privilege on non-impeachment was thereby inherited as a privilege of Nauru's Parliament—there is nothing in the Constitution with which it is inconsistent.'

This conclusion is despite s 21 of the Parliamentary Powers, Privileges and Immunities Act 1976 (which the learned Chief Justice had set out). It seems that he quite overlooks the exception at the end of the section:

- f '... except any of such powers, privileges or immunities as are inconsistent with or repugnant to the Constitution or the express provisions of this Act.'

On the view I have reached the exception in s 21 is technically surplusage: Parliament is bound by the Constitution anyway. Yet the exception is an explicit acknowledgement by Parliament that it is bound by the Constitution.

- g Secondly the learned Chief Justice in considering a decision of the Court of Appeal of the Solomon Islands *Huniehu v A-G* (24 April 1997, unreported) preferred and followed the dissenting view of Casey J that the court should give no remedy.

- h Thirdly, the learned Chief Justice said:

- i '... the sovereignty of Parliament is little affected by the constraints of Westminster-model Constitutions and the approach by the Courts to applicability of the non-impeachment privilege enjoyed by the legislature is, in general, the same in those jurisdictions as in those of the common law. Nauru's Constitution, as explained above, confers on its Parliament the power to declare its powers, privileges and immunities and to prescribe its procedures. It thus, in my view, abdicates its right to control

the legislature to the extent of these privileges and immunities and only if it can be shown that to assert them would be inconsistent with the provisions of the Constitution, could a Court refuse to uphold them. The privilege of non-impeachment guarantees to the Parliament that its proceedings are sacrosanct and as such cannot be impeached. There is nothing in the Constitution of Nauru which fetters that privilege and, undoubtedly, the Court must uphold it.' a b

This overlooks the fetter which Parliament has acknowledged in s 21 of the Immunities Act.

Fourth, with respect to the learned Chief Justice, he is in error over the quorum:

'The question of quorum is a procedural matter; it is to be decided by the Speaker who is the master of the House. The correctness or otherwise of that decision can only be reviewed by an inquiry into what went on in the House and what was the basis of the Speaker's decision to allow the proceedings to continue and to transact its business. Such an inquiry would involve the Court on what Barwick C.J in *Cormack* (supra) call the "intra-mural deliberations of the House" which is unquestionable, being an involvement in which the Court has no jurisdiction to undertake.' c d

I use the present situation to illustrate the error. On 22 March the Speaker did not adjourn the Parliament, merely suspended the sitting. Mr Frederick Cain, Clerk of Parliament, in a letter dated 25 March to His Excellency the President stated: e

'Regretfully, I'm not able to provide the votes and proceedings for the sitting of 22nd March, 2008 as the Parliament is still sitting and has not been adjourned.' f

The result is that there is no official record of proceedings on that day: no record as to whether a quorum of members was present during the transaction of business or whether any member ever raised the question of a quorum.

At the hearing before me I admitted affidavits from nine members of Parliament, each of whom swore he was not present in Parliament that day. Two of the gentlemen were cross-examined during the hearing. Mr Nimes called two other members (Mr Rene Harris and Mr Shadlog Bernicke) who swore they were present in Parliament that day. They did not count numbers but assumed a quorum was present. Finally, Mr Nimes called Mr Cain, who said the Speaker was in the chair and eight other members were present. Beyond reasonable doubt only eight members and the Speaker were in Parliament when business was being transacted. g h

ARTICLE 45—QUORUM

'45. No business shall be transacted at a sitting of Parliament if the number of its members present, other than the person presiding at the sittings, is less than one-half of the total number of members of Parliament.' i

a I know that besides the Speaker 'less than one-half of the total number of members of Parliament' were present. How can I ignore that? I cannot. I must express an opinion. Article 45 is mandatory: 'No business shall be transacted ...' It follows that the business purported to be done at the sitting of Parliament when a quorum was not present is a nullity.

b I turn now to the judgement of Dillon J, especially as it concerns the quorum:

c 'What the Plaintiffs are here attempting is to bypass Parliament where the question of quorum must be dealt with by the Speaker ... This Court cannot inquire into the procedure of the House which is solely within the control of the Speaker or his nominee. The Plaintiffs acknowledge and concede that limitation. If there was no quorum on 12 June 1997 as alleged and relied upon by the Plaintiffs, nevertheless the proceedings of Parliament on that day remain valid ...'

d Yet I cannot ignore what I know: there was no quorum. Article 45 requires that for the valid transaction of business there must be at least one-half of the members present as well as the presiding officer. With unfeigned respect to the two learned judges who decided *Harris*, I must regard the impediment avoided. I may answer the questions.

e (I am fortified in my decision by noticing that in *Constitutional Reference No 1 of 2003* my immediate predecessor, Connell CJ, although he referred to *Harris*, nevertheless said:

f '... so far as the powers, privileges and immunities of Parliament and members are concerned, these are subject to such powers, privileges, or immunities as are inconsistent with or repugnant to the Constitution. In other words, where there are mandatory provisions within the Constitution it is open in any properly maintained suit or the Court to accept jurisdiction and make appropriate declarations or orders.'

His Honour gave relief.)

There remains to be considered the question concerning the eligibility of persons for election as members of Parliament.

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ARTICLE 30—QUALIFICATION FOR MEMBERSHIP OF PARLIAMENT

h '30. A person is qualified to be elected a member of Parliament if, and is not so qualified unless, he—
a. is a Nauruan citizen and has attained the age of twenty years; and
b. is not disqualified under this Constitution.'

On 22 March Parliament purported to pass this amendment to the Naoero Citizenship Act 2005:

i '7(b) The powers, privileges and immunities of a Member of Parliament holding the citizenship of one or two countries other than Nauru shall be as determined by the Standing Orders of the Parliament of Nauru.'

Even if it had been validly enacted (which it was not, for the reasons I have given) it would be unconstitutional. There is no bar in the Constitution either to the election of a person as a member of Parliament or to his (or her) sitting because of dual citizenship. It follows from the absence of that bar in the Constitution that Parliament may not enact one. a

Likewise is invalid the new Standing Order which Parliament purported to make on 22 March: b

'21(b) No Member holding the citizenship of one or more country, other than Nauru, shall be permitted to sit in the Chamber, unless the Speaker is satisfied that such other citizenship(s) has been revoked or otherwise foregone.'

ARTICLE 36—DETERMINATION ON QUESTIONS OF MEMBERSHIP OF PARLIAMENT c

'36. Any question that arises concerning the right of a person to be of or to remain a Member of Parliament shall be referred to and determined by the Supreme Court.' d

It is for this court alone, not for the Speaker or Parliament to determine 'the powers, privileges and immunities'—a roundabout way of saying 'membership'—of a member of Parliament. The Standing Order even if validly made, is repugnant to the Constitution and void.

There is one final matter to consider. It arises from para 13 of the affidavit in support of the Constitutional Reference by the Hon Marcus Stephen [the President]: e

'13. On March 24, 2008, I wrote a letter to the Speaker advising that Parliament meets on March 25, 2008. Now produced and shown to me at the time of making this affidavit and marked MS-4 is a true copy of the letter to the Speaker of Parliament. I have not received any response from the Speaker to my letter.' f

ARTICLE 40—SESSIONS OF PARLIAMENT

'40(1) Each session of Parliament shall be held at such a place and shall begin at such time, not being later than twelve months after the end of the preceding session if Parliament has been prorogued, or twenty-one days after the last day on which a candidate at a general election is declared elected if Parliament has been dissolved, as the Speaker in accordance with the advice of the President appoints ...' g

This article makes it clear that the Speaker appoints the place and date, not on his own initiative but only 'in accordance with the advice of the President'. He must have the advice first. h

I may now answer the questions:

- A. No.
 - B. No.
 - C. Yes.
 - D. Yes.
- i

- a* E. The "spirit and intention" of art 45 are irrelevant. The wording of the article is plain and should be regarded.
- F. Yes.
 - G. Yes.
 - H. No.
 - I. Yes.
- b* J. Yes.'