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The Separation of Federal Judicial Power
A Purposive Analysis

by

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A thesis submitted for the Degree of Doctor of Philosophy of The Australian National University
This thesis is my own work and all sources have been acknowledged.
It has not been submitted for another degree.

Fiona Dowling Wheeler
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Fiona Wheeler
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ABSTRACT

This thesis examines the separation of federal judicial power from legislative and executive power, arguably the most resilient of the fundamental implications drawn by the High Court from the text and structure of the Australian Constitution. The separation of federal judicial power is primarily manifested in two rules of constitutional law: first, that federal judicial power can only be exercised by Chapter III courts and, secondly, that Chapter III courts cannot validly be invested by the Commonwealth Parliament with non-judicial power unless incidental to the discharge of their judicial functions.

The independent and impartial exercise of judicial power is deeply imbued in our legal culture. It is perhaps not surprising then that the design of the first three Chapters of our federal Constitution, coupled with the words of ss.1, 61 and 71 should be interpreted as incorporating a legally enforceable doctrine of the separation of powers, even if the framers were largely silent on this point. Critically, the separation of federal judicial power is not an end in itself. As leading commentators have pointed out, the separation of powers is a normative or purposive doctrine chiefly directed towards the creation of an institutional and structural environment in which the supremacy of law over arbitrary power will be fostered. The central argument of this thesis is a simple one: that the rule of law rationale of the separation of federal judicial power should consistently and explicitly inform the High Court’s separation of powers jurisprudence. In other words, we need a consciously purposive approach to the separation of federal judicial power in Australia in order to navigate this aspect of our constitutional law in a principled, as opposed to a purely formalistic, fashion.

This thesis then tells the story of the separation of federal judicial power in Australia in purposive or “functional” terms, relating the recognition and operation of the separation doctrine to changing patterns of governance in twentieth century Australia. It revisits
existing doctrine in light of the purposive approach and explores the burgeoning area of implications derived from Chapter III of the Constitution protective of individual rights.
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