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**The Separation of Federal Judicial Power**  
**A Purposive Analysis**

by

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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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## 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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- Adelaide Steamship Co. Ltd v. R. and Attorney-General (Cth)* (1912) 15 C.L.R. 65
- Aldridge v. Booth* (1988) 80 A.L.R. 1
- Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (Engineers' Case)*  
(1920) 28 C.L.R. 129
- American Communications Association v. Douds* 339 U.S. 382 (1950)
- Attorney-General (Cth) v. R. (Boilermaker's Case)* (1957) 95 C.L.R. 529 (P.C.)
- Attorney-General for N.S.W. v. Brewery Employees Union of N.S.W. (Union Label Case)*  
(1908) 6 C.L.R. 469
- Attorney-General for Ontario v. Attorney-General for Canada (Reference Appeal)*  
[1912] A.C. 571
- Australian Boot Trade Employes' Federation v. Whybrow & Co.* (1910) 11 C.L.R. 311
- Australian Building Construction Employes' and Builders Labourers' Federation v. Commonwealth* (1986) 161 C.L.R. 88
- Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 C.L.R. 106
- Australian Communist Party v. Commonwealth (Communist Party Case)* (1951) 83  
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- Australian National Airways Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 29

### B

- Barton v. R.* (1980) 147 C.L.R. 75
- Baxter v. Ah Way* (1909) 8 C.L.R. 626
- Benton v. Maryland* 395 U.S. 784 (1969)

*Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245

*British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]* (B.I.O. No.1)  
(1925) 35 C.L.R. 422

*British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.2]* (B.I.O. No.2)  
(1926) 38 C.L.R. 153.

*Building Construction Employees and Builders' Labourers Federation of New South  
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*Capital Duplicators Pty Ltd v. Australian Capital Territory [No.1]* (1992) 177 C.L.R.  
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*Capital Duplicators Pty Ltd v. Australian Capital Territory [No.2]* (1993) 178 C.L.R.  
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*Castlemaine Tooheys Ltd v. South Australia* (1990) 169 C.L.R. 436

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*Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1

*Coco v. R.* (1994) 179 C.L.R. 427

*Cole v. Whitfield* (1988) 165 C.L.R. 360

*Cominos v. Cominos* (1972) 127 C.L.R. 588

*Commodity Futures Trading Commission v. Schor* 478 U.S. 833 (1986)

*Commonweath v. Hospital Contribution Fund* (1982) 150 C.L.R. 49

*Commonwealth v. Queensland* (1975) 134 C.L.R. 298

*Connelly v. D.P.P.* [1964] A.C. 1254

*Cummings v. Missouri* 71 U.S. 277 (1867)

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*Davern v. Messell* (1984) 155 C.L.R. 21

*D'Emden v. Pedder* (1904) 1 C.L.R. 91

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*Deputy Commissioner of Taxation v. Richard Walter Pty Ltd* (1995) 183 C.L.R. 168

*Dietrich v. R.* (1992) 177 C.L.R. 292

*Director of Public Prosecutions v. B.* (1998) 155 A.L.R. 539

*D.P.P. (Cth) v. Bayly* (1994) 63 S.A.S.R. 97

*Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577

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*Ebatarinja v. Deland* (1998) 157 A.L.R. 385

*Egan v. Willis* (1998) 158 A.L.R. 527

*Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477

*Ex parte Garland* 71 U.S. 333 (1867)

*Ex parte Walsh* [1942] Argus L.R.

**F**

*Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd* (1959) 101 C.L.R.

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*Farey v. Burvett* (1916) 21 C.L.R. 433

*Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153

*Federal Trade Commission v. Ruberoid Co.* 343 U.S. 470 (1952)

*Field v. Clarke* 143 U.S. 649 (1892)

*Fourmile v. Selpam Pty Ltd* (1998) 152 A.L.R. 294

*Frugtniet v. Victoria* (1997) 148 A.L.R. 320

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*Gideon v. Wainwright* 372 U.S. 335 (1963)

*Gould v. Brown* (1998) 151 A.L.R. 395

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*H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563

*Hammond v. Commonwealth* (1982) 152 C.L.R. 188

*Harris v. Caladine* (1991) 172 C.L.R. 84

*Hayburn's Case* 2 Dall. 409; 1 L.Ed. 436 (1792)

*Health Insurance Commission v. Peverill* (1994) 179 C.L.R. 226

*Hilton v. Wells* (1985) 157 C.L.R. 57

*Hodge v. R* (1883) 9 App.Cas. 117

*Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330

## I

*In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257

*In Re Pinochet* (unreported, House of Lords, 17 December 1998 (oral judgment) 15

January 1999 (reasons)) <http://www.parliament.the-stationery->

[office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm](http://office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm) at 20 January 1999 (copy on file with author)

*In Re Winship* 397 U.S. 358 (1970)

*In the Marriage of B and R* (1995) 19 Fam.L.R. 594

*In the Marriage of Collins* (1990) 14 Fam.L.R. 162

## J

*Jago v. District Court (N.S.W.)* (1989) 168 C.L.R. 23

*Jones v. Commonwealth* (1987) 71 A.L.R. 497

*J.W. Hampton, Jr & Co. v. United States* 276 U.S. 394 (1928)

## K

*Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51

*Kariapper v. Wijesinha* [1968] A.C. 717

*Kennedy v. Mendoza-Martinez* 372 U.S. 144 (1963)

*Kioa v. West* (1985) 159 C.L.R. 550

*Klopper v. North Carolina* 386 U.S. 213 (1967)

*Knight v. Knight* (1971) 122 C.L.R. 114

*Kotsis v. Kotsis* (1970) 122 C.L.R. 69

*Kruger v. Commonwealth* (1997) 190 C.L.R. 1

## L

*Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520

*Le Mesurier v. Connor* (1929) 42 C.L.R. 481

*Leask v. Commonwealth* (1996) 187 C.L.R. 579

*Leeth v. Commonwealth* (1992) 174 C.L.R. 455

*Levy v. Victoria* (1997) 189 C.L.R. 579

*Little v. Commonwealth* (1947) 75 C.L.R. 94

*Liyanage v. R.* [1967] A.C. 259

*Lloyd v. Wallach* (1915) 20 C.L.R. 299

## M

*Mabo v. Queensland [No.1]* (1988) 166 C.L.R. 186

*Mabo v. Queensland [No.2]* (1992) 175 C.L.R. 1

*MacCormick v. Federal Commissioner of Taxation* (1984) 158 C.L.R. 622

*Malloy v. Hogan* 378 U.S. 1 (1964)

*Marcus Clark & Co. Ltd v. Commonwealth* (1952) 87 C.L.R. 177

*McGinty v. Western Australia* (1996) 186 C.L.R. 140

*McInnes v. R.* (1979) 143 C.L.R. 575

*McKinney v. R.* (1991) 171 C.L.R. 468

*Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31

*Melbourne Steamship Co. Ltd v. Moorehead* (1912) 15 C.L.R. 333

*Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 127 C.L.R. 617

*Milicevic v. Campbell* (1975) 132 C.L.R. 307

*Millner v. Raith* (1942) 66 C.L.R. 1

*Mistretta v. United States* 488 U.S. 361 (1989)

*Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 208

*Murphy v. Waterfront Commission of New York Harbor* 378 U.S. 52 (1964)

*Mutual Pools & Staff Pty Ltd v. Commonwealth* (1994) 179 C.L.R. 155



**N**

*Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1

*New South Wales v. Canellis* (1994) 181 C.L.R. 309

*New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R.

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*Newcrest Mining (W.A.) Ltd v. Commonwealth* (1997) 190 C.L.R. 513

*Ngoc Tri Chau v. Director of Public Prosecutions (Cth)* (1995) 132 A.L.R. 430

*Nicholas v. R.* (1998) 151 A.L.R. 312

*Nixon v. Administrator of General Services* 433 U.S. 425 (1977)

*North Ganalanja Aboriginal Corporation v. Queensland* (1996) 185 C.L.R. 595

**O**

*Ousley v. R.* (1997) 148 A.L.R. 510

**P**

*Peacock v. Newtown Marrickville and General Co-operative Building Society No.4 Ltd*  
(1943) 67 C.L.R. 25

*Petty v. R.* (1991) 173 C.L.R. 95

*Plaut v. Spendthrift Farm Inc* 514 U.S. 211 (1995)

*Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501

*Port MacDonnell Professional Fishermen's Assn Inc v. South Australia* (1989) 168  
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*Porter v. R.; Ex parte Yee* (1926) 37 C.L.R. 432

*Powell v. Alabama* 287 U.S. 45 (1932)

*Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167

*Prentis v. Atlantic Coast Line Co.* 211 U.S. 210 (1908)

*Prohibitions Del Roy* (1607) 12 Co.Rep. 63; 77 E.R. 1342

## Q

*Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144

## R

*R. and Attorney-General (Cth) v. Associated Northern Collieries (Vend Case)* (1911) 14

C.L.R. 387

*R. v. Bernasconi* (1915) 19 C.L.R. 629

*R. v. Bevan; Ex parte Elias and Gordon* (1942) 66 C.L.R. 452

*R. v. Brislan; Ex parte Williams* (1935) 54 C.L.R. 262

*R v. Burah* (1878) 3 App.Cas. 889

*R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane*

*Tramways Company Ltd (Tramways Case [No.1])* (1914) 18 C.L.R. 54

*R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte G.P. Jones*

*(Builders' Labourers' Case)* (1914) 18 C.L.R. 224

*R. v. Commonwealth Industrial Court; Ex parte the Amalgamated Engineering Union,*

*Australian Section* (1960) 103 C.L.R. 368

*R. v. Cox; Ex parte Smith* (1945) 71 C.L.R. 1

*R. v. Davison* (1954) 90 C.L.R. 353

*R. v. Director of Serious Fraud Office; Ex parte Smith* [1993] A.C. 1

*R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556

*R. v. Glennon* (1992) 173 C.L.R. 592

*R. v. Hegarty; Ex parte City of Salisbury* (1981) 147 C.L.R. 617

- R. v. Humby; Ex parte Rooney* (1973) 129 C.L.R. 231
- R. v. Hush; Ex parte Devanny* (1932) 48 C.L.R. 487
- R. v. Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87
- R. v. Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 C.L.R. 194
- R. v. Kidman* (1915) 20 C.L.R. 425
- R. v. Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 C.L.R. 254 (H.C.A.)
- R. v. L. (Rape in Marriage Case)* (1991) 174 C.L.R. 379
- R. v. Local Government Board* (1902) 2 I.R. 349
- R. v. Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518
- R. v. Oakes* (1986) 50 C.R. (3d) 1
- R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1
- R. v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157
- R. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277
- R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361
- Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty Ltd* (1987) 163 C.L.R. 140
- Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323
- Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460
- Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 C.L.R. 656
- Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518

*Re Tyler; Ex parte Foley* (1994) 181 C.L.R. 18

*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3

*Reference re Secession of Quebec* [1998] S.C.J. No.61 (Q.L.), File No.25506, Supreme Court of Canada, decided 20 August 1998

*Reid v. Howard* (1995) 184 C.L.R. 1

*Riverina Transport Pty Ltd v. Victoria* (1937) 57 C.L.R. 327

*Roche v. Kronheimer* (1921) 29 C.L.R. 329

*Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185

## S

*Sachter v. Attorney-General (Cth)* (1954) 94 C.L.R. 86

*Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841  
(1984)

*Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530  
(P.C.)

*Shillitani v. United States* 384 U.S. 364 (1966)

*Silk Bros Pty Ltd v. State Electricity Commission of Victoria* (1943) 67 C.L.R. 1

*Sorby v. Commonwealth* (1983) 152 C.L.R. 281

*Steele v. Defence Forces Retirement Benefits Board* (1955) 92 C.L.R. 177

*Street v. Queensland Bar Association* (1989) 168 C.L.R. 461

## T

*Tasmania v. Commonwealth (Tasmanian Dam Case)* (1983) 158 C.L.R. 1

## U

*United States v. Brown* 381 U.S. 437 (1965)

*United States v. Ferreira* 13 How. 40; 14 L.Ed. 42 (1852)

*United States v. Lovett* 328 U.S. 303 (1946)

## V

*Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 C.L.R. 25

*Victoria v. Commonwealth (Payroll Tax Case)* (1971) 122 C.L.R. 353

*Victorian Chamber of Manufacturers v. Commonwealth (Industrial Lighting Case)*  
(1943) 67 C.L.R. 413

*Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan*  
(1931) 46 C.L.R. 73

## W

*Walton v. Gardiner* (1993) 177 C.L.R. 378

*Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R.  
434

*Webb v. Outrim* [1907] A.C. 81

*Weissensteiner v. R.* (1993) 178 C.L.R. 217

*Williamson v. Ah On* (1926) 39 C.L.R. 95

*Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1

## ABBREVIATIONS

A.C.	Appeal Cases
Adel.L.R.	Adelaide Law Review
A.H.J.R.	Australian Journal of Human Rights
A.I.A.L. Forum	Australian Institute of Administrative Law Forum
A.L.J.	Australian Law Journal
A.L.R.	Australian Law Reports
Amer.Univ.Law Rev.	American University Law Review
Am.J.Jurisprud	American Journal of Jurisprudence
App.Cas.	Appeal Cases
Argus L.R.	Argus Law Reports
Aus.Bar Rev.	Australian Bar Review
Aus.J.Labour Law	Australian Journal of Labour Law
Aus.J.Pol.Hist.	Australian Journal of Politics and History
Aus.Quarterly	Australian Quarterly
C.B.P.A.	Canberra Bulletin of Public Administration
C.L.R.	Commonwealth Law Reports
Co.Rep.	Coke's Reports
Cornell L.R.	Cornell Law Review
C.R.	Criminal Reports
Crim.L.J.	Criminal Law Journal
Crim.L.R.	Criminal Law Review
Cth	Commonwealth
Deakin L.R.	Deakin Law Review

Depaul L.R.	Depaul Law Review
Duke L.J.	Duke Law Journal
Fam.L.R.	Family Law Reports
F.C.A.	Federal Court of Australia
F.L.Rev.	Federal Law Review
E.R.	English Reports
Geo.Wash.L.Rev.	George Washington Law Review
Harv.L.Rev	Harvard Law Review
Hastings Const.L.Q.	Hastings Constitutional Law Quarterly
H.C.A.	High Court of Australia
Indiana L.J.	Indiana Law Journal
I.R.	Irish Reports
J.Ind.Rel	Journal of Industrial Relations
J.J.A.	Journal of Judicial Administration
J.Soc.Pub.T.L.	Journal of the Society of Public Teachers of Law
L.Q.R.	Law Quarterly Review
Minnesota L.R	Minnesota Law Review
Mon.L.R.	Monash University Law Review
M.U.L.R.	Melbourne University Law Review
N.S.W.	New South Wales
N.S.W.L.R.	New South Wales Law Reports
N.T.	Northern Territory
P.C.	Privy Council
Pepperdine L.R.	Pepperdine Law Review
P.L.R.	Public Law Review

S.A.S.R.	South Australian State Reports
S.C.R.	Supreme Court Reports
Syd.L.R.	Sydney Law Review
T.J.R.	The Judicial Review
U. of Chi.L.Rev.	University of Chicago Law Review
U.N.S.W.L.J	University of New South Wales Law Journal
U of Pa L.Rev.	University of Pennsylvania Law Review
U.Q.L.J.	University of Queensland Law Journal
U.S.	United States Supreme Court Reports
U.Tas.L.R.	University of Tasmania Law Review
U.W.A.L.R.	University of Western Australia Law Review
Vic.	Victoria
Yale L.J.	Yale Law Journal



## INTRODUCTION

This thesis, like many other academic undertakings, began life as a general desire to “make sense” of the High Court’s treatment of the doctrine of the separation of federal judicial power from legislative and executive power. The doctrine is one of the most frequently litigated aspects of the Australian Constitution – it was the subject of debate in the High Court in the first decade of federation and ninety years later separation of powers issues still constitute a sizeable, even growing, proportion of the High Court’s constitutional caseload. The “judicial power” or “separation of powers” problems which have occupied the Court’s attention have been diverse, and the High Court’s response to these dilemmas has had a major impact on the structure and functioning of many of the institutions of national governance, including federal tribunals, commissions and courts. But despite the recurring nature of these issues, and with the notable exception of the work of Professor Geoffrey Sawer<sup>1</sup> and Professor Leslie Zines,<sup>2</sup> surprisingly little had been written on the separation of federal judicial power until the last few years. So, how does this ninety years of case law fit together? What are its animating principles? Where should it go in the future? These were the questions which inspired this dissertation.

As one of the basic doctrines or principles of government incorporated in the text and structure of the Constitution,<sup>3</sup> the separation of federal judicial power, along with federalism and representative and responsible government, is no narrow constitutional rule, but part of the lifeblood of our constitutional system. It has been lauded by

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<sup>1</sup> G. Sawer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177; G. Sawer, “Judicial Power Under the Constitution” in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961); G. Sawer, *Australian Federalism in the Courts* (1967).

<sup>2</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) (but see also first edition appearing in 1981).

<sup>3</sup> See, eg, *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1, 69-70 per Deane and Toohey JJ. describing the separation of federal judicial power, along with federalism and representative government, as one of “at least three main general doctrines of government which underlie the Constitution and are implemented by its provisions” (fn. omitted). For an earlier judicial statement recognizing the separation of powers as a “fundamental principle” of the Constitution, see *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 88 per Isaacs J.

members of the High Court as promoting the finest traditions of the Anglo-Australian legal system – the values of “individual liberty”<sup>4</sup> or “freedom under the law”.<sup>5</sup> Obviously, the separation of federal judicial power serves important constitutional and social objectives. But how do these objectives influence its interpretation? How should they? If the separation doctrine is the topic of this thesis, its overarching theme is the exploration of these two issues. And, as its title suggests, the argument which unfolds is that the separation doctrine should be construed consistently with its objects and purposes and in a context which is alive both to evolving patterns of Australian governance and the historical experience of Australian constitutionalism.

Of course, to take this general approach to the separation of federal judicial power is simply to apply to it one variant of that “purposive or policy oriented” interpretative methodology which looks to “substance rather than form” and the real-world impact of different interpretative choices which has become part of the pattern of the High Court’s constitutional jurisprudence throughout the 1980s and 1990s.<sup>6</sup> Sir Anthony Mason, arguably the most influential practitioner of this particular mode of construction, recently observed that “a purposive functional approach to the separation of powers provided for by the Australian Constitution has much to commend it”.<sup>7</sup> And looking to the experience of the United States with its much longer history of dealing with separation of powers problems, contemporary debate over judicial interpretation of the doctrine as embodied in that nation’s Constitution centres on how best to give effect to its animating principles 200 years after its adoption.<sup>8</sup>

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<sup>4</sup> See, eg, *R. v. Davison* (1954) 90 C.L.R. 353, 381 per Kitto J. See also *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 11 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

<sup>5</sup> *Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518, 574 per Brennan and Toohey JJ.

<sup>6</sup> For these descriptors, see A. Mason, “Trends in Constitutional Interpretation” (1995) 18 *U.N.S.W.L.J.* 237, 245. And see generally, J.J. Doyle, “Constitutional Law: ‘At the Eye of the Storm’” (1993) 23 *U.W.A.L.R.* 15; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 444-449.

<sup>7</sup> A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 2.

<sup>8</sup> See, eg, M.S. Flaherty, “The Most Dangerous Branch” (1996) 105 *Yale L.J.* 1725; R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U of Pa L.Rev.* 1513; M.H. Redish and E.J. Cisar, “‘If Angels Were to Govern’: The Need for Pragmatic Formalism in Separation of Powers Theory” (1991) 41 *Duke L.J.* 449.

This thesis then takes these basic ideas, and explores them in a systematic way in the Australian constitutional setting. The logical starting point of such an endeavour is a fuller understanding of the objects and purposes associated with the separation doctrine and of the historical context of its entry into Australian constitutional discourse. This is the task essayed in the first three chapters. Chapter One examines the Convention Debates of the 1890s and asks whether the wording of ss.1, 61 and 71 and the structure of Chapters I, II and III of the Constitution represented a conscious decision by the Australian framers to follow the American model and incorporate a legally enforceable doctrine of separation of powers as part of our fundamental law. As will appear, the Convention Debates are strangely silent on this issue and in such a setting the first stirrings and early development of the separation doctrine in the High Court become vitally important. This is the subject of Chapter Two which surveys the judicial development of the Australian separation doctrine from *Baxter v. Ah Way*<sup>9</sup> and *Huddart, Parker and Co. Proprietary Ltd v. Moorehead*<sup>10</sup> in 1909 to *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan*<sup>11</sup> in 1931. It emerges that Sir Isaac Isaacs was the main architect of the separation doctrine in this formative period in which it was established that federal judicial power can only be exercised by Chapter III courts (the “primary separation rule”) but that nothing in the Constitution prevents the delegation of legislative power by the Commonwealth Parliament to the federal executive. Chapter Three, although a somewhat different piece of writing from Chapters One and Two, completes this first package of chapters by seeking to elucidate, with reference to classical theoretical writings on separation of powers, a clearer picture of those goals which the separation doctrine is designed to serve.

Chapters Four to Seven form the balance of this work. The first part of Chapter Four takes the survey of the historical development of the Australian separation doctrine up

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<sup>9</sup> (1909) 8 C.L.R. 626.

<sup>10</sup> (1909) 8 C.L.R. 330.

<sup>11</sup> (1931) 46 C.L.R. 73.

to its major modern staging post in the form of the *Boilermakers' Case*.<sup>12</sup> The “rule in the *Boilermakers' Case*” – that federal courts are unable to exercise non-judicial functions unless incidental to the performance of their judicial functions – is then examined in detail and it is urged that the rule be abandoned in favour of a purposive “incompatibility test” which would allow the Commonwealth Parliament to invest federal courts with non-judicial functions not inconsistent with or repugnant to the exercise of their judicial functions. Chapters Five, Six and Seven move on to explore those issues which are the mainstay of contemporary separation of judicial power challenges. Chapter Five asks how, in a changing world, do we define “judicial power” for the purposes of the primary separation rule and the rule in the *Boilermakers' Case*. And Chapters Six and Seven, with particular focus upon the High Court’s separation of powers jurisprudence over the last decade but also reaching back to more established constitutional traditions, address the burgeoning question of what “rights” or “freedoms” protective of the individual can be distilled from the constitutional commitment to the separate exercise of judicial power.

It should be emphasized that what follows does not purport to be an exhaustive survey of all that the High Court has said and done in relation to the separation of powers; it makes no claims to “textbook” status on the subject. It is instead a purposive and historical analysis of major themes and issues in relation to the separation of federal judicial power. The separation doctrine, perceived perhaps as a “technical” and “specialized” area has always been the poor cousin to federalism in Australian constitutional scholarship. And in the last decade, the High Court’s increasingly innovative separation of powers case law has been eclipsed in part by a new focus on implications from representative and responsible government. What follows is simply one contribution to redressing that imbalance.

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<sup>12</sup> *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 (H.C.A.); *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529 (P.C.).

## CHAPTER 1 - THE DOCTRINE OF SEPARATION OF POWERS: ORIGINAL UNDERSTANDINGS

“the framers of the American Constitution had been frightened by the tendency then lately exhibited in the United Kingdom of ministers to overawe Parliament, and they thought it extremely desirable to separate the legislative and executive branches of government, following the arguments of a great writer – I should rather say a celebrated writer – of those days, Montesquieu, the wisdom of whose observations and the accuracy of whose deductions and assumption of principles may be, I submit with great respect, very open to doubt.”

Sir Samuel Griffith in *Official Report of the National Australasian Convention Debates* (1891) 35.

The Constitution establishes and maintains in being the political entity known as the Commonwealth of Australia. The Constitution supplies that entity with three categories of power – legislative, executive and judicial – entrusting each to a separate branch of government charged with exercising its functions on behalf of the Australian people, in whom ultimate legal sovereignty now resides.<sup>1</sup>

The Constitution sets out this three-fold division of governmental power in its first three Chapters. Chapter I is headed “The Parliament”. Chapter II is headed “The Executive Government”. Chapter III is headed “The Judicature”. Within this framework, s.1 of the Constitution vests the legislative power of the Commonwealth in the Federal Parliament; s.61 states, in recognition of the continuing role of the Crown, that the “executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative”; and s.71 vests the judicial power of the Commonwealth in the High Court “and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction”. The

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<sup>1</sup> *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 C.L.R. 106, 137-138 per Mason C.J. (but cf *ibid* 181 per Dawson J. “[the Constitution] does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine ... The legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament”); *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1, 70-72 per Deane and Toohey JJ.; *McGinty v. Western Australia* (1996) 186 C.L.R. 140, 230 per McHugh J.

structure of Chapters I, II and III of the Constitution corresponds to that of the first three Articles of the United States Constitution.<sup>2</sup> Did the framers thereby intend to incorporate into the Constitution a doctrine of separation of powers operating as a legal limitation on the powers of government as certain passages in the majority judgment in *R. v. Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* could be taken to suggest?<sup>3</sup> Or was the structure of the first three Chapters of the Constitution, as Sir Robert Garran recorded in later life, merely a “draftsman’s neat arrangement”?<sup>4</sup> Could the Constitution, in the words of a dissenting Justice in the *Boilermakers' Case*, “hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity”?<sup>5</sup>

### 1. The Early Commentators

Quick and Garran perceived in the Constitution an imperative separation of the federal judicial power corresponding to that ultimately recognized in the *Boilermakers' Case*.

Under the sub-heading “Separation of Powers” they observed:

“This Constitution vests the legislative, executive and judicial powers respectively in distinct organs; and, though no specific definition of these powers is attempted, it is conceived that the distinction is peremptory, and that any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions, would be equally unconstitutional.”<sup>6</sup>

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<sup>2</sup> Article I, s.1 of the United States Constitution provides: “All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.” Article II, s.1(1) begins: “The executive Power shall be vested in a President of the United States of America.” Article III, s.1 provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

<sup>3</sup> (1956) 94 C.L.R. 254, 276-277, 297 per Dixon C.J., McTiernan, Fullagar and Kitto JJ.  
<sup>4</sup> R.R. Garran, *Prosper the Commonwealth* (1958) 194 (quoted in J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 161). Cf, however, the view expressed by Garran in 1901 that a legally enforceable doctrine of the separation of federal judicial power formed part of the Australian constitutional framework (see pp.6-7 of this chapter).

<sup>5</sup> (1956) 94 C.L.R. 254, 302 per Williams J.

<sup>6</sup> J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720. See also *ibid* 767: “Under this Constitution it is clear that, as in the United

The two authors cited American authority in support of their proposition, noting the “similar separation of functions”<sup>7</sup> prescribed in the Constitution of the United States. Perhaps not surprisingly in view of the common authorship, Quick and Groom in *The Judicial Power of the Commonwealth* published in 1904 expressed the same view<sup>8</sup> – though not, it should be said, unambiguously so.<sup>9</sup> Inglis Clark accepted that the distribution of powers effected by the first three Chapters of the Constitution served to limit the legislative power of the Commonwealth Parliament<sup>10</sup> and that “any attempt on the part of the Parliament or the Crown to exercise functions which are essentially and distinctly judicial must be as invalid as any attempt to legislate upon a matter clearly outside of the legislative power conferred upon the Parliament by the Constitution”.<sup>11</sup> He did not expressly advert to the question whether federal courts are confined to the exercise of federal judicial power.<sup>12</sup>

Harrison Moore, writing in the second edition of his text in 1910 and invoking the frame of the Constitution and the American analogy, was at one with Quick and Garran in recognizing a full, legally enforceable separation of the federal judicial power.<sup>13</sup> However, as J.M. Finnis has pointed out in his article “Separation of Powers in the Australian Constitution”,<sup>14</sup> in the first edition of the same work published in 1902, Professor Moore was less forthcoming in his recognition of the doctrine of the separation of powers and at points appeared to deny its relevance as a legal limitation upon the distribution of powers within the new Australian government:

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States, the functions of the federal Justices are ‘strictly and exclusively judicial’, and that no duties can be cast upon them of an essentially extra-judicial kind.”

7 *Ibid* 720.

8 J. Quick and L. Groom, *The Judicial Power of the Commonwealth* (1904) 7, 70.

9 *Ibid* 85.

10 A. Inglis Clark, *Studies in Australian Constitutional Law* (1901) 31.

11 *Ibid* 37.

12 In relation to the matters discussed in this chapter, Inglis Clark expressed the same views in both the first and second editions of his text. See A. Inglis Clark, *Studies in Australian Constitutional Law* (2nd ed) (1905).

13 W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 96-97, 303.

14 J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 161.

“It may be conjectured that in this matter of the distribution of powers, our Courts will not closely follow the American precedents, which would assign to the Commonwealth Parliament in its sphere a position quite different from the States Parliaments in their sphere. In America, as has been already pointed out, the practical restraints upon the legislature came rather from express prohibitions than from the implications of the separation of powers. The political ideas under the influence of which the United States Constitution was established ... are very different from those prevailing in Australia: the distrust of legislatures is not the first article of political faith in the new Commonwealth.”<sup>15</sup>

Finnis suggests that the views expressed by Professor Moore in the second edition of his text were penned under the influence of the High Court’s then recent decision in *Huddart, Parker & Co Proprietary Ltd v. Moorehead*<sup>16</sup> (in which Professor Moore made an appearance among counsel for the company). More recent research by Professor George Winterton, however, reveals that Harrison Moore had changed his mind well before *Huddart, Parker*.<sup>17</sup> A transcript of Professor Moore’s 1905 constitutional law lectures states that “[t]he Constitution has in fact adopted in plan and principle the separation of powers” and explains that observation of High Court proceedings had persuaded Moore that “he somewhat underrated the importance” of this issue in his 1902 text.<sup>18</sup> Nonetheless, the first edition of Professor Moore’s work remains an important record of the author’s original impression and understanding unsullied by later judicial activity.<sup>19</sup> That Harrison Moore was not alone in originally downplaying the significance of the structure of the Constitution is indicated by an early

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<sup>15</sup> W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) 89 (fn omitted). See generally Moore’s Chapter V, “Distribution of Powers in the Commonwealth Government” and also *ibid* 280-281.

<sup>16</sup> (1909) 8 C.L.R. 330 (see J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 161). Note though that Professor Moore was also aware of the High Court’s decision in *Baxter v. Ah Way* (1909) 8 C.L.R. 626 (in relation to which see below pp.27-29 (ch.2)) handed down eighteen days prior to *Huddart, Parker*. *Baxter v. Ah Way* is noteworthy for the summary fashion in which Griffith C.J. dismissed a potentially relevant separation of powers argument pressed before him.

<sup>17</sup> G. Winterton, “Introduction to the 1997 Reprint” in W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) (1997 reprint).

<sup>18</sup> *Ibid* xlvi-xlvii.

<sup>19</sup> J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 161.



article which addressed the topic of the judicial power of the Commonwealth without reference to separation of powers theory.<sup>20</sup>

But although Quick and Garran, Inglis Clark and (ultimately) Harrison Moore recognized a constitutional doctrine of separation of powers, according to which the federal judicial power was confined to the bodies described in s.71 (which bodies, at least in the opinion of Quick and Garran and Harrison Moore, could exercise no other category of power), these writers discerned a less complete separation between the legislative and executive functions. Quick and Garran affirmed the ability of the Commonwealth Parliament to delegate law-making authority to “a body of its own creation”, the Commonwealth Parliament being in no sense a delegate or agent of the Imperial Parliament and thus standing unaffected by the operation of the maxim *delegatus non potest delegare*.<sup>21</sup> The two authors made no mention of a possible delegation of law-making authority to the federal Executive or of the relevance of the doctrine of separation of powers to such an attempt.<sup>22</sup> Harrison Moore, however, writing in the second edition of his work discussed at length whether the legislature could endow the executive with subordinate law-making authority in the face of the strict division of responsibility suggested by ss.1 and 61 of the Constitution.<sup>23</sup> He concluded that history, convenience and the implicit adoption by the Constitution of the principle of responsible government made it impossible to believe that the Commonwealth Parliament was debarred from empowering the executive to issue

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20 T. Bavin, “The Judicial Power of the Commonwealth” (1903-1904) 1 *Commonwealth Law Review* 49 (Part 1) and 97 (Part 2). The author makes no mention of any limitation on governmental power flowing from the structure of Chapters I, II and III of the Constitution, but simply notes in passing that s.71 of the Constitution identifies “three classes of Courts among which the whole of the judicial power of the Commonwealth must be distributed” (*ibid* 56).

21 J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 510 citing *R v. Burah* (1878) 3 App.Cas. 889 and *Hodge v. R* (1883) 9 App.Cas. 117.

22 No mention is made of these matters by Quick and Garran in their annotations accompanying Chapters I, II and III of the Constitution.

23 But cf the bald statement in the earlier edition of the Professor’s book: “[n]or can it be doubted that the Parliament may, without abdicating its legislative power, delegate to the Governor-General in Council powers of subordinate legislation” (W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) 88).

administrative regulations.<sup>24</sup> Nonetheless, keenly aware of American authority placing restrictions on the power of Congress to delegate legislative authority to the executive,<sup>25</sup> Harrison Moore posited that the doctrine of separation of powers could still operate as a legal limitation on power “where Parliament leaves to the discretion of the Executive the whole matter of legislative policy”.<sup>26</sup> Inglis Clark, on the other hand, approached the issue of the delegation of federal legislative power within an analytical framework more closely approximating that of abdication of legislative powers, than separation of powers theory.<sup>27</sup>

To the extent that the federal Parliament’s perception of its own legal capacity is at all relevant, it proceeded to delegate (with some generosity) legislative authority to the executive from the outset.<sup>28</sup>

## 2. The Convention Debates

Putting to one side the shifting opinion of Harrison Moore, one would expect the views of Quick and Garran, Quick and Groom and Inglis Clark concerning the existence and scope of a constitutionally entrenched doctrine of separation of powers to reflect the intentions and understandings of the framers as expressed in the Convention Debates of the 1890s. After all, Andrew Inglis Clark, whose “sympathies” for American systems

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<sup>24</sup> W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 98-100.

<sup>25</sup> A case commonly referred to by the early commentators in this context was *Field v. Clarke* 143 U.S. 649 (1892) in which the Supreme Court quoting from an earlier judgment drew a distinction between “the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made” (*ibid* 693-694). The Australian commentators were conscious, however, that the American authorities drew on both the doctrine of separation of powers and the maxim *delegatus non potest delegare*. See, eg, W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 101.

<sup>26</sup> *Ibid* 100-101.

<sup>27</sup> A. Inglis Clark, *Studies in Australian Constitutional Law* (1901) 41-51.

<sup>28</sup> See, eg, *Customs Act* 1901 (Cth) s.270: “The Governor-General may make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the Customs.” See also W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 97-100.

and institutions of government are well documented,<sup>29</sup> was a delegate to the 1891 Convention and served as Chair of its Judiciary Committee. John Quick was a delegate to the 1897-1898 Convention. And Robert Garran, as secretary to Edmund Barton – leader of the second Convention – was intimately associated with the drafting of the Constitution.<sup>30</sup> But whereas the concepts of federalism, responsible government and equality of trade pervade the Convention Debates, the doctrine of separation of powers, even the doctrine of the separation of federal judicial power, was accorded scant attention by the founding fathers. To the extent that one can glean the collective intent of several dozen men from the bare record of their debate one hundred years after the event, the introduction of an Antipodean version of the doctrine of separation of powers appears to have been, at best, a somewhat hazy consideration in the establishment of the Commonwealth. For the most part, delegates appear not to have turned their minds to the issue, or, if their attention was so directed, not to have apprehended its significance.<sup>31</sup>

The history of the drafting of s.71 of the Constitution is illustrative. The original resolution put to the 1891 Convention by Sir Henry Parkes called for (inter alia):

- “the framing of a federal constitution, which shall establish, -
- (1.) A parliament ...
  - (2.) A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia, under the direct authority of the Sovereign, whose decisions, as such, shall be final.
  - (3.) An executive ...”<sup>32</sup>

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<sup>29</sup> See J. Reynolds, “A.I. Clark’s American Sympathies and his Influence on Australian Federation” (1958) 32 *A.L.J.* 62; J.A. La Nauze, *The Making of the Australian Constitution* (1972); J.M. Williams, “‘With Eyes Open’: Andrew Inglis Clark and Our Republican Tradition” (1995) 23 *F.L.Rev.* 149; J.M. Williams, “Introduction to the 1997 Reprint” in A. Inglis Clark, *Studies in Australian Constitutional Law* (1901) (1997 reprint).

<sup>30</sup> For Robert Garran’s own account of his involvement in the second Convention see R.R. Garran, *Prosper the Commonwealth* (1958) ch.9.

<sup>31</sup> Cf the well known position of the United States framers who clearly intended to incorporate a doctrine of separation of powers as part of the United States Constitution (see generally below ch.3).

<sup>32</sup> *Official Report of the National Australasian Convention Debates* (1891) 23.

The resolution, with some amendments, was carried.<sup>33</sup> But the draft Constitution Bill ultimately adopted by the Convention, although setting out the precursors to ss.1 and 61 in essentially their current form, did not establish the federal supreme court as the creature of the Constitution or specifically vest the federal judicial power in any body or bodies.<sup>34</sup> Instead, Chapter III of the 1891 Draft Bill followed the Canadian, as opposed to the United States model,<sup>35</sup> and empowered Parliament to establish a federal supreme court as well as other federal courts.<sup>36</sup> The Bill conferred on this nascent supreme court defined original and appellate jurisdiction<sup>37</sup> and, in addition, empowered the federal Parliament to confer on the supreme court or any other federal court jurisdiction in respect of enumerated matters.<sup>38</sup> At the same time, delegates seemed unaware that to

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33 *Ibid* 499-500. The only amendment relevant for present purposes was the deletion of the reference to the finality of the decisions of the federal supreme court.

34 This outcome was the handiwork of three of the members of the 1891 drafting sub-committee – Griffith, Kingston and Barton (an unofficial member). The 1891 Judiciary Committee, chaired by Inglis Clark, had recommended that the Constitution contain (inter alia) a provision to the effect that: “The Judicial power of the Union shall be vested in one High Court, to be called the High Court of Australia, and in such Inferior Courts as the Federal Parliament may from time to time create and establish” (see “Report of the Judiciary Committee”, *Official Record of the Proceedings and Debates of the National Australasian Convention* (1891) clxiii). Under Clark’s influence (he was also a member of the drafting sub-committee), the 1891 Draft Bill had originally entrenched the High Court in this way in the Constitution. But when Clark was suffering from influenza, his colleagues altered the judicature clauses on board the “Lucinda” in his absence. See J. Reynolds, “A.I. Clark’s American Sympathies and his Influence on Australian Federation” (1958) 32 *A.L.J.* 62, 66 and J.A. La Nauze, *The Making of the Australian Constitution* (1972) 66-67.

35 *British North America Act, 1867* 30 & 31 Vict., c.3 (Imp.) s.101: “The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” Cf United States Constitution Article III, s.1: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The *British North America Act, 1867* (now the *Constitution Act, 1867*) has not been interpreted as incorporating a general doctrine of separation of powers. Thus, as stated in P. Hogg, *Constitutional Law of Canada* (1997) (student ed) 188-189 the Canadian Parliament can legislate to confer judicial functions on bodies that are not courts and can correspondingly legislate to confer non-judicial functions on its courts. See also *Attorney-General for Ontario v. Attorney-General for Canada* (the *Reference Appeal*) [1912] A.C. 571 where the Privy Council rejected an argument that the conferral by the Canadian Parliament of an advisory jurisdiction on the Supreme Court of Canada resulted in that Court ceasing to be such a court as s.101 of the *British North America Act* provided for. The Canadian Supreme Court affirmed the validity of this advisory jurisdiction in *Reference re Secession of Quebec* [1998] S.C.J. No.61 (Q.L.), File No.25506, decided 20 August 1998.

36 1891 Draft Bill, Ch.III, cl.1 in *Official Report of the National Australasian Convention Debates* (1891) 956.

37 1891 Draft Bill, Ch.III, cl.4 and 8 in *ibid* 956-957.

38 1891 Draft Bill, Ch.III, cl.7 and 8 in *ibid* 957.

frame Chapter III in this way represented, at least potentially, a significant choice in terms of legal and political theory.<sup>39</sup> It is interesting to note, however, that at the very outset of the Convention when discussing the form which the federal Executive might take, Sir Samuel Griffith had observed that:

“the framers of the American Constitution had been frightened by the tendency then lately exhibited in the United Kingdom of ministers to overawe Parliament, and they thought it extremely desirable to separate the legislative and executive branches of government, following the arguments of a great writer – I should rather say a celebrated writer – of those days, Montesquieu, the wisdom of whose observations and the accuracy of whose deductions and assumption of principles may be, I submit with great respect, very open to doubt.”<sup>40</sup>

The second Convention took the 1891 Draft Bill as a guide to its deliberations, but purported to approach afresh the formulation of a Constitution for Australia. In the new Draft Bill presented to the Convention for debate by the Constitutional Committee, the precursor to s.71 was now modelled on its American counterpart:

“Clause 69 – The judicial power of the Commonwealth shall be vested in one Supreme Court, to be called the High Court of Australia, and in such other courts as the Parliament may from time to time create or invest with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than four, as the Parliament may from time to time prescribe.”<sup>41</sup>

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<sup>39</sup> See, eg, Sir Samuel Griffith *ibid* 527-528 moving that the Draft Bill, brought up from the Constitutional Committee, be referred for consideration to the Committee of the Whole Convention. See also the subsequent discussion and adoption of Ch.III, cl.1 of the Draft Bill by the Committee of the Whole Convention *ibid* 779-785. On neither occasion was there any apparent awareness on the part of the speakers of separation of powers issues. See also J. Thomson, “Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution” in G. Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 173, 193. Moreover, in his pamphlet *Notes on Australian Federation: Its Nature and Probable Effects* (1896), Sir Samuel Griffith made no mention of the doctrine of separation of powers.

<sup>40</sup> *Official Report of the National Australasian Convention Debates* (1891) 35.

<sup>41</sup> *Official Report of the National Australasian Convention Debates* (1897) 934-935.

This redrafted clause was taken verbatim from the recommendations of the 1897 Judiciary Committee.<sup>42</sup> Although the handwritten minutes of the Committee survive, they give no hint of the motives which inspired committee members to suggest this change.<sup>43</sup> In the ensuing debate of the Committee of the Whole Convention, there was general agreement among delegates that it had been a mistake in 1891 to leave the creation of the supreme court to federal Parliament.<sup>44</sup> Instead, the supreme court should be embedded in the Constitution itself, a view which delegates strenuously maintained in the face of an amendment suggested (without success) to the Melbourne session by the Legislative Council of South Australia which would have inserted at the beginning of the clause the words “Until Parliament otherwise provides”.<sup>45</sup> Sir John Downer’s comment, that the Legislative Council’s proposal went “to the very root of the Constitution”,<sup>46</sup> was echoed by others.<sup>47</sup> But in rejecting the Legislative Council’s proposal, delegates did not expressly call in aid adherence to the doctrine of separation of powers. The key consideration was instead the role of the High Court as interpreter of the Constitution and the consequent need to preserve the independence of the Court vis-a-vis the federal Parliament and Executive. In the words of Downer:

“The very essence of this Constitution is the establishment of a Commonwealth which is not to interfere with the rights conferred on the states, and a tribunal to decide when those rights are imperilled. To provide that the Parliament – the very tribunal whose jurisdiction is intended to be questioned, or over the exercise of whose jurisdiction there is to be a supervising power – should itself be the authority to decide what the tribunal should be that is to sit in judgment on itself, in disputes between it and the states, is to make an attack on the very cardinal principles on which Federal Constitutions are established. I really do

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- 42 Report of the Judiciary Committee on microfilm, “Australasian Federal Convention Adelaide 1897-8” GRG 72 Series 8/12 [32] (held in Chifley Library, Australian National University). The 1897 Judiciary Committee comprised Symon (Chair), Matthew Clark, Dobson, Glynn, Higgins, James, Leake, Peacock, Walker and Wise.
- 43 “Minutes of Proceedings of Judiciary Committee” in *ibid* [2]-[3] (1 April 1897), [14] (6 April 1897).
- 44 See, eg, the exchange between Reid, Barton, Wise and Deakin in *Official Report of the National Australasian Convention Debates* (1897) 272. See also Matthew Clarke *ibid* 307, Barton *ibid* 445 and Wise *ibid* 935.
- 45 *Official Record of the Debates of the Australasian Federal Convention* (1898) 265-285.
- 46 *Ibid* 274.
- 47 See Barton: “[i]t would be a structural change in the whole fabric of the Constitution” *ibid* 268. See also Kingston *ibid* 271-272, Higgins *ibid* 279 and Reid *ibid* 284-285.

not think that in this committee there will be a great deal of difference of opinion on the subject that that amendment ought not to be agreed to for one moment.”<sup>48</sup>

The clause as originally proposed by the Judiciary and Constitutional Committees, with the addition of an amendment reducing to two the minimum number of puisne judges, was adopted by the Convention.<sup>49</sup>

But despite the framers’ failure to cast the debate concerning the drafting of s.71 in terms of the language of separation of powers, their much expressed desire to ensure the absolute independence of the federal judiciary as the “bulwark of the Constitution”<sup>50</sup> coupled with the positive steps taken in s.72 to secure that independence,<sup>51</sup> is hardly consistent with an intention on their part that the federal judicial power be generally capable of assumption by bodies standing outside the framework of Chapter III.<sup>52</sup> Whether this *actually was* the framers’ intention is impossible to say, although it is no accident that a majority of the High Court in the *Boilermakers’ Case* called in aid the special nature of the judicial function within a federation as a factor underpinning their conclusion that the Constitution incorporated a strict separation of judicial from legislative and executive powers.<sup>53</sup>

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48 *Ibid* 274. See also Barton *ibid* 268, Kingston *ibid* 271-272, Higgins *ibid* 279 and Reid *ibid* 284-285. For similar expressions of opinion at the Adelaide session see *Official Report of the National Australasian Convention Debates* (1897) 272 (Reid) and 935 (Wise).

49 *Official Record of the Debates of the Australasian Federal Convention* (1898) 308. Drafting amendments were made after the fourth report. Note that Professor Harrison Moore, in a lecture on the 1897 Draft Bill, did not attribute the decision to remodel the precursor to s.71 to any express desire to embrace an entrenched doctrine of separation of powers. The Professor simply described the drafting change as “[b]y way of emphasizing the position of the supreme federal court”. See W. Harrison Moore, *The Commonwealth of Australia: Four Lectures on the Constitution Bill 1897* (1897) 101.

50 *Official Report of the National Australasian Convention Debates* (1897) 952 (Barton). See also, eg, Kingston *ibid* 946, Symon *ibid* 950-951, Higgins *ibid* 953, Fraser *ibid* 954, Douglas *ibid* 955, Downer *ibid* 955-956.

51 See the debate concerning the framing of s.72 in *ibid* 944-962 and *Official Record of the Debates of the Australasian Federal Convention* (1898) 308-318.

52 *Harris v. Caladine* (1991) 172 C.L.R. 84, 159 per McHugh J. See also *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 117 per Evatt J.

53 (1956) 94 C.L.R. 254, 276 per Dixon C.J., McTiernan, Fullagar and Kitto JJ. And see generally below ch.4.

The few explicit references to separation of powers theory which can be found in the second Convention suggest, with varying degrees of conviction, that those who uttered them supported the proposition that the federal judiciary be confined to the exercise of federal judicial power. At the Adelaide session, when discussing a provision then before delegates as clause 71, which provision attempted to define those matters to which the judicial power extended,<sup>54</sup> Patrick Glynn argued (and proposed an amendment to the effect) that the Commonwealth Parliament should be empowered to confer on the High Court an advisory jurisdiction,<sup>55</sup> an argument which echoed an earlier unsuccessful motion moved by Glynn in the Judiciary Committee.<sup>56</sup> Charles Kingston supported Glynn's amendment,<sup>57</sup> but Josiah Symon (Chair of the Judiciary Committee) was opposed. Symon argued that the suggestion had nothing to do with the judicial power "which is contra-distinguished from the executive and legislative power under the Constitution."<sup>58</sup> More particularly, Symon argued that an advisory jurisdiction:

"is not a desirable thing to introduce. The great charm of the judiciary in the Supreme Court of the United States consists in the fact that they do not mix themselves up with the questions of legislation or constitutional law or the question of executive control until their attention is directed to it in some suit

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54 The then clause 71 provided as follows:  
 "The judicial power shall extend to all matters:  
 i. Arising under this Constitution, or involving its interpretation:  
 ii. Arising under any laws made by the Parliament:  
 iii. Arising under any treaty:  
 iv. Of admiralty and maritime jurisdiction:  
 v. Affecting the public ministers, consuls, or other representatives of other countries:  
 vi. In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:  
 vii. In which a writ of mandamus or prohibition is sought against an officer of the Commonwealth:  
 viii. Between States:  
 ix. Relating to the same subject matter claimed under the laws of different States." See *Official Report of the National Australasian Convention Debates* (1897) 962.

55 *Ibid* 962-963.

56 The handwritten minutes record: "Mr Glynn moved to add to Clause 6 'The High Court of Australasia shall have jurisdiction in all other matters that the Parliament may from time to time declare to be within its jurisdiction'. Amendment negatived by two votes to five." See Minutes of Proceedings of Judiciary Committee, 2 April 1897 on microfilm, "Australasian Federal Convention Adelaide 1897-8" GRG 72 Series 8/12 [6] (held in Chifley Library, Australian National University).

57 *Official Report of the National Australasian Convention Debates* (1897) 966.

58 *Ibid* 965.



between parties, and it seems to me that this is a very desirable course to preserve.”<sup>59</sup>

Glynn’s amendment was negated,<sup>60</sup> although it is straining history to draw the conclusion that it was thereby understood, with reference to the American experience, that there was incorporated in the Constitution a full legal separation of the federal judicial power. Other speakers against the amendment (Henry Bournes Higgins and Alfred Deakin) instead called in aid the traditions of the English legal system and the general undesirability of committing hypothetical cases to any legal tribunal.<sup>61</sup> Later discussion of the same clause, however, did seem to produce the consensus that the High Court should not be asked to decide “political matters”.<sup>62</sup>

The Adelaide session also saw the introduction into Chapter III of the Constitution of a new clause, which in the Draft Bill of 1897 appeared as clause 80, but ultimately was omitted from the Constitution. The clause provided:

“No person holding any judicial office shall be appointed to or hold the office of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the Government, or any other executive office.”<sup>63</sup>

The clause was the brainchild of Symon who proposed it in order to bar the simultaneous appointment of the Chief Justice of the High Court to the post of acting Governor-General.<sup>64</sup> Although the clause was adopted in Adelaide,<sup>65</sup> the substantive

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<sup>59</sup> *Id.*

<sup>60</sup> *Ibid* 967.

<sup>61</sup> *Ibid* 966-967 (Higgins) and Deakin *ibid* 967. And it is not clear beyond all doubt that Symon was arguing that the assumption of an advisory jurisdiction was the assumption of non-judicial power. Instead, Symon may have been arguing that Glynn’s amendment related merely to the procedure according to which judicial power was exercised, and therefore should have been inserted in a place other than clause 71. There is a longstanding debate as to whether the rendering of an advisory opinion by a court in fact amounts to the exercise of judicial power or non-judicial power. See below p.52 esp. fnn. 132-133 (ch.2).

<sup>62</sup> *Official Record of the Debates of the Australasian Federal Convention* (1898) 318-320 (exchanges between Isaacs, Symon, Quick and Glynn).

<sup>63</sup> 1897 Draft Bill, cl.80 in *Official Report of the National Australasian Convention Debates* (1897) 1236.

<sup>64</sup> *Ibid* 634 and 1174. Symon was responding to the practice which had obtained in many of the Australian colonies of appointing the Chief Justice of the Supreme Court to the post

debate concerning its incorporation into Chapter III occurred at the Melbourne session when delegates were confronted with the suggestion of the Legislative Assemblies of New South Wales and Victoria that the clause be omitted.<sup>66</sup> The argument of the defenders of the clause was generally to emphasize the special role of the High Court as interpreter of the Constitution and protector of the interests of individuals and States from legislative and executive encroachment. Many of the questions coming before the High Court would be big with controversy. Its judges should be above even the possibility of suspicion (“in a calm ether of [their] own”<sup>67</sup>) and thus shielded from contact with the executive.<sup>68</sup> Several such delegates, however, took this argument further and described the retention of the clause as a matter of high principle – that principle being the absolute isolation of the federal judiciary from the legislative and executive branches of government. Symon said of the clause:

“So far as the Commonwealth is concerned, it is a mere indication that we believe and desire that one of the three parts of the Constitution which we are seeking to establish – the Judiciary – which to a certain extent is co-equal with the other two, and is intended to be kept absolutely apart from the other two, shall be so kept absolutely apart.”<sup>69</sup>

William McMillan maintained that there was no room to import to the Commonwealth the practice obtaining in many of the colonies of appointing the Chief Justice to the position of acting Governor:

“We have not made the same absolute distinction between the Executive and the Legislature and the Judiciary in the cases of a state Government as we have done in the case of this Federal Government. We have implanted in this Constitution this great high Supreme Court, which practically marks the Judiciary off from the other branches of Government, except that the Executive has to make the appointments to the bench ... We have to indicate what we believe to be the basis

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of Acting Governor. See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 118 per McHugh J.

65 *Official Report of the National Australasian Convention Debates* (1897) 1176.

66 *Official Record of the Debates of the Australasian Federal Convention* (1898) 355.

67 *Ibid* 361 (Downer).

68 *Ibid* 356 (Forrest), O’Connor *ibid* 356-357, McMillan *ibid* 358-359, 371-372, Downer *ibid* 361-362, Symon *ibid* 363-364, 372-374, Wise *ibid* 365-366, Trenwith *ibid* 366-367, and Barton *ibid* 368-369.

69 *Ibid* 363. See also *ibid* 372 (Symon).

of this Constitution in all its parts, and I think that the principle which we lay down – that this great Judiciary shall be, not merely not under the heel of the Executive and Legislature, but shall be absolutely isolated and apart, is one of the truest principles in this Bill.”<sup>70</sup>

Later McMillan added:

“we purposely follow the American rule by absolutely isolating the Judiciary from either the Executive or the Legislature.”<sup>71</sup>

Downer declared that for the Chief Justice of the High Court to fill the position of acting Governor-General would go “to the root of the Constitution”:

“We say, as a question of principle, that the protector of the Constitution must not be a portion of the Executive, and the argument is unanswerable.”<sup>72</sup>

These speeches give every indication that Symon, McMillan and (to a lesser extent) Downer believed that the Constitution was already apt to enshrine, and did enshrine, a legally enforceable doctrine of the separation of federal judicial power. For these three men, consistency with this “sacred principle”<sup>73</sup> of the Constitution meant that the clause must be retained.<sup>74</sup> But in so arguing, Symon, McMillan and Downer failed to articulate any general theory supporting the inclusion in a normative sense of this principle as part of the constitutional framework apart from reference to the role of the federal judiciary as arbiter of the Constitution and the consequent need to protect and preserve its independence.<sup>75</sup> And in addition, they failed to explore the potential impact

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<sup>70</sup> *Ibid* 358-359.

<sup>71</sup> *Ibid* 371.

<sup>72</sup> *Ibid* 362. See also *ibid* 368 (Barton).

<sup>73</sup> *Ibid* 372 (McMillan).

<sup>74</sup> Note, however, that on current authority, a member of the federal judiciary may be appointed to executive office consistently with the *Boilermakers’ Case* under the “designated person” principle. See *Hilton v. Wells* (1985) 157 C.L.R. 57; *Grollo v. Palmer* (1995) 184 C.L.R. 348 and *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1 (discussed below pp.150-154 (ch.4)).

<sup>75</sup> Although Symon did quote from a dispatch dated 20 January 1862 from the Duke of Newcastle to Governor Daly in South Australia that “[t]o separate the functions of a Judge from those of a Governor is one of the first precautions which society adopts in order to secure itself from injustice, when it becomes capable of political and judicial organization” (*Official Record of the Debates of the Australasian Federal Convention*

of this principle of separation of powers beyond the immediate issue of the appointment of serving judges to executive office (although their speeches, read in full, suggest that they did not envisage the same degree of separation between the legislative and executive powers<sup>76</sup>). Finnis, reflecting on these speeches, claims that the transcript of debate reveals that these men regarded the Constitution as incorporating an institutional theory of separation of powers (that is, a separation doctrine applicable only to certain *institutions* of government) as opposed to an abstract theory applicable to *all* institutions and actors exercising public power.<sup>77</sup> Although the above speeches could be interpreted in this way, the contrary position is not necessarily excluded<sup>78</sup> and it may be questioned whether it is not reading too much into these utterances (which were

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(1898) 364). Cf the much richer theoretical context in which the American framers discussed the separation doctrine (see generally below ch.3).

76 *Official Record of the Debates of the Australasian Federal Convention* (1898) 371-372 (McMillan), Symon *ibid* 372-374.

77 J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 171-172. Finnis describes his use of these terms *ibid* 162-163. According to Finnis, an institutional theory of separation of powers "postulate[s] a number of government institutions, and require[s] that no person be a member of more than one of these, that none of these institutions do any of the jobs assigned to the others, and in general that their organisation, personnel and tasks be kept entirely separate". Under an institutional theory of separation of powers, the requirement of separation would extend only to these named institutions, their personnel and tasks. The requirement of separation would not necessarily extend to any new institution of government standing outside this framework. Thus, the institutional doctrine of separation "can really be spoken of only as a sort of shorthand ... *derived* from the planned separation of certain particular institutions" (emphasis in original). An abstract theory of separation of powers, however, "postulate[s] a conceptual system of governmental functions, and require[s] that these functions be exercised so entirely separately that no institution of government should exercise more than one of them". Thus, under an abstract theory of separation of powers, the doctrine of separation "is logically prior to every particular institution" and all proposed, as well as existing, institutions of government would have to conform to the constitutional imperative.

78 It can be argued that the Constitution, in allocating public power, divides that power at federal level into three exhaustive categories – legislative, executive and judicial – conferring each on a separate institution or branch of government according to the terms of ss.1, 61 and 71 (see, eg, G. Sawyer, "The Separation of Powers in Australian Federalism" (1961) 35 *A.L.J.* 177, 177). Seen in this light, the Constitution takes as its starting point an abstract separation of governmental functions. As ss.1, 61 and 71 had assumed their present form (subject to minor drafting variations) by the Melbourne session, it could be argued that reference to the absolute isolation of the federal judiciary from the federal legislature and executive was simply shorthand for the aforementioned separation of functions. And see also McMillan's exchange with Isaacs (an opponent of the clause) where McMillan asks: "[i]s it not a question of principle as to whether a person should combine executive with judicial functions?" (*Official Record of the Debates of the Australasian Federal Convention* (1898) 361).

necessarily brief and delivered *ex tempore*) to attempt to extract from them adherence to a discrete and relatively sophisticated version of the theory in question.

But even if it is possible to interpret the contributions of Symon, McMillan and Downer as advocating a particular theory of separation of powers, the fact is that the clause under consideration did not survive as part of the constitutional compact. Finnis points to this as evidence of a rejection of separation.<sup>79</sup> Certainly, if the consensus of the Convention had been (as Symon and McMillan appeared to suggest) that the Constitution was intended to incorporate a legal doctrine of the separation of federal judicial power, then one would have expected the arguments of the opponents of the clause to be conducted, at least in part, in the context of that doctrine. But that was not so. The opponents of the clause simply argued that to exclude the judges from the position of acting Governor-General was to exclude that class of person best suited to the task by reason of training and temperament, and, moreover, that the selection of an acting Governor-General should be left open for determination as occasion demanded.<sup>80</sup> That the opponents of the clause did not thereby seek to reconcile their arguments with the doctrine of separation of powers<sup>81</sup> and that they ultimately succeeded in their goal of expunging the clause from the Bill<sup>82</sup> must lead one to doubt whether the framers, considered collectively, truly intended to incorporate into the Constitution a binding

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<sup>79</sup> J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 171.

<sup>80</sup> *Official Record of the Debates of the Australasian Federal Convention* (1898) 355 (Holder), Turner *ibid* 355-356, Higgins *ibid* 357-358, Reid *ibid* 359-360, Isaacs *ibid* 360-361, Walker *ibid* 362-363, Kingston *ibid* 364-365, Peacock *ibid* 367-368.

<sup>81</sup> Although it should be noted that the opponents of the clause tried to beat Symon, McMillan and Downer at their own game by arguing that adherence to the principle of separation would demand that members of the legislature, and even those holding any "political office", also be excluded from serving as acting Governor-General (see, eg, *ibid* 360-361, 372 (Isaacs) and Higgins *ibid* 2341-2342). Symon and McMillan attempted to deflect this argument by emphasizing the special role of the federal judiciary under the Constitution and the inter-relationship between legislature and executive under a system of responsible government (Symon *ibid* 363-364, McMillan *ibid* 371-372). Nonetheless, the "spoiling tactics" of those opposed to the clause were instrumental in its ultimate rejection (see Higgins' proposed amendment to the clause seeking to insert the words "or parliamentary" after the word "judicial" and the perfunctory rejection of this amendment and then the clause itself *ibid* 2341-2343).

<sup>82</sup> Although the clause initially survived the amendment suggested by the Legislative Assemblies of New South Wales and Victoria that it be omitted (*ibid* 375 (1 February 1898)), it was subsequently deleted in perfunctory fashion (*ibid* 2343 (11 March 1898)).

doctrine of the separation of federal judicial power. The debate concerning the establishment of the Inter-State Commission, and, in particular, the vague and somewhat inconsistent discussion concerning its powers, only underscores this point. That debate never really focussed, in terms of the doctrine of separation of powers, on the conjunction of “adjudication” and “administration” in the constitutional description of the Commission’s powers.<sup>83</sup> To the extent that it is possible to discern a consensus, it appears to have been understood that the Commission would exercise both administrative and judicial functions.<sup>84</sup>

### 3. Conclusion: A Non-Compelling Historical Record

The majority of the High Court in the *Boilermakers’ Case*, in concluding that not only must any grant of the judicial power of the Commonwealth be reposed in a Chapter III court, but that federal courts are constitutionally disbarred from assuming functions “not in themselves part of the judicial power [or] auxiliary or incidental thereto”,<sup>85</sup> called in aid textual considerations, the role of a constitutional court in a federation, and, significantly for present purposes, the “contemporary” opinion of Inglis Clark and Harrison Moore (second edition).<sup>86</sup> Professor Geoffrey Sawer, writing in 1961, was persuaded by “the even more convincing opinion of Quick and Garran” to declare that the decision in the *Boilermakers’ Case* “is a way beyond question corresponding to the

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<sup>83</sup> Section 101 of the Constitution provides: “There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.”

<sup>84</sup> See, eg, *Official Report of the National Australasian Convention Debates* (1897) 1133 (Barton); *Official Record of the Debates of the Australasian Federal Convention* (1898) 1515 (McMillan), Symon *ibid* 1521-1522 and Isaacs *ibid* 2461. This is also Finnis’ assessment of the debate concerning the Inter-State Commission (J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 172-176) as well as that of La Nauze (J.A. La Nauze, “The Inter-State Commission” (1937) 9 *Aus. Quarterly* 48, 55). And James Bryce, whose book, *The American Commonwealth* (1888) had a profound influence upon the framers (see J.A. La Nauze, *The Making of the Australian Constitution* (1972) 273-274) had no difficulty in describing the Australian Inter-State Commission as a “second Court”, exercising functions “half-administrative, half-judicial” (J. Bryce, *Studies in History and Jurisprudence* (1901) 509).

<sup>85</sup> (1956) 94 C.L.R. 254, 271-272.

<sup>86</sup> *Ibid* 276-277. See generally below ch.4.

expectations of the Founders”.<sup>87</sup> Yet, Quick and Garran’s confident assertion that the new Constitution ordained a complete separation of the federal judicial power finds only a faint echo in the Convention Debates, something which Sawyer must have realized when in 1967 he softened his stance, observing that “[t]he historical probabilities are that only a very limited separation of powers was intended”.<sup>88</sup>

In light of the High Court’s interpretation of Chapter III of the Constitution since federation, it is tempting to seize on the few fragments of debate from last century which support the strict separation of federal judicial power in an attempt to sanctify modern doctrine as blessed by the framers. But to do so ignores the fact that, overall, the doctrine of separation of powers was barely mentioned in the Conventions of the 1890s, and, that on the one occasion when the doctrine was discussed at length, it was in defence of a clause ultimately omitted from the Constitution. The primary historical material simply does not support the conclusion that the framers expressly intended to adopt, as a principle of their Constitution, a doctrine of separation of powers – be that doctrine narrowly or broadly conceived.

But to say this of the framers’ express intent is not to exclude the possibility that, for example, had these men been confronted with the question whether a body external to Chapter III could validly be entrusted with the exercise of federal judicial power, they would have responded in the negative. As suggested above, when faced with the inferences of their careful drafting of ss.71 and 72 of the Constitution, the framers may have conceded that, with the exception of the Inter-State Commission, only the courts referred to in Chapter III could validly discharge the judicial power of the Commonwealth. And, in addition, what has been said above does not exclude the possibility (indeed probability in light of later events<sup>89</sup>) that individual framers, particularly those with legal training and versed in the American Constitution, were

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<sup>87</sup> G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 178-179 (fn. omitted).

<sup>88</sup> G. Sawyer, *Australian Federalism in the Courts* (1967) 154 (and see generally 152-154).

<sup>89</sup> See below ch.2.

aware of the division of responsibility which ss.1, 61 and 71 suggested (even if, as Sir Robert Garran wrote in his twilight years, the language of those provisions was introduced at the Adelaide Convention “as a draftsman’s neat arrangement, without any hint of further significance”<sup>90</sup>). Such Convention luminaries as Barton, Isaacs and Higgins – who must surely have apprehended the significance of their document’s adoption of the structure of the United States Constitution<sup>91</sup> – may nonetheless have been mindful that to initiate a discussion on this technical legal issue in a forum in which time was so often pressing would only serve to distract the mass of delegates from the key political issues confronting them, such as the powers of the Senate and control of federal finance, in relation to which compromise between the colonies and the agreement of the people was vital if federation was ever to become a reality.<sup>92</sup> And as Professor Alex Castles has pointed out, the formal text of the Convention Debates provides only part of the historical picture. Informal meetings and gatherings of delegates played an important part in the framing of the Constitution.<sup>93</sup> Thus, of Quick and Garran and the Convention Debates “it can never be assumed these are necessarily accurate representations of all the thinking which went into the making of the Constitution”.<sup>94</sup>

The attractiveness of the scenario outlined in the previous paragraph is that it may also go some of the way towards explaining the disjunction between the Convention Debates and the views of the early commentators in relation to the incorporation of the doctrine of the separation of powers as part of the new Constitution. Of course, when one takes into account the first edition of Harrison Moore, the early writers were not unanimous in their recognition of the existence of a legal separation of federal judicial power. But

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<sup>90</sup> R.R. Garran, *Prosper the Commonwealth* (1958) 194 (quoted in J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 161).

<sup>91</sup> But note Barton’s 1898 admission to Inglis Clark that he had not read, or, alternatively, had “forgotten” the case of *Marbury v. Madison* (quoted in J.A. La Nauze, *The Making of the Australian Constitution* (1972) 234).

<sup>92</sup> *Ibid* 270-272.

<sup>93</sup> A. Castles, “The Voyage of the ‘Lucinda’ and the Drafting of the Australian Constitution in 1891” (1991) 65 *A.L.J.* 277.

<sup>94</sup> *Ibid* 281.



maybe Quick and Garran (and Quick and Groom), in writing of the exclusive and exhaustive vesting of the judicial power of the Commonwealth in federal courts were, as Finnis appears to suggest,<sup>95</sup> conveying to their readership their understanding of the legal consequences of the text of the Constitution, as opposed to their understanding of express, formal, original intent.

Ultimately then, the appeal made by the majority in the *Boilermakers' Case* to “contemporary” opinion was not an indirect invocation of original intent in an era when the High Court took a self-denying attitude to the place of the Convention Debates in constitutional interpretation.<sup>96</sup> It was instead an appeal to the legal assessment of select commentators. The question whether the Australian Constitution enshrined a legally enforceable doctrine of the separation of powers was not addressed in the Convention Debates and, by default, was left to the “Federal Supreme Court” established by s.71. And, as will be seen in the following chapter, that the jurisprudence of this new Court developed to the point where it could sustain the decision in the *Boilermakers' Case* was largely the result of the judicial vision of one individual who, paradoxically, was also a framer – Isaac Alfred Isaacs.

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<sup>95</sup> J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 161.

<sup>96</sup> It is interesting to speculate what the majority in *Boilermakers' Case* would have made of the primary Convention material had they regarded themselves as free to refer to it. See *Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 208, 213-214 and see now *Cole v. Whitfield* (1988) 165 C.L.R. 360, 385.

## CHAPTER 2 - SIR ISAAC ISAACS AND THE “DOMINANT PRINCIPLE OF DEMARCATION”

“It would require, in view of the careful delimitation I have mentioned, in my opinion, very explicit and unmistakable words to undo the effect of the dominant principle of demarcation.”

Isaacs J. in *Commonwealth v. New South Wales (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 90.

From the perspective of the 1990s, Sir Isaac Isaacs stands out as the intellectual leader of the early High Court. Although at the time, Sir Samuel Griffith may have had claims to the title, the result in the *Engineers’ Case*<sup>1</sup> laid to rest much of his “vision” of the Constitution.<sup>2</sup> The *Engineers’ Case* represented the victory of Isaacs’ model of federalism, the influence of which in the realm of both constitutional law and politics continues to be felt to this day.<sup>3</sup> Sir Isaac’s pivotal contribution to federalism has, however, overshadowed his role in the development of another fundamental conception of the Australian Constitution – the doctrine of the separation of powers – for it was Isaacs who was largely responsible for incorporating formal separation of powers thinking into our constitutional jurisprudence and in whose efforts the result in the *Boilermakers’ Case* and many more recent Chapter III innovations find their Australian antecedents. This chapter charts the emergence of the separation doctrine in the High Court at Isaacs’ hands to his departure from the bench in 1931.

### 1. A Tentative Beginning: *Baxter v. Ah Way* and *Huddart, Parker v. Moorehead*

The first High Court cases dealing with the effect of ss.1, 61 and 71 of the Constitution and the consequent location of the federal judicial power were decided by men, including Isaacs J., who had all been prominent in the framing of the new federal compact. As the Convention Debates were ambiguous in relation to the significance (if

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<sup>1</sup> *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

<sup>2</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) ch.1 (referring to “[t]he vision of Sir Samuel Griffith” (*ibid* 1)).

<sup>3</sup> See generally M. Coper and G. Williams (eds), *How Many Cheers for Engineers?* (1997).

any) to be attributed to the arrangement of these provisions, it is perhaps not surprising that the earliest cases dealing with this question – *Baxter v. Ah Way*<sup>4</sup> and *Huddart, Parker and Co. Proprietary Ltd v. Moorehead*<sup>5</sup> – were somewhat equivocal in outcome.<sup>6</sup> The reasons for judgment in these two cases were delivered within weeks of each other, although hearings in *Huddart, Parker* had commenced several months prior to *Baxter* reaching the Full Court. The summary of argument in the *Commonwealth Law Reports* records that in those earlier hearings, counsel for Huddart, Parker and Co. (an eminent team which, as noted in Chapter One, included Professor Harrison Moore) put a submission to the Court to the following effect:

“The legislative, executive, and judicial powers of the Commonwealth are not only separate but are mutually exclusive. A power that is found to be an exercise of the judicial power cannot be invested in any authority except a judicial authority.”<sup>7</sup>

Thus, the line of argument which ultimately led to recognition in the *Boilermakers’ Case* of a complete separation of the federal judicial power was early in play before the High Court, even if the Court in *Baxter* and *Huddart, Parker* was not yet ready to embrace the separation of powers as a principle of the Constitution.

**(a) *Baxter v. Ah Way***

*Baxter v. Ah Way* involved, not the judicial power of the Commonwealth, but the relationship between the federal Parliament and Executive in the context of a challenge to the validity of federal subordinate legislation. The *Customs Act* 1901 (Cth) prohibited the importation of certain goods, including “all goods the importation of

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4 (1909) 8 C.L.R. 626.

5 (1909) 8 C.L.R. 330.

6 This is not to say, however, that the foundation Justices of the High Court did not have strong views on certain matters which escaped debate at the Conventions. For example, Professor Sawyer records that “there was no discussion at all” in the Conventions of whether the Commonwealth and the States could, as a general rule, legislate to bind each other (*Australian Federalism in the Courts* (1967) 12 ). Yet, see the views expressed on this question by Griffith C.J., Barton and O’Connor JJ. in *D’Emden v. Pedder* (1904) 1 C.L.R. 91.

7 (1909) 8 C.L.R. 330, 337.

which may be prohibited by proclamation". To this broad, unstructured legislative invitation, the Governor-General in Council had responded by nominating as a prohibited import "opium suitable for smoking".<sup>8</sup> The argument put to the High Court was that these provisions were invalid as involving "a delegation of legislative power by Parliament to the Governor-General" contrary to s.1 of the Constitution.<sup>9</sup> The argument was unanimously rejected.

That the High Court should uphold the validity of the proclamation and its enabling provision was, in itself, unremarkable. To have denied the Commonwealth Parliament the power of authorizing subordinate legislation of this kind would have been to disable the new federal administration in its infancy.<sup>10</sup> Moreover, the device of empowering the Crown's representative in this regard was in conformity with colonial practice.<sup>11</sup> What *was* remarkable about *Baxter v. Ah Way* was the summary fashion in which Griffith C.J. dismissed the separation of powers argument pressed before him. Having confirmed that the maxim *delegatus non delegare potest* had no application to the Commonwealth Parliament, Griffith C.J. observed:

"It is suggested that the words of the first section of the Constitution, which provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament, make a difference. *But that section is merely introductory to the provisions of the Constitution which deal with the legislature.* Then come other provisions dealing with the executive power, followed by another series dealing with the judicial power. The actual powers of the Parliament are conferred by sec. 51, and in their ambit they are unlimited."<sup>12</sup>

According to Sir Robert Garran's memoirs, Griffith C.J. was here pointing to the historical fact that the niceties of drafting (alone) drove the arrangement of the first three

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<sup>8</sup> These facts are drawn from the judgment of Griffith C.J. ((1909) 8 C.L.R. 626, 632).

<sup>9</sup> Argument for the defendant as summarized *ibid* 629-631.

<sup>10</sup> All four judgments in *Baxter v. Ah Way* allude to the practical necessity of this form of legislation. See *ibid* 635 per Griffith C.J.; 637-639 per O'Connor J.; 641 per Isaacs J. and 646 per Higgins J. See also the forecasts of the early commentators in this regard above pp.9-10 (ch.1).

<sup>11</sup> See generally P.D. Finn, *Law and Government in Colonial Australia* (1987) chs 3-5.

<sup>12</sup> (1909) 8 C.L.R. 626, 634 (emphasis added).

Chapters of the Constitution.<sup>13</sup> But if this was the *historical* fact (and as discussed in Chapter One, the history is not clear beyond all doubt), *Baxter v. Ah Way* was never going to settle the *legal* question, even as regards the separation of legislative and executive powers. When the judgments in *Baxter* are studied closely, Isaacs J. and Higgins J. and, less directly, Griffith C.J. himself, conceded that the Governor-General in Council had not exercised, or been empowered to exercise, legislative power. Parliament had retained and exercised that power, the Governor-General simply nominating a fact upon which the *Customs Act* was made to operate according to Parliament's expressed intention.<sup>14</sup> The remaining judge, O'Connor J., may have been expressing a similar idea when he described this scheme as an example of the enactment by the Commonwealth Parliament of "conditional legislation".<sup>15</sup> Hence, the actual analysis in *Baxter* was not inconsistent with the future recognition of a constitutionally entrenched separation of governmental functions. And Griffith C.J.'s brother judges, unlike their senior, refused to be drawn into express declarations on the matter – mindful, perhaps, of their reasons for judgment shortly to be delivered in *Huddart, Parker*.

**(b) *Huddart, Parker v. Moorehead***

*Huddart, Parker* was the first case to call for a detailed examination of s.71 of the Constitution. It was argued that s.15B of the *Australian Industries Preservation Act* 1906 (Cth) which authorized the Comptroller-General of Customs to conduct compulsory inquiries into alleged offences under the Act<sup>16</sup> was invalid as investing the Comptroller with judicial power. In rejecting this argument, all five members of the

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<sup>13</sup> R.R. Garran, *Prosper the Commonwealth* (1958) 194.

<sup>14</sup> (1909) 8 C.L.R. 626, 633-635 per Griffith C.J.; 641-642, 644 per Isaacs J. and 645-646 per Higgins J. D. Kerr in *The Law of the Australian Constitution* (1925) 32 fn.5 described the finding in *Baxter v. Ah Way* in these terms ("no 'legislative power' conferred on the executive"). See also *Le Mesurier v. Connor* (1929) 42 C.L.R. 481, 506 per Isaacs J. still describing the Governor-General's proclamations under the *Customs Act* prohibiting the importation of certain goods as "mere *facta* and dependent solely for legal effect on the *Customs Act*, that is, on the will of Parliament".

<sup>15</sup> (1909) 8 C.L.R. 626, 640.

<sup>16</sup> The effect of s.15B of the *Australian Industries Preservation Act* is fully described in the judgment of Griffith C.J. ((1909) 8 C.L.R. 330, 345-346).

Court concluded that s.15B conferred no part of the judicial power of the Commonwealth.<sup>17</sup> And it was in so deciding that Griffith C.J. offered his classical definition of judicial power, discussed in Chapter Five, which has become the touchstone for all later attempts to attribute meaning to the concept.<sup>18</sup> But a definition was only needed if the Constitution placed limitations upon the location or the manner of exercise of federal judicial power<sup>19</sup> and, critically, four members of the Court either found, or assumed, that the judicial power of the Commonwealth could not be exercised by an administrative official.<sup>20</sup> Although both sides had framed their submissions on this basis (and so, strictly speaking, the question whether federal judicial power can only be exercised by courts was not in contest<sup>21</sup>), the approach of the two judges who expressly dealt with the matter – Griffith C.J. and Isaacs J. – repays attention as presaging future developments.

For Griffith C.J. it was self-evident from a recital of the text of s.71 that Parliament had “no power to entrust the exercise of judicial power to any other hands” than those named therein.<sup>22</sup> No further justification was offered for this conclusion – in the circumstances a puzzling omission – as the disjunction between this finding and his Honour’s comments in *Baxter* is immediately apparent; whereas the vesting of the legislative power of the Commonwealth in the federal Parliament was “merely

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<sup>17</sup> *Ibid* 357-358 per Griffith C.J.; 366 per Barton J.; 377-380 per O’Connor J.; 384 per Isaacs J. and 418 per Higgins J.

<sup>18</sup> Griffith C.J. defined the judicial power of the Commonwealth as follows: “the words ‘judicial power’ as used in sec.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action” (*ibid* 357).

<sup>19</sup> As Isaacs J. put it: “[t]he question of what is judicial power cannot arise in a unitary State in the precise form in which it presents itself here, because, where the legislature is supreme, the only question is the ascertainment of its will” (*ibid* 381).

<sup>20</sup> *Ibid* 355 per Griffith C.J.; 366 per Barton J. (expressing his agreement with the judgment of the Chief Justice in relation to the validity of s.15B); 377-381 per O’Connor J. (apparently assuming the point) and 384 per Isaacs J. The remaining judge, Higgins J., confined his remarks to denying that any part of the judicial power of the Commonwealth had been entrusted to the Comptroller-General.

<sup>21</sup> See the summary of argument in the *Commonwealth Law Reports* *ibid* 334-345, especially 342.

<sup>22</sup> *Ibid* 355.

introductory” to the provisions of the Constitution dealing with the legislature, the vesting of the judicial power of the Commonwealth in Chapter III courts had a deeper significance. Sections 1 and 71 of the Constitution may have mirrored each other, but their legal consequences were distinct. That this should be so is not surprising,<sup>23</sup> but something more than mere textual analysis was necessarily in play. Otherwise, Griffith C.J.’s comments in the two cases are incompatible for if bare textual analysis could yield a solution to the interpretative dilemma, then that solution must be identical for each of ss.1, 61 and 71. Thus, if nothing else, Griffith C.J.’s disparate comments in *Baxter* and *Huddart, Parker* highlighted from the outset that textual analysis alone would not answer the question whether the Australian Constitution incorporated a separation of powers – the text merely supplied the problem, not the answer.

Some of the non-textual factors which almost certainly prompted Griffith C.J.’s approach in *Huddart, Parker* were adverted to by Isaacs J. in the judgment which planted the first seeds of separation of powers thinking at federal level. Isaacs J. too believed that the “express words of the Federal Constitution” demanded that judicial powers be henceforth exercised by judicial bodies.<sup>24</sup> But his Honour prefaced this statement with a discussion of the intellectual debt which the American separation doctrine owed to the writings of Sir William Blackstone who had identified in the British Constitution a three-fold division of governmental powers.<sup>25</sup> Had Isaacs J. investigated the matter still further, he might have acknowledged the intellectual debt which Blackstone owed in this regard to the writings of Montesquieu.<sup>26</sup> Nonetheless, Isaacs J. invoked Blackstone as pointing out that in Britain the judicial power “is by

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<sup>23</sup> That is, if one takes into account English legal traditions and the different nature of legislative and judicial power. See, eg, Evatt J. in *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 117: “Questions of judicial power occupy a place apart under the Constitution, not only because of the special nature of judicial power but because of the elaborate provisions of Chapter III. As Sir *W. Harrison Moore* has pointed out in his well known work on the Australian Constitution ‘between legislative and executive power on the one hand and judicial power on the other, there is a great cleavage’ (*Commonwealth of Australia*, 2nd ed, p.101).”

<sup>24</sup> (1909) 8 C.L.R. 330, 384.

<sup>25</sup> *Ibid* 382-383.

<sup>26</sup> See below ch.3.

constitutional usage and law” vested in the judicature,<sup>27</sup> a practice supported by adherence to the rule of law – “[w]ere it [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose *decisions* would be then regulated only by their own opinions, and not by any fundamental principles of law”.<sup>28</sup> Thus, the twin considerations of tradition and avoidance of arbitrary power were at the forefront of Isaacs J.’s thinking when addressing the impact of s.71 of the Constitution. Yet, despite his allusion to American doctrine, Isaacs J. declined to link his finding that judicial powers could no longer be exercised by “non-judicial instruments” to a general theory of separation. But the idea was there to be given its first full exposition by Isaacs J. in the *Inter-State Commission Case*.

## 2. The “Dominant Principle of Demarcation”: The *Inter-State Commission Case*

In the years immediately following *Huddart, Parker*, members of the High Court affirmed on more than one occasion that federal judicial power must be exercised by Chapter III courts.<sup>29</sup> However, it was not until *New South Wales v. Commonwealth (Inter-State Commission Case)*<sup>30</sup> in 1915 that it was clearly established, after detailed consideration, that s.71 of the Constitution deals in exhaustive terms with the allocation of the judicial power of the Commonwealth. Subsequently, *Waterside Workers’*

<sup>27</sup> (1909) 8 C.L.R. 330, 382 (Isaacs J. paraphrasing Blackstone).

<sup>28</sup> *Ibid* 382-383 (Isaacs J. quoting Blackstone who in turn was borrowing from Montesquieu. See W. Blackstone, *Commentaries on the Laws of England*, vol.1 (1765) (facsimile ed, 1983, The Legal Classics Library) 259 and Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 157).

<sup>29</sup> *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd (Tramways Case [No.1])* (1914) 18 C.L.R. 54, 75 per Isaacs J. (“[s]ec. 71 confers no jurisdiction whatever. It merely declares the separation of judicial authority from all other, and prescribes that it shall be exercised by judicial tribunals and not otherwise, and indicates the tribunals”); *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte G.P. Jones (Builders’ Labourers’ Case)* (1914) 18 C.L.R. 224, 236 per Griffith C.J. (with whom Barton J. agreed); 252 per Isaacs J.; 257 per Gavan Duffy and Rich JJ.; 272 per Powers J. Moreover, in *R. v. Bernasconi* (1915) 19 C.L.R. 629, Isaacs J. described Chapter III of the Constitution as dealing with “the whole judicial power of the Commonwealth proper” in the course of rejecting an argument that s.80 of the Constitution constrained the use of the Commonwealth’s territories power in s.122 (*ibid* 637).

<sup>30</sup> (1915) 20 C.L.R. 54.



*Federation of Australia v. J.W. Alexander Ltd*<sup>31</sup> drew attention to one consequence of this finding: that if Parliament seeks to confer judicial power upon a body of its own creation, then that body *must* be constituted as a court in accordance with the requirements of s.72 of the Constitution.<sup>32</sup> And a majority of the Court in *Alexander* interpreted those requirements, as they stood in 1918, as demanding that the members of any federal court be appointed for life.<sup>33</sup> In practical terms, this meant that as the President of the Commonwealth Court of Conciliation and Arbitration, a body invested with judicial and “arbitral” functions<sup>34</sup> was appointed for a term of seven years, the body over which he presided was invalidly constituted.<sup>35</sup>

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31 (1918) 25 C.L.R. 434.

32 *Ibid* 447 per Griffith C.J.; 450, 457, 461-2 per Barton J.; 467-468 per Isaacs and Rich JJ.; 472, 475 per Higgins J.; 486, 489 per Powers J.

33 *Ibid* 442 per Griffith C.J.; 457 per Barton J.; 469 per Isaacs and Rich JJ.; 486 per Powers J. The two judges who dissented on this point regarded s.72 as consistent with an appointment for a term of years. See *ibid* 474 per Higgins J. and 478-479 per Gavan Duffy J. The majority view was approved by the Privy Council in *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530, 545-6.

34 The question of the proper characterization of the Arbitration Court’s functions (legislative, executive, judicial or an admixture thereof) was the issue at the heart of *Alexander*, a majority of the High Court accepting that at least some of its functions were judicial in character. More specifically, Griffith C.J. and Barton J. were of the view that many, if not all, of the Court’s functions, including its arbitral functions, amounted to the exercise of judicial power ((1918) 25 C.L.R. 434, 443-446 per Griffith C.J. and 452-457 per Barton J). Isaacs and Rich JJ. (and similarly Powers J.), however, distinguished “arbitral” from “judicial” power, noting that “they spring from different sources in the Constitution. The arbitral power arises under sec. 51(xxxv); the judicial power under sec. 71” (*ibid* 463-465 per Isaacs and Rich JJ. and 481-482, 485 per Powers J). Higgins J. took a different approach again, doubting whether the President’s functions constituted part of the judicial power of the Commonwealth at all (*ibid* 476 per Higgins J).

35 The majority judges differed amongst themselves as to the extent of this invalidity. Barton J. held that the Arbitration Court was invalidly constituted in all respects given his earlier finding that the Court’s functions should collectively be seen as judicial (*ibid* 462 per Barton J). Isaacs and Rich JJ. and Powers J. held that the Arbitration Court was invalidly constituted in relation to its judicial functions, but could nonetheless continue to validly perform its arbitral functions (*ibid* 470-471 per Isaacs and Rich JJ. and 486, 488 per Powers J). Griffith C.J., however, denied that the Arbitration Court was invalidly constituted. He reasoned that because the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) s.12 required the President of the Court to “be appointed by the Governor-General from among the Justices of the High Court”, that President, though only “entitled to hold office during good behaviour for seven years”, already enjoyed a life tenure. Thus, the requirements of s.72 were met (*ibid* 447-449). Higgins J. and Gavan Duffy J. denied that the Arbitration Court was invalidly constituted on the basis of their earlier finding that the President’s tenure was consistent with s.72 (*ibid* 475 per Higgins J. and 479 per Gavan Duffy J).

Thus, *Alexander's Case* illustrates one particular application of the separation doctrine and its impact on institutional design. But it was the *Inter-State Commission Case* which carried the notion of a separation of powers or, at least, a separation of the federal judicial power, to this stage of development and on which attention will focus, beginning with a brief examination of the Inter-State Commission itself.

#### (a) The Inter-State Commission

The Inter-State Commission has always been something of a constitutional curiosity, enjoying two brief incarnations some sixty-four years apart.<sup>36</sup> The provisions of the Constitution relating to the Commission (ss.101-104) were prompted by the disputes over railway rates between New South Wales and Victoria in the 1890s as each colony endeavoured to attract to its markets the lucrative Riverina trade.<sup>37</sup> Henceforth, the Commonwealth Parliament was to have power to deal with these pernicious “cut-throat rates”,<sup>38</sup> s.102 of the Constitution providing that Parliament could “by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State” if “undue and unreasonable, or unjust to any State”. But in testament to the intensity of feeling on this issue, the framers saw that there was placed between any federal legislative intervention and the State interests at stake the judgment of an independent<sup>39</sup> body of experts – the Inter-State Commission – for under s.102 no preference or discrimination was to be taken to be undue and unreasonable or unjust to any State “unless so adjudged by the Inter-State Commission”.<sup>40</sup> Section 101 of the

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<sup>36</sup> See generally in relation to the establishment and activities of the original Inter-State Commission J.A. La Nauze, “The Inter-State Commission” (1937) 9 *Aus. Quarterly* 48; and in its second incarnation *The Inter-State Commission: A Guide to its Powers, Functions and Procedures* (1984) and M. Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *A.L.J.* 731.

<sup>37</sup> See J.A. La Nauze, *The Making of the Australian Constitution* (1972) 155-156, 215-217; L. Zines, “The Inter-State Commission: Its Origins, History, Role and Scope” in *The Inter-State Commission: A Guide to its Powers, Functions and Procedures* (1984) 1-2 and M. Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *A.L.J.* 731, 733.

<sup>38</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 91 per Isaacs J.

<sup>39</sup> See the provision made for Commissioners’ tenure and remuneration in s.103 of the Constitution.

<sup>40</sup> See generally *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 91 per Isaacs J.; L. Zines, “The Inter-State Commission: Its Origins,

Constitution, however, envisaged a more extensive role for this panel of experts than the issue of railway rates alone:

“There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.”

As events unfolded, it was not until 1913 that the Commission was brought into existence by the *Inter-State Commission Act 1912 (Cth)*. Quick and Garran, reflecting in 1901 on the future role of the Commission, had described it as “intended to be policeman as well as judge”<sup>41</sup> – a vision to which the Act of 1912 conformed. That Act purported to erect the Commission as a Court of record,<sup>42</sup> conferring upon it a mixture of judicial and administrative functions relating to trade and commerce.<sup>43</sup> The Commission was to consist of three members each appointed, in accordance with s.103 of the Constitution, for seven years.<sup>44</sup> And in recognition of its specialist role and dual functions, of the three men elevated to the Commission by the Cook Government, only the Chief Commissioner, Mr A.B. Piddington K.C., possessed legal qualifications.<sup>45</sup> The Hon. George Swinburne had a background in politics and business, and Nicholas Lockyer was, at the time of his appointment, the incumbent Comptroller-General of Customs.<sup>46</sup>

The *Inter-State Commission Case* reached the High Court when a majority of the Commission ruled, in a dispute between the Commonwealth and New South Wales, that

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History, Role and Scope” in *The Inter-State Commission: A Guide to its Powers, Functions and Procedures* (1984) 1; M. Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *A.L.J.* 731, 733.

41 J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 900.

42 Section 23.

43 See, eg, Parts III and V of the Act.

44 Sections 4 and 5 of the Act.

45 J.A. La Nauze, “The Inter-State Commission” (1937) 9 *Aus. Quarterly* 48, 51.

46 *Id.*

the *Wheat Acquisition Act* 1914 (N.S.W.) was invalid under s.92 of the Constitution.<sup>47</sup> As permitted by its enabling Act, the Commission had granted injunctive relief in the matter and made orders as to costs. Thus, the relevant question before the High Court was whether the Commission could validly be empowered so to act. Griffith C.J., Isaacs, Powers and Rich JJ. (Barton and Gavan Duffy JJ. dissenting) held that it could not, Isaacs J. in the leading judgment explicitly invoking the doctrine of the separation of powers – in his words the “dominant principle of demarcation” – as a fundamental principle of the Constitution.

**(b) The *Inter-State Commission Case*: Majority and Minority Views**

For Isaacs J. the question whether Parliament could erect the Commission as a “Court of Justice” and invest it with judicial functions turned on the interpretation of s.101 of the Constitution; more particularly, the use by that provision of the term “adjudication” to describe one of the permissible functions of the Commission. In Isaacs J.’s view, the term “adjudication” was ambiguous for it could be taken to refer either to the functions of a Court of Justice or, in accordance with what his Honour acknowledged as modern tendencies, to decisions of a quasi-judicial character emanating from an administrative body.<sup>48</sup> Section 73(iii) of the Constitution, conferring appellate jurisdiction on the High Court from “all judgments, decrees, orders, and sentences” of the Commission, “but as to questions of law only” did nothing to relieve this ambiguity for the determination of an administrative body, as well as that of a court, could properly be labelled an “order” or “judgment”.<sup>49</sup> But, according to Isaacs J., s.73 did indicate that the Commission “was not one of the ‘Courts’ within the meaning of Part III of the Constitution”.<sup>50</sup> This followed from the contrast between s.73(iii) and the “exhaustive words” of s.73(ii) “which embrace all Courts, other than the High Court, to which the

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<sup>47</sup> The dissident was Piddington, the only legally qualified member of the Commission (see M. Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *A.L.J.* 731, 734).

<sup>48</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 83-87.

<sup>49</sup> *Ibid* 87.

<sup>50</sup> *Ibid* 88.

High Court appellate jurisdiction extends”, a conclusion reinforced by the provision made by s.72 for the tenure of Justices of federal courts.<sup>51</sup> Accepting this was so, could Parliament nonetheless establish the Commission as a court, and endow it with judicial power, *outside* the framework of Chapter III? Isaacs J. said no, for s.101 must be read consistently with “the fundamental principle of the separation of powers as marked out in the Australian Constitution”.<sup>52</sup>

According to Isaacs J., the existence of this “fundamental principle of the separation of powers” was dictated by the “frame of the Constitution”, his Honour referring to the vesting by the first three Chapters of the Constitution of the legislative, executive and judicial powers of the Commonwealth in Parliament, the Sovereign and the courts identified in s.71 respectively.<sup>53</sup> This was the “dominant principle of demarcation”<sup>54</sup> which, at least in the case of the federal judicial power, was enforceable by legal sanction. In other words, s.71 was exhaustive in its terms, allocating the entirety of the federal judicial power to the High Court, federal courts created by the Commonwealth Parliament and State courts invested with federal jurisdiction, the Justices of the two former bodies enjoying the tenure mandated in s.72.<sup>55</sup> As his Honour said:

“the distinct command of the Constitution is that whatever judicial power ... is to be exerted in the name of the Commonwealth, must be exercised by these strictly so called judicial tribunals”.<sup>56</sup>

Isaacs J. conceded that this dominant principle of demarcation was not absolute, and that “very explicit and unmistakable words” elsewhere in the Constitution might found an exception to its operation.<sup>57</sup> But he could discern no such contra-indication in the case of the Inter-State Commission. And, indeed, in his opinion the fact that the proceedings of a court standing outside Chapter III would be free from the “protective

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51 *Ibid* 87.

52 *Ibid* 88.

53 *Ibid* 88-89.

54 *Ibid* 90.

55 *Ibid* 88-89.

56 *Ibid* 89-90.

57 *Ibid* 90.

influence” of s.80 of the Constitution, the broad, discretionary nature of the judgment called for in s.102 (“not measurable by any legal standard”), the similarity of aspects of the language of s.101 with that descriptive of the executive power in s.61, as well as the prospect of a “court” constituted by a majority of non-legally trained members – all pointed in the opposite direction.<sup>58</sup> Thus, the provisions of the Act conferring judicial functions upon the Commission were invalid and the Commission was henceforth confined to fulfilling an administrative role.

The reasons of the other majority judges were similar to those of Isaacs J., but Griffith C.J., Powers and Rich JJ. in their separate judgments eschewed express reference to any grand constitutional design, or fundamental constitutional principle. In other words, while their Honours accepted that s.71 of the Constitution was “complete and exclusive”<sup>59</sup> in terms of its treatment of the federal judicial power and that s.101 did not suggest any exception from this, they declined to link these propositions of law to a broader theory of government. Nonetheless, their judgments were not inconsistent with recognition of a doctrine of the separation of powers, particularly that of Rich J. who pointed out that to construe s.101 as authorizing the establishment of the Inter-State Commission as a Court would “lead to the creation of a curiously anomalous body which might at once be an executive department and a Court of law” and “combine the investigating department, the prosecuting authority, the Court and the Sheriff’s department”.<sup>60</sup>

By contrast, the approach of the two dissentients, Barton J. and Gavan Duffy J., was to place greater emphasis upon s.101 as a free-standing constitutional provision. They

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<sup>58</sup> *Ibid* 90-94. But, in relation to this last consideration, note the retort of Finnis that nothing in the Constitution expressly requires that the Justices of the High Court be lawyers (J.M. Finnis, “Separation of Powers in the Australian Constitution” (1967) 3 *Adel.L.R.* 159, 167 fn.42). According to Professor Sawyer (G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 177) a similar point was also made in argument before the High Court in the *Boilermakers’ Case*.

<sup>59</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 62 per Griffith C.J; 108-110 per Rich J. (assuming this point) and 106-107 per Powers J. who purported to agree with the reasons of both the Chief Justice and Isaacs J.

<sup>60</sup> *Ibid* 109.

insisted that s.101 should be given its “natural meaning”,<sup>61</sup> the use of the term “adjudication” indicating that “Parliament can choose for itself whether or not it will give that body the status of a Court”.<sup>62</sup> According to these two judges, Chapter III contained nothing to derogate from this; Chapter III was about the “general Judiciary”,<sup>63</sup> and although in that regard was “self-contained”,<sup>64</sup> it did not reflect back upon the construction to be placed upon s.101 which stood apart as an independent and “supplemental” provision<sup>65</sup> permitting Parliament to constitute the Commission as a court and to confer upon it a mixture of judicial and administrative functions. As Gavan Duffy J. conceded, a body exercising judicial and administrative functions “must look ugly and anomalous in the eyes of a lawyer”, but that could not determine the issue at hand; “[i]t may well be that those who framed the Constitution were impressed with the necessity of giving to the Inter-State Commission in Australia such an anomalous character because they recognized that in the United States the Inter-State Commission was enfeebled and impeded in the performance of its duties by its want of judicial power”.<sup>66</sup> In short, the minority, while not denying that implications may flow from Chapter III – in light of *Huddart, Parker* they would surely have rejected out of hand the possibility of an ordinary administrative official being entrusted with the exercise of general judicial functions<sup>67</sup> – regarded ss.101-104 of the Constitution as standing apart from Chapter III.

It has been argued by Finnis that when the majority and minority approaches in the *Inter-State Commission Case* are contrasted, the case reveals a clash between two distinct theories of separation – an abstract theory reflected in the judgment of Isaacs J. and an institutional theory evident in the dissenting opinions – the abstract theory prevailing and thereafter permeating all future separation of powers thinking at federal

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61 *Ibid* 70 per Barton J.; 102 per Gavan Duffy J.

62 *Ibid* 71 per Barton J.

63 *Ibid* 72 per Barton J.; 103 per Gavan Duffy J.

64 *Ibid* 75 per Barton J.; 103 per Gavan Duffy J.

65 *Ibid* 74 per Barton J.

66 *Ibid* 103.

67 And see above fn.29 of this chapter referring to the *Builders' Labourers' Case*.

level.<sup>68</sup> Finnis' conception of these two theories was adverted to in Chapter One.<sup>69</sup> Certainly, Isaacs J. regarded the three-fold assignment of the functions of government to three departments in ss.1, 61 and 71 of the Constitution as governing the interpretation of s.101, suggesting an abstract doctrine of separation "logically prior to every particular institution".<sup>70</sup> The dissentients, however, in insisting that s.101 should be taken at face value, and that the terms of Chapter III did not provide a "controlling context"<sup>71</sup> and thus did not dictate the functions which could validly be assigned to the Commission suggested, in their approach, a doctrine of separation based on an institutional model (that is, a doctrine of separation confined to certain specified institutions).

But this clash of theories was perhaps not so clearly defined as Finnis contends. The "abstract theory" embraced by Isaacs J. was not, by his own admission, absolute. The effect of the dominant principle of demarcation could be undone, at least by "very explicit and unmistakable words".<sup>72</sup> Thus not all institutions were required to conform to the dictates of the doctrine, and, for example, it is hard to imagine that the Isaacs J. of *Farey v. Burvett*<sup>73</sup> would have denied the ability of a federal military tribunal to exercise judicial power in the manner subsequently accepted in *R. v. Bevan; Ex parte Elias and Gordon*<sup>74</sup> and *R. v. Cox; Ex parte Smith*.<sup>75</sup> Of course, s.101 arguably contained such "explicit and unmistakable words", but that Isaacs J. did not regard s.101 as an exception to the doctrine of separation of powers probably owed as much to considerations of history and policy – unlike a military tribunal, the Inter-State Commission undoubtedly did "look ugly and anomalous" to many lawyers – as it did to the strength of an *a priori* theory of separation. Admittedly, Finnis concedes much of

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<sup>68</sup> J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 163-166.

<sup>69</sup> See above p.20 (ch.1).

<sup>70</sup> J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 162.

<sup>71</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 71 per Barton J.

<sup>72</sup> *Ibid* 90.

<sup>73</sup> (1916) 21 C.L.R. 433.

<sup>74</sup> (1942) 66 C.L.R. 452.

<sup>75</sup> (1945) 71 C.L.R. 1.



this.<sup>76</sup> Finnis' analysis then cannot be pushed too far. And it might be suggested that the difference between the majority and minority views in the *Inter-State Commission Case* is better explained as the result of a more prosaic clash of interests; namely, a difference of opinion as to the weight to be attached to the values underpinning the vesting of judicial power in courts as traditionally conceived as opposed to the policy considerations impelling the creation of a multi-functional specialist agency like the Inter-State Commission. The broader context in which this clash of interests arose will be adverted to under the next two sub-headings as Isaacs J.'s "dominant principle of demarcation" is more fully explored.

**(c) Isaacs J. and the Dominant Principle of Demarcation**

Reflecting on Isaacs J.'s leading judgment in the *Inter-State Commission Case*, the notion that Chapter III of the Constitution dealt exhaustively with the judicial power of the Commonwealth clearly built on what had earlier been established in *Huddart, Parker*. But in *Inter-State Commission*, Isaacs J. clothed this proposition *with a theory* – "the fundamental principle of the separation of powers as marked out in the Australian Constitution".<sup>77</sup> And against the backdrop of United States experience, Isaacs J. must have known that, embraced by a majority of the Court, this theory would supply a rich intellectual resource for the future interpretation of the Constitution.

It is disappointing, then, that Isaacs J.'s direct case in favour of recognition of the "dominant principle of demarcation" simply called in aid the constitutional frame. As discussed above, reference to the frame of the Constitution merely establishes the interpretive dilemma; it does not, in itself, supply the answer. Nonetheless, despite this paucity of express analysis, Isaacs J.'s judgment in *Inter-State Commission* betrays a concern with the ideas which infused his thinking in *Huddart, Parker* – notably the notion of courts as the traditional repositories of judicial power in our society, a court

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<sup>76</sup> J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 164-165.

<sup>77</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 *C.L.R.* 54, 88.

being an institution presided over by persons trained in the law (and thus equipped to dispense justice according to law) and enjoying the independence associated with something other than a limited, seven year term of office.<sup>78</sup> That the impartial administration of justice was a value which Isaacs J. associated with the doctrine of the separation of powers was made clear in a passage in which, commenting on the language of s.101, he hinted at something akin to the outcome in the *Boilermakers' Case* – that not only are Chapter III courts the sole repositories of federal judicial power, but that such courts are restricted to that function:

“Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated.”<sup>79</sup>

Subsequently, in *Alexander's Case*, Isaacs J. (in a joint judgment with Rich J.) further rationalized the exclusive vesting of federal judicial power in Chapter III courts in terms of the impartial administration of justice, describing s.72 of the Constitution and its prescription of life tenure for judges of the federal courts as “one of the strongest guarantees in the Constitution for the security of the States”.<sup>80</sup> Of course, in any system of government, federal or unitary, the exclusive vesting of judicial power in bodies constituted by judges enjoying life tenure would be apt to enhance the independent and impartial administration of justice. But as Isaacs and Rich JJ. emphasized, in a federation “where the central legislative and executive bodies are largely competitive with, and in a sense adverse to, the State authorities”,<sup>81</sup> and where the ultimate appellate court<sup>82</sup> has a special role in adjudicating upon what may be

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78 *Ibid* 93-94.

79 *Ibid* 93.

80 *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434, 469.

81 *Ibid* 470.

82 In 1918, although the Privy Council stood at the apex of the Australian judicial system, this was not the case in relation to so-called “inter se” matters. See s.74 of the Constitution: “No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the

heated political controversies thereby ensuring that the federal division of powers is maintained, the values of judicial independence and impartiality assume added significance.

It is arguable, of course, that these values were not threatened by the *Inter-State Commission Act* – lawyers are not the only persons capable of comprehending legal principle and ensuring that “justice” and the rule of law are observed. And, at the end of the day, in whatever manner official functions and tenure are dispersed and described (and one may accept the view of Barton J. that s.103 “is a strong provision for the independence of the Commissioners”<sup>83</sup>), personal integrity supplies the ultimate guarantee of independence and impartiality in office. Moreover, an independent, expert body with a range of judicial and administrative powers at its disposal may have had a positive contribution to make to Australian governance in its designated field of interstate trade and commerce,<sup>84</sup> which contribution could have outweighed what were admittedly only *possible* or *perceived* threats to the values to which Isaacs J. alluded.<sup>85</sup> Nonetheless, these values were more likely to be observed if judicial power was firmly in the hands of judicial bodies as traditionally conceived. On this basis, and taking into account the special nature of judicial power,<sup>86</sup> it is submitted that Isaacs J. was correct in finding that the Constitution enshrined a legally enforceable separation of federal

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Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.” In addition, from the first decade of federation until 1976, the *Judiciary Act* 1903 (Cth) contained provisions automatically removing into the High Court any inter se question arising in a State Supreme Court. This foreclosed the possibility (exposed in *Webb v. Outrim* [1907] A.C. 81) of avoiding s.74 by taking an appeal from a State Supreme Court directly to the Privy Council. See Z. Cowen and L. Zines, *Federal Jurisdiction in Australia* (2nd ed) (1978) 9-10.

<sup>83</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 76; and see also 103 per Gavan Duffy J.

<sup>84</sup> One cannot help but speculate whether the vexed history of the interpretation of s.92 of the Constitution (in relation to which see *Cole v. Whitfield* (1988) 165 C.L.R. 360) would have been any different if the Inter-State Commission had been able to continue to fulfil a judicial role. And see *Riverina Transport Pty Ltd v. Victoria* (1937) 57 C.L.R. 327, 349, 352-357 per Latham C.J.

<sup>85</sup> See, eg, *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 103 per Gavan Duffy J.

<sup>86</sup> See below ch.5 (“Chasing Shadows: Defining Judicial Power”).

judicial power. The challenge would be to marry this principle with the practical demands of a changing world.

**(d) The Dominant Principle of Demarcation and the Emerging Twentieth Century Conception of Government**

The reasoning process which led to Isaacs J.'s recognition in *Inter-State Commission* of the separation doctrine, and the application of that doctrine to the facts of the case, are thrown into sharper relief when it is realized that the early twentieth century witnessed concerted attacks on the doctrine of separation of powers both as a desirable structure of government and as a philosophically convincing theory. These attacks had their origins in late nineteenth century political movements in both the United States and Britain represented by the "Progressives" and groups such as the "Fabian Socialists" respectively. In broad terms, and acknowledging that the American and British streams of thought were by no means identical, these groups questioned the prevailing conception of political liberty as "freedom *from* government",<sup>87</sup> regarding "negative liberty" as entrenching, in its *laissez-faire* ethos, existing social and economic inequalities. Instead, government should actively intervene in national and local affairs in order to address the ills associated with modern industrial society.<sup>88</sup>

In this new intellectual climate, the doctrine of the separation of powers and its companion system of checks and balances were challenged in the United States as unduly impeding a strong, effective and united governmental response to the problems of the day.<sup>89</sup> In the words of an Australian commentator, the American separation doctrine produced a car of State which was "over-braked and under-powered"; the American framers "succeeded in making the way hard for a would-be dictator; but they

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<sup>87</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 264.

<sup>88</sup> *Ibid* 264-267. See also W. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994) 12-21 and in relation to fabian socialism R. Mathews, *Australia's First Fabians* (1993) ch.1. See also, as to the relationship between government's new role and the separation of powers, R. Blackford, "Judicial Power, Political Liberty and the Post-Industrial State" (1997) 71 *A.L.J.* 267.

<sup>89</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 264-276.

also made it hard to take prompt and united action in an emergency”.<sup>90</sup> Moreover, these developments undermined the three-fold division of the functions of government which had sustained the separation doctrine since Montesquieu. The new vision of government witnessed the rise of the specialist administrative agency which refused to fit neatly into any one of the existing categories of power, whereas the new science of public administration suggested instead a mere two-fold division between “politics” and “administration”.<sup>91</sup>

In Britain, with its system of responsible parliamentary government, the state was readily able to assume its new role as social and economic regulator. However, as the tasks of government grew, so too did the power of the executive – notably the departments of State – at the expense of the legislature.<sup>92</sup> As Vile notes in his classic work *Constitutionalism and the Separation of Powers*, “[d]elegated legislation’ and ‘administrative justice’ were the inevitable accompaniments of the expanded role of government in society”.<sup>93</sup> By 1928, William Robson was able to devote an entire book to an examination of the phenomenon of the acquisition and exercise of judicial and quasi-judicial power by government departments, local government authorities and tribunals<sup>94</sup> in which, in a famous passage, he rejected the doctrine of the separation of powers as “that antique and rickety chariot ... so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas”.<sup>95</sup> The

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<sup>90</sup> R.R. Garran, *Prosper the Commonwealth* (1958) 193. It should be acknowledged, however, that many such criticisms of the American system of government related to the separation between Congress and President.

<sup>91</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 267, 276-281. And see also Jackson J. in *Federal Trade Commission v. Ruberoid Co.* 343 U.S. 470, 487 (1952): “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century ... They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking” (cited in G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 67-68).

<sup>92</sup> W.A. Robson in *Justice and Administrative Law: A Study of the British Constitution* (1928) 33 was able to observe that “the centre of gravity in English government has shifted from legislation to administration during the past half-century, and the hegemony of the executive, whether we like it or not, is an accomplished fact”.

<sup>93</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 232.

<sup>94</sup> W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (1928).

<sup>95</sup> *Ibid* 12.

separation between administrative and judicial functions, claimed Robson, had never approached completeness in England and had proved impracticable throughout the nation's history.<sup>96</sup>

But whereas Robson was a proponent of the new style of government (Robson was a Fabian<sup>97</sup>), others were vehemently opposed to it. Lord Hewart in *The New Despotism* published in 1929, contended that Parliament was, paradoxically, being used to undermine the rule of law.<sup>98</sup> Administrative officials, via their Ministers, were able to secure the enactment by Parliament of legislation delegating to them vast subordinate law-making powers and, in addition, conferring upon them broad statutory discretions to decide conclusively matters of a judicial nature – the possibility of judicial review by courts of justice being expressly excluded in both instances.<sup>99</sup> According to Hewart, the ousting of the jurisdiction of the courts in such matters and the lack of parliamentary scrutiny of delegated legislation threatened the liberty of the English people.<sup>100</sup> The Donoughmore Committee on Ministers' Powers reporting in 1932 struck a course midway between these two positions asserting that “[t]he separation of powers is merely a rule of political wisdom, and must give way where sound reasons of public policy so require”,<sup>101</sup> but yet Parliament should still be guided by its precepts when allocating the tasks of government.<sup>102</sup>

Australia, despite its geographic isolation from the centres of Western legal and political thought, was not untouched by these events. From 1788, government had necessarily played an active role in Australian economic development and had always provided

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<sup>96</sup> *Ibid* 13-26 (it does seem though that Robson was here using the term “judicial functions” in a broader sense than that commonly associated with the Australian separation doctrine).

<sup>97</sup> A.M. McBriar, *Fabian Socialism and English Politics 1884-1918* (1966) 347.

<sup>98</sup> Hewart, *The New Despotism* (1929) 17.

<sup>99</sup> *Ibid* 20-21.

<sup>100</sup> Again, it appears that Lord Hewart was using “judicial” in a broader sense than that usually associated with the Australian separation doctrine. See generally as to Hewart's arguments, *ibid* ch.1 (“The Nature of the Question”).

<sup>101</sup> *Report of the Committee on Ministers' Powers* (1932) Cmd 4060, 95 quoted in M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 233.

<sup>102</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 234.

many essential social services,<sup>103</sup> so the new modes of thought represented a less radical departure from past practice than, for example, in the United States. In 1933, at the first summer school of the Australian Institute of Political Science, W.G.K. Duncan presented a paper entitled “Modern Constitutions” in which he observed that “the whole conception of government, and governmental functions, has changed during the course of this century”:

“The state can no longer be conceived as a policeman ‘keeping the ring’ and enforcing a few Marquess of Queensbury prohibitions. The state must now assume an active and positive role in the regulation of the whole social process. In particular, it has been forced to undertake an elaborate network of ‘social services’ in order to mitigate the consequences of economic and social inequality.”<sup>104</sup>

Duncan went on to note, however, that “[i]mprovements in the machinery of government have not kept pace with this assumption of new and wider functions”.<sup>105</sup> Thus, despite the continuing influence of the writings of Dicey, Duncan advocated the open avowal and regulation of a system of administrative law; the sheer volume and technicality of much of the business of a modern legislature meant that it was obliged to delegate its legislative powers. Moreover:

“The enormous development of legislation relating to public health, education, local government, unemployment relief, pensions and other social services makes indispensable the provision for rapid and inexpensive adjudication of literally thousands of disputes. The ordinary courts of law would be swamped by this volume of work, and, in any case, they lack the requisite technical knowledge, and are more solicitous of private property rights than of furthering the social policy embodied in the legislation.”<sup>106</sup>

Of course, Duncan made these remarks well after the decision in the *Inter-State Commission Case*, but the climate of thought of which they were a part must have been familiar to Isaacs J. as he penned his judgment recognizing the separation of powers as a

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<sup>103</sup> See P.D. Finn, *Law and Government in Colonial Australia* (1987) esp.82.

<sup>104</sup> W.G.K. Duncan, “Modern Constitutions” in G.V. Portus (ed), *Studies in the Australian Constitution* (1933) 10.

<sup>105</sup> *Id.*

<sup>106</sup> *Ibid* 21.

fundamental principle of the Australian Constitution. Both as a delegate to the second federal Convention and as a High Court judge, Isaac Isaacs was always willing to display (to the irritation of some of his colleagues<sup>107</sup>) his command of the latest British and American jurisprudence, as well as the legal history of those two nations. Even that most critical commentator of colonial conditions, Beatrice Webb, described Isaacs as “the only man we have met in the colonies who has an international mind determined to make use of international experience”.<sup>108</sup> In the *Inter-State Commission Case* itself, Isaacs J. noted the “tendency, greatly increasing of late years ... to invest administrative bodies with quasi-judicial functions without at all creating them Courts of Justice”,<sup>109</sup> a trend which also attracted the attention of Griffith C.J.<sup>110</sup> and Barton J.<sup>111</sup>

One can only speculate as to the impact which the emergence of the modern administrative state had on the judgments of Isaacs J. and his majority brethren in *Inter-State Commission*. By clearly establishing that s.71 of the Constitution reserved the judicial power of the Commonwealth to the three categories of court named therein (but leaving the precise content of that power to future determination), the Court staked the judiciary’s claim to a guaranteed minimum set of functions immune from either legislative or executive usurpation. To the more ardent advocates of “administrative justice”, this must have looked like an attempt on the part of the courts to shore up their position in the face of unprecedented modern challenge, but there is no reason to suppose that the judges were influenced by anything other than a genuine intellectual conviction as to what was required to preserve the values implicit in the impartial administration of justice and maintenance of the rule of law. Throughout his life, Isaacs

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- <sup>107</sup> J.A. La Nauze, *The Making of the Australian Constitution* (1972) 121, 151 and L.F. Crisp, *Federation Fathers* (1990) 189 quoting Glynn of Isaacs during the second Convention: “a man would have to be the age of Methuselah [ ] to cultivate a memory equal to remembering all the [U.S.] cases which the Hon. Member is always referring to”.
- <sup>108</sup> A.G. Austin (ed), *The Webbs’ Australian Diary 1898* (1965) 68.
- <sup>109</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 84.
- <sup>110</sup> *Ibid* 63 (“[i]t has been the practice for many years in the United Kingdom and in the Australian Colonies and States to confer quasi-judicial powers upon officers of Government and administrative bodies”).
- <sup>111</sup> *Ibid* 70-71.



maintained that the Constitution must be able to evolve with the changing needs of the Australian people.<sup>112</sup> He also believed that abuses of legislative power were better checked, not by constitutional limitation, but by electoral sanction.<sup>113</sup> Moreover, Isaacs was a supporter of social reform who argued in the second Convention in favour of Commonwealth control over old age pensions and interstate industrial disputes.<sup>114</sup> Thus, his decision in the *Inter-State Commission Case* recognizing a doctrine of separation of powers which operated to disable a modern specialist agency like the Inter-State Commission, and was pregnant with similar disruptive possibilities for the Commonwealth Court of Conciliation and Arbitration, was in many respects inconsistent with his overarching constitutional philosophy. Yet, as mentioned above, in *Inter-State Commission*, Isaacs J. was deeply troubled by the threat posed to rule of law values by the lay assumption of judicial responsibility – especially without the protection of judicial tenure in office. As testament to this, he saw fit to record in his judgment that:

“in reply to a question by the Court, learned counsel for the Commonwealth claimed that the Inter-State Commission could now validly try such a case as the *Vend Case*, or Customs prosecutions. It would be rather remarkable to permit two laymen to overrule a lawyer in a criminal case, or to overrule perhaps a unanimous judgment of the Supreme Court of a State ...”<sup>115</sup>

Isaacs J. had tried the notorious *Vend Case* at first instance,<sup>116</sup> and the prospect of someone without formal legal training managing that trial and ensuring that justice according to law was done was clearly more than he, and perhaps some of his

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<sup>112</sup> See generally L.F. Crisp, *Federation Fathers* (1990) ch.4 (“The Unrelenting Penance of Federalist Isaac Isaacs 1897-1947”).

<sup>113</sup> Writing in 1939 as a private citizen, he said: “I do not favour any attempts to insert what are called guarantees of personal speech, thought or action in a Constitution. The danger is that they tend to defeat their object by becoming limitations rather than guarantees ... In a democratic community the only guarantee is the sense of the people itself. Freedom is sometimes invaded ... but the corrective is in the hands of the peoples’ representatives” (*ibid* 260 quoting from Isaacs’ pamphlet *Australian Democracy and Our Constitutional System* (1939) 35-36). This approach is consistent with the philosophy evinced in his joint majority judgment in the *Engineers’ Case*.

<sup>114</sup> L.F. Crisp, *Federation Fathers* (1990) 220-221, 225-227.

<sup>115</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 93 (fn. omitted).

<sup>116</sup> *R. and Attorney-General (Cth) v. Associated Northern Collieries* (1911) 14 C.L.R. 387.

colleagues, could countenance. With a slightly different issue in mind even Samuel Griffith had asserted as a colonial politician that the “Executive Government is the last body in the community that ought to be entrusted with judicial functions”.<sup>117</sup> Thus, even if the judges could be seen to be shoring up their own positions in the *Inter-State Commission Case*, there is no evidence that their motives were other than proper. The real test of their sympathies with modern administrative law would come with their definition of judicial power.<sup>118</sup>

But amidst this speculation, one thing remains clear: from a distance of over eighty years, the judgment of Isaacs J. in *Inter-State Commission* is the anchor grounding an extensive and still evolving Chapter III jurisprudence. Until his retirement from the bench as Chief Justice in 1931, Isaacs J. continued to develop, with the help of his colleagues, the vision of an Australian doctrine of the separation of powers. The remainder of this chapter explores this vision and its relationship with emerging patterns of Australian governance.

### **3. The “Dominant Principle of Demarcation” Applied: The Doctrine of Separation of Powers 1921-1931**

#### **(a) *In Re Judiciary and Navigation Acts***

Isaacs J. did not participate in the hearing in 1921 of *In Re Judiciary and Navigation Acts*.<sup>119</sup> This is a matter of regret as the case directly raised a classic constitutional dilemma to which the doctrine of separation of powers was relevant – the ability of Parliament to confer on the High Court an “advisory jurisdiction”.<sup>120</sup> It is some compensation, then, that the case provided a forum for the intellectual brilliance of

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<sup>117</sup> Quoted in P.D. Finn, *Law and Government in Colonial Australia* (1987) 130. In making this statement, Griffith was defending the constitution of a Land Board exercising functions of a judicial character by two non-political officers removable only upon parliamentary address from claims that the Board’s structure violated the principles of responsible government (*ibid* 129-130).

<sup>118</sup> See below pp.59-62 of this chapter. And see generally below ch.5.

<sup>119</sup> (1921) 29 C.L.R. 257.

<sup>120</sup> See generally S. Crawshaw, “The High Court of Australia and Advisory Opinions” (1977) 51 *A.L.J.* 112.

Owen Dixon who appeared as counsel on behalf of the Attorney-General for Victoria and whose submissions formed the basis of the majority judgment. Later, as a member of the High Court, Dixon would have a profound impact on the development of the Australian separation doctrine.<sup>121</sup>

*In Re Judiciary Act* involved the validity of Part XII of the *Judiciary Act* 1903 (Cth). That Part had been inserted into the principal Act in 1910<sup>122</sup> and purported to invest the High Court with jurisdiction to “hear and determine” any question of law referred to it by the Governor-General concerning the validity of a federal enactment.<sup>123</sup> Each of the State Attorneys-General had a right to appear or be represented at such a reference hearing.<sup>124</sup> Other interested persons could be heard at the direction of the Court.<sup>125</sup> It was further provided that the Court’s determination in this regard was to be final and conclusive and not subject to appeal.<sup>126</sup>

The rationale for such a scheme grew out of the experience of the first decade of federation and the demise of several significant federal legislative initiatives at the hands of the High Court.<sup>127</sup> Attorney-General William Morris Hughes in his second reading speech to the House of Representatives summed up the object of Part XII in the following terms: “[i]t removes uncertainty, obviates delay, and prevents injustice being done to the Commonwealth, to the States, or to individuals”.<sup>128</sup> In other words, the new advisory jurisdiction would allow persons to order their affairs in reliance on

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121 See below ch.4.

122 *Judiciary Act* 1910 (Cth), s.3 (Act No.34 of 1910).

123 *Judiciary Act* 1903 (Cth), s.88.

124 *Ibid* s.90.

125 *Ibid* ss.91-92.

126 *Ibid* s.93.

127 Eg, Attorney-General Hughes, in his second reading speech to the House of Representatives in relation to Part XII, mentioned the *Union Label* litigation (*Attorney-General for N.S.W. v. Brewery Employes Union of N.S.W.* (1908) 6 C.L.R. 469), *R. v. Barger* (1908) 6 C.L.R. 41, *Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330 and the failure of the common rule provisions in *Australian Boot Trade Employes’ Federation v. Whybrow & Co.* (1910) 11 C.L.R. 311. See *Parliamentary Debates*, vol.59, 6490-6491.

128 *Ibid* 6497.

federal legislation without the danger of a “judicial thunderbolt”.<sup>129</sup> Nonetheless, Hughes was conscious that just such a thunderbolt might descend upon the very measures he was sponsoring. Evincing an early awareness of the possibility that the Constitution might dictate the complete isolation of the federal judicial power, he contended that “these functions with which we desire now to clothe the High Court are strictly judicial in their nature”,<sup>130</sup> and, even supposing otherwise, “it does not follow, merely because the judicial power is vested in the High Court, that ... no other power can be vested in it. There is nothing to prevent this Parliament clothing the High Court with any power”.<sup>131</sup>

As events transpired, the High Court in *In Re Judiciary Act* interpreted Part XII as seeking to extract from the Court “not merely an opinion but an authoritative declaration of the law”, the making of which was “clearly a judicial function”.<sup>132</sup> Although later courts were to cast doubt upon the correctness of this threshold finding,<sup>133</sup> it allowed the Court in *In Re Judiciary Act* to avoid consideration of the question whether Parliament could indeed, as Hughes had asserted, clothe the High Court with *any* power. As Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. said in their joint majority judgment:

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129 *Ibid* 6491.

130 *Ibid* 6493.

131 *Ibid* 6493-6494.

132 *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 264 per Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. Although Higgins J. was not as adamant on this point, he too inclined to the view that Part XII sought from the Court a judicial, as opposed to an advisory, determination (*ibid* 269-271).

133 See, eg, *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 274 per Dixon C.J., McTiernan, Fullagar and Kitto JJ.: “[t]here is in truth much to be said for the view that the function which the legislation, held invalid in *In re Judiciary and Navigation Acts*, attempted to confer was either not judicial or not only outside Chap.III but outside all affirmative legislative powers” (fn. omitted). The Privy Council in the appeal in the *Boilermakers' Case* expressed a similar view (*Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 541). But cf *Commonwealth v. Queensland* (1975) 134 C.L.R. 298, 327-328 per Jacobs J. supporting the finding in *In Re Judiciary Act* and stating that “[t]he giving of an advisory opinion on a question of law by a court is an exercise of judicial power” (*ibid* 328). See also *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 185 C.L.R. 595, 612 per Brennan C.J., Dawson, Toohey, Gaudron and Gummow JJ.; and cf 666-667 per Kirby J.; *Director of Public Prosecutions v. B.* (1998) 155 A.L.R. 539, 558 fn.95 per Kirby J.

“If this be so, [that Part XII confers on the High Court a judicial function] it is not within our province in this case to inquire whether Parliament can impose on this Court or on its members any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question.”<sup>134</sup>

This was a convenient result, for although in the wake of *Alexander's Case*, the Commonwealth Court of Conciliation and Arbitration was confined to the exercise of non-judicial power, its presidential member was still required to be appointed from among the Justices of the High Court<sup>135</sup> (Powers J. assuming this role after Higgins J.'s resignation from the presidency in 1921).<sup>136</sup> Moreover, the majority in *In Re Judiciary Act* must have known that any pronouncement upon this issue would vitally affect plans to reconstitute the Arbitration Court in accordance with s.72 of the Constitution as a body exercising both judicial and arbitral functions,<sup>137</sup> a prospect it might not have wished to foreclose.<sup>138</sup> Thus, it was left to the *Boilermakers' Case* to grapple with this issue, although Higgins J. in his dissenting judgment in *In Re Judiciary Act* urged, with undoubtedly the Arbitration Court in mind, that the vesting of the judicial power of the Commonwealth in Chapter III courts “does not imply that no other jurisdiction, or power, shall be vested in the High Court or in the other Courts”.<sup>139</sup>

The finding that Part XII conferred on the High Court a judicial function was not, however, enough to save it from invalidity. The majority in *In Re Judiciary Act* reasoned that a judicial function was not competent to the Court “unless its exercise is an exercise of part of the judicial power of the Commonwealth”.<sup>140</sup> In this manner, their Honours drew a distinction between judicial power and the topics of federal

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<sup>134</sup> *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 264.

<sup>135</sup> *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) s.12(1).

<sup>136</sup> G. Sawyer, *Australian Federal Politics and Law 1901-1929* (1956) 199 fn.111.

<sup>137</sup> This reconstitution occurred in 1926. See *ibid* 268.

<sup>138</sup> Even if it was not prepared to accept the submission of Leverrier K.C. for the Commonwealth that Part XII of the *Judiciary Act* validly conferred non-judicial power on the High Court (see summary of argument in the *Commonwealth Law Reports* (1921) 29 C.L.R. 257, 259-260).

<sup>139</sup> *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 271. Higgins J. was not the only High Court justice of this period to express such a view. In *Alexander's Case*, both Barton J. and Powers J. had denied that Chapter III courts were confined to the exercise of judicial functions ((1918) 25 C.L.R. 434, 453 per Barton J. and 479 per Powers J).

<sup>140</sup> *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 264.

jurisdiction; a judicial function or power could be validly conferred on the High Court (and on other federal courts) only if it fell within the bounds of federal jurisdiction – the subject matters of federal judicial power – exhaustively delineated in Chapter III.<sup>141</sup> But in the opinion of the majority, Part XII of the *Judiciary Act* fell outside federal jurisdiction: Part XII could only be supported under s.76(i) of the Constitution empowering Parliament to confer original jurisdiction on the High Court “in any matter [a]rising under this Constitution, or involving its interpretation”, and although exercise of the reference jurisdiction clearly involved the interpretation of the Constitution, the majority denied that it involved a “matter”. According to their Honours:

“there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court”.<sup>142</sup>

Leading to the outcome:

“we can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved”.<sup>143</sup>

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<sup>141</sup> Strictly speaking, *In Re Judiciary Act* established that Chapter III of the Constitution exhaustively delineated “the whole of the *original jurisdiction* which may be exercised under the judicial power of the Commonwealth” (*ibid* 265) (emphasis added), but there would seem to be no reason to support a different conclusion in relation to Chapter III and federal appellate jurisdiction. Subsequently, in *Porter v. R.; Ex parte Yee* (1926) 37 C.L.R. 432, 441 Isaacs J. described *In Re Judiciary Act* as “authoritatively determining that ‘the judicial power of the Commonwealth’, within the meaning of Chapter III, and both original and appellate, cannot be increased by Parliament”, a view which has not been disputed (see Z. Cowen and L. Zines, *Federal Jurisdiction in Australia* (2nd ed) (1978) 152-153). However, *Ex parte Yee* (drawing from *R. v. Bernasconi* (1915) 19 C.L.R. 629) itself established that “the judicial power of the Commonwealth” in this regard refers to that power in relation to which the Commonwealth stands in the place of the States. Thus, under s.122 of the Constitution, the Commonwealth Parliament can confer appellate jurisdiction on the High Court from a Territory Supreme Court despite the fact that such jurisdiction falls outside the terms of s.73 and Chapter III in general. The relationship between s.122 and Chapter III of the Constitution has re-emerged in more recent times as a matter of dispute in the High Court. See, eg, *Kruger v. Commonwealth* (1997) 190 C.L.R. 1.

<sup>142</sup> *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 265 per Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ.

<sup>143</sup> *Ibid* 267 per Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. Higgins J., in his dissenting judgment, found that Part XII was validly supported by s.51(xxxix) (as incidental to the execution of powers vested in the Government of the Commonwealth) (*ibid* 269-270) as well as s.76(i) (his Honour taking a broader view of the meaning of

As noted above, this conclusion – that the reference jurisdiction fell outside the limits of the federal jurisdiction exhaustively defined in Chapter III – effectively amounted to the adoption by the Court of the arguments put to it by Owen Dixon, who had raised the objection as to the validity of Part XII in the first place.<sup>144</sup> But these arguments had in turn been foreshadowed in 1910 by parliamentarians Patrick Glynn and Sir John Quick, who in response to Hughes’ assertion of the validity of the *Judiciary Act* amendments, had speculated that they would have to run the gauntlet of the definition of “matter” in s.76<sup>145</sup> (the twist being that Glynn, as a delegate to the second Convention, had unsuccessfully urged that the Commonwealth Parliament be expressly empowered to confer on the High Court an advisory or reference jurisdiction).<sup>146</sup> In making these

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“matter” than his colleagues) (*ibid* 272). The outcome in *In Re Judiciary Act* has been affirmed by members of the High Court on several occasions in recent times. See, eg, *North Galanjanja Aboriginal Corporation v. Queensland* (1996) 185 C.L.R. 595, 612 per Brennan C.J., Dawson, Toohey, Gaudron and Gummow JJ.; 642 per McHugh J.; and cf 666-668 per Kirby J.; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 19-20 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. (“the giving to the executive of advisory opinions on questions of law is quite alien to the exercise of the judicial power of the Commonwealth” (fn. omitted)); *Director of Public Prosecutions v. B.* (1998) 155 A.L.R. 539, 547 per Gaudron, Gummow and Hayne JJ.; 557-558 per Kirby J. See also J.M. Williams, “Re-thinking Advisory Opinions” (1996) 7 *P.L.R.* 205.

<sup>144</sup> This appears from the summary of argument reproduced in the *Commonwealth Law Reports*. See *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 258-259.

<sup>145</sup> *Parliamentary Debates*, vol 59, 6503 “[b]ut there is nothing in section 76 enabling us to confer original jurisdiction in hypothetical cases. The power to confer original jurisdiction relates to a ‘matter’, and the word ‘matter’ was inserted in the Constitution as being almost synonymous with, but a little wider than, the words ‘causes’ and ‘controversies’ which occur in the Constitution of the United States of America. Those causes or controversies must be judicial, and Congress has never attempted to give such a power to the Supreme Court of the United States of America” (Glynn); Sir John Quick observed “[t]he word ‘matter’ [in s.76 of the Constitution] is undoubtedly equivalent to, and a mere substitution for, the expression in the American Constitution ‘controversy’ or ‘case’. The use of the word ‘matter’ shows that an issue must be raised by responsible or interested parties. I do not see how a matter can arise unless raised by a party. A case generally arises through some person or persons wishing to assert a right or to enforce a duty, and implies a plaintiff and a defendant” (*ibid* 6512). A decade earlier, in J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 767-768 Quick and his co-author had suggested that advisory opinions, of the type contemplated by Part XII of the *Judiciary Act* would be extra-judicial in nature and thus beyond the power of the federal judiciary (Quick and Garran being of the view that under the Constitution “the functions of the federal Justices are ‘strictly and exclusively judicial’, and that no duties can be cast upon them of an essentially extra-judicial kind” (*ibid* 767)).

<sup>146</sup> See above p.16 (ch.1).

comments, Glynn and Quick demonstrated their familiarity with the corresponding American jurisprudence. From its earliest days, the judges of the United States Supreme Court have refused to render “advisory opinions”.<sup>147</sup> This refusal is generally ascribed to the so-called “case or controversy” requirement of Art.III, s.2,<sup>148</sup> but is not unrelated, at least from an historical perspective, to the need to maintain the doctrine of separation of powers as that doctrine is understood in the United States<sup>149</sup> (the tendency there being to regard such opinions as extra-judicial in nature).<sup>150</sup>

The majority in *In Re Judiciary Act* did not advert to this American experience, but, significantly, they specifically endorsed Isaacs J.’s pronouncement in the *Inter-State Commission Case* that the Australian Constitution incorporates as a fundamental principle a doctrine of separation of powers. Referring to Isaacs J.’s judgment in that case Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. said:

“The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes – legislative, executive and judicial ... In each case the Constitution first grants the power and then delimits the scope of its operation”.<sup>151</sup>

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- <sup>147</sup> Correspondence between President Washington and Chief Justice Jay and Associate Justices (18 July, 8 August 1793) reproduced in part in P. Bator *et al*, *Hart and Wechsler’s The Federal Courts and the Federal System* (2nd ed) (1973) 64-66. Cf, however, the Canadian position, where the Supreme Court has long exercised an advisory or reference jurisdiction (in relation to which see generally J. Huffman and M. Saathoff, “Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction” (1990) 74 *Minnesota L.R.* 1251).
- <sup>148</sup> L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 73.
- <sup>149</sup> Chief Justice Jay and the Associate Justices of the United States Supreme Court, in declining Washington’s request for their advice in relation to, *inter alia*, the nation’s treaty obligations with France, wrote: “[regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to” (correspondence between President Washington and Chief Justice Jay and Associate Justices (18 July, 8 August 1793) reproduced in part in P. Bator *et al*, *Hart and Wechsler’s The Federal Courts and the Federal System* (2nd ed) (1973) 65-66).
- <sup>150</sup> Note: “Advisory Opinions on the Constitutionality of Statutes” (1956) 69 *Harv.L.Rev.* 1302, 1303; L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 73 n.4.
- <sup>151</sup> *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 264 (fn. omitted) but their Honours referring in a footnote to the page in Isaacs J.’s judgment in the *Inter-State Commission Case* where he described the doctrine of the separation of powers as a fundamental constitutional principle. Cf Higgins J. *ibid* 276: “The separation of the



Their Honours then used this “principle” to buttress their finding, referred to above, that Chapter III delimited “the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth” and that, for example, s.51(xxxix) “does not extend the power to confer original jurisdiction on the High Court contained in sec.76”.<sup>152</sup> Thus, the “self-contained” nature of Chapter III was emphasized and, at the same time, one of the planks supporting the outcome in the *Boilermakers’ Case* set in place. As the High Court majority were to comment in that later case:

“What reason could there be in treating [Chapter III] as an exhaustive statement, not of the powers, but only of the judicial power that may be exercised by the judicature? It hardly seems a reasonable hypothesis that in respect of the very kind of power that the judicature was designed to exercise its functions were carefully limited but as to the exercise of functions foreign to the character and purpose of the judicature it was meant to leave the matter at large.”<sup>153</sup>

But the majority in *In Re Judiciary Act* showed little awareness that their decision could be used to this end. Moreover, they adopted Isaacs J.’s fundamental constitutional principle, and used it to support their reading of Chapter III, without explanation or justification. *In Re Judiciary and Navigation Acts* thus marks an important staging post in the recognition and development of a legally binding doctrine of separation of powers at federal level, but its importance in this regard lies less in the nuances of its reasoning than in the further consequences which its conclusions could be taken to suggest.

### **(b) The *British Imperial Oil* Litigation**

Against the cumulative background of *Huddart, Parker*, the *Inter-State Commission Case* and *In Re Judiciary Act*, the notion that the Constitution enshrined a legally binding doctrine of separation of powers was well established by the mid-1920s. The

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legislative, executive and judicial powers under the Constitution leaves these arms of the Commonwealth interdependent.”

<sup>152</sup> *Ibid* 265. Note, however, that one contemporary Australian commentator described the decision in *In Re Judiciary Act* as directly attributable to the doctrine of separation of powers observing that Part XII “conflicted with the American-designed distribution of powers in the Constitution” (P. Phillips, “Advisory Opinions” (1928) 2 *A.L.J.* 87, 87).

<sup>153</sup> *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 272 per Dixon C.J., McTiernan, Fullagar and Kitto JJ.

full extent of this doctrine in a constitutional setting which also incorporated the doctrine of responsible government with its admixture of the legislative and executive roles<sup>154</sup> was as yet unclear. In particular, in the wake of *Baxter v. Ah Way*, the extent to which Parliament could delegate law-making authority to the executive remained unresolved.<sup>155</sup> What was clear was that the judicial power of the Commonwealth could be exercised by the courts referred to in s.71 of the Constitution *and those courts only*.<sup>156</sup> It was this limb of the separation doctrine (the “primary separation rule”) which had governed the outcomes in both the *Inter-State Commission Case* and *Waterside Workers’ Federation v. Alexander*. The *B.I.O.* litigation was yet another illustration of this proposition at work.

In essence, federal legislation had established a Taxation Board of Appeal to which members were appointed for a term of seven years. The Board of Appeal was invested with judicial power but as the members’ tenure did not comply with s.72 of the Constitution, the Board was held to be invalidly constituted.<sup>157</sup> When the Board was subsequently reconstituted as a Board of Review and invested by Parliament with non-judicial functions, its validity was upheld.<sup>158</sup> Thus, in terms of the historical development of the separation of powers doctrine, the *B.I.O. Cases – British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]*,<sup>159</sup> *Federal Commissioner of Taxation v. Munro*,<sup>160</sup> *British Imperial Oil Co. Ltd v. Federal Commissioner of*

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<sup>154</sup> That the Australian Constitution incorporates the doctrine of responsible government is indicated by ss.62 and 64 and has long been recognized by the High Court (see, eg, the authorities referred to, several dating from the early days of the High Court and attributable to Isaacs J., in G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 76).

<sup>155</sup> The issue would shortly be addressed in detail in *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73.

<sup>156</sup> D. Kerr in *The Law of the Australian Constitution* (1925) included a chapter entitled “The Significance of the Distribution of Powers Amongst the Governmental Organs of the Commonwealth”. This chapter dealt with many issues which would not necessarily be addressed in a separation of powers context today. Nonetheless, the author discussed at some length the “constitutional command that judicial power must be exercised by strictly so-called judicial tribunals” (*ibid* 32).

<sup>157</sup> *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]* (1925) 35 C.L.R. 422.

<sup>158</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153.

<sup>159</sup> (1925) 35 C.L.R. 422.

<sup>160</sup> (1926) 38 C.L.R. 153.

*Taxation [No.2]*<sup>161</sup> and *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation*<sup>162</sup> – involved, at least at one level, the application of settled law. The complexity, for which these cases have become notorious, stems instead from the technical basis upon which the Court distinguished between the Board as a repository of (in the first instance) judicial and then (latterly) non-judicial power (and this despite Isaacs J.’s assertion in *Federal Commissioner of Taxation v. Munro* that the difference in status and function between the two Boards was “the difference between daylight and dark”<sup>163</sup>). This “judicial power” dimension of the *B.I.O. Cases* is dealt with in detail in a later chapter.<sup>164</sup>

Nonetheless, in *Federal Commissioner of Taxation v. Munro*, Isaacs J. was moved to comment on the doctrine which he had introduced into the Australian sphere in the *Inter-State Commission Case*. Isaacs J. was clearly relieved that it was possible to uphold the validity of the Board of Review. The function of the Board was to “review” taxation assessments made by the Commissioner. Under the relevant enabling legislation the role of the Board in this regard was designed to mirror the primary decision-making function of the Commissioner. There was an “appeal” from a determination of the Board to the High Court where a question of law was involved, and a disgruntled taxpayer had, in the first instance, a choice whether to ventilate her or his grievances before the Board or to take them directly to the High Court or a State Supreme Court.<sup>165</sup> If this scheme were struck down as investing the Board with judicial power, a great many objections to taxation assessments would have to be resolved in the courts, with all the expense and delay associated with judicial proceedings. This was anathema to Isaacs J.<sup>166</sup> who, as a former member of the executive himself at both colonial and federal level, was alert to the day-to-day demands of practical governance. For example, his Honour insisted that “[g]overnment could not

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161 (1926) 38 C.L.R. 153.

162 (1930) 44 C.L.R. 530.

163 (1926) 38 C.L.R. 219, 175.

164 See below ch.5.

165 The facts of the *B.I.O. Cases* are described in further detail below pp.213-215 (ch.5).

166 *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 182.

be carried on without some administrative power of finally determining disputed facts".<sup>167</sup> In this light he developed the idea that although some governmental functions "are appropriate *exclusively* to judicial action"<sup>168</sup> other functions are of an "innominate"<sup>169</sup> character and are consistent with either judicial, administrative or legislative action.<sup>170</sup> Thus, Isaacs J. was concerned to articulate a more flexible version of the doctrine of separation of powers than might otherwise have been thought to exist. The separation of powers was a means to an end – the effective working of representative government – not necessarily an end in itself. In his Honour's opinion, the Constitution should, whenever possible, be read in such a way as to meet the practical needs of Australians:

"if a legislative provision of the present nature [establishing the Board of Review] be forbidden, then a very vast and at present growing page of necessary constitutional means by which Parliament may in its discretion meet, and is at present accustomed to meet, the requirements of a progressive people, must, in my opinion, be considered as substantially obliterated so far as the Commonwealth is concerned. Administration must be hampered, and either injustice suffered or litigation fostered. *The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution.*"<sup>171</sup>

Subsequently, in *Le Mesurier v. Connor*,<sup>172</sup> in what was to be his last opportunity judicially to consider the "dominant principle of demarcation" Isaacs J. reiterated the truism that a constitutional doctrine of separation of powers is but a means to an end (albeit a vaguely expressed end – "a free government") and not an end in itself. The doctrine must have its limits if the Constitution is to be a working document:

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<sup>167</sup> *Ibid* 177.

<sup>168</sup> *Ibid* 175 (emphasis in original).

<sup>169</sup> P.H. Lane, *The Australian Federal System* (1972) 324.

<sup>170</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 175, 178-179.

<sup>171</sup> *Ibid* 178 (emphasis added). And see R. Blackford, "Judicial Power, Political Liberty and the Post-Industrial State" (1997) 71 *A.L.J.* 267, 270.

<sup>172</sup> (1929) 42 C.L.R. 481.

“It is altogether a mistaken notion that because the Constitution distinguishes between the legislative and the executive and the judicial departments of the Commonwealth, there can ever in the practical working of any Constitution be a rigid demarcation placing each class of acts in an exclusive section ... The separation of the powers must be understood, as *Story J.* says in his work on the *Constitution* in sec.525, ‘in a limited sense’. In sec.529 he says: ‘A perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government’. Then he refers to the refutation of the idea by ‘the illustrious statesmen who formed the Constitution’, since they maintained the proposition that ‘unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained’. Indeed, if our Constitution is to be a working apparatus, such a rigid and undeviating segregation as the argument for invalidity requires, is quite impossible.”<sup>173</sup>

This call for a flexible application of the separation of powers contrasts with the more rigid approach to the doctrine adopted by Isaacs J. in the *Inter-State Commission Case*. The two approaches can, however, be reconciled when it is appreciated that in *Inter-State Commission*, Isaacs J. was concerned to establish as constitutional principle that certain governmental functions *must* be exercised by courts as traditionally conceived. In this regard, the *Inter-State Commission Case* may have seemed a clear one; for example, and as already noted, counsel for the Commonwealth had claimed that under the Act of 1912 the Inter-State Commission constituted by a lawyer and two laymen could validly try a criminal prosecution – a prospect at which Isaacs J. balked.<sup>174</sup> Yet, the principle of separation having been thus established in *Inter-State Commission*, Isaacs J. was concerned in the *B.I.O. Cases* to marry the principle with “the requirements of a progressive people” by emphasizing what the Americans had long

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<sup>173</sup> *Ibid* 519-520.

<sup>174</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 93-94. Of course, as already pointed out, Chapter III of the Constitution does not in terms require that s.71 courts be constituted by legally trained persons. But s.71 arguably presupposes such a state of affairs, whereas in the case of the Inter-State Commission “the functions contemplated by the Constitution in relation to finance, railways, and commercial transactions do not presuppose a body composed exclusively of lawyers” (*ibid* 94 per Isaacs J.).

known – that it is impossible to allocate all governmental functions among three abstract categories on an exclusive basis.<sup>175</sup> Thus, whereas it was possible to say of a trial for murder and punishment for crime generally that they were exclusively judicial functions (“so clearly and distinctively appertain[ing] to one branch of government as to be incapable of exercise by another),<sup>176</sup> other functions could be allocated by Parliament in its discretion either to the judiciary or to another branch of government.<sup>177</sup> In other words, in the *B.I.O. Cases*, Isaacs J. was advocating a flexible approach to the separation doctrine, not by admitting exceptions to separation – although this was possible – but by employing a concept of judicial power that recognized that beyond an irreducible core it had an essentially “chameleon”-like content.<sup>178</sup> And given Isaacs J.’s insistence that the Constitution meet the practical needs of Australians this may have seemed a balanced response to the new patterns of government chronicled by Robson, Hewart and Duncan; for although the judicial claim to a guaranteed minimum set of functions immune from either legislative or executive encroachment remained in place, this was not incompatible with the exercise of quasi-judicial power by a range of administrative tribunals – the court, through its definition of judicial power, retaining ultimate control over that degree of compatibility.

### (c) *Dignan’s Case*

By the time *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan*<sup>179</sup> came before the High Court in August 1931, Isaacs C.J. had enjoyed some seven months retirement from the bench. However, it is appropriate to deal with *Dignan* here, for it resolved the question which *Baxter v. Ah Way* had left open some

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<sup>175</sup> For example, James Madison wrote in *The Federalist No. 37* that “[e]xperience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science” (in B.F. Wright (ed), *The Federalist* (1961) 269).

<sup>176</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 178, 175 per Isaacs J.  
<sup>177</sup> *Ibid* 176-177.

<sup>178</sup> S. Ratnapala, “*Harry Brandy’s Case* and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 245.

<sup>179</sup> (1931) 46 C.L.R. 73.

two decades earlier. In the face of a forceful separation of powers challenge, the Court in *Dignan* unanimously upheld s.3 of the *Transport Workers Act 1928* (Cth) which empowered the Governor-General to make regulations “with respect to the employment of transport workers”<sup>180</sup> which “notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* ... shall have the force of law”. It is hard to imagine a stronger factual setting in which to affirm the ability of the federal legislature to delegate law-making power to the executive – the broad discretion in s.3 permitted executive determination of employment policy unchecked by any governing standard<sup>181</sup> and was accompanied by a Henry VIII clause. In all probability, such a provision would not have survived in the United States. The American separation doctrine recognizes that, as a matter of practical necessity, Congress must be able to delegate law-making authority to the executive branch. But the Supreme Court has traditionally denied that this legislative authority can be delegated in gross; there must be some governing standard or plan according to which the delegate is directed to proceed. Thus, in a case decided just three years prior to *Dignan* it was stated that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [take action] is directed to conform such legislative action is not a forbidden delegation of legislative power”,<sup>182</sup> – the object being to preserve Congress’ control over policy formulation.<sup>183</sup> By rejecting this approach, *Dignan* signalled that

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<sup>180</sup> The definition of “transport worker” in s.2 confined the operation of the Act to workers associated with the provision of transport services in relation to interstate or overseas trade or commerce by sea.

<sup>181</sup> In fact, the delegation under s.3 was wide enough to enable two very different government policies to be pursued within its terms: the Bruce-Page Nationalist-Country Party Government made regulations under s.3 to suppress militant trade unionism on the waterfront, whereas the Scullin Labor Government used s.3 to opposite effect (G. Sawyer, *Australian Federal Politics and Law 1901-1929* (1956) 265 and G. Sawyer, *Australian Federal Politics and Law 1929-1949* (1963) 30). See also L. Zines, *The High Court and the Constitution* (4th ed) (1997) 158 and L. Zines, “Social Conflict and Constitutional Interpretation” (1996) 22 *Mon.L.R.* 195, 200-203.

<sup>182</sup> *J.W. Hampton, Jr & Co. v. United States* 276 U.S. 394, 409 (1928).

<sup>183</sup> G.R. Stone *et al*, *Constitutional Law* (2nd ed) (1991) 416. Note that the United States nondelegation doctrine draws both from the separation of powers and from the maxim *delegatus non potest delegare*. The importance of the nondelegation doctrine has, however, declined in recent times (*ibid* 417-418 “[i]n general, the nondelegation doctrine is of little or no practical importance today”).

the focus of the Australian separation doctrine would remain with the provisions of Chapter III.<sup>184</sup>

Dixon J. and Evatt J., both only recently appointed to the Court, wrote the leading judgments.<sup>185</sup> Each accepted that the Constitution incorporated a doctrine of the separation of powers, but in the course of recognizing that Parliament could delegate legislative authority to the executive (for there was no doubt that this is what s.3 did),<sup>186</sup> each demonstrated a different degree of adherence to that doctrine. Dixon J. gave the separation of powers greater scope. In his Honour's opinion:

“an independent consideration of the provisions of the Commonwealth Constitution ... cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested ... The arrangement of the Constitution and the emphatic words in which the three powers are vested by secs.1, 61 and 71 combine with the careful and elaborate provisions constituting or defining the repositories [sic] of the respective powers to provide evidence of the intention with which the powers were apportioned and the organs of government separated and described.”<sup>187</sup>

And he referred to the line of authority in relation to the separation of powers beginning with Isaacs J. in the *Inter-State Commission Case* and extending to the *B.I.O.* litigation.<sup>188</sup> Against this background Dixon J. asserted, as he was to do twenty-five

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<sup>184</sup> As Sir Harry Gibbs has observed, despite the High Court's frequent assertions that the Constitution is based upon a separation of the functions of government “the Court has paid no more than lip service to that principle when it has come to consider the separation between legislative and executive power” (H. Gibbs, “The Separation of Powers – A Comparison” (1987) 17 *F.L.Rev.* 151, 154).

<sup>185</sup> Gavan Duffy C.J. and Starke J. in their joint judgment said in relation to the separation of powers argument: “[i]t does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power” (*Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 84). Rich J. said “*Roche v. Kronheimer* is an authority for the proposition that an authority of subordinate law-making may be invested in the Executive. Whatever may be said for or against that decision, I think we should not now depart from it. I have read the judgment of my brother Dixon, and agree with the view of that authority which he has expressed” (*ibid* 86-87 (fn. omitted)).

<sup>186</sup> *Ibid* 100 per Dixon J.

<sup>187</sup> *Ibid* 96.

<sup>188</sup> *Ibid* 96-97.



years later in the *Boilermakers' Case*, that the Constitution demanded a full separation of the federal judicial power:

“From these authorities it appears that, because of the distribution of the functions of government and of the manner in which the Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals.”<sup>189</sup>

The ostensible basis of Dixon J.’s reasoning in this regard was textual and offered no insight into the object or purpose of the separation doctrine save for his use in passing of a quotation from Madison in *Federalist No.47*.<sup>190</sup> However, Dixon J. had to travel beyond textual analysis if the separation of the federal legislative and executive powers was to be distinguished from his treatment of judicial power. This he did by calling in aid two factors. The first was precedent and the fact that in *Roche v. Kronheimer*<sup>191</sup> a legislative provision authorizing the Governor-General to make such regulations as appeared to him to be necessary for giving effect to the economic clauses of the Treaty of Versailles<sup>192</sup> had survived a separation of powers challenge. The reasons given for this aspect of the decision in *Roche* were, as Dixon J. effectively conceded, perfunctory (interestingly, Isaacs J. had not participated in the hearing of *Roche*). It was also questionable whether legislative power had indeed been conferred on the Governor-General given that his regulation-making power was constrained by the terms of the treaty.<sup>193</sup> Nonetheless, Dixon J. in *Dignan* accepted that *Roche* had signalled “that the time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the

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189 *Ibid* 97-98.

190 *Ibid* 90 “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny”. Dixon J. referred to this classic passage when discussing the operation of the separation of powers in America.

191 (1921) 29 C.L.R. 329.

192 *Treaty of Peace Act* 1919 (Cth), s.2.

193 See Dixon J.’s analysis of *Roche v. Kronheimer* in *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 98-100. And see also extra-curially, O. Dixon, “The Separation of Powers in the Australian Constitution” (1942) *American Foreign Law Association, Proceedings No.24*, 8.

Parliament so as to restrain it from reposing in the Executive an authority of an essentially legislative character”.<sup>194</sup>

By following *Roche v. Kronheimer* in this way Dixon J. was forced to admit that the Court’s interpretation of Chapters I, II and III of the Constitution “may appear to involve an inconsistency or, at least, an asymmetry”.<sup>195</sup> But Dixon J. rationalized this result by reference to a second, more convincing, factor; namely “the long history of parliamentary delegation in Britain and the British colonies” coupled with English legal theory:

“It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository [sic] of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law. In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature.”<sup>196</sup>

Subsequently, in two separate extra-curial writings, Dixon was to confirm that this passage was central to his decision in favour of the validity of s.3. In an article published in 1935 in the *Law Quarterly Review*,<sup>197</sup> Dixon referred to British practice supporting legislative delegation and, showing an awareness of the new, increasingly interventionist model of government, observed that:

“it seemed unbelievable that the executive should be forbidden to carry on the practice of legislation by regulation – the most conspicuous legal activity of a modern government. What otherwise might have been treated as a rigid

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194 *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 C.L.R. 73, 100-101.

195 *Ibid* 101.

196 *Ibid* 101-102.

197 O. Dixon, “The Law and the Constitution” (1935) 51 *L.Q.R.* 590.

requirement of the supreme law has been given the appearance of the mere categories of a draftsman. Legal symmetry gave way to common sense.”<sup>198</sup>

If the practical demands of modern government provided a reason for his decision in *Dignan*, Dixon felt that he had also provided a sufficient theoretical justification for this approach. In an address to the American Foreign Law Association in 1942 while serving as Australian Minister to the United States, Dixon declared that he had reconciled the validity of s.3 with the frame of the Constitution by focussing on “the essential attributes of legislative power according to British conceptions”.<sup>199</sup> Clearly referring to his judgment in *Dignan*, Dixon said:

“It was pointed out that, according to the common law, an instrument like a by-law, or regulation, made under statute, depended so absolutely on the statute that upon the repeal of the statute it ceased to be law; that a violation of the instrument was an offence against the statute and not an independent or substantive offence. It was also pointed out that legislative power reposed in a legislature is considered to be plenary, and to be original, not derivative. The long history of legislation conferring regulating powers upon the executive was treated as evidence that, according to British conceptions such regulations were not legislative. From all this, the conclusion was drawn that, for the purposes of the threefold division of powers, subordinate regulations, however wide the discretion under which they are made, could not be considered as an exercise of legislative power.”<sup>200</sup>

Leaving aside Dixon’s extra-judicial statements, the role of historical practice and English legal theory in suggesting that the Commonwealth Parliament could validly delegate legislative authority to the executive was confronted more directly in the judgment of Evatt J. – after all, the issue in *Dignan* was whether the distribution of powers adopted by the new Constitution necessitated modification of that historical practice. Evatt J. was less enamoured of the theory of separation of powers than Dixon J. While he did not in terms deny that the classification in ss.1, 61 and 71 incorporated

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198 *Ibid* 606. See also O. Dixon, “The Separation of Powers in the Australian Constitution” (1942) *American Foreign Law Association, Proceedings No.24*, 8.

199 O. Dixon, “The Separation of Powers in the Australian Constitution” (1942) *American Foreign Law Association, Proceedings No.24*, 9.

200 *Ibid* 9-10.

such a theory, it was not “the full theory of ‘Separation of Powers’” which Evatt J. said “cannot apply under our Constitution”.<sup>201</sup> Evatt J. accepted that s.71 of the Constitution dealt in exhaustive terms with the allocation of the federal judicial power,<sup>202</sup> his Honour noting that the British tradition of judicial independence “has resulted in a special tendency to resist any serious encroachment upon the field of judicial action by agencies of the Executive Government”.<sup>203</sup> But Evatt J. denied that this principle demanded that the courts mentioned in s.71 be confined to the exercise of federal judicial power invoking, in a bootstraps argument, the example of the Commonwealth Court of Conciliation and Arbitration:

“For instance, there is a Federal Court created by the *Commonwealth Conciliation and Arbitration Act*. Such Court has for some years performed functions which are not the exercise of judicial power at all ... The exercise of ‘arbitral’ functions in relation to industrial disputes is lawful because the Commonwealth Parliament has made a valid law in the exercise of its power under sec.51(xxxv) of the Constitution.”<sup>204</sup>

Thus Evatt J. accepted that the Constitution enshrined only a limited separation of the federal judicial power. In Evatt J.’s opinion, it was not possible to reason from this limited separation to the existence of a legislative/executive separation for the two sets of functions were fundamentally different. In his Honour’s words:

“Questions of judicial power occupy a place apart under the Constitution, not only because of the special nature of judicial power but because of the elaborate provisions of Chapter III. As Sir *W. Harrison Moore* has pointed out ... ‘between legislative and executive power on the one hand and judicial power on the other, there is a great cleavage’”.<sup>205</sup>

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201 *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 C.L.R. 73, 118.

202 *Ibid* 116.

203 *Ibid* 115.

204 *Ibid* 116-117.

205 *Ibid* 117.

Evatt J. did not explain the nature of this “cleavage”, but it can be inferred that he had in mind the peculiar capacity of an exercise of judicial power to state with conclusive force the existing rights of an individual.<sup>206</sup>

Against this backdrop Evatt J. identified a series of factors which worked in favour of the validity of s.3 of the *Transport Workers Act*. These factors may not have led to that conclusion in logical fashion, but they made for a more convincing case than Dixon J.’s rather formalistic discussion. First, Evatt J. noted that underlying the Australian Constitution was the system of responsible government. In contrast to the situation in the United States, responsible government engendered a close relationship between the federal legislative and executive branches which “must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power”.<sup>207</sup> Moreover, “effective government” necessitated at least some capacity on the part of Parliament to entrust the executive or other authorities with subordinate law-making power,<sup>208</sup> Evatt J. claiming that the framers had had the British model in mind when considering the meaning of “legislative power”, thus bringing to bear British practice in this regard.<sup>209</sup> Evatt J. also believed that “every grant by the Commonwealth Parliament of authority to make rules and regulations” whomsoever the grantee “is itself a grant of legislative power”.<sup>210</sup> And this led him to conclude that the “true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself” whatever the extent of such subordinate grant.<sup>211</sup> *Roche v. Kronheimer* had thus indeed meant to decide that Parliament could validly commit legislative power to the executive.<sup>212</sup>

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<sup>206</sup> See L. Zines, *The High Court and the Constitution* (4th ed) (1997) 171-172.

<sup>207</sup> *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 114.

<sup>208</sup> *Ibid* 117.

<sup>209</sup> *Ibid* 118.

<sup>210</sup> *Ibid* 119.

<sup>211</sup> *Id.*

<sup>212</sup> *Ibid* 114, 122.

Evatt J. did identify one limitation attending Parliament's power in this regard. This limitation, however, stemmed not from the theory of the separation of powers but from the fact that the Commonwealth Parliament is confined to those subject matters of legislative power set out in the Constitution. Employing a hint of a since discredited mode of characterization,<sup>213</sup> Evatt J. was of the view that some delegations of law-making power may be so broad as to amount "in substance" to laws with respect to *the legislative power* to deal with a particular subject matter (say interstate trade or commerce) as opposed to laws with respect to that subject matter itself.<sup>214</sup> But, s.3 of the *Transport Workers Act*, despite the width of its grant, did not suffer from this deficiency.<sup>215</sup> Dixon J.'s judgment also contained a not dissimilar qualification.<sup>216</sup> However, neither proviso has proved a problem for the Commonwealth in practice.<sup>217</sup>

#### 4. Conclusion: *Dignan* and Three Decades of the Doctrine of Separation of Powers

*Dignan* marked a turning point in Australian separation of powers jurisprudence. If the Court had been troubled by the more extreme manifestations of Lord Hewart's new despotism, then *Dignan* was the case in which to take a stand. It provided the perfect factual setting in which to import and apply the American nondelegation principles, even in diluted form. That this did not occur demonstrated that the Court was not unsympathetic to the new "positive role"<sup>218</sup> of the state and the demands of practical governance in an increasingly complex world, something already apparent from Isaacs

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213 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 157. See also *Port MacDonnell Professional Fishermen's Assn Inc v. South Australia* (1989) 168 C.L.R. 340, 379-380 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

214 *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 119-120.

215 *Ibid* 123-124.

216 *Ibid* 101. In addition, Dixon J. suggested that the separation of powers would be relevant to any attempt on the part of the Commonwealth Parliament to abdicate its legislative authority (*id.* and see also *ibid* 118 per Evatt J.).

217 H. Gibbs, "The Separation of Powers – A Comparison" (1987) 17 *F.L.Rev.* 151, 155; D. Malcolm, "The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate" (1992) 66 *A.L.J.* 247 and L. Zines, *The High Court and the Constitution* (4th ed) (1997) 157, 161. For a more detailed discussion of the qualifications attending the Dixon J. and Evatt J. judgments in *Dignan* see *ibid* 157-161.

218 W.G.K. Duncan, "Modern Constitutions" in G.V. Portus (ed), *Studies in the Australian Constitution* (1933) 10.

J.'s remarks in *Federal Commissioner of Taxation v. Munro*. And although it is pure speculation, the intervening events of the Great Depression may have made the Court even less inclined than in *Munro* to unduly fetter the actions of government.

Of course, other factors were also at play in the decision in *Dignan*. In particular, the adoption by the Constitution of the system of responsible government had always corrupted the American analogy offering the Court a degree of discretion as to the significance, if any, which it would attach to the separate vesting clauses in ss.1 and 61 (even if responsible government did not dictate a conclusion one way or the other – as Professor Sawyer has pointed out, once the separation doctrine is accepted as a fundamental constitutional principle “then the cabinet system could well be regarded as defining the full extent to which the legislative and executive functions are to be mixed”<sup>219</sup>). The long history of legislative delegation in Britain and her colonies relied on by both Dixon J. and Evatt J. was, however, something of a furphy for no one was suggesting that such delegation was impossible – the issue was, abdication aside, whether the doctrine of separation of powers set outer limits to the scope of permissible parliamentary delegation to the executive. It is submitted that the Court should have recognized that it did and, borrowing from United States doctrine, demanded that s.3 include a governing standard or policy to which the Governor-General in the exercise of his discretion was obliged to conform. For paradoxically, this would have strengthened the system of responsible government by extracting from Parliament greater control over the executive.<sup>220</sup> As matters stood, two separate governments were able to use s.3

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<sup>219</sup> G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 184. This possibility was also acknowledged by Sir Harry Gibbs in “The Separation of Powers – A Comparison” (1987) 17 *F.L.Rev.* 151, 154 (“the system of responsible government could have been regarded as defining the full extent to which the legislative and executive functions were to be mixed” (citing Sawyer)). For a not dissimilar argument see O. Dixon, “The Separation of Powers in the Australian Constitution” (1942) *American Foreign Law Association, Proceedings No.24*, 5 and in relation thereto G. Winterton “Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 186-187.

<sup>220</sup> A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 4-5; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 158.

to enact (bearing in mind the Henry VIII clause) two fundamentally different policies in relation to industrial organization on the Australian waterfront.<sup>221</sup>

If the effect of *Dignan* was to recognize only a “nominal”<sup>222</sup> separation between the federal legislative and executive powers, it confirmed that the federal judicial power would continue to be treated differently.<sup>223</sup> Isaacs J. had shown in *Munro* that this aspect of the separation doctrine could be flexibly applied and did not necessarily merit Robson’s “antique and rickety chariot” description. Nonetheless, under the doctrine certain functions were to remain the exclusive preserve of the courts, although precisely *which* functions would vex the High Court forever more. Reflecting on the three decades of constitutional interpretation in relation to Chapter III outlined above, the overarching criticism which can be directed to the Court in this period, including the contributions of Isaacs J. himself, was its failure to offer a systematic analysis of the object or purpose of the separation doctrine in the Australian setting. As has been seen, the Convention Debates offered limited insight into whether a constitutional separation of powers was intended in Australia in the first place, let alone much of value in relation to the normative content of such a doctrine. And although Isaacs J. in *Huddart, Parker and Inter-State Commission* invoked tradition, the impartial administration of justice and, more broadly, the rule of law to support the exclusive vesting of judicial power in Chapter III courts, these ideas were not fleshed out in detail. They provided the basic justifications for a separation of the federal judicial power, but readers were left to ascertain for themselves how these conceptions served to set limits to the separation doctrine and give meaning to the generalized notion of “judicial power”. An American writer, reflecting on the history of the separation maxim in his own country, has observed that:

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<sup>221</sup> See above fn.181 of this chapter.

<sup>222</sup> G. Winterton, “Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 186.

<sup>223</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 161.



“Long ago Justice Holmes pointed out that legal concepts like ‘executive, judicial, and legislative’ are not ‘things’ that ‘have’ immutable existences; rather, they are constructs that we create to serve purposes, and these purposes should define their reach and measure.

As long as the courts persist in analyzing separation of powers questions by asking whether a particular function ‘is’ executive or legislative [or, one might add in the Australian context, judicial], their task will be hopeless. Only when they begin to attack these problems by abstracting and elaborating theories of what goals separation of powers law should serve, and then asking whether a particular function should be deemed to be executive in light of those goals, can they hope to make any progress.”<sup>224</sup>

Isaacs J.’s dominant principle of demarcation needs this theoretical abstraction and elaboration. Thus the following chapter attempts to construct an Australian theory of the separation of powers.

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<sup>224</sup> E.D. Elliott, “Why Our Separation of Powers Jurisprudence Is So Abysmal” (1989) 57 *Geo. Wash. L. Rev.* 506, 527 (fn. omitted).

## **CHAPTER 3 - THE DOCTRINE OF SEPARATION OF POWERS AND THE RULE OF LAW: AN AUSTRALIAN PERSPECTIVE**

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”  
*The Federalist No.47* in B.F. Wright (ed), *The Federalist* (1961) 336  
(James Madison).

The emerging Chapter III jurisprudence in Australia, founded largely as it is on the doctrine of the separation of federal judicial power and the principle of judicial independence, draws on theories of constitutionalism dating back many centuries. This chapter is an attempt to trace, albeit in broad outline, the historical development of those theories and to discern their essential content in the Australian setting. The object is to identify an Australian version of the separation doctrine which will provide a coherent organizing or guiding principle in cases involving the judicial power of the Commonwealth.

### **1. The Doctrine of Separation of Powers in Political and Constitutional Theory**

The separation of powers has a long history and, in its modern form, can be traced back to a series of political philosophers and pamphleteers writing amidst the turmoil of the English Civil War.<sup>1</sup> Yet, despite this heritage, there are surprisingly few detailed surveys of the doctrine. The leading theoretical works are W.B. Gwyn's, *The Meaning of the Separation of Powers* published in 1965 and M.J.C. Vile's *Constitutionalism and the Separation of Powers* published in 1967. Gwyn's book explores the objectives associated with the separation of powers in the century or so prior to the framing of the United States Constitution. Vile's text, by contrast, is a comprehensive survey of the doctrine from earliest times. Read together, these two books still provide the best account of the doctrine of the separation of powers as a theory of government.

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<sup>1</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) esp. chs 2-4; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 38-52.

Gwyn defines the separation doctrine as comprising two elements – a classification of functions and a normative prescription:

“*In the first place*, the separation of powers, as suggested by the very term, incorporates an analysis of governmental ‘powers’, or functions as we might say today. What is more, the analysis distinguishes between law-making and the implementation of the law in particular instances. *The second characteristic* of the separation of powers is that it is a normative doctrine prescribing certain governmental arrangements which should be created or perpetuated in order to achieve certain desirable ends.”<sup>2</sup>

Vile’s general description of the separation doctrine, although not identical, is also structured around these two basic ideas.<sup>3</sup> And both elements coalesce, for example, in James Madison’s classical statement of the doctrine of separation of powers in the *Federalist Papers* where he claimed that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny”.<sup>4</sup>

As both Gwyn and Vile make clear, until the latter half of the eighteenth century the functions of government were usually identified as either legislative or executive in nature,<sup>5</sup> a distinction corresponding broadly to that between the making of law and the giving effect to law. Under this two-way division, the functions of government which today would be classified as “judicial” were encompassed within the executive power.<sup>6</sup> Despite this particular classificatory approach, it is apparent that early theorists were

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<sup>2</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 5 (emphasis added).

<sup>3</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 12-13.

<sup>4</sup> *The Federalist No. 47* in B.F. Wright (ed), *The Federalist* (1961) 336.

<sup>5</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 5; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 14-15, 28-30. This approach can still be discerned as late as 1765 in the writings of Blackstone (see below pp.95-100 of this chapter).

<sup>6</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 5; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 28-30. James Wilson, a prominent framer of the United States Constitution and foundation Justice of the Supreme Court speaking of the doctrine of the separation of powers in a lecture series delivered at the College of Philadelphia in 1790-1791 said of the judicial function: “[t]he third great division of the powers of government is the judicial authority. It is sometimes considered as a branch of the executive power; but inaccurately” (quoted in M. Sharp, “The Classical American Doctrine of ‘The Separation of Powers’” (1935) 2 *U. of Chi.L.Rev.* 385, 414). See also the approach of Blackstone below pp.95-100 of this chapter).

nonetheless conscious of a distinction between the two types of “executive” function.<sup>7</sup> The importance of the exercise of judicial power by an independent judiciary pre-dates the development of a general doctrine of the separation of powers as an element in English legal and political thought.<sup>8</sup> And by 1701 and the passage of the *Act of Settlement*,<sup>9</sup> the independence of the judiciary from the government of the day had become a generally accepted principle of English constitutional law.<sup>10</sup> Moreover, under the two-fold division of the functions of government, much of what was described as “executive” would today be classified as “judicial” in nature – for prior to the emergence of the modern regulatory state and its accompanying bureaucracy, the courts, and their decisions in civil and criminal cases, were the key interface between law and the community.<sup>11</sup>

The more familiar three-way division of the functions of government employed, for example, by Madison in *The Federalist* can be attributed to the man he described as “the celebrated Montesquieu”.<sup>12</sup> Although it is possible to find divisions of the functions of

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<sup>7</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 5-8; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 30-31.

<sup>8</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 6-7; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 30-32; W. Holdsworth, *A History of English Law* vol.5 (2nd ed) (1937) 346-350.

<sup>9</sup> 12 & 13 Will., c.2 providing that “Judges’ commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them” (quoted in *ibid*, vol.6, 234).

<sup>10</sup> *Ibid*, vol.6, 514; W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 7; S. de Smith and R. Brazier, *Constitutional and Administrative Law* (7th ed) (1994) 395-410, esp. 408-410, noting that only one judge has been removed under the terms of the *Act of Settlement*. To say that the independence of the judiciary is a principle of English constitutional law is not to deny the existence of certain exceptions to that principle, notably the place of the Law Lords in the House of Lords. However, as de Smith and Brazier point out, the Law Lords “generally abstain from politically controversial debate in the upper House” (*ibid* 21).

<sup>11</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 28-30.

<sup>12</sup> *The Federalist* No.47 in B.F. Wright (ed), *The Federalist* (1961) 337 (Madison). A. Vanderbilt in *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) 43-44 records that Madison had studied Montesquieu’s *The Spirit of the Laws* at Princeton University and that it was reputed that “his knowledge of it ‘was so accurate that twenty years after he had left Princeton he could quote it freely from memory without errors’” (quoting Carpenter, “Political Education in the Time of John Witherspoon” (1928) 28 *Princeton Alumni Weekly* 489). Note, however, that Madison became somewhat less enamoured of Montesquieu in the post-ratification years (M. Bergman, “Montesquieu’s Theory of Government and the Framing of the American Constitution” (1990) 18 *Pepperdine L.R.* 1, 39).

government into legislative, executive and judicial which pre-date Montesquieu,<sup>13</sup> it was Montesquieu's *The Spirit of the Laws* published in 1748 which propagated this approach. And only forty years after its appearance, Montesquieu's classification, along with a corresponding three-fold division of the branches of government, was adopted by Madison and his fellow framers as part of the fundamental law of the United States of America. Although he was an enthusiastic supporter of Montesquieu's formulation of the separation of powers, Madison was conscious of the fact that it was not always easy to ascertain when a function was "legislative", "executive" or "judicial" in character. As he observed in an essay published in 1793:

"Montesquieu, however, has rather distinguished himself by enforcing the reasons and the importance of avoiding a confusion of the several powers of government, than by enumerating and defining the powers which belong to each particular class."<sup>14</sup>

These problems in adequately defining legislative, executive and judicial power have been reiterated by commentators ever since<sup>15</sup> and borne out in practice.<sup>16</sup> Nonetheless, the division of the functions of government into legislative, executive and judicial has persisted, and over a century after the formulation of the United States Constitution its three-fold classification of functions and branches was mirrored in the Constitution of

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- <sup>13</sup> In this regard, both Gwyn and Vile refer to the writings of John Sadler whose *Rights of the Kingdom* first appeared in 1649 and George Lawson whose *An Examination of the Political Part of Mr Hobbs his Leviathan* appeared in 1657. Vile also mentions the three-fold classification of the functions of government adopted by Charles Dallison in *The Royalists Defence* in 1648. See W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 8, 54; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 31-32.
- <sup>14</sup> From *Helvidius No.1*, *The National Gazette*, Aug. 24, 1793 in 15 *The Papers of James Madison* 266-268 quoted in M. Bergman, "Montesquieu's Theory of Government and the Framing of the American Constitution" (1990) 18 *Pepperdine L.R.* 1, 39. See also Madison's observations about the meaning of "legislative", "executive" and "judicial" in *The Federalist No.37* in B.F. Wright (ed), *The Federalist* (1961) 269. But cf the views of the anti-federalists who criticized the draft United States Constitution for not sufficiently separating the functions of government, a criticism founded upon the assumption that Montesquieu's work provided clear guidelines for the division of the powers of government (B. Manin, "Checks, Balances and Boundaries: the Separation of Powers in the Constitutional Debate of 1787" in B. Fontana (ed), *The Invention of the Modern Republic* (1994) esp. 50).
- <sup>15</sup> See, eg, M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 318-320; G. Sawyer, "The Separation of Powers in Australian Federalism" (1961) 35 *A.L.J.* 177, 177-178; G. Winterton, *Parliament, The Executive and the Governor-General* (1983) 66.
- <sup>16</sup> See generally below ch.5, esp. pp.170-171.

the Commonwealth of Australia. Thus, the separation of powers jurisprudence of America and Australia is, by virtue of their written Constitutions, necessarily frozen in the Montesquieuian mould.

The doctrine of the separation of powers is, however, concerned with more than simply attaching labels (legislative, executive and judicial) to different governmental activities and institutions. As Gwyn emphasizes, the separation of powers “is not taxonomic”,<sup>17</sup> but is instead a “normative”<sup>18</sup> or purposive doctrine, drawing upon a classification of functions to prescribe “certain governmental arrangements which should be created or perpetuated in order to achieve certain desirable ends”.<sup>19</sup> Ultimately, the doctrine is one of limited government,<sup>20</sup> but in most summations of the theory, this basic tenet of constitutionalism is little more than restated in vague, aspirational language. Madison’s contribution was that a separation of powers would help forestall “tyranny” and preserve “liberty”.<sup>21</sup> Other representative examples suggest that the doctrine is directed towards “the preservation of political safeguards against the capricious exercise of power”,<sup>22</sup> “the protection of individual liberty against arbitrary actions of governmental officials”<sup>23</sup> or, more simply, “protecting the individual from oppression”.<sup>24</sup>

Assuming that these verbal formulae express the same (albeit vague) constitutional goal, a number of views have emerged as to the arrangements necessary to fulfil this goal. Vile has suggested that a “pure” version of the separation doctrine would demand, in the name of “political liberty”, that each of the three branches of government (legislature,

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17 W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 8.

18 *Id.*

19 *Ibid* 5.

20 As Professor Winterton has neatly observed, “[d]ividing governmental power is the oldest device for restraining it” (G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185).

21 *The Federalist No.47* in B.F. Wright (ed), *The Federalist* (1961) 336-337.

22 L. Jaffe and N. Nathanson, *Administrative Law: Cases and Materials* (4th ed) (1976) 33.

23 M. Conant, “Introduction” in A. Vanderbilt, *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) v.

24 G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 177.

executive and judiciary) be strictly confined to its own function, there being in addition no admixture of personnel among the three branches.<sup>25</sup> It is generally accepted, however, that such a rigid and inflexible view of the separation of powers would be unworkable and unsustainable in practice.<sup>26</sup> Not only would it be impossible, for example, to delegate law-making functions to the executive, but relatively “strict” or “pure” versions of the separation of powers are vulnerable to collapse under the weight of unrestrained legislative encroachment upon the executive and judicial domains.<sup>27</sup> Thus Vile notes that the separation doctrine has seldom been formulated or applied in this form.<sup>28</sup> Instead, it is usually modified to accommodate a limited blending of functions, most notably via its conjunction, in the United States Constitution, with the doctrine of checks and balances.<sup>29</sup> In Australia, the separation of powers has had to bend, not only to a limited system of checks and balances as represented, for example, by the Crown’s formal role in the legislative process, but also to the demands of responsible government.<sup>30</sup>

As a matter of logic (and leaving to one side other theories, such as responsible government, which might also have to be accommodated within a constitutional framework) the arrangement of the functions of government under the separation doctrine, and any consequential restraints upon the manner of exercise of functions so allocated, should be governed by the objects or purposes sought to be attained by adoption of the doctrine. But as noted above, the objects of the separation doctrine tend to be expressed in broad and general terms. Thus, a former Chief Justice of the High Court has endorsed a description of the separation of powers as “a political maxim

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<sup>25</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 13.

<sup>26</sup> See, eg, *Le Mesurier v. Connor* (1929) 42 C.L.R. 481, 519-520 per Isaacs J.; *Harris v. Caladine* (1991) 172 C.L.R. 84, 161 per McHugh J. and Madison in *Federalist No. 47* referring to the “impossibility and inexpediency of avoiding any mixture whatever of these departments” (B.F. Wright (ed), *The Federalist* (1961) 339).

<sup>27</sup> See, eg, *Federalist No. 48* in B.F. Wright (ed), *The Federalist* (1961) 343-347 (Madison).

<sup>28</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 13.

<sup>29</sup> *Ibid* 18. And see generally *ibid* ch.6.

<sup>30</sup> *Victorian Stevedoring and General Contracting Co. Pty Ltd. and Meakes v. Dignan* (1931) 46 C.L.R. 73. And see generally, H. Gibbs, “The Separation of Powers – A Comparison” (1987) 17 *F.L.Rev.* 151.

rather than a technical rule of law”,<sup>31</sup> a view which, as the separation doctrine in Australia and America is more than a constitutional convention, seems to convey the same idea as Jaffe and Nathanson when they suggest that the doctrine should be understood “as the expression of a general attitude rather than inexorable table of organization”.<sup>32</sup> Moreover, adding to this lack of specificity, the objects generally ascribed to the separation of powers are not unique to it. The old theory of the mixed constitution, for example, with its balancing of the different estates or classes in society, was also promoted by its adherents as entrenching structural barriers to the undue accumulation of power in the one set of hands and arbitrary government.<sup>33</sup>

Thus, the normative content of the separation doctrine tends not to be spelt out in detail and may not even lend itself to rigorous definition. As a consequence, the *process or means* by which a particular arrangement of the functions of government serves to enhance liberty or to prevent the arbitrary use of power may also be incapable of precise description. Nonetheless, and to focus on the Australian situation, if separation of powers, along with federalism and representative government, is one of “three main general doctrines of government which underlie the Constitution and are implemented by its provisions”,<sup>34</sup> and if “fundamental implications”<sup>35</sup> can be drawn from the Constitution’s adoption of the doctrine of separation of powers, then the Australian constitutional lawyer is obliged to explore that doctrine on a theoretical level and to attempt to understand *why* the concentration of two or more powers in the one person or body, particularly any mixing of the judicial power, is so inimical to “liberty”.

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31 *Ibid* 151 (fn. omitted).

32 L. Jaffe and N. Nathanson, *Administrative Law: Cases and Materials* (4th ed) (1976) 30.

33 M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 36; M.H. Redish and E.J. Cisar, “‘If Angels Were to Govern’: The Need for Pragmatic Formalism in Separation of Powers Theory” (1991) 41 *Duke L.J.* 449, 458.

34 *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1, 69-70 per Deane and Toohey JJ. In light of *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 it is probably now more correct to refer in this summation to “representative and responsible government”, rather than representative government alone.

35 *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1, 70 per Deane and Toohey JJ. As to which implications see generally G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 and below chs 6 and 7.



But at this very point the Australian constitutionalist encounters a methodological stumbling block. As was shown in Chapter One, references to the doctrine of the separation of powers in the constitutional decade of the 1890s were sparse, to say the least.<sup>36</sup> And Sir Samuel Griffith, one of the leading framers of the Australian Constitution, far from regarding Montesquieu as an “oracle”<sup>37</sup> as had the American framers, was moved to criticize and even faintly to disparage him. As was pointed out in Chapter One, at the 1891 Convention when discussing the form which the new federal executive might take, Griffith observed that:

“the framers of the American Constitution had been frightened by the tendency then lately exhibited in the United Kingdom of ministers to overawe Parliament, and they thought it extremely desirable to separate the executive and legislative branches of government, following the arguments of a great writer – I should rather say a celebrated writer – of those days, Montesquieu, the wisdom of whose observations and the accuracy of whose deductions and assumption of principles may be, I submit with great respect, very open to doubt.”<sup>38</sup>

Although it would be wrong to make too much of this comment of Griffith,<sup>39</sup> the fact remains that the experience of the Australian framers, unlike that of their United States counterparts, does not lead the modern commentator committed to understanding the separation of powers at federal level directly to the writings of persons such as Locke and Montesquieu. Yet, in the 1990s, a legally binding doctrine of the separation of federal judicial power is an undeniable (indeed, vigorous) part of our federal framework of government. And although its recognition as such can be attributed to the judicial efforts of Isaacs J. in the first two decades of federation,<sup>40</sup> Isaacs J.’s contribution was not made in a vacuum; it was only possible and only comprehensible against the

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<sup>36</sup> See above ch.1.

<sup>37</sup> *Federalist No.47* in B.F. Wright (ed), *The Federalist* (1961) 337 (Madison).

<sup>38</sup> *Official Report of the National Australasian Convention Debates* (1891) 35.

<sup>39</sup> Nonetheless, the comment is consistent with Griffith C.J.’s derisory treatment of the separation of powers argument in *Baxter v. Ah Way* (1909) 8 C.L.R. 626, 634 (in relation to which see above pp.27-29 (ch.2)). But note that neither set of remarks expressly dealt with the judicial power which Griffith C.J. maintained in *Huddart, Parker and Co. Proprietary Ltd. v. Moorehead* (1909) 8 C.L.R. 330, 355 was exclusively vested in the courts mentioned in s.71 of the Constitution.

<sup>40</sup> See below ch.2.

backdrop of several centuries of political and constitutional thought to which identities such as Locke and Montesquieu were leading contributors.

Of course, the joint majority judges in the *Boilermakers' Case* may be seen to question this in their rhetorical observation:

“If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss.1, 61 and 71. It would be difficult to treat it as a mere draftsman’s arrangement.”<sup>41</sup>

Even more direct were the members of the Privy Council in the same case. Expressing their general agreement with the view of the majority below that the Constitution incorporated a legally binding doctrine of the separation of powers, their Lordships said:

“first and last, the question is one of construction and they [their Lordships] doubt whether, had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached”.<sup>42</sup>

But Windeyer J. rightly retorted in *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*<sup>43</sup> that it was “impossible” to construe the Constitution “on the assumption that Montesquieu had never lived”.<sup>44</sup> And as Professor Sawyer has pointed out, “[i]t is absurd to suppose a person reading *and understanding* the Constitution without any knowledge of its history and of the history of European political thought”.<sup>45</sup> Thus, the Australian commentator is inevitably sent back to this source in order more fully to understand the separation of powers as it exists in the Australian setting.

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41 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 275.

42 *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 540.

43 (1970) 123 C.L.R. 361.

44 *Ibid* 392.

45 G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 179 (emphasis in original).

It is proposed then to examine in turn the contribution of four sets of authors to the development of the doctrine of the separation of powers as a theory of limited government, paying particular attention to the separation of judicial functions and focussing generally on the objects or purposes of the doctrine. Beginning with Locke and Montesquieu as the two most famous theoretical exponents of the doctrine of separated powers, attention will then be directed to the writings of Blackstone and the American federalists; the former because of his English restatement of Montesquieu (which restatement was referred to by Isaacs J. in the case which was the precursor to his Honour's recognition of the separation of powers as a fundamental principle of the Australian Constitution<sup>46</sup>) and the latter because of their insight into the workings of the United States Constitution which has always been a model for Australian protagonists of separation. The principle of judicial independence will also be briefly explored in light of its intersection with the separation of federal judicial power.

In reviewing these various contributions, it should be acknowledged that the discussion which follows draws in large part from the original and penetrating analysis of the normative content of the separation doctrine offered by Professor Gwyn in the *Meaning of the Separation of Powers*. The overarching object of this exercise is to identify an Australian version of the doctrine of the separation of powers at once securely anchored in the Western constitutional tradition but reflecting our distinct constitutional inheritance.

## **2. Four Formulations of the Doctrine of the Separation of Powers: Locke, Montesquieu, Blackstone and the American Federalists**

### **(a) Locke**

The question whether John Locke's *Second Treatise of Government* expounds a doctrine of separation of powers has been much debated, the scholarly introduction to one of the

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<sup>46</sup> *Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330, 382-383.

standard editions of this work proclaiming the editor's opinion that Locke did not advocate a doctrine of necessary separation.<sup>47</sup> Others disagree,<sup>48</sup> but it is not proposed here to enter into this argument; for although the present author has no difficulty in discerning a doctrine of separation in Locke, this is less important than the historical fact that the *Second Treatise* has been used (whether rightly or wrongly) to construct a Lockean theory of separation. Locke's influence, particularly over the framers of the United States Constitution,<sup>49</sup> thus compels an examination of his work.

Locke's *Second Treatise* contains a three-way division of the functions of government. This division is not, however, that to be found in the Australian and United States Constitutions. It is instead between the "Legislative, Executive, and Federative Power[s] of the Commonwealth",<sup>50</sup> the legislative power being that of "*direct[ing] how the Force of the Commonwealth shall be employ'd*" (that is, directing the course of government policy) by the making of laws,<sup>51</sup> the executive power being that of executing such laws,<sup>52</sup> and the federative power that belonging to a government in its dealings with other nations.<sup>53</sup> It should be stressed that in his depiction of civil or political society, Locke was not unmindful of the role of the judges and on several occasions referred to the need for an independent judiciary – his "*indifferent and upright*

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47 J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 119-120.

48 Many of the competing views in this debate are referred to in W.B Gywn, *The Meaning of the Separation of Powers* (1965) 66-70. Gywn's own opinion is that the *Second Treatise* does incorporate a normative doctrine of the separation of powers (*ibid* 70). M.J.C. Vile in *Constitutionalism and the Separation of Powers* (1967) 58 also classes Locke as a separation of powers theorist. A more recent case in favour of Locke as presenting a "genuine" theory of separation can be found in S. Ratnapala, "John Locke's Doctrine of the Separation of Powers: A Re-Evaluation" (1993) 38 *Am.J.Jurisprud.* 189.

49 M.H. Redish and E.J. Cisar, "'If Angels Were To Govern': The Need for Pragmatic Formalism in Separation of Powers Theory" (1991) 41 *Duke L.J.* 449, 457-458 referring to primary sources attesting to Locke's influence in America during the "framing period" as an exponent of the separation of the functions of government. See also M. Sharp, "The Classical American Doctrine of 'The Separation of Powers'" (1935) 2 *U. of Chi.L.Rev.* 385, 387-389.

50 J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 364 (heading to Locke's Ch.XII, emphasis omitted).

51 *Id* (emphasis in original).

52 *Ibid* 364-365.

53 *Ibid* 365.

*Judges*".<sup>54</sup> But like many other theorists of his generation, he grouped together under one label what we would today describe as executive and judicial functions.<sup>55</sup> For example, in describing the progression from the state of nature to political society, Locke said that in political society:

"all private judgement of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by Men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society, with such Penalties as the Law has established: Whereby it is easie to discern who are, and who are not, in *Political Society* together. Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, *are in Civil Society* one with another: but those which have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect *state of Nature*."<sup>56</sup>

Later references establish that the maker of the settled, standing and indifferent rules mentioned at the beginning of this passage is the legislature,<sup>57</sup> the "execution of those Rules" then being conceived in terms of the judicial enforcement of those rules in controverted cases of right. Thus, Locke runs together the execution and the judicial enforcement of the law, and on occasions, as Dr Suri Ratnapala has shown at greater length, uses "executive power" when he means to refer to the judicial function.<sup>58</sup> Locke's later assertion that the executive and federative powers should be in the same set of hands<sup>59</sup> does not derogate from this conclusion, for although one cannot contemplate the "indifferent and upright" judges wielding the powers of foreign

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54 *Ibid* 353. See also *ibid* 351 where Locke describes the state of nature as wanting "a known and indifferent Judge, with Authority to determine all differences according to the established Law" (emphasis in original). And see also *ibid* 326-327 and Locke's explanation as to why absolute monarchy is inconsistent with civil society.

55 See above p.75 of this chapter.

56 J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 324 (emphasis in original).

57 *Ibid* 355-363 (Locke's Ch.XI "Of the Extent of the Legislative Power").

58 S. Ratnapala, "John Locke's Doctrine of the Separation of Powers: A Re-Evaluation" (1993) 38 *Am.J.Jurisprud.* 189, 211-212.

59 J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 365-366.

relations, other executive officials may. Moreover, to the extent that the above quoted passage in its description of the community as “Umpire” suggests that Locke conceived of the judicial power as the “general attribute of the state”,<sup>60</sup> this too is consistent with certain taxonomies of his time<sup>61</sup> and does not exclude recognition of a specialist judicial function forming but a component of overall public power.

That part of the *Second Treatise of Government* which is most frequently referred to in support of the proposition that Locke developed this description of the functions of government into a doctrine of the separation of powers bears quoting in full. Having observed that laws may be made in but little time, yet require a perpetual or constant execution, Locke claimed that in consequence “there is no need, that the *Legislative* should be always in being, not having always business to do”. He continued:

“And because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in well order’d Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative* Power is put into the hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good.

But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution*, or an attendance thereunto: Therefore ‘tis necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.”<sup>62</sup>

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60 *Ibid* 120 (quoting Laslett from his introduction).

61 M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 28-31.

62 J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 364-365 (emphasis in original, paragraph numbers omitted).

And to reinforce this point, Locke asserted in his next chapter that “in all moderated Monarchies, and well-framed Governments” the “Legislative and Executive Power are in distinct hands”.<sup>63</sup>

Gwyn has pointed out that these passages offer two justifications for the separation of the legislative and “executive” powers. In the first place, the different temporal demands involved in making law and giving effect to law suggest an efficiency model.<sup>64</sup> Although this particular efficiency model may to some extent be anachronistic – in a modern representative legislature, the role of law-maker can be a full-time responsibility – there has always been an efficiency dimension to separation of powers thinking conceived of in terms of specialization of function. Legislative assemblies cannot act with the “speed” and discretion necessary for the performance of certain governmental functions, such as the conduct of relations with foreign nations.<sup>65</sup> Moreover, it makes sense for judicial functions, for example, to be exercised by those with specialist legal skills – hence Sir Edward Coke’s famous response to the assertion of a royal right on the part of James I to adjudge such cases as he chose in person; His Majesty, said Coke, “was not learned in the laws of his realm of England”.<sup>66</sup> This, of course, is not to claim that a separation of the functions of government is intrinsically efficient. To the contrary, the inefficiency of the doctrine in the sense that it can impede an allocation of the functions of government in accordance with such criteria as “cost minimization” and “streamlined performance” is one of the major complaints directed against it.<sup>67</sup> Nonetheless, a system of government whereby one (or several) branches

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<sup>63</sup> *Ibid* 374.

<sup>64</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 77. See also M. Sharp, “The Classical American Doctrine of ‘The Separation of Powers’” (1935) 2 *U. of Chi.L.Rev.* 385, 388.

<sup>65</sup> M. Richter, *The Political Theory of Montesquieu* (1977) 88.

<sup>66</sup> *Prohibitions Del Roy* (1607) 12 Co.Rep. 63, 65; 77 E.R. 1342, 1343. Note, however, that the appointment of legally-trained persons to federal judicial office in Australia is not a constitutional imperative (see below p.38 fn.58 (ch.2)).

<sup>67</sup> See, eg, the comments of Professor Sawyer in G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 177. Consider also in this context the “registration and enforcement” regime for H.R.E.O.C. determinations struck down by the High Court in *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245 (discussed below pp.181-186 (ch.5)).

served indifferently, but still expertly, as legislator, executor and judge is hard to imagine.

Secondly, the above-quoted passages from Locke rationalize the separation of legislative and executive functions in terms of the values linked to the rule of law.<sup>68</sup> Human frailty being what it is, were the one body of persons to act as both legislator and executor “they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community”. The legislators should be subject to the laws they make “which is a new and near tie upon them, to take care, that they make them for the publick good”.<sup>69</sup> Thus, by separating the legislative and executive powers and placing them in different hands, the ideal of a limited government, operating under the law and in the public interest, is promoted. Moreover, the kindred rule of law notion of a society governed by established laws which are applied fairly and impartially to all in the community is also associated by Locke with a separation of the legislative and executive functions. This can be discerned in part in Locke’s claim that absolute monarchy “can be no Form of Civil Government at all” for:

“he being suppos’d to have all, both Legislative and Executive Power in himself alone, there is no Judge to be found, no Appeal lies open to any one, who may fairly, and indifferently, and with Authority decide, and from whose decision relief and redress may be expected of any Injury or Inconveniency, that may be suffered from the Prince or by his Order”.<sup>70</sup>

In other words, when legislative and executive powers are combined in the one set of hands, and remembering here Locke’s composite use of the term “executive power”, law ceases to be distinguishable from individual whim; individuals affected by the “illegal” and unjust actions of government have no means of redress, save revolution.

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68 W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 75, 77.

69 J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 364.

70 *Ibid* 326. And see W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 71.



It is submitted that the above point also flows – albeit indirectly – from Locke’s summary of why men leave the state of nature and form political societies. They do so, said Locke, to preserve their property, “[t]o which in the state of Nature there are many things wanting”:

“*First*, There wants an *establish’d*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them. For though the Law of Nature be plain and intelligible to all rational Creatures; yet Men being biassed by their Interest, as well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases.

*Secondly*, In the State of Nature there wants a *known and indifferent judge*, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases.

*Thirdly*, In the state of Nature there often wants *Power* to back and support the Sentence when right, and to *give* it due *Execution*. They who by any Injustice offended, will seldom fail, where they are able, by force to make good their Injustice: such resistance many times makes the punishment dangerous, and frequently destructive, to those who attempt it.”<sup>71</sup>

Thus, as Ratnapala points out, according to Locke “[s]ociety is advantageous precisely for the reason that it differentiates these functions” of law making and law enforcement<sup>72</sup> – the importance of which differentiation, in terms of the above-mentioned rule of law values, was further propounded by Montesquieu.

### **(b) Montesquieu**

That Montesquieu espoused a normative or purposive doctrine of the separation of powers in *The Spirit of the Laws* is undoubted.<sup>73</sup> This book first appeared in 1748, and although the notion of a separation of powers was part of the currency of English political thought a century prior to this event, it is Montesquieu’s name which today is

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<sup>71</sup> J. Locke, *Two Treatises of Government* (P. Laslett ed, 1988) 351 (emphasis in original, paragraph numbers omitted). See also *ibid* 353.

<sup>72</sup> S. Ratnapala, “John Locke’s Doctrine of the Separation of Powers: A Re-Evaluation” (1993) 38 *Am.J.Jurisprud.* 189, 206.

<sup>73</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 104.

most commonly linked to the doctrine.<sup>74</sup> Montesquieu set out his version of the separation of powers in Book 11, Chapter 6 of *The Spirit of the Laws* under the heading “On the constitution of England”. Montesquieu spent two years in England between 1729 and 1731 and was greatly impressed by that country’s system of government. England, he wrote, was the “one nation in the world whose constitution has political liberty for its direct purpose”,<sup>75</sup> this constitutional liberty being attributable in large part to the separate exercise of the three powers of government (legislative, executive and “the power of judging”) but also, it should be said, to the involvement of the three estates (King, lords and commons) in the legislative process.<sup>76</sup> Thus, Montesquieu’s doctrine of the separation of powers was presented, not simply as an abstract theory, but as a representation of an existing constitutional structure. In consequence, considerable energy has been invested in examining the accuracy of his depiction of the mid-eighteenth century English Constitution, the orthodox conclusion being that Montesquieu failed to account for such departures from the maxim of separation as the emergence of the cabinet system.<sup>77</sup> Other commentators, more forgiving of Montesquieu, suggest that he was not attempting a scientific analysis of the English Constitution, but rather seeking to present an idealized framework of government drawing upon the English model.<sup>78</sup> Whichever view is correct, the profound influence of Montesquieu’s doctrine of separation cannot be denied.

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74 That Montesquieu drew inspiration for his separation doctrine from English writers is clear, although there is some debate as to whether Locke or Bolingbroke was his critical influence. See R. Shackleton, “Montesquieu, Bolingbroke, and the Separation of Powers” in R. Shackleton (D. Gilson and M. Smith eds), *Essays on Montesquieu and on the Enlightenment* (1988) 3.

75 Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 156.

76 *Ibid* 160.

77 For example, A. Vanderbilt, *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) 45 claims that “Montesquieu failed, among other things, to see the King’s role in legislation, the dual position of the House of Lords as the high court and the upper branch of the legislature, and the beginnings of ministerial government which would lead in due season to the supremacy of Parliament”. Montesquieu did make note, however, of the two former phenomena. See Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 163-164.

78 M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 84-85.

It has already been observed that the standard division of the functions of government into legislative, executive and judicial can be traced to Montesquieu. Oddly enough, Montesquieu began Book 11, Chapter 6 with a three-fold division of the functions of government virtually identical to that of Locke,<sup>79</sup> which division Montesquieu immediately and mysteriously abandoned to refer instead to “legislative power”, “executive power” and “the power of judging”.<sup>80</sup> Legislative power, said Montesquieu, was that of “making the laws”<sup>81</sup> expressing “the general will of the state”,<sup>82</sup> executive power involved “the execution of that general will”<sup>83</sup> and, it would seem, the “federative” powers – although Montesquieu did not use that term – of making war and peace and sending and receiving ambassadors;<sup>84</sup> and “the power of judging” was that by which the state “punishes crimes or judges disputes between individuals”.<sup>85</sup>

According to Montesquieu, “[a]ll would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers”.<sup>86</sup> More specifically, what would be lost was “political liberty”, which Montesquieu ultimately defined as “that tranquillity of spirit which comes from the opinion each one has of his security”. In order for a citizen to have this liberty, said Montesquieu, “the government must be such that one citizen cannot fear another citizen”<sup>87</sup> – “fear” in his broader political analysis being that spirit which primarily shapes society within a despotism.<sup>88</sup>

This link between the accumulation of governmental functions and political liberty Montesquieu sought further to elucidate. When legislative and executive powers are united, he wrote, “there is no liberty, because one can fear that the same monarch or

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<sup>79</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 156.

<sup>80</sup> *Ibid* 156-157.

<sup>81</sup> *Ibid* 157.

<sup>82</sup> *Ibid* 158.

<sup>83</sup> *Id.*

<sup>84</sup> *Ibid* 157.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> M. Richter, *The Political Theory of Montesquieu* (1977) 78-79.

senate that makes tyrannical laws will execute them tyrannically”.<sup>89</sup> Apart from the obvious point that the separate exercise of the functions of government helps insure against the possibility of an evil or corrupt faction assuming total power (and one is reminded in this regard of Madison’s reflection on the human condition – that “[i]f angels were to govern men, neither external nor internal controls on government would be necessary”<sup>90</sup>), it is difficult to know what this statement means. There are many possible objections to the combination of legislative and executive power, but it would be making too much of this statement, considered in isolation, to extract them from it. Gwyn, working from a slightly different translation of the phrase,<sup>91</sup> suggests that Montesquieu was asserting that persons invested with both powers “would make oppressive laws and execute them in such a way as to exempt themselves from the harsh provisions, or they would make oppressive laws and futher [sic] oppress the people by being under no legal limitations in the methods used in executing them”.<sup>92</sup> Hence Gwyn concludes that Montesquieu advocated the separation of legislative and executive powers “to maintain the rule of an impartial law made in the public interest”.<sup>93</sup> This view is arguably supported by a later passage where Montesquieu observed that a body exercising both legislative and executive functions “can plunder the state by using its general wills”,<sup>94</sup> a remark which hints at Locke’s objection to the unity of these powers – that under such a regime, law and the individual will of the ruler become indistinguishable. In addition, and again like Locke, Montesquieu acknowledged that the separate exercise of the legislative and executive powers was also important for reasons of efficiency; “[t]he executive power should be in the hands of a monarch” he wrote, “because the part of the government that almost always needs immediate action

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89 Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 157.

90 *The Federalist No. 51* in B.F. Wright (ed), *The Federalist* (1961) 356.

91 W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 104 where Gwyn describes the fear (according to his own translation) as being that “the same monarch or senate should enact tyrannical laws in order to execute them tyrannically”.

92 *Ibid* 104-105.

93 *Ibid* 105.

94 Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 157.

is better administered by one than by many, whereas what depends on legislative power is often better ordered by many than by one”.<sup>95</sup>

Turning his attention to “the power of judging”, Montesquieu painted a clearer picture of the relationship between the arrangement of the functions of government and political liberty. Were the power of judging joined to the legislative power, said Montesquieu, “the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator”.<sup>96</sup> In other words, one again finds expressed here the fundamental rule of law concern that the community should be governed by established, known laws which are applied to individual cases in a fair and impartial manner.<sup>97</sup> If judges were also legislators they would be politically aligned and liable to “capture” by a range of interests seeking legislative action of one kind or another. This would clearly imperil judicial independence of which Montesquieu was a proponent.<sup>98</sup> Moreover, legislator judges could alter the law to “pre-judge” the outcome of particular cases or pronounce legislative judgment in those cases without affording affected individuals a trial on the merits. In Montesquieu’s words, “[i]f judgments were the individual opinion of a judge, one could live in this society without knowing precisely what engagements one has contracted”.<sup>99</sup> And under such a system, no one would enjoy “that tranquillity of spirit which comes from the opinion each one has of his security”, a conception of liberty which surely implies some stability and “predictability” in the rules by which people live.<sup>100</sup> Against this background then, Montesquieu’s acceptance in Book 12, Chapter 19 of Parliament’s use of the bill of attainder is difficult to understand. “There are” he wrote, “in the states where one sets the most store by liberty, laws that violate it

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<sup>95</sup> *Ibid* 161. See also M. Sharp, “The Classical American Doctrine of ‘The Separation of Powers’” (1935) 2 *U. of Chi.L.Rev.* 385, 391; W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 108-109.

<sup>96</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 157.

<sup>97</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 105.

<sup>98</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 88.

<sup>99</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 158.

<sup>100</sup> R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1534.

for a single person in order to keep it for all. Such are what are called *bills of attainder* in England”.<sup>101</sup> Perhaps the best commentary on this Chapter of *The Spirit of the Laws* is the reaction to it on the part of the framers of the United States Constitution.

Montesquieu was held in such high regard by these men that “[a]t times the constitutional debate of 1787 came close to an exegesis of Montesquieu’s theories”.<sup>102</sup> Nonetheless, the United States Constitution expressly states that “No Bill of Attainder ... shall be passed”.<sup>103</sup>

Putting to one side the bill of attainder anomaly, a similar rule of law concern to that which inspired Montesquieu’s separation of the judicial and legislative powers underscored his treatment of the judicial and executive powers; were the two to be joined “the judge could have the force of an oppressor”,<sup>104</sup> presumably because all public force (whether exercised in accordance with “law” or not) could go potentially unchecked for the want of an independent arbiter of its validity.<sup>105</sup>

Reflecting on Book 11, Chapter 6 of *The Spirit of the Laws*, it is important to realize that Montesquieu believed that these objectives of the separation doctrine – a limited notion of efficiency and the promotion of political liberty via both the general diffusion of power and the creation of structural incentives to observance of the rule of law – could be achieved by something other than a strict or “pure” separation of functions.<sup>106</sup> Montesquieu’s conception of the separation doctrine admitted of some blending of functions and incorporated a system of checks and balances in order to prevent, in the main, the legislature from becoming over-mighty and “wip[ing] out all the other

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<sup>101</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 204.

<sup>102</sup> B. Manin, “Checks, Balances and Boundaries: the Separation of Powers in the Constitutional Debate of 1787” in B. Fontana (ed), *The Invention of the Modern Republic* (1994) 27.

<sup>103</sup> Art.1, s.9, cl.3. See also Art.I, s.10, cl.1 and R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1536-1537.

<sup>104</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 157.

<sup>105</sup> For Gwyn’s views, see W.B. Gywn, *The Meaning of the Separation of Powers* (1965) 106-108.

<sup>106</sup> See above pp.78-79 of this chapter.

powers”.<sup>107</sup> For example, he supported executive control of the summoning and dissolution of Parliament,<sup>108</sup> the executive veto in relation to legislation<sup>109</sup> and legislative scrutiny of “the manner in which the laws it has made have been executed”.<sup>110</sup> Furthermore, Montesquieu expressed no disquiet in relation to the judicial role of the House of Lords which he justified on the basis that the general judiciary could not modify the law when that law proved “too rigorous in certain cases”. Thus, in these exceptional situations, the House of Lords acting as an ultimate court of appeal could attune the law to remain commensurate with justice.<sup>111</sup>

In making at least some of these concessions, Montesquieu was undoubtedly attempting to reconcile his version of the separation of powers with his earlier claim that the English constitution was the exemplar of liberty. He might not, for example, have countenanced the judicial role of a house of lords or the bill of attainder if the English example were not before him.<sup>112</sup> But at the same time, Montesquieu clearly believed that a system of checks and balances was an essential concomitant of a doctrine of separated powers if those powers were to remain within their respective spheres and not unduly encroach, the one upon the other.

### (c) Blackstone

In contrast to Montesquieu, Sir William Blackstone was a commentator on English law, not a legal or political theorist. Nonetheless, his *Commentaries on the Laws of England* published in four parts between 1765 and 1769 are worthy of analysis in this context. Their significance, in terms of the development and subsequent dissemination of the doctrine of the separation of powers, is that Blackstone was, in the words of Vile, a

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<sup>107</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 162. See generally W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 109-113.

<sup>108</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 162.

<sup>109</sup> *Ibid* 164.

<sup>110</sup> *Ibid* 162.

<sup>111</sup> *Ibid* 163; W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 105-106.

<sup>112</sup> *Id.*

“disciple” of Montesquieu<sup>113</sup> and freely adopted many of Montesquieu’s ideas in relation to separation of powers. So, for example, when Isaacs J. in *Huddart, Parker and Co. Proprietary Ltd v. Moorehead*<sup>114</sup> was confronted with the question whether s.15B of the *Australian Industries Preservation Act 1906* (Cth) invalidly conferred judicial power on the Comptroller-General of Customs, he downplayed the relevance of American authorities and instead quoted at length from Blackstone – comforted by the fact that “[s]till in the domain of purely British jurisprudence there is to be found sufficient to elucidate the problem”.<sup>115</sup> However, part of this “British” quotation was in fact Blackstone’s paraphrase of portion of Book 11, Chapter 6 of *The Spirit of the Laws* which French source Isaacs J. would probably have been reluctant explicitly to embrace.<sup>116</sup> Blackstone’s restatement of Montesquieu’s version of the separation of powers is thus worth exploring in full.

Blackstone was understandably not as systematic in his abstract analysis of the functions of government as either Locke or Montesquieu, but clearly recognized a primary distinction between legislative and executive power: “[w]ith us therefore in England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone”.<sup>117</sup> The executive power was, however, divisible in Blackstone’s hands into two parts – the one corresponding to the modern notion of executive power,<sup>118</sup> the other a highly developed conception of judicial power.<sup>119</sup> Thus, Blackstone wrote that the King:

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<sup>113</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 105, also describing Blackstone as one of “[t]he most important of Montesquieu’s disciples in England” (*ibid* 102).

<sup>114</sup> (1909) 8 C.L.R. 330.

<sup>115</sup> *Ibid* 382.

<sup>116</sup> See above pp.31-32 (ch.2).

<sup>117</sup> W. Blackstone, *Commentaries on the Laws of England* vol. 1 (1765) (facsimile ed, 1983, The Legal Classics Library) 142-143.

<sup>118</sup> For example, Blackstone included in this category the exercise of the prerogative powers of the crown and the issuing of proclamations by the King in pursuance of legislative authority (*ibid* 242 and 260-261).

<sup>119</sup> See M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 103-105.



“has alone the right of erecting courts of judicature: for, though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority.”<sup>120</sup>

Blackstone noted that although the King had originally dispensed royal justice in person, he could no longer validly assume this role:

“by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament.”<sup>121</sup>

And Blackstone went on to laud the measures taken in the *Act of Settlement* to “maintain both the dignity and independence of the judges in the superior courts”.<sup>122</sup> He even offered a definition of a “court” and “judicial power”. “A court” he wrote “is defined to be a place wherein justice is judicially administered”<sup>123</sup> in which “there must be at least three constituent parts”:

“the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex* or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and by it’s [sic] officers to apply the remedy.”<sup>124</sup>

Against this functional background, Blackstone echoed Montesquieu in declaring that the English constitution was unique in having “political or civil liberty” as its “very end and scope”.<sup>125</sup> The liberties of Englishmen, said Blackstone, “are coeval with our form

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120 W. Blackstone, *Commentaries on the Laws of England* vol.1 (1765) 257.

121 *Ibid* 258 (fn. omitted).

122 *Id.*

123 W. Blackstone, *Commentaries on the Laws of England* vol. 3 (1768) (facsimile ed, 1983, The Legal Classics Library) 23 (fn. omitted).

124 *Ibid* 25.

125 W. Blackstone, *Commentaries on the Laws of England* vol. 1 (1765) (facsimile ed, 1983, The Legal Classics Library) 6 (Blackstone describing England as “[a] land, perhaps the

of government".<sup>126</sup> More particularly, Blackstone believed that the liberties of Englishmen were preserved by that nation's mixed and balanced constitution, coupled with its broad separation of the functions of government. The legislature, in which resided the sovereign power of the state, was comprised of England's three classes or estates – the King, lords and commons. Each class brought to the deliberations of Parliament its own peculiar talents and perspective – monarchic, aristocratic and democratic respectively – and given that all three must concur in the enactment of legislation no one group could impose its will on the others without their consent.<sup>127</sup> The executive power was vested in the King alone, but was protected from legislative encroachment by the King's veto power.<sup>128</sup> The executive power was in turn kept within bounds by the power of the lords and commons to inquire into, impeach and punish the conduct of the King's "evil and pernicious counsellors".<sup>129</sup> In Blackstone's words; "herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other".<sup>130</sup>

But besides praising this "mixed and compounded constitution",<sup>131</sup> Blackstone also ascribed the liberties of his countrymen to separated powers, albeit clearly not in the "pure" or "stark" form.<sup>132</sup> And again, Blackstone's language is resonant of Montesquieu. Of the legislative and executive powers, Blackstone wrote:

"In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of

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only one in the universe, in which political or civil liberty is the very end and scope of the constitution" (citing Montesquieu)) and *ibid* 141 ("the English is the only nation in the world, where political or civil liberty is the direct end of it's [sic] constitution" (again, citing Montesquieu)).

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*Ibid* 123.

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*Ibid* 50-51.

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*Ibid* 149-150.

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*Ibid* 151.

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*Ibid* 150.

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*Ibid* 153.

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See above pp.78-79 of this chapter.

justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's [sic] own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone."<sup>133</sup>

As Gwyn points out,<sup>134</sup> this passage illuminates contemporary understanding of Montesquieu's indistinct claim that when legislative and executive powers are united, "there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically".<sup>135</sup> It is evident that for Blackstone, the objection to the accumulation of the two powers was yet again the consequent suspension of the rule of an established, known and impartially administered law.<sup>136</sup> The importance of the rule of law as so conceived pervades Blackstone's *Commentaries* and its significance in his thinking in distinguishing a tyrannical from a libertarian constitution is illustrated by his observation that:

"whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it."<sup>137</sup>

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<sup>133</sup> W. Blackstone, *Commentaries on the Laws of England* vol. 1 (1765) (facsimile ed, 1983, The Legal Classics Library) 142-143.

<sup>134</sup> W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 104-105.

<sup>135</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 157. Note though that Montesquieu and Blackstone may have been using "executive" here in slightly different senses – Blackstone's use of the term "enforcing" at the outset of the above-quoted passage and his reference to "dispenser of justice" may indicate that, unlike Montesquieu, he was using "executive" in the composite seventeenth century fashion.

<sup>136</sup> See W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 105. Blackstone also subscribed to the efficiency rationale for the separate exercise of the legislative and executive functions. See W. Blackstone, *Commentaries on the Laws of England* vol. 1 (1765) (facsimile ed, 1983, The Legal Classics Library) 50-51 where he observed that the executive power in England "is lodged in a single person", having "all the advantages of strength and dispatch".

<sup>137</sup> *Ibid* 129.

This rule of law theme is yet again explicit in Blackstone's Montesquieuian inspired treatment of the "judicial power". At the outset of the first volume of the *Commentaries*, Blackstone described the English judges as "the depository of the laws", "living oracles", each being "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land".<sup>138</sup> Against this background Blackstone subsequently wrote:

"In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe."<sup>139</sup>

And he went on to explain that if the judicial and executive powers were joined, "this union might soon be an over-ballance [sic] for the legislative" for the King's ministers of state might "be inclined to pronounce that for law, which was most agreeable to the prince or his officers".<sup>140</sup>

#### **(d) The American Federalists**

It was against this background provided by the writings of Locke, Montesquieu and Blackstone that the American doctrine of the separation of powers was conceived. Thus, when Madison proclaimed in *Federalist No. 47* that the accumulation of all the functions of government in the one set of hands "may justly be pronounced the very definition of tyranny"<sup>141</sup> and that "the preservation of liberty requires that the three great departments of power should be separate and distinct"<sup>142</sup> there is every reason to believe that he, echoing the above-mentioned authors, was concerned with the creation

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138 *Ibid* 69.

139 *Ibid* 259.

140 *Ibid* 260.

141 B.F. Wright (ed), *The Federalist* (1961) 336.

142 *Ibid* 337.

of an institutional and structural environment in which the basic values of the rule of law would be promoted.<sup>143</sup> Indeed, in *Federalist No.47*, Madison referred to the earlier-quoted passages from *The Spirit of the Laws* in which Montesquieu had explained why the three powers of government should be separately exercised and observed that these passages “sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author”.<sup>144</sup>

The rule of law rationale of the doctrine of the separation of powers was even made explicit in one of the more prominent of the revolutionary State Constitutions, Article XXX of the Constitution of the Commonwealth of Massachusetts of 1780 providing that:

“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them, *to the end it may be a government of laws and not of men.*”<sup>145</sup>

Moreover, it should be noted that the anti-federalists also subscribed to the separation of powers as propounded by Montesquieu.<sup>146</sup> At the time of the framing of the United States Constitution both “[l]eft wing and right wing united in thinking of the doctrine, in

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<sup>143</sup> Gwyn, in the conclusion to his book summarizes five arguments offered by various writers in the period from the English Civil War to the framing of the United States Constitution in favour of the separation maxim: “the separation of powers has been urged (1) to create greater governmental efficiency; (2) to assure that statutory law is made in the common interest; (3) to assure that the law is impartially administered and that all administrators are under the law; (4) to allow the people’s representatives to call executive officials to account for the abuse of their power; and (5) to establish a balance of governmental powers” (W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 127-128). However, Gwyn goes on to describe the “rule of law version” as the “purest version” of the doctrine (*ibid* 128, fn.1) and, as this chapter demonstrates, it was the version emphasized by the most influential separation theorists. Cf, however, in relation to the objectives of the United States framers in adopting the separation of powers as part of the framework of federal government M.S. Flaherty, “The Most Dangerous Branch” (1996) 105 *Yale L.J.* 1725.

<sup>144</sup> B.F. Wright (ed), *The Federalist* (1961) 339.

<sup>145</sup> Quoted in M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 149 (emphasis added).

<sup>146</sup> B. Manin, “Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787” in B. Fontana (ed), *The Invention of the Modern Republic* (1994) 27.

various and more or less rigid forms, as a cardinal principle of government".<sup>147</sup> In consequence, the debate between these schools of thought centred not on *whether* the separation doctrine should be reflected in the new instrument of federal government, but *how*. The anti-federalists favoured a more rigid version of the maxim than the Philadelphia draft displayed.<sup>148</sup> Thus, it was Madison's object in *Federalist Nos. 47-51* (the papers devoted to separated powers and checks and balances), not to reiterate the arguments in favour of a constitutional doctrine of the separation of powers, but to defend the particular system of checks and balances which he and his fellow framers had engrafted onto that theory in practice.

But the American doctrine of the separation of powers drew on more than the work of Locke, Montesquieu and Blackstone. It was also shaped by American experience of colonial and state government, as well as the Articles of Confederation. This indigenous experience, particularly the failure of relatively "pure" models of the doctrine of the separation of powers in the States – such systems proved susceptible to legislative invasion of the executive and judicial spheres – helped inspire the famous combination of separated powers and checks and balances which Madison outlined in *The Federalist*.<sup>149</sup> Local experience also helped the American framers appreciate the utility of the separation maxim in efficiency terms.<sup>150</sup> But, more importantly, this experience also led to endorsements of the maxim as an anti-majoritarian device. Australian constitutionalists have frequently depicted the United States system, in

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- 147 M. Sharp, "The Classical American Doctrine of 'The Separation of Powers'" (1935) 2 *U. of Chi. L. Rev.* 385, 396.
- 148 B. Manin, "Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787" in B. Fontana (ed), *The Invention of the Modern Republic* (1994) 40.
- 149 See generally M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) ch.6. And see Madison's reference in *Federalist No. 48* to Jefferson's *Notes on the State of Virginia* where Jefferson deprecated the assumption by Virginia's legislature of executive and judicial functions in the face of that State's adoption of a system of separated powers (B.F. Wright (ed), *The Federalist* (1961) 345-346).
- 150 See, eg, M. Sharp, "The Classical American Doctrine of 'The Separation of Powers'" (1935) 2 *U. of Chi. L. Rev.* 385, 418-419 (noting the impact on the American framers of the weakness of the Confederation's executive). See also R.L. Brown, "Separated Powers and Ordered Liberty" (1991) 139 *U. of Pa. L. Rev.* 1513, 1533-1534.

contrast to their own, as evincing a “distrust of legislatures”.<sup>151</sup> This is not an inaccurate description, but it must be remembered that the United States Constitution, as originally drafted and ratified, did not contain a Bill of Rights.<sup>152</sup> It did, however, incorporate a doctrine of the separation of powers, and as Sharp demonstrates in “The Classical American Doctrine of ‘The Separation of Powers’”<sup>153</sup> a characteristic feature of that doctrine was “the idea that the separation of powers would and should protect the individual and his property, not against the tyranny of kings, but against the tyranny of legislatures”.<sup>154</sup>

This train of thought is evident in *Federalist Nos. 47-51*. Throughout these papers, Madison gave vent to his distrust of legislatures. In light of the separation of powers experiment in the States, he was troubled by the threat which “legislative usurpations”<sup>155</sup> posed to the separation doctrine; “[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex”.<sup>156</sup> And, as noted above, it was for this reason that Madison advocated a doctrine of separation of powers *coupled with* a system of checks and balances.<sup>157</sup> But Madison was also concerned with the content of the decisions which unrestrained popular rule might yield. In *Federalist No. 48* he wrote:

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- 151 W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) 89 observing that “[t]he political ideas under the influence of which the United States Constitution was established ... are very different from those prevailing in Australia: the distrust of legislatures is not the first article of political faith in the new Commonwealth”. See also W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 612-618; O. Dixon, “Address at the Annual Dinner of the American Bar Association” (1942) 16 *A.L.J.* 192, 193; A. Mason, “The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience” (1986) 16 *F.L.Rev.* 1, 8-11.
- 152 R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1513. See also E.D. Elliott, “Why Our Separation of Powers Jurisprudence Is So Abysmal” (1989) *Geo.Wash.L.Rev.* 506, 511.
- 153 M. Sharp, “The Classical American Doctrine of ‘The Separation of Powers’” (1935) 2 *U. of Chi.L.Rev.* 385.
- 154 *Ibid* 396. See also R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1530-1531; A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 3.
- 155 *Federalist No. 48* in B.F. Wright (ed), *The Federalist* (1961) 344.
- 156 *Ibid* 343.
- 157 See Madison’s summary of *Federalist Nos 47-48* in the first paragraph of *Federalist No. 48*: “[i]t was shown in the last paper that the political apothegm there examined [the separation of powers] does not require that the legislative, executive, and judiciary

“in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions”.<sup>158</sup>

And later, in *Federalist No. 51*, Madison made more explicit these anti-majoritarian sentiments:

“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”<sup>159</sup>

And with Lockean allusion:

“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger”.<sup>160</sup>

Thus, the implication of the incorporation of these sentiments in this group of papers must surely be that the diffusion of power under a doctrine of functional separation (buttressed by a system of checks and balances) represented, among other things, a means of “braking”<sup>161</sup> the passions of the multitude in the name of the protection of minority interests.

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departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, can never in practice be duly maintained” (*ibid* 343).

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*Ibid* 344.

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*Ibid* 357-358.

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*Ibid* 358-359.

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Adapting R.R. Garran, *Prosper the Commonwealth* (1958) 193.



The relevance, or otherwise, of these anti-majoritarian views to Australian separation of powers thinking will be explored below when essaying an Australian version of the separation doctrine. Before embarking on that task, however, it remains to consider the insights which the principle of judicial independence offers to understanding the objectives upon which the separation of powers is based.

### 3. Judicial Independence

In Australia, the doctrine of the separation of federal judicial power and the principle of judicial independence are intimately linked. They are not, however, necessarily coterminous. Whereas the separation doctrine takes as its focus the insulation of the judicial function from the other functions of government, the principle of judicial independence is concerned to uphold the impartial administration of justice in the face of countervailing public and *private* interests. Nonetheless, recent High Court dicta support the view that the doctrine of the separation of powers is concerned with both the allocation *and* the manner of exercise of federal judicial power in the sense that Chapter III of the Constitution impliedly requires that judicial power be exercised in an independent and impartial fashion.<sup>162</sup> As Brennan, Deane and Dawson JJ. observed in *Chu Kheng Lim v. Minister for Immigration*,<sup>163</sup> the grants of legislative power in s.51 of the Constitution would not support a law:

“which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power”.<sup>164</sup>

Thus, and as Gummow J. has foreshadowed in *Grollo v. Palmer*,<sup>165</sup> the separation doctrine at federal level may ultimately encompass, and constitutionalize, the independence principle in its entirety.<sup>166</sup>

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<sup>162</sup> See below pp.231-245 (ch.6).

<sup>163</sup> (1992) 176 C.L.R. 1.

<sup>164</sup> *Ibid* 27 (fn. omitted).

<sup>165</sup> (1995) 184 C.L.R. 348.

But whatever the precise situation at federal level in Australia, it is clear that the doctrine of separation of powers and the principle of judicial independence, while frequently merging, retain distinct histories and distinct applications within the Western legal tradition. As pointed out above, the importance of the exercise of judicial power by an independent and impartial judiciary had been acknowledged in England prior to the emergence of the modern separation doctrine.<sup>167</sup> And many legal systems, notably those of the Australian States and the United Kingdom, regard as fundamental the notion of judicial independence yet fail to entrench any separation of functions.<sup>168</sup> Thus, although the principle of judicial independence can be accommodated within a separation doctrine, it need not always be so. Nonetheless, to the extent that the two maxims frequently intersect, the theoretical underpinnings of judicial independence should further illuminate the objects and purposes of the separation doctrine.

It is no surprise then to find that judicial independence is also justified in terms of the maintenance of the rule of law. The opening line of the preface to *Judicial Independence: The Contemporary Debate*<sup>169</sup> proclaims that “[f]or many generations, the independence of the judiciary has been viewed as a significant principle of the rule of law in a democratic-libertarian society”.<sup>170</sup> Michael Kirby in his national report in the same publication states that:

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<sup>166</sup> *Ibid* 394 observing that “the rules as to reasonable apprehension of bias in their application to the courts have, at their root, the doctrine of the separation of the judicial from the political heads of power” (fn. omitted).

<sup>167</sup> See above p.76 of this chapter. See also G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 186.

<sup>168</sup> In relation to the absence of an entrenched doctrine of the separation of powers in the Australian States, see, eg, *Building Construction Employees and Builders’ Labourers Federation of New South Wales v. Minister for Industrial Relations* (1986) 7 N.S.W.L.R. 372, 381 per Street C.J.; 401 per Kirby P.; 407 per Glass J.A.; 407 per Mahoney J.A.; 419-420 per Priestley J.A. and *Mabo v. Queensland [No.1]* (1988) 166 C.L.R. 186, 202 per Wilson J. (“it may be doubted whether the doctrine of separation of powers ... is entrenched in the constitutional framework of Queensland” (fn. omitted)). And see also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51. As to the position in the United Kingdom, see S. de Smith and R. Brazier, *Constitutional and Administrative Law* (7th ed) (1994) 17-22.

<sup>169</sup> S. Shetreet and J. Deschenes, *Judicial Independence: The Contemporary Debate* (1985).

<sup>170</sup> *Ibid* xv.

“There is no present controversy in Australia concerning judicial independence in the wide sense, it being generally acknowledged in all arms of government, in the media, and in the community at large, that the independence of the judiciary from interference by the executive arm, is vital for the rule of law, and integral to the federal state.”<sup>171</sup>

Kirby’s latter point, that judicial independence in Australia is “integral to the federal state”, is redolent of Alexander Hamilton writing in *Federalist No. 78*:

“The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”<sup>172</sup>

And again in the same paper:

“If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”<sup>173</sup>

Hamilton (and Kirby’s) point, echoed over the years by the High Court notably in the *Boilermakers’ Case*<sup>174</sup> and more recently in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*,<sup>175</sup> seems to be that the process of judicial review under a

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171 *Ibid* 12.

172 B.F. Wright (ed), *The Federalist* (1961) 491.

173 *Ibid* 494.

174 *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 276 per Dixon C.J., McTiernan, Fullagar and Kitto JJ. (“[t]he position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed”).

175 (1996) 189 C.L.R. 1, 12-13 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. See also, eg, *Waterside Workers’ Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434, 469 per Isaacs and Rich JJ. (describing s.72 of the Constitution as “one of the strongest guarantees in the Constitution for the security of the States”).

“limited Constitution” has the potential to place the judiciary in conflict with the legislative and executive branches in relation to issues which go to the unfolding of the organic law of the nation. Such conflict, while not unavoidable in other systems such as that of the United Kingdom with its “uncontrolled” constitution, is both more common and more pronounced under a written constitution. Thus, to develop a point alluded to in Chapter Two,<sup>176</sup> Hamilton and Kirby are not identifying an additional justification for judicial independence in the case of a limited constitution, but are merely highlighting a difference of degree.<sup>177</sup> Ultimately, whether a controlled or an uncontrolled constitution is involved, one is driven back to the basic rule of law rationale of judicial independence; that were judges not to administer the law in a fair and impartial manner, law would give way to “will”.

#### **4. An Australian Version of the Doctrine of the Separation of Powers**

Whether the High Court majority and the Privy Council in their respective contributions to the *Boilermakers’ Case* cared to admit it or not, the formulations of the doctrine of the separation of powers discussed in this chapter formed an essential backdrop (indeed a *sine qua non*) to recognition of the doctrine in Australia. Coupled with the overlapping principle of judicial independence, these formulations are crucial to understanding the “dominant principle of demarcation”. Although our constitutional history, unlike that of the United States, does not map a clear course through these theoretical materials, Australians are not thereby absolved from the task of identifying or constructing an Australian version of the separation doctrine. If separation of powers is truly one of the pillars of the Australian Constitution, then its animating purpose must be understood as something more specific than the preservation of “individual liberty”.<sup>178</sup> Otherwise, the legal rules of which it is progenitor will lack any clear

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<sup>176</sup> See below pp.42-43 (ch.2).

<sup>177</sup> See, as making a like point, W.A. Wynes, “The Decision in the *Boilermakers’ Case*” (1957) 30 *A.L.J.* 614, 616.

<sup>178</sup> *R. v. Davison* (1954) 90 C.L.R. 353, 381 per Kitto J. See also *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 11 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. (“[t]he separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges”). On occasions,

organizing principle. And although no single “right” or “wrong” Australian version of the doctrine exists, it remains possible to identify that formulation most compatible with Australian constitutional experience.

The main body of this chapter suggests that the leading theoretical proponents of the separation doctrine conceived of its utility as twofold; first, functional differentiation and specialization in government had advantages in terms of efficiency, and, secondly, adherence to the separation of powers helped create an institutional and structural environment in which the supremacy of law over arbitrary power would be fostered. Of the two, the “rule of law version”<sup>179</sup> was the more important in the eyes of these seventeenth and eighteenth century authors. And, as has been seen, the rule of law also underpins the principle of judicial independence.

Translating these concerns into the contemporary Australian setting, the rule of law underpins our legal system as a whole. As Keith Mason has put it, it is “the bedrock of civilised society”.<sup>180</sup> The rule of law is reflected in a variety of common law and statutory rules<sup>181</sup> and informs the Constitution. As Dixon J. said in an oft-quoted passage from the *Communist Party Case*:<sup>182</sup>

“[the Australian Constitution] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption”.<sup>183</sup>

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members of the High Court have sought to give further content to these ideas. See, eg, *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 167 per Gummow J.

<sup>179</sup> To use Gwyn’s expression. See W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 128 fn.1.

<sup>180</sup> K. Mason, “The Rule of Law” in P.D. Finn (ed), *Essays on Law and Government vol.1: Principles and Values* (1995) 114.

<sup>181</sup> As is shown in K. Mason, “The Rule of Law” in P.D. Finn (ed), *Essays on Law and Government vol.1: Principles and Values* (1995).

<sup>182</sup> *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.

<sup>183</sup> *Ibid* 193.

This passage, albeit incidentally, signals that the doctrine of the separation of federal judicial power should not be equated with the rule of law, or, to put the same thing another way, cannot be expected to do all the work of the rule of law in our society. Such an expectation would be so inflated as to be insupportable. This is a crucial point, for definitions of the rule of law vary; as Sir Ninian Stephen has observed, it is a phrase “more easily acclaimed than understood”.<sup>184</sup> Some commentators effectively accord to the rule of law a substantive content,<sup>185</sup> while others conceive of the rule of law in essentially procedural terms.<sup>186</sup> This definitional debate is unlikely to admit of resolution, but it is submitted that this does not destroy the utility, at least in the Australian context, of understanding the doctrine of the separation of powers as primarily designed to create structural incentives to observance of the rule of law (or, if one likes, structural impediments to its disavowal).

And this for an inter-locking set of reasons. When asking what aspects of the rule of law does the doctrine of the separation of powers foster, it must be remembered that separation of powers is concerned with the *structure* or *framework* of government. It is also concerned with limitations on governmental power, but only to the extent that these limitations reflect structural imperatives in relation to the allocation of power or the manner of exercise of power so allocated (because, as Professor Winterton has pointed out, “[t]he separation of judicial power would be a rather formalistic doctrine heedless of its underlying rationale if it focussed merely on which governmental institution should exercise a particular power, but was unconcerned with the manner in which the judiciary performs its functions”<sup>187</sup>). In the absence of a countervailing constitutional context as in the United States with its distinctive anti-majoritarian heritage, these structural imperatives have nothing to say about the substantive content of the legal

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<sup>184</sup> N.M. Stephen, “Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion” (1982) 13 *M.U.L.R.* 334, 334.

<sup>185</sup> See, eg, G. de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) 23-42 noting, in particular, the fourth element of Walker’s twelve-point definition of the rule of law – “[g]eneral congruence of law with social values” (*ibid* 27).

<sup>186</sup> See, eg, J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195.

<sup>187</sup> G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 199.

rules which emanate from a system of separated powers, save that a system designed to enhance the supremacy of law over individual will is less readily the tool of those who would abrogate fundamental human rights.<sup>188</sup> As Joseph Raz (drawing in turn from Hayek) has pointed out, what distinguishes law from “naked power and unbridled discretion”<sup>189</sup> (and hence, it is submitted, what the doctrine of the separation of powers is concerned to promote via its structural and institutional directives) is law’s capacity to guide human behaviour.<sup>190</sup> This then is the central norm which informs the rule of law version of the doctrine of the separation of powers and, as demonstrated above, was a key concern of Locke, Montesquieu and Blackstone.

It may be countered, of course, that what distinguishes law from “naked power” is more than law’s capacity to guide human behaviour; that under the “rule of law” law must have a minimal moral or social content if only because a system of “law” untuned to social values may lead to “widespread disrespect for the law and pressures for violent change may build up and find expression in arbitrary and lawless actions”.<sup>191</sup> But whatever the abstract merits of this position, and leaving aside the uneasy fit between a structural doctrine and the morality or otherwise of the legal rules referable to such a structure, it is submitted that to regard the doctrine of the separation of powers as fostering the rule of law conceived in substantive terms would be incompatible with the Australian constitutional tradition.

As is well known, the framers of the Australian Constitution decided against a Bill of Rights as part of our organic law because they believed that Parliament and our system

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188 Note in this regard Vanderbilt’s reflections on the absence of an effective doctrine of the separation of powers in both the Weimar Republic and the Soviet Union (A. Vanderbilt, *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) 7-18). Much the same point is made in A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 2.

189 K. Mason, “The Rule of Law” in P.D. Finn (ed), *Essays on Law and Government vol. I: Principles and Values* (1995) 114.

190 J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195, 198 (describing “the basic intuition from which the doctrine of the rule of law derives” as “the law must be capable of guiding the behaviour of its subjects”).

191 G. de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) 27.

of representative and responsible government, coupled with the common law, would guarantee the “rights” of Australians. As Sir Anthony Mason said, addressing an American audience in 1986:

“Because the founders accepted, in conformity with prevailing English legal thinking, that the citizen’s rights are best left to the protection of the common law and because they were not concerned to protect the individual from oppression by majority will, the Constitution contains very little in the way of provisions guaranteeing new rights. The founders did not share the American framers’ lack of faith in parliamentary supremacy and their belief that it was necessary to protect minority rights against majority oppression. And the Court, influenced by the tradition of parliamentary supremacy, in the absence of a solid anti-majoritarian basis in the Constitution, has interpreted these provisions so that they do not subtract significantly from that supremacy.”<sup>192</sup>

Of course, in recent years the High Court has indicated that it is prepared to interpret more expansively those few express guarantees of rights and freedoms to be found in the Australian Constitution,<sup>193</sup> and, more dramatically, has recognized an implied constitutional freedom of political communication.<sup>194</sup> Nonetheless, and as a number of commentators have recognized,<sup>195</sup> the latter development is not necessarily at odds with our majoritarian heritage for it enhances the capacity of the political system to respond to the will of the people; hence, the famous injunction of the majority in the *Engineers’ Case*<sup>196</sup> is rendered more efficacious:

“When the people of Australia, to use the words of the Constitution itself, ‘united in a Federal Commonwealth’, they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people

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192 A. Mason, “The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience” (1986) 16 *F.L.Rev.* 1, 8.

193 See, eg, *Street v. Queensland Bar Association* (1989) 168 C.L.R. 461.

194 *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 C.L.R. 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1; *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520.

195 See, eg, L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166, 177.

196 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.



themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.”<sup>197</sup>

And as Professor Zines has pointed out, a majority of the High Court in *Australian Capital Television Pty Ltd v. Commonwealth*<sup>198</sup> and *Nationwide News Pty Ltd v. Wills*<sup>199</sup> expressly noted that our framers rejected a Bill of Rights.<sup>200</sup>

Thus, by viewing the separation doctrine as designed to foster, through structural and procedural means, the supremacy of law over arbitrary power, yet within those parameters not dictating the substantive content of any exercise of public power, consistency with our constitutional heritage is maintained – an especially important factor when contemplating the separation of federal judicial power as a source of “implied rights”. In addition, such a measured approach to constructing a “rule of law version” of the separation doctrine in Australia is encouraged by the consideration that unchecked “judicial activism” may itself undermine the supremacy of law by arrogating to the judiciary unduly broad law-making powers.<sup>201</sup> Of course, what is “procedural” and what is “substantive” is a matter of debate at the margins, but this is true of many other distinctions fundamental to our system of jurisprudence: the juxtaposition of questions of “fact” and questions of “law” or the distinction between review on the “merits” as opposed to review of the “manner of exercise” of an administrative discretion provide just two examples.

It remains then to explore in more depth those procedural requirements associated with the supremacy of law over arbitrary power. Joseph Raz has presented a useful model in this regard.<sup>202</sup> Accepting, as indicated above, that “the basic intuition from which the rule of law derives” is that “the law must be capable of guiding the behaviour of its

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197 *Ibid* 151-152 per Knox C.J., Isaacs, Rich and Starke JJ.

198 (1992) 177 C.L.R. 106.

199 (1992) 177 C.L.R. 1.

200 L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166, 177.

201 See K. Mason, “The Rule of Law” in P.D. Finn (ed), *Essays on Law and Government vol.1: Principles and Values* (1995) 116, 132-135.

202 J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195.

subjects”<sup>203</sup> (for how else can law demand obedience from both governors and governed?) he lists a series of principles which can be extracted from this idea. These principles form two groups. The first group is concerned to ensure that law conforms to “standards designed to enable it effectively to guide action”.<sup>204</sup> Thus, Raz maintains that laws should be prospective, open, clear and “relatively stable”. In addition, particular or non-general legal orders should be made within a guiding framework of “open, stable, clear and general rules”.<sup>205</sup> The second group of principles bear more directly upon the present study. In Raz’s words, they “are designed to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it”.<sup>206</sup> The first such principle identified by Raz is that of judicial independence, which if not honoured, imperils the capacity of law to guide human action.<sup>207</sup> Secondly, Raz believes that the rules of natural justice support adherence to the rule of law; “[o]pen and fair hearing, absence of bias and the like are obviously essential for the correct application of the law and thus ... to its ability to guide action”.<sup>208</sup> One might add to these considerations the requirement that courts publish reasons for their decisions, for how else can one determine both what the law is and whether it has been correctly applied in the instant case? In this regard, a passage from the judgment of Mason C.J., Dawson and McHugh JJ. in *Leeth v. Commonwealth*<sup>209</sup> points to the nexus between the rules of natural justice and the doctrine of the separation of powers:

“It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers’ Case*, a fundamental principle which lies behind

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203 *Ibid* 198.

204 *Ibid* 202.

205 *Ibid* 198-200 (italics omitted in final quote).

206 *Ibid* 202.

207 *Ibid* 201.

208 *Id.*

209 (1992) 174 C.L.R. 455.

the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.”<sup>210</sup>

The remaining principles which Raz includes in this second group are the requirements that the courts possess the capacity to review the implementation of the rule of law, that the courts be readily accessible, and that the discretion vested in crime preventing agencies not be permitted to pervert the law.<sup>211</sup>

Raz stresses that this list of principles derived from his conception of the rule of law is not exhaustive. And indeed, further additions readily suggest themselves – for example, the principle of appellate review of decisions of courts lower in the judicial hierarchy by courts higher in the judicial hierarchy.<sup>212</sup> Conversely, it is not to be thought that the Australian doctrine of the separation of federal judicial power should necessarily be informed by all these principles in all their rigour. The doctrine of the separation of powers also enshrines an efficiency norm and as Raz points out “[s]ince the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values”.<sup>213</sup> In addition, it should be remembered that the object of the present exercise is not to identify those legal rules which flow from the separation of federal judicial power, but to formulate an Australian version of the separation doctrine as a useful organizing principle in separation of power cases. Vile in *Constitutionalism and the Separation of Powers* wisely cautions:

“Although it may be true of constitutional theories, as of political theories in general, that it is impossible to move from general propositions to unambiguous statements about particular practical issues, this does not by any means prove that such theories have no value. They can provide guiding-lines within which

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210 *Ibid* 470 (fn. omitted). And see also R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1535-1540 noting the links between the objectives of the American separation doctrine and the concept of “due process”.

211 J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195, 201-202.

212 K. Mason, “The Rule of Law” in P.D. Finn (ed), *Essays on Law and Government vol.1: Principles and Values* (1995) 135-136. See also *Building Construction Employees and Builders’ Labourers Federation of New South Wales v. Minister for Industrial Relations* (1986) 7 N.S.W.L.R. 372, 375-376 per Street C.J.

213 J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195, 210.

the solution to practical issues must be found; they help to create an intellectual atmosphere in which certain courses of action will be excluded, even though the choice between the remaining alternatives is not precisely determined; they make self-conscious the values which are to be given priority, and the choice of a means of furthering those values.”<sup>214</sup>

If the ideas developed in this chapter can serve these modest ends, that is half the battle in developing a coherent Chapter III jurisprudence.

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<sup>214</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 296.

## CHAPTER 4 - SIR OWEN DIXON AND THE RULE IN THE *BOILERMAKERS'*

### CASE

“in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.”

*Attorney-General (Cth) v. R. (Boilermakers' Case)* (1957) 95 C.L.R. 529, 540-541 (Privy Council)

Sir Owen Dixon was sworn in as a Justice of the High Court in February 1929. As Chapter Two demonstrates, the course of judicial decision leading up to his appointment had established that the Constitution was based upon a separation of the functions of government, although the extent to which this doctrine set limits upon the power of the Commonwealth Parliament remained to be fully explored. The 1929 Royal Commission on the Constitution reported that it “does not make a complete ‘separation of powers’”: whereas federal judicial power could only be exercised by Chapter III courts, *Roche v. Kronheimer* had shown that the executive could validly be empowered to make ordinances and regulations.<sup>1</sup> In 1931 *Dignan* confirmed this latter point, closing off one avenue of potential application for the separation doctrine in Australia. Professor Sawyer has suggested that *Dignan* “would have fitted without difficulty into a constitutional history culminating in a general repudiation of separation-of-powers doctrines”.<sup>2</sup> With Owen Dixon on the bench, however, this was not to be. Dixon J. proved “our most ardent proponent of the legal separation of powers”,<sup>3</sup> although it would take some time to bring a majority of the Court with him in an appropriate case.

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<sup>1</sup> *Report of the Royal Commission on the Constitution* (1929) 7. The report also cited *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257 as authority for the proposition that Parliament cannot “assign to the High Court any duty which is not judicial”, but given that the Court in *In Re Judiciary Act* expressly declined to decide whether Parliament could impose non-judicial duties on the High Court (see below pp.52-53 (ch.2)), the Royal Commission must have meant to say that in the exercise of judicial power the High Court is confined to those subject matters of federal jurisdiction set out in Chapter III.

<sup>2</sup> G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 185.

<sup>3</sup> G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 187.

He achieved this in 1956 with the decision of the High Court in *R. v. Kirby; Ex parte Boilermakers' Society of Australia*.<sup>4</sup>

Before that decision is discussed, however, it is necessary to complete the historical overview of the development of the Australian separation doctrine commenced in Chapter Two. Whereas Isaacs J. was the leading figure in that earlier chapter, that mantle now falls to Dixon J.

### 1. Pre-*Boilermakers'* Developments: The *Lowenstein* Misadventure

As discussed in Chapter Two, Dixon J. had been party to the decision in *Dignan* and as such had denied that ss.1 and 61 of the Constitution imported an American-style nondelegation doctrine.<sup>5</sup> Nonetheless, in *Dignan* he set out his view that the Constitution prescribed a more complete separation of the federal judicial power than precedent admitted. According to Dixon J. the courts mentioned in s.71 of the Constitution, apart from being the sole repositories of federal judicial power, could not validly be invested by Parliament with any other category of function.<sup>6</sup> In other words, the High Court and the federal courts created by the Commonwealth Parliament could exercise federal judicial power alone. Dixon J. was the only judge to express this view in *Dignan*,<sup>7</sup> but in an extra-curial address in 1942 showed no signs of having resiled from his position. Indeed, he told his American audience that he could:

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<sup>4</sup> (1956) 94 C.L.R. 254.

<sup>5</sup> See above pp.64-67 (ch.2).

<sup>6</sup> *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 97-98 (“because of the distribution of the functions of government and of the manner in which the Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals”).

<sup>7</sup> Evatt J. expressly denied that “the only function which may lawfully be assigned by the Commonwealth Parliament to the three kinds of tribunals mentioned in sec.71 is the exercise of the judicial power of the Commonwealth” asserting that the Commonwealth Court of Conciliation and Arbitration was validly constituted (*ibid* 116-117).

“discover no reason in the form or text of the Australian constitution why the legal implications of the separation of powers should not have been as full as they have been in this country”.<sup>8</sup>

In making this claim, Dixon was reaffirming his commitment to the separation maxim in the wake of the decision of the Court in 1938 in *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein*.<sup>9</sup> *Lowenstein* arguably marks the nadir of the separation doctrine in Australia, a majority of the High Court upholding s.217 of the *Bankruptcy Act 1924* (Cth) which empowered the Federal Court of Bankruptcy upon an application for an order of discharge to charge a bankrupt with an offence against the Act and to try him or her summarily. Garfield Barwick, appearing for the applicant bankrupt, had relied upon the separation doctrine and seems to have urged the Court both that non-judicial powers could not validly be conferred on a federal court and, in the alternative, that the impugned provision “constitutes an attempt to invest a court with a non-judicial function inconsistent with its judicial function”,<sup>10</sup> the essence of his attack being that “in effect, the Bankruptcy Court acts as prosecutor and judge in the particular matter”.<sup>11</sup>

Latham C.J., Rich, Starke and McTiernan JJ., however, evinced little sympathy for these submissions. Latham C.J. (with whom Rich J. agreed) and Starke J. denied that the Constitution incorporated a strict doctrine of the separation of powers.<sup>12</sup> Thus, Latham C.J. declined to recognize a blanket prohibition upon the admixture of judicial and non-judicial functions in the one judicial body.<sup>13</sup> Nonetheless, he conceded that the two functions could not be combined in all circumstances:

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<sup>8</sup> O. Dixon, “The Separation of Powers in the Australian Constitution” (1942) *American Foreign Law Association, Proceedings No.24*, 5.

<sup>9</sup> (1938) 59 C.L.R. 556.

<sup>10</sup> *Ibid* 559 (summary of argument).

<sup>11</sup> *Ibid* 558 (summary of argument).

<sup>12</sup> *Ibid* 565 per Latham C.J.; 576-577 per Starke J. Of course, even the United States Constitution does not employ a “pure” version of the separation of powers (see M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 13). Nonetheless, the overall tenor of the judgments of Latham C.J. and Starke J. in *Lowenstein* was to play down the significance of the separation doctrine in Australia.

<sup>13</sup> *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556, 566.

“If a power or duty were in its nature such as to be inconsistent with the co-existence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it.”<sup>14</sup>

Yet, somewhat surprisingly, Latham C.J. found that this qualification upon the power of Parliament to combine judicial and non-judicial functions was not attracted on the facts of the case. Drawing amongst other things on the long accepted practice of the same tribunal both charging and trying an individual for contempt in the face of the court,<sup>15</sup> Latham C.J. concluded that the relevant provision of the *Bankruptcy Act* did not confer functions upon the Bankruptcy Court incompatible one with the other.<sup>16</sup> Starke J. simply asserted that the functions in question were “clearly connected with and incidental to judicial power and to the functions of a court of bankruptcy”.<sup>17</sup> McTiernan J. found that the provision in question did not vest the Bankruptcy Court with any power “inconsistent with the due exercise of its judicial power” because it did not “intend to make the court a party to the proceedings”.<sup>18</sup> In light of these various approaches, it has proven difficult to extract from *Lowenstein* a clear majority proposition.

Dixon and Evatt JJ. dissented. In a joint judgment, the carefully crafted language of which bears the hallmarks of compromise between two strong judicial minds (as discussed in Chapter Two, they had expressed opposing views in *Dignan* on the general ability of Parliament to invest federal courts with non-judicial power<sup>19</sup>) their Honours stressed that federal judicial power in bankruptcy must conform to the dictates of Chapter III of the Constitution.<sup>20</sup> The attempt on the part of the Commonwealth Parliament to empower the Bankruptcy Court both to charge and try an individual for a

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<sup>14</sup> *Ibid* 567.

<sup>15</sup> However, this is arguably an “exceptional power” (*ibid* 589 per Dixon and Evatt JJ.). See below fn.26 of this chapter.

<sup>16</sup> *Ibid* 567-570.

<sup>17</sup> *Ibid* 577.

<sup>18</sup> *Ibid* 590-591.

<sup>19</sup> See also above p.118 of this chapter (including fnn. 6-7).

<sup>20</sup> *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556, 586.



bankruptcy offence did “not fall within the conception of judicial power”, their Honours emphasizing that the English notion of the judicial process supposed “a detached tribunal entertaining and determining civil and criminal pleas brought before it”.<sup>21</sup>

Thus, Dixon and Evatt JJ. reasoned of the provision in question:

“However it may be described, whether as a combination of functions, as a course of procedure, or as a jurisdiction or authority, it terminates in an act which under the Constitution can be done only in the exercise of judicial power, namely, the conviction of an offender and the passing of judgment upon him; yet the duty is to be performed in a manner at variance with the conception of judicial power.”<sup>22</sup>

In other words, their Honours’ conclusion seems to have been that the function of charging the bankrupt was inconsistent with the judicial function of trying him or her, or, viewing the same matter from a slightly different perspective, that the impugned provision authorized the Court to act in a manner inconsistent with traditional judicial process.<sup>23</sup> On either analysis, the provision did not conform to the requirements of Chapter III of the Constitution.

This dissenting view in *Lowenstein* was clearly the correct one.<sup>24</sup> Section 217 of the *Bankruptcy Act* did not nominate an official to carry forward a prosecution launched by the Court. This led various members of the majority to presume the intervention of an official prosecutor.<sup>25</sup> Even so, for a court to initiate a criminal prosecution without the involvement of a third party and proceed to try the offence in question (the court possibly having carriage of the prosecution) flies in the face of the rules of natural justice and due process of law. As was pointed out in Chapters Two and Three, the basic rule that federal judicial power be exercised only by Chapter III courts serves to promote the impartial administration of justice. Surely that impartiality, or public

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21 *Ibid* 588.

22 *Ibid* 589.

23 See below pp.241-242 (ch.6).

24 However, in *Sachter v. Attorney-General (Cth)* (1954) 94 C.L.R. 86 the High Court declined to reconsider the correctness of *Lowenstein*.

25 *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556, 568 per Latham C.J.; 591 per McTiernan J.

perceptions thereof, would be imperilled were the one federal tribunal (save in the “exceptional” instance of contempt in the face of the court<sup>26</sup>) both to charge and try an individual for an offence.<sup>27</sup> The two sets of functions in *Lowenstein* were incompatible. By denying this, the majority undercut the rationale of the rule established in the *Inter-State Commission Case*. *Lowenstein* did not require the High Court to decide that judicial and non-judicial functions could not validly be combined and it is doubtful that Dixon and Evatt JJ. went this far.<sup>28</sup> *Lowenstein* simply required the High Court to honour the object behind the exclusive vesting of federal judicial power in the courts mentioned in s.71.

## 2. The *Boilermakers’ Case* and the Extension of the Separation Doctrine

### (a) The Rule in the *Boilermakers’ Case*

In the *Boilermakers’ Case* the High Court was asked to pass judgment upon the validity of the reconstituted Commonwealth Court of Conciliation and Arbitration.<sup>29</sup> In light of *Alexander’s Case*, the Arbitration Court was now composed of judges appointed in accordance with s.72 of the Constitution. Its primary functions were arbitral and thus, according to High Court orthodoxy, non-judicial in nature. But it was also invested by the Commonwealth Parliament with certain judicial functions, including the power to

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<sup>26</sup> As Dixon and Evatt JJ. said in *Lowenstein* of the power of a court to charge and try an individual for contempt in the face of the court: “this has always been regarded as an exceptional power based on the necessity of keeping order and of preserving the court from actual interference in the discharge of its duties” (*ibid* 589).

<sup>27</sup> As Isaacs J. said in a slightly different context in *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 93: “[c]ourts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. *But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated*” (emphasis added).

<sup>28</sup> As already pointed out, Evatt J. had previously endorsed the validity of the reconstituted Arbitration Court (see above fn.7 of this chapter). Williams J. in his dissenting judgment in *Boilermakers’* accepted that Parliament could validly invest a federal court with judicial and non-judicial functions. Nonetheless, he still cast doubt on the correctness of *Lowenstein* suggesting that the Bankruptcy Court’s power to charge the bankrupt was inconsistent with its strictly judicial functions ((1956) 94 C.L.R. 254, 313-314).

<sup>29</sup> This reconstitution was undertaken in 1926 by the *Commonwealth Conciliation and Arbitration Act 1926* (Cth). Its effect is summarized in the majority judgment in the *Boilermakers’ Case* (*R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 285-288).

punish a contempt of its authority by the imposition of pecuniary penalties. Dixon C.J. and a majority of the High Court in a joint judgment, affirmed on appeal by the Privy Council, decided that this combination of functions in the one federal body was unconstitutional. The doctrine of the separation of federal judicial power was extended by the establishment of two interrelated propositions: first, that judicial power and associated judicial character cannot validly be attached to a body whose principal purpose is non-judicial; and, secondly, that the High Court and other federal courts created by the Commonwealth Parliament cannot validly be invested with non-judicial functions unless incidental or ancillary to the performance of their judicial duties.<sup>30</sup> These two propositions, however, necessarily collapse into a single rule – that judicial and non-judicial functions cannot validly be combined in the one federal tribunal (the “rule in the *Boilermakers’ Case*”). The practical effect of the *Boilermakers’ Case* was that the Arbitration Court was once again, as in *Alexander’s Case* thirty-eight years previously, constitutionally confined to its dominant arbitral role.

It should be noted at the outset that the decided cases did not compel this conclusion. The majority in *In Re Judiciary Act* had managed to avoid consideration of the admixture of judicial and non-judicial functions. And although obiter comments in a number of cases addressed this issue, the balance of opinion suggested that the combination was possible.<sup>31</sup> Thus, the joint majority judgment in *Boilermakers’*

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<sup>30</sup> *Ibid* 288-289, 296 per Dixon C.J., McTiernan, Fullagar and Kitto JJ. *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144 had earlier affirmed that the Commonwealth Parliament could not validly invest a State court with non-judicial power. The Court reasoned that s.77(iii) of the Constitution constituted an exhaustive statement of the Commonwealth’s capacity to repose functions in State courts (*ibid* 151-152). See generally, Z. Cowen and L. Zines, *Federal Jurisdiction in Australia* (2nd ed) (1978) 180-181.

<sup>31</sup> Suggestions that judicial and non-judicial functions could validly be combined in the one federal tribunal included *Waterside Workers’ Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434, 453 per Barton J. and 479 per Powers J.; *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 271-272 per Higgins J.; *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 116-117 per Evatt J.; *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556, 566 per Latham C.J. Suggestions to the contrary included *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]* (1925) 35 C.L.R. 422, 436 per Isaacs J. (although this may be straining matters somewhat); *Porter v. R.; Ex parte Yee* (1926) 37 C.L.R. 432, 438 per Knox C.J. and Gavan Duffy J.; *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 97-98 per Dixon J.

represented Dixon C.J.'s own constitutional vision, and bears the indicia of his authorship in its elevation of a formal and legalistic mode of construction over a more transparently purposive approach which explicitly invokes social and political factors.<sup>32</sup> As will be seen, the majority judgment did not eschew social and political factors entirely, but the overall result was a legalistic one.<sup>33</sup>

### (b) The Majority Judgment

Accepting that federal judicial power could only be exercised by the bodies mentioned in s.71, Dixon C.J., McTiernan, Fullagar and Kitto JJ. in *Boilermakers*' invoked a number of considerations in support of the view that judicial and non-judicial functions could not validly be combined in the one federal tribunal, first among which they placed "the very text of the Constitution".<sup>34</sup> In a passage already quoted in Chapter Three, but which bears repeating, their Honours asserted that:

"If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical

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These authorities suggest that D.C. Thomson was correct in his contemporary assessment that "the weight of authority is against the decision of the High Court and of the Privy Council in the *Boilermakers*' case. These judgments rest on a construction of the Constitution which, in large measure, marks a departure from previous development" (D.C. Thomson, "The Separation of Powers Doctrine in the Commonwealth Constitution: *The Boilermakers' Case*" (1958) 2 *Syd.L.R.* 480, 491). See also R. Anderson, "Exclusiveness of Judicial Power of the Commonwealth" (1956-59) 3 *U.Q.L.J.* 71, 71 and G. Sawyer, "Separation of Judicial Powers in the Australian Constitution" [1957] *Public Law* 198, 198.

<sup>32</sup> See Professor Sawyer's description of Dixon C.J.'s approach to constitutional interpretation in G. Sawyer, *Australian Federal Politics and Law 1901-1929* (1956) 321. And see also Dixon C.J.'s own remarks upon being sworn in as Chief Justice, professing that "[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism" ("Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 *C.L.R.* xi, xiv). For a fuller examination of Dixonian legalism, see L. Zines, *The High Court and the Constitution* (4th ed) (1997) 424-430.

<sup>33</sup> See, eg, Gareth Evans' description of the *Boilermakers' Case* as a "standing monument to the Court's legalistic obduracy" (G. Evans, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in A.D. Hambly and J.L. Goldring (eds), *Australian Lawyers and Social Change* (1976) 32).

<sup>34</sup> *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 *C.L.R.* 254, 272.

inferences from Chaps. I, II and III and the form and contents of ss.1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement."<sup>35</sup>

Presumably these "logical inferences" pointed, at least prima facie, to a mutually exclusive distribution of powers among the three organs of government, although their Honours left this unsaid. The Privy Council, adopting an almost identical analysis, explicitly accepted that the positive vesting of the legislative, executive and judicial powers in Parliament, the Crown and the courts mentioned in s.71 respectively had the prima facie effect of negating the possibility of such powers being vested in any other way.<sup>36</sup> Thus, the arrangement and opening clauses of the first three Chapters of the Constitution suggested even without the American analogy (although this was later invoked<sup>37</sup>) that judicial power alone could be reposed in federal judicial bodies, a conclusion which the majority further supported by reference to the terms of Chapter III taken as a whole. Proceeding from the proposition established in *In Re Judiciary Act* that Chapter III contains an exhaustive statement of the subject matters of federal jurisdiction, Dixon C.J., McTiernan, Fullagar and Kitto JJ. asked rhetorically:

"What reason could there be in treating it as an exhaustive statement, not of the powers, but only of the judicial power that may be exercised by the judicature? It hardly seems a reasonable hypothesis that in respect of the very kind of power that the judicature was designed to exercise its functions were carefully limited but as to the exercise of functions foreign to the character and purpose of the judicature it was meant to leave the matter at large."<sup>38</sup>

The majority subsequently sought to underscore these textual conclusions by reference to the judgment of Isaacs J. in the *Inter-State Commission Case*<sup>39</sup> and by reference to history; more particularly, the "contemporary view" of Inglis Clark and Harrison Moore contained in the second editions of their respective texts that the arrangement of the first

<sup>35</sup> *Ibid* 275. See also to the same general effect the companion passage from the decision of the Privy Council quoted above p.82 (ch.3).

<sup>36</sup> *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 537-538.

<sup>37</sup> *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 276, 297. See also *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 537.

<sup>38</sup> *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 272. See also *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 541.

<sup>39</sup> *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 277-278.

three Chapters of the Constitution enshrined a legally enforceable distribution of powers.<sup>40</sup> The passages from these commentators quoted by their Honours, however, do not explicitly support the view that the High Court and other federal courts created by the Commonwealth Parliament are restricted to the exercise of judicial functions. And, as Finnis has pointed out in his writing on this topic, these secondary sources are no substitute for resort to the Convention Debates<sup>41</sup> which (as discussed in Chapter One) fail clearly to suggest that the framers intended to adopt a legal separation of the functions of government.<sup>42</sup>

In terms of the relevance of the above-mentioned textual considerations to the question whether the Constitution incorporates a legally enforceable doctrine of the separation of powers (or, more specifically, a full legal separation of federal judicial power) it was argued in Chapter Two that the frame of the Constitution and ss.1, 61 and 71 merely establish the interpretative dilemma which is necessarily to be resolved by reference to non-textual considerations. Otherwise, ss.1, 61 and 71 would each demand the same interpretative response, an outcome which the High Court has consistently denied.<sup>43</sup> The majority's discrete textual argument based upon Chapter III's exhaustive statement of the subject matters of federal judicial power admittedly carries some force. But it is overstating matters to claim that rejection of the majority view entails accepting that Parliament is "at large" in the non-judicial functions which it may validly confer on federal courts. Williams J. and Taylor J. in their dissenting judgments in *Boilermakers'* each identified limits upon the valid combination of judicial and non-judicial functions, as had Latham C.J. in *Lowenstein*. As will be discussed later in this chapter, the notion of "incompatibility" can provide an effective "filter" in this regard.

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40 *Ibid* 276-277.

41 J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 160-161.

42 *Ibid* 171-177. And see generally above ch.1.

43 J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 159.

As the preceding paragraph anticipates, the majority's reliance in *Boilermakers'* upon the form and contents of ss.1, 61 and 71 of the Constitution in establishing the existence of a complete separation of the federal judicial power forced them to confront the somewhat different treatment meted out to the legislative and executive powers – as Dixon J. had acknowledged in *Dignan* “the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository [sic] of the legislative power of the Commonwealth”.<sup>44</sup> The majority in *Boilermakers'* (and similarly the Privy Council) did not question the ability of the federal Parliament to invest the executive with subordinate law-making functions,<sup>45</sup> a position which the High Court reconciled with the separation doctrine by affirming the earlier approach of Dixon J. in *Dignan* when dealing with the same dilemma. In other words, the long history of legislative delegation in Britain and her colonies coupled with English conceptions of legislative power suggested that the grant of subordinate law-making authority under continuing parliamentary control (that is, parliament retaining its capacity to withdraw the delegation) did not in fact amount to the grant of “true legislative power” at all.<sup>46</sup> Hence the majority's reassurance in *Boilermakers'* that once the character of the three categories of power employed by the separation doctrine “is determined according to traditional British conceptions ... difficulties as between executive and legislative power are not to be expected and none has arisen”.<sup>47</sup>

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<sup>44</sup> *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 101.

<sup>45</sup> *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 279; *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 545. This is not to deny, however, that in its restatement of the separation doctrine, *Boilermakers'* provided ammunition for a revision of *Dignan*. See G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 183-187 concluding that “either the references to separation of power principles as applied to the legislative field in *Boilermakers'* are empty incantations, or *Dignan* must be overruled”.

<sup>46</sup> *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 280 quoting from Dixon J.'s judgment in *Dignan*. See also O. Dixon, “The Separation of Powers in the Australian Constitution” (1942) *American Foreign Law Association, Proceedings No.24*, 9-10 for a similar rationalization of this apparent asymmetry.

<sup>47</sup> *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 276. Although the majority in *Boilermakers'* referred to the Constitution's adoption of the system of responsible government, they did not expressly press this system in aid of the conclusion that powers of subordinate legislation can validly be conferred on the executive. The Privy Council were, however, more ambiguous and may have been

As in *Dignan* itself, this attempt to marry the Court's treatment of the federal legislative and executive powers with its contrasting approach to federal judicial power bears something of the flavour of an *ex post facto* rationalization designed to restore theoretical integrity to a lopsided doctrine. Dixon virtually admitted as much speaking extra-curially in 1942.<sup>48</sup> A more convincing approach would have been to recognize, as Isaacs J. did in *Le Mesurier v. Connor*, that rigid adherence to the doctrine of separation of powers is inconsistent with the operation of the Constitution as a working instrument of government;<sup>49</sup> that modern social and economic conditions demand that the federal Parliament be empowered to delegate legislative authority to the executive. The doctrine of the separation of powers, in turn, has rarely been propounded in pure form, does not have a fixed content (in the sense that there is one model to which a constitution incorporating a system of separated powers must conform<sup>50</sup>) and is but a means to an end – the promotion of the supremacy of law over arbitrary power.<sup>51</sup> In other words, the separation doctrine did not necessarily demand the pseudo-symmetrical explanation of the treatment of legislative and executive powers offered in *Boilermakers*'. Moreover, the different nature of the two sets of functions – legislative and executive on the one hand and judicial on the other – may well justify their disparate treatment at the hands of the separation doctrine.<sup>52</sup>

The majority in *Boilermakers*' chose not to place their support for legislative delegation to the executive within the context of the above-mentioned factors, but they did call in

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referring to responsible government when they supported the outcome in *Dignan* observing that: "[t]he delegation of regulative power by the legislature to an executive body does not mean that the legislature has abdicated a power constitutionally vested in it. For the executive body is at all times subject to the control of the legislature" (*Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 540).

48 O. Dixon, "The Separation of Powers in the Australian Constitution" (1942) *American Foreign Law Association, Proceedings* No.24, 9-10.

49 (1929) 42 C.L.R. 481, 519-520. For a recent expression of this view in the American context, see the majority opinion in *Mistretta v. United States* 488 U.S. 361 (1989).

50 See generally, M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967).

51 See above ch.3.

52 The Privy Council in *Boilermakers*' hinted at this in quoting a passage from the judgment of Evatt J. in *Dignan (Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 546).



aid the special role of the judicial branch within a federation as an additional consideration compelling the complete separation of federal judicial power. In their Honours' words:

“The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed. This would be enough in itself, were there no other reasons, to account for the fact that the Australian Constitution was framed so as closely to correspond with its American model in the classical division of powers between the three organs of government”.<sup>53</sup>

Although often quoted, this passage is more elusive than first appears. Upon close study, it merely identifies a relationship between the inability of the Commonwealth Parliament to invest non-judicial functions in Chapter III courts and the role of those courts in supervising the distribution of powers under the federal Constitution – it does not endeavour to explain that relationship at all. The Privy Council, however, was more explicit:

“in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.”<sup>54</sup>

And after cautioning against advisory opinions as tending to “sap” judicial independence and impartiality, their Lordships continued:

“More serious objection may for the same reason be taken to vesting in them powers which if exercised by another would be open to challenge on all the grounds that are available to a citizen who thinks his rights have been infringed. For it is their own executive act which they may be invited judicially to examine.”<sup>55</sup>

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53 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 276.

54 *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 540-541.

55 *Ibid* 541.

Thus the Privy Council was concerned that the combination of judicial and non-judicial functions in the one judicial body could render that body judge in its own cause or promote a relationship between it and the other branches of government liable to undermine public confidence in judicial independence.<sup>56</sup> The force of such concerns does not require elaboration. It is difficult to understand, however, the pivotal role which federalism plays in arriving at such a conclusion. To reiterate a point made in the previous chapter,<sup>57</sup> in any system of government – federal or unitary – the isolation of judicial functions in a judiciary enjoying tenure in *Act of Settlement* terms would enhance the impartial administration of justice. The existence of a federal division of powers gives added significance to judicial independence, but it does not create a need that was not already there.<sup>58</sup> These issues of judicial independence and impartiality, which were crucial to the majority outcome in *Boilermakers'*, will be explored at greater length later in the chapter.

### (c) The Dissenting Judgments

It remains to say something of the three dissenting judgments in *Boilermakers'*, each of which found the Arbitration Court to be validly constituted. The judgment of Williams J. was the most detailed and convincingly argued. Underlying his Honour's approach was a general wariness of the legal doctrine of separation of powers. Williams J. affirmed more than once that federal judicial power could be exercised only by the courts mentioned in s.71 of the Constitution.<sup>59</sup> However, separation of powers had "led to grave difficulties in the United States" and should be applied "with great circumspection to the Australian Constitution".<sup>60</sup> In making these remarks, Williams J. was clearly troubled by the inconvenience and inefficiency of dividing functions like

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<sup>56</sup> G. Winterton, "Judges as Royal Commissioners" (1987) 10 *U.N.S.W.L.J.* 108, 124.

<sup>57</sup> See above p.108. And see also W.A. Wynes, "The Decision in the *Boilermakers'* Case" (1957) 30 *A.L.J.* 614, 616.

<sup>58</sup> Nonetheless, in recent times members of the High Court have emphasized the importance of judicial independence under a *federal* Constitution. See *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 12-13 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.; 22-25 per Gaudron J.

<sup>59</sup> *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 302, 306, 314.

<sup>60</sup> *Ibid* 301.

those at issue which were in fact complementary of one another.<sup>61</sup> Moreover, he questioned the taxonomical basis of the separation doctrine, observing that:

“at the time the Australian Constitution was being formed neither in England nor elsewhere had any precise tests by which the respective functions of the three organs of government might be distinguished ever come to be generally accepted”.<sup>62</sup>

He might have added that the passage of time had not cast further light on this definitional conundrum.

In light of this scepticism as to the practicability of the legal doctrine of separation of powers it is not surprising that Williams J. felt that the broad English doctrine of separation of powers provided a more appropriate theoretical model than its American counterpart, his Honour observing that “[t]he *Commonwealth of Australia Constitution Act* is an Act of the Imperial Parliament and should be interpreted as such”.<sup>63</sup> Of the majority’s textual argument and American analogue based on the frame of the Constitution and the language of ss.1, 61 and 71, Williams J. simply observed that “the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity”.<sup>64</sup> In the event, Williams J. turned implications based on the text of the Constitution back on the majority. After noting that several grants of legislative power in s.51 – more specifically bankruptcy and insolvency (xvii), copyrights, patents and trade marks (xviii), divorce and matrimonial causes (xxii) and industrial conciliation and arbitration (xxxv) – appeared to require a combination of judicial and non-judicial functions for their effective exercise, his Honour said that if Parliament saw fit to combine these functions:

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61 *Ibid* 307-309.

62 *Ibid* 301.

63 *Id.* Naturally enough, Williams J. also noted the failure of the Constitution to keep separate the federal legislative and executive powers (*ibid* 302).

64 *Ibid* 302.

“I can find nothing expressed or unexpressed in the Constitution to prevent Parliament resorting at the same time to its powers under s.51 and under Chap.III of the Constitution for that purpose”.<sup>65</sup>

And having reached this conclusion, Williams J. did not regard it as anomalous that in conferring judicial power on federal courts, the Commonwealth Parliament was confined to the subject matters of federal jurisdiction set out in Chapter III:

“The reason why, under Chap. III, courts can only be invested with the judicial power of the Commonwealth may lie in the circumstance that under that chapter State courts as well as federal courts can be invested with judicial power and it is necessary strictly to limit the extent to which State courts can have duties imposed on them by federal law.”<sup>66</sup>

This general conclusion did not mean, however, that Williams J. was prepared to sanction any combination of judicial and non-judicial functions. Proceeding from the primary separation rule that Chapter III courts alone can exercise the judicial power of the Commonwealth, Williams J. insisted that “nothing must be done which is likely to detract from their complete ability to perform their judicial functions”.<sup>67</sup> This led to the formulation of a limitation on the admixture of judicial and non-judicial functions similar to that identified by Latham C.J. in *Lowenstein*:

“The Parliament cannot ... impose on the courts duties which would be at variance with the exercise of these functions or duties and which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions.”<sup>68</sup>

More succinctly, non-judicial functions conferred on federal courts:

“must not be functions which courts are not capable of performing consistently with the judicial process”.<sup>69</sup>

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65 *Ibid* 309.

66 *Ibid* 315-316.

67 *Ibid* 314.

68 *Id.*

69 *Ibid* 315.

Nonetheless, his Honour found that there was no incompatibility in the same federal court both making and enforcing an industrial award.<sup>70</sup>

The judgment of Taylor J. was more specific to the circumstances of the Arbitration Court than that of Williams J. Once again, Taylor J. accepted that federal judicial power could only be exercised by Chapter III courts.<sup>71</sup> Of the general theory of the separation of powers, his Honour emphasized that its utility as a constitutional principle was dependent upon the extent to which one could define the three classical functions of government.<sup>72</sup> Taylor J. evidently believed that a core meaning could be attached to each of these functions because after a lengthy excursus into the doctrine of innominate powers as developed by Isaacs J. in *Federal Commissioner of Taxation v. Munro*, his Honour maintained that Parliament was debarred from conferring on federal courts “powers and functions which are essentially legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions”.<sup>73</sup> “Arbitral” powers deriving from s.51(xxxv) of the Constitution were not, however, essentially legislative or executive in nature. They were instead of a “special character” which Parliament could allocate in its discretion, presenting certain features usually associated with the exercise of judicial power.<sup>74</sup> Moreover Taylor J. believed, particularly in light of historical factors, that the language of s.51(xxxv) was apt to embrace the creation of a tribunal possessing both arbitral and enforcement powers. Against this backdrop, there could not be found in the Constitution any implication which would prohibit the combination of judicial and arbitral functions in the one federal body.<sup>75</sup>

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<sup>70</sup> *Ibid* 309, 317.

<sup>71</sup> *Ibid* 332, 338.

<sup>72</sup> *Ibid* 333.

<sup>73</sup> *Ibid* 340-341.

<sup>74</sup> *Ibid* 341-343, 346.

<sup>75</sup> *Ibid* 346.

Webb J. wrote a judgment in which he insisted that the Constitution was to be interpreted in accordance with classic “*Engineers*” principles.<sup>76</sup> In his Honour’s opinion, in order effectively to counter the view that the Arbitration Court was validly constituted, it was necessary “to fall back on the strict doctrine of the separation of powers”.<sup>77</sup> But the principles of interpretation to be applied to the Constitution did not allow this:

“Whatever difference there is between the English and Australian Constitutions is due to the fact that the latter is a written Constitution, that is to say, that the rules of construction of statutes determine its meaning and effect and the theory of the strict doctrine of separation of powers as applied in the United States of America plays no part.”<sup>78</sup>

Thus, arbitral and judicial functions were validly combined in the Arbitration Court, his Honour discerning no conflict in the discharge of these functions by a single body.<sup>79</sup>

### **3. The *Boilermakers’ Case* in Critical Perspective**

#### **(a) The *Boilermakers’ Case* and the Independence of the Federal Judiciary**

The preceding analysis of the opinions in the *Boilermakers’ Case* – both majority and minority – suggests that the formal reasoning adopted by Dixon C.J. and his majority brethren was deficient in a number of respects. Above all else, and as the dissenting judgment of Williams J. demonstrates, the textual considerations on which so much reliance was placed were not compelling.<sup>80</sup> In a reflection on this textual ambiguity, later judges and commentators have inverted the emphasis of the joint majority judgment and come (rightly) to regard the rule in the *Boilermakers’ Case* as turning

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<sup>76</sup> Although he did not use this terminology. See *ibid* 325-326, 328-329.

<sup>77</sup> *Ibid* 328.

<sup>78</sup> *Ibid* 328-329.

<sup>79</sup> *Ibid* 330-331.

<sup>80</sup> See also Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987) 67 reporting that “[i]t may be conceded that the *Boilermakers’* rule is a judicial creation, which is not compelled by the language of the Constitution itself”.

upon the principle of judicial independence in a federal system.<sup>81</sup> Professor Winterton has expressed this rationalization of *Boilermakers* ' as follows:

“The policy underlying the *Boilermakers* ' principle is that the independence and impartiality of the federal judiciary, which ultimately determines the boundaries of power between the Commonwealth and the States, could be compromised, or at least be perceived to be by the States and the public, if federal judges were to become entangled with the national government.”<sup>82</sup>

So regarded, the rule in the *Boilermakers* ' Case buttresses the primary separation rule established in the *Inter-State Commission Case* and *Alexander's Case* by shielding the federal judiciary from potentially damaging contact with the legislative and executive branches. Thus, the *Boilermakers* ' prohibition of the admixture of judicial and non-judicial functions owes its inspiration to the same considerations which impelled the joint dissenting judgment in *Lowenstein* as well as Latham C.J.'s admission in that case that not all powers are consistent with the exercise of judicial power. The difference is that the majority in *Boilermakers* ' were driven by their emphasis on the constitutional text to lay down a more absolute rule than *Lowenstein* had suggested. Henceforth, judicial independence was to be rigorously policed by ensuring that federal courts were constitutionally confined to the exercise of federal judicial power.

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<sup>81</sup> See, eg, G. Sawyer, *Australian Federalism in the Courts* (1967) 165; E. Campbell, “The Choice Between Judicial and Administrative Tribunals and the Separation of Powers” (1981) 12 *F.L.Rev.* 24, 27; G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 61-62; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 169-170, 212-218; M. Gaudron, “Some Reflections on the *Boilermakers* Case” (1995) 37 *J.Ind.Rel.* 306, 309; *R. v. Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87, 90 per Barwick C.J.; *Hilton v. Wells* (1985) 157 C.L.R. 57, 82 per Mason and Deane JJ. referring to “the independence of the federal judiciary which is protected by the *Boilermakers* ' Case”; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 10-13 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. As already indicated, however, the present author is not persuaded of the overarching importance of the existence of a federal system to this statement of principle.

<sup>82</sup> G. Winterton, “Judges as Royal Commissioners” (1987) 10 *U.N.S.W.L.J.* 108, 124 (fn. omitted).

As apparent from *Dignan*, Dixon C.J. had long been convinced of the necessity of this rule.<sup>83</sup> That he was able to bring a majority of the Court with him in the mid-1950s may be explicable in terms of the industrial relations climate of the day. As was pointed out in a contemporary article on *Boilermakers*, the case was actually one skirmish in a wider battle by trade unions against penal sanctions.<sup>84</sup> In 1951, amendments were made by the Menzies Government to the *Conciliation and Arbitration Act 1904* (Cth) giving the Arbitration Court increased powers both to order compliance with awards and to punish contempt of Court.<sup>85</sup> In consequence of union refusal to comply with such orders, the Arbitration Court between 1951 and 1956 imposed in excess of £6 000 worth of fines (including the £500 fine directed to the Boilermakers' Society of Australia which sparked the *Boilermakers' Case* itself).<sup>86</sup> The spectre of such wilful disobedience of Court orders and the further politicization of the already politically charged activities of the Arbitration Court may have driven home to Dixon C.J., McTiernan, Fullagar and Kitto JJ. the danger of judicial involvement in industrial policy. Their Honours would already have been alert to this danger because, as d'Alpuget shows in her biography of Sir Richard Kirby, following the Arbitration Court's 1953 decision in the Basic Wage and Standard Hours Inquiry unexpectedly abolishing automatic quarterly cost of living adjustments and substituting a wage-fixing system based on the capacity of the economy to pay, the Arbitration Court's authority among key sectors of its "client" community had declined rapidly.<sup>87</sup> Sir Owen Dixon believed that public dissatisfaction with the Arbitration Court was apt to infect Chapter III courts generally; upon being sworn in as Chief Justice of the High Court in April

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83 *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 97-98. And earlier, when giving evidence before the Royal Commission on the Constitution in 1927, Dixon expressed the view that the combination of judicial and arbitral functions in the Arbitration Court was invalid. See O. Dixon, *Minutes of Evidence taken before the Royal Commission on the Constitution of the Commonwealth* (1927) 782 referred to in G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 59 fn.90.

84 D.C. Thomson, "The Separation of Powers Doctrine in the Commonwealth Constitution: *The Boilermakers' Case*" (1958) 2 *Syd.L.R.* 480, 494-495.

85 *Ibid* 495.

86 *Id.* See also B. d'Alpuget, *Mediator: A Biography of Sir Richard Kirby* (1977) 142-143.

87 *Ibid* 139. And see, in relation to the Basic Wage and Standard Hours Inquiry of 1953, *ibid* ch.9 ("This Infamous Document").



1952 he declared that “the public do not maintain the distinction between the administration of justice according to law and the very important functions of industrial tribunals”.<sup>88</sup> Thus, against this backdrop, and for the sake of all courts exercising federal judicial power, it may have seemed that the “pristine independence of the judiciary”<sup>89</sup> could not be too jealously guarded.

In 1987 the Australian Judicial System Advisory Committee reported to the Constitutional Commission that “[t]he view that the separation of judicial power under the *Boilermakers’ case* is desirable and should be retained was strongly supported in submissions to the Committee”.<sup>90</sup> Although the Committee did not spell out the basis of this support, it can be assumed from the Committee’s report that the *Boilermakers’* prohibition upon the admixture of judicial and non-judicial functions is still widely regarded as vitally protecting judicial independence.<sup>91</sup> Yet, as the Committee also acknowledged, the rule in the *Boilermakers’ Case* has detractors. Chief Justice Barwick in 1974 in *R. v. Joske; Ex parte Australian Building Construction Employees and Builders’ Labourers’ Federation*<sup>92</sup> cast doubt on *Boilermakers’* in a trenchant critique of Dixon C.J.’s handiwork. Barwick C.J. said:

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88 “Swearing in of Sir Owen Dixon as Chief Justice” (1952) 85 C.L.R. xi, xvi (noted in B. d’Alpuget, *Mediator: A Biography of Sir Richard Kirby* (1977) 142). Although its influence in the Australian context can only be speculative, it is notable that the longstanding American debate concerning the appropriateness of the assumption by federal judges of extra-judicial assignments was rekindled in the mid-1950s with the publication in December 1953 of certain of the correspondence of the late Chief Justice Stone setting out that Justice’s strong views against the propriety of such activity (see A.T. Mason, “Extra-Judicial Work for Judges: The Views of Chief Justice Stone” (1953) 67 *Harv.L.Rev.* 193). Professor George Winterton has also pointed out that two members of the *Boilermakers’* majority – Dixon C.J. and Fullagar J. – had studied under Professor Harrison Moore at Melbourne University. Thus, their approach to the separation of powers was possibly shaped by Harrison Moore’s ultimate support for a complete separation of federal judicial power. See G. Winterton, “Introduction to the 1997 Reprint” in W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) (1997 reprint) xlv, including fn.204.

89 To borrow the phrase of Professor Galligan in B. Galligan, *Politics of the High Court* (1987) 203.

90 Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987) 67 (fn. omitted).

91 *Ibid* 65-67.

92 (1974) 130 C.L.R. 87.

“The principal conclusion of the *Boilermakers’ Case* was unnecessary, in my opinion, for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit. But none the less and notwithstanding the unprofitable inconveniences it entails it may be proper that it should continue to be followed. On the other hand, it may be thought so unsuited to the working of the Constitution in the circumstances of the nation that there should now be a departure from some or all of its conclusions.”<sup>93</sup>

Mason J. agreed that “a serious question arises as to the course which this Court should adopt in relation to the principle [sic] conclusion reached in [the *Boilermakers’ Case*]”.<sup>94</sup> Neither Barwick C.J. nor Mason J. found it necessary, however, for the purposes of the case at hand to decide whether *Boilermakers’* should be overturned.<sup>95</sup>

Accepting that the rule in the *Boilermakers’ Case* is not dictated by the text of the Constitution but is instead a structural implication operating to safeguard the independence of the federal judiciary, Barwick C.J.’s claim that a blanket ban on the assumption by federal courts of non-judicial functions goes further than is necessary in order to protect and preserve that independence strikes at the rule at its foundation. As Mason C.J. observed in *Australian Capital Television Pty Ltd v. Commonwealth*,<sup>96</sup> a constitutional implication which is structural rather than textual “must be logically or

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<sup>93</sup> *Ibid* 90 (fn. omitted). These criticisms directed to the rule in the *Boilermakers’ Case* have been echoed by Professors Winterton and Zines. See G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 61-64; G. Winterton, “Judges As Royal Commissioners” (1987) 10 *U.N.S.W.L.J.* 108, 126; L. Zines, *The High Court and the Constitution* (3rd ed) (1992) 184 (cf L. Zines, *The High Court and the Constitution* (4th ed) (1997) 218). See also *Gould v. Brown* (1998) 151 A.L.R. 395, 483 per Kirby J. But for a recent defence of the rule in the *Boilermakers’ Case*, see K. Walker, “Persona Designata, Incompatibility and the Separation of Powers” (1997) 8 *P.L.R.* 153, esp. 162-164.

<sup>94</sup> *R. v. Joske; Ex parte Australian Building Construction Employees and Builders’ Labourers’ Federation* (1974) 130 C.L.R. 87, 102.

<sup>95</sup> In the subsequent case of *R. v. Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 C.L.R. 194 the Commonwealth sought, and was granted, leave to intervene to argue that *Boilermakers’* should no longer be followed. However, the Court found that the provisions of the *Conciliation and Arbitration Act 1904* (Cth) at issue did not confer non-judicial power on the Industrial Court. It thus proved unnecessary to consider the correctness of *Boilermakers’*.

<sup>96</sup> (1992) 177 C.L.R. 106.

practically necessary for the preservation of the integrity of that structure”.<sup>97</sup> Thus, if the rule in the *Boilermakers’ Case* is neither a textual implication nor “logically or practically necessary” for the maintenance of judicial independence and, moreover, is productive of “unprofitable inconveniences” in the working of the Constitution then a strong case must exist for its rejection.

The remainder of this chapter seeks to make out that case. The “unprofitable inconveniences” frequently associated with the *Boilermakers’ Case* are identified and explored followed by an examination of the demands of judicial independence. This latter consideration is the more problematic for the argument that judicial independence cannot be too vigorously protected lends appeal to the rule in the *Boilermakers’ Case* as the 1987 Australian Judicial System Advisory Committee Report demonstrates. But that appeal assumes both that the terms “judicial” and “non-judicial” provide appropriate discriminating criteria upon which to base such a rule and that the protection of judicial independence (or, more accurately, the perception thereof – the rule in the *Boilermakers’ Case* is essentially prophylactic<sup>98</sup>) must trump every competing interest in every circumstance. As will be seen, High Court authority and common sense supports neither proposition.

## **(b) The *Boilermakers’ Case* and “Unprofitable Inconveniences” in the Working of the Constitution**

### **(i) Industrial Arbitration and Administrative Law**

Although Barwick C.J. in *Joske* did not spell out the “inconveniences” which he associated with the *Boilermakers’ Case*, the academic literature suggests the existence of two key concerns. First, the fact that the rule in the *Boilermakers’ Case* constrains the ability of the Commonwealth Parliament to allocate governmental functions among

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<sup>97</sup> *Ibid* 135.

<sup>98</sup> For discussion of the “prophylactic” nature of the doctrine of separation of powers in the United States setting, see M.H. Redish and E.J. Cisar, “‘If Angels Were to Govern’: The Need for Pragmatic Formalism in Separation of Powers Theory” (1991) 41 *Duke L.J.* 449.

federal tribunals according to considerations of “efficiency” alone has led to the argument that *Boilermakers’* has impeded the development of efficient and coherent federal systems of industrial arbitration and administrative law.<sup>99</sup> In relation to industrial arbitration, the Hancock Committee inquiring into Australian Industrial Relations Law and Systems reported in 1985 that “there is dissatisfaction with the present institutional arrangements, grounded in a belief that the overall effective functioning of the system has been impaired by the division of arbitral and judicial powers”.<sup>100</sup> (In the wake of *Boilermakers’* federal arbitral functions were vested in a new body, the Conciliation and Arbitration (now Industrial Relations) Commission. Associated judicial functions were separately vested in a federal court, currently the Federal Court of Australia).<sup>101</sup> More particularly, the Hancock Committee believed that the inability of the Arbitration Commission to interpret and enforce its awards had led to a “perceived lessening of the ‘authority’” of that body, that the dual system entailed “unnecessary complexity and legalism” and that there was a need “for a rationalisation of the exercise of arbitral and judicial powers”.<sup>102</sup>

The case of *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia*<sup>103</sup> decided shortly after the Hancock Report provides one example of the technical distinctions and inefficiencies which the dual system promotes, the High Court finding that although the Conciliation and Arbitration Commission was

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<sup>99</sup> Although depending on the meaning of the slippery term “efficiency”, the primary separation rule established in the *Inter-State Commission Case* could equally be seen as undermining a purely “efficient” allocation of governmental functions. See also Deane J.’s reference in *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501 to “the somewhat inconvenient separation of judicial from executive and legislative powers” (*ibid* 606).

<sup>100</sup> *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.2, 382.

<sup>101</sup> See in this regard, M. Crock and R. McCallum, “The Chapter III Courts: The Evolution of Australia’s Federal Judiciary” (1995) 6 *P.L.R.* 187, 194-196 and subsequent to this *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) transferring jurisdiction of the Industrial Relations Court of Australia to the Federal Court of Australia.

<sup>102</sup> *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.2, 382. The Committee added that there would be merit in the federal institutional arrangements more closely mirroring those of the States (*ibid* 383).

<sup>103</sup> (1987) 163 C.L.R. 656.

unable to entertain a dispute “as to the existence or enforcement of a legal right to reinstatement or as to the breach of a legal obligation properly remedied by an order for reinstatement” it could nonetheless vary an award or make a new award to bring a reinstatement obligation into existence in settlement of a dispute,<sup>104</sup> the Court acknowledging that the two sets of functions in this situation – judicial and arbitral – might well involve the making of similar findings as to whether an employee’s dismissal was in breach of an award obligation.<sup>105</sup> Confronted with these technicalities (and other difficulties besides),<sup>106</sup> the Hancock Committee canvassed a number of options designed to secure greater integration of arbitral and judicial functions, ultimately recommending the establishment of a system of dual office holding between Commission and Court<sup>107</sup> exploiting the designated person exception to the rule in the *Boilermakers’ Case* recognized in *Drake v. Minister for Immigration and Ethnic Affairs*.<sup>108</sup>

It would be wrong to suggest, however (and the Hancock Committee did not suggest) that the *Boilermakers’* division between arbitral and judicial functions has been universally condemned. Interestingly, it appears that the dual system of Commission and Court may well have been adopted by the Menzies Government even in the absence of the *Boilermakers’ Case*.<sup>109</sup> The bifurcated system has been credited with rendering

<sup>104</sup> *Ibid* 663 per Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ. And see M. Crock and R. McCallum, “The Chapter III Courts: The Evolution of Australia’s Federal Judiciary” (1995) 6 *P.L.R.* 187, 195.

<sup>105</sup> (1987) 163 C.L.R. 656, 665-667.

<sup>106</sup> The irony is, however, that *Re Ranger* is regarded in industrial law as a “liberating” decision, identifying a mechanism by which reinstatement claims can be validly brought before the Commission. See W.B. Creighton *et al*, *Labour Law: Text and Materials* (2nd ed) (1993) 296, 329.

<sup>107</sup> *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.2, 383-398.

<sup>108</sup> (1979) 24 A.L.R. 577 (F.C.A.). In relation to the designated person principle, see below pp.150-154 of this chapter. The Hancock Committee’s recommendations in this regard have not been adopted. See M. Crock and R. McCallum, “The Chapter III Courts: The Evolution of Australia’s Federal Judiciary” (1995) 6 *P.L.R.* 187, 196; J.T. Ludeke, “The Structural Features of the New System” (1994) *Aus.J.Labour Law* 132, 142.

<sup>109</sup> *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.3, 125; G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 188 (Menhennitt); B. d’Alpuget, *Mediator: A Biography of Sir Richard Kirby* (1977) 143-145.

the arbitral process more responsive to social and economic change.<sup>110</sup> And writing in 1971 in the Conciliation and Arbitration Commission Annual Report, Sir Richard Kirby (President of the Commission from its establishment in 1956 until his retirement in 1973) expressed the opinion that the Commission had been able to function “more efficiently and effectively” because of its “confinement to conciliation and arbitration”; that “it would be unwise for the tribunal responsible for conciliation, to have any connection whatever with enforcement or punishment”.<sup>111</sup> However, in an earlier annual report in which Sir Richard expressed the same view, he noted with regret that the Commission was unable to interpret its own awards.<sup>112</sup>

The Hancock Committee, although aware of Sir Richard’s opinion, nonetheless found that “the present institutional arrangements have an adverse effect on the operation of the system”.<sup>113</sup> This conclusion of an expert committee must be accepted. Apart from anything else, were any relaxation of the rule in the *Boilermakers’ Case* to occur, it would remain possible for persons minded as Sir Richard to agitate for such continued separation of arbitral and judicial functions as they saw fit.

By contrast, the impact of the rule in the *Boilermakers’ Case* upon administrative law is harder to assess and calls for a specialist investigation beyond the scope of this thesis. *Boilermakers’* has been criticized for inhibiting “the development of a sound system of administrative law” at federal level.<sup>114</sup> But whereas in the absence of the

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<sup>110</sup> M. Gaudron, “Some Reflections on the Boilermakers Case” (1995) 37 *J.Ind.Rels* 306, 307; J.E. Isaac, “Lawyers and Industrial Relations” in A.D. Hambly and J.L. Goldring (eds), *Australian Lawyers and Social Change* (1976) 331-332, 334.

<sup>111</sup> Quoted in *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.3, 127.

<sup>112</sup> Quoted in *ibid* 128. For a similar opinion in favour of the separation of judicial and arbitral functions coupled with a similar qualification, see G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 189 (Menhennitt).

<sup>113</sup> *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.2, 382.

<sup>114</sup> G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 193-194 (Else-Mitchell). It should be noted, however, that Else-Mitchell’s criticism in this regard was directed at the doctrine of the separation of powers as a whole and not just the rule in the *Boilermakers’ Case*. See also Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987) 66.

*Boilermakers' Case*, the Commonwealth Parliament would enjoy greater flexibility in the allocation among federal courts and tribunals of those non-judicial functions associated with a modern system of administrative law, it is submitted that the primary separation rule – that federal judicial power be exercised only by Chapter III courts – imposes the greater institutional constraint in this area. If *Boilermakers' Case* were overturned, that primary separation rule would still stand in the way of the creation of expert panels of lawyers and non-lawyers exercising a mixture of judicial and non-judicial functions in an informal and non-legalistic manner. For even leaving aside the problems of non-lawyers being appointed to a Chapter III court<sup>115</sup> and such a court being directed by Parliament to proceed in an unconventional and possibly non-curial manner,<sup>116</sup> appointments to such a tribunal would have to be in accordance with s.72 of the Constitution – anathema to any government anxious to minimize expenditure and maximize institutional flexibility.

The Constitutional Commission was not unduly troubled by the impact of the rule in the *Boilermakers' Case* on administrative law or on areas such as family law. This was essentially because, in the Commission's words, "[t]he High Court has recognized a large area of decision-making that can, at the Parliament's discretion, be conferred on either courts or tribunals" and "has allowed the Parliament considerable latitude in choosing to confer discretionary powers, and jurisdiction to apply broad standards, on federal courts".<sup>117</sup> In other words, the post-*Boilermakers' Case* High Court has not pursued

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<sup>115</sup> As both Professor Sawyer and J.M. Finnis have pointed out, the Constitution does not in terms demand that justices of federal courts be lawyers (G. Sawyer, "The Separation of Powers in Australian Federalism" (1961) 35 *A.L.J.* 177, 177; J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel.L.R.* 159, 167 fn.42). Nonetheless, a "court" and a "justice" thereof as those terms are used in ss.71 and 72 of the Constitution might well be thought to imply, in accordance with their traditional usage, the appointment of legally trained or experienced personnel.

<sup>116</sup> As discussed at length in chapter six, the Commonwealth Parliament cannot sanction the exercise of federal judicial power "in a manner which is inconsistent with the essential character of a court or with the nature of judicial power" (*Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27 per Brennan, Deane and Dawson JJ. (fn. omitted)). Admittedly this requirement would not touch a court's non-judicial functions, unless the manner of exercise of those functions in some way "infected" its judicial functions.

<sup>117</sup> *Final Report of the Constitutional Commission* (1988) 392-393.

rigid conceptions of judicial and non-judicial power.<sup>118</sup> Drawing in particular from two pre-*Boilermakers*' decisions – *Federal Commissioner of Taxation v. Munro*<sup>119</sup> and *R. v. Davison*<sup>120</sup> – the High Court has emphasized that many governmental functions are not inherently legislative, executive or judicial in nature but instead take their character in any given instance from the body in which they are invested and the circumstances of their exercise. Moreover, in addition to the development of this doctrine of “innominate powers”, the High Court has accepted that broad statutory discretions, structured by considerations of justice and fairness, do not necessarily fall outside the judicial province.<sup>121</sup>

This largely flexible approach to the meaning of judicial and non-judicial power has been depicted by one commentator as marking a decline of both limbs of the separation doctrine. According to Professor Lane:

“without denying that there is to be a separation of judicial and non-judicial powers in federal jurisdiction and for federal non-judicial bodies, the cases are slowly removing the sting from this ruling. Along one course the cases are allowing s.71 courts to exercise what we might have regarded as non-judicial powers in the past. Along another course the cases are allowing federal non-judicial bodies to exercise what we might have regarded as judicial powers in the past.”<sup>122</sup>

In relation to the primary separation rule, recent developments emphasizing that s.71 of the Constitution is concerned with both the location or repository of federal judicial

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118 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 217.

119 (1926) 38 C.L.R. 153, 178-179 per Isaacs J.

120 (1954) 90 C.L.R. 353, 368-370 per Dixon C.J. and McTiernan J.

121 See, eg, *R. v. Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87, 94 per Barwick C.J. (with whom Stephen J. and Mason J. agreed) (“[t]he determination whether some activity or its result is oppressive, unreasonable or unjust is not something which is foreign to the exercise of judicial power”); 97 per Menzies J.; 100-101 per Gibbs J.; *R. v. Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 C.L.R. 194, 209-211 per Stephen J. (with whom Barwick C.J. agreed on this point); 215-218 per Mason and Murphy JJ. And see also *Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 127 C.L.R. 617, 631 per Barwick C.J.; 638-639 per Menzies J.; 648-650 per Walsh J.; 650-651 per Gibbs J. See also below pp.204-207 (ch.5).

122 P.H. Lane, “The Decline of the Boilermakers Separation of Powers Doctrine” (1981) 55 *A.L.J.* 6, 11.



power *and* the manner of its exercise may have arrested in part the decline noted by Professor Lane by revealing a new, and potentially far-reaching, dimension to the rule.<sup>123</sup> It is correct to say, however, that the High Court's liberal approach to defining judicial power has taken some of the "sting" from the *Boilermakers'* extension of the separation doctrine. As is discussed at greater length in Chapter Five, with the separation doctrine admitting of few formal exceptions, the High Court has seized upon the most flexible element therein, and utilized the concepts of "judicial" and "non-judicial" power to accommodate the separation of powers to contemporary social needs.<sup>124</sup> This adjustment of interests is to be applauded, but it begs the question whether the rule in the *Boilermakers' Case*, which is subsidiary to that expressed in the *Inter-State Commission Case* and *Alexander's Case*, is expressed too starkly and should not be reframed in more flexible terms.

It seems then that the rule in the *Boilermakers' Case*, as opposed to the rule set out in the *Inter-State Commission Case* and *Alexander's Case*, has not unduly stultified initiatives in the area of administrative law. Certainly, the most recent such initiative to founder in the High Court on separation of powers grounds – that considered in *Brandy v. Human Rights and Equal Opportunity Commission*<sup>125</sup> – involved not the rule in the *Boilermakers' Case* but the basic command that judicial power be exercised only by courts.

### **(ii) Defining Judicial and Non-Judicial Power**

As just noted, the High Court has blunted a potentially rigid version of the separation of federal judicial power by emphasizing a flexible approach to the meaning of "judicial" and "non-judicial". This flexible approach, however, has rendered the definition of those terms and the practical identification of those powers extremely difficult. Thus, the other "unprofitable inconvenience" which Barwick C.J. may have had in mind in his

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<sup>123</sup> See generally below ch.6.

<sup>124</sup> See generally below ch.5. See also R. Blackford, "Judicial Power, Political Liberty and the Post-Industrial State" (1997) 71 *A.L.J.* 267.

<sup>125</sup> (1995) 183 C.L.R. 245.

*Joske* critique of the rule in the *Boilermakers' Case* relates to the difficulty of defining such abstract concepts as “judicial power” and “non-judicial power”, a difficulty which the High Court has repeatedly acknowledged.<sup>126</sup>

The majority judgment in *Boilermakers'*, despite creating a new realm for the application of these terms, offered little guidance as to the meaning to be attributed to them, an omission which attracted immediate criticism. In a commentary published in 1958 it was pointed out that:

“The view of the High Court and the Privy Council to the effect that ‘courts’ must be the only organs of government to exercise ‘judicial’ powers, and that they must exercise no powers but these and powers incidental to or compatible with these, involves reasoning which is clearly circuitous. Since neither court made any real attempt to define what it meant by a ‘court’ or ‘judicial’ power, it is very difficult to extract any meaningful principle from their decisions.”<sup>127</sup>

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<sup>126</sup> A great many references could be given to substantiate this proposition. The following is just a selection from leading judgments: *R. v. Davison* (1954) 90 C.L.R. 353, 366 per Dixon C.J. and McTiernan J. (“[m]any attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive”); *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 373 per Kitto J. (“[t]he question is whether the powers which Pt VI thus purports to confer are within the concept of the judicial power of the Commonwealth. Questions of this general description are often difficult to decide, for it has not been found possible to frame an exhaustive definition of judicial power. But this is not to say that the expression is meaningless”); *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167, 188-189 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. (“[t]he acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it”); *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 257 per Mason C.J., Brennan and Toohey JJ.; 267 per Deane, Dawson, Gaudron and McHugh JJ. (“[d]ifficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not” (fn. omitted)). See also below fn.19 (ch.5).

<sup>127</sup> D.C. Thomson, “The Separation of Powers Doctrine in the Commonwealth Constitution: *The Boilermakers' Case*” (1958) 2 *Syd.L.R.* 480, 492. See also *ibid* 499; R. Anderson, “Exclusiveness of Judicial Power of the Commonwealth” (1956-59) 3 *U.Q.L.J.* 71, 73. And see generally, J.D. Merralls, “Judicial Power Since the *Boilermakers' Case*: Statutory Discretion and the Quest for Legal Standards” (1959) 32 *A.L.J.* 283 (Part 1) and 303 (Part 2).

Of course, this criticism is directed both to the rule in the *Boilermakers' Case* and to the primary separation rule that federal judicial power be exercised only by courts. But to acknowledge the difficulty of authoritatively identifying those judicial functions which must be exercised by a court, or not at all, is to provide no warrant for an extension of the situations in which the terms "judicial" and "non-judicial" are controlling. To the contrary, these difficulties of definition supply a reason for subjecting the rule in the *Boilermakers' Case* to close scrutiny.<sup>128</sup> Is it really necessary in order to protect and preserve the independence of the federal judiciary that a blanket ban be placed on the admixture of "judicial" and "non-judicial" functions? Can judicial independence and impartiality be just as effectively safeguarded by a better targeted rule employing concepts more susceptible of practical application? The answer is yes, and the irony is that the High Court is already applying such a rule, albeit in relation to a different aspect of the separation doctrine.

**(c) Is the Rule in the *Boilermakers' Case* Necessary for the Preservation of the Independence of the Federal Judiciary?**

**(i) Some Limitation Necessary on the Category of Functions Which May Validly be Combined With Judicial Functions**

In addressing the questions set out above, the necessity of some limitation upon the category of functions which may validly be combined with the judicial functions of a federal court should be emphasized. As the discussion of *Lowenstein* at the outset of this chapter made clear, Parliament could not wield an absolute discretion in this regard consistently with the basic principle of separation embodied in the *Inter-State*

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<sup>128</sup> See *Harris v. Caladine* (1991) 172 C.L.R. 84, 93 per Mason C.J. and Deane J.: "The difficulties which have invariably attended attempts to define judicial power in a comprehensive fashion and to identify those functions which constitute an exercise of the power and those that do not provide yet another reason for refusing to imply in s.71 a restriction limiting the exercise of all federal jurisdiction to judges." See also A. Mason, "A New Perspective on Separation of Powers" (1996) 82 *C.B.P.A.* 1, 5-6 and the arid High Court litigation over whether s.140 of the *Conciliation and Arbitration Act* 1904 (Cth) enabling the Commonwealth Industrial Court to strike down a union rule on certain grounds, conferred judicial or non-judicial power (*R. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277 and *R. v. Commonwealth Industrial Court; Ex parte the Amalgamated Engineering Union, Australian Section* (1960) 103 C.L.R. 368).

*Commission Case* and *Alexander's Case*.<sup>129</sup> To reiterate the basic point: if one accepts that the object of the exclusive vesting of federal judicial power in Chapter III courts is the promotion of the rule of law by means of the impartial administration of justice, then that object would be endangered were, for example, federal judges to act as legal advisers to the government of the day. In that situation, and leaving aside the *actual* effect on judicial impartiality of such an assumption of responsibility, public confidence in judicial independence would be sufficiently undermined as to call in question the rationale for investing judicial power in the courts in the first place.<sup>130</sup> Moreover, overlapping these basic considerations of judicial independence is the fact that the varying expertise possessed by each of the three branches of government suggests that certain tasks inhere exclusively in only one such branch or, alternatively, in those two branches representative of the people.<sup>131</sup>

It comes as no surprise then that the progenitor of the legal doctrine of the separation of powers in Australia – Isaacs J. – identified certain broad limitations attending the admixture of judicial and non-judicial functions. According to his Honour in *Federal Commissioner of Taxation v. Munro*:

“some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of

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<sup>129</sup> See also *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 703 per Gaudron J.  
<sup>130</sup> And see *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 19-20 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.: “the giving to the executive of advisory opinions on questions of law is quite alien to the exercise of the judicial power of the Commonwealth”.

<sup>131</sup> See *R. v. Davison* (1954) 90 C.L.R. 353, 382 per Kitto J. describing the Australian separation doctrine as employing “distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different ‘skills and professional habits’ in the authorities entrusted with their exercise”. See also M.H. Redish, “Separation of Powers, Judicial Authority, And the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*” (1990) 39 *DePaul L.R.* 299, 303: “the judicial exercise of purely legislative or executive power, untied to the adjudicatory mold, may threaten fundamental democratic values by effectively allowing the one unrepresentative branch of government to perform the starkly political functions reserved for those branches most directly responsible to public will”. Cf, however, *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 10-11 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

public money, a trial for murder, and the appointment of a Federal Judge are instances.”<sup>132</sup>

Significantly, counsel for the Commonwealth in the *Boilermakers’ Case* did not dispute this. Instead, the Commonwealth submitted that “non-judicial powers not inconsistent with the exercise of judicial powers can ... be added to the functions of this Court”,<sup>133</sup> an idea which was developed in the dissenting judgment of Williams J. and employs as an alternative to the rule in the *Boilermakers’ Case* an “incompatibility test”.

### (ii) The Incompatibility Test

The incompatibility test applied by Williams J. in *Boilermakers’*, which resembled that formulated by Latham C.J. in *Lowenstein*,<sup>134</sup> was outlined above. Williams J. accepted that as courts alone can exercise federal judicial power, nothing must be done to derogate from their ability to do so.<sup>135</sup> There thus arose an implied prohibition foreclosing the assumption by federal courts of those non-judicial functions “which courts are not capable of performing consistently with the judicial process”.<sup>136</sup> His Honour suggested that “[p]urely administrative discretions governed by nothing but standards of convenience and general fairness” would fall foul of this test because “there must be some standards applicable to a set of facts not altogether undefined before a court can hear and determine a matter”.<sup>137</sup> However, emphasizing that the arbitral process envisaged by s.51(xxxv) calls for “that fairness and impartiality which should characterize proceedings in courts of justice”, Williams J. discerned no conflict “between the arbitral duty to make the award and the curial duty to enforce it”.<sup>138</sup>

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<sup>132</sup> (1926) 38 C.L.R. 153, 178.

<sup>133</sup> From summary of argument in *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 262. The same argument was put by the Commonwealth to the Privy Council on appeal (*Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 542).

<sup>134</sup> See above p.120 of this chapter.

<sup>135</sup> *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 314.

<sup>136</sup> *Ibid* 315.

<sup>137</sup> *Id* (fn. omitted). But see above text accompanying fn.121 of this chapter. And see also below pp.204-207 (ch.5).

<sup>138</sup> *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 317.

This incompatibility notion has since come to prominence in cases involving the “designated person” principle. This principle represents a formal exception to the *Boilermakers’* extension of the separation doctrine: whereas *Boilermakers’* does not permit the vesting of non-judicial functions in federal courts, it has been held that such functions can validly be exercised by federal judges in their capacity as *personae designatae* – that is, as individuals “detached from the court they constitute”.<sup>139</sup> The designated person principle has a long history as part of American separation of powers jurisprudence<sup>140</sup> and in the form just described has had a place in Australian constitutional thought coextensive with the outcome in the *Boilermakers’ Case*<sup>141</sup> and even predating that decision.<sup>142</sup>

The operation of the designated person principle, including its associated incompatibility test, is illustrated by the decision of the High Court in *Grollo v. Palmer*.<sup>143</sup> That case involved the validity of certain provisions of the *Telecommunications (Interception) Act 1979* (Cth) which conferred the non-judicial function of issuing warrants to intercept communications passing over a telecommunications service on “eligible” judges of courts created by the Commonwealth Parliament. An “eligible” judge had consented to carrying out this function. The High Court determined that as a matter of statutory construction the Act

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<sup>139</sup> *Grollo v. Palmer* (1995) 184 C.L.R. 348, 363 per Brennan C.J., Deane, Dawson and Toohey JJ. See also *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577 (F.C.A.); *Hilton v. Wells* (1985) 157 C.L.R. 57; *Jones v. Commonwealth* (1987) 71 A.L.R. 497 (H.C.A.) and *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1.

<sup>140</sup> See *Mistretta v. United States* 488 U.S. 361, 402-403 (1989) per Blackmun J. delivering the opinion of the Supreme Court and referring to *Hayburn’s Case* 2 Dall. 409; 1 L.Ed. 436 (1792) and *United States v. Ferreira* 13 How. 40; 14 L.Ed. 42 (1852); S.G. Calabresi and J.L. Larsen, “One Person, One Office: Separation of Powers or Separation of Personnel?” (1994) 79 *Cornell L.R.* 1045, 1132.

<sup>141</sup> See, eg, *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 329-330 per Webb J. Webb J. found in favour of the validity of the Commonwealth Court of Conciliation and Arbitration. However, he indicated that were it not possible to combine arbitral and judicial functions in the one federal court, the then current arbitration system could substantially be maintained by vesting arbitral functions in the judges of the Arbitration Court as *personae designatae*.

<sup>142</sup> See *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144, 152 per Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

<sup>143</sup> (1995) 184 C.L.R. 348.

conferred the power to issue interception warrants on each eligible judge in her or his individual capacity (that is, as a designated person) “detached from the court of which he [or she] is a member”.<sup>144</sup> This finding led the applicant in *Grollo* to argue that the designated person principle undermined the rule established in the *Boilermakers’ Case* and should be abolished as “apt to convert the principle of separation of powers into a mockery”.<sup>145</sup> The Court rejected this submission, but the joint majority judgment of Brennan C.J., Deane, Dawson and Toohey JJ. failed to confront directly the “mockery” claim.<sup>146</sup> Instead, these judges sought to identify those conditions according to which the designated person principle and the doctrine of the separation of powers could co-exist. Drawing from the Court’s earlier decision in *Hilton v. Wells*,<sup>147</sup> their Honours insisted that a judge must consent to being used as a *persona designata*.<sup>148</sup> Moreover, the separation doctrine and “the conditions necessary for the valid and effective exercise of judicial power”<sup>149</sup> ordained that:

“no function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power”.<sup>150</sup>

And their Honours approved a passage from the judgment of Blackmun J. speaking for a majority of the United States Supreme Court in *Mistretta v. United States*<sup>151</sup> where his Honour observed that “[t]he ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch”.<sup>152</sup> Not surprisingly, the

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<sup>144</sup> *Ibid* 362 per Brennan C.J., Deane, Dawson and Toohey JJ. (quoting from *Hilton v. Wells* (1985) 157 C.L.R. 59, 81 per Mason and Deane JJ.); 374-375 per McHugh J.; 385-386 per Gummow J.

<sup>145</sup> *Ibid* 363 per Brennan C.J., Deane, Dawson and Toohey JJ. (fn. omitted).

<sup>146</sup> *Ibid* 363-364 per Brennan C.J., Deane, Dawson and Toohey JJ.

<sup>147</sup> (1985) 157 C.L.R. 57.

<sup>148</sup> *Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 488 U.S. 361 (1989).

<sup>152</sup> *Ibid* 404 (fn. omitted). Cited in *Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ. See also *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 9 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. *Mistretta v. United States* 488 U.S. 361 (1989) concerned the validity of federal legislation which established the United States Sentencing Commission. The Commission, although located in the judicial branch, was

High Court indicated that maintenance of public confidence in judicial integrity was as important a factor in the application of this test as judicial integrity itself.<sup>153</sup>

Faced with the applicant's submission that the conferral on eligible judges of the function of issuing interception warrants did indeed undermine the integrity of the judicial branch, a majority of the Court in *Grollo* responded in the negative. In so concluding Brennan C.J., Deane, Dawson and Toohey JJ. reasoned that individual claims of apprehended bias associated with the issue of an interception warrant (for example, where a judge had received information upon a warrant application relevant to the determination of a case before her or him) could be dealt with in the ordinary way, that is, by judicial disqualification.<sup>154</sup> In their Honours' view, the greater threat posed by the statutory scheme was to the judiciary's institutional integrity which could be diminished in the public mind by judicial involvement in the gathering of evidence against suspected criminals. However, Brennan C.J., Deane, Dawson and Toohey JJ. maintained that this concern was neutralized by the fact that an eligible judge was bound to act independently of the law enforcement agency seeking an interception warrant in any given case. More particularly, in so acting an eligible judge performed a valuable social function:

“it is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property (both real and personal), be authorised to control the official interception of communications. In other words, the professional experience and cast of mind of a Judge is a desirable guarantee that the appropriate balance will

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not a court. It was empowered to undertake the non-judicial function of issuing binding sentencing guidelines in relation to federal offences. The Act required at least three of the seven members of the Commission to be federal judges. The Supreme Court held that this consensual use of federal judges in their individual capacity did not undermine the integrity of the judicial branch and was not in violation of the separation of powers. This was essentially because sentencing was a “uniquely judicial subject”. Thus, the injection of judicial experience and expertise into the Commission's endeavours was entirely appropriate (*ibid* 408).

153 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.; 377-378 per McHugh J.

154 *Ibid* 366 per Brennan C.J., Deane, Dawson and Toohey JJ.



be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.”<sup>155</sup>

A similar approach to the role of judges in issuing interception warrants had been taken in a number of other countries as well as in a majority of the States and territories.<sup>156</sup> Thus, the incompatibility condition was not infringed and the relevant provisions of the Act upheld.

McHugh J. in his dissenting judgment in *Grollo* adopted an incompatibility test similar to that of the majority.<sup>157</sup> However, in McHugh J.’s opinion, the nature of the functions performed by eligible Federal Court judges under the Act and the manner of their exercise were such that “public confidence in the ability of the judges to perform their judicial functions in an independent and impartial manner is likely to be jeopardised”.<sup>158</sup> Of the nature of the power to issue interception warrants his Honour emphasized that it involved Federal Court judges considered as *personae designatae* “in the exercise of invasive power by members of the executive government or its agents” for the purposes of criminal investigation.<sup>159</sup> Of the manner of exercise of this power, his Honour placed particular reliance on the fact that the “authorisation is necessarily carried out ex parte and in secret” thereby contravening “the spirit of the requirement that justice in the federal courts should be open”.<sup>160</sup> In addition, his Honour believed, particularly in light of this secrecy, that specific instances of apprehended bias arising out of the issue of an interception warrant were not as readily detectable nor as remediable as the majority opinion suggested.<sup>161</sup> For these reasons, his Honour discerned incompatibility of function and found the relevant provisions of the Act invalid.

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155 *Ibid* 367 per Brennan C.J., Deane, Dawson and Toohey JJ. (fn. omitted).

156 *Ibid* 367-368.

157 *Ibid* 376-378. And see *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 15 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. (“[i]n *Grollo* all members of the Court accepted the existence of the incompatibility doctrine. There was division of opinion as to its application”).

158 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 378.

159 *Id.*

160 *Ibid* 379-380 (fn. omitted).

161 *Ibid* 380-382.

In the following year in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*,<sup>162</sup> a majority of the High Court applied the *Grollo* incompatibility test to deny that a federal judge, acting *persona designata*, could validly be appointed to serve as a “reporter” under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). The function involved writing a report for the Minister as a pre-requisite to the exercise by the Minister of a discretionary power to make a protection order in relation to an area or site of significance to Aboriginal people. The matters to be considered by a reporter included: the extent of the area that should be protected; the restrictions that should apply in relation to an area; the impact of a protection order on individual proprietary or pecuniary interests; and the extent to which the area was protected under State law (s.10(4) of the Act).

In the opinion of Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. the performance of this function by a federal judge, albeit in her or his personal capacity, was liable to undermine public confidence in the independence and impartiality of the federal courts.<sup>163</sup> This was because preparation of a report placed its author within the executive branch “in a position equivalent to that of a ministerial adviser”.<sup>164</sup> He or she was not obliged to act in disregard of any ministerial directions and could be required to make “political decisions”<sup>165</sup> – for example, in recommending upon the nature and extent of the protection warranted in relation to a particular area. Moreover, the requirement that a reporter address the extent to which the area is or may be protected under State law involved the rendering to the Minister of an advisory opinion, a function which their Honours described as “alien to the exercise of the judicial power of the Commonwealth.”<sup>166</sup>

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162 (1996) 189 C.L.R. 1.

163 *Ibid* 16, 18-20.

164 *Ibid* 19 (fn. omitted).

165 *Id.*

166 *Ibid* 20 (fn. omitted). For a more detailed analysis of the case, including the dissent of Kirby J., see F. Wheeler, “The Use of Federal Judges to Discharge Executive Functions: The *Justice Mathews Case*” (1996) 82 *C.B.P.A.* 10.

Not surprisingly, the designated person principle as recognized in these and other cases has been frequently criticised.<sup>167</sup> The effect of *Grollo v. Palmer*, for example, was to place the High Court's imprimatur on the exercise by consenting Federal Court judges of a type of non-judicial function. Of course, technically speaking, these Federal Court judges were acting in their capacity as designated persons – and presumably the consent requirement underscored this – but this merely suggests that the rule established in the *Boilermakers' Case* is one of form rather than substance<sup>168</sup> and that *the incompatibility test serves as the true expression of the outer limits of the separation of federal judicial power*.<sup>169</sup> Upon application of that test, a majority of the Court in *Grollo* found that the exercise by persons who are Federal Court judges of the power to issue interception warrants *did not have the effect of undermining the integrity of the judicial branch*, a conclusion which begs the question of the necessity of the *Boilermakers' rule*. The fact that these designated persons could not be *required* to undertake these non-judicial functions does not alter this analysis – for the High Court concluded that the *actual performance* of the functions by persons who were federal judges did not endanger the institutional impartiality of Chapter III courts.

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<sup>167</sup> See, eg, G. Sawyer, "The Separation of Powers in Australian Federalism" (1961) 35 *A.L.J.* 177, 182; G. Sawyer, *Australian Federalism in the Courts* (1967) 165-166; G. Winterton, "Judges as Royal Commissioners" (1987) 10 *U.N.S.W.L.J.* 108, 124-125; A. Mason, "A New Perspective on Separation of Powers" (1996) 82 *C.B.P.A.* 1, 5; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 214-218; K. Walker, "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 *P.L.R.* 153. See also *Hilton v. Wells* (1985) 157 *C.L.R.* 57, 81-82 per Mason and Deane JJ. who recognized the designated person principle, but sought to confine it within a narrower compass than the majority. As their Honours correctly observed "[t]he ability of Parliament to confer non-judicial power on a judge of a Ch.III court, as distinct from the court to which he belongs, has the potential, if it is not kept within precise limits, to undermine the doctrine in the *Boilermakers' Case*" (fn. omitted).

<sup>168</sup> Cf the High Court's recent insistence on substance over form in the areas of implied intergovernmental immunities, s.51(xxxi), s.90, s.92, and s.117.

<sup>169</sup> See, as effectively recognizing this point, *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 *C.L.R.* 1, 16 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. ("[b]earing in mind that public confidence in the independence of the judiciary is achieved by a separation of the judges from the persons exercising the political functions of government, no functions can be conferred on a Ch III judge that would breach that separation").

### **(iii) The Incompatibility Test as the True Expression of the Outer Limits of the Separation of Federal Judicial Power**

Of course, one response to the challenge to the rule in the *Boilermakers' Case* which a case like *Grollo* presents would be to reject the designated person principle in favour of strict adherence to a substantive separation of judicial and non-judicial power. In light of the various arguments presented in this chapter, however, it is submitted that the present rule needs to be reframed rather than entrenched in more absolute form. As pointed out above, in revisiting the *Boilermakers' Case* the necessity of some limitation upon the category of functions which may validly be combined with the judicial functions of a federal court is not in question. The issue is instead the nature of the prohibitory rule which triumphed at Owen Dixon's hands. And for reasons already foreshadowed and developed below, that prohibitory rule should be rejected in favour of an incompatibility test of the *Grollo* type.

More specifically, the reasons favouring an incompatibility test over the rule in the *Boilermakers' Case* are threefold. First, accepting that the rule in the *Boilermakers' Case* operates to protect judicial independence, the exclusion of all "non-judicial" functions from the reach of federal courts seems a crude response to the problem at hand, albeit that response flowed from the majority's emphasis on textual analysis. What is "judicial" and "non-judicial" is historically and socially determinable.<sup>170</sup> To commit the conclusive determination of existing rights to independent and impartial tribunals acting in accordance with the traditional conception of the curial process (that is, to commit "judicial power" to "courts" alone) is to give effect to "traditional social values associated with freedom under law".<sup>171</sup> Not surprisingly, the corresponding question of what functions "are" non-judicial does not lend itself to a priori abstract analysis. In seeking to protect the integrity of the federal courts, why not then ask the real "functional" question rather than reasoning backwards in any given instance from the historically and socially constructed "non-judicial"? Why not ask, as in *Grollo* and

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<sup>170</sup> See generally below ch.5.

<sup>171</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 212.

*Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* whether the assumption of a particular function by a federal court “is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power”?<sup>172</sup> The result of such an approach would be a more explicit appraisal of those policy considerations which render a function appropriate or inappropriate for judicial performance. And to the extent that it remains necessary to classify a function as “judicial” for the purposes of the primary separation rule, a less distorted picture of what is “judicial” might emerge.

The second reason for abandoning the rule in the *Boilermakers’ Case* and reverting to an incompatibility test is a refinement of the first. Unlike the “once and for all” labelling approach of *Boilermakers’*, the incompatibility test is a flexible mechanism which allows open adjustment of competing social interests, an approach suggested by the insistence of the joint majority judges in *Grollo* that interposition of the judicial cast of mind in sanctioning telecommunications interceptions served as a “desirable guarantee” of the preservation of an appropriate balance between competing individual and societal interests.<sup>173</sup> Of course, it might be argued that there are no competing interests here; that judicial independence is an absolute which suffers no invasion. But whereas judicial independence is to be vigorously promoted, it is no absolute, but like all other express and implied constitutional guarantees, exists as part of a broader system of government. As the Chief Justice of the Canadian Supreme Court recently observed, “[j]udicial independence is valued because it serves important societal goals – it is a means to secure those goals.”<sup>174</sup> As such, judicial independence can hardly

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<sup>172</sup> *Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

<sup>173</sup> See above pp.152-153 of this chapter.

<sup>174</sup> *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3, 34 per Lamer C.J.C. with whom L’Heureux-Dube, Sopinka, Gonthier, Cory and Iacobucci JJ. concurred. See also F.G. Brennan, “Limits on the Use of Judges” (1978) 9 *F.L.Rev.* 1, 11-12; A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 2 (“[t]he doctrine [of separation of powers] should operate to maintain and enhance the system of representative and responsible government brought into existence

operate to trump every other social objective in every circumstance. Moreover, it is important to remember the limited extent to which the notion of judicial independence is currently under consideration. In the words of Sir Kenneth Bailey:

“it may very well have dangers to vest judicial powers in non-judicial persons; but the considerations which make that dangerous are simply not convertible, so as to require the conclusion that it is dangerous to vest non-judicial powers in judicial persons. I say that because by definition the judicial person is one who has in law a position of independence, independence by tenure and by remuneration of both the Executive Government and, in all ordinary circumstances, of the Legislature.”<sup>175</sup>

One example of the flexibility which the incompatibility test offers, and which no amount of manipulation of the terms “judicial” and “non-judicial” can achieve, is that it allows the needs of judicial independence to be tested in light of the size and jurisdiction of the individual court concerned.<sup>176</sup> Thus, in reasoning to their conclusion in the *Boilermakers’ Case*, both the High Court and the Privy Council emphasized the role of the judiciary in a federation as the “bulwark of the constitution”.<sup>177</sup> But as Professor Zines has pointed out, “it is the High Court which ultimately determines those questions. As a matter of policy, therefore, there might be a case for treating the High Court differently from other federal courts”.<sup>178</sup> This is indeed the case; the High Court fulfils a very different legal and social role from the old Arbitration Court, the old

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by the Constitution and to ensure the maintenance of the rule of law by an independent judiciary whose responsibility it is to determine justiciable controversies”).

<sup>175</sup> G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 196 (Bailey).

<sup>176</sup> This approach is suggested by the observation in the joint majority judgment in *Grollo* to the effect that it would be prudent for a resident judge of the Supreme Court of the Australian Capital Territory, given the small size of that Court, not to accept appointment under the *Telecommunications (Interception) Act* as an eligible judge ((1995) 184 C.L.R. 348, 366). See also *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 46 per Kirby J.; K. Booker *et al*, *Federal Constitutional Law: An Introduction* (2nd ed) (1998) 169.

<sup>177</sup> See above p.129 of this chapter.

<sup>178</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 213. See also *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 46 per Kirby J. (“[t]he use of judges of final courts of appeal, particularly in federations where the court must be able to discharge its vital constitutional functions, presents questions different from the appointment of other judges to non-judicial duties” (fn. omitted)).

Bankruptcy Court or the contemporary Federal and Family Courts (the latter two fulfilling very different roles from each other). Unlike the rule in the *Boilermakers' Case*, the incompatibility test can take these matters into account and adjust for them. So, for example, it might be acknowledged that the function of industrial arbitration under s.51(xxxv) of the Constitution could not be performed by the High Court without the guardian of the Constitution becoming too closely associated in the public mind with industrial policy. In addition, the field of industrial arbitration has traditionally provoked constitutional challenges which require the attention of that guardian. Taken in conjunction, these factors supply a strong case for arguing that the Constitution impliedly prohibits the Commonwealth Parliament from entrusting s.51(xxxv) functions to the High Court. But as indicated below, the same factors do not necessarily apply to the admixture of judicial and arbitral functions in a specialist industrial court. Such a court might well survive an incompatibility test.

The incompatibility test applied by Williams J. in *Boilermakers'* was rejected by the Privy Council as too uncertain,<sup>179</sup> a concern echoed by Professor Enid Campbell and Kirsten Walker.<sup>180</sup> Two counter-arguments, however, weigh against this position. First, it is hard to imagine that a *Grollo* type incompatibility test would prove any more uncertain than the present classificatory approach.<sup>181</sup> Indeed, as argued above, adoption of an incompatibility test would promote legal certainty by reducing reliance on the abstract concepts "judicial" and "non-judicial". Secondly, the fact that flexibility may come at the expense of certainty in the formulation and application of legal doctrine has not impeded reform to judge-made law in areas such as s.90 of the

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<sup>179</sup> *Attorney-General (Cth) v. R.* (1957) 95 C.L.R. 529, 542-543.

<sup>180</sup> E. Campbell, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *F.L.Rev.* 24, 60 (and see also E. Campbell, "Constitutional Protection of State Courts and Judges" (1997) 23 *Mon.L.R.* 397, 421-422); K. Walker, "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 *P.L.R.* 153, 154-161 (Walker's critique of "incompatibility", however, is broader than this. She argues that the values served by the separation of powers can only be adequately protected and preserved if judicial and non-judicial functions are strictly segregated (*ibid* 162-164)). But cf A. Mason, "A New Perspective on Separation of Powers" (1996) 82 *C.B.P.A.* 1, 5.

<sup>181</sup> *Ibid* 5-6.

Constitution. As members of the High Court have often remarked, an open-textured or substantive test will become more certain as a series of precedents governing its application is developed. In the words of Sir Anthony Mason, arguing for the abandonment of *Boilermakers*':

“It is a matter of identifying the purpose or purposes intended to be served by the separation of judicial power, particularly from executive power. Once this is done ‘incompatibility’ has a natural place in the scheme of things.”<sup>182</sup>

It was said that the reasons favouring an incompatibility test over the rule in the *Boilermakers*' Case are threefold. The third such reason is the authority of *Grollo* itself as supplemented by the decision of the Court in *Kable v. Director of Public Prosecutions (N.S.W.)*.<sup>183</sup> Unless one subscribes to formalistic distinctions, *Grollo* identifies the metes and bounds of the legal doctrine of the separation of federal judicial power: taking a substantive approach to the issue, judicial power can only be exercised by Chapter III courts, and federal courts can only exercise those non-judicial functions which are not “incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power”.<sup>184</sup> The significance of *Kable* to this argument lies in the fact that it found that this second or subsidiary limb of the separation doctrine also applies to State courts. Thus, “while the legislatures of the States may confer upon State courts non-judicial functions, they may not confer upon them functions which are incompatible with the exercise by those courts of the judicial power of the Commonwealth”.<sup>185</sup>

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182 *Ibid* 5.

183 (1996) 189 C.L.R. 51.

184 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ. Of course, federal courts can also exercise those non-judicial functions which are incidental to the performance of their judicial functions.

185 *Gould v. Brown* (1998) 151 A.L.R. 395, 461 per Gummow J. summarizing the effect of *Kable* (fn. omitted). See, for an identical statement of the effect of *Kable*, *ibid* 441 per McHugh J. See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 103, 106 per Gaudron J.; 116, 118-119 per McHugh J.; 126, 128 per Gummow J.



Examining the *Kable Case* in more detail, Gaudron J., McHugh J. and Gummow J. essentially reasoned in their majority judgments that the Constitution establishes “an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power”.<sup>186</sup> This integrated system flowed from the provisions of the Constitution allowing the Commonwealth Parliament to invest State courts with federal jurisdiction<sup>187</sup> (that is, “the autochthonous expedient”<sup>188</sup>) and the fact that the High Court sits at the apex of the Australian judicial system hearing appeals, under s.73 of the Constitution, from both State Supreme Courts and courts exercising federal jurisdiction.<sup>189</sup> Under this integrated system, there could not be two “grades”<sup>190</sup> or “qualities”<sup>191</sup> of federal judicial power. Thus, neither the Commonwealth Parliament nor any State Parliament could “undermine”<sup>192</sup> the constitutionally ordained role of State courts as recipients of the judicial power of the Commonwealth by conferring upon them functions “incompatible with”<sup>193</sup> or “repugnant to”<sup>194</sup> the exercise of such power.

Their Honours denied that this approach meant that the full doctrine of separation of powers, as applicable to the Commonwealth, henceforth extended to the States.<sup>195</sup> But applying the incompatibility test, the majority struck down the *Community Protection Act* 1994 (N.S.W.) as contrary to Chapter III of the Constitution. The *Community Protection Act* was *ad hominem* in nature, its operative effect being confined to a single

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186 *Ibid* 114-115 per McHugh J. See also *ibid* 102 per Gaudron J. and 137-139, 143 per Gummow J.

187 *Ibid* 103 per Gaudron J.; 111, 114-115 per McHugh J. and 139-140 per Gummow J.

188 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 268 per Dixon C.J., McTiernan, Fullagar and Kitto JJ.

189 *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 101 per Gaudron J. (however, her Honour's emphasis was on the autochthonous expedient); 112-114 per McHugh J.; 138-139, 142-143 per Gummow J.

190 *Ibid* 103 per Gaudron J.; 115 per McHugh J. and 127 per Gummow J.

191 *Ibid* 103 per Gaudron J.

192 *Ibid* 116 per McHugh J.

193 *Ibid* 103 per Gaudron J.; 116 per McHugh J.

194 *Ibid* 103 per Gaudron J.

195 *Ibid* 103-104 per Gaudron J.; 109, 118, 121 per McHugh J.

individual – Gregory Wayne Kable.<sup>196</sup> At the time of the passage of the Act through the New South Wales Parliament, Mr Kable was serving a term of imprisonment for manslaughter, but was due shortly for release. The object of the Act was expressed to be the protection of the community “by providing for the preventive detention ... of [Kable]” (s.3(1)). Thus, s.5 of the Act empowered the Supreme Court of New South Wales, on the application of the Director of Public Prosecutions, to order the involuntary detention of Mr Kable if satisfied, on the balance of probabilities, that he was “more likely than not to commit a serious act of violence” and “that it is appropriate, for the protection of a particular person or persons or the community generally, that [he] be held in custody”. The maximum duration of a detention order was six months, although an order could be renewed. The Act went on to modify certain of the ordinary rules of evidence in proceedings under s.5 (s.17(3)). Moreover, the Act provided that the protection of the community was to be the paramount consideration in its construction (s.3(2)) and that if detained, Mr Kable was to be taken to be a prisoner within the meaning of the *Prisons Act 1952* (N.S.W.) (s.22(1)).

The matter was appealed to the High Court after the Supreme Court made a detention order in relation to Mr Kable, in the course of which proceeding the validity of the *Community Protection Act* was raised. In the opinion of McHugh J., the Act infringed Chapter III of the Constitution because it conferred on the Supreme Court a non-judicial function liable to undermine public confidence in the impartiality of that court as a repository of federal judicial power.<sup>197</sup> In his words, the Act was apt to create the impression in the public mind that the Supreme Court was “a party to and responsible for implementing the political decision of the executive government that [Mr Kable] should be imprisoned without the benefit of the ordinary processes of law”.<sup>198</sup> Likewise, Gummow J. took the view that in empowering the Supreme Court to order the detention of Mr Kable – and Mr Kable alone – not for breach of the criminal law, but

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<sup>196</sup> Section 3(3) of the Act.

<sup>197</sup> *Kable v. Director of Public Prosecutions* (N.S.W.) (1996) 189 C.L.R. 51, 121-124.

<sup>198</sup> *Ibid* 124.

because of an assessment that he was likely to breach that law in the future, the Act was “repugnant to judicial process”<sup>199</sup> and had the potential to undermine public confidence in the impartiality of the Supreme Court by implicating it in a political decision to incarcerate Mr Kable.<sup>200</sup> In her judgment, Gaudron J. emphasized that, in several respects, the Act required the Supreme Court to act in a manner contrary to traditional judicial process.<sup>201</sup>

The fourth member of the majority – Toohey J. – found the Act invalid on a narrower basis than his brethren. His Honour relied on the fact that the constitutional arguments raised at first instance had converted the proceedings in the Supreme Court into an exercise of federal jurisdiction.<sup>202</sup> However, the peculiar features of the New South Wales Act, notably its *ad hominem* nature and requirement that the Supreme Court “participate in the making of a preventive detention order where no breach of the criminal law is alleged”,<sup>203</sup> meant that it directed the Supreme Court, contrary to Chapter III of the Constitution, “to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process”.<sup>204</sup>

The potential ramifications of *Kable* have been explored in detail by other commentators.<sup>205</sup> For the purposes of the present discussion, however, *Kable* reinforces the argument that it is the concept of incompatibility which marks the

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199 *Ibid* 134.

200 *Ibid* 132-134.

201 *Ibid* 106-108.

202 *Ibid* 94-95.

203 *Ibid* 98.

204 *Id* (fn. omitted). See generally as to the approach of Toohey J. in *Kable*, L. Zines, “The States and the Constitution” in G. Moens and R. Mortensen (eds), *Essays in Honour of Richard Darrell Lumb* (working title) (forthcoming) (pp.23-24 of manuscript on file with author).

205 See, eg, E. Campbell, “Constitutional Protection of State Courts and Judges” (1997) 23 *Mon.L.R.* 397; L. Zines, “The States and the Constitution” in G. Moens and R. Mortensen (eds), *Essays in Honour of Richard Darrell Lumb* (working title) (forthcoming) (copy on file with author). For a critical perspective on *Kable*, see R. Orr, “Kable v DPP: Taking Judicial Protection Too Far?” (1996) 11 *A.I.A.L. Forum* 11; E. Handsley, “Do Hard Laws Make Bad Cases? – The High Court’s Decision in *Kable v Director of Public Prosecutions (NSW)*” (1997) 25 *F.L.Rev.* 171; K. Walker, “Persona Designata, Incompatibility and the Separation of Powers” (1997) 8 *P.L.R.* 153.

boundary of the separation of federal judicial power at federal level. If incompatibility is the measure of what is necessary to protect and preserve public confidence in the independent and impartial exercise of judicial power in the context of both the *persona designata* doctrine (*Grollo*) and the conferral of federal jurisdiction on State courts (*Kable*), and, moreover, if there are not two “grades” or “qualities” of federal judicial power, then the rule in the *Boilermakers’ Case* should be replaced with an incompatibility test.<sup>206</sup> Of course, it can be argued that whatever was said in *Grollo* and *Kable*, textual considerations nonetheless dictate that the Commonwealth is prohibited from conferring non-judicial functions on Chapter III courts. But as pointed out earlier, the text is far from unambiguous and does not in terms demand that federal courts exercise judicial power alone. Underlying constitutional principle necessarily comes into play in interpreting the requirements of Chapter III. And when that is done, it is submitted that the incompatibility test should prevail.

Even apart from the notion of incompatibility, it should be added that ss.1 and 61 of the Constitution suggest that a federal court could not validly exercise a governmental function – like the appropriation of public funds or the entry into a treaty – which by its very nature demands the attention of a branch representative of the people.<sup>207</sup>

#### **4. The Incompatibility Test Applied**

Having critically analysed the rule in the *Boilermakers’ Case* and set out the reasons why it should be abandoned in favour of a purposive or “functional” incompatibility test, it remains to give some indication as to the application of that test. To a significant extent *Grollo*, *Wilson* and *Kable* point the way: incompatibility of function is measured both in terms of the impact upon an individual judge’s exercise of judicial power as well as the judiciary’s institutional integrity. Public confidence in judicial integrity at both the individual and institutional levels is as important a factor in the application of the

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<sup>206</sup> See, as flagging this possibility in this context, E. Campbell, “Constitutional Protection of State Courts and Judges” (1997) 23 *Mon.L.R.* 397, 421.

<sup>207</sup> See M.H. Redish, “Separation of Powers, Judicial Authority, And the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*” (1990) 39 *DePaul L.R.* 299, 303.

test as judicial integrity itself. And in making these assessments, some balancing of social interests is tolerated as the majority's reference in *Grollo* to the desirability of judges standing as an independent force between law enforcement agencies and suspected criminals in the interception of communications demonstrates: this may have given rise to the perception of judicial involvement in criminal investigation, but as judges were bound to act independently in deciding whether or not to issue an interception warrant and served a valuable social role in so doing there was no real threat to public confidence in the judiciary.<sup>208</sup> But as McHugh J.'s dissent in *Grollo* shows, the incompatibility test is susceptible of varying interpretations.<sup>209</sup>

So, apart from the examples provided by *Grollo*, *Wilson* and *Kable* what functions could be given to a federal court under the incompatibility test and what functions would be excluded? For the reasons set out at the beginning of this chapter, *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein*<sup>210</sup> provides an example of an admixture of functions which would not survive a properly applied incompatibility test. On the other hand, it is difficult to discern incompatibility of function in relation to the facts of *Queen Victoria Memorial Hospital v. Thornton*.<sup>211</sup> That case concerned the validity of certain provisions of the *Re-establishment and Employment Act 1952* (Cth) which prescribed a list of matters to be taken into account by an employer (such as comparative qualifications and nature of wartime service) when deciding between the employment applications of two or more ex-service personnel entitled to preference. If an unsuccessful applicant believed that he or she best satisfied the prescribed criteria, that applicant could apply to a court of summary jurisdiction. On the hearing of the application, the court was to have regard to the same list of matters as the employer and "make such order as it thinks just and reasonable in the circumstances".<sup>212</sup> The High

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208 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 367 per Brennan C.J., Deane, Dawson and Toohey JJ.

209 See also the dissent of Kirby J. in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1.

210 (1938) 59 C.L.R. 556.

211 (1953) 87 C.L.R. 144.

212 *Ibid* 149.

Court led by Dixon C.J. unanimously found that the function purportedly conferred on the court was non-judicial in nature as not involving the ascertainment or enforcement of pre-existing legal rights.<sup>213</sup> Thus, the function could not validly be imposed on a state court under s.77(iii) of the Constitution.<sup>214</sup> But it is submitted that this function could validly be conferred on a federal court under the incompatibility test: the function is analogous to many functions already performed by courts, is amenable to the judicial process and poses no threat to judicial independence at either the individual or institutional levels.

The judgment of Williams J. in *Boilermakers'* testifies to the outcome of an incompatibility test when applied to the admixture of arbitral and judicial functions in a federal court. As pointed out earlier, in discerning no conflict between these functions, his Honour emphasized both that the Arbitration Court was bound to discharge its arbitral responsibilities with fairness and impartiality<sup>215</sup> and that the Court's arbitral and judicial functions were complementary: "[t]he whole process of making the awards and enforcing them is a continuous process just like the duties imposed upon the Bankruptcy Court to superintend the administration of the estate of the bankrupt and its distribution amongst his creditors after the sequestration order has been made".<sup>216</sup> Of course, it is arguable that the "complexity and legalism"<sup>217</sup> which has traditionally attended the *Boilermakers'* separation of powers in the industrial arena is the price to be paid for insulating the judiciary from the politicized realm of industrial arbitration, but were arbitral and associated judicial functions combined and confined in a specialized arbitration court – a possibility which the incompatibility test admits<sup>218</sup> – then the

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213 *Ibid* 151.

214 *Ibid* 151-152.

215 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 309, 317.

216 *Ibid* 308.

217 *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol.2, 382.

218 There is a passage in the judgment of Williams J. in *Boilermakers'* which could be taken to suggest that both the High Court and any other federal court could validly be invested with arbitral functions (see *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 307). This passage, however, is ambiguously worded and presents no obstacle to acceptance of an incompatibility test which takes into account the size and jurisdiction of the court concerned. There is, of course, a long history of specialized

general threat to public confidence in judicial independence which Dixon C.J. apprehended as flowing from the activities of the former Arbitration Court would be negated. In discharging both its arbitral and judicial responsibilities such a court would be required to act independently and in accordance with the rules of natural justice.<sup>219</sup> In light of these considerations and the social costs attendant upon the bifurcated system, it is submitted that it would be possible to combine arbitral and associated judicial functions in a specialized Arbitration Court under the incompatibility test envisaged in this chapter.

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Arbitration or Industrial Courts at federal level in Australia beginning with the establishment in the first decade of federation of the Commonwealth Court of Conciliation and Arbitration. After *Boilermakers*, the judicial functions associated with the federal industrial system were transferred from the old Arbitration Court to the newly established Commonwealth Industrial Court (later styled the Australian Industrial Court). Upon the establishment of the Federal Court of Australia in 1977, the jurisdiction of the Australian Industrial Court became the responsibility of a special Industrial Division of the Federal Court. This jurisdiction was in turn transferred to a separate Industrial Relations Court of Australia which commenced operation in 1994. In 1997, the jurisdiction of the Industrial Relations Court was transferred back to the Federal Court of Australia. Some of this history, up to and including the establishment of the Industrial Relations Court of Australia, may be found in J.T. Ludeke, "The Structural Features of the New System" (1994) 7 *Aus.J. Labour Law* 132, 141-142. See also the official Industrial Relations Court of Australia website at <<http://www.austlii.edu.au/au/other/fca/irca.htm>>

<sup>219</sup> See N. Gunningham, *Industrial Law and the Constitution* (1988) 132-134 citing authorities to the effect that the power of industrial arbitration under s.51(xxxv) of the Constitution must be exercised in accordance with the rules of natural justice.

## CHAPTER 5 - CHASING SHADOWS: DEFINING JUDICIAL POWER

“legal concepts like ‘executive, judicial, and legislative’ are not ‘things’ that ‘have’ immutable existences; rather, they are constructs that we create to serve purposes, and these purposes should define their reach and measure”.

E.D. Elliott, “Why Our Separation of Powers Jurisprudence Is So Abysmal” (1989) 57 *George Washington Law Review* 506, 527 (footnote omitted).

### 1. Why Has Judicial Power Proved So Difficult to Define?

As discussed in preceding chapters, particularly Chapters Two and Four, the separation of federal judicial power from legislative and executive power finds expression in two basic rules: the *primary separation rule* (the Commonwealth Parliament cannot validly confer judicial power on any person or body other than a court referred to in s.71 of the Constitution and, a fortiori, cannot itself exercise judicial power) and the *rule in the Boilermakers’ Case* (the Commonwealth Parliament cannot validly confer any power other than judicial power, or power incidental thereto, on s.71 courts).<sup>1</sup>

These rules presume that judicial power and non-judicial power are fundamentally distinct. At one level of analysis this is certainly true; the trial of a criminal offence is a fundamentally different type of governmental function, which all would agree should be exercised in a fundamentally different way, from the appropriation of money or the appointment of a judge.<sup>2</sup> But beyond such paradigms, the High Court has found it extremely difficult to define judicial power. This difficulty is the single most prominent feature of the “judicial power” cases.

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<sup>1</sup> Prior to the decision in the *Boilermakers’ Case*, the High Court affirmed in *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144 that the Commonwealth Parliament cannot validly invest a State court with non-judicial power. The Court reasoned that s.77(iii) of the Constitution constitutes an exhaustive statement of the Commonwealth’s capacity to repose functions in State courts (*ibid* 151-152).

<sup>2</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 178 per Isaacs J.



This is not to suggest, however, that attempts to define judicial power have not been made. In *Huddart, Parker and Co. Proprietary Ltd v. Moorehead*,<sup>3</sup> the first case acknowledging a separation of federal judicial power from legislative and executive power, Griffith C.J. offered a famous definition of the judicial function. His Honour said:

“the words ‘judicial power’ as used in sec.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.”<sup>4</sup>

In *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*,<sup>5</sup> Kitto J. filled out this definition, observing that:

“a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.”<sup>6</sup>

And more recently, five members of the High Court in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*<sup>7</sup> described the function of the “federal judicial branch” as:

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<sup>3</sup> (1909) 8 C.L.R. 330.

<sup>4</sup> *Ibid* 357. This definition of judicial power received the imprimatur of the Privy Council in *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530, 542-543.

<sup>5</sup> (1970) 123 C.L.R. 361.

<sup>6</sup> *Ibid* 374-375.

<sup>7</sup> (1996) 189 C.L.R. 1.

“the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation. This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion. The result is promulgated in public and implemented by binding orders.”<sup>8</sup>

From statements such as these it is often said that judicial power involves the binding determination of controversies as to existing legal rights.<sup>9</sup> This is a useful working description of judicial power, but as commentators have repeatedly observed, the High Court has recognized that sometimes a function can be judicial even if one of the elements in the description is missing.<sup>10</sup> Alternatively, the description appears to have been satisfied, but yet the function has been characterized by the High Court as non-judicial.<sup>11</sup> Moreover, although the High Court has identified certain functions as exclusively judicial in nature, exclusively legislative in nature and exclusively executive in nature, other functions are of an “innominate”<sup>12</sup> character and take “colour”<sup>13</sup> as either judicial or non-judicial depending upon the circumstances of the case.<sup>14</sup>

Clearly, no single definition of judicial power can comprehend all these shades of meaning.<sup>15</sup> And analysing the case law on judicial power can sometimes feel like

<sup>8</sup> *Ibid* 11 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. (fn. omitted).

See also *Nicholas v. R.* (1998) 151 A.L.R. 312, 334-335 per Gaudron J.

<sup>9</sup> See, eg, G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 180; E. Campbell, “The Choice Between Judicial and Administrative Tribunals and the Separation of Powers” (1981) 12 *F.L.Rev.* 24, 29; S. Ratnapala, “Harry Brandy’s Case and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 234; P. Hanks, *Constitutional Law in Australia* (2nd ed) (1996) 475; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 171-172.

<sup>10</sup> See, eg, *Peacock v. Newtown Marrickville and General Co-operative Building Society No.4 Ltd* (1943) 67 C.L.R. 25; *R. v. Davison* (1954) 90 C.L.R. 353.

<sup>11</sup> See, eg, *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153; *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185.

<sup>12</sup> This expression, which has entered general usage, seems to derive from the writings of Professor Lane. See P.H. Lane, *The Australian Federal System* (1972) 324.

<sup>13</sup> *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 18 per Aickin J.

<sup>14</sup> See, eg, *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1.

<sup>15</sup> See E. Campbell, “The Choice Between Judicial and Administrative Tribunals and the Separation of Powers” (1981) 12 *F.L.Rev.* 24, 29 (“[n]o single, simple formulation is capable of encapsulating all of the factors which at one time or another have been

chasing shadows. As Dixon C.J. and McTiernan J. said in *R. v. Davison*,<sup>16</sup> “[m]any attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive”.<sup>17</sup> Or as four judges observed in *Brandy v. Human Rights and Equal Opportunity Commission*:<sup>18</sup>

“Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic.”<sup>19</sup>

Even in eighteenth century America, James Madison wrestled with the same problem. In *Federalist No.37* he wrote:

“Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.”<sup>20</sup>

On another occasion he conceded that the distinctions between the three categories of governmental power “consist in many instances of mere shades of difference”.<sup>21</sup>

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regarded as indicative of judicial power for the purposes of the Australian federal Constitution”).

16 (1954) 90 C.L.R. 353.

17 *Ibid* 366.

18 (1995) 183 C.L.R. 245.

19 *Ibid* 267 per Deane, Dawson, Gaudron and McHugh JJ. See also *ibid* 257 per Mason C.J., Brennan and Toohey JJ. For other acknowledgments of the difficulty in defining judicial power see, eg, *R. v. Davison* (1954) 90 C.L.R. 353, 386-388 per Taylor J.; *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 373 per Kitto J.; 394 per Windeyer J.; *Cominos v. Cominos* (1972) 127 C.L.R. 588, 606-607 per Mason J.; *R. v. Hegarty; Ex parte City of Salisbury* (1981) 147 C.L.R. 617, 627 per Mason J.; *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 15 per Aickin J.; *Harris v. Caladine* (1991) 172 C.L.R. 84, 93 per Mason C.J. and Deane J.; 122 per Dawson J.; *Precision Data Holdings Limited v. Wills* (1991) 173 C.L.R. 167, 188-189 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.; *Gould v. Brown* (1998) 151 A.L.R. 395, 424 per Gaudron J.; *Nicholas v. R.* (1998) 151 A.L.R. 312, 374, 380 per Kirby J.; 388 per Hayne J.

20 *The Federalist No.37* in B.F. Wright (ed), *The Federalist* (1961) 269.

21 Quoted in M.S. Flaherty, “The Most Dangerous Branch” (1996) 105 *Yale L.J.* 1725, 1807. The difficulty in defining legislative, executive and judicial power was also recognized in the Australian founding period. See J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720 (“though the distinction between the three departments is broad and fundamental, it is difficult to

As Professor Zines points out in *The High Court and the Constitution*, judicial power eludes basic definition because the terms “legislative”, “executive” and “judicial” lack intrinsic meaning and can only be defined by reference to historical and social practice considered in light of the objects and purposes of the separation doctrine.<sup>22</sup> In other words, these three labels are the product of “a continuous sifting-out over the course of history of matters which it is considered *should* be decided by one procedure rather than another”.<sup>23</sup> Thus, while history and policy suggest that disputes about individual legal rights and obligations should be authoritatively “quelled”<sup>24</sup> in an independent and impartial manner by experts insulated from the political process, history and policy also dictate a range of exceptions to this generalized conception of judicial power. And as historical and normative constructs, these exceptions are not always explicable in terms of pure logical analysis.<sup>25</sup> For example, the historical activities of Anglo-Australian courts explain why judicial power can sometimes subsist in the absence of a controversy,<sup>26</sup> or a dispute about existing rights.<sup>27</sup> These historical and normative considerations have even generated exceptions to the separation rule itself; thus history and defence policy considerations explain why the Commonwealth Parliament can

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define their powers exactly. Judicial acts have, of necessity, points of contact with both executive and legislative acts”).

- 22 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 171-173. See also *R. v. Davison* (1954) 90 C.L.R. 353, 380-382 per Kitto J.; *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 392, 394 per Windeyer J.; *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 11-12 per Jacobs J.; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 67 per McHugh J.
- 23 M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 328 (emphasis added).
- 24 See *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 11 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. describing the function of the federal judiciary as “the quelling of justiciable controversies”.
- 25 W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 315.
- 26 *R. v. Davison* (1954) 90 C.L.R. 353.
- 27 *Ibid* 368 per Dixon C.J. and McTiernan J.; *Peacock v. Newtown Marrickville and General Co-operative Building Society No.4 Ltd* (1943) 67 C.L.R. 25, 35 per Latham C.J.

confer judicial power on a military tribunal constituted otherwise than in accordance with s.72 of the Constitution.<sup>28</sup>

The contemporary High Court, however, faces additional problems in defining judicial power. The fact that legislative, executive and judicial powers take their meaning, to a significant extent, from historical practice fuels tensions between the formal structure of the Constitution and the day-to-day conduct of government in an era of rapid change. As was discussed in part in Chapter Two, the twentieth century has witnessed a dramatic growth in the functions of government and the emergence of an educated, articulate populace anxious to vindicate an expanded range of social and economic rights against countervailing public and private interests. Major challenges for classical separation of powers theory have flowed from these developments, including increased government reliance on adjudicatory tribunals in supervising the implementation of legislative schemes<sup>29</sup> and the creation of new sets of legal entitlements in areas like human rights<sup>30</sup> and commercial regulation.<sup>31</sup> At the same time, the conception of the judicial function has itself undergone change as the idea of law as a discrete system of pre-existing rules which judges locate and apply in mechanical fashion gives way to a growing appreciation that judges make law and have always done so.<sup>32</sup> Parliament has

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28 *R. v. Bevan; Ex parte Elias and Gordon* (1942) 66 C.L.R. 452; *R. v. Cox; Ex parte Smith* (1945) 71 C.L.R. 1; *Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518; *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460; *Re Tyler; Ex parte Foley* (1994) 181 C.L.R. 18.

29 See, eg, the *B.I.O. Cases* (*British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]* (1925) 35 C.L.R. 422; *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153; *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.2]* (1926) 38 C.L.R. 153; *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530). See also *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54 and *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434.

30 See, eg, *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245.

31 See, eg, *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361 and *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167. See generally in relation to these developments and their impact upon the separation doctrine, R. Blackford, "Judicial Power, Political Liberty and the Post-Industrial State" (1997) 71 *A.L.J.* 267, esp.270.

32 *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 532-533 per Mason C.J. ("it is widely recognized that courts, in exercising their judicial power, make and alter law in the sense of formulating new or altered legal principles"). And see generally M. McHugh, "The Law-making Function of the Judicial Process – Part I" (1988) 62 *A.L.J.*

contributed to this process by vesting courts with broad discretionary powers to be exercised in accordance with generalized notions of justice and fairness.<sup>33</sup> It is thus no accident that the High Court has recently emphasized that judicial power involves not only the “ascertainment of facts” and the “application of legal criteria”, but also the exercise “where appropriate, of judicial discretion”.<sup>34</sup>

This chapter shows, amongst other things, that the reconciliation of this tension between the formal framework of the Constitution and the evolving functions and practices of modern government has been a factor affecting the outcome of many “judicial power” cases.<sup>35</sup> The High Court has generally adopted a flexible approach to the meaning of judicial power (what American commentators might term “functionalism”<sup>36</sup>) accepting that a variety of quasi-judicial administrative tribunals can be accommodated within Australian separation of powers theory and that federal courts can validly discharge a range of discretionary powers. But is such an approach a legitimate one? As the meaning of terms used in the Constitution is that which they had in 1900,<sup>37</sup> it might be

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15; R. Sackville, “Continuity and Judicial Creativity – Some Observations” (1997) 20 *U.N.S.W.L.J.* 145.

33 A. Mason, “Future Directions in Australian Law” (1987) 13 *Mon.L.R.* 149, 161-162; R. Sackville, “Continuity and Judicial Creativity – Some Observations” (1997) 20 *U.N.S.W.L.J.* 145, 152.

34 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 11 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ (fn. omitted).

35 As noted above fn.31 of this chapter, the impact of this tension upon the meaning of judicial power is also explored in R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, esp. 270.

36 One of the major debates in relation to separation of powers in the United States Constitution revolves around competing “formalist” and “functionalist” approaches to application of the doctrine. In general terms, “formalists” argue that the separation doctrine should be applied according to a classificatory approach – is the function in question legislative, executive or judicial in nature? This is both for textual reasons and because of a belief that the separation doctrine erects precautionary barriers against the assumption of arbitrary power, the gradual erosion of which may be impossible to detect in individual cases. Functionalists, however, question whether it is possible to classify the functions of government into the three traditional categories, and argue that to maintain fidelity with the original vision of the framers in a radically different world, it is necessary to apply the separation doctrine (outside clear cases) by asking whether the allocation of the function in question to the body in question would undermine the values which the separation of powers was designed to promote. See, for summaries of these two approaches, R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1522-1531; M.S. Flaherty, “The Most Dangerous Branch” (1996) 105 *Yale L.J.* 1725, 1733-1738.

37 *Attorney-General for N.S.W. v. Brewery Employes Union of N.S.W. (Union Label Case)* (1908) 6 C.L.R. 469, 501 per Griffith C.J.

argued that this tension between formal framework and evolving practice can have no bearing upon the resolution of concrete cases and that the content of judicial power is set as at 1900 regardless of social consequences. After all, the separation doctrine is about the imposition of structural barriers to the assumption of arbitrary power. To compromise this ideal in the name of “administrative convenience” or other contemporary demands is to give in to those very forces against which the separation of powers is designed to protect.<sup>38</sup>

This contention, however, does not survive closer scrutiny. Accepting that judicial power takes its meaning from “traditional British conceptions”,<sup>39</sup> it is to distort those conceptions to tie s.71 of the Constitution to the specific manifestations of judicial power known to the framers – even assuming (wrongly)<sup>40</sup> that this would somehow remove all doubt as to the nature of the judicial function. Part of the historical conception of judicial power is that it has an evolutionary or dynamic quality; as was pointed out above, judicial power is both an historical and *normative* construct. It follows that to strip the judicial power of the Commonwealth of this feature would be to deprive it of one of its basic attributes.<sup>41</sup>

Moreover, a dynamic conception of judicial power is integral to preservation of the broader constitutional framework. To maintain a static conception of judicial power within an altered social and political climate would result in a separation doctrine

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- <sup>38</sup> M.H. Redish and E.J. Cisar, “‘If Angels Were to Govern’: The Need for Pragmatic Formalism in Separation of Powers Theory” (1991) 41 *Duke L.J.* 449, 474-478; *Commodity Futures Trading Commission v. Schor* 478 U.S. 833, 863-864 (1986) per Brennan J.; *Harris v. Caladine* (1991) 172 C.L.R. 84, 112 per Brennan J.
- <sup>39</sup> *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 10 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.
- <sup>40</sup> *R. v. Davison* (1954) 90 C.L.R. 353, 380-381 per Kitto J. (“[i]t is well to remember that the framers of the Constitution, in distributing the functions of government amongst separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed”).
- <sup>41</sup> The above discussion has deliberately avoided the language of connotation and denotation because of the inherent difficulty in identifying the “core” or “essential” meaning of judicial power. See, eg, *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 267 per Deane, Dawson, Gaudron and McHugh JJ. (quoted above p.171 of this chapter). And see, in relation to the connotation/denotation distinction, L. Zines, *The High Court and the Constitution* (4th ed) (1997) 17-19.

disengaged from its constitutional object and purpose.<sup>42</sup> It would also place the separation of powers at odds with other fundamental principles of the Constitution which have shown themselves capable of adaptation to a changing world: the High Court's conception of federalism has not remained static over time,<sup>43</sup> any more than its conception of representative government.<sup>44</sup>

Of course, such a purposive or "functional"<sup>45</sup> conception of judicial power cannot be an empty vessel into which each generation pours its ambitions.<sup>46</sup> But s.71 is capable of a progressive interpretation consistently with the rule of law values which it enshrines.

As Isaacs J. said over seventy years ago in *Federal Commissioner of Taxation v. Munro*:<sup>47</sup>

"The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution."<sup>48</sup>

As discussed in Chapter Two, Isaacs J. was concerned in this and other cases to develop a separation doctrine attuned to the twentieth century conception of "active" government which would ensure that core judicial functions remained the responsibility of the courts, but that Parliament retained substantial discretion in the allocation of functions

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<sup>42</sup> See the description of American "functionalism" above fn.36 of this chapter.

<sup>43</sup> See, eg, the famous comments of Windeyer J. in *Victoria v. Commonwealth (Payroll Tax Case)* (1971) 122 C.L.R. 353, 396-397 in relation to the outcome of the *Engineers' Case*.

<sup>44</sup> *Cheatle v. R.* (1993) 177 C.L.R. 541, 560-561 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also Professor Zines' discussion of *McGinty v. Western Australia* (1996) 186 C.L.R. 140 and the question whether the Constitution contains a guarantee of universal adult franchise (L. Zines, *The High Court and the Constitution* (4th ed) (1997) 398).

<sup>45</sup> *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563, 567 per Gleeson C.J., Gaudron, Gummow, Kirby and Hayne JJ.

<sup>46</sup> W.B. Gwyn, "The Indeterminacy of the Separation of Powers and the Federal Courts" (1989) 57 *Geo. Wash. L. Rev.* 474, 504.

<sup>47</sup> (1926) 38 C.L.R. 153.

<sup>48</sup> *Ibid* 178. See also *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 185 C.L.R. 595, 666 per Kirby J. ("[t]he judicial function is not frozen in time. This court should remain alert to developments in judicial procedures which further, in proper ways, the defence of the rule of law").



lacking strong historical or purposive links with a particular branch of government. In *Munro* he translated these concerns into a schema according to which individual governmental functions were either exclusively legislative, executive or judicial in nature, or alternatively “subject to no *a priori* exclusive delimitation, but ... capable of assignment by Parliament in its discretion to more than one branch of government”.<sup>49</sup> This vision of the separation of powers continues profoundly to influence the High Court to this day. In particular, the recognition of a category of innominate powers has played a major role in reconciling the division in ss.1, 61 and 71 of the Constitution with evolving patterns of governance.<sup>50</sup> At the same time, another device favoured by Isaacs J. – the “factum” – has also played an important part in the emergence of a flexible conception of judicial power.<sup>51</sup> Both innominate powers and “facta” are explored below in a review of the High Court’s search for a meaningful, yet workable conception of judicial power. That review must commence, however, with an examination of those functions exclusively judicial in nature.

## 2. Exclusively Judicial Functions

### (a) Identifying Those Functions Exclusively Judicial in Nature

Under the primary separation rule and Isaacs J.’s schema in *Munro*, certain federal governmental functions must be exercised by courts, and courts alone.<sup>52</sup> Historically, the core functions of the common law courts included the determination of breaches of the criminal law, the trial of actions in contract or in tort and the vindication of proprietary rights via such actions as ejectment and trespass.<sup>53</sup> It is not surprising then that the High Court has maintained that “punishment for crime or trial of actions for

<sup>49</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 178.

<sup>50</sup> R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, 270.

<sup>51</sup> S. Ratnapala, “*Harry Brandy’s Case* and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 234.

<sup>52</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 147 per Gaudron J.

<sup>53</sup> W.S. Holdsworth, *A History of English Law* vol.6 (2nd ed) (1937) 624-640; W. Blackstone, *Commentaries on the Laws of England* vol.3 (1768) (facsimile ed, 1983, The Legal Classics Library) chs 3 and 4 (actions for civil wrongs) and W. Blackstone, *Commentaries on the Laws of England* vol.4 (1769) (facsimile ed, 1983, The Legal Classics Library) ch.19 (trial and punishment of criminal offences).

breach of contract or for wrongs”<sup>54</sup> are the archetypal examples of functions which can only be exercised by the judicial branch.<sup>55</sup> Thus, it has been held that the power to make an order for recovery of possession of land as between landlord and tenant<sup>56</sup> or for payment of wages payable by an employer to an employee under a contract of employment or industrial award<sup>57</sup> is exclusively judicial in nature, as is the ascertainment of criminal guilt in its various guises.<sup>58</sup>

In describing judicial power as involving the binding determination of controversies as to existing legal rights, modern judges and commentators have been “guided” by the features of the traditional criminal and civil trials referred to above.<sup>59</sup> Traditionally, the courts have undertaken an inquiry into “the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined”,<sup>60</sup> and made a binding or conclusive determination in the sense of a finding which has an “immediate effect on legal rights”<sup>61</sup> and is immune from attack in collateral

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- 54 *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 175 per Isaacs J.
- 55 *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 258 per Mason C.J., Brennan and Toohey JJ.; 269 per Deane, Dawson, Gaudron and McHugh JJ.; *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563, 567 per Gleeson C.J., Gaudron, Gummow, Kirby and Hayne JJ.
- 56 *Silk Bros Pty Ltd v. State Electricity Commission of Victoria* (1943) 67 C.L.R. 1, 9 per Latham C.J. (with whom Rich J. and McTiernan J. agreed); 21 per Starke J.; 23 per Williams J.
- 57 *Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty Ltd* (1987) 163 C.L.R. 140, 148 per Mason C.J., Brennan, Deane, Dawson and Toohey JJ.
- 58 See, eg, *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501.
- 59 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 171, 173. See also *R. v. Davison* (1954) 90 C.L.R. 353, 368-369 per Dixon C.J. and McTiernan J.; *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 258-259 per Mason C.J., Brennan and Toohey JJ.
- 60 *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 374 per Kitto J. Note the similarity with Blackstone’s definition of the judicial function (W. Blackstone, *Commentaries on the Laws of England* vol.3 (1768) (facsimile ed, 1983, The Legal Classics Library) 25): “In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex* or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and by it’s [sic] officers to apply the remedy.” See also W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 304.
- 61 G. Sawer, *Australian Federalism in the Courts* (1967) 161.

proceedings.<sup>62</sup> As Professor Harrison Moore, writing in 1910, described this latter feature of the work of the courts:

“It is characteristic of the determinations of Courts, acting in their jurisdiction, that they are conclusive and binding until nullified or amended by the appropriate revising authority (if any), and everything done under them is valid and lawful.”<sup>63</sup>

By contrast, it has long been accepted by English and Australian courts that the validity of an executive determination is generally open to both direct and indirect judicial challenge.<sup>64</sup>

This historical conception of those functions exclusively judicial in character, however, also has a normative dimension. This was acknowledged by Jacobs J. in *R. v. Quinn; Ex parte Consolidated Food Corporation*<sup>65</sup> in an influential passage generally regarded as describing the irreducible heartland of the judicial function. His Honour said:

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<sup>62</sup> This is the generally accepted touchstone of “conclusive” in this context. See S. Ratnapala, “*Harry Brandy’s Case* and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 234-235; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 171. Cf the view of Professor Campbell who says that a decision is conclusive if immune from collateral attack and “not open to recall or rectification by the person or body which made it” (E. Campbell, “The Choice Between Judicial and Administrative Tribunals and the Separation of Powers” (1981) 12 *F.L.Rev.* 24, 34). Although the decision of the Privy Council in *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530, 543 lends support to this view, the absence of a power of recall by the decision-maker has not featured as an element in the High Court’s treatment of the concept of conclusiveness. Moreover, it is not unknown for a court to set aside its own order. See, for a recent example, the decision of the House of Lords in *In Re Pinochet* (unreported, House of Lords, 17 December 1998 (oral judgment) 15 January 1999 (reasons)) <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> at 20 January 1999 (copy on file with author) setting aside an earlier order of the House made on 25 November 1998 on the ground that a member of the earlier panel should have disqualified himself on the ground of apprehended bias.

<sup>63</sup> W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 304. See also *R. v. Local Government Board* (1902) 2 I.R. 349, 373 per Palles C.B. (quoted in *R. v. Davison* (1954) 90 C.L.R. 353, 367 per Dixon C.J. and McTiernan J.) and *Nicholas v. R.* (1998) 151 A.L.R. 312, 318 per Brennan C.J.

<sup>64</sup> W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 304-305. For a recent illustration, see *Ousley v. R.* (1997) 148 A.L.R. 510, 515 per Toohey J.; 520-521 per Gaudron J.; 529-531 per McHugh J.; 550 per Gummow J.; 567, 569 per Kirby J. See generally M. Aronson and B. Dyer, *Judicial Review of Administrative Action* (1996) 18, 644-646.

<sup>65</sup> (1977) 138 C.L.R. 1.

“The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the *basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom*. The governance of a trial for the determination of criminal guilt is the classic example.”<sup>66</sup>

According to this approach, not every binding adjudication of right constitutes an exercise of power exclusively judicial in nature. The determination of certain species of rights are innominate functions capable of exercise in a judicial or non-judicial way.<sup>67</sup> But tradition and policy have elevated certain other rights to the status of “basic rights” which should be determined “by that independent judiciary which is the bulwark of freedom”. And at the heart of these “basic rights” are those involved in the trial of civil and criminal wrongs.<sup>68</sup>

Indeed, in recent times, members of the High Court have gone further and claimed that the “adjudgment and punishment of criminal guilt” is the “most important” of those functions “exclusively judicial in character”.<sup>69</sup> In other words, where the liberty of the individual is at stake, the rule of law values served by the assumption of decision-making authority by an independent judiciary are at their zenith. The consequences of this “most important” status are yet fully to emerge, but as is discussed in Chapter Six, in the case of the trial and punishment of a criminal offence, the content of the procedural due process requirement which tempers each exercise of federal judicial power is at its greatest. In addition, it seems that the High Court will apply an enhanced

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<sup>66</sup> *Ibid* 11 (emphasis added).

<sup>67</sup> See below pp.192-201 of this chapter.

<sup>68</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 187.

<sup>69</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27 per Brennan, Deane and Dawson JJ. See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 107 per Gaudron J.

level of scrutiny to any suggestion, for example, that the power to determine criminal guilt<sup>70</sup> or to impose criminal sanctions<sup>71</sup> has been reposed in a non-judicial body.<sup>72</sup>

Of course, the ascertainment and punishment of criminal guilt and the classical forms of civil action are not the only functions exclusively judicial in nature. For example, under a limited Constitution where judicial review is accepted as “axiomatic”,<sup>73</sup> the conclusive determination of the validity of legislative and executive activity must necessarily be the sole responsibility of the judicial branch.<sup>74</sup> The *Communist Party Case*<sup>75</sup> is testament to this. Arguably the conclusive determination of the validity of administrative action according to the traditional principles of administrative law is also an exclusively judicial function, a proposition suggested by history and the vital role which the doctrines of ultra vires play in subjecting the executive branch to the rule of law.<sup>76</sup> It is, however, in relation to the trial of actions for civil wrongs that the judicial monopoly on certain categories of public power has been most forcefully reasserted in recent times. And this necessitates consideration of the *Brandy Case*.

### (b) The *Brandy Case*

In *Brandy v. Human Rights and Equal Opportunity Commission*,<sup>77</sup> the High Court struck down amendments to the *Racial Discrimination Act 1975* (Cth) on the ground that they conferred judicial power on, or at least purported to provide for an exercise of

<sup>70</sup> See, eg, the distinction drawn by Deane J. and Gaudron J. in *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501 between retroactive criminal and civil laws (discussed below pp.320-321 (ch.7)).

<sup>71</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27-29 per Brennan, Deane and Dawson JJ.

<sup>72</sup> See also *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563, 568 per Gleeson C.J., Gaudron, Gummow, Kirby and Hayne JJ.

<sup>73</sup> *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 262 per Fullagar J.

<sup>74</sup> *Ibid* 262-263 per Fullagar J.; *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 165 per Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.; *Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518, 580 per Deane J.

<sup>75</sup> *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.

<sup>76</sup> As to the role of the courts in this regard, see generally G. Brennan, “Courts, Democracy and the Law” (1991) 65 *A.L.J.* 32.

<sup>77</sup> (1995) 183 C.L.R. 245.

judicial power by, the Human Rights and Equal Opportunity Commission (a body constituted otherwise than in accordance with s.72 of the Constitution).

Prior to these amendments, the Commission had been empowered to adjudicate upon claims of unlawful discrimination and could declare, for example, that a respondent had engaged in conduct contrary to the *Racial Discrimination Act* and should pay compensatory damages to the complainant. The Act expressly provided, however, that these determinations were not “binding or conclusive”.<sup>78</sup> Thus, if a successful complainant wished to enforce a Commission finding against an uncooperative respondent, he or she was forced to institute proceedings in the Federal Court where the matter was heard de novo.<sup>79</sup> These arrangements for the enforcement of Commission determinations were regarded as unsatisfactory and the amendments sought to mitigate the impact of the two-tiered approach by requiring the registration of Commission determinations in the Federal Court.<sup>80</sup> Under the new enforcement regime, a registered determination was to have effect “as if it were an order made by the Federal Court”.<sup>81</sup> This was subject, however, to the right of the respondent within twenty-eight days of registration to apply to the Federal Court for a review of the Commission’s finding.<sup>82</sup> The Court was empowered to “review all issues of fact and law”<sup>83</sup> and make such order as it thought fit,<sup>84</sup> but a party could not adduce new evidence without leave.<sup>85</sup>

The High Court’s finding of invalidity was unanimous. Underpinning its conclusion was the view that the functions of the Commission in determining whether a respondent

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78 Section 25Z(2).

79 See, eg, *Aldridge v. Booth* (1988) 80 A.L.R. 1.

80 Section 25ZAA. And see S. Power, “Constitutional Validity of Enforcement Procedures Under Commonwealth Anti-discrimination Legislation – Response to Article by Anthony J.H. Morris Q.C.” (1994) 68 *A.L.J.* 434, 434-435; E. Henderson, “Trials, Tribunals and Tribulations: *Brandy v. Human Rights and Equal Opportunities Commission*” (1995) 17 *Syd.L.R.* 581, 587-588; M. Allars, “Theory and Administrative Law: Law as Form and Theory as Substance” (1996) 79 *C.B.P.A.* 20, 22.

81 Section 25ZAB(1).

82 Section 25ZAB(5).

83 Section 25ZAC(4).

84 Section 25ZAC(6).

85 Section 25ZAC(5).

had engaged in acts of unlawful discrimination and, if so, awarding remedies like damages were “closely analogous to those of a court in deciding criminal or civil cases”.<sup>86</sup> In other words, the rights and duties at issue before the Commission, although the creature of modern human rights legislation, were of the same nature as those “basic rights” which Jacobs J. in *Quinn*, and before him Isaacs J. in *Munro*, had described as the preserve of an independent judiciary. In adjudicating upon alleged breaches of the *Racial Discrimination Act*, the Commission was engaged in the process of resolving disputes by application of a pre-existing legal standard to facts as found. Thus, the Commission was effectively acting as a trial court in the vindication of traditional rights,<sup>87</sup> and although its findings had previously lacked the element of conclusiveness, the amendments supplied this last component of judicial power by equating registered determinations with orders of the Federal Court.<sup>88</sup>

Despite the urging of the Commonwealth to the contrary, this conclusion was not affected by the provisions facilitating review of registered determinations by the Federal Court. The Commonwealth argued that registration was analogous to the institution of proceedings in the original jurisdiction of the Court, the enforceability of a registered determination flowing from those proceedings. But the High Court did not see it that way. All seven Justices pointed out that a determination could be registered and enforced without Federal Court review taking place.<sup>89</sup> Moreover, only a respondent could initiate review which, by reason of the exclusion of “new evidence” without prior

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<sup>86</sup> *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 269 per Deane, Dawson, Gaudron and McHugh JJ.; 258-259 per Mason C.J., Brennan and Toohey JJ. See also A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 6.

<sup>87</sup> *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 259-260 per Mason C.J., Brennan and Toohey JJ.; 269 per Deane, Dawson, Gaudron and McHugh JJ.

<sup>88</sup> *Ibid* 260 per Mason C.J., Brennan and Toohey JJ.; 269-270 per Deane, Dawson, Gaudron and McHugh JJ. See also A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 6.

<sup>89</sup> *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 262 per Mason C.J., Brennan and Toohey JJ.; 270-271 per Deane, Dawson, Gaudron and McHugh JJ.

leave, did not take the form of a hearing de novo.<sup>90</sup> Instead, it more closely approximated a re-examination of the Commission's determination in the context of the evidence before that tribunal.<sup>91</sup> Nor could the procedure at hand be likened to entry of a default judgment because default judgments were controlled by a court under rules of court.<sup>92</sup> It thus remained the case that the Commission was exercising judicial power, and, in the words of Deane, Dawson, Gaudron and McHugh JJ., "[t]he existence or exercise of a right of appeal from a decision made in the exercise of judicial power does not convert that decision into one of an administrative kind".<sup>93</sup>

Reflecting on this decision, it is possible to depict *Brandy* as a conservative reaffirmation of the authority of the courts in the adjudication of "rights" disputes at the expense of the activities of rival adjudicatory tribunals. On this argument, *Brandy* is a retrograde step in the protection of human rights in Australia because it substitutes a costly, formal, adversarial enforcement mechanism for the more informal and accessible processes of an expert administrative tribunal.<sup>94</sup> But if *Brandy* is depicted as a contest between constitutional structure and the aspirations of contemporary human rights law, it is submitted that the High Court's decision was nonetheless the correct one in the circumstances.

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90 *Ibid* 263-264 per Mason C.J., Brennan and Toohey JJ.; 271 per Deane, Dawson, Gaudron and McHugh JJ.

91 *Ibid* 264 per Mason C.J., Brennan and Toohey JJ.; 271 per Deane, Dawson, Gaudron and McHugh JJ.

92 *Ibid* 262 per Mason C.J., Brennan and Toohey JJ.; 270 per Deane, Dawson, Gaudron and McHugh JJ.

93 *Ibid* 271.

94 Although not pressed in these stark terms, elements of this critique can be detected in K. Walker, "Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights" (1995) 25 *U.W.A.L.R.* 238, 247; I. Omar, "Darkness on the Edge of Town: The High Court and Human Rights in the *Brandy* Case" (1995) 2 *A.H.J.R.* 115; M.G. Cowman, "Separation of Judicial Power: *Brandy v. Human Rights and Equal Opportunity Commission*" (1995) 2 *Deakin L.R.* 119, 122. See also the criticisms of *Brandy* adverted to in M. Allars, "Theory and Administrative Law: Law as Form and Theory as Substance" (1996) 79 *C.B.P.A.* 20, 22.



Looking at the disputed registration and enforcement regime as a whole, it is hard to avoid the conclusion that the Federal Court was being asked to “rubber stamp”<sup>95</sup> Commission determinations. The Court was given no control over the act of registration which was simply a trigger for the legislative attribution to the findings of the Commission of the elements of conclusiveness and enforceability attendant upon an exercise of judicial power by the Federal Court.<sup>96</sup> The Federal Court’s adjudicative processes were not thereby engaged and to the extent that they were engaged by a respondent seeking “review”, it was in the form of an appeal by way of rehearing. As will be seen later in this chapter, there exist certain situations where the preservation of access to the courts in the form of an appeal from a decision of an administrative tribunal or official may support the vesting in that body of a “borderline” innominate powers/basic rights function. But in *Brandy*, the appeal was not a full one and the adjudication of the rights at issue was clearly an exclusively judicial function.

Seen in this light, had *Brandy* been decided the other way, it would have constituted a direct challenge to the primary separation rule itself. For example, had the registration and enforcement regime survived scrutiny, what would have stopped its adaptation to other federal causes of action?<sup>97</sup> To all federal causes of action? Could the Human Rights and Equal Opportunity Commission, or some other tribunal whose members do not enjoy the tenure prescribed by s.72 of the Constitution, be empowered to make summary determinations of *criminal guilt* which once registered in the Federal Court,

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<sup>95</sup> E. Henderson, “Trials, Tribunals and Tribulations: *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 17 *Syd.L.R.* 581, 587.

<sup>96</sup> *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 *C.L.R.* 245, 260 per Mason C.J., Brennan and Toohey JJ.; 270 per Deane, Dawson, Gaudron and McHugh JJ.

<sup>97</sup> Note that prior to the decision in *Brandy*, the registration and enforcement regime at issue in that case had also been applied to determinations of the Human Rights and Equal Opportunity Commission made under the *Sex Discrimination Act* 1984 (Cth), the *Disability Discrimination Act* 1992 (Cth) and the *Privacy Act* 1988 (Cth) (see R. Treyde, “Enforcing Human Rights: The Response to *Brandy*” (1996) 7 *P.L.R.* 15, 15). See also Morris’ reference to use of a similar scheme in the *Native Title Act* 1993 (Cth) (A.J.H. Morris, “Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation” (1994) 68 *A.L.J.* 193, 204-205) as to which see now *Fourmile v. Selpam Pty Ltd* (1998) 152 *A.L.R.* 294 (F.C.A.).

and exposed to review on the *Brandy* model, take effect as orders of the court?<sup>98</sup>

Ultimately, if one accepts our legal system's historic commitment to the view that the adjudgment and punishment of criminal guilt, as well as the trial of actions for breach of contract or for civil wrongs, should be undertaken by a body independent of the government of the day,<sup>99</sup> then the decision in *Brandy* was inevitable even adopting a purposive conception of judicial power. So regarded, *Brandy* does promote human rights in Australia by ensuring that Chapter III courts continue to provide an effective check on executive power.<sup>100</sup>

As a subsidiary matter, *Brandy* makes it clear that a tribunal need not possess an independent power of enforcement in order for its determinations to be classified as judicial in character.<sup>101</sup> Capacity to enforce its own determinations will, however, be a factor pointing in the direction of judicial power.<sup>102</sup>

**(c) *Harris v. Caladine***

The decision in *Brandy* should be contrasted with that in *Harris v. Caladine*.<sup>103</sup> In *Harris v. Caladine*, a majority of the High Court held that federal judicial power could

<sup>98</sup> A question put in argument by Toohey J. to the Solicitor-General for the Commonwealth is suggestive of these considerations. His Honour asked, “[d]oes it not follow from your argument that it is competent for the Parliament to establish tribunals to make determinations in a range of matters all capable of enforcement by registration as orders of the Federal Court so long as provision is made for review by a Ch III court?” To this the Solicitor-General replied, “[y]es, if the review has the capacity to be complete” (see summary of argument in (1995) 183 C.L.R. 245, 250).

<sup>99</sup> *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 11.

<sup>100</sup> M. Allars, “Theory and Administrative Law: Law as Form and Theory as Substance” (1996) 79 *C.B.P.A.* 20, 22-24.

<sup>101</sup> *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 256-257 per Mason C.J., Brennan and Toohey JJ.; 269 per Deane, Dawson, Gaudron and McHugh JJ. This was also the view of Dixon C.J. (see *R. v. Davison* (1954) 90 C.L.R. 353, 368 per Dixon C.J. and McTiernan J.) and seems to have been the view of Isaacs J. (see *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 176). For a contrary view, see *R. v. Davison* (1954) 90 C.L.R. 353, 373-375 per Webb J.; *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 198-199 per Latham C.J. (with whom McTiernan J. agreed). And see also *ibid* 211 per Starke J.; *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 202 per Higgins J.

<sup>102</sup> *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 257 per Mason C.J., Brennan and Toohey JJ.; 268-269 per Deane, Dawson, Gaudron and McHugh JJ.

<sup>103</sup> (1991) 172 C.L.R. 84.

validly be delegated to, and correspondingly exercised by, officers of a federal court not enjoying s.72 tenure such as registrars or masters. At issue in the case was the validity of s.37A of the *Family Law Act 1975* (Cth) which empowered the Judges of the Family Court to delegate to registrars “all or any of the powers of the Court”.<sup>104</sup> Certain proceedings, however, were expressed to remain the sole responsibility of the Judges of the Court.<sup>105</sup> The Act deemed a delegated power to have been exercised by the Court<sup>106</sup> and further provided that a party to delegated proceedings could apply to the Court to review a registrar’s exercise of power.<sup>107</sup> Such review could also take place on the Court’s own motion,<sup>108</sup> and the Act permitted removal of proceedings before a registrar to a Judge.<sup>109</sup> Relying on s.37A, the Judges of the Family Court delegated to registrars a range of functions, including the power to make orders by consent. The Family Court Rules which contained this delegation specifically provided that review by the Court of an exercise of power by a registrar “shall proceed by way of a hearing de novo”.<sup>110</sup> The case came before the High Court after a Deputy Registrar made a consent order altering the property interests of a husband and wife. The wife later withdrew her consent and challenged, among other things, the validity of the Registrar’s exercise of power.

In upholding this scheme against the argument that federal judicial power committed to a federal court must be exercised by the judges of that court, Mason C.J. and Deane J. emphasized that “a court may be organized or structured in a wide variety of ways for the purpose of exercising its jurisdiction”.<sup>111</sup> Likewise, Dawson J. made the point that “traditionally courts have exercised part of their functions through masters and

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<sup>104</sup> Section 37A(1).

<sup>105</sup> Section 37A(2) (a decree of dissolution of marriage in defended proceedings, a decree of nullity of marriage, a declaration as to the validity, dissolution or annulment of a marriage and orders relating to children in defended proceedings).

<sup>106</sup> Section 37A(3).

<sup>107</sup> Section 37A(9).

<sup>108</sup> Section 37A(10).

<sup>109</sup> Sections 37A(11) and (12).

<sup>110</sup> Order 36A, rule 7(4).

<sup>111</sup> (1991) 172 C.L.R. 84, 91.

registrars, subject to the supervision and control of the courts”.<sup>112</sup> It followed that when s.71 of the Constitution vested the judicial power of the Commonwealth in a series of “courts”, it meant the court considered as an “entity” or “organization” equipped with officers to assist in the discharge of its functions, as opposed to the judges who, strictly speaking, constitute its members.<sup>113</sup> In *Commonwealth v. Hospital Contribution Fund*,<sup>114</sup> the High Court had read “any court of a State” in s.77(iii) of the Constitution in the same way with the consequence that invested federal jurisdiction could validly be exercised by officers of a State court in accordance with the ordinary practice of that court.<sup>115</sup> In *Harris v. Caladine* the reasoning of Mason C.J. and Deane J., in particular, was heavily influenced by this precedent.

It followed that federal judicial power could validly be delegated to officers of a federal court. This was subject, however, to certain conditions designed to ensure fidelity to the notion that a federal court must be constituted by judges appointed in accordance with s.72 of the Constitution.<sup>116</sup> Mason C.J. and Deane J. regarded these conditions as twofold:

“The *first condition* is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters. The *second condition* is that the delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court. For present purposes it is sufficient for us to say that, if the exercise of delegated jurisdiction, powers and functions by a court officer is subject to review or appeal by a judge or judges of the court on

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<sup>112</sup> *Ibid* 120. See also *ibid* 145, 148 per Gaudron J.; 163 per McHugh J.

<sup>113</sup> *Ibid* 92 per Mason C.J. and Deane J.; 120-121 per Dawson J. Gaudron J. reached a similar conclusion (*ibid* 148-149).

<sup>114</sup> (1982) 150 C.L.R. 49.

<sup>115</sup> See, in particular *ibid* 58-59 per Gibbs C.J. with whom Stephen, Mason, Murphy, Aickin and Wilson JJ. were in general agreement.

<sup>116</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 94 per Mason C.J. and Deane J.; 122 per Dawson J. Gaudron J. took a slightly different approach, maintaining that “the limits on the delegation by a court of its powers and functions derive from the nature of judicial power and the nature of courts” (*ibid* 150).

questions of both fact and law, we consider that the delegation will be valid. Certainly, if the review is by way of hearing de novo, the delegation will be valid.”<sup>117</sup>

Mason C.J. and Deane J. concluded that these conditions were not infringed by the scheme before them. Dawson J. and Gaudron J. identified similar limitations upon the power of delegation,<sup>118</sup> although Gaudron J. confined her finding of validity to the particular delegation at issue on the facts of the case.<sup>119</sup> Neither Dawson J. nor Gaudron J. adverted to the possibility that something less than review de novo would suffice.

The remaining member of the majority was McHugh J. who adopted a more consciously purposive approach to the problem before the Court, asking whether the delegation of judicial power by a federal court to an officer of the court was “contrary to the substance and spirit of the doctrine of the separation of powers”.<sup>120</sup> His Honour found in favour of s.37A on the basis that a delegation of judicial power to an officer of a federal court, subject to review by a judge, “does not threaten the values which Ch.III of the Constitution seeks to protect – the independence and impartiality of the federal judiciary and the separation of the exercise of judicial power from legislative and executive power”.<sup>121</sup> McHugh J. insisted, however, that this conclusion was dependent on provision for de novo review by a judge.<sup>122</sup>

Brennan J. and Toohey J. dissented. According to Brennan J., the hearing and determination of matters in a federal court by a person other than a judge was contrary to s.72 of the Constitution.<sup>123</sup> This did not preclude the delegation to an officer of

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117 *Ibid* 95 (emphasis added).

118 *Ibid* 122-123 per Dawson J.; 149-151 per Gaudron J.

119 *Ibid* 149.

120 *Ibid* 160.

121 *Ibid* 164.

122 *Id.*

123 *Ibid* 108-109.

functions “ancillary to an adjudication by the court”,<sup>124</sup> but the making of the consent order at issue fell outside this category. The approach of Toohey J. was similar.<sup>125</sup>

At first blush, it might be wondered how the decisions in *Brandy* and *Harris v. Caladine* can stand together. In *Brandy*, the High Court denied that the Human Rights and Equal Opportunity Commission could exercise judicial power under the *Racial Discrimination Act* despite provision for review of its determinations by the Federal Court. In *Harris v. Caladine*, however, it was decided that persons who were not Chapter III judges could validly exercise judicial power under the *Family Law Act* subject to review by the Family Court. Both cases concerned functions exclusively judicial in nature.<sup>126</sup> Indeed, as Gaudron J. pointed out in *Harris v. Caladine*, it was not in doubt that registrars and other non-judicial officers could validly discharge functions which bore a “double aspect”<sup>127</sup> and were capable of performance as either judicial or administrative tasks.<sup>128</sup> So how then can *Brandy* and *Harris v. Caladine* be reconciled?

The answer lies in a mix of historical and purposive considerations. Courts have traditionally been assisted by masters and other officers in the discharge of their functions. Thus, the statutory provisions and rules at issue in *Harris v. Caladine* invoked an established legal model for the exercise of judicial power by non-judicial personnel and it was natural to read the term “court” in s.71 of the Constitution as embracing such a scheme. By contrast, the *Brandy* registration and enforcement regime was an innovation upon historical practice. A purposive or functional conception of judicial power would not condemn the *Brandy* regime on that basis, but as shown above, *Brandy* does not survive a purposive analysis. *Harris v. Caladine*, however,

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<sup>124</sup> *Ibid* 110-111 quoting Windeyer J. in *Kotsis v. Kotsis* (1970) 122 C.L.R. 69, 92.

<sup>125</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 138-139, 141.

<sup>126</sup> Putting to one side the characterization of the consent order at issue on the facts of *Harris v. Caladine*, it was accepted by the majority that exclusively judicial functions could be delegated by federal courts to officers of the court. See *ibid* 90 per Mason C.J. and Deane J.; 115, 122 per Dawson J.; 148 per Gaudron J.

<sup>127</sup> *Ibid* 147-148 quoting Dixon C.J. and McTiernan J. in *R. v. Davison* (1954) 90 C.L.R. 353, 369.

<sup>128</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 148.

should be supported from a purposive perspective. Unlike the situation in *Brandy*, the judicial power of the Family Court remained under the control of its Judges: those Judges were responsible for the delegation of judicial functions and they retained full supervisory control in relation to the discharge of those functions, both in the provision for removal of matters from registrars to Judges and for de novo review of a registrar's exercise of jurisdiction. As McHugh J. recognized, the values implicit in ss.71 and 72 of the Constitution, notably those flowing from the exercise of judicial power by an independent and impartial judiciary, were not imperilled. Judges enjoying s.72 tenure put in place the arrangement and monitored its operation, while litigants retained the right at all times to seek a determination of their dispute in the original jurisdiction of the Court.

Of course, it is possible to argue that the outcome in *Harris v. Caladine* offends rule of law values because it obliges a party to accept the adjudication of a non-judicial officer as binding upon them prior to instituting fresh proceedings in court.<sup>129</sup> This argument, however, is weakened by the fact that a delegated adjudication takes place under the auspices of the judges of the court in the sense explained in the previous paragraph. Moreover, in considering whether the "provisional effectiveness"<sup>130</sup> of a registrar's order under the *Harris v. Caladine* formula is such as to infringe ss.71 and 72 of the Constitution, one cannot ignore the fact that *Harris v. Caladine* seeks to reconcile the separation of federal judicial power with the significant expansion, particularly in the last twenty-five years, of the number of matters falling within federal jurisdiction.<sup>131</sup> In the context of this expansion, it would be both surprising and undesirable if the federal

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<sup>129</sup> A majority of the Court in *Harris v. Caladine* recognized that an order made by a registrar in delegated proceedings was binding on the parties to the dispute until set aside on review. See *ibid* 97 per Mason C.J. and Deane J.; 104, 106, 112 per Brennan J.; 126-127 per Dawson J.; 140-141 per Toohey J; 154 per Gaudron J. And cf *ibid* 165 per McHugh J. And see as to this issue generally S. Ratnapala, "Harry Brandy's Case and its Implications for Taxation Administration in Australia" (1995) 18 *U.Q.L.J.* 233, 236.

<sup>130</sup> *Ibid* 234.

<sup>131</sup> See also *Commonwealth v. Hospital Contribution Fund of Australia* (1982) 150 C.L.R. 49 and cf *Kotsis v. Kotsis* (1970) 122 C.L.R. 69 and *Knight v. Knight* (1971) 122 C.L.R. 114.

judiciary could not avail themselves of the support traditionally enjoyed by courts from officers of court in the discharge of their business.<sup>132</sup>

Thus, the decision in *Harris v. Caladine* seems correct in both principle and policy. This is subject, however, to strict observance of the conditions identified by Mason C.J. and Deane J. restricting the extent of valid delegation. And although Mason C.J. and Deane J. might be taken to suggest otherwise, it is submitted that nothing less than the availability of review de novo by the judges of the court will satisfy the requirements of Chapter III, particularly in light of *Brandy*. Moreover, Dawson J. and McHugh J. were right when they denied that Parliament could validly “compel a federal court to exercise any of its judicial functions through an officer of the court”.<sup>133</sup> The judicial power of a court must remain under the real control of its judges if the constitutional requirement of the exercise of the judicial power of the Commonwealth by federal courts composed of judges appointed in accordance with s.72 is to be upheld.<sup>134</sup>

### 3. The Innominate Powers Doctrine and Facta

It was noted above that the doctrine of innominate powers has played a major role in the High Court’s formulation of a flexible conception of judicial power. As already explained, the doctrine recognizes that although certain functions are exclusively legislative, executive or judicial in character, there exists a further group of functions “which may be classified as either judicial or administrative, according to the way in which they are to be exercised”.<sup>135</sup> Thus, as Isaacs J. said in *Federal Commissioner of Taxation v. Munro*, these functions are “capable of assignment by Parliament in its

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<sup>132</sup> See in this regard, *Harris v. Caladine* (1991) 172 C.L.R. 84, 120 per Dawson J. and 145 per Gaudron J.

<sup>133</sup> *Ibid* 121 per Dawson J.; 164 per McHugh J.

<sup>134</sup> *Ibid* 121 per Dawson J.

<sup>135</sup> *R. v. Hegarty; Ex parte City of Salisbury* (1981) 147 C.L.R. 617, 628 per Mason J. This passage was referred to with approval by the entire Court in *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1987) 163 C.L.R. 656, 665 and *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167, 189. See also *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144, 151 per Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.; *R. v. Davison* (1954) 90 C.L.R. 353, 368-370 per Dixon C.J. and McTiernan J.; 388 per Taylor J.



discretion to more than one branch of government”.<sup>136</sup> When assigned to a court, they “form part of the judicial power of the Commonwealth with all the consequences dictated by Ch.III of the Constitution”.<sup>137</sup> When conferred on some other tribunal, they fall “outside the reach of Ch.III”.<sup>138</sup>

In *R. v. Davison*, Dixon C.J. and McTiernan J. observed that “[i]t is this double aspect which some acts or functions may bear that makes it so difficult to define the judicial power”.<sup>139</sup> This is true in several respects. First, there is uncertainty as to which functions are capable of wearing a “double aspect”.<sup>140</sup> Secondly, even accepting that a particular function is innominate in character, the question remains whether Parliament *intended* the function to be performed in the exercise of judicial or executive power,<sup>141</sup> an innominate function will not automatically take “colour” from the repository of the power if some other feature of the legislative scheme indicates that it is to be performed in a manner more closely associated with one of the other branches of government.<sup>142</sup>

In addition to the above, there are two distinct categories of innominate powers – what might be termed “innominate acts” and “innominate functions strictly so-called”.

“Innominate acts” are the generic components or steps which combine to produce a specific functional outcome. The determination of facts, a necessary part of the performance of a range of governmental functions, is the most common example of an “innominate act”. The High Court has repeatedly affirmed that the “ascertainment or determination in a judicial manner of facts, whether controverted or not” takes its

<sup>136</sup> (1926) 38 C.L.R. 153, 178.

<sup>137</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 148 per Gaudron J.

<sup>138</sup> *Id.*

<sup>139</sup> (1954) 90 C.L.R. 353, 369.

<sup>140</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 148 per Gaudron J. See, eg, *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 9-12 per Jacobs J.

<sup>141</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 175-177 per Isaacs J.

<sup>142</sup> See, eg, *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]* (1925) 35 C.L.R. 422 (as to which see L. Zines, *The High Court and the Constitution* (4th ed) (1997) 177); *R. v. Davison* (1954) 90 C.L.R. 353, 365-366, 370-371 per Dixon C.J. and McTiernan J.; 384-385 per Kitto J.; *R. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277, 305 per Kitto J.



character from the “main purpose” to which it is attached.<sup>143</sup> In other words, “[t]he nature of the final act determines the nature of the previous inquiry”.<sup>144</sup> It follows that fact finding may be an element in the exercise of legislative, executive and judicial power.<sup>145</sup> Similarly, although perhaps less obviously, the “formation of an opinion as to the legal rights and obligations of parties” may also be an element in the exercise of legislative, executive or judicial power.<sup>146</sup> As five members of the Court observed in an industrial context in *Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty Ltd*:<sup>147</sup>

“a tribunal may find it necessary to form an opinion as to the existing legal rights of the parties as a step in arriving at the ultimate conclusions on which the tribunal bases the making of an award intended to regulate the future rights of the parties ... Of course, the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights”.<sup>148</sup>

In addition, the High Court has upheld arrangements under which non-judicial bodies have been empowered to interpret complex legislation as a prelude to making determinations altering future rights.<sup>149</sup> Indeed, this is the stuff of contemporary executive power.<sup>150</sup>

<sup>143</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 176 per Isaacs J.

<sup>144</sup> *Prentis v. Atlantic Coast Line Co.* 211 U.S. 210, 227 (1908) per Holmes J. (quoted with approval in *R. v. Davison* (1954) 90 C.L.R. 353, 370 per Dixon C.J. and McTiernan J.). For a contemporary illustration of this point, see *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 C.L.R. 656.

<sup>145</sup> *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167, 189 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also, eg, *R. v. Davison* (1954) 90 C.L.R. 353, 388 per Taylor J.

<sup>146</sup> *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167, 189 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

<sup>147</sup> (1987) 163 C.L.R. 140.

<sup>148</sup> *Ibid* 149 per Mason C.J., Brennan, Deane, Dawson and Toohey JJ. (in relation to the last sentence of this quote, cf *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361 discussed below pp.208-212 of this chapter). See also *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 C.L.R. 656, 666 per Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

<sup>149</sup> See, eg, *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361; *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167.

<sup>150</sup> *R. v. Hegarty; Ex parte City of Salisbury* (1981) 147 C.L.R. 617, 627 per Mason J.; 631 per Murphy J. (“[a]djudicative decisions involving application of known criteria to particular facts are a daily part of the work of numerous administrative officers and bodies”).

By contrast, the category of innominate functions “strictly so-called” refers to those composite functions which lack strong historical or normative associations with a particular branch of government and thus may be discharged in an executive, judicial (or possibly legislative) way. In *Federal Commissioner of Taxation v. Munro*, Isaacs J. described the determination of claims to register trade marks as an innominate function.<sup>151</sup> It seems that voluntary entry into bankruptcy may also be brought about, at Parliament’s discretion, in a judicial or non-judicial way.<sup>152</sup> The case of *R. v. Quinn; Ex parte Consolidated Food Corporation*,<sup>153</sup> however, provides the clearest example of this aspect of the innominate powers doctrine at work.

In *Quinn* it was argued that s.23 of the *Trade Marks Act 1955* (Cth) conferred judicial power on the Registrar of Trade Marks contrary to s.71 of the Constitution. Section 23 empowered “the High Court or the Registrar” on the application of “a person aggrieved” to order the removal of a trade mark from the Register on specified grounds. These included “that the trade mark was registered without an intention in good faith ... that it should be used” in circumstances where “there has, in fact, been no use in good faith ... by the registered proprietor or a registered user” (s.23(1)(a)). It was evident that proceedings before the Registrar under s.23(1)(a) exhibited many of the indicia of judicial power. In particular, they involved a contest between the applicant and the registered proprietor in relation to which the Registrar found facts and applied legal criteria. Moreover, the High Court seems to have accepted that once an order for removal was made, it was conclusive in the sense that the Registrar “carries [it] into

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<sup>151</sup> (1926) 38 C.L.R. 153, 178-179. This was effectively confirmed in *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd* (1959) 101 C.L.R. 652.

<sup>152</sup> See *R. v. Davison* (1954) 90 C.L.R. 353 discussed below pp.201-203 of this chapter. See also Gaudron J. in *Gould v. Brown* (1998) 151 A.L.R. 395 raising the possibility that the power to order the winding-up of a company or the sequestration of the estate of a bankrupt “need not be conferred on courts” (*ibid* 425) and *R. v. Humby; Ex parte Rooney* (1973) 129 C.L.R. 231, 244 per Stephen J. and 248 per Mason J. seemingly recognizing that the Commonwealth Parliament can provide for divorce by a judicial or non-judicial proceeding.

<sup>153</sup> (1977) 138 C.L.R. 1.

effect by alteration of the register”.<sup>154</sup> Nonetheless, all seven members of the High Court found that the Registrar had not been invested with judicial power.

Jacobs J. wrote the leading judgment. According to his Honour, Parliament’s intention in s.23 was “severable and distributive” in that “the Court was to exercise judicial power and the Registrar administrative power”.<sup>155</sup> The only question was whether a trade mark could be removed from the Register under s.23 in both ways. Jacobs J. acknowledged that the decision in *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd*<sup>156</sup> suggested that an order for removal of a trade mark could be made in the exercise of judicial power,<sup>157</sup> but concluded that it was nonetheless an innominate function which could equally be conferred on an administrative official.<sup>158</sup> This was because the “rights” affected by an exercise of power under s.23 did not fall into the category of “basic rights ... traditionally ... judged by that independent judiciary which is the bulwark of freedom”.<sup>159</sup> For example, the rights were not of the same order as the rights at issue in a criminal trial. And to underscore this point, Jacobs J. stressed that the statutory entitlements arising from registration of a trade mark were, at least to a certain extent, fragile or conditional.<sup>160</sup> As he said “[r]egistration is not itself conclusive of the right to the exclusive use of a trade mark”.<sup>161</sup> Moreover, “[t]he rights involved spring from the statute which governs their creation *and continuance*”,<sup>162</sup> a point also made by Barwick C.J. in his concurring judgment.<sup>163</sup>

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<sup>154</sup> *Ibid* 11 per Jacobs J.

<sup>155</sup> *Ibid* 9. Strictly speaking, however, his Honour only found it necessary to decide that Parliament intended the Registrar to exercise administrative power.

<sup>156</sup> (1959) 101 C.L.R. 652.

<sup>157</sup> In *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd* it was held by Dixon C.J. (with whom the other members of the Court agreed) that the determination of claims to register trade marks in opposition proceedings could validly be conferred on a Chapter III court (*ibid* 659). The decision strongly suggested, however, that the same function could validly be conferred on an administrative official.

<sup>158</sup> *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 10.

<sup>159</sup> *Ibid* 11.

<sup>160</sup> *Ibid* 12.

<sup>161</sup> *Id.*

<sup>162</sup> *Ibid* 10 (emphasis added).

<sup>163</sup> *Ibid* 5. Gibbs, Stephen, Mason and Murphy JJ. agreed with Jacobs J. Aickin J. took the view that the power conferred upon the Registrar by s.23 of the Act bore all the features of Griffith C.J.’s classical definition of judicial power in *Huddart, Parker*. His Honour

Was this the correct outcome? Jacobs J.'s judgment accords with Isaacs J.'s vision of the separation of federal judicial power expressed in *Munro* and his call for a balance between the judicial monopoly on certain categories of power and the "requirements of a progressive people".<sup>164</sup> The only question is whether the power to order removal of a trade mark from the Register was indeed an innominate function or a "basic right". The answer is not immediately apparent. The category of "basic rights" is not determined by history alone. Normative considerations are also relevant. Thus, in the context of our legal traditions the right must be of such a "quality" that it warrants exclusive protection by an independent judiciary. As Jacobs J. said in response to the argument that trade marks legislation in the United Kingdom and Australia had traditionally vested the power to order the removal of a trade mark from the Register in the courts:

"the course of legislation in comparatively recent times does not, in itself, provide a foundation for the historical approach. If the legislation requires the exercise of a power to determine questions the determination of which will affect what are traditionally regarded as basic legal rights, the judicial nature of the power springs from the effect which the exercise of the decision-making function under the legislation will have upon the legal rights rather than from the history of similar legislation reposing the function in a judicial tribunal."<sup>165</sup>

As already pointed out, basic rights include those involved in the trial of a criminal offence or an action for breach of contract or a wrong. This is due to the strong historical association of these functions with the courts and the rule of law concern that heightened procedural protections should surround the affection of interests of this magnitude. But to recognize this does not supply precise criteria by which to identify other "basic rights".

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felt constrained, however, by the decision in *Farbenfabriken* to agree with the conclusion of the other members of the Court.

<sup>164</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 178.

<sup>165</sup> *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 12. See also G.J. McC, "Recent Cases" (1978) 52 *A.L.J.* 510, 512 describing this quote as identifying "an important limitation ... to the use of the historical test".

The lack of such criteria means that the category of “basic rights” is open to criticism as ill-defined and impressionistic, allowing courts to “pick and choose” those functions over which they have exclusive authority. But yet in other areas of the law, courts regularly single out particular rights or interests for an enhanced level of procedural protection; for example, it is a well accepted principle of statutory interpretation that only a clear expression of legislative intent will suffice to derogate from a so-called “common law right”.<sup>166</sup> Moreover, as a matter of administrative law, the courts insist that both the application and the content of the rules of natural justice will vary with the magnitude of the right or interest at stake.<sup>167</sup> Seen in this light, the “basic rights” approach simply recognizes that the concept of judicial power has a normative and evolutionary dimension. In addition, it is submitted that to reject the approach of Jacobs J. in *Quinn* (and thereby to concede that the conclusive determination of controversies about every species of legal right is exclusively judicial in nature) would simply serve to shift the focus of inquiry in many judicial power cases to the question whether an existing legal right was necessarily involved as opposed to a finding of fact, law and/or discretion (that is, a factum) upon which legislation operates to change rights for the future.<sup>168</sup>

Like innominate powers, the notion of a factum seems to have entered Australian constitutional consciousness via the judgments of Isaacs J. Indeed, to a significant extent, Isaacs J. regarded innominate powers and facta as linked. In *Waterside Workers’ Federation of Australia v. J.W. Alexander Ltd*,<sup>169</sup> he and Rich J. argued that the function of industrial arbitration under s.51(xxxv) of the Constitution was non-judicial in nature, their Honours employing the device of the factum to underscore the quasi-legislative status of the power:

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<sup>166</sup> *Coco v. R.* (1994) 179 C.L.R. 427.

<sup>167</sup> *Kioa v. West* (1985) 159 C.L.R. 550.

<sup>168</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 188.

<sup>169</sup> (1918) 25 C.L.R. 434.

“The arbitral function is ancillary to the legislative function, and provides the *factum* upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law.”<sup>170</sup>

Translating this statement into the nomenclature of this chapter, it can be said that industrial arbitration involves a series of innominate acts (essentially the finding of facts and the making of discretionary judgments against the backdrop of certain legal standards), “[t]he nature of the final act” (the creation of new rights and obligations) governing “the nature of the previous inquiry”.<sup>171</sup> In his later judgment in *Federal Commissioner of Taxation v. Munro*, Isaacs J. shifted between the language of innominate powers and *facta* in such a way as to suggest that, subject to any contrary legislative intention, an innominate function proper like the registration of a trade mark was to be conceptualized as involving the determination of a *factum* and the creation of new rights when vested in an administrative body and a determination of existing rights when vested in a court.<sup>172</sup> This approach has been echoed in more recent writing on judicial power,<sup>173</sup> but its very fluidity suggests that the distinction between the creation of rights and the ascertainment of existing rights is often a matter of perception<sup>174</sup> – a point explored in more detail below<sup>175</sup> – and may mask a substantive judgment as to whether a function *should* be exercised by the courts or an administrative official. This is hardly a desirable or principled path along which to take our judicial power

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<sup>170</sup> *Ibid* 464. The distinction between arbitral and judicial functions has become so well accepted that it is often forgotten that in *Alexander’s Case* Griffith C.J. – the author of the “classical” *Huddart, Parker* definition of judicial power – found that industrial arbitration was a *judicial* function (see above p.33 fn.34 (ch.2)) and G. Sawyer, “Judicial Power Under the Constitution” in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961) 73-74; G. Sawyer, *Australian Federalism in the Courts* (1967) 161).

<sup>171</sup> *Prentis v. Atlantic Coast Line Co.* 211 U.S. 210, 227 (1908) per Holmes J. (quoted with approval in *R. v. Davison* (1954) 90 C.L.R. 353, 370 per Dixon C.J. and McTiernan J.).

<sup>172</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 176-177.

<sup>173</sup> See, eg, L. Zines, *The High Court and the Constitution* (4th ed) (1997) 186.

<sup>174</sup> G. Sawyer, “Judicial Power Under the Constitution” in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961) 74; P. Hanks, *Constitutional Law in Australia* (2nd ed) (1996) 480-481; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 175, 182-183, 191.

<sup>175</sup> See below pp.203-212 of this chapter.



jurisprudence. Wherever possible, the more transparent basic rights approach is to be preferred.

It follows that the judgment in *Quinn* should be supported so long as the notion of basic rights is broadly construed. The rights at issue on the facts of *Brandy* provide a clear example of novel legal entitlements which satisfy the basic rights test. The power to order removal of a trade mark from the Register is more equivocal, but it is submitted that in circumstances where it is unclear whether a function is truly innominate in character (and thus can validly be conferred on a non-judicial body), the High Court should take into account any mechanism for curial review or appeal to which the determination is subject. This is not to recast the element of conclusiveness in the conventional definition of judicial power, but simply to suggest that in situations of uncertainty, one should look to the object or purpose of the separation doctrine to show the way.

On the above basis, the existence of a full right of “appeal” to a court would usually be enough in “borderline” innominate power/basic rights cases to ensure that the rule of law rationale of the separation doctrine was maintained, even if the administrative order was binding on the parties prior to appeal.<sup>176</sup> As Professor Zines argues, what is important is “the opportunity for judicial determination. Whether that opportunity arises in collateral proceedings or in a prescribed ‘appeal’ to a court is irrelevant as far as the principle of the separation of powers is concerned.”<sup>177</sup> That principle would not necessarily be honoured, however, if access to a court was on limited grounds only. Nor should it be accepted that an exclusively judicial function can be conferred on a non-judicial body, subject to appeal de novo to a court.<sup>178</sup> The idea of an administrative trial of a criminal offence, subject to “appeal” to a court, only has to be stated to be

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<sup>176</sup> Cf S. Ratnapala, “*Harry Brandy’s Case* and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 236.

<sup>177</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 188.

<sup>178</sup> Cf the view of Professor Zines *ibid* 190. See also the discussion of the outcome in *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153 below pp.216-223 of this chapter which, it is submitted, turns largely on its own facts and circumstances.

rejected. Neither of these reservations, however, was present on the facts of *Quinn*. The legislation in that case provided for a general right of “appeal” from the decision of the Registrar to a court,<sup>179</sup> and although Jacobs J. did not rely upon the existence of this right in his reasons for decision, it is submitted that it removes any doubt as to whether the outcome in *Quinn* should be supported on its facts.

#### 4. A Flexible Conception of Judicial Power

An understanding of the “basic rights” heartland of judicial power and the notions of innominate powers and facta make it possible to navigate a series of key cases which, taken collectively, illustrate the High Court’s flexible or “functional”<sup>180</sup> approach to the meaning of judicial power and its reconciliation of constitutional structure with evolving patterns of governance. Each case illuminates one or more of the elements of the generalized or working definition of judicial power given earlier in this chapter, further demonstrating why that description can only be a starting point or base line for analysis of judicial power problems. The conclusion which follows maps certain broad principles which, it is submitted, may usefully assist determination of the content of judicial power in the future.

##### (a) Controversy

Accepting that judicial power *typically* involves the binding determination of controversies concerning existing legal rights, *R. v. Davison*<sup>181</sup> indicates that a dispute or controversy between parties is not a necessary requirement of *each and every* exercise of judicial power.

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<sup>179</sup> *Trade Marks Act 1955* (Cth), s.23(7): “An appeal lies to the Appeal Tribunal from an order or direction of the Registrar under this section.” By s.111(1) of the Act, the High Court was designated as the Appeal Tribunal. Section 23(7) was later amended to substitute “a prescribed court” for the High Court (*Trade Marks Amendment Act 1976* (Cth), s.10).

<sup>180</sup> *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563, 567 per Gleeson C.J., Gaudron, Gummow, Kirby and Hayne JJ.

<sup>181</sup> (1954) 90 C.L.R. 353.

*Davison* concerned the validity of provisions of the *Bankruptcy Act* 1924 (Cth) governing the making of sequestration orders upon debtors' petitions. The Act conferred this power on "the Court", defined as any court with jurisdiction in bankruptcy or a judge of such a court, including a registrar when exercising the powers of the court. Under s.24(1)(a) of the Act registrars were authorized "[t]o hear debtor's petitions and to make sequestration orders thereon". A registrar in bankruptcy made a sequestration order upon Mr Davison's voluntary petition. When Mr Davison was subsequently charged with offences under the *Bankruptcy Act*, he challenged the validity of the registrar's order. Did s.24(1)(a) invest registrars with judicial power contrary to s.71 of the Constitution?

The Court concluded that s.24(1)(a) breached the separation of powers and was invalid.<sup>182</sup> Under the Act, bankruptcy registrars were not officers of court.<sup>183</sup> Thus, the reasoning which was later to prevail in *Harris v. Caladine* was not available. Instead, the majority in *Davison* analysed the function of making a sequestration order upon a debtor's petition and concluded that entry into bankruptcy, at least on a voluntary basis, could theoretically be brought about by a non-judicial procedure.<sup>184</sup> It did not follow, however, that the making of a voluntary sequestration order under the Act was non-judicial in nature when performed by a registrar. When performed by a Chapter III court in the usual way, the function was clearly judicial even though no *lis inter partes* was involved.<sup>185</sup> As Dixon C.J. and McTiernan J. pointed out, English courts had traditionally made a range of orders in the absence of a controversy, including orders in the administration of trusts and grants of probate.<sup>186</sup> Against this backdrop, it followed that the way in which the relevant provisions of the *Bankruptcy Act* were structured – conferring power to make voluntary sequestration orders on "the

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182 Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.; Webb J. dissenting.

183 As to why this was so, see *R. v. Davison* (1954) 90 C.L.R. 353, 362-364 per Dixon C.J. and McTiernan J.

184 *Ibid* 365-366 per Dixon C.J. and McTiernan J.; 376 per Fullagar J.; 384 per Kitto J.; 389 per Taylor J.

185 *Ibid* 377 per Fullagar J.; 380 per Kitto J.; 389-390 per Taylor J.

186 *Ibid* 386.

Court” defined so as to include registrars – indicated that Parliament’s intention was that registrars should issue *judicial orders*. In the words of the Chief Justice:

“When s.24(1) is construed with the definition of ‘the Court’ ... it becomes clear that the function of making an order of sequestration is treated as judicial and is confided to the registrar in the same character as it is confided to the court. In other words it is the intention of the legislature that the registrar should make an order operating as an order of the court.”<sup>187</sup>

Thus *Davison* illustrates some of the intricacies of the innominate powers doctrine: the provision at issue was invalid even though voluntary entry into bankruptcy was not an exclusively judicial function.<sup>188</sup> Its finding that judicial power can exist without a controversy, however, does no violence to the generalized definition of judicial power. To the contrary, just as history and policy explain that definition, history and policy explain this departure from it. *Davison* exemplifies judicial power as an historical and normative construct.

### (b) Existing Rights

The conventional formulations of judicial power emphasize the vindication of existing rights. Thus, in *Ha v. New South Wales*,<sup>189</sup> four members of the High Court stated that:

“The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power.”<sup>190</sup>

It followed in *Ha* that so-called “prospective overruling” was “inconsistent” with the judicial function under Chapter III of the Constitution “on the simple ground that the

<sup>187</sup> *Ibid* 371. See also *ibid* 378 per Fullagar J.; 384-385 per Kitto J.; 390 per Taylor J.

<sup>188</sup> In *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, Jacobs J. described “the determination of a status of a person whereby the right to recover money owing by that person is barred” as an example of a “basic right” citing *Davison* (*ibid* 11). However, as was pointed out at the time in a note on *Quinn*, Jacobs J. seems to have been mistaken in his understanding of *Davison* (see G.J. McC, “Recent Cases” (1978) 52 *A.L.J.* 510, 512).

<sup>189</sup> (1997) 189 C.L.R. 465.

<sup>190</sup> *Ibid* 504 per Brennan C.J., McHugh, Gummow and Kirby JJ. (fn. omitted).

new regime that would be ushered in when the overruling took effect would alter existing rights and obligations”.<sup>191</sup>

But whereas the adjudication of existing rights provides the classic example of the exercise of judicial power, the dichotomy erected by their Honours in *Ha* – like other attempts to draw clear distinctions between judicial and non-judicial power – is unsafe in several respects. The common law as a system of jurisprudence has only been able to survive and flourish over many centuries as a result of “judicial law-making”.<sup>192</sup>

Although the refusal of the High Court in *Ha* openly to embrace prospective overruling is consistent with the traditional declaratory theory of law,<sup>193</sup> it is now “widely recognized”, as Mason C.J. conceded in *Polyukhovich v. Commonwealth*, that courts exercising the judicial power of the Commonwealth “make and alter law in the sense of formulating new or altered legal principles”.<sup>194</sup> Admittedly, the articulation of a new legal principle “in accordance with the balance of existing reasons such as might be argued in a court” is a far cry from unrestrained rule formulation.<sup>195</sup> Nonetheless, the High Court’s conscious reshaping of the common law in light of contemporary community values in cases like *Mabo*<sup>196</sup> and *R. v. L.*<sup>197</sup> blurs the distinction between the enforcement of existing rights and the creation of new ones.

The existing rights/new rights distinction is further clouded by the fact that courts have long exercised a variety of jurisdictions to modify existing legal rights by reference to broad “judicial” standards such as justice, reasonableness and the demands of good conscience. This is exemplified by the role of the Court of Chancery over several centuries, which De Lolme described as:

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191 *Id.* Dawson, Toohey and Gaudron JJ. agreed that the High Court had no power to engage in prospective overruling (*ibid* 515).

192 M. McHugh, “The Law-making Function of the Judicial Process – Part I” (1988) 62 *A.L.J.* 15, 15.

193 *Ibid* 24-25.

194 (1991) 172 C.L.R. 501, 532-533.

195 M.J. Detmold, *The Australian Commonwealth* (1985) 234.

196 *Mabo v. Queensland [No.2]* (1992) 175 C.L.R. 1.

197 *R. v. L. (Rape in Marriage Case)* (1991) 174 C.L.R. 379.

“a kind of inferior experimental legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the courts of common law, nor the legislature, have as yet found it convenient or practicable to establish any”.<sup>198</sup>

An extensive body of case law now governs the exercise of equitable jurisdiction, but the same consideration which led to the emergence of the Court of Chancery – the desire for just outcomes in individual cases – has led in the twentieth century to the conferral upon courts of a range of broad discretionary powers exercisable by reference to criteria of justice and fairness in areas like family law and consumer protection.<sup>199</sup> A number of other more traditional functions, like the power of a court to make orders in the administration of trusts or in relation to wards of court, also fit uncomfortably into an existing rights framework and prompted Dixon C.J. to point out in *Davison* that courts have historically exercised a range of functions which involve “no adjudication of rights”.<sup>200</sup>

These strands in the historical and normative conception of judicial power are illustrated by the decision of the High Court in *Peacock v. Newtown Marrickville and General Co-operative Building Society No.4 Ltd.*<sup>201</sup> *Peacock* concerned the validity of wartime regulations which empowered a court to make orders cancelling, suspending or varying the terms of a contract where satisfied, having taken into account various matters, that

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198 De Lolme, *The Constitution of England* (new ed) (1800) (quoted in *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 397 per Windeyer J.).

199 For two prominent examples, see s.79 *Family Law Act* 1975 (Cth); *Contracts Review Act* 1980 (N.S.W.).

200 *R. v. Davison* (1954) 90 C.L.R. 353, 368 per Dixon C.J. and McTiernan J. For an example of certain broad discretionary powers traditionally exercised by courts in granting relief in substantive proceedings and consequently adjusting the rights of parties, see *Cominos v. Cominos* (1972) 127 C.L.R. 588. For some more contemporary examples, see *Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 127 C.L.R. 617 and *R. v. Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 C.L.R. 194. See also *R. v. Commonwealth Industrial Court; Ex parte the Amalgamated Engineering Union, Australian Section* (1960) 103 C.L.R. 368 holding that it was an exercise of judicial power for the Commonwealth Industrial Court to make an order that the rules of an organization were, having regard to the objects and purposes of the *Conciliation and Arbitration Act* 1904 (Cth), “oppressive, unreasonable or unjust”.  
201 (1943) 67 C.L.R. 25.

the war had made performance “impossible” or “inequitable or unduly onerous” for the applicant. It was found that these provisions endeavoured to confer federal judicial power upon State courts. In so deciding, Latham C.J. (with whom McTiernan J. agreed) expressly recognized that the regulations involved courts in the alteration of existing rights, but denied that this demonstrated the non-judicial character of the powers concerned.<sup>202</sup> His Honour pointed out that courts made orders altering existing rights in the resolution of matrimonial causes<sup>203</sup> and also suggested that the task of a court under the regulations was not dissimilar to that of a court in declining, for discretionary reasons, to grant specific performance of a contract.<sup>204</sup> Moreover, the judiciary in the United Kingdom and the states had power to vary contracts under Money Lenders, Rent Restriction and Moratorium legislation.<sup>205</sup>

The other members of the Court in *Peacock* agreed that the regulations conferred judicial power.<sup>206</sup> However, both Starke J. and Williams J. (the only other judges to consider the matter in any depth) seemed to regard the role of the courts under the regulations as involving the enforcement of existing rights,<sup>207</sup> a conclusion presumably based on the view that the legislation laid down “pre-existing standards”<sup>208</sup> against which the terms of a contract could be assessed. But it is submitted that in situations such as these, the existing rights/new rights distinction is of limited utility as an indicium of judicial power. In the words of Professor Sawyer: “[w]henver a tribunal is given power to modify an existing legal relationship, it can be argued that the relevant legislation refers, if only by implication, to some established body of principles in

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202 *Ibid* 35.

203 As to which see *Cominos v. Cominos* (1972) 127 C.L.R. 588.

204 *Peacock v. Newtown Marrickville and General Co-operative Building Society No.4 Ltd* (1943) 67 C.L.R. 25, 35.

205 *Id.*

206 *Ibid* 42 per Rich J. (*sub silentio*, his Honour finding that the regulations attempted to invest State courts with federal jurisdiction); 45-46 per Starke J. and 53-56 per Williams J.

207 *Ibid* 46 per Starke J. and 54-55 per Williams J.

208 M.J. Detmold, *The Australian Commonwealth* (1985) 234. And see *Peacock v. Newtown Marrickville and General Co-operative Building Society No.4 Ltd* (1943) 67 C.L.R. 25, 54-55 per Williams J.; G. Sawyer, “Judicial Power Under the Constitution” in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961) 74.

accordance with which the modification should be carried out”.<sup>209</sup> Where the modification criteria have a high policy content, this claim may overstate matters somewhat.<sup>210</sup> Nonetheless, Sawyer’s statement serves to highlight that there comes a point at which the categories of existing rights and new rights merge. In other words, in cases such as *Peacock* the existing rights/new rights distinction does not in itself provide a secure foundation upon which to reason and may simply serve to restate the basic judicial/non-judicial dilemma.

It follows that the better approach in marginal existing rights/creation of rights cases is to avoid artificially forcing the function into one or other category. Instead, the Court should accept, as Latham C.J. and a number of other judges have done, that judicial power may, in certain circumstances, involve the creation or alteration of legal rights.<sup>211</sup> As in Latham C.J.’s judgment in *Peacock*, reference to the traditional functions of the courts, and widely accepted evolutionary developments therefrom will provide the basic touchstone of judicial character.

What has been said thus far in relation to “existing rights” bears largely on the rule in the *Boilermakers’ Case* and the rule that the Commonwealth can only invest State

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<sup>209</sup> *Id* (fn. omitted). See also Professor Sawyer’s discussion of the early disagreement among the Justices of the High Court over whether the function of industrial arbitration involved the creation of rights or the ascertainment of existing rights (*ibid* 74 fn.15 and G. Sawyer, *Australian Federalism in the Courts* (1967) 161) and L. Zines, *The High Court and the Constitution* (4th ed) (1997) 196-197. The point made by Professor Sawyer was arguably recognized by the High Court in *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167, 191 and *Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323, 360 per Gaudron J. (with whom Mason C.J., Brennan, Deane and Toohey JJ. agreed on this aspect of the case). Another case which illustrates the difficulty of the existing rights/alteration of rights distinction is *Steele v. Defence Forces Retirement Benefits Board* (1955) 92 C.L.R. 177.

<sup>210</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323, 360 per Gaudron J. (with whom Mason C.J., Brennan, Deane and Toohey JJ. agreed on this aspect of the case).

<sup>211</sup> See, eg, *Cominos v. Cominos* (1972) 127 C.L.R. 588, 600 per Gibbs J.; *R. v. Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 C.L.R. 194, 215-216 per Mason and Murphy JJ. (“[m]any examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights. Likewise, there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised – nevertheless they have been accepted as involving the exercise of judicial power”). See also *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 387 per Menzies J.



courts with judicial power. However, the primary separation rule dictates that federal administrative tribunals and officers cannot validly be invested with exclusively judicial functions. In *R. v. Davison*, Dixon C.J. and McTiernan J. suggested that many traditional judicial functions which do not involve the ascertainment of existing rights may in fact be innominate in character.<sup>212</sup> Moreover, the basal “existing rights” conception of judicial power points to a range of functions involving the creation, alteration and adjustment of rights and interests which can be validly discharged by federal bodies not enjoying judicial tenure.<sup>213</sup> The slippery distinction between existing rights and new rights, however, means that these bodies can on occasion appear to be exercising a function approximating judicial power. The decision in *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*<sup>214</sup> illustrates this point.

*Tasmanian Breweries* is another case concerned with the compatibility of contemporary institutions of social and economic regulation with the framework of the Constitution.<sup>215</sup> The *Trade Practices Act* 1965 (Cth) established the Trade Practices Tribunal composed of persons appointed for seven years.<sup>216</sup> Presidential members were required to possess legal qualifications, but other members were appointed on the basis of their expertise in industry, commerce or public administration. The Act defined the expressions “examinable agreement” and “examinable practice” as, broadly speaking, agreements or practices restrictive of trade (ss.35-39) and provided that the Commissioner of Trade Practices could initiate proceedings before the Tribunal where he was of opinion that there existed an examinable agreement or practice which was contrary to the public interest. The functions of the Tribunal were then described in s.49(1) of the Act:

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<sup>212</sup> (1954) 90 C.L.R. 353, 368-370.

<sup>213</sup> See, eg, *Precision Data Holdings Ltd v. Wills* (1991) 173 C.L.R. 167; *Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323.

<sup>214</sup> (1970) 123 C.L.R. 361.

<sup>215</sup> R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, 270.

<sup>216</sup> The summary of the facts is taken from the judgments of Menzies J. and Owen J.

“[Where the Tribunal] is satisfied that an examinable agreement exists or has existed, or an examinable practice has been, is being or is proposed to be, engaged in, [it] shall make a determination by which it -

- (a) records its findings as to those matters ... ; and
- (b) determines, in accordance with its opinion, whether the relevant restrictions to which the proceedings relate are contrary to the public interest or, as the case may require, whether the examinable practice is contrary to the public interest.”

Section 50 set out a series of matters to be taken into account by the Tribunal in assessing the public interest. These included “the principle that the preservation and encouragement of competition are desirable in the public interest”; “the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors and investors”; “the needs and interests of small businesses”; “the promotion of new enterprises” and so forth.

The effect of a determination under s.49(1) of contrariety to the public interest was to render an agreement, to the extent that it dealt with the restriction or practice at issue, unenforceable for the future (s.51). The Tribunal was also empowered to make orders having the force of law restraining persons from giving further effect to the agreement or practice (s.52). Breach of such an order was punishable by the Commonwealth Industrial Court, but it was expressly declared that “the validity of a determination or order of the Tribunal” was not to be “challenged, reviewed or called in question in any proceedings” (s.102). This was subject, however, to the jurisdiction of the High Court to issue a prerogative writ or an injunction.

A majority of the High Court rejected the argument that the Tribunal had been invested with judicial power. It was agreed that the Tribunal’s power to determine whether an examinable agreement or practice was contrary to the public interest was non-judicial in nature.<sup>217</sup> This was because ss.49 and 50 of the Act did not refer the Tribunal to an ascertainable judicial standard, but instead called for “a balancing of various

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<sup>217</sup> (1970) 123 C.L.R. 361, 371 per McTiernan J.; 376-377 per Kitto J.; 400 per Windeyer J.; 408-409 per Owen J.; 410-411 per Walsh J. This seems also to have been the view of Menzies J. (*ibid* 387-388).

considerations of economic and commercial policy”,<sup>218</sup> a process which Windeyer J. described as “more appropriate to law-making than to adjudication according to existing law.”<sup>219</sup> Kitto J. was more blunt: the Tribunal was required to consider a description of no “fixity” and was ultimately referred “to its own idiosyncratic conceptions and modes of thought”.<sup>220</sup> In short, Parliament intended the Tribunal to operate in the realm of policy, rather than the adjudication of existing rights – a conclusion which some judges noted was reflected in the qualifications for Tribunal membership.<sup>221</sup>

It followed that an order made by the Tribunal in pursuance of a determination that an agreement or practice was contrary to the public interest was prospective only.<sup>222</sup> As a quasi-legislative ruling, it did not involve the Tribunal in enforcing its own findings.<sup>223</sup> The power of enforcement was instead expressly vested in the Commonwealth Industrial Court.<sup>224</sup>

The more problematic feature of this case, however, was the power of the Tribunal to determine conclusively the questions of fact and law governing its jurisdiction (its satisfaction, under s.49(1)(a), that “an examinable agreement exists or has existed, or an examinable practice has been, is being or is proposed to be, engaged in”). Walsh J. noted that although this function was “susceptible of judicial performance”, it was not exercised by the Tribunal “for the purpose for which ordinarily a court makes its decisions on the facts and on the law”<sup>225</sup> – no rights were directly affected by such a determination,<sup>226</sup> which was merely a prelude to a second determination which was non-judicial in character. On several occasions his Honour emphasized that the

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218 *Ibid* 411 per Walsh J.

219 *Ibid* 400.

220 *Ibid* 376.

221 *Ibid* 377 per Kitto J.; 409 per Owen J.; 410-411 per Walsh J.

222 *Ibid* 378 per Kitto J.; 408 per Owen J.; 412, 416 per Walsh J. See also Windeyer J.’s description of the Tribunal’s power to make determinations and orders as “an exercise of a legislative or administrative function of government” (*ibid* 400).

223 *Ibid* 408 per Owen J.; 416 per Walsh J.

224 *Ibid* 412, 416 per Walsh J.

225 *Ibid* 411 per Walsh J.

226 *Ibid* 410 per Walsh J.

legislative scheme before him was simply concerned with the adjustment of rights for the future.<sup>227</sup> Nonetheless, Walsh J. indicated that the fact that the Tribunal's threshold decision was not entirely immune from judicial challenge, but was subject to the jurisdiction of the High Court to issue a prerogative writ or an injunction, was a factor in his reasons in favour of validity.<sup>228</sup> Kitto J. and Windeyer J., whose approach was broadly similar to that of Walsh J.,<sup>229</sup> also referred to this feature of the case.<sup>230</sup> Owen J., however, seems not to have attached any particular significance to the prerogative writs.<sup>231</sup> By contrast, Menzies J. dissented on the basis that a determination by the Tribunal as to the existence of an examinable agreement or practice carried "legal consequences" and could not simply take colour from the determination it preceded.<sup>232</sup>

It is tempting to conclude from *Tasmanian Breweries* that an administrative tribunal or official can validly make a conclusive determination of fact and law as a prelude to the alteration of future rights. But experience counsels against such an absolutist approach to the identification of judicial (or non-judicial) power. Moreover, the general tenor of the judgments in *Tasmanian Breweries* was to find in favour of validity in light of all the circumstances of the case.<sup>233</sup> At one stage Kitto J. observed of the problem before him that there were "no traditional concepts to be applied".<sup>234</sup> Likewise Menzies J. observed that "[i]n this case history provides no assistance".<sup>235</sup> In both instances this must have been a reference to the broad considerations of policy to be taken into account by the Tribunal in arriving at its determination in relation to the public interest because once such a determination was made it had a direct and immediate impact upon

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227 *Ibid* 412, 414, 416 per Walsh J.

228 *Ibid* 415 per Walsh J.

229 *Ibid* 375-376 per Kitto J.; 399 per Windeyer J. (his Honour, however, was more absolute, claiming that "[i]n my opinion, deciding whether or not a fact exists on which jurisdiction depends is not an exercise of the judicial power unless the jurisdiction dependent upon the decision is itself part of the judicial power ...").

230 *Ibid* 376 per Kitto J.; 399 per Windeyer J. Cf the view of Menzies J. (*ibid* 382-383).

231 *Ibid* 408-409.

232 *Ibid* 388.

233 See, eg, *ibid* 403 per Windeyer J.; 409 per Owen J.; 411, 414 per Walsh J. This was also the general approach of Kitto J.

234 *Ibid* 373.

235 *Ibid* 387.

contractual rights – rights at the heartland of judicial power.<sup>236</sup> Had the scheme of the Act been to empower the Tribunal to make a conclusive determination concerning the existence of an examinable agreement as a prelude to a bare order declaring such agreement unenforceable for the future, this may well have crossed the boundary into judicial power as amounting in substance to administrative adjudication of breach of a statutory prohibition.<sup>237</sup>

### (c) The *B.I.O. Cases* and Binding Determinations

#### (i) The *B.I.O. Cases*

It is generally acknowledged that the most difficult judicial power decisions are the famous (or possibly infamous) *British Imperial Oil Cases: British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1] (B.I.O. [No.1])*,<sup>238</sup> *Federal Commissioner of Taxation v. Munro (Munro)*,<sup>239</sup> *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.2] (B.I.O. [No.2])*<sup>240</sup> and *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation (Shell)*.<sup>241</sup> These cases were part of the same general course of litigation and, despite their age, continue to confound and perplex. When understood in functional or purposive terms, however, they lose much of their mystery.

<sup>236</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 175 per Isaacs J.; *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 258 per Mason C.J., Brennan and Toohey JJ.; 269 per Deane, Dawson, Gaudron and McHugh JJ.; *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563, 567 per Gleeson C.J., Gaudron, Gummow, Kirby and Hayne JJ.

<sup>237</sup> Professor Zines and Geoffrey Lindell have pointed out that where a preliminary finding of fact or law provides the platform for the creation of new rights, an administrative order may sometimes carry consequences which are indistinguishable from the imposition of a criminal or civil penalty. Chapter III may thus be breached despite the outward form of the legislation. See in this regard the discussion of *Victorian Chamber of Manufacturers v. Commonwealth (Industrial Lighting Case)* (1943) 67 C.L.R. 413 in L. Zines and G.J. Lindell, *Sawyer's Australian Constitutional Cases* (4th ed) (1982) 649. See also L. Zines, *The High Court and the Constitution* (4th ed) (1997) 182-183; *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245, 269 per Deane, Dawson, Gaudron and McHugh JJ.

<sup>238</sup> (1925) 35 C.L.R. 422.

<sup>239</sup> (1926) 38 C.L.R. 153.

<sup>240</sup> (1926) 38 C.L.R. 153.

<sup>241</sup> (1930) 44 C.L.R. 530 (P.C.).

All four decisions concerned the twentieth century phenomenon of mass income taxation:<sup>242</sup> specifically, the validity of the system erected by the Commonwealth for hearing objections to income tax assessments. *B.I.O. [No.1]* concerned provisions of the *Income Tax Assessment Act 1922* (Cth) establishing taxation Boards of Appeal. The Act empowered the Commissioner of Taxation to “cause assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied” (s.35). If a taxpayer wished to contest the Commissioner’s assessment, he or she could lodge a formal objection with the Commissioner (s.50(1)). If unhappy with the Commissioner’s decision on the objection, s.50(4) presented the taxpayer with a choice of appeal forum, including a Board of Appeal:

“A taxpayer who is dissatisfied with the decision of the Commissioner may ... request the Commissioner to treat his objection as an appeal and to forward it, as required by the taxpayer, either to the High Court or the Supreme Court of a State (where the objection raises questions of law only), or to the High Court or a Supreme Court or a Board of Appeal (where the objection raises questions of fact).”

Although each Board consisted of three members appointed by the Governor-General for seven years (ss.41(2) and (4)), the general scheme of the Act was to “equate”<sup>243</sup> the functions of Boards of Appeal and the nominated “appeal” courts. For example, it was provided that on an “appeal” under s.50(4), “the Court or Board of Appeal may make such order as it thinks fit, and may either reduce or increase the assessment” (s.51(1)). In addition, an order of a Board on questions of fact was “final and conclusive on all parties” (s.51(2)).<sup>244</sup> Section 51(8) completed the appeal structure, providing for an

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242 Although South Australia levied income taxation as early as 1884, it was not until the first decade of federation that income tax legislation was in force in all the Australian States. The Commonwealth did not impose its own income tax until 1915. See R.H. Woellner, T.J. Vella, L. Burns and S. Barkoczy, *Australian Taxation Law* (7th ed) (1997) 12-13.

243 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 176; G. Sawyer, *Australian Federalism in the Courts* (1967) 162.

244 However, under s.53(1) a Board of Appeal was not bound by the rules of evidence, but was to be “guided by good conscience and the facts of the case” in reaching a decision. This sub-section was repealed in the 1925 amendments to the scheme.

appeal to the High Court “in its appellate jurisdiction” from any order made under s.51(1) “except a decision by the Board on a question of fact”.

In *B.I.O. [No. 1]*, the High Court unanimously found that these arrangements infringed the primary separation rule – federal judicial power had been invalidly conferred on Boards of Appeal. The system for dealing with objections to income tax assessments was promptly reframed. Under the Act as amended by the *Income Tax Assessment Act* 1925 (Cth), “Boards of Appeal” became “Boards of Review” (s.41 as amended) and a dissatisfied taxpayer was given a different choice of appeal forum: the taxpayer could ask the Commissioner “to refer the decision to a Board of Review for review” or alternatively to treat their objection “as an appeal” and send it either to the High Court or a Supreme Court (s.50(4) as amended). This “separate streaming” of the functions of the Boards and the courts was reinforced by a series of other changes to the scheme. Critically, the functions of the Boards were henceforth to correspond with those of the Commissioner. Thus, a new s.44(1) provided:

“A Board of Review shall have power to review such decisions of the Commissioner ... as are referred to it by the Commissioner under this Act and, for the purpose of reviewing such decisions, shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act, and such assessments, determinations and decisions of the Board, and the decisions of the Board upon review, shall ... be deemed to be assessments, determinations or decisions of the Commissioner.”

Section 51 was repealed in its entirety and replaced by a new set of provisions. The new s.51(4) provided that “[t]he Board, on review, shall give a decision and may either confirm the assessment or reduce, increase or vary the assessment”. Under s.51A, separate provision was made for the powers and procedures of a court upon an appeal taken directly from the Commissioner, such an appeal not being limited to questions of law. Orders of a Board on questions of fact were no longer expressly made final and conclusive on all parties, but s.51(6) provided that “[t]he Commissioner or a taxpayer may appeal to the High Court from any decision of the Board under this section which, in the opinion of the High Court, involves a question of law”. The reference to the

exercise of “appellate jurisdiction” in appeals from the Board to the High Court was deleted, but in the case of an appeal taken directly from the Commissioner to a court, provision was made for a further appeal to the High Court “in its appellate jurisdiction” (s.51A(10)).

By majority, the High Court in *Federal Commissioner of Taxation v. Munro* and its companion case, *B.I.O. [No.2]*, concluded that these changes were sufficient to transform the functions of the Boards from judicial to non-judicial in nature,<sup>245</sup> a finding affirmed on appeal from *B.I.O. [No.2]* by the Privy Council in *Shell*. It is the basis of this transformation which excites all difficulty in relation to the *B.I.O. Cases*, but before exploring *Munro* it is necessary to return to the decision in *B.I.O. [No.1]*.

**(ii) *B.I.O. [No.1]***

The decision in *B.I.O. [No.1]* that Boards of Appeal were invalidly invested with judicial power is relatively easy to understand. As Isaacs J. (author of the leading judgment in *B.I.O. [No.1]*) summed up that earlier decision in *Munro*:

“In the former legislation the Board of Appeal was linked up in character with the High Court and the Supreme Court of the State, and an appeal on law points was given to this Court in its appellate jurisdiction.”<sup>246</sup>

In other words, the legislative linking of the “appeal” functions of the Boards and the courts (notably, a taxpayer’s option under the old s.50(4) to appeal either to the High Court, a Supreme Court or a Board of Appeal where their objection raised questions of fact) signalled, as a matter of statutory construction, a correspondence between the functions of those three bodies.<sup>247</sup> The scheme of the Act was thus to repose in the

<sup>245</sup> Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.; Knox C.J. dissenting.

<sup>246</sup> (1926) 38 C.L.R. 153, 175.

<sup>247</sup> There were a number of other indications to this effect. See, eg, s.51(1) which provided that “the Court or Board of Appeal may make such order as it thinks fit ...” and s.51(4) “[t]he costs of the appeal shall be in the discretion of the Court or the Board, as the case may be”.



courts and Boards of Appeal the power to declare existing rights in a controversy between parties:

“The power thus given is one of ascertaining and determining whether and how far the rights and duties independently enacted have been accurately declared by the Commissioner, and not for the purpose of superseding his discretionary judgment to create a constitutive element of liability.”<sup>248</sup>

The provision for an appeal to the High Court in its “appellate jurisdiction” from an order made by any one of these three bodies “except a decision by the Board on a question of fact” (s.51(8)) served, in Isaacs J.’s opinion, to “complete[] the chain of proof that Parliament has endeavoured to invest the Board with what is strict judicial power”.<sup>249</sup> His Honour’s emphasis was on the existence of *appellate jurisdiction* in the High Court, but he also pointed out that ss.51(2) and (8) rendered a Board’s decision on a question of fact “final and conclusive”.<sup>250</sup> Isaacs J. did not specify whether a decision of a Board on a question of law was immune from collateral attack. But it is hard to imagine that his conclusion on the facts admitted of collateral challenge in this regard.<sup>251</sup>

### (iii) *Federal Commissioner of Taxation v. Munro*

On what basis then did the 1925 amendments convert the functions of the Boards from judicial to non-judicial in nature? In his leading judgment in *Munro*, essentially adopted by the Privy Council in *Shell*, Isaacs J. described the difference between the Board of Appeal and the Board of Review as “the difference between daylight and dark”.<sup>252</sup> However, his exact reasons for concluding that the functions of the Board no longer infringed the separation of powers are difficult to discern. Isaacs J.’s arguments in

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<sup>248</sup> (1925) 35 C.L.R. 422, 436 per Isaacs J. See also *ibid* 432 per Knox C.J.; 439 per Isaacs J. and 445 per Starke J.

<sup>249</sup> *Ibid* 437.

<sup>250</sup> *Id.*

<sup>251</sup> The reasoning of Knox C.J. was similar to that of Isaacs J. Starke J. agreed that Boards of Appeal had been invalidly invested with judicial power, but his analysis was more scant. Powers J. and Rich J. arrived at the same conclusion, but did not offer any analysis of the issue.

<sup>252</sup> (1926) 38 C.L.R. 153, 175.

*Munro* were not set out in logical order and he did not explore, other than in a very abstract way, what the Board actually *did*. Cast in his often strongly rhetorical language, the judgment eludes ready analysis.

What is clear is that the conception of innominate powers, *facta* and the intention of the Commonwealth Parliament were central to his conclusion.<sup>253</sup> Armed with these intellectual tools, Isaacs J. seems to have taken the view that (1) the “unyoking” of the functions of the Board and the courts and (2) the “assimilation”<sup>254</sup> of the functions of the Board and the Commissioner (s.44(1)) signified Parliament’s intention:

“[to] entrust successive administrative functionaries to consider and review assessments, making the final decision the governing *factum* fixing the taxpayer’s liability”.<sup>255</sup>

In other words, under the Act as amended the functions of the Board of Review mirrored those of the Commissioner: both found facts, construed the relevant law and exercised discretionary powers “for the purpose of ascertaining the taxable income upon which income tax shall be levied” (s.35). No exercise of judicial power was involved because the *factum* (assessment) was merely the platform “for the operation of the legislative will”<sup>256</sup> creating the obligation to pay tax as assessed. No determination of existing rights was involved. The removal of reference to “appellate jurisdiction” in appeals from the Board to the High Court reinforced this reading of the Act.<sup>257</sup>

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253 *Ibid* 176 (“[t]he application of these considerations to the present case leaves me in no doubt whatever as to the character of the function assigned to the Board of Review”). See also *ibid* 179.

254 *Ibid* 181, 183.

255 *Ibid* 177.

256 *Ibid* 176.

257 *Ibid* 181-182. The correspondence between the functions of the Commissioner and the Board was also a major factor in the decisions of Higgins J. and Starke J. that the Board of Review was validly constituted (*ibid* 200-201 per Higgins J. and 212 per Starke J.). Both Higgins J. and Starke J. expressly accepted that the functions of the Commissioner under the legislation at issue were non-judicial (*ibid* 201 per Higgins J. and 212 per Starke J.). The remaining members of the majority in *Munro* – Rich J. and Gavan Duffy J. – did not offer any reasons for their decision.

Isaacs J. acknowledged that his decision meant that the Board had power finally to determine certain questions of fact (an appeal to the High Court was only possible where a question of law was raised: s.51(6)). In addition, he seemed to accept that this was a power of conclusive determination.<sup>258</sup> But his Honour insisted that:

“[t]he power and function of finally determining matters of fact and even of discretion are not solely indicative of judicial action. That is an attribute common to administrative bodies, to subordinate bodies that are adjuncts to legislation, and to judicial bodies ... The character of the function often takes its colour largely from the primary character of the functionary, and depends also on how the decision is made binding and how enforced. Government could not be carried on without some administrative power of finally determining disputed facts.”<sup>259</sup>

Of course, it was possible to appeal to the High Court from a decision of the Board which, in the opinion of the High Court, involved a question of law. Isaacs J. described this as a “right of applying to this Court to exercise its ordinary judicial power in original jurisdiction”.<sup>260</sup> However, the extent to which this path into the High Court, which would also bring up questions of fact,<sup>261</sup> was relevant to Isaacs J.’s conclusion in *Munro* is unclear. It is possible that he simply regarded the existence of *original jurisdiction* as indicative of Parliament’s intention that the Board’s functions were non-judicial.<sup>262</sup> Alternatively, this original jurisdiction had a deeper significance<sup>263</sup> (explored below). Curiously, Isaacs J. made no mention in his judgment of ss.38 and 39 of the *Assessment Act* stating that “[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with” (s.38) and

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<sup>258</sup> *Ibid* 183 (“the Crown is bound by all opinions of the Board on pure matters of fact”). See also *ibid* 176 (“unless some misconstruction of the law takes place, the Board’s decision stands as the assessment”).

<sup>259</sup> *Ibid* 177.

<sup>260</sup> *Ibid* 181.

<sup>261</sup> *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.2]* (1926) 38 C.L.R. 153, 196 per Isaacs J.; *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 201 per Higgins J. In relation to the current taxation appeals system, cf s.44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) which provides that a party before the tribunal (the successor in function to the Board of Review) may only appeal to the Federal Court on a question of law.

<sup>262</sup> See above p.217 of this chapter.

<sup>263</sup> Note the special emphasis which Isaacs J. gave to this original jurisdiction (*Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 182-183).

that production of a notice of assessment in collateral proceedings shall be “conclusive evidence of the due making of the assessment” (s.39(1)(a)) and “that the amount and all the particulars of the assessment are correct” (s.39(1)(b)) – provisions which clearly rendered the Board’s determinations conclusive.<sup>264</sup>

What has always made this judgment so difficult to understand is that, as a practical matter, both the Board of Appeal and the Board of Review did the same thing: both found facts and applied the relevant law in order to determine the taxable income upon which an individual taxpayer was obliged to pay tax.<sup>265</sup> Of course, the Board of Review, “standing in the shoes of the Commissioner”<sup>266</sup> under s.44(1), also re-exercised the Commissioner’s discretions under the *Assessment Act*. The Board of Appeal, however, seems to have engaged in this (potentially) non-judicial function as well.<sup>267</sup> Moreover, then (as now), most of the provisions of the *Assessment Act* were not dependent for their operation on the opinion of the Commissioner, but were objectively framed.<sup>268</sup> It follows that the discretionary powers of the Commissioner are not the key to unlocking the distinction between the two Boards.

Instead, guided by Parliament’s intention as expressed in the 1922 and 1925 versions of the *Assessment Act* respectively, Isaacs J. simply conceptualized the functions of the Boards differently in each case.<sup>269</sup> As the legislation stood in *B.I.O. [No.1]*, the functions of the Board were assimilated to those of the courts – thus, the Board was engaged in the conclusive determination of existing rights. As the legislation stood in *Munro*, however, the functions of the Board were assimilated to those of the

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<sup>264</sup> Cf *ibid* 201 per Higgins J. who was aware of the effect of s.39. And see L. Zines, *The High Court and the Constitution* (4th ed) (1997) 178 drawing attention to these provisions.

<sup>265</sup> *Ibid* 177.

<sup>266</sup> G. Sawer, *Australian Federalism in the Courts* (1967) 163.

<sup>267</sup> *British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.1]* (1925) 35 C.L.R. 422, 430-431 per Knox C.J.; 435 (but cf 436) per Isaacs J. and 442-443 per Powers J.

<sup>268</sup> S. Ratnapala, “*Harry Brandy’s Case* and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 243.

<sup>269</sup> This is the view of Professor Zines. See L. Zines, *The High Court and the Constitution* (4th ed) (1997) 177.

Commissioner – thus, the Board was engaged in finding facts, exercising statutory discretions and applying law for the purpose of arriving at a factum or assessment in conjunction with which the taxation legislation created an obligation to pay.

So was this just a judicial sleight of hand? A trick conjured from the devices of innominate powers and facta? Not entirely, for Isaacs J.'s analysis in *Munro* was shaped by two additional factors which render his judgment explicable in purposive terms: the demands of modern governance and Parliament's preservation of access to the courts.

In *Munro*, Isaacs J. argued that the Constitution should be interpreted, if at all possible, to facilitate practical systems of public administration. The judge who had done most to install a separation of federal judicial power as part of Australian law<sup>270</sup> urged the adoption of a balanced approach to the judicial monopoly on this species of public power. With characteristic passion, Isaacs J. claimed in a passage which has already been quoted in part:

“if a legislative provision of the present nature be forbidden, then a very vast and at present growing page of necessary constitutional means by which Parliament may in its discretion meet, and is at present accustomed to meet, the requirements of a progressive people, must, in my opinion, be considered as substantially obliterated so far as the Commonwealth is concerned. Administration must be hampered, and either injustice suffered or litigation fostered. The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamentals features of that institution.”<sup>271</sup>

In other words, under modern conditions, it was vital that a mechanism exist for administrative review of assessments to income tax – a process which would inevitably involve finding facts and applying law. As the Commissioner's assessments were

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<sup>270</sup> See above ch.2.

<sup>271</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 178. See also *ibid* 203 per Higgins J.

already conclusive in enforcement proceedings given the effect of ss.38 and 39 of the *Assessment Act*<sup>272</sup> (for otherwise a taxpayer could refuse to pay until, in an action brought by the Commissioner of Taxation, a court conclusively determined all issues of fact and law behind an assessment<sup>273</sup>) it was hardly surprising that the Board's determinations should also have this quality – whether by virtue of ss.38 and 39 or s.51(6) of the *Assessment Act*.

Isaacs J.'s factum analysis must be understood against this backdrop. That analysis, however, like many other invocations of the "factum" was to some extent formalistic. In substance, Isaacs J. seems to have reasoned that assessments to income tax did not involve "basic rights" of the same nature as those involved in, for example, the trial of a criminal offence. Thus, the making of assessments was not inevitably judicial in nature.<sup>274</sup> Nonetheless, on a rule of law spectrum, determination of liability to income taxation more closely approximates a core judicial function than, for example, "claims to register trade marks".<sup>275</sup> Thus, although on one view, Isaacs J.'s lengthy discussion of access to the original jurisdiction of the High Court from a Board of Review simply underscored Parliament's intention that the Board exercise non-judicial power, on another view that discussion was crucial to his finding of validity – for even if the functions of the Board bordered on, or indeed amounted to, the adjudication of "basic rights", the fact that a taxpayer had access to the courts from the Board on joint questions of fact and law assured a climate of legality and substantial preservation of the rule of law.

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<sup>272</sup> As pointed out by Professor Zines (L. Zines, *The High Court and the Constitution* (4th ed) (1997) 178).

<sup>273</sup> See *Deputy Commissioner of Taxation v. Richard Walter Pty Ltd* (1995) 183 C.L.R. 168, 196 per Brennan J. observing in the context of a discussion of the current taxation appeals system at federal level modelled on that upheld in the *B.I.O. Cases*: "[t]he service of a notice of assessment would fail in its purpose if the assessment were open to challenge for non-compliance with the general and often complex provisions of the Act governing the calculation of taxable income and the liability to pay tax".

<sup>274</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 176.

<sup>275</sup> *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 178-179 per Isaacs J.

Admittedly Isaacs J. did not spell out the above in so many words, but it is submitted that this is the best interpretation of a difficult decision.<sup>276</sup> The Privy Council in *Shell* suggested that the functions of Boards of Appeal and Boards of Review could also be distinguished on the basis that Boards of Review did not issue binding determinations, whereas s.51(2) of the 1922 Act had provided that orders of a Board of Appeal on questions of fact were final and conclusive on all parties.<sup>277</sup> This additional rationalization of the decision in *Munro*, however, is not entirely convincing. The Privy Council based its view on provisions of the *Assessment Act* allowing the Commissioner to vary his assessment or that of a Board of Review at any time prior to a judicial ruling on the matter.<sup>278</sup> But while the Commissioner doubtless had this capacity, it ignores the fact that a Board of Review's determinations remained binding in collateral enforcement proceedings – the conventional touchstone of conclusivity.<sup>279</sup>

Ultimately, the *B.I.O. Cases* will continue to confound and perplex for so long as judges and commentators attempt to assess the outcome in those cases against the template of abstract definitions of judicial power. The decision in favour of the Board of Review represents a complex adjustment of specific social interests within the framework of a purposive conception of the separation of powers.<sup>280</sup> Isaacs J. was rightly concerned to marry modern systems of taxation with the structural features of the Constitution. In his opinion, in the case of administrative review of assessments to income tax, the objects and purposes of the separation of federal judicial power were sufficiently preserved by

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<sup>276</sup> It is also consistent with a passage in *B.I.O. [No.2]* where Isaacs J. maintained that “[t]he Courts were always there and have always been intended to be there, and it might well be argued that the power of appeal to the Courts is an essential and inseparable condition of liability” (*British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation [No.2]* (1926) 38 C.L.R. 153, 195). See also E. Campbell, “The Choice Between Judicial and Administrative Tribunals and the Separation of Powers” (1981) 12 *F.L.Rev.* 24, 34, 36, 38. For a different perspective on the *B.I.O. Cases*, see S. Ratnapala, “*Harry Brandy's Case* and its Implications for Taxation Administration in Australia” (1995) 18 *U.Q.L.J.* 233, 234-236.

<sup>277</sup> *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530, 543.

<sup>278</sup> *Income Tax Assessment Act 1922* (Cth), s.37.

<sup>279</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 178. And see generally above fn.62 of this chapter.

<sup>280</sup> For hints of a similar perspective on the *B.I.O. Cases*, see G. Sawer, *Australian Federalism in the Courts* (1967) 162-163.

access to the High Court from the Board of Review where questions of law were involved. It should not be forgotten, however, that the 1925 legislation spread its net of legality more widely – a taxpayer who objected to their assessment had an *initial choice* of ventilating her or his grievance *in either a Court or the Board of Review* (s.50(4)). Although Isaacs J. did not specifically invoke this feature of the 1925 appeal structure in favour of its validity, some later judges have been interpreted as suggesting that the existence of a direct route from the Commissioner into the Courts was vital to the constitutionality of the scheme.<sup>281</sup> Bearing in mind the close resemblance between determinations of liability to income tax and core judicial functions, adherence to the rule of law strongly supports this view. The Commonwealth would be well advised not to delete this feature of the 1925 scheme from its current taxation appeals structure,<sup>282</sup> a position reinforced by the High Court's aversion on characterization grounds to so-called "incontestable" taxes.<sup>283</sup>

In summary, the *B.I.O. Cases* should be seen as a specific judicial response to a specific legal and social problem. So regarded, care is needed in assessing the guidance or precedential value they provide in other judicial power cases.

#### (vi) *The Rola Case*

It is traditional to consider the *B.I.O. Cases* in conjunction with the later decision of the High Court in *Rola Co. (Australia) Pty Ltd v. Commonwealth*.<sup>284</sup> In *Rola*, it was argued that reg 5C of the *Women's Employment Regulations* (made under the *Women's Employment Act 1942* (Cth)) invalidly conferred judicial power on Committees of Reference. The *Women's Employment Regulations* set up a Women's Employment

<sup>281</sup> *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 218 per Williams J. citing *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530, 544 (as to which see L. Zines, *The High Court and the Constitution* (4th ed) (1997) 177-178).

<sup>282</sup> *Taxation Administration Act 1953* (Cth), Part IVC (ss.14ZL-14ZZS).

<sup>283</sup> See, eg, *MacCormick v. Federal Commissioner of Taxation* (1984) 158 C.L.R. 622, 639-641 per Gibbs C.J., Wilson, Deane and Dawson JJ. discussing the relevant authorities and L. Zines, *The High Court and the Constitution* (4th ed) (1997) 189.

<sup>284</sup> (1944) 69 C.L.R. 185.



Board endowed with arbitral functions – namely, deciding whether women could be employed on certain categories of work and, if so, on what pay and conditions. At the same time, the regulations also provided for the summoning of temporary Committees of Reference empowered to determine questions relating to decisions of the Employment Board. Under reg 5C(2) these questions included “what females (if any) who are or were employed by an employer, are or were employed on work specified in the [Board’s] decision”. By reg 5C(5), a determination of a Committee of Reference was “binding” on the employer and employees concerned.

A majority of the Court upheld this arrangement. All five judges seemed to accept that the Committees of Reference determined questions of fact relevant to existing legal rights (that is, the rights of employers and employees under “awards” of the Women’s Employment Board).<sup>285</sup> The Court divided, however, on whether the Committees could validly discharge this function and on the significance in this regard of *Munro* and *Shell*. Starke J. seemed to treat *Munro* and *Shell* as concerned with existing rights, for he instanced Boards of Review for the proposition that the conclusive<sup>286</sup> determination of facts “in matters affecting public or private rights” was not necessarily “an exclusive attribute of judicial power”.<sup>287</sup> Against this backdrop, his Honour denied that Committees of Reference exercised the judicial power of the Commonwealth; they did not conclusively determine disputes as to existing legal rights, but merely “ascertain[ed] whether persons were or are employed upon work specified in a decision of the Board” this being “a matter of identification rather than of interpretation”.<sup>288</sup> Latham C.J. and McTiernan J. made up the majority. Latham C.J., however, wrote a disjointed and poorly reasoned judgment which seemed to suggest that the Committees did not

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<sup>285</sup> *Ibid* 198 per Latham C.J.; 207 per Rich J.; 212 per Starke J.; 216-217 per Williams J. (the approach of Williams J., however, is consistent with the view that it is not possible to isolate pure questions of fact from questions of law).

<sup>286</sup> Although Starke J. did not spell this out, when the relevant passage is read in context he seems to be referring to the conclusive determination of facts (*ibid* 211).

<sup>287</sup> *Id.*

<sup>288</sup> *Ibid* 212. For a penetrating critique of Starke J.’s distinction between “identification” and “interpretation”, see G. Sawyer, “Judicial Power Under the Constitution” in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961) 75.

exercise judicial power because they lacked a power of enforcement.<sup>289</sup> The Chief Justice apparently regarded *Munro* and *Shell* as supporting his decision in favour of the Committees, although he failed to explain why.<sup>290</sup> McTiernan J. agreed with Latham C.J.

Williams J. wrote a forceful dissent. In his Honour's opinion, to allow a Committee of Reference conclusively to determine questions of fact relevant to the enforcement of existing rights, was to vest judicial power in a non-judicial body.<sup>291</sup> Legal controversies concerning existing rights could raise questions of fact, questions of fact and law, or questions of law alone.<sup>292</sup> To "remit" binding determinations of fact in matters affecting existing rights to administrative tribunals would be to empty judicial power of substantial content. As Williams J. said of the Committees:

"If such tribunals can be appointed, then, since, in many cases, there is no dispute as to the law, and the whole controversy turns on questions of fact, all that would be left for a court to do would be to give a formal judgment, and, as an entirely ancillary and subordinate body, to enforce rights and obligations, the controversy as to which had, in every substantial sense, been predetermined by a tribunal that is not a court."<sup>293</sup>

*Munro* and *Shell* did not suggest a contrary conclusion. Like Starke J., Williams J. treated the Boards of Review as dealing with existing rights.<sup>294</sup> But Williams J. indicated that he regarded the preservation of access to the courts under the *Income Tax Assessment Act* as vital to the validity of that earlier scheme.<sup>295</sup> As Professor Zines has pointed out, in the context of the issues with which Williams J. was dealing, this must have been a reference to the preservation of an appeal directly from the Commissioner

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<sup>289</sup> *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 199-200. More recent authority indicates that the ability of a tribunal to enforce its own determinations is not a necessary requirement of judicial power. See above p.186 of this chapter.

<sup>290</sup> *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 200-201.

<sup>291</sup> *Ibid* 216-217.

<sup>292</sup> *Ibid* 217.

<sup>293</sup> *Id.*

<sup>294</sup> *Ibid* 218 (see L. Zines, *The High Court and the Constitution* (4th ed) (1997) 178, 184.)

<sup>295</sup> *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 218.

to the courts.<sup>296</sup> By contrast, the determinations of Committees of Reference were “not even subject to any appeal”.<sup>297</sup> Rich J. took a similar view to Williams J., although he did not mention *Munro* or *Shell*.

In light of the less than helpful judgment of Latham C.J. and the dissents of Rich J. and Williams J., it would be dangerous to read too much into the outcome in *Rola*.<sup>298</sup> Obviously that outcome supports the view that a non-judicial tribunal can make a binding determination of fact relevant to the ascertainment of existing rights. But in the absence of a fuller exposition of the competing arguments, *Rola* should not be regarded as settling matters.<sup>299</sup> Nor should the *B.I.O. Cases* be analysed and re-analysed in an attempt to isolate the precedent they set in this regard. Admittedly, the Boards of Review made conclusive determinations of fact. But as explained above, the validity of that particular scheme was the product of a complex adjustment of factors not readily reducible to a series of definitional statements about the content of judicial power. To the contrary, the *B.I.O. Cases* and the High Court’s general approach to the separation of federal judicial power caution against absolutism in the conception of judicial power.<sup>300</sup> Thus, while the judgment of Williams J. in *Rola* makes a powerful argument against treating the conclusive determination of facts bearing upon existing rights as an innominate function – a multitude of actions heard in the courts each day turn on disputed questions of fact alone – this should not preclude the possibility that in *certain circumstances* an administrative tribunal may validly assume this power. However, the

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296 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 178.

297 *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 216.

298 This is the view of a number of commentators. See, eg, G. Sawer, “Judicial Power Under the Constitution” in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961) 74-75; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 185, 190.

299 In *R. v. Davison*, Dixon C.J. and McTiernan J. maintained that “the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power” ((1954) 90 C.L.R. 353, 369) (emphasis added). In the same case, Taylor J. specifically cast doubt on the outcome in *Rola* (*ibid* 387-388). But of the view of Webb J. (*ibid* 373-375). See also, as expressing a view seemingly at odds with *Rola*, *Deputy Commissioner of Taxation v. Richard Walter Pty Ltd* (1995) 183 C.L.R. 168, 185 per Mason C.J.

300 E. Campbell, “The Choice Between Judicial and Administrative Tribunals and the Separation of Powers” (1981) 12 *F.L.Rev.* 24, 29.

preservation of access to the courts in a measure appropriate to the nature of the rights concerned would be vital.

## 5. Conclusion

In light of all that has been said in this chapter, what conclusions can be drawn about the meaning of judicial power? The inadequacy of formal, one-dimensional tests as a means of identifying the concept is apparent. Although rooted in history, judicial power is an evolving concept. Considered as part of a separation doctrine, it has always been a product of a societal decision about which functions should be exercised in accordance with the judicial process (that is, by courts). To accept the standard definitions of judicial power and the many exceptions annexed thereto without acknowledging the value judgments which inspired them and the underlying normative dimension of judicial power as a whole, would constitute legal reasoning at its worst – the replication of a legal definition or test “frozen in time”<sup>301</sup> for its own sake. Such a rigid approach, although suspect in any area of the law, is nowhere more ill-suited than in the interpretation of an “instrument of government meant to endure”.<sup>302</sup>

By contrast, a purposive approach to the separation of powers maintains that our s.71 jurisprudence should be explicitly shaped by the values which the separation doctrine is designed to protect. This, it is submitted, points to an important inquiry which is ostensibly missing from much of the judicial power case law considered above: *should the function at issue be exercised in accordance with the judicial process alone?* At first sight this might seem a radical question for the High Court to ask, but upon closer examination is simply to switch from a definition of judicial power like that supplied by Griffith C.J. in *Huddart, Parker* to the underlying rationale of that definition. Moreover, it allows that underlying rationale to speak to contemporary circumstances.

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<sup>301</sup> *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 185 C.L.R. 595, 666 per Kirby J.

<sup>302</sup> *Australian National Airways Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 29, 81 per Dixon J.

For example, the view that findings of criminal guilt represent the apex of those functions exclusively judicial in character – one of the few certainties in this area of discourse – ultimately represents a normative evaluation based upon a range of factors including history, the impact of a finding of criminal guilt upon individual rights and interests, established judicial expertise and the disparity in the resources and power of the prosecutor (usually the state) and the individual accused. The determination of liability to income taxation shares some of these features, but a system under which a Chapter III court alone could make a binding determination of liability to federal taxation would be unworkable, both from the perspective of scarce judicial resources and the need to assure a guaranteed revenue stream to government. In this situation, a principled accommodation of rule of law values and contemporary social and political realities was reached in *Munro*, where a disgruntled taxpayer could proceed directly from the Commissioner to the courts, or to a Board of Review whose conclusive determinations were subject to direct judicial oversight. In a setting such as this where the policy considerations which determine whether a function should be exercised in an exclusively judicial way are either equivocal or contradictory, *it must be legitimate to take into account whether the function under consideration is tempered by legislative measures for preservation of access to the courts*, either in the form of an appeal from an administrative decision-maker to a court, an initial choice of decisional forum, or both. Again, this is not to embark on some novel course, but simply to focus on the values which enliven the separation doctrine and thus to ask whether the supremacy of law over arbitrary power is truly threatened by the arrangements in question.

Similarly, in labelling a function as either innominate in character or non-judicial, it is submitted that coherency and consistency in this area would be fostered by an approach which places less emphasis on definitional analysis and instead seeks to identify those aspects of a function which make it inappropriate for judicial performance or alternatively capable of being exercised in either a judicial or non-judicial way. Considerations relevant to this assessment include historical analogues, the nature of the interests affected, the policy content of the decision and the “type” of policy

considerations involved, whether the function more closely approximates one involving the creation of rights or the adjudication of existing rights, the locus of relevant expertise in dealing with the issues concerned and the appropriate use of judicial resources.

It is not suggested that these inquires should replace the conventional approach to identifying judicial power discussed at length in this chapter. Clearly, they do not represent a self-contained alternative system for applying the separation doctrine. Instead they are tools or considerations which, it is submitted, could usefully supplement the established approach in this area. The meaning of judicial power will always elude “exclusive and exhaustive”<sup>303</sup> analysis. Judges and commentators should accept that this is so and consciously dig beneath the definitional facade to the historical and purposive considerations which shape this aspect of the separation of powers.

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<sup>303</sup> *R. v. Davison* (1954) 90 C.L.R. 353, 366 per Dixon C.J. and McTiernan J.

## CHAPTER 6 - THE SEPARATION OF FEDERAL JUDICIAL POWER AS A SOURCE OF IMPLIED FREEDOMS: CURIAL DUE PROCESS

“The determination in accordance with the judicial process of controversies as to legal rights and obligations and as to the legal consequences attaching to conduct is vital to the maintenance of an open, just and free society ... By reason of the interests which the judicial process protects, that process is properly to be seen as partaking of the same fundamental importance as the democratic process.”

*Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496-497 per Gaudron J.

As the rights revolution in Australian constitutional law takes its at times unpredictable course, the attention of judges and commentators has focussed largely on implications from representative government. This is only to be expected of a legal landmark of the dimensions of *Australian Capital Television Pty Ltd v. Commonwealth*.<sup>1</sup> But in considering the place of that decision in our broader constitutional framework, it should not be forgotten that in his prescient statement in *Street v. Queensland Bar Association*<sup>2</sup> to the effect that the Australian Constitution “contains a significant number of express or implied guarantees of rights and immunities”,<sup>3</sup> Deane J. referred only indirectly to representative government.<sup>4</sup> Instead, his Honour said that the “most important” constitutional guarantee “is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the ‘courts’ designated by Ch.III (s.71)”.<sup>5</sup>

Thus far, this thesis has focussed on the separation of federal judicial power as a constraint in the establishment and empowering of federal courts and tribunals. In recent years, however, members of the High Court have also treated the separation

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1 (1992) 177 C.L.R. 106.

2 (1989) 168 C.L.R. 461.

3 *Ibid* 521.

4 Merely referring to “the guarantee of direct suffrage and of equality of voting rights among those qualified to vote (ss.24 and 25)” (*ibid* 522). Admittedly, Deane J.’s list of guarantees was not meant to be exhaustive (*ibid* 521).

5 *Id.*

doctrine as a source of implications protective of individual rights.<sup>6</sup> This increasingly prominent role of the separation of powers is the subject of the final two chapters. Chapter Seven explores the “rights” implications which flow from the prohibition upon legislative and executive usurpation of the judicial function. The present chapter, by contrast, examines the constitutional constraints which attend the manner of exercise of judicial power by Chapter III courts – specifically, the unfolding requirement, highlighted in recent dicta of the High Court, of due process in the exercise of federal judicial power. This chapter begins with those dicta, explores the rationale of the due process requirement and goes on to consider in detail some of the more prominent due process applications identified by members of the High Court: the guarantee of natural justice and a fair trial in the exercise of federal judicial power and the (contested) guarantee of equal justice in the exercise of federal judicial power. As will be seen, the former guarantee has much to commend it and has a foothold in High Court thinking dating back many decades. A guarantee of substantive equality in the exercise of federal judicial power should not, however, be accepted.

### **1. A Constitutionally Entrenched Limitation Upon the Manner of Exercise of Federal Judicial Power: The Recognition and Rationale of the Curial Due Process Requirement**

In *Chu Kheng Lim v. Minister for Immigration*<sup>7</sup> Brennan, Deane and Dawson JJ. commenced a section of their judgment concerned with Chapter III of the Constitution by affirming that “[t]he Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers”.<sup>8</sup> But in a passage

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<sup>6</sup> See generally in relation to the High Court’s altered conception of the separation doctrine, C. Parker, “Protection of Judicial Process as an Implied Constitutional Principle” (1994) 16 *Adel.L.R.* 341; L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166; G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994); A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1 and R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267.

<sup>7</sup> (1992) 176 *C.L.R.* 1.

<sup>8</sup> *Ibid* 26.



which followed, their Honours ascribed to this doctrine something more than its traditional operation:

“Thus, it is well settled that the grants of legislative power contained in s.51 of the Constitution, which are expressly ‘subject to’ the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. *Nor do those grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.*”<sup>9</sup>

Nearly four years earlier in *Re Tracey; Ex parte Ryan*,<sup>10</sup> Deane J. had described the separation doctrine as “the Constitution’s only general guarantee of due process”<sup>11</sup> – a description which he repeated in *Re Tyler; Ex parte Foley*.<sup>12</sup> While neither of these remarks was specifically directed to the notion that judicial power must be exercised in a manner consistent with the essential character of a court, they clearly suggest the shorthand depiction of this idea as the requirement of *due process* in the exercise of federal judicial power – a label which has since been adopted by constitutional commentators<sup>13</sup> and in the High Court itself.<sup>14</sup>

*Lim* was not the first case in which voice was given to the due process requirement, but its significance lies in the fact that Brennan J. and Dawson J. joined with Deane J. in expressly recognizing this constitutional constraint. In the previous year in *Polyukhovich v. Commonwealth*<sup>15</sup> Deane J., Toohey J. and Gaudron J. had each

<sup>9</sup> *Ibid* 26-27 (fn. omitted and emphasis added).

<sup>10</sup> (1989) 166 C.L.R. 518.

<sup>11</sup> *Ibid* 580.

<sup>12</sup> (1994) 181 C.L.R. 18, 34 referring to Chapter III as enshrining “the Constitution’s fundamental and overriding guarantee of judicial independence and due process”.

<sup>13</sup> See G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 200; L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166, 167-168. Cf the terminology of “judicial process” in C. Parker, “Protection of Judicial Process as an Implied Constitutional Principle” (1994) 16 *Adel.L.R.* 341.

<sup>14</sup> *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 63, 68 per Dawson J.

<sup>15</sup> (1991) 172 C.L.R. 501.

acknowledged the due process principle. Toohey J. observed that “if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power ... a contravention of Ch.III may be involved”.<sup>16</sup> Gaudron J., a strong proponent of the curial due process implication, maintained in *Polyukhovich* that “[a]n essential feature of judicial power is that it be exercised in accordance with the judicial process”.<sup>17</sup> And Deane J. insisted, as in *Lim*, that the Commonwealth Parliament could not sanction the exercise of federal judicial power “in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power”.<sup>18</sup>

According to Deane J. in *Polyukhovich*, the requirement of due process was closely related to the main object or purpose of the separation doctrine which was to ensure the supremacy of law over arbitrary power.<sup>19</sup> The exclusive vesting of federal judicial power in Chapter III courts could hardly serve that purpose if it merely imported the formal requirement “that the repository of judicial power be called a court”.<sup>20</sup> Instead, “in insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch.III, the Constitution’s intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires”.<sup>21</sup> In this regard, Chapter III was based “on the assumption of traditional

<sup>16</sup> *Ibid* 689. See also *ibid* 685 and 692 per Toohey J.; *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 98 per Toohey J.; *Nicholas v. R.* (1998) 151 A.L.R. 312, 330 per Toohey J.

<sup>17</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 703. See also *Harris v. Caladine* (1991) 172 C.L.R. 84, 150 per Gaudron J.; *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496 per Gaudron J.; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 22 per Gaudron J.; *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 108 per Gaudron J.; *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 112 per Gaudron J.; *Nicholas v. R.* (1998) 151 A.L.R. 312, 335-336 per Gaudron J.; M. Gaudron, “Some Reflections on the Boilermakers Case” (1995) 37 *J.Ind.Rels* 306, 308.

<sup>18</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607.

<sup>19</sup> *Ibid* 606-607 referring, as had Isaacs J. in *Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330, 382-383, to Blackstone’s injunction that were the judicial power joined with the legislative, “the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law” (W. Blackstone, *Commentaries on the Laws of England*, vol.1 (1765) (facsimile ed., 1983, The Legal Classics Library) 259).

<sup>20</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607.

<sup>21</sup> *Id.*

judicial procedures, remedies and methodology”.<sup>22</sup> In *Leeth v. Commonwealth*,<sup>23</sup> decided after *Polyukhovich* but before *Lim*, Deane and Toohey JJ. in a joint judgment telescoped these arguments into the claim that the provisions of Chapter III were concerned with more than the bare allocation of federal judicial power:

“They also dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance. Thus, in Ch.III’s exclusive vesting of the judicial power of the Commonwealth in the ‘courts’ which it designates, there is implicit a requirement that those ‘courts’ exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially.”<sup>24</sup>

In other words, the exclusive vesting of federal judicial power in Chapter III courts carries with it the requirement that that power be exercised in accordance with the “traditional judicial process”,<sup>25</sup> for why else would s.71 have made a point of vesting the judicial power of the Commonwealth in such courts in the first place?<sup>26</sup>

<sup>22</sup> *Id.* See also *ibid* 614-615.

<sup>23</sup> (1992) 174 C.L.R. 455.

<sup>24</sup> *Ibid* 486-487. And see also *Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518, 580 per Deane J.: “[t]he guilt of the citizen of a criminal offence and the liability of the citizen under the law, either to a fellow citizen or to the State, can be conclusively determined only by a Ch.III court acting as such, that is to say, acting judicially”.

<sup>25</sup> *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1, 70 per Deane and Toohey JJ. affirming that “no part of the judicial power of the Commonwealth can be exercised either by a body which is not a Ch.III court or in a manner which is inconsistent with our traditional judicial process” (fn. omitted).

<sup>26</sup> It should be pointed out that Gaudron J., although sharing the supremacy of law rationale of the due process requirement (see *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496-497), has reasoned to its existence via a somewhat different route from Deane J. Gaudron J. maintains that a power not exercised in accordance with the judicial process would not be judicial power and thus could not validly be conferred by the Commonwealth Parliament on a Chapter III court (*Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 703-704; *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 502-503). At first sight, this approach seems to invoke the rule established in the *Boilermakers’ Case* rather than the exclusive vesting of federal judicial power in Chapter III courts. Nonetheless, her Honour has noted that even leaving aside the majority judgment in *Boilermakers’*, “it is not in doubt that s.71 imposes limits as to the powers which the Parliament may confer on a court” (*Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 703). It may be then, as Professor Winterton says, that Gaudron J.’s view “does not depend on *Boilermakers’*” (G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 202 fn.117), but instead draws from the basic allocation of federal judicial power to the courts designated in Chapter III. See also, as possibly sharing Gaudron J.’s views in this regard, Dawson J. in *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 63.

Reflecting on these general statements of principle, the first point to note is that the curial due process requirement has attracted wide support in the High Court.<sup>27</sup> But what exactly do the above-collected pronouncements mean? Statements that judicial power must be exercised in accordance with the “essential character of a court”, “the judicial process” or “the essential requirements of the curial process” each suggest, but are not necessarily confined to, observance of the rules of natural justice. And indeed Gaudron J. has explicitly acknowledged that “the judicial process” involves “the application of the rules of natural justice”.<sup>28</sup> Moreover, Deane and Toohey JJ. have said that one of the “essential requirements of the curial process” is “the obligation to act judicially”<sup>29</sup> and Mason C.J., Dawson and McHugh JJ. have observed that “[i]t may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power”.<sup>30</sup> However, beyond certain core applications – for example, the rule against bias and the basic right to be heard – the content of this constitutionally entrenched natural justice obligation is less than clear. Deane J. and Gaudron J. have indicated that they regard the due process requirement as embracing the emerging fair trial principle (a principle which incorporates natural justice, but seems broader than it), thus founding an implied constitutional guarantee of a fair trial of a federal offence.<sup>31</sup> But the further one moves from the natural justice heartland, the less

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- 27 See, apart from the references in this paragraph and above, *ibid* 63, 68 per Dawson J. affirming that Ch.III incorporates an implicit guarantee of procedural due process in the exercise of federal judicial power; *ibid* 167 per Gummow J. (seemingly recognizing that the judicial power of the Commonwealth must be exercised “in accordance with judicial process”); *Nicholas v. R.* (1998) 151 A.L.R. 312, 319 per Brennan C.J.; 355 per Gummow J. (“[t]he legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature” (fn. omitted, but citing *Lim*)).
- 28 *Harris v. Caladine* (1991) 172 C.L.R. 84, 150. And see also *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496 per Gaudron J.; *Nicholas v. R.* (1998) 151 A.L.R. 312, 335-336 per Gaudron J.
- 29 *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 487.
- 30 *Ibid* 470. See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 116 per McHugh J.
- 31 *Dietrich v. R.* (1992) 177 C.L.R. 292, 326 per Deane J. and 362 per Gaudron J.; *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496 per Gaudron J.; *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 703 per Gaudron J.; *Nicholas v. R.* (1998) 151 A.L.R. 312, 336 per Gaudron J.

consensus there is as to the elements of due process. Thus, Deane J. and Gaudron J., with some support from Toohey J., have stated that the application by a Chapter III court of a retroactive criminal law would be a denial of due process,<sup>32</sup> a proposition which Mason C.J., Dawson and McHugh JJ. have rejected.<sup>33</sup> Gaudron J. has also accepted that the “judicial process” encompasses a species of equality rights,<sup>34</sup> a claim which certain members of the High Court have denied.<sup>35</sup>

With the exception of the issues raised by retrospective federal criminal laws (discussed separately in Chapter Seven), these various applications of the due process requirement are considered below. Before embarking on that survey, however, the abstract conception of curial due process warrants further scrutiny. Clearly, curial due process is not the only constitutional implication protective of individual rights recognized by members of the High Court in recent years: the freedom of political communication<sup>36</sup> and the ill-fated general guarantee of legal equality<sup>37</sup> are other examples. This emerging, if sometimes unstable, jurisprudence of implied constitutional “rights” or freedoms is in turn part of a broader resurgence of judicial interest in, and enforcement of, individual rights, whether founded in constitutional, statutory or common law.<sup>38</sup> Against this backdrop, the due process requirement serves to protect individual liberty by insulating certain “judicial procedures, remedies and methodology”<sup>39</sup> (to adopt the words of Deane J. in *Polyukhovich*) from legislative interference, thereby directly

<sup>32</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 612-615 per Deane J. and 706-708 per Gaudron J. See also *ibid* 689 per Toohey J.

<sup>33</sup> Although they did not specifically consider this point in *Polyukhovich v. Commonwealth*, they each found that s.9 of the *War Crimes Act* 1945 (Cth) (as amended) which created a retroactive federal offence was a valid law of the Commonwealth and did not infringe Chapter III of the Constitution.

<sup>34</sup> *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 501-503; *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 107; *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 112; *Nicholas v. R.* (1998) 151 A.L.R. 312, 335.

<sup>35</sup> *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 469-471 per Mason C.J., Dawson and McHugh JJ.

<sup>36</sup> *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 C.L.R. 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1; *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520.

<sup>37</sup> *Leeth v. Commonwealth* (1992) 174 C.L.R. 455. But see now *Kruger v. Commonwealth* (1997) 190 C.L.R. 1.

<sup>38</sup> A. Mason, “The State of the Judicature” (1994) 20 *Mon.L.R.* 1, 10.

<sup>39</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607.

enhancing the autonomy of Chapter III courts vis-a-vis the elected arms of government. In this sense, recognition of the due process requirement complements an older institutional vision; just as the *Inter-State Commission Case* staked the judiciary's claim to a guaranteed minimum set of functions immune from either legislative or executive usurpation (these functions being exclusively "judicial" in nature),<sup>40</sup> so too the due process implication secures to the courts a guaranteed measure of control over their own procedures at the expense of Parliament.

The link between these mutually reinforcing institutional visions is supplied by the rule of law. As discussed in earlier chapters, the exclusive vesting of federal judicial power in Chapter III courts, although suggested by s.71 of the Constitution, draws decisive force from our inherited legal traditions and the need to promote the supremacy of law over arbitrary power (including therein the impartial administration of justice).<sup>41</sup> The curial due process implication enjoys a less secure textual foundation than this primary separation rule, but as is apparent from Deane J.'s explanation in *Polyukhovich*, seeks to give life to the same rule of law considerations. The nexus, in terms of adherence to the rule of law, between the ideal of courts as the repositories of judicial power in our society and the manner of exercise of that power, was recognized by Street C.J. speaking in the New South Wales context in *Building Construction Employees and Builders' Labourers Federation of New South Wales v. Minister for Industrial Relations*:<sup>42</sup>

"Fundamental to the rule of law and the administration of justice in our society is the convention that the judiciary is the arm of government charged with the responsibility of interpreting and applying the law as between litigants in individual cases. The built-in protections of natural justice, absence of bias, appellate control, and the other concomitants that are the ordinary daily province

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<sup>40</sup> See above ch.2.

<sup>41</sup> *Id.*; *R. v. Quinn*; *Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 11 per Jacobs J.; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 10-13 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 212.

<sup>42</sup> (1986) 7 N.S.W.L.R. 372.

of the courts, are fundamental safeguards of the democratic rights of individuals.”<sup>43</sup>

Thus, the due process requirement flows from a purposive approach to constitutional interpretation:<sup>44</sup> the Constitution allocates federal judicial power to Chapter III courts in order to promote the supremacy of law over arbitrary power but that purpose would be defeated were those courts to proceed in other than a fair and impartial manner. Hence the necessity of the curial due process implication which relieves against the possibility of s.71 being treated as a formalistic incantation rather than a constitutional command of substance.<sup>45</sup>

Seen in this light, the curial due process implication fits into contemporary patterns of constitutional interpretation which emphasize substance over form and purposive reasoning generally.<sup>46</sup> Moreover, the contemporary unfolding of curial due process draws unexpectedly strong support from the fact that the notion of constitutionally entrenched limitations upon the manner of exercise of federal judicial power is not new. It emerged in the High Court as early as 1938 in the context of judicial adherence to the impartiality limb of the natural justice obligation and has been effectively recognized by members of the High Court on a number of occasions since.<sup>47</sup> The section which

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43 *Ibid* 375-376. See also J. Rawls, *A Theory of Justice* (1972) 238-239 and J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195, 201.

44 See A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 2, 7. See also R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, 283; H. Roberts, “Retrospective Criminal Laws and the Separation of Federal Judicial Power” (1997) 8 *P.L.R.* 170.

45 Note in this regard the view of an American commentator who, despite acknowledging that adjudicative fairness in the United States is primarily a function of the due process clause, has observed of the United States Constitution that: “[h]istorically, the common law system presumed the impartiality of the courts. Thus article III’s investiture of ‘judicial power’ in the federal courts probably represents an implicit requirement of fairness in adjudication” (R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513, 1545 fn.145).

46 See L. Zines, *The High Court and the Constitution* (4th ed) (1997) 444-449. For a recent example of this generalized approach to constitutional interpretation, see *Ha v. New South Wales* (1997) 189 *C.L.R.* 465.

47 But see also as recognizing a constitutionally entrenched due process requirement, W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 323-324: “the power to adjudicate possessed by a Court imports the observance of principles of legal administration essential to the judicial office. The full extent of these principles cannot be easily determined; but whatever they are, they may not be interfered with by the Legislature ... any interference with the essentials of judicial administration is

follows not only underscores the legitimacy of the due process implication, but explores its operational heartland.

## 2. Curial Due Process and the Natural Justice Obligation

The 1938 decision alluded to above is *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein*<sup>48</sup> which was examined in some detail in Chapter Four.<sup>49</sup> It will be recalled from that earlier discussion that in *Lowenstein* a majority of the High Court upheld s.217 of the *Bankruptcy Act* 1924 (Cth) which empowered the Federal Court of Bankruptcy upon an application for an order of discharge to charge a bankrupt with an offence against the Act and to try her or him summarily. It will also be recalled that the case must be regarded as wrongly decided and the joint dissenting judgment of Dixon and Evatt JJ. preferred in terms of application of the doctrine of separation of powers. Moreover, it is in this dissenting judgment that the curial due process requirement can be discerned.

Counsel for the applicant bankrupt in *Lowenstein* – Garfield Barwick – had argued the case in terms of (inter alia) the separation doctrine, seemingly urging the Court both that non-judicial powers could not validly be conferred on a federal court and, in the alternative, that the impugned provision “constitutes an attempt to invest a court with a non-judicial function inconsistent with its judicial function”.<sup>50</sup> But these submissions placed Dixon and Evatt JJ. in an awkward position in the framing of a joint opinion for they had previously expressed opposing views on whether the Commonwealth Parliament could validly invest a federal court with non-judicial functions: Dixon J. had

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a deprivation of judicial power and an attempt to require the Court to act in a non-judicial way. A judicial act may be said to include *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings. It is an essential principle that no man shall be judge in his own cause, and that no person may be condemned without an opportunity of being heard” (fn. omitted). And see J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720.

48 (1938) 59 C.L.R. 556.

49 See below pp.118-122 (ch.4).

50 *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556, 559 (summary of argument).



already committed himself to the view that federal courts were confined to the exercise of federal judicial power<sup>51</sup> whereas Evatt J. had denied the existence of a general prohibition upon the admixture of judicial and non-judicial functions.<sup>52</sup> It is this disagreement over the scope of the separation doctrine, however, which explains the language in which Dixon and Evatt JJ. chose to express their disapprobation of s.217 of the *Bankruptcy Act*.

Having confirmed that federal judicial power in bankruptcy must conform to the requirements of Chapter III of the Constitution, Dixon and Evatt JJ. reasoned that Parliament's attempt to confer on the Bankruptcy Court the twin functions of prosecutor and judge was "outside the conception of judicial power".<sup>53</sup> The maxim *nemo potest esse simul actor et iudex* (no one can be at once suitor and judge) was not "a mere caution against human frailty".<sup>54</sup> Instead, it captured an essential feature of the English notion of the judicial function. Of this function Dixon and Evatt JJ. said:

"A long course of development produced a conception of the judicial process which placed the court in the position of a detached tribunal entertaining and determining civil and criminal pleas brought before it. It is true that in relation to contempt of court the courts of justice are armed with powers of summary punishment, at all events for contempts *in facie curiae* exercisable *ex mero motu*. But this has always been regarded as an exceptional power based on the necessity of keeping order and of preserving the court from actual interference in the discharge of its duties ... *The judicial power does not include the promotion, prosecution and proof of criminal charges by a court for its own determination.*"<sup>55</sup>

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51 *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73, 97-98. Dixon J.'s view was, of course, ultimately to prevail in the *Boilermakers' Case*.

52 In *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73 Evatt J. had denied that judicial power alone could be reposed in federal courts pointing to the example of the Commonwealth Court of Conciliation and Arbitration which exercised both judicial and arbitral functions (*ibid* 116-117).

53 *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556, 588.

54 *Id.*

55 *Ibid* 588-589 (emphasis added).

And this in turn led to their Honours' conclusion which successfully camouflaged their difference of opinion with respect to what ultimately would become known as the rule in the *Boilermakers' Case*:

“However it [s.217] may be described, whether as a combination of functions, as a course of procedure, or as a jurisdiction or authority, it terminates in an act which under the Constitution can be done only in the exercise of judicial power, namely, the conviction of an offender and the passing of judgment upon him; *yet the duty is to be performed in a manner at variance with the conception of judicial power.*”<sup>56</sup>

Thus contrary to the view of the majority, s.217 of the *Bankruptcy Act* was invalid as travelling beyond Chapter III of the Constitution.

Of course, this judgment of Dixon and Evatt JJ. in *Lowenstein* can be interpreted as a decision that the function of charging the bankrupt was inconsistent with the judicial function of trying her or him on that charge. So conceived, the decision represents an application of the incompatibility test discussed at length in Chapter Four. But in the passage quoted immediately above their Honours suggest as an alternative basis for their decision that Parliament was asking the Court of Bankruptcy to try an individual for a federal offence “in a manner at variance with the conception of judicial power”, the lack of due process arising from the circumstance that the tribunal of fact and law had itself launched the charge against the individual in question contrary to generally accepted principles of apprehended bias.<sup>57</sup>

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<sup>56</sup> *Ibid* 589 (emphasis added).

<sup>57</sup> One other member of the Court in *Lowenstein* – McTiernan J. – recognized a principle coming very close to, if not corresponding with, the due process principle. His Honour said that the case before him raised the question “whether the court would by exercising any of the powers expressed in [s.217] take any part in the proceedings other than that of a judge. If the answer to that question is yes, it would not be correct to say that the bankrupt was being tried by a court which sec.71 intended to exercise the judicial power of the Commonwealth, and it would follow that the provisions of sec.217 which brought about that result would be invalid”. However, McTiernan J. went on to deny that “sec.217 gives to ‘the court’ any power that is inconsistent with the due exercise of its judicial power” (*ibid* 590). In terms of the recognition of a due process principle, cf however *ibid* 567 per Latham C.J. See also *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185, 203 per Rich J. recognizing that “judicial power” carries with it “a duty to act judicially”.

The overlap which *Lowenstein* thus reveals between the due process requirement and the “incompatibility test” arises from the fact that when a legislative or executive power is described as incompatible with the exercise of judicial power, it is rarely the case that one power can be performed only at the expense of the other; it is, after all, quite possible for a court both to prosecute and to try an individual for a criminal offence. Instead, inconsistency or incompatibility of function in this context generally denotes that if one function is performed, it will reflect adversely on the manner of exercise of the other. Thus, if a court were to charge an individual with an offence, that fact – while not preventing the court from proceeding summarily with the trial of the offence – would nonetheless undermine the appearance, if not the substance, of impartiality in the court’s exercise of judicial power.

It is not surprising then that Williams J. in his exposition of the incompatibility test in his dissenting judgment in *Boilermakers’* used language suggestive of the idea that the exclusive vesting of federal judicial power in Chapter III courts carries with it the requirement that that power be exercised in accordance with “the judicial process”. Although Williams J. rejected the view that judicial power alone could be conferred on Chapter III courts, he was not prepared to sanction every combination of judicial and non-judicial functions. To the contrary, the exclusive vesting of judicial power in Chapter III courts meant that “nothing must be done which is likely to detract from their complete ability to perform their judicial functions”.<sup>58</sup> This in turn led to the following implied limitation upon the admixture of judicial and non-judicial powers:

“The Parliament cannot ... by legislation impose on the courts duties which would be at variance with the exercise of these functions or duties *and which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions.* (What Fry L.J. in *Royal Aquarium & Summer & Winter Garden Society Ltd v. Parkinson* calls their ‘fixed and dignified course of procedure’).”<sup>59</sup>

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<sup>58</sup> *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254, 314.  
<sup>59</sup> *Id* (emphasis outside brackets added, fn. omitted).

In other words:

“The functions must not be functions which courts *are not capable of performing consistently with the judicial process.*”<sup>60</sup>

Of course, Williams J.’s incompatibility test was overtaken by the broader rule articulated by the majority in the *Boilermakers’ Case*. But as *Grollo v. Palmer*<sup>61</sup> and *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*<sup>62</sup> demonstrate, even accepting that non-judicial functions cannot be conferred by the Commonwealth on Chapter III courts, the incompatibility limitation survives as a constraint upon the ability of Parliament to vest executive functions in federal judges considered as designated persons. If in the realm of the designated person principle, the separation doctrine and “the conditions necessary for the valid and effective exercise of judicial power”<sup>63</sup> ordain that:

“no function can be conferred [on a judge considered as a designated person] that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power”<sup>64</sup> -

such incompatibility arising from, for example, a perceived threat to judicial impartiality or public confidence therein,<sup>65</sup> it is but a short step to the due process requirement.

This is because if Parliament cannot undermine judicial impartiality by conferring a

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<sup>60</sup> *Ibid* 315 (emphasis added). The relationship between the incompatibility qualification and curial due process is also clearly evident in the judgment of Toohey J. in *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 98. See also *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 22 per Gaudron J.

<sup>61</sup> (1995) 184 C.L.R. 348.

<sup>62</sup> (1996) 189 C.L.R. 1. See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51.

<sup>63</sup> *Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

<sup>64</sup> *Id.*

<sup>65</sup> See *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1.

particular type of non-judicial function upon a federal judge *persona designata*, then it can hardly do so directly by asking the court to exercise judicial power in a partial, or apparently partial, manner. To do so would fly in the face of the evident purpose of s.71's exclusive vesting of federal judicial power in Chapter III courts.

It is of course highly improbable that Parliament would in terms authorize a Chapter III court to exercise judicial power in a partial manner. But this core natural justice application of the due process requirement can be infringed in more subtle ways. *Lowenstein* provides one example. The judgment of Gummow J. in *Grollo v. Palmer* refers to another. It will be recalled that in *Grollo*, a majority of the High Court upheld provisions of the *Telecommunications (Interception) Act 1979* (Cth) which conferred the non-judicial function of authorizing the issue of telecommunication interception warrants on Federal Court judges who had consented to act as designated persons. Gummow J. recognized the designated person principle, but hesitated as to whether the Act nonetheless infringed the separation doctrine. In particular, Gummow J. was concerned that the Act, as well as certain provisions of the *Crimes Act 1914* (Cth), appeared to impose a duty of confidentiality upon a *persona designata* in relation to information obtained in the course of a warrant application. This duty might conflict with the subsequent discharge of that person's judicial functions, preventing (for example) the disclosure to parties of facts which would otherwise prompt, or dispel, a claim of apprehended bias. In this regard, Gummow J. described judicial independence as "a necessary attribute of the exercise of the judicial power of the Commonwealth"<sup>66</sup> having earlier observed that "the rules as to reasonable apprehension of bias in their application to the courts have, at their root, the doctrine of the separation of the judicial from the political heads of power".<sup>67</sup>

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<sup>66</sup> *Grollo v. Palmer* (1995) 184 C.L.R. 348, 395. See also, eg, *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 25 per Gaudron J.: "impartiality and the appearance of impartiality are defining features of judicial power"; *Nicholas v. R.* (1998) 151 A.L.R. 312, 319 per Brennan C.J.; 335 per Gaudron J.

<sup>67</sup> *Grollo v. Palmer* (1995) 184 C.L.R. 348, 394 (fn. omitted).

Ultimately Gummow J. concluded that as a matter of statutory construction the duty of confidentiality did not extend to the discharge by a *persona designata* of functions as a judge exercising federal judicial power.<sup>68</sup> But his Honour clearly indicated that had he found otherwise, the confidentiality requirement would have amounted to “an impermissible undermining of the *Boilermakers’* doctrine”.<sup>69</sup> It should be acknowledged that Gummow J. did not expressly link this “impermissible undermining of the *Boilermakers’* doctrine” to dicta such as those from *Lim* and *Polyukhovich* quoted at the outset of this chapter. Yet, Gummow J.’s concerns in *Grollo* fall neatly within the due process rubric; to prevent a judge charged with the exercise of the judicial power of the Commonwealth from ensuring that no shadow of apprehended bias taints proceedings in a particular matter derogates from one of the essential requirements of the curial process.<sup>70</sup>

The rule against bias is but one manifestation of the natural justice obligation and there can be no doubt that under the due process requirement the hearing rule also operates as a constitutionally entrenched limitation upon the manner of exercise of federal judicial power, at least to the extent that parties are entitled to be present throughout the hearing of their matter and to put their side of the case to the tribunal of fact and law.<sup>71</sup> One possible consequence of the constitutionalization of the *audi alteram partem* rule is to check recent proposals to place time limits upon court hearings.<sup>72</sup> The High Court

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68 *Ibid* 397-398.

69 *Ibid* 398.

70 See also McHugh J. in *Grollo* who speculated: “[i]t may be that constitutionally neither the Act nor s 70 of the *Crimes Act* can prevent a judge, exercising federal judicial power, from disclosing to the parties any information that might found an application that the judge disqualify him or herself for apprehended bias. But it is unnecessary to decide that question” (*ibid* 381).

71 See, eg, *ibid* 394 per Gummow J. describing an “essential attribute of the judicial power of the Commonwealth” as the resolution of justiciable controversies by application of the law to the facts “so as to provide final results which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning”; *Nicholas v. R.* (1998) 151 A.L.R. 312, 335-336 per Gaudron J. See also *In the Marriage of Collins* (1990) 14 Fam.L.R. 162, esp. 174-175.

72 For a call for such limitations see, eg, M. Howell, “Your Time is Up’ – The Imposition of Time Limits for the Presentation of Cases at Hearings” (1996) 5 *J.J.A.* 170. See also A. Mason, “The Role of the Courts at the turn of the Century” (1993) 3 *J.J.A.* 156, 157.

Rules restrict the time permitted for oral argument in applications for special leave to appeal to twenty minutes per side, the applicant enjoying an additional five minute reply.<sup>73</sup> Presumably the High Court regards this innovation as consistent with the due process implication. Indeed, in light of the growing number of applications for special leave to appeal, Mason C.J. foreshadowed in an address delivered in 1993 that the Court “[u]ltimately ... will find it necessary to consider dealing with these applications on written argument”.<sup>74</sup> This can already occur under the High Court Rules with the consent of a party.<sup>75</sup> The requirement of special leave to appeal is, however, a “filtering mechanism”<sup>76</sup> and the special leave application cannot be likened to a full trial or appeal. It can be expected then that the High Court will closely scrutinize for conformity to constitutional principle any attempt under rule of court or statute to limit hearing times in federal jurisdiction.

In addition to the hearing rule, the “judicial process” or “the essential requirements of the curial process” would necessarily embrace the associated requirement that courts proceed, save in exceptional circumstances, by way of open and public hearing.<sup>77</sup> The exceptional circumstances qualification is important as it is generally accepted that certain matters, for example many of those involving children, should be heard in closed court.<sup>78</sup> This in turn draws attention to the fact that like any other constitutional implication protective of individual rights, the due process implication is surely subject

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<sup>73</sup> Order 69A rule 11.

<sup>74</sup> A. Mason, “The State of the Judicature” (1994) 20 *Mon.L.R.* 1, 6. See also s.21(1) *Judiciary Act* 1903 (Cth); A. Mason, “The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal” (1996) 15 *U.Tas.L.R.* 1, 21.

<sup>75</sup> High Court Rules, Order 69A rule 15(1): “A party may, in his or her summary of argument, elect not to present oral argument.” See also Order 69A rules 15(2) and (3). The author acknowledges the assistance of Mr Ernst Willheim in identifying contemporary High Court practice in this regard.

<sup>76</sup> A. Mason, “The State of the Judicature” (1994) 20 *Mon.L.R.* 1, 6. See also A. Mason, “The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal” (1996) 15 *U.Tas.L.R.* 1, 6; D.F. Jackson, “Practice in the High Court of Australia” (1997) 15 *Aus.Bar Rev.* 187.

<sup>77</sup> *Harris v. Caladine* (1991) 172 C.L.R. 84, 150 per Gaudron J.; *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496 per Gaudron J.; *Grollo v. Palmer* (1995) 184 C.L.R. 348, 379 per McHugh J: “[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power”; *ibid* 394 per Gummow J. (quoted above fn.71 of this chapter).

<sup>78</sup> J. Seymour, *Dealing With Young Offenders* (1988) 296-299.

to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>79</sup> Application of this reasonable limitations notion will of course involve the Court in “policy evaluations”<sup>80</sup> and a balancing of social interests. Nonetheless, it is a balancing process which in other contexts the High Court has been prepared to undertake.<sup>81</sup>

In conclusion, it should be emphasized that each of the aforementioned “natural justice” limitations upon the manner of exercise of federal judicial power serves to promote the rule of law considerations implicit in s.71 of the Constitution.<sup>82</sup> Thus, in *Re Nolan; Ex parte Young*,<sup>83</sup> Gaudron J. affirmed that curial due process involves application of the rules of natural justice and open and public hearings. She then went on in a crucial passage to characterize the due process requirement, which she also regarded as including the right to a fair trial for federal offences and “the ascertainment of the facts as they are ... and the identification of the applicable law, followed by an application of that law to those facts”,<sup>84</sup> as equivalent to the democratic process in terms of its transcendent importance to Australian society:

“The determination in accordance with the judicial process of controversies as to legal rights and obligations and as to the legal consequences attaching to conduct is vital to the maintenance of an open, just and free society. Quite apart from the public’s right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice. Moreover and more directly, the judicial process protects the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained.

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79 To borrow the formulation of the justified limits provision recommended by the Constitutional Commission as part of a new Chapter of the Constitution on rights and freedoms (*Final Report of the Constitutional Commission* (1988) 490).

80 *Id.* (quoting the rights committee).

81 See, eg, *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 C.L.R. 106; *Levy v. Victoria* (1997) 189 C.L.R. 579.

82 See J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195, 201.

83 (1991) 172 C.L.R. 460, 496.

84 *Id.*



By reason of the interests which the judicial process protects, that process is properly to be seen as partaking of the same fundamental importance as the democratic process.”<sup>85</sup>

This passage underscores the rule of law rationale of the curial due process requirement (thus expressly aligning Gaudron J. with Deane J. in this regard) while hinting at the potentially broad scope of the principle beyond the core features of the natural justice obligation. As just seen, Gaudron J. accepted in *Re Nolan* that since judicial power must be exercised in accordance with the judicial process “Ch.III provides a guarantee, albeit only by implication, of a fair trial of those offences created by a law of the Commonwealth”,<sup>86</sup> a statement which points to adherence to a super-added notion of procedural fairness (that is, to a notion of fairness not satisfied by mere compliance with the rule against bias and the core features of the hearing rule) as a potential due process extension, at least in criminal proceedings. That extension, pregnant as it is with possibilities for our criminal justice system, is considered in the section which follows.

### **3. Curial Due Process and the Guarantee of a Fair Trial of a Federal Offence**

#### **(a) General Considerations**

In *Re Tracey; Ex parte Ryan*, Deane J. observed that “[t]he guarantee involved in the vesting of judicial power exclusively in Ch.III courts is at its most important in relation to criminal matters”.<sup>87</sup> As the liberty of the individual is at stake in such matters, it can readily be accepted that the curial due process requirement places special constraints upon the conduct of a trial for a federal offence – after all, the practical content of natural justice or procedural fairness varies with the circumstances of the case.

Nonetheless, had Gaudron J.’s reference in *Re Nolan* to an implied constitutional guarantee of a “fair trial” of a federal offence stood in isolation, there may have been

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<sup>85</sup> *Ibid* 496-497.

<sup>86</sup> *Ibid* 496.

<sup>87</sup> (1989) 166 C.L.R. 518, 581. See also *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 11 per Jacobs J.; *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 608 per Deane J.; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27 per Brennan, Deane and Dawson JJ.; *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 107 per Gaudron J. describing criminal proceedings as involving “the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences”.

doubt as to whether this imported more than trial by an impartial judge and (in the case of an indictable offence<sup>88</sup>) impartial jury, the defendant having previously been supplied with particulars of the charge against her or him, being entitled to respond to the prosecution case, to adduce evidence and to cross-examine witnesses.<sup>89</sup> But, in *Dietrich v. R.*<sup>90</sup> Gaudron J. (joined by Deane J.) suggested that by “guarantee ... of a fair trial” she envisaged a meeting between the curial due process requirement and a previously distinct and separately evolving body of law based upon the “fundamental requirement” of our system of criminal justice “that a person should not be convicted of an offence save after a fair trial according to law”.<sup>91</sup> This latter body of law can be termed the “fair trial principle”.<sup>92</sup> And in the discussion which follows, the composite expression “fair trial” refers to that fair trial principle. The curial due process principle in its various applications is referred to as such.

In recent years, in cases involving both federal and non-federal offences, the High Court has placed renewed emphasis on an accused’s right not to be tried unfairly and has “redefin[ed] the essential elements of a fair trial” in response to changing perceptions of what fairness in the administration of criminal justice requires.<sup>93</sup> This revitalized fair trial principle finds its primary application “in rules of law and of practice designed to regulate the course of the trial”.<sup>94</sup> The “*McKinney* warning” to be directed to a jury as to the dangers of convicting an accused when substantially the only basis for a finding of guilt is an uncorroborated confession allegedly made whilst in police custody is an

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88 See s.80 of the Constitution.

89 See generally *Jago v. District Court (N.S.W.)* (1989) 168 C.L.R. 23, 57 per Deane J.

90 (1992) 177 C.L.R. 292.

91 *Ibid* 362 per Gaudron J.

92 See M. Weinberg, “Criminal Procedure and the Fair Trial Principle” in P.D. Finn (ed), *Essays on Law and Government vol.2: The Citizen and the State in the Courts* (1995) 159.

93 A. Mason, “Fair Trial” (1995) 19 *Crim.L.J.* 7, 8. See generally J. Badgery-Parker, “The Criminal Process in Transition: Balancing Principle and Pragmatism” (1995) 4 *J.J.A.* 171 (Part 1) 193 (Part 2); K.P. Duggan, “Reform of the Criminal Law with Fair Trial as the Guiding Star” (1995) 19 *Crim.L.J.* 258; M. Weinberg, “Criminal Procedure and the Fair Trial Principle” in P.D. Finn (ed), *Essays on Law and Government vol.2: The Citizen and the State in the Courts* (1995) 159.

94 *Dietrich v. R.* (1992) 177 C.L.R. 292, 299-300 per Mason C.J. and McHugh J. (fn. omitted).

example of such a rule.<sup>95</sup> The High Court has accepted, however, that sometimes there is nothing a trial judge can do during the course of a trial in the form of directions, warnings and so forth to counteract a source of unfairness to the accused. In this situation the inherent jurisdiction of the court “extends to a power to stay proceedings in order ‘to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair’”.<sup>96</sup> *Dietrich v. R.*, discussed immediately below, exemplifies the operation of the fair trial principle in this latter situation.

### **(b) Fair Trial and Constitutionalization of the Abuse of Process Discretion**

*Dietrich*<sup>97</sup> confirmed that an indigent accused in Australia does not enjoy a common law right to be provided with counsel at public expense.<sup>98</sup> Nonetheless, a majority of the High Court held that where an accused is charged with a serious criminal offence, legal representation of the accused is generally essential to a fair trial. As a trial judge in the course of her or his conduct of the trial is unable to eliminate this source of unfairness to the accused, the appropriate remedy is a stay or adjournment of proceedings in order to prevent an abuse of process. Thus, a majority of the High Court in *Dietrich* subscribed to the following statement of principle:

“[when] a trial judge ... is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation ... [then] in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If ... an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused

<sup>95</sup> *McKinney v. R.* (1991) 171 C.L.R. 468, 476 and 478 per Mason C.J., Deane, Gaudron and McHugh JJ.

<sup>96</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 300 per Mason C.J. and McHugh J. (fn. omitted) quoting from *Barton v. R.* (1980) 147 C.L.R. 75, 95-96 per Gibbs A.C.J. and Mason J. See also *Jago v. District Court (N.S.W.)* (1989) 168 C.L.R. 23, 29-31 per Mason C.J.; 71-72 per Toohey J.; 75 per Gaudron J.; D.M. Paciocco, “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991) 15 *Crim.L.J.* 315; G. Zdenkowski, “Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?” (1994) 18 *Crim.L.J.* 135, 147; A. Mason, “Fair Trial” (1995) 19 *Crim.L.J.* 7, 11.

<sup>97</sup> See generally in relation to the *Dietrich Case*, G. Zdenkowski, “Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?” (1994) 18 *Crim.L.J.* 135.

<sup>98</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 297-298 per Mason C.J. and McHugh J.

must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial”.<sup>99</sup>

Gaudron J. was a member of that *Dietrich* majority and in the opening sentences of her judgment explicitly linked the fair trial principle to curial due process:

“It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law ... The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch.III’s implicit requirement that judicial power be exercised in accordance with the judicial process. Otherwise the requirement that a trial be fair is not one that impinges on the substantive law governing the matter in issue.”<sup>100</sup>

Deane J., also part of the *Dietrich* majority, commenced his judgment in identical fashion:

“The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the Constitution’s requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch.III of the Constitution designates.”<sup>101</sup>

Yet despite the fact that Mr Dietrich had been forced to proceed to trial unrepresented on serious *federal* offences, Deane J. and Gaudron J. failed to elaborate upon this link between the right of an accused not to be tried unfairly and the implication flowing from Ch.III of the Constitution that federal judicial power must be exercised in accordance with the judicial process. Their above extracted comments, taken in the context of the case as a whole, suggest, however, that Deane J. and Gaudron J. would regard the inherent power of a court exercising federal jurisdiction to stay or adjourn proceedings

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<sup>99</sup> *Ibid* 315 per Mason C.J. and McHugh J. summarizing the effect of the majority judgments. See also *ibid* 337 per Deane J.; *ibid* 357 per Toohey J.; *ibid* 369-371, 374 per Gaudron J.

<sup>100</sup> *Ibid* 362-363 (fn. omitted).

<sup>101</sup> *Ibid* 326. The other members of the majority in *Dietrich* – Mason C.J., Toohey and McHugh JJ. – were silent as to the constitutional issue.

to prevent what would otherwise be an abuse of its process – an unfair trial of a criminal offence – as immune from legislative abrogation. To put matters another way, were Parliament to deprive a Chapter III court of this aspect of its inherent jurisdiction,<sup>102</sup> then an unrepresented accused in the situation of Mr Dietrich would be forced to submit to an unfair exercise of federal judicial power. And that, in the opinion of Deane J. and Gaudron J., would be unconstitutional.

This analysis of *Dietrich* is confirmed by certain comments of Gaudron J. in *Polyukhovich v. Commonwealth* and in the more recent case of *Nicholas v. R.*<sup>103</sup> In *Polyukhovich*, which concerned the constitutional validity of a federal provision creating a retroactive criminal offence, Gaudron J. described the power to stay proceedings as “an essential attribute of a superior court” which “exists for the purpose of ensuring that proceedings serve the ends of justice and are not themselves productive of or an instrument of injustice”. Her Honour indicated that Parliament would have to make clear its intention to interfere “with such an important and essential power”, but warned that if it did so:

“a question might arise, at least in circumstances which would call for the exercise of that power, whether its curtailment or abrogation transformed the power purportedly vested in the court into something other than judicial power and, thus, brought the provision into conflict with Ch.III”.<sup>104</sup>

It was not necessary for Gaudron J. to take this matter further on the facts of *Polyukhovich*. But subsequently in *Nicholas v. R.*, after restating that the curial due process implication “necessitates” the determination of criminal guilt “by means of a fair trial according to law”<sup>105</sup> – her Honour added that “a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would

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<sup>102</sup> The inherent jurisdiction of a superior court has many applications extending well beyond the stay for abuse of process (see K. Mason, “The Inherent Jurisdiction of the Court” (1983) 57 *A.L.J.* 449).

<sup>103</sup> (1998) 151 *A.L.R.* 312.

<sup>104</sup> *Polyukhovich v. Commonwealth* (1991) 172 *C.L.R.* 501, 703.

<sup>105</sup> (1998) 151 *A.L.R.* 312, 335-336.

render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.”<sup>106</sup>

It would seem to follow then that Deane J. and Gaudron J. believe that it would be contrary to Chapter III of the Constitution for Parliament to abrogate or, at least in certain circumstances, curtail the inherent power of a court exercising federal jurisdiction to stay proceedings to prevent an unfair criminal trial.<sup>107</sup> But will other members of the Court subscribe to the constitutional entrenchment of this aspect of the fair trial principle?<sup>108</sup> Of *Dietrich*, Professor Zines has written that “if the right to counsel is in a particular case an essential element in a fair trial, it is difficult to see any judge deciding that Parliament may require courts exercising federal judicial power to conduct an unfair trial”.<sup>109</sup> Certainly, viewed from one perspective, the constitutional entrenchment in federal jurisdiction of the outcome in *Dietrich* can be seen as but a small extension of the proposition advanced earlier that the hearing rule operates as a constitutional limitation upon the manner of exercise of federal judicial power. As was said by the United States Supreme Court in *Powell v. Alabama*, “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

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<sup>106</sup> *Ibid* 336. See also *Dietrich v. R.* (1992) 177 C.L.R. 292, 330-331 per Deane J. and s.360A *Crimes Act* 1958 (Vic.) (inserted by s.27 *Crimes (Criminal Trials) Act* 1993 (Vic.)) regulating judicial discretion to grant an adjournment or a stay of a criminal trial in response to the *Dietrich* decision (in relation to which legislative provision see J. Hope, “A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System” (1996) 24 *F.L.Rev.* 173, 191; E. Campbell, “Constitutional Protection of State Courts and Judges” (1997) 23 *Mon.L.R.* 397, 417-418; *Frugtniet v. Victoria* (1997) 148 A.L.R. 320 (H.C.A.).

<sup>107</sup> If the Commonwealth were to abrogate the inherent power of an invested State court to stay proceedings to prevent an unfair criminal trial, query whether this would breach the general rule that the Commonwealth must take a State court as it finds it. See, for a recent discussion of the boundaries of this rule, *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51.

<sup>108</sup> Toohey J. expressed some support for an implied guarantee of a fair trial of a federal offence in *Nicholas v. R.* (1998) 151 A.L.R. 312, 330. In the same case, McHugh J. found that in light of Ch.III of the Constitution, “parliament cannot prevent this court from protecting its process by declaring conduct not to be an abuse of process when it is an abuse of process” (*ibid* 350). See also *ibid* 377 (but cf 381) per Kirby J. And cf *ibid* 388 per Hayne J.

<sup>109</sup> L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166, 168. See also, as recognizing the issues facing the High Court here, A. Mason “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 7.

counsel”.<sup>110</sup> This constitutes a powerful argument in favour of *Dietrich*'s constitutionalization under the due process mantle, a like argument existing in relation to the provision of interpreter services for an accused who does not speak the language of the court.<sup>111</sup> Significantly, both the right of an indigent accused to the assistance of counsel at public expense<sup>112</sup> and the right of an accused person to the free assistance of an interpreter if that person does not understand the language of the court<sup>113</sup> enjoy constitutional protection in certain other common law countries and are enshrined in various international instruments – a phenomenon which did not escape judicial attention in *Dietrich*.

But certain members of the High Court might be reluctant to treat *Dietrich* as the bridgehead to the constitutional entrenchment of the right to a fair trial of a federal offence in Australia. Both Brennan J. and Dawson J. dissented in *Dietrich*.

Significantly, Brennan J.'s dissent was based on his conception of the role of the courts vis-a-vis the elected arms of government. His Honour insisted that the courts would be exceeding their constitutional function were they to compel the legislature and the executive to provide legal representation for an indigent accused.<sup>114</sup> The provision of a stay or adjournment in a situation like that confronting Mr Dietrich technically avoided

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<sup>110</sup> 287 U.S. 45, 68 (1932) quoted by Gaudron J. in *Dietrich v. R.* (1992) 177 C.L.R. 292, 371. And see also *New South Wales v. Canellis* (1994) 181 C.L.R. 309, 329 per Mason C.J., Dawson, Toohey and McHugh JJ.: “[t]o the extent that the decision was derived from the concept of the accused’s right to a fair trial, *Dietrich* may possibly be regarded as a manifestation of the rules of procedural fairness”.

<sup>111</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 300 per Mason C.J. and McHugh J.; 330-331 per Deane J. and 363 per Gaudron J. And see also *Ebatarinja v. Deland* (1998) 157 A.L.R. 385, 391 per Gaudron, McHugh, Gummow, Hayne and Callinan JJ.; *Final Report of the Constitutional Commission* (1988) 578.

<sup>112</sup> See Sixth Amendment to the United States Constitution (“In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence”) as interpreted and also applied to the States via the due process clause of the Fourteenth Amendment in *Gideon v. Wainwright* 372 U.S. 335 (1963) and subsequent cases (see H.J. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (6th ed) (1994) 64-67); s.24(f) of the New Zealand Bill of Rights. See also Art.6(3)(c) of the European Convention on Human Rights and Fundamental Freedoms and Art.14(3)(d) of the International Covenant on Civil and Political Rights.

<sup>113</sup> See s.14 of the Canadian Charter of Rights and Freedoms and s.24(g) of the New Zealand Bill of Rights. See also Article 6(3)(e) of the European Convention on Human Rights and Fundamental Freedoms and Article 14(3)(f) of the International Covenant on Civil and Political Rights.

<sup>114</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 321, 323.

such a direct demand upon the public purse, but was open to criticism as a refusal to exercise jurisdiction.<sup>115</sup> Overall, Brennan J. took a narrower view of the abuse of process discretion than his majority brethren, maintaining that “not every case of unfairness amounts to an abuse of process”:

“When the criminal jurisdiction is invoked for the purpose it is designed to serve [and there was no suggestion to the contrary on the facts in *Dietrich*], there is no abuse of process. The jurisdiction must be exercised in a way that prevents unfairness as far as possible, but it must be exercised. As a matter of constitutional duty, the courts cannot indefinitely adjourn a trial to force the provision of legal aid.”<sup>116</sup>

And his Honour concluded:

“The rhetoric that our system of administering criminal justice ensures a fair trial is comforting, but the reality is that the courts cannot always eliminate obstacles to a fair trial. Rhetoric does not always correspond with reality. If public funds are not available to provide legal representation in serious criminal cases, the administration of criminal justice will not be, or at least will not be seen to be, evenhanded. But the remedy does not lie with the courts; the remedy must be found, if at all, by the legislature and the executive who bear the responsibility of allocating and applying public resources.”<sup>117</sup>

Dawson J.’s dissent reflected similar concerns.<sup>118</sup>

In assessing this minority reasoning in *Dietrich*, Brennan J.’s emphasis upon the constitutional distribution of powers between legislature, executive and judiciary is of particular importance. Surely a judge sympathetic to these views would be reluctant to take *Dietrich* further by constitutionalizing in the name of the separation of powers a principle which he or she regards as inimical to it.<sup>119</sup> Such an approach derives further support from comments of Brennan J. depicting refusal to exercise jurisdiction under an

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115 *Ibid* 324.

116 *Id.*

117 *Ibid* 324-325.

118 See, in particular, *ibid* 345, 349-350.

119 In this regard, note Brennan J.’s observation in *Dietrich* that “[i]n the present case, there is no constitutional or statutory provision which supports the applicant’s case” (*ibid* 318). See also generally Brennan J.’s judgment in *Jago v. District Court (N.S.W.)* (1989) 168 C.L.R. 23.



expansive abuse of process doctrine as contrary to the rule of law. As his Honour said in the abuse of process case of *Walton v. Gardiner*,<sup>120</sup> “[t]he rule of law depends on the certain performance by the court or tribunal of its duty to exercise its jurisdiction. To admit a power in the court or tribunal to decline to exercise its jurisdiction in a case instituted on reasonable grounds for a proper purpose is to assert a power to elevate abstract notions of unfairness or want of justification above the law itself”.<sup>121</sup>

But assuming that members of the Court will accept the constitutionalization in federal jurisdiction of the outcome in *Dietrich* – that is, that a court cannot be forced to tolerate an abuse of its process in this regard – then other situations calling for the exercise of the inherent power of a court to stay proceedings to prevent what would otherwise be an unfair criminal trial would seem to demand identical treatment.<sup>122</sup> Thus, the “guarantee ... of a fair trial of those offences created by a law of the Commonwealth”<sup>123</sup> would include the power recognized in *Jago v. District Court (N.S.W.)*<sup>124</sup> to stay criminal proceedings where undue pre-trial delay has prejudiced an accused’s fair trial entitlement, the power at issue in *R. v. Glennon*<sup>125</sup> to grant a stay of proceedings (almost invariably of a temporary nature) to protect an accused from an unacceptable risk that the effect of prejudicial pre-trial publicity will prevent her or his fair trial, and the power admitted in *Connelly v. D.P.P.*<sup>126</sup> and *Walton v. Gardiner*<sup>127</sup> to stay

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120 (1993) 177 C.L.R. 378.

121 *Ibid* 415.

122 See A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 7.

123 *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496 per Gaudron J.

124 (1989) 168 C.L.R. 23. See also the protection accorded to the right of a charged person to be tried without undue delay in Art.14(3)(c) of the International Covenant on Civil and Political Rights; Art.6(1) of the European Convention on Human Rights and Fundamental Freedoms; s.11(b) of the Canadian Charter of Rights and Freedoms; s.25(b) of the New Zealand Bill of Rights; and the Sixth Amendment to the United States Constitution (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”) applicable to the States via the due process clause of the Fourteenth Amendment (see *Klopper v. North Carolina* 386 U.S. 213 (1967) cited in H.J. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (6th ed) (1994) 76-78).

125 (1992) 173 C.L.R. 592.

126 [1964] A.C. 1254.

127 (1993) 177 C.L.R. 378.

proceedings which place a defendant in a situation of double jeopardy (at least to the extent that this power turns on an accused's fair trial entitlement<sup>128</sup>).

Of course, Brennan J.'s point about failure to exercise jurisdiction must be conceded. But to the extent that this failure derogates from the rule of law, it must be weighed against the damage to the rule of law occasioned by a court being forced to lend its process to what it regards as an unfair criminal trial. Although the weighing of these competing considerations is not easy, it is submitted that, in the ultimate analysis, an unfair criminal trial poses a greater threat to the supremacy of law than a refusal to exercise jurisdiction in such a case. This is not only because of the threat which an unfair criminal trial poses to the liberty of the individual, but because Parliament and the executive are in a position to ameliorate many sources of unfairness so as to allow fair trials to proceed. To the extent that this involves the elected branches of government in resource reallocation in response to a constitutional implication, Deane J. was surely correct when he pointed out in *Dietrich* that "[i]nvariably, compliance with the law's overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of public funds: for example, the funds necessary to provide an impartial judge and jury; the funds necessary to provide minimum court facilities; the funds necessary to allow committal proceedings where such proceedings are necessary for a fair trial".<sup>129</sup> And as Mason C.J. and McHugh J. observed in *Dietrich*, despite the Commonwealth and the States being provided with the opportunity to intervene in relation to the issues joined in that case, "no argument was put to the Court that

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<sup>128</sup> See A.L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993) 17 and A.L.-T. Choo, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited" [1995] *Crim.L.R.* 864, 866; *Davern v. Messell* (1984) 155 C.L.R. 21 (as cited in *Final Report of the Constitutional Commission* (1988) 584). The rule against double jeopardy is recognized in Art.14(7) of the International Covenant on Civil and Political Rights; s.11(h) of the Canadian Charter of Rights and Freedoms; s.26(2) of the New Zealand Bill of Rights; and the Fifth Amendment to the United States Constitution ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb") applicable to the States via the due process clause of the Fourteenth Amendment (see *Benton v. Maryland* 395 U.S. 784 (1969) cited in H.J. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (6th ed) (1994) 81-83).

<sup>129</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 330.

recognition of ... a right for the provision of counsel at public expense would impose an unsustainable financial burden on government".<sup>130</sup> Yet even assuming the need for increased government expenditure, if we expect our criminal justice system to protect the innocent while convicting the guilty, and if, by reason of the interests which it protects, the judicial process "is properly to be seen as partaking of the same fundamental importance as the democratic process",<sup>131</sup> then perhaps we should all be prepared to pay more for its principled operation.

It is possible to frame a theoretical objection to the above conclusion by pointing to the orthodox view that the meaning of constitutional terms like "judicial power" and "court" must be determined by reference to their connotation as at 1900.<sup>132</sup> At the time the Constitution was framed, the common law had not yet evolved to the stage of accepting, for example, that in the case of an accused charged with a serious criminal offence, legal representation is generally a pre-requisite to a fair trial, its absence enlivening the abuse of process discretion.<sup>133</sup> How then can the exclusive vesting of federal "judicial power" in Chapter III "courts" pick up and entrench the result in a case like *Dietrich*? The answer must surely be that in 1900 no one would have doubted, in the context of the common law tradition, that the exercise of judicial power by a court must be attended by observance of the rules of procedural fairness or procedural due process. At the Melbourne session of the second Convention, Richard O'Connor argued in favour of inclusion in the Australian Constitution of an express guarantee modelled on the Fourteenth Amendment to the United States Constitution. As sponsored by O'Connor, this clause would have constrained state governments alone:

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<sup>130</sup> *Ibid* 312 per Mason C.J. and McHugh J. See also A. Mason, "Defining the Framework of Government: Judicial Deference v. Human Rights and Due Process" (paper delivered at Centre for Public Policy Workshop, Melbourne University, 7 June 1996, 19-20) (copy on file with author).

<sup>131</sup> *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 497 per Gaudron J.

<sup>132</sup> See, eg, *R. v. Brislan; Ex parte Williams* (1935) 54 C.L.R. 262. And see, as raising this theoretical objection, A. Mason, "A New Perspective on Separation of Powers" (1996) 82 *C.B.P.A.* 1, 7-8.

<sup>133</sup> See, eg, the approach of the majority as late as 1979 in *McInnes v. R.* (1979) 143 C.L.R. 575 and note the analysis of the common law by Murphy J. (dissenting) *ibid* 589.

“A state shall not deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.”<sup>134</sup>

Of the first part of this clause, O’Connor said:

“In the ordinary course of things such a provision at this time of day would be unnecessary; but we all know that laws are passed by majorities, and that communities are liable to sudden and very often to unjust impulses – as much so now as ever. The amendment is simply a declaration that no impulse of this kind which might lead to the passing of an unjust law shall deprive a citizen *of his right to a fair trial.*”<sup>135</sup>

Thus O’Connor recognized the existence of a common law right to a fair trial. But his proposal to entrench that right as against the states was rejected, it being claimed by other delegates that this right was sufficiently well protected in Australia under existing arrangements (noting, however, that this argument affirmed, rather than denied, the existence of the right).<sup>136</sup>

This decision that a due process clause was unnecessary might, from an originalist’s perspective, undercut the interpretation of s.71 of the Constitution presented in this chapter. One response is that the framers were not here concerned with limitations upon the federal government. But more convincingly, acceptance of the above-posed originalist argument would seem – contrary to our legal traditions – to deny a procedural dimension to the meaning of “judicial power” and “court” in s.71 of the Constitution. One hundred and thirty years prior to the Australian constitutional conventions, Blackstone had defined a court as “a place wherein justice is judicially administered [sic]”,<sup>137</sup> his depictions of the civil and criminal trial bearing witness to the importance of procedural fairness (albeit an eighteenth century version of that concept) in the

<sup>134</sup> *Official Record of the Debates of the Australasian Federal Convention* (1898) 673.

<sup>135</sup> *Ibid* 683 (emphasis added).

<sup>136</sup> *Ibid* 678 (Kingston); 683 (Symon); 687-688 (Isaacs) and 688 (Cockburn). See also J.A. La Nauze, *The Making of the Australian Constitution* (1972) 231; J.M. Williams, “Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the ‘Fourteenth Amendment’” (1996) 42 *Aus.J.Pol.Hist.* 10.

<sup>137</sup> W. Blackstone, *Commentaries on the Laws of England* vol.3 (1768) (facsimile ed, 1983, Legal Classics Library) 23.

exercise of judicial power.<sup>138</sup> Thus, it has long been accepted that the exercise of judicial power by a court must be undertaken in a procedurally fair manner; it was true in 1900 and is true today. What has altered over time is each generation's interpretation of that fairness requirement.<sup>139</sup> So, just as the High Court in *Cheatle v. R.*<sup>140</sup> found that the element of "representativeness" in relation to a s.80 jury, although satisfied in 1900 by men of property alone, would necessarily demand inclusion of women and unpropertied persons today,<sup>141</sup> so too the conception of fairness in the exercise of federal judicial power prevailing at the turn of the century should not govern our approach to curial due process a century later. As Kirby J. observed in *North Galanjanja Aboriginal Corporation v. Queensland*,<sup>142</sup> "[t]he judicial function is not frozen in time. This Court should remain alert to developments in judicial procedures which further, in proper ways, the defence of the rule of law".<sup>143</sup>

**(c) Fair Trial and Constitutionalization of "Rules of Law and of Practice Designed to Regulate the Course of the Trial"**

To leave the abuse of process discretion as discussed in the previous section does not exhaust the "guarantee ... of a fair trial" recognized by Gaudron J. in *Re Nolan*.<sup>144</sup> This is because, as was earlier stated, the fair trial principle is manifested not only in the abuse of process discretion, but also in "rules of law and of practice designed to regulate the course of the trial".<sup>145</sup> These rules of law and of practice which reflect the fair trial principle are many,<sup>146</sup> and as Mason C.J. and McHugh J. observed in *Dietrich* "[t]here

<sup>138</sup> *Ibid* ch.23 ("Of the Trial by Jury"); W. Blackstone, *Commentaries on the Laws of England* vol.4 (1769) (facsimile ed, 1983, Legal Classics Library) ch.27 ("Of Trial, and Conviction").

<sup>139</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 328 per Deane J.

<sup>140</sup> (1993) 177 C.L.R. 541.

<sup>141</sup> *Ibid* 560-561 per Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

<sup>142</sup> (1996) 185 C.L.R. 595.

<sup>143</sup> *Ibid* 666.

<sup>144</sup> *Re Nolan; Ex parte Young* (1991) 172 C.L.R. 460, 496.

<sup>145</sup> *Dietrich v. R.* (1992) 177 C.L.R. 292, 299-300 per Mason C.J. and McHugh J (fn. omitted).

<sup>146</sup> See, eg, *ibid* 363 per Gaudron J.; D.M. Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 *Crim.L.J.* 315, 332-333; A. Mason, "Fair Trial" (1995) 19 *Crim.L.J.* 7; J. Badgery-Parker, "The Criminal Process in Transition: Balancing Principle and Pragmatism" (1995) 4 *J.J.A.* 171,

has been no judicial attempt to list exhaustively the attributes of a fair trial”.<sup>147</sup> This is due in part to the nature of the criminal appellate process<sup>148</sup> and also to the fact that “what is fair is not written in stone for all time”;<sup>149</sup> in other words “the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances”.<sup>150</sup> Nonetheless, despite this absence of a comprehensive judicial formulation of the elements of a fair trial, Mason C.J. and McHugh J. in *Dietrich* pointed out that broad definitions of some of the features of a fair trial could be found in various international instruments and national charters of rights, such as the International Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms.<sup>151</sup>

It follows that these instruments may assist in identifying those “rules of law and of practice” without which the exercise of federal judicial power in a criminal trial could not be said to be “fair” and in accordance with the “judicial process”. Yet, even with such assistance it is not possible within the confines of a chapter concerned to present a general overview of the curial due process notion to identify each of the rules of criminal procedure which could potentially be constitutionalized in federal jurisdiction. Instead, it is proposed briefly to consider whether the “fundamental requirement that a trial be fair [which] is entrenched in the Commonwealth Constitution by Ch.III’s implicit requirement that judicial power be exercised in accordance with the judicial process”<sup>152</sup> is capable of encompassing two rules of law regarded as basic to our system of criminal justice – the presumption of innocence<sup>153</sup> and the associated

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172-177 (Part 1); M. Weinberg, “Criminal Procedure and the Fair Trial Principle” in P.D. Finn (ed), *Essays on Law and Government vol.2: The Citizen and the State in the Courts* (1995) 159, 160.

147 *Dietrich v. R.* (1992) 177 C.L.R. 292, 300. See also, eg, *ibid* 353 per Toohey J.: “the concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the concept”.

148 *Ibid* 300 per Mason C.J. and McHugh J.

149 A. Mason, “Fair Trial” (1995) 19 *Crim.L.J.* 7, 7.

150 *Dietrich v. R.* (1992) 177 C.L.R. 292, 328 per Deane J. (fn. omitted). And see, eg, the joint majority judgment in *McKinney v. R.* (1991) 171 C.L.R. 468.

151 *Dietrich v. R.* (1992) 177 C.L.R. 292, 300.

152 *Ibid* 362 per Gaudron J.

153 A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 7.

requirement that an accused is not to be compelled to be a witness against herself or himself at her or his trial.

**(i) Constitutionalization of the Presumption of Innocence**

The presumption of innocence is enshrined in Article 14(2) of the International Covenant on Civil and Political Rights, Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms, s.11(d) of the Canadian Charter of Rights and Freedoms and s.25(c) of the New Zealand Bill of Rights. It is also incorporated in the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.<sup>154</sup> The presumption of innocence – which, as the Constitutional Commission pointed out, is “no more than a shorthand expression for the general rule that, in criminal cases, the prosecution bears the onus of proving each element of the offence charged, beyond a reasonable doubt”<sup>155</sup> – has been variously described by members of the High Court as a “fundamental principle of the common law”<sup>156</sup> and as “fundamental to our system of criminal justice”.<sup>157</sup> As the report of the Constitutional Commission makes clear, the presumption of innocence (while also promoting respect for human dignity in the criminal process<sup>158</sup>) is an important element in the right of an accused not to be tried unfairly:

“It forces the prosecution to gather cogent evidence pointing to the guilt of the accused and it reduces the risk of convictions based on factual error. It serves as a counterbalance to the superior resources of the state and to the inference of

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<sup>154</sup> L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 741 fn.61 citing *In Re Winship* 397 U.S. 358 (1970).

<sup>155</sup> *Final Report of the Constitutional Commission* (1988) 579.

<sup>156</sup> *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477, 501, 503 per Mason C.J. and Toohey J.; 527 per Deane, Dawson and Gaudron JJ.; 550 per McHugh J.

<sup>157</sup> *Petty v. R.* (1991) 173 C.L.R. 95, 128 per Gaudron J.; J. Badgery-Parker, “The Criminal Process in Transition: Balancing Principle and Pragmatism” (1995) 4 *J.J.A.* 171, 172.

<sup>158</sup> *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477, 546 per McHugh J.; *R. v. Oakes* (1986) 50 C.R. (3d) 1, 15 per Dickson C.J. (quoted in D. Stuart, *Charter Justice in Canadian Criminal Law* (1991) 250).

guilt that may be drawn [from] the very fact that a criminal charge has been laid.”<sup>159</sup>

Thus, the presumption of innocence operates alongside the rules of natural justice as a procedural constraint upon the assertion of arbitrary power in our society. Moreover, acceptance of the contrary rule – that an accused must prove her or his innocence – would involve an alignment of the courts with decisions of police and prosecuting authorities apt to undermine the separation of executive and judicial functions.<sup>160</sup> It is submitted, therefore, that in light of these considerations (and bearing in mind the interests of an accused at stake in a criminal trial) it should be accepted that where Parliament has placed upon the defendant the persuasive burden of proof in relation to an element of a federal offence, this is (prima facie) to ask a court exercising federal jurisdiction to conduct an unfair criminal trial because of the risk that under such circumstances a defendant will be convicted despite the existence of a reasonable doubt as to her or his guilt.<sup>161</sup> Certainly, it is not stretching language to describe such an exercise of judicial power as other than in accordance with our “traditional judicial process”,<sup>162</sup> or “traditional judicial procedures, remedies and methodology”.<sup>163</sup>

Were a majority of the High Court to accept the argument set out in the previous paragraph, the presumption of innocence would not be a constitutional absolute, but would be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>164</sup> Thus in light of the Canadian

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<sup>159</sup> *Final Report of the Constitutional Commission* (1988) 579 (fn. omitted). See also *Ngoc Tri Chau v. Director of Public Prosecutions (Cth)* (1995) 132 A.L.R. 430, 445 per Kirby P.

<sup>160</sup> A.R.N. Cross, “The Right to Silence and the Presumption of Innocence – Sacred Cows or Safeguards of Liberty?” (1970) 11 *J.Soc.Pub.T.L.* 66, 74.

<sup>161</sup> As is pointed out in P.W. Hogg, *Constitutional Law of Canada* (3rd ed) (1992) 1101 “[i]t is a general rule of the criminal law that, when an element of a criminal offence has to be disproved by the accused, the standard of proof is not the criminal one of proof beyond a reasonable doubt but the civil one of proof on the balance of probabilities”. Nonetheless, this lower standard of proof still exposes an accused to conviction if all he or she can show is a reasonable doubt as to the non-existence of that element. See also M. Aronson and J. Hunter, *Litigation: Evidence and Procedure* (6th ed) (1998) 698-702.

<sup>162</sup> *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1, 70 per Deane and Toohey JJ. (fn. omitted).

<sup>163</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607 per Deane J.

<sup>164</sup> *Final Report of the Constitutional Commission* (1988) 490.



jurisprudence associated with s.11(d) of the Charter (which provides that “[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”) it may be that the persuasive burden of proof can validly be borne by a defendant in relation to an element of an offence peculiarly within her or his own knowledge,<sup>165</sup> when “there is a sufficient rational connection between proved and presumed fact”<sup>166</sup> or, in exceptional cases, in the name of a pressing social problem presenting more than usual difficulties of law enforcement.<sup>167</sup>

It should be acknowledged, however, that constitutionalization of the presumption of innocence would necessitate the High Court revisiting a number of cases, such as *Milicevic v. Campbell*<sup>168</sup> and *Williamson v. Ah On*<sup>169</sup> which have upheld federal legislative provisions reversing the onus of proof in criminal matters. Moreover, recent dicta in *Leask v. Commonwealth*<sup>170</sup> and *Nicholas v. R.*<sup>171</sup> (the latter case directly

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<sup>165</sup> M. Aronson and J. Hunter, *Litigation: Evidence and Procedure* (6th ed) (1998) 702.

<sup>166</sup> *Final Report of the Constitutional Commission* (1988) 581 (summarizing the effect of certain Canadian cases).

<sup>167</sup> *Milicevic v. Campbell* (1975) 132 C.L.R. 307, 320 per Mason J. See generally in relation to s.1 justifications of incursions upon the presumption of innocence under s.11(d) of the Canadian Charter, D. Stuart, *Charter Justice in Canadian Criminal Law* (1991) 263-267. (1975) 132 C.L.R. 307.

<sup>168</sup> (1975) 132 C.L.R. 307.

<sup>169</sup> (1926) 39 C.L.R. 95. In *Williamson v. Ah On* it was argued, inter alia, that a reverse onus of proof provision attached to a federal offence infringed Ch.III of the Constitution. However, those judges who specifically addressed this argument were dismissive of it. See *ibid* 122 per Higgins J. and 128 per Rich and Starke JJ. See also *R. v. Hush; Ex parte Devanny* (1932) 48 C.L.R. 487, 505 per Rich J. (dissenting). But cf. W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 324. Note also that in *Adelaide Steamship Co. Ltd v. R. and Attorney-General (Cth)* (1912) 15 C.L.R. 65 Griffith C.J., Barton and O'Connor JJ. declined to express an opinion in response to an argument that a particular federal legislative provision reversing the onus of proof in a criminal matter was an attempted interference with the judicial power of the Commonwealth by seeking to direct courts to pass sentence without trial (*ibid* 102). Cf, however, Isaacs J. at first instance who, without deciding, expressed an opinion in favour of validity (*R. and Attorney-General (Cth) v. Associated Northern Collieries* (1911) 14 C.L.R. 387, 404-405).

<sup>170</sup> (1996) 187 C.L.R. 579 where a number of members of the High Court accepted that the Commonwealth Parliament can validly reverse the onus of proof (*ibid* 611 per Toohey J. citing *Milicevic v. Campbell* with apparent approval; 636 per Kirby J.) or alter the standard of proof from beyond a reasonable doubt (*ibid* 599 per Dawson J.; 611 per Toohey J.; 626-627 per Gummow J.) in criminal proceedings. On this aspect of the case, Gaudron J. expressed her agreement with the judgment of Toohey J. and McHugh J. expressed his agreement with the reasons of Dawson J. Chapter III of the Constitution, however, was not in issue.

raising a Chapter III issue) suggest that the current members of the High Court are not prepared to go down this path, concerned perhaps at being drawn into the admittedly difficult questions involved in determining when the presumption of innocence has been validly displaced.

**(ii) Constitutionalization of an Accused's Non-Compellability at Her or His Trial**

Turning from the presumption of innocence to the rule that an accused cannot be compelled to be a witness against herself or himself at her or his trial, this too enjoys protection under various international instruments and national charters of rights.<sup>172</sup> Although it is possible to cite various judicial statements attesting to the importance of the right to silence in our system of criminal justice<sup>173</sup> (of which right to silence the accused's non-compellability at trial is but one feature),<sup>174</sup> it is possible that constitutionalization of the presumption of innocence could itself carry with it the right of an accused not to testify at her or his trial. In *Environment Protection Authority v. Caltex Refining Co. Pty Ltd*,<sup>175</sup> Deane, Dawson and Gaudron JJ. (dissenting) said that

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171 (1998) 151 A.L.R. 312, 320-321 per Brennan C.J.; 331 per Toohey J.; 349 per McHugh J.; 357-358 per Gummow J.; 377 per Kirby J.

172 See Art.14(3)(g) of the International Covenant on Civil and Political Rights ("In the determination of any criminal charge against him, everyone shall be entitled ... Not to be compelled to testify against himself or to confess guilt"); s.11(c) of the Canadian Charter of Rights and Freedoms ("Any person charged with an offence has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence"); s.25(d) of the New Zealand Bill of Rights ("Everyone who is charged with an offence has, in relation to the determination of the charge ... The right not to be compelled to be a witness or to confess guilt"). The Fifth Amendment to the United States Constitution provides, inter alia, that no person shall "be compelled in any criminal case to be a witness against himself" (applied to the States via the due process clause of the Fourteenth Amendment (see H.J. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (6th ed) (1994) 67-69 citing *Malloy v. Hogan* 378 U.S. 1 (1964) and *Murphy v. Waterfront Commission of New York Harbor* 378 U.S. 52 (1964)).

173 See, eg, *Weissensteiner v. R.* (1993) 178 C.L.R. 217, 240 per Gaudron and McHugh JJ. (describing the right to silence as "a fundamental rule of the common law"). See also *Petty v. R.* (1991) 173 C.L.R. 95, 101 per Mason C.J., Deane, Toohey and McHugh JJ. (referring to the right to silence as a "fundamental right"); A. Mason, "Fair Trial" (1995) 19 *Crim.L.J.* 7, 10 ("the right to silence is firmly entrenched in our common law"); *Hammond v. Commonwealth* (1982) 152 C.L.R. 188, 203 per Brennan J. (describing the immunity from interrogation of an accused person as "a freedom so treasured by tradition and so central to the judicial administration of criminal justice").

174 *R. v. Director of Serious Fraud Office; Ex parte Smith* [1993] A.C. 1, 30-31 per Lord Mustill.

175 (1993) 178 C.L.R. 477.

the right of an accused person “to refrain from giving evidence and to avoid answering incriminating questions” was not wholly explained by the maxim that no one is bound to betray himself.<sup>176</sup> Instead, the right in question:

“is to be explained by the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way”.<sup>177</sup>

Mason C.J. and Toohey J. in their joint judgment discerned a similar relationship between the presumption of innocence and an accused’s non-compellability at trial:

“The fundamental principle of the common law that the onus rests on the Crown of proving guilt beyond reasonable doubt is complemented by the elementary principle that no accused person can be compelled by process of law to admit the offence with which he or she is charged: ‘an accused person is not bound to incriminate himself’.”<sup>178</sup>

Their Honours later described the presumption of innocence and the principle that “an accused person cannot be required to testify to the commission of the offence charged” as “companion rule[s]”.<sup>179</sup> Similarly, McHugh J. regarded the presumption of innocence as “reinforced by the further rule that an accused person cannot be compelled to give evidence in defence of his or her plea of not guilty”.<sup>180</sup> As McHugh explained:

“If the prosecution could compel the answering of questions in the course of the trial and the answering of interrogatories and the production of documents for the purpose of the trial, the burden of proof on the prosecution would be immeasurably lightened and, in the case of the guilty, frequently discharged.”<sup>181</sup>

And a decade earlier in *Sorby v. Commonwealth*,<sup>182</sup> Gibbs C.J. had observed that:

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<sup>176</sup> *Ibid* 527.

<sup>177</sup> *Id.* See also *ibid* 528 per Deane, Dawson and Gaudron JJ.: “the immunity enjoyed by an accused in a criminal trial extends to evidence of any kind, whether incriminating or not. The immunity is, perhaps, better explained by the principle that the prosecution bears the onus of proving its case, than by the more confined principle that an accused has a privilege against self-incrimination, notwithstanding that both have a common origin”.

<sup>178</sup> *Ibid* 501 (fn. omitted).

<sup>179</sup> *Ibid* 503.

<sup>180</sup> *Ibid* 550.

<sup>181</sup> *Ibid* 551.

<sup>182</sup> (1983) 152 C.L.R. 281.

“It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt.”<sup>183</sup>

Of course, the statements just quoted also raise the different, but related, question of whether the curial due process principle is apt to embrace the privilege against self-incrimination.<sup>184</sup> The High Court has recently affirmed, on more than one occasion, that the privilege against self-incrimination is a “basic and substantive common law right”<sup>185</sup> and a “fundamental right”,<sup>186</sup> but has also affirmed that it is liable to be overridden by statute<sup>187</sup> and has no application to corporations.<sup>188</sup> Admittedly, these recent statements were not delivered in a context involving the exercise of federal judicial power, but it is submitted that constitutionalization of the privilege under the curial due process mantle raises some difficult questions, particularly as the privilege is

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<sup>183</sup> *Ibid* 294. For criticism of the High Court’s rationalization of the right to silence in terms of the presumption of innocence, see M. Aronson and J. Hunter, *Litigation: Evidence and Procedure* (6th ed) (1998) 310-311.

<sup>184</sup> As Aronson and Hunter point out, the privilege against self-incrimination “is the term usually employed where the person being questioned ... is otherwise obliged to answer” (*ibid* 304). And see also in relation to the distinction between the accused’s non-compellability at trial and the privilege against self-incrimination, *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477, 503 per Mason C.J. and Toohey J.; 509, 517 per Brennan J.; 527-528 per Deane, Dawson and Gaudron JJ.

<sup>185</sup> *Reid v. Howard* (1995) 184 C.L.R. 1, 11 per Toohey, Gaudron, McHugh and Gummow JJ.

<sup>186</sup> *Ibid* 14 per Toohey, Gaudron, McHugh and Gummow JJ. See also *ibid* 5 per Deane J.; *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477, 498 per Mason C.J. and Toohey J. (“the privilege is now seen to be one of many internationally recognized human rights”); 522 per Brennan J. describing the privilege against self-incrimination as “a fundamental bulwark of liberty for the individual”); 532-533 per Deane, Dawson and Gaudron JJ. (the privilege against self-incrimination “may be classified as a human right” and “confers an immunity which is deeply embedded in the law” (fn. omitted)).

<sup>187</sup> *Reid v. Howard* (1995) 184 C.L.R. 1, 5 per Deane J.; 12, 14 per Toohey, Gaudron, McHugh and Gummow JJ.; *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477, 503-504 per Mason C.J. and Toohey J.; 512 per Brennan J.; 533-534 per Deane, Dawson and Gaudron JJ. See also *Sorby v. Commonwealth* (1983) 152 C.L.R. 281, 298-299 per Gibbs C.J.; 306-309 per Mason, Wilson and Dawson JJ.; and 313 per Murphy J. rejecting an argument that an attempt on the part of the Commonwealth Parliament to abrogate the privilege against self-incrimination before a Royal Commission infringed Chapter III of the Constitution.

<sup>188</sup> *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477.

frequently called in aid in non-judicial proceedings.<sup>189</sup> In addition, in *Sorby v. Commonwealth*<sup>190</sup> in the course of rejecting an argument that a federal legislative provision operating to displace the privilege in proceedings before a Royal Commission was invalid in light of Chapter III of the Constitution, Mason, Wilson and Dawson JJ. said:

“the privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch.III of the Constitution. It is a privilege that has been abrogated by legislative action in Australia, the United Kingdom and Canada without anyone having previously suggested that it involved the elimination of an integral element in the exercise of judicial power in a democratic society ... No doubt, like other features of our system of criminal justice, it has a long history and confers a very valuable protection. But it is quite another thing to say that it is an immutable characteristic of the exercise of judicial power”.<sup>191</sup>

There is support in the case law for the proposition that Parliament cannot, consistently with Chapter III, validly authorize a non-judicial body, such as a Royal Commission, to extract testimony from a person against whom federal charges are pending.<sup>192</sup> But this is because Parliament cannot interfere with the exercise of federal judicial power in a particular case – a separate, albeit related, doctrine to curial due process.

#### **(d) The Guarantee of a Fair Trial of a Federal Offence: Concluding Remarks**

As apparent from the preceding discussion, the meeting between the curial due process requirement and the fair trial principle signalled by Gaudron J. in *Re Nolan* and

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189 See, eg, *Hammond v. Commonwealth* (1982) 152 C.L.R. 188; *Sorby v. Commonwealth* (1983) 152 C.L.R. 281.

190 *Ibid.*

191 *Ibid* 308. See also *ibid* 298 per Gibbs C.J. (“The privilege against self-incrimination is not protected by the Constitution”).

192 *Hammond v. Commonwealth* (1982) 152 C.L.R. 188, 206-207 per Deane J. See also *Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330, 379-380 per O’Connor J.; *Melbourne Steamship Co. Ltd v. Moorehead* (1912) 15 C.L.R. 333, esp. 346 per Barton J. but also 341 per Griffith C.J. and cf 349-350 per Isaacs J. (dissenting); *Victoria v. Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 C.L.R. 25, 105 per Murphy J.; 161-162 per Brennan J.; *Environment Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477, 507 per Mason C.J. and Toohey J.; 557-559 per McHugh J. Many of these authorities are referred to in L. Zines, *The High Court and the Constitution* (4th ed) (1997) 203-204.

subsequently endorsed by Deane J. and Gaudron J. in *Dietrich* has the potential to reorient our federal criminal justice system by entrenching benchmark standards of fairness and justice in the exercise of federal judicial power which the Commonwealth Parliament is free to surpass, but unable to derogate from save in exceptional situations.

The fact that constitutional entrenchment of the right to a fair trial would secure from attrition a safeguard of individual liberty “deeply rooted in our system of law”<sup>193</sup> is a powerful consideration in favour of its acceptance. It was this view which led the Constitutional Commission to recommend that the Constitution be formally amended to incorporate a range of procedural protections for persons charged with a criminal offence.<sup>194</sup> On the other hand, judicial moves towards recognition of a constitutional right to a fair trial have been criticized in an article by Hope on the basis that the “uncertainty and inflexibility” likely to be associated with such a right may imperil urgently needed reforms of our criminal justice system designed to ameliorate problems of expense and delay.<sup>195</sup> Hope emphasizes the uncertainty which attends the notion of “fairness” in this context<sup>196</sup> and argues that “the threat of having legislation declared invalid on unpredictable grounds” may deter governments from reformist ventures.<sup>197</sup> Moreover, from the point of view of the courts, Hope speculates that “framing the right to a fair trial in constitutional terms might stunt its further development at common law, thereby making it less effective as a weapon against injustice in individual cases”.<sup>198</sup> These concerns are real and it must be conceded that there are situations in which a constitutional guarantee of a fair trial could stymie legislative attempts to enhance overall access to justice. Proposals to place time limits on court hearings have already

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193 *R. v. Macfarlane; Ex parte O’Flanagan and O’Kelly* (1923) 32 C.L.R. 518, 541 per Isaacs J. (quoted in *Dietrich v. R.* (1992) 177 C.L.R. 292, 326 per Deane J.).

194 *Final Report of the Constitutional Commission* (1988) 560-592, esp. 569.

195 J. Hope, “A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System” (1996) 24 *F.L.Rev.* 173, 174.

196 *Ibid* 177, 192-194.

197 *Ibid* 198.

198 *Id.* Sir Anthony Mason has also recognized these concerns. See A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 2. See also the comments of K. Mason in M. Coper and G. Williams (eds), *How Many Cheers for Engineers?* (1997) 138-139.

been discussed.<sup>199</sup> Another example of legislation which could founder on a constitutionally entrenched fair trial requirement, albeit drawn from state criminal law, relates to so-called “rape shield” laws which operate to exclude from a criminal trial evidence of a victim’s sexual history.<sup>200</sup>

In light of these competing considerations, the appropriate balance between constitutional “safeguards” and general law “flexibility” is a value judgment dependent as much upon a personal assessment as to whether individual rights are more appropriately protected in our society by Parliament or the courts as anything else. As should be apparent, this author’s preference is for constitutional protection of the right to a fair trial. But if the High Court is to proceed in the direction heralded by Deane J. and Gaudron J. in *Dietrich*, then it has to face the fact that criminal law in Australia is administered overwhelmingly by State courts exercising state jurisdiction. As Professor Zines has pointed out, Chapter III of the Constitution “even on [its] broadest construction ... refers only to *federal judicial power*”.<sup>201</sup> The prospect of two streams of criminal procedure in Australia – one representing in large part a constitutionally entrenched guarantee of a fair trial, the other not – is hardly attractive.<sup>202</sup> The extent to which the decision of the High Court in *Kable v. Director of Public Prosecutions (N.S.W.)*<sup>203</sup> ameliorates this position, either by extending the ambit of federal jurisdiction or by preventing the conferral of functions upon state courts incompatible with the exercise of federal judicial power, remains to be seen.<sup>204</sup> Nonetheless, and

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199 See above pp.245-246 of this chapter.

200 See, eg, “Staying a Trial for Unfairness: The Constitutional Implications” (1994) 18 *Crim.L.J.* 317 (editorial); the comments of P. Pether and K. Mason in M. Coper and G. Williams (eds), *How Many Cheers for Engineers?* (1997) 137-139; R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, 285.

201 L. Zines, “A Judicially Created Bill of Rights” (1994) 16 *Syd.L.R.* 166, 167 (emphasis added).

202 See *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 499 per Gaudron J. (“it is entirely appropriate that the one body of law should regulate the conduct of proceedings in a court, whether State or federal jurisdiction is invoked”). See also *ibid* 490 per Deane and Toohey JJ.

203 (1996) 189 C.L.R. 51.

204 This issue is discussed in E. Campbell, “Constitutional Protection of State Courts and Judges” (1997) 23 *Mon.L.R.* 397, 416-418. See also L. Zines, “The States and the

putting *Kable* to one side, if the curial due process principle constitutionalizes in federal jurisdiction the developing fair trial principle, this fair trial principle (at least at the hands of the High Court) will presumably continue to represent the common law of State criminal procedure. State Parliaments will thus have to act to overcome its effects in specific instances – a politically difficult manoeuvre when to do so involves trenching upon what in federal jurisdiction is a constitutional “right”.

But the emergence of a constitutional guarantee of a fair trial of a federal offence might require action on the part of the Commonwealth Parliament to alter the procedural law which federal statute currently applies to the trial of such matters. Section 68(1) of the *Judiciary Act* 1903 (Cth) provides:

“The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

...

(c) their trial and conviction on indictment; and

...

for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.”

Section 79 of the *Judiciary Act* 1903 (Cth) also provides:

“The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.”<sup>205</sup>

The *Evidence Act* 1995 (Cth) does not apply to State courts exercising invested federal jurisdiction.<sup>206</sup> Thus, at least in the case of those courts, the effect of ss.68 and 79 of the *Judiciary Act* is generally to apply State adjectival law to their proceedings. To the

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Constitution” in G. Moens and R. Mortensen (eds), *Essays in Honour of Darrell Richard Lumb* (working title) (forthcoming) (copy on file with author).

<sup>205</sup> See also s.80 *Judiciary Act* 1903 (Cth).

<sup>206</sup> Section 4.



extent that any State legislative provision applicable to federal proceedings by ss.68 and 79 of the *Judiciary Act* was found to be inconsistent with the curial due process obligation, then it could have no operation.<sup>207</sup> And this in turn may ultimately force the Commonwealth's hand in terms of the enactment of non-referential procedural laws.<sup>208</sup>

#### 4. Curial Due Process and Equality

At the outset of this chapter when surveying applications of the curial due process principle identified by members of the High Court, it was noted that Gaudron J. has accepted that Chapter III of the Constitution founds a type of equality guarantee. In the final section of this chapter it remains to explore her Honour's opinion in this regard and the associated question of whether the Australian Constitution enshrines a guarantee of "substantive due process" in the exercise of federal judicial power.<sup>209</sup>

*Leeth v. Commonwealth*<sup>210</sup> is the relevant authority, although it must now be read in light of *Kruger v. Commonwealth*.<sup>211</sup> *Leeth* concerned the validity of s.4 of the *Commonwealth Prisoners Act 1967* (Cth) which directed a Chapter III court engaged in sentencing a federal offender to fix a non-parole period by reference to the law of the State or Territory where the offender was convicted. The relevant State and Territory laws governing the fixing of non-parole periods were not identical, with the result that the minimum term of imprisonment imposed upon persons convicted of the same federal offence could vary according to the State or Territory where their trial took place. The plaintiff argued that this scheme was discriminatory and infringed an implied constitutional prohibition against such legislation flowing from the text and structure of the Constitution as a whole and/or the exclusive vesting of federal judicial

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<sup>207</sup> For one approach to this issue see *D.P.P. (Cth) v. Bayly* (1994) 63 S.A.S.R. 97, esp. 116-119.

<sup>208</sup> The uncertainty which can attend the question whether a particular court is exercising federal jurisdiction adds to the difficulties here.

<sup>209</sup> See generally, G. Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 201-208 adopting in this setting the terminology of procedural and substantive due process.

<sup>210</sup> (1992) 174 C.L.R. 455.

<sup>211</sup> (1997) 190 C.L.R. 1.

power in Chapter III courts. A majority of the High Court in a joint judgment of Mason C.J., Dawson and McHugh JJ. and a separate judgment of Brennan J. upheld the provision at issue. Yet given the terms of Brennan J.'s concurrence with the majority, *Leeth* did not clearly resolve the question whether, or to what extent, the Australian Constitution contains a guarantee of equality. It is thus appropriate to start with the dissenting judgment of Gaudron J.

Gaudron J. applied the curial due process notion to invalidate s.4 of the *Commonwealth Prisoners Act*. Her Honour accepted that s.4 was discriminatory in the sense that “in the ordinary course of events, the exercise of that power would involve a failure to treat like offences against the laws of the Commonwealth in a like manner and also a failure to give proper account to genuine differences”.<sup>212</sup> In so determining, her Honour emphasized that State courts exercising invested federal jurisdiction – in which most federal offences are tried – are exercising “an Australian jurisdiction”<sup>213</sup> and that “it is manifestly absurd that the legal consequences attaching to a breach of a law of the Commonwealth should vary merely on account of the location or venue of the court in which proceeding are brought”.<sup>214</sup> Gaudron J. then set out her formulation of the curial due process principle, maintaining as in *Re Nolan* and *Polyukhovich* that “an essential feature of judicial power” is that it “should be exercised in accordance with the judicial process”.<sup>215</sup> But her Honour added a previously unforeseen dimension to the operation of this implication:

“All are equal before the law. And *the concept of equal justice* – a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such – *is fundamental to the judicial process.*”<sup>216</sup>

<sup>212</sup> *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 502-503.

<sup>213</sup> *Ibid* 498 (fn. omitted). And see now *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51.

<sup>214</sup> *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 499 (fn. omitted).

<sup>215</sup> *Ibid* 502 (fn. omitted).

<sup>216</sup> *Id* (emphasis added). See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 107 per Gaudron J.; *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 112 per Gaudron J.; *Nicholas v. R.* (1998) 151 A.L.R. 312, 335 per Gaudron J.; M. Gaudron,

Thus it followed that since exercise of the power on the part of a Chapter III court to fix a non-parole period in accordance with s.4 of the Act “would necessarily involve impermissible discrimination” it was “not part of the judicial power of the Commonwealth”<sup>217</sup> – a conclusion which her Honour expressly affirmed in *Kruger v. Commonwealth*.<sup>218</sup>

Reflecting on this judgment in *Leeth*, it is submitted that Gaudron J.’s claim that the concept of equal justice is fundamental to the judicial process is problematic in a number of respects. From a purely practical point of view, the scope of the requirement is unclear. Later dicta indicate that Gaudron J. was concerned with more than just discrimination between persons on the basis of their locality within the Commonwealth, and would have arrived at the same conclusion in *Leeth* had the *Commonwealth Prisoners Act* directed Chapter III courts to fix varying minimum terms of imprisonment for the same federal offence on the basis of, for example, race or gender.<sup>219</sup> But in *Kruger*, her Honour seemingly narrowed her description of the guarantee, stating that Chapter III prevents “the conferral on courts of *discretionary powers* which are conditioned in such a way that they must be exercised in a discriminatory manner”<sup>220</sup> – a limitation which did not in terms appear in her discussion in *Leeth*. Her most recent restatement of this view in *Nicholas v. R.* does not cast further light on the matter, her Honour simply speaking of an implied prohibition that “a court not be required ... to proceed in a manner that does not ensure equality before the law”.<sup>221</sup>

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“Equality Before the Law With Particular Reference to Aborigines” (1993) 1 *T.J.R.* 81, 88.

217 *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 503.

218 (1997) 190 C.L.R. 1, 112.

219 *Nicholas v. R.* (1998) 151 A.L.R. 312, 337-338.

220 *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 112 (emphasis added, fn. omitted).

221 *Nicholas v. R.* (1998) 151 A.L.R. 312, 335.

What is clear is that Gaudron J. regards her “equal justice” invocation of the curial due process requirement as more confined than the basis upon which Deane and Toohey JJ. in *Leeth* invalidated s.4 of the *Commonwealth Prisoners Act*<sup>222</sup> – a basis which Gaudron J. herself has rejected.<sup>223</sup> As is well known, Deane and Toohey JJ. found that s.4 of the Act infringed an implied constitutional guarantee of the “equality of the people of the Commonwealth under the law and before the courts”.<sup>224</sup> Although their Honours invoked the separation of federal judicial power in aid of recognition of this implied guarantee,<sup>225</sup> they relied upon other considerations as well,<sup>226</sup> and it is clear that they contemplated that the guarantee operated as a general constraint upon federal governmental power and was not limited to the operations of Chapter III courts.<sup>227</sup> Deane and Toohey JJ., however, still supported Gaudron J.’s more limited claim that “equal justice” tempers the exercise of federal judicial power for their Honours said in a passage which was earlier quoted in part:

“in Ch.III’s exclusive vesting of the judicial power of the Commonwealth in the ‘courts’ which it designates, there is implicit a requirement that those ‘courts’ exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially. *At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds*”.<sup>228</sup>

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222 *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 501-502 per Gaudron J.; *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 112 per Gaudron J.

223 *Ibid* 112-113.

224 *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 491.

225 *Ibid* 486-487.

226 Notably the “conceptual basis of the Constitution” being the “free agreement of ‘the people’ ... of the federating Colonies to unite in the Commonwealth under the Constitution” (*ibid* 486) and “the existence of a number of specific [constitutional] provisions which reflect the doctrine of legal equality” (*ibid* 487).

227 See the discussion *ibid* 489-490.

228 *Ibid* 487 (emphasis added). And see G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 203.

But despite so stating, Deane and Toohey JJ. expressly indicated that their decision on the basis of their generalized equality guarantee made it unnecessary to consider the plaintiff's alternative argument based solely on Chapter III.<sup>229</sup>

Apart from the above statement of Deane and Toohey JJ., other members of the High Court are yet to embrace Gaudron J.'s equal justice application of curial due process. Her Honour might receive support from Kirby J., for in the New South Wales Court of Appeal in *Ngoc Tri Chau v. Director of Public Prosecutions (Cth)*<sup>230</sup> his Honour said that he had "some sympathy for the notion of a constitutionally implied principle of equality of treatment in the application of the judicial power of the Commonwealth as discussed in *Leeth*".<sup>231</sup> Mason C.J., Dawson and McHugh JJ., however, have disavowed this development. In their joint judgment in *Leeth* they rejected the finding of Deane and Toohey JJ. that the Constitution is predicated upon a doctrine of legal equality, stating that "[t]here is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth".<sup>232</sup> In *Kruger*, Dawson J., Gaudron J., McHugh J. and Gummow J. each affirmed this view, thus rejecting a generalized equality guarantee.<sup>233</sup> But the joint majority judgment in *Leeth* also rejected Gaudron J.'s more limited approach suggesting that her "equal justice" interpretation of the curial due process requirement failed to distinguish between "the function of a court" (their Honours implying that the "functional or procedural" dimension of a court's operation was a legitimate concern of curial due process<sup>234</sup>) and "the law which a court is to apply in the exercise of its function"<sup>235</sup> (outside the ambit of curial due process).<sup>236</sup> The fourth member of the *Leeth* majority – Brennan J. – did not directly address this issue.<sup>237</sup>

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229 *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 493.

230 (1995) 132 A.L.R. 430.

231 *Ibid* 445.

232 (1992) 174 C.L.R. 455, 467.

233 *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 63, 68 per Dawson J.; 112-113 per Gaudron J.; 142 per McHugh J.; 153-155 per Gummow J. Although Brennan C.J. was not prepared to embrace a generalized equality guarantee, his language was more guarded (*ibid* 44-45). Cf *ibid* 94-97 per Toohey J. affirming his position in *Leeth*.

234 *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 470.

235 *Ibid* 469.

It follows that the question whether there exists a doctrine of substantive due process in the exercise of federal judicial power and, in that context, the scope of the principle articulated by Gaudron J. in *Leeth*, awaits resolution by the High Court.<sup>238</sup> It is submitted, however, that the High Court would not be justified in embracing the equal justice emanation of curial due process to the extent that it imports more than *procedural equality* in the exercise of the judicial function.<sup>239</sup> In part this conclusion flows from the model of the Australian separation doctrine developed in Chapter Three which emphasized pursuit of the rule of law via structural and procedural means. But Professor Winterton has also made the point that the inclusion of equality in the concept of “judicial power” in *Leeth* was “merely asserted”.<sup>240</sup> Thus the precise basis upon

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- 236 See G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 203 interpreting this passage from the judgment of Mason C.J., Dawson and McHugh JJ. as evincing their Honours’ opinion that s.71 entrenches only procedural as opposed to substantive due process. Dawson J. and McHugh J. have since affirmed this view. See *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 63, 68 per Dawson J. (McHugh J. agreeing with Dawson J. in this regard).
- 237 But see *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 480 per Brennan J.
- 238 The Full Court of the Family Court in *In the Marriage of B and R* (1995) 19 Fam.L.R. 594, 621-623 per Fogarty, Kay and O’Ryan JJ. cited with approval the passages from the judgments of Deane and Toohey JJ. and Gaudron J. in *Leeth* to the effect that equal justice tempers the exercise of federal judicial power. The Full Court then stated that “[t]he notion of equal justice binds the Family Court, as it does any Chapter III court” (*ibid* 621). The case before their Honours did not involve the validity of federal legislation, but the Full Court used the equal justice notion as an element in its decision that the trial judge had erred in rejecting the admission of certain evidence in a custody dispute between an Aboriginal mother and a white Australian father relating to the historical experience of Aboriginal children growing up in white society. Although *In the Marriage of B and R* is probably best classified under the rubric of procedural due process, it shows that the distinction between substantive and procedural due process is by no means clear cut. On the question whether there exists a doctrine of substantive due process in the exercise of federal judicial power, see also *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 687-691 per Toohey J.
- 239 Procedural equality in the exercise of the judicial function (albeit at certain stages of Anglo-Australian legal history a relatively crude version thereof) does form part of our legal heritage. For example, insistence upon judicial impartiality and absence of bias is long established as is the necessity to hear both sides of a legal controversy. See *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 66 per Dawson J.; 155 per Gummow J.; G. Kennett, “Individual Rights, The High Court and the Constitution” (1994) 19 *M.U.L.R.* 581, 603.
- 240 G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 205. And see the view of Professor Winterton that “the ‘judicial power of the Commonwealth’ should not generally be held to include substantive rights” (*ibid* 207 (fn. omitted) and generally *ibid* 204-208).

which Deane J., Toohey J. and Gaudron J. arrived at their opinion in this regard is unclear. But if one examines legal history and experience, the conclusion is unavoidable that courts have developed and applied discriminatory common law doctrines.<sup>241</sup> Indeed, this has been a frequent criticism directed to courts by contemporary legal commentators. Admittedly, in more recent times notions of substantive equality have infused many welcome legal developments.<sup>242</sup> But as highly desirable as absence of discrimination in the exercise of all public and private power in our society is, equality in the substantive law which a court is to apply is not a necessary feature of the rule of law<sup>243</sup> and, in the ultimate analysis, taps a vein of legal thought of too recent a provenance to be regarded as impliedly incorporated in s.71 of the Constitution.<sup>244</sup>

## 5. Conclusion

The applications of the curial due process principle considered in this chapter are not the only possible offspring of a purposive construction of s.71 of the Constitution. For example, Deane J.'s claim in *Polyukhovich* that Chapter III is based upon "the assumption of traditional judicial procedures, remedies and methodology"<sup>245</sup> suggests that Parliament may not be able to limit the availability of certain forms of relief on the part of a Chapter III court – a restraint upon legislative power of no small significance in

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<sup>241</sup> See in relation to the common law, *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 66 per Dawson J.; 154 per Gummow J.; D. Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Mon.L.R.* 194, 212 and G. Kennett, "Individual Rights, The High Court and the Constitution" (1994) 19 *M.U.L.R.* 581, 611. It is submitted that the claim of Deane and Toohey JJ. in *Leeth* that "putting to one side the position of the Crown and some past anomalies, notably, discriminatory treatment of women, the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government" ((1992) 174 C.L.R. 455, 486) is so heavily qualified as to beg the question of the principle identified. See also in this regard L. Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd.L.R.* 166, 181.

<sup>242</sup> See, eg, *Mabo v. Queensland [No.2]* (1992) 175 C.L.R. 1.

<sup>243</sup> J. Raz, "The Rule of Law and its Virtue" (1977) 93 *L.Q.R.* 195, esp. 200.

<sup>244</sup> For an argument leading to the same conclusion, see G. Kennett, "Individual Rights, The High Court and the Constitution" (1994) 19 *M.U.L.R.* 581, 594, 603.

<sup>245</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607.

a remedy driven system like the common law.<sup>246</sup> The judgments of Toohey J. and Gaudron J. in *Polyukhovich* also hint at further due process implications<sup>247</sup> as do recent statements of Gaudron J. in *Nicholas v. R.*<sup>248</sup> In reality, the High Court has only just begun to divine the limits of Chapter III of the Constitution as a source of implications protective of individual liberty,<sup>249</sup> a theme which is further developed in the following chapter.

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<sup>246</sup> See also A. Mason, "A New Perspective on Separation of Powers" (1996) 82 *C.B.P.A.* 1, 7.

<sup>247</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 687-690 per Toohey J.; 704 per Gaudron J.

<sup>248</sup> (1998) 151 A.L.R. 312, 336.

<sup>249</sup> G. Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 208.



## CHAPTER 7 - THE SEPARATION OF FEDERAL JUDICIAL POWER AS A SOURCE OF IMPLIED FREEDOMS: ACTS OF ATTAINDER AND RETROSPECTIVITY

“Were it [the judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.”

W. Blackstone, *Commentaries on the Laws of England* (1765) vol.1 (facsimile ed, 1983, The Legal Classics Library) 259.

This final chapter continues to explore ways in which the constitutional commitment to the separation of federal judicial power from legislative and executive power can operate as a source of implications protective of individual “rights”. Specifically, it considers the implied prohibition upon federal Acts of Attainder – that is, legislative judgments and punishments – suggesting a framework for a substantive approach to the identification of this species of enactment in Australia. But whereas the courts should be alert to this type of usurpation of their power, it is argued that, by contrast, there is no constitutional foundation in the separation of powers for a general prohibition upon retroactive federal criminal laws.

### 1. Acts of Attainder

#### (a) General and Theoretical Considerations

As apparent from Chapter Two of this thesis, the notion that s.71 of the Constitution deals in exhaustive terms with the allocation of federal judicial power was established by the High Court in the first two decades of federation. Thus, prior to 1920 it had already been accepted that federal judicial power could not validly be conferred on the Comptroller-General of Customs,<sup>1</sup> the Inter-State Commission,<sup>2</sup> or a body created by the Commonwealth Parliament whose members did not enjoy life tenure in accordance

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<sup>1</sup> *Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330.

<sup>2</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54.

with the implicit requirements of s.72 of the Constitution.<sup>3</sup> If rule of law considerations prevented the Commonwealth Parliament from investing these three bodies with judicial functions, then a fortiori the legislature could hardly assume such functions itself.<sup>4</sup> However, it was not until 1991 in *Polyukhovich v. Commonwealth*<sup>5</sup> that the full import of the implied constitutional prohibition upon legislative usurpation of the judicial function began to emerge.

In *Polyukhovich*, six judges of the High Court either expressly or impliedly accepted that the Constitution's separation of judicial power from legislative and executive power would prevent the Commonwealth Parliament from validly passing an Act of Attainder or an Act of Pains and Penalties.<sup>6</sup> As a matter of English legal history, both Acts of Attainder and Acts of Pains and Penalties were devices whereby punishment was legislatively imposed upon specified individuals or a group of individuals without the intervention of a judicial determination and pronouncement of guilt.<sup>7</sup> In the case of an Act of Attainder the legislated punishment was death whereas in the case of an Act of Pains and Penalties the punishment was something other than death such as imprisonment, forfeiture of property, banishment or loss of franchise.<sup>8</sup> The 1701 attainder directed to "the pretended Prince of Wales" (the catholic James Stuart, known to subsequent generations as the "old pretender") gives the historic flavour of this class of legislation:

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<sup>3</sup> *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434.

<sup>4</sup> And see Isaacs J. in *Huddart, Parker and Co. Proprietary Ltd v. Moorehead* (1909) 8 C.L.R. 330, 382-383 quoting from Blackstone to the effect that were judicial power "joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose *decisions* would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe".

<sup>5</sup> (1991) 172 C.L.R. 501.

<sup>6</sup> See below fn.19 of this chapter. But note the earlier recognition of this proposition by Murphy J. in *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 C.L.R. 25, 107.

<sup>7</sup> M.P. Lehmann, "The Bill of Attainder Doctrine: A Survey of the Decisional Law" (1978) 5 *Hastings Const.L.Q.* 767, 767 fn.1, 768-771.

<sup>8</sup> *Ibid* 768-770.

“Whereas the pretended Prince of Wales hath, since the Decease of the late King James ... openly and traiterously, with Design to dethrone your Majesty, assumed the Name and Title of James the Third ... be it enacted ... That the said pretended Prince of Wales stand and be convicted and attainted of High Treason, and that he suffer Pains of Death, and incur all Forfeitures, as a Traitor convicted and attainted of High Treason.”<sup>9</sup>

The United States Constitution has always contained provisions expressly proscribing the enactment by either Congress or the States of any “Bill of Attainder” or “ex post facto Law”.<sup>10</sup> In erecting this barrier against the Bill of Attainder, the framers of the American Constitution were reacting not only to the English experience of such legislation (although the last Act of Attainder to result in the death of an individual appears to have been enacted by Parliament in 1696, Acts of Attainder – like that enacted in relation to the “pretended Prince of Wales” – continued to secure passage through Parliament in the first half of the eighteenth century and Bills of Pains and Penalties persisted into the first two decades of the nineteenth century<sup>11</sup>) but also to legislative incursions upon the judicial function, including the passage of Acts of Attainder, in several of the States in the revolutionary period.<sup>12</sup> The United States Supreme Court has long accepted that the prohibition against Bills of Attainder is also directed to Bills of Pains and Penalties, and it is in this composite sense that the expression “Bill” or “Act of Attainder” will henceforth be used. But beyond this, in elucidating the meaning of the Bill of Attainder clauses, the Supreme Court has offered

<sup>9</sup> 13 William III, c.3 (1701) (reproduced in *Statutes at Large* vol.4, 81).

<sup>10</sup> Art.I, s.9(3) (directed to Congress); Art.I, s.10(1) (directed to the State legislatures).

<sup>11</sup> M.P. Lehmann, “The Bill of Attainder Doctrine: A Survey of the Decisional Law” (1978) 5 *Hastings Const.L.Q.* 767, 774; W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) 106 fn.1. *Halsbury’s Laws of England* (4th ed) (1980) para.1312 gives 1746 as the date of the last Act of Attainder passed by Parliament.

<sup>12</sup> *The Federalist No.44* in B.F. Wright (ed), *The Federalist* (1961) 319 (Madison). See also *The Federalist No.48* in *ibid* 343-347 (Madison); M. Sharp, “The Classical American Doctrine of ‘The Separation of Powers’” (1935) 2 *U. of Chi.L.Rev.* 385, 393 fn.19 quoting contemporary accounts of an Act of Attainder passed by the legislature of Virginia during the revolutionary period; Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, 331; M.P. Lehmann, “The Bill of Attainder Doctrine: A Survey of the Decisional Law” (1978) 5 *Hastings Const.L.Q.* 767, 777; *United States v. Lovett* 328 U.S. 303, 322 (1946) per Frankfurter J.; *United States v. Brown* 381 U.S. 437, 442 (1965) per Warren C.J. (speaking for a majority of the Court).

two competing conceptions of the constitutional limitation. The first is a more confined historical definition, associated with the judgment of Frankfurter J. in *United States v. Lovett*,<sup>13</sup> emphasizing those features which, historically speaking, characterized English and early American Acts of Attainder. This contrasts with a broader “functional” approach emphasizing the evils which the Bill of Attainder clauses sought to forestall.<sup>14</sup> It is the broader functional approach which has generally prevailed,<sup>15</sup> but as will be seen in due course, this debate has had a resonance in the High Court in the *Polyukhovich Case*.

*Polyukhovich v. Commonwealth* concerned the validity of s.9 of the *War Crimes Act* 1945 (Cth) (introduced into the principal Act in the late 1980s) which retroactively made it an offence between 1 September 1939 and 8 May 1945 to have committed a “war crime”. The expression “war crime” was defined in some detail, but in practice related almost exclusively to conduct which occurred in Europe during the Second World War. Mr Polyukhovich was charged under s.9 with war crimes allegedly committed in the Ukraine between September 1942 and May 1943. He challenged the validity of s.9 on the ground, inter alia, that it amounted to a legislative usurpation of the judicial power of the Commonwealth, or, at least, contravened Chapter III of the Constitution. A majority of the High Court, however, rejected his claim and upheld s.9 as a valid law with respect to s.51(xxix) of the Constitution. Mr Polyukhovich was subsequently tried and acquitted.<sup>16</sup>

The rejection of the Chapter III argument in *Polyukhovich* masked a diverse range of views on the question of when Parliament will be held to have invalidly exercised or undermined judicial power – for example, the Court split three/three on the pivotal question whether the creation of a retroactive federal offence involves, at least in certain

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<sup>13</sup> 328 U.S. 303 (1946).

<sup>14</sup> Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, esp. 332-337.

<sup>15</sup> See below text accompanying fn.76 of this chapter.

<sup>16</sup> G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 201 fn.111.

circumstances, an unauthorized legislative usurpation or invasion of the curial function.<sup>17</sup> Indeed, as discussed in a later section of this chapter, Deane J. and Gaudron J. (both dissenting) would have struck down s.9 of the *War Crimes Act* in its application to the proceedings against Mr Polyukhovich on this basis.<sup>18</sup> But on the issue of Acts of Attainder a majority in *Polyukhovich* accepted that despite the absence in the Australian Constitution of an express prohibition upon such legislation, an Act of the Commonwealth Parliament imposing punishment upon named individuals or an ascertainable group of individuals without a judicial finding of guilt would amount to a legislative judgment contrary to the separation of powers.<sup>19</sup> Section 9 of the *War Crimes Act*, however, did not fall into this category because, as Toohey J. succinctly put it, “[i]t specifies no particular persons and it requires a trial”,<sup>20</sup> that trial focussing on whether the accused had infringed a general rule, albeit one prescribed retrospectively.

There can be no doubt that the Court was correct in recognizing the invalidity of federal Acts of Attainder. It is the basic function of the federal legislature to formulate broad and general rules for the “peace, order, and good government of the Commonwealth”, its composition and processes being specifically tailored to performance of this rule-making role within a representative federal democracy. When Parliament departs from this activity, and imposes punishment for past conduct upon named individuals or an identifiable group, it is engaged not simply in rule formulation, but *rule application*; in other words, unless it be assumed that Parliament is behaving in a wholly whimsical

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<sup>17</sup> See below pp.318-324 of this chapter.

<sup>18</sup> See below pp.318-321 of this chapter.

<sup>19</sup> (1991) 172 C.L.R. 501, 535-536, 539 per Mason C.J.; 612 per Deane J.; 646-649 per Dawson J. (his Honour’s analysis strongly suggesting this outcome); 685-686 per Toohey J.; 721 per McHugh J. Gaudron J. simply said that “a law which declares a person guilty of an offence” involves a “usurpation of judicial power” (*ibid* 706). Because he found that the relevant provisions of the *War Crimes Act* were not supported by a head of Commonwealth legislative power, Brennan J. did not have to consider Chapter III of the Constitution. Nonetheless, it seems that Brennan J. agrees with the rest of the Court in this regard (*Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27-29 per Brennan, Deane and Dawson JJ.). See also *ibid* 70 per McHugh J.

<sup>20</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 686. See also *ibid* 536 per Mason C.J.; 647-651 per Dawson J.; 721 per McHugh J. See also the rejection of the Bill of Attainder argument in *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 88 per Dawson J. and 99 per Toohey J.

fashion, it is applying a prospective (or retroactive) rule to a particular set of circumstances in an attempt conclusively to determine the rights of individuals.<sup>21</sup> And this, of course, is to exercise that category of power which has been held to reside exclusively in Chapter III courts, not for mere tripartite symmetry, but in order to promote adherence to the rule of law – the High Court having repeatedly emphasized that the determination and punishment of criminal guilt is the archetypal judicial function.<sup>22</sup>

From the perspective of the rule of law, Parliament is ill-equipped to make specific determinations as to the rights of individuals; it is by definition a partisan body whose decision-making processes do not guarantee to an affected individual the right to be heard.<sup>23</sup> Also, Parliament is free to dispense with rules governing the burden and standard of proof in a criminal trial to which Chapter III courts are traditionally and, arguably, constitutionally subject.<sup>24</sup> In the words of an American commentator, arguing for an approach to the Bill of Attainder clause grounded in the separation maxim:

“The bill of attainder clause is an implementation of the belief that the legislature is a tribunal unsuited to conducting ... an investigation [involving the gathering and evaluation of empirical data relating to specific individuals]. It demands that whenever an individual is ‘tried’ to see whether he comes within the purview of a broad mandate, he be tried in the proceeding best adapted to

<sup>21</sup> This analysis draws from Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, esp. 345-351.

<sup>22</sup> See, eg, *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153, 175, 178 per Isaacs J.; *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 11 per Jacobs J.; *Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518, 581 per Deane J.; *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 107 per Gaudron J.

<sup>23</sup> See, eg, Pearce’s description of “Cahill’s case” in which in 1968 the Victorian Legislative Assembly found a person guilty of contempt of Parliament without affording him an oral hearing (D.C. Pearce, “Contempt of Parliament – Instrument of Politics or Law?” (1969) 3 *F.L.Rev.* 241, 243-246. Cf the constitutionally entrenched natural justice obligation which constrains the manner of exercise of federal judicial power by Chapter III courts (discussed above ch.6).

<sup>24</sup> As to these last two points, see Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, 345-346, 349-350. See also L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 641. And see above pp.262-265 (ch.6).

safeguard his rights and dispassionately seek the truth – a trial before an adjudicatory body.”<sup>25</sup>

Or in the words of Cooley:

“Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited, - the very class of cases most likely to be prosecuted by this mode.”<sup>26</sup>

Moreover, in addition to the inappropriateness of Parliament as a body for rule application, a legislated judgment raises the spectre of a collapse of the distinction, vital to the maintenance of the rule of law, between rule formulation and rule application. Although the notion that judges – whether applying common law, statute or the Constitution – do not engage in interstitial law-making is discredited,<sup>27</sup> the ambit of judicial law-making is significantly more constrained than parliamentary law-making.<sup>28</sup> In other words, assuming always the availability of a head of federal legislative power, Parliament (unlike the courts) is at large in rule creation and were it able to combine this function in one and the same act (and Act) with that of rule application, would be able to devise the law according to which it simultaneously judges an individual or group. The breakdown of the rule of law involved in such a situation is patent.<sup>29</sup>

<sup>25</sup> Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, 351.

<sup>26</sup> Cooley, *Constitutional Limitations* (6th ed) (1890) 314 quoted in *ibid* 346. See also *United States v. Brown* 381 U.S. 437, 445-446 (1965) per Warren C.J. (speaking for a majority of the Court); L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 650, 656-657; *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607 per Deane J. emphasizing the relationship between the prohibition upon the exercise of judicial power by the Commonwealth Parliament and procedural due process.

<sup>27</sup> “[I]t is widely recognized that courts, in exercising their judicial power, make and alter law in the sense of formulating new or altered legal principles” (*ibid* 532-533 per Mason C.J.).

<sup>28</sup> See, eg, A. Mason, “The Role of the Courts at the Turn of the Century” (1993) 3 *J.J.A.* 156, 165; B. Horrigan, “Is the High Court Crossing the Rubicon? – A Framework for Balanced Debate” (1995) 6 *P.L.R.* 284.

<sup>29</sup> F.S. Burin, “The Theory of the Rule of Law and the Structure of the Constitutional State” (1966) *Amer. Univ. Law Rev.* 313, 315; W. Blackstone, *Commentaries on the Laws of England* vol.1 (1765) (facsimile ed, 1983, The Legal Classics Library) 259; L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 657 (“[b]y restricting the legislative

**(b) The *Fitzpatrick and Browne Case***

These arguments against the legislative discharge of curial functions are graphically illustrated by the events which gave rise to the decision of the High Court in 1955 in *R. v. Richards; Ex parte Fitzpatrick and Browne* in which it was held that the House of Representatives was empowered to commit an individual to prison for contempt of Parliament.<sup>30</sup> Raymond Fitzpatrick was the proprietor, and Frank Browne the editor, of the *Bankstown Observer* – a free suburban weekly newspaper printed (at least according to Browne) on four sheets of foolscap. The *Observer* published an article which alleged that the local member for the federal electorate of Reid, Charles Morgan (Labor Party), “is, or was” involved in an “Immigration Racket”.<sup>31</sup> Mr Morgan took umbrage and complained to the House of Representatives that the article constituted “a direct attack on my integrity and my conduct as a member of this House”.<sup>32</sup> The matter was referred by the House to its Committee of Privileges which found Mr Fitzpatrick and Mr Browne guilty of a breach of privilege in “publishing articles intended to influence and intimidate a member ... in his conduct in the House”,<sup>33</sup> the Committee simultaneously clearing Mr Morgan of any improper conduct as a member of Parliament.<sup>34</sup> On a

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- process to the formulation of general rules, the bill of attainder clauses work to guarantee an institutional fractionalization of power”).
- 30 (1955) 92 C.L.R. 157. The following account is drawn from G. Souter, *Acts of Parliament* (1988) 431-433; J.A. Pettifer (ed), *House of Representatives Practice* (1981) 656-657; N. O’Neill and R. Handley, *Retreat From Injustice: Human Rights in Australian Law* (1994) 253; *Parliamentary Debates* 3 May, 9 and 10 June 1955 and “Report from the Committee of Privileges Relating to Articles Published in the *Bankstown Observer*” (8 June 1955) in *Votes and Proceedings of the House of Representatives 1954-1955*, vol.1, 417-430. For a fuller account of the Fitzpatrick and Browne affair in the context of the press/parliamentary relationship of the time, see C.J. Lloyd, *Parliament and the Press: The Federal Parliamentary Press Gallery 1901-1988* (1988) 199-206.
- 31 *Parliamentary Debates*, 3 May 1955, 352 (Charles Morgan quoting from the article); G. Souter, *Acts of Parliament* (1988) 431. The offending article is reproduced as part of Appendix “B” attached to “Report from the Committee of Privileges Relating to Articles Published in the *Bankstown Observer*” (8 June 1955) in *Votes and Proceedings of the House of Representatives 1954-1955*, vol.1, 417-430.
- 32 *Parliamentary Debates*, 3 May 1955, 353.
- 33 *Parliamentary Debates*, 9 June 1955, 1614 (Prime Minister Menzies quoting from the Committee’s findings). See also “Report from the Committee of Privileges Relating to Articles Published in the *Bankstown Observer*” (8 June 1955) in *Votes and Proceedings of the House of Representatives 1954-1955*, vol.1, 417, 423.
- 34 *Id.*



motion moved by Prime Minister Menzies, the House, after a brief debate, adopted these findings.<sup>35</sup> Mr Fitzpatrick and Mr Browne were informed that they would be heard at the Bar of the House on the following day (10 June 1955) before any decision was made as to “proper punishment”<sup>36</sup> for their conduct.

Fitzpatrick and Browne duly appeared at the Bar of the House, were denied legal representation,<sup>37</sup> made their statements – Fitzpatrick’s a brief apology,<sup>38</sup> Browne’s a feisty defence of the rights of fair trial and free speech<sup>39</sup> – and, after the House deliberated, were committed to prison for three months. The essence of the House’s resolution in relation to Fitzpatrick (the resolution in relation to Browne was not relevantly different) was as follows:

“That Raymond Edward Fitzpatrick, being guilty of a serious breach of privilege, be for his offence committed to the custody of the person for the time being performing the duties of Chief Commissioner of Police at Canberra in the Australian Capital Territory or to the custody of the keeper of the gaol at such place as Mr Speaker from time to time directs and that he be kept in custody until the tenth day of September, 1955, or until earlier prorogation or dissolution, unless this House shall sooner order his discharge.”<sup>40</sup>

Fitzpatrick and Browne were ultimately sent to Goulburn Gaol.

The power at the heart of these events and on which the House of Representatives relied in committing Fitzpatrick and Browne to prison was s.49 of the Constitution which states that until Parliament otherwise declares (and in 1955 there had been no contrary declaration<sup>41</sup>), the “powers, privileges, and immunities of the Senate and of the House

<sup>35</sup> *Parliamentary Debates*, 9 June 1955, 1613-1617.

<sup>36</sup> *Ibid* 1615 (Prime Minister Menzies).

<sup>37</sup> *Parliamentary Debates*, 10 June 1955, 1625.

<sup>38</sup> *Id.*

<sup>39</sup> *Ibid* 1625-1627.

<sup>40</sup> *Ibid* 1663-1664 (also quoted in *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 158). For the resolution of the House in relation to Browne see *Parliamentary Debates*, 10 June 1955, 1664.

<sup>41</sup> Cf *Parliamentary Privileges Act 1987* (Cth). Although this Act limits the grounds upon which contempt of Parliament may be established, as well as making other changes to the law of parliamentary privilege, it does not abolish Parliament’s penal jurisdiction.

of Representatives ... shall be those of the Commons House of Parliament of the United Kingdom ... at the establishment of the Commonwealth". The House of Commons in 1901 clearly possessed the power to imprison an individual whom it had adjudged guilty of a breach of privilege or contempt of Parliament.<sup>42</sup> Thus, the critical interpretative question for the High Court when confronted a fortnight after the events in Parliament with applications for writs of *habeas corpus* in *R. v. Richards; Ex parte Fitzpatrick and Browne* was whether this power of parliamentary trial and punishment was in fact possessed by the House of Representatives in light of the Constitution's adoption of the separation maxim. The Court unanimously held that the House had acted within its powers. In an oral judgment of all seven Justices delivered by Dixon C.J., their Honours conceded that "the Constitution is based in its structure upon the separation of powers" and that "the judicial power of the Commonwealth is reposed exclusively in the courts contemplated by Chap.III".<sup>43</sup> Moreover, the Court seemed to accept that the power exercised by the House of Representatives in relation to Fitzpatrick and Browne was judicial in nature,<sup>44</sup> something which members of the House speaking to the issue of "proper punishment" had admitted.<sup>45</sup> But the answer to the separation of powers argument was simple: "in unequivocal terms the powers of the House of Commons have been bestowed upon the House of Representatives ... a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words [of s.49], which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear".<sup>46</sup>

But was the answer to the separation of powers question really this simple? It is of the nature of the fundamental doctrines of government which are embedded in the text and structure of the Constitution – federalism, representative and responsible government

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42 E. Campbell, *Parliamentary Privilege in Australia* (1966) 111 and generally, chapter 7 ("Penal Jurisdiction").

43 (1955) 92 C.L.R. 157, 166.

44 *Ibid* 167.

45 See, eg, *Parliamentary Debates*, 10 June 1955, 1634 (Evatt); 1638 (Allan Fraser); 1643-1645 (Haylen); 1651 (Beazley) and 1658 (Gullett).

46 *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 167.

and the separation of powers – that they serve as the basis for constitutional implications which temper express grants of legislative and executive power. For example, only a few years prior to *Fitzpatrick and Browne*, Dixon J. had accepted that the grant of legislative power contained in s.51(xiii) of the Constitution (“Banking”) was subject to an implied limitation flowing from the federal nature of the Constitution preventing the Commonwealth from singling out the States from other legal actors and subjecting them to a special burden or disability.<sup>47</sup> Admittedly, s.51(xiii) is expressly conferred “subject to this Constitution”, whereas s.49 is silent as to its relationship with other parts of the Act. Nonetheless, in the absence of express words, s.101 of the Constitution was read subject to Isaacs J.’s “dominant principle of demarcation” in the *Inter-State Commission Case*, with dramatic consequences for the future of that body.<sup>48</sup> Against the backdrop of this earlier separation of powers decision, the reconciliation of ss.49 and 71 of the Constitution in *Fitzpatrick and Browne* demanded more than a recitation of the text of s.49; it called for an examination of the values underpinning the Constitution’s exclusive vesting of federal judicial power in Chapter III courts, and a weighing of those values against the rationale – the maintenance of “Parliament’s independence and its free and effective working”<sup>49</sup> – for Parliament’s possession of penal jurisdiction.

Had this assessment been openly undertaken by the Court in *Fitzpatrick and Browne*, it is submitted that *habeas corpus* should have issued. Leaving aside the situation of a

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<sup>47</sup> *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31.

<sup>48</sup> See above ch.2. The s.101 argument was raised in *Fitzpatrick and Browne*, but without success ((1955) 92 C.L.R. 157, 166-167). See also A. Twomey, “Reconciling Parliament’s Contempt Powers with the Constitutional Separation of Powers” (1997) 8 *P.L.R.* 88, 97-101 where Twomey argues that despite not being expressly conferred “subject to this Constitution”, s.49 should be read subject to the separation of federal judicial power. In this context, Twomey points (inter alia) to the outcome in the *Inter-State Commission Case* and to the fact that in *Capital Duplicators Pty Ltd v. Australian Capital Territory [No.1]* (1992) 177 C.L.R. 248, a majority of the High Court found that s.122 of the Constitution (also not conferred “subject to this Constitution”) was limited by s.90. To this should now be added the support expressed by a number of members of the High Court for the view that s.122 is generally subject to Chapter III (see *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 84 per Toohey J.; 109 per Gaudron J. and 162-176 per Gummow J; *Newcrest Mining (W.A.) Ltd v. Commonwealth* (1997) 190 C.L.R. 513, 656 per Kirby J.

<sup>49</sup> *Final Report of the Joint Select Committee on Parliamentary Privilege* 1984 para.7.7 (Cth) quoted in *Final Report of the Constitutional Commission* (1988) 274; *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 167.

direct and immediate interference with the legislative process or legislative functions,<sup>50</sup> “Parliament’s independence and its free and effective working” would arguably be enhanced by an assurance that no repeat of the events of 1955 could occur, future allegations of “subversion” of Parliament being dealt with by the courts.<sup>51</sup> In finding Fitzpatrick and Browne guilty of a breach of privilege and committing them to prison, the House of Representatives took unto itself the role of ultimate arbiter of the limits of acceptable public criticism of members of Parliament and Parliament itself. This would seem inimical to Parliament’s “free and effective working” under a system of representative and responsible government,<sup>52</sup> especially when members have at their disposal the forum of Parliament and the legal immunity which attaches to statements made in Parliament in order to refute scurrilous allegations. If counter-statement proves an inadequate response in any such case, then presuming the enactment of appropriate legislation<sup>53</sup> the aggrieved House or Houses could refer the alleged breach of privilege to a Chapter III court for an independent and impartial determination of the matter, thereby avoiding the damage to Parliament’s standing in the community attendant upon it acting as victim, prosecutor and judge in the same cause.<sup>54</sup>

In short, the resolutions of the House of Representatives in relation to Fitzpatrick and Browne were “attainders”, noting that they named Fitzpatrick and Browne, declared each “guilty of a serious breach of privilege” for which “offence” the punishment of

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50 See the distinction drawn in A. Twomey, “Reconciling Parliament’s Contempt Powers with the Constitutional Separation of Powers” (1997) 8 *P.L.R.* 88 between the use of parliamentary contempt powers in aid of legislative functions and the punitive use of such powers.

51 But see now ss.4 and 6 of the *Parliamentary Privileges Act* 1987 (Cth) which go some way towards limiting the basis upon which this type of activity will amount to contempt.

52 *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 C.L.R. 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 C.L.R. 1; *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520.

53 A. Twomey, “Reconciling Parliament’s Contempt Powers with the Constitutional Separation of Powers” (1997) 8 *P.L.R.* 88, 101-102.

54 G. Souter, *Acts of Parliament* (1988) 433 says of the Browne and Fitzpatrick affair that “[t]he press and other channels of public opinion sided strongly against parliament” and quotes the *Sydney Morning Herald* to the effect that the incident had “raised up a strong public feeling that no citizens of this free country, whatever their misdemeanours, should be gaoled except by due process of the law and the Courts”. Souter then refers to a Gallup poll which revealed that 67% of Australians broadly subscribed to this view.

three months imprisonment was exacted. Although not “Acts of Parliament”, and hence not strictly “Acts of Attainder” in the American sense, they amounted to a usurpation of judicial power by a body standing outside Chapter III and thus infringed s.71 of the Constitution.

Moreover, the *Fitzpatrick and Browne* resolutions testify to the dangers of parliamentary engagement in rule application. Fitzpatrick and Browne were heard by the Committee of Privileges, but were denied legal representation before that body, whose proceedings were conducted *in camera*. In addition, the two “defendants” were apparently not given the opportunity to test the case against them under cross-examination<sup>55</sup> (although it must be conceded that they had made some fairly damaging admissions in response to the Committee’s questions).<sup>56</sup> At the bar of the House, Fitzpatrick and Browne were heard simply on the question of penalty, were again denied legal representation and were asked to withdraw from the chamber while the House deliberated.<sup>57</sup> To these departures from generally accepted and, in the case of Chapter III courts, constitutionally entrenched standards of due process must be added the fact that the resolutions of the House were in general terms in the sense that they did not specify the basis upon which Fitzpatrick and Browne had been found guilty of a breach of privilege. This in turn led the High Court in *Fitzpatrick and Browne* to disclaim any capacity to go behind the Speaker’s warrants of committal (which incorporated the House’s resolutions) in order to determine whether the circumstances relied on by the House were sufficient in law to amount to a breach of privilege.<sup>58</sup>

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55 “Report from the Committee of Privileges Relating to Articles Published in the *Bankstown Observer*” (8 June 1955) in *Votes and Proceedings of the House of Representatives* 1954-1955, vol.1, 417-430.

56 *Ibid* 421-422.

57 *Parliamentary Debates*, 10 June 1955, 1625-1627.

58 *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 162-165; E. Campbell, *Parliamentary Privilege in Australia* (1966) 117-118. Cf *Parliamentary Privileges Act* 1987 (Cth), s.9 which provides that where either House imposes the penalty of imprisonment in exercise of its penal jurisdiction, the resolution of the House and the warrant of committal must set out particulars determined by the House to constitute the offence.

All this leads to the conclusion that if the opportunity presents itself, *R. v. Richards; Ex parte Fitzpatrick and Browne* should be reconsidered by the High Court in the name of a more consistent and coherent approach to the values, notably those concerned with preservation of individual liberty, which underlie and inform the doctrine of the separation of federal judicial power.<sup>59</sup>

**(c) Formal v. Substantive Approaches to the Australian Conception of an Act of Attainder**

The above conclusion – that the resolutions of the House of Representatives in relation to Fitzpatrick and Browne were unconstitutional “attainers” – prompts inquiry as to other circumstances in which Parliament will be held to have enacted a legislative judgment in violation of Chapter III. In many ways, the *Fitzpatrick and Browne Case* was a clear one; once the notion that Parliament’s penal jurisdiction constitutes a general exception to the Constitution’s exclusive vesting of federal judicial power in Chapter III courts is rejected, one is left with resolutions which named two individuals, expressly found them guilty of an offence and imposed a custodial sentence. The usurpation of judicial power by the House of Representatives could not have been more explicit, but need it always be so? In other words, when will Parliament be held to have imposed punishment upon named individuals or an identifiable group of individuals in the sense redolent of trial by legislature?

In this regard, two streams of authority have emerged in the High Court reflecting, as foreshadowed, the American debate. The narrower, formalist position can be discerned in the judgment of Mason C.J. in *Polyukhovich* (although it was evident, forty years

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<sup>59</sup> As to those values see above ch.3; *R. v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 C.L.R. 1, 11 per Jacobs J.; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 C.L.R. 1, 10-13 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. See also G. Lindell, “Parliamentary Inquiries and Government Witnesses” (1995) 20 *M.U.L.R.* 383, 414-415 pointing to a number of factors which suggest that *R. v. Richards; Ex parte Fitzpatrick and Browne* might be decided differently today; A. Mason, “A New Perspective on Separation of Powers” (1996) 82 *C.B.P.A.* 1, 5 and *Egan v. Willis* (1998) 158 A.L.R. 527, 574 per Kirby J. observing that the decision of the High Court in *Fitzpatrick and Browne* that s.49 of the Constitution is not subject to s.71 “may one day require reconsideration”.

earlier, in certain of the judgments in the *Communist Party Case*<sup>60</sup>). His Honour joined in recognizing the existence of an implied constitutional prohibition against Acts of Attainder dependent upon “the legislature adjudging the guilt of a specific individual or specific individuals or imposing punishment upon them”.<sup>61</sup> But he went on to suggest that for a statute to amount to a usurpation of judicial power, it must contain an *express declaration of guilt* for which punishment is exacted,<sup>62</sup> his Honour discussing with apparent approval the decision of the Privy Council in *Kariapper v. Wijesinha*<sup>63</sup> which in turn had invoked the judgment of Frankfurter J. in *United States v. Lovett*.<sup>64</sup>

*United States v. Lovett*, decided in 1946, was the first case this century in which legislation was struck down by the United States Supreme Court as a Bill of Attainder. Lovett, and fellow respondents Watson and Dodd, were federal government employees found by a House of Representatives Committee to have engaged in “subversive activity”. They were subsequently named in s.304 of the *Urgent Deficiency Appropriation Act of 1943* which provided that after a certain date no salary should be paid to them out of federal appropriations. A majority of the Court, led by Black J., drew on the reconstruction era decisions of the Court in *Cummings v. Missouri*<sup>65</sup> and *Ex parte Garland*<sup>66</sup> to espouse a broad, “functional”<sup>67</sup> conception of the legislation caught

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60 The arguments put to the Court against the validity of the *Communist Party Dissolution Act 1950* (Cth) in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 included the submission that certain provisions of the Act (notably s.4) amounted to a legislative usurpation of judicial power (see, eg, *ibid* 35-37 (F.W. Paterson); 73-74 (H.V. Evatt K.C.)). Those members of the Court who dealt with this argument rejected it offering only a scant and formalistic analysis of the issue. See *ibid* 172-173 per Latham C.J.; 234-235 per Webb J.; 268-269 per Fullagar J. On the treatment of the Chapter III argument in the *Communist Party Case* see generally G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 190-192; L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166, 173-174.

61 (1991) 172 C.L.R. 501, 536.

62 *Ibid* 537.

63 [1968] A.C. 717.

64 328 U.S. 303 (1946). It should be pointed out that Mason C.J. in *Polyukhovich* did not *in terms* assert that a prohibited Act of Attainder must contain an express declaration of guilt (and, for reasons explained below (p.297 of this chapter) such a position sits uneasily with his broader constitutional philosophy). Nonetheless, the general sense of Mason C.J.’s discussion of Acts of Attainder in *Polyukhovich* is as set out in the text.

65 71 U.S. 277 (1867).

66 71 U.S. 333 (1867).

by the Bill of Attainder clauses, which although not explicitly grounded in a separation of powers analysis, was consistent with such an approach:

“legislative acts, *no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution”.<sup>68</sup>

It followed from this definition that s.304 of the *Urgent Deficiency Appropriation Act* was invalid; resort to legislative history showed that its purpose was not merely to sever the respondents’ salary, but to “purge” the Government service “of those whom Congress deemed guilty of ‘subversive activities’ and therefore ‘unfit’ to hold a federal job”,<sup>69</sup> this exclusion from federal employment being regarded by the majority as “punishment, and of a most severe type”.<sup>70</sup>

By contrast, Frankfurter J. (joined by Reed J.) eschewed the majority’s purposive approach to the Bill of Attainder clause in favour of a form of originalism. According to Frankfurter J., the definition of a Bill of Attainder was “settled by history”, the Bill of Attainder clauses deriving from “definite grievances” which prompted the founders “to proscribe against recurrence of their experience”.<sup>71</sup> This opinion led inevitably to the conclusion that Congress had not passed a Bill of Attainder in this instance:

“Section 304 lacks the characteristics of the enactments in the Statutes of the Realm and the Colonial Laws that bear the hallmarks of bills of attainder. *All bills of attainder specify the offense for which the attainted person was deemed*

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<sup>67</sup> Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, 333.

<sup>68</sup> *United States v. Lovett* 328 U.S. 303, 315 (1946) (emphasis added).

<sup>69</sup> *Ibid* 314.

<sup>70</sup> *Ibid* 316. As pointed out in the text, although the majority in *United States v. Lovett* did not explicitly adopt a separation of powers based analysis of the Bill of Attainder clause, their judgment is entirely consistent with this approach. Note in particular the observation of Black J. that the effect of s.304 “was to inflict punishment without the safeguards of a judicial trial and ‘determined by no previous law or fixed rule’” (a reference to the fact that the House Committee which made the initial finding against Lovett, Watson and Dodd had devised and employed its own definition of “subversive activity”) (*ibid* 316-317 (fn. omitted)). These are the evils of legislative engagement in rule application identified above pp.284-286 of this chapter).

<sup>71</sup> *United States v. Lovett* 328 U.S. 303, 321 (1946).



*guilty and for which the punishment was imposed ... [but in the case of s.304] [n]o offense is specified and no declaration of guilt is made.”*<sup>72</sup>

Frankfurter J. was alive to the criticism that this historically derived conception of a Bill of Attainder was open to evasion:

“It may be said that such a view of a bill of attainder offers Congress too easy a mode of evading the prohibition of the Constitution. Congress need merely omit its ground of condemnation and legislate the penalty! But the prohibition against a ‘Bill of Attainder’ is only one of the safeguards of liberty in the arsenal of the Constitution.”<sup>73</sup>

Subsequently, in *Kariapper v. Wijesinha* the Privy Council claimed to “have found particularly valuable guidance in the judgment of Frankfurter J. in *United States v. Lovett*”<sup>74</sup> in deciding that a Ceylonese statute was not an Act of Attainder contrary to an implied constitutional separation of judicial power. Their Lordships found that the separation doctrine was not infringed because, inter alia, the statute did not contain an express declaration of guilt.<sup>75</sup> However, this reliance by the Privy Council on a specific approach to the Bill of Attainder clause based upon American constitutional history and experience is not easy to understand. Frankfurter J.’s reasoning in *Lovett* was taxonomical rather than doctrinal, drawing upon American legal history to define a specific category of prohibited enactment (the “Bill of Attainder”), his narrow interpretation of that specific category being arrived at against the backdrop of the existence of the Bill of Rights. In addition, it should not be forgotten that Frankfurter J.’s approach in *Lovett* represented the view of only two members of the Court and, notably, has failed to win acceptance in more recent Supreme Court decisions, these

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<sup>72</sup> *Ibid* 322-323 (emphasis added).

<sup>73</sup> *Ibid* 326. Frankfurter J. apparently regarded his historically anchored approach to the Bill of Attainder clause as consistent with a separation of powers based analysis, observing at one point in his judgment that “[t]he restrictive function of this clause against bills of attainder was to take from the legislature a judicial function which the legislature once possessed” (*id.*).

<sup>74</sup> [1968] A.C. 717, 735.

<sup>75</sup> *Ibid* 734-736.

cases essentially embracing the functional, purposive approach to the Bill of Attainder clauses exemplified by the majority in *Lovett*.<sup>76</sup>

In this setting, Mason C.J.'s apparent embrace of the formalism of *Kariapper v. Wijesinha* and Frankfurter J. in *Lovett* is also not easy to understand. As a matter of general constitutional interpretation, Mason C.J. has been at the forefront of the High Court's methodological shift away from "strict and complete legalism"<sup>77</sup> towards "a more purposive or policy oriented form of jurisprudence".<sup>78</sup> One manifestation of this movement has been an emphasis on "considerations of substance rather than form",<sup>79</sup> particularly in the construction of express constitutional guarantees.<sup>80</sup> As the attainder of the "pretended Prince of Wales" illustrates, Frankfurter J. could call in aid historical support for his claim that all Bills of Attainder "specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed",<sup>81</sup> but the features of English Bills of Attainder of the seventeenth and eighteenth centuries can hardly be determinative of the question whether the Commonwealth Parliament has, at the close of the twentieth century, usurped the judicial function and pronounced a

<sup>76</sup> *United States v. Brown* 381 U.S. 437 (1965) (majority and minority opinions); *Nixon v. Administrator of General Services* 433 U.S. 425, 475, 480 (1977) per Brennan J. with Stewart and Marshall JJ. (Blackmun and Powell JJ. concurring on this point); 485 per Stevens J.; 538 per Burger C.J. (dissenting in the application of the Bill of Attainder test to the facts of the case); *Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841, 853-854 (1984) per Burger C.J. with White, Rehnquist, Stevens and O'Connor JJ. (Powell J. concurring on this point).

<sup>77</sup> "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 C.L.R. xi, xiv.

<sup>78</sup> A. Mason, "Trends in Constitutional Interpretation" (1995) 18 *U.N.S.W.L.J.* 237, 245. See also, eg, J.J. Doyle, "Constitutional Law: 'At the Eye of the Storm'" (1993) 23 *U.W.A.L.R.* 15.

<sup>79</sup> A. Mason, "Trends in Constitutional Interpretation" (1995) 18 *U.N.S.W.L.J.* 237, 245; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 444-449.

<sup>80</sup> See *Cole v. Whitfield* (1988) 165 C.L.R. 360 (s.92); *Street v. Queensland Bar Association* (1989) 168 C.L.R. 461 (s.117); *Capital Duplicators Pty Ltd v. Australian Capital Territory [No.2]* (1993) 178 C.L.R. 561 (s.90); *Georgiadis v. Australian and Overseas Telecommunications Corporation* (1994) 179 C.L.R. 297 (s.51(xxxi)). But cf the interpretation of s.100 of the Constitution in *Tasmania v. Commonwealth (Tasmanian Dam Case)* (1983) 158 C.L.R. 1 (referred to in A. Mason, "Trends in Constitutional Interpretation" (1995) 18 *U.N.S.W.L.J.* 237, 245).

<sup>81</sup> M.P. Lehmann, "The Bill of Attainder Doctrine: A Survey of the Decisional Law" (1978) 5 *Hastings Const.L.Q.* 767, 770-771 noting that English Bills of Attainder generally displayed five separate characteristics: "(1) the designation of a certain person or group of persons, (2) the recital of their crimes, (3) the pronouncement of their guilt, (4) the judgment of the legislature upon them and (5) a summary of the punishment imposed against them" (fn. omitted).

legislative judgment contrary to the Constitution's exclusive vesting of judicial power in Chapter III courts. Accepting that that vesting serves an important constitutional purpose, the High Court should be alert not only to the remote possibility of an express parliamentary declaration of guilt, but also to the much greater risk of veiled legislative punishment of a particular person or group.

Fortunately, none of the other judges in *Polyukhovich* suggested that an Act of Attainder in the Australian sense must incorporate an express declaration of guilt or statement of offence; instead, their judgments are consistent with a substantive approach to the question of when Parliament has invalidly exercised judicial power.<sup>82</sup> This assessment is underscored by the potentially far-reaching dictum of Brennan, Deane and Dawson JJ. in *Chu Kheng Lim v. Minister for Immigration*.<sup>83</sup> Having affirmed that "the adjudgment and punishment of criminal guilt" is "[t]he most important" of those functions exclusively judicial in character, their Honours endorsed a substantive approach to policing the monopoly of such power by Chapter III courts, with (seemingly) novel effect:

"In exclusively entrusting to the courts designated by Ch.III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive

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<sup>82</sup> (1991) 172 C.L.R. 501, 612 per Deane J.; 646-647, 649 per Dawson J. (observing at the last mentioned page reference that "[i]t is when the legislature itself, expressly or impliedly, determines the guilt or innocence of an individual that there is an interference with the process of the court" (emphasis added)); 685-686 per Toohy J.; 721 per McHugh JJ. Gaudron J. did not direct her attention to this issue. See also McHugh J.'s treatment of the Bill of Pains and Penalties argument in *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 70-72 and the claim of Gummow J. in *Nicholas v. R.* (1998) 151 A.L.R. 312 that "the concern of the court in construing Ch III of the Constitution is with substance, not merely form" (*ibid* 356) (and to the same effect as Gummow J. *ibid* 375 per Kirby J. and 392 per Hayne J.).

<sup>83</sup> (1992) 176 C.L.R. 1. And see L. Zines, *The High Court and the Constitution* (4th ed) (1997) 208 linking *Lim* and a substantive approach to Australian Act of Attainder jurisprudence.

in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.”<sup>84</sup>

The “exceptional cases” referred to in this passage were identified as pre-trial custody of an accused and involuntary detention attendant upon mental illness or infectious disease – collectively rationalized as “non-punitive in character and as not necessarily involving the exercise of judicial power”.<sup>85</sup> Later in their judgment, Brennan, Deane and Dawson JJ., joined by a majority of the Court, affirmed that “the conferral upon the Executive of authority to detain ... an alien in custody for the purposes of expulsion or deportation” was also non-punitive, constituting an incident of the executive power of expulsion or deportation.<sup>86</sup> Thus, their Honours concluded:

“putting to one side the traditional powers of the Parliament to punish for contempt and of military tribunals to punish for breach of military discipline, the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth”.<sup>87</sup>

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<sup>84</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27 per Brennan, Deane and Dawson JJ.

<sup>85</sup> *Ibid* 28 per Brennan, Deane and Dawson JJ. See also *ibid* 71 per McHugh J.: “imprisonment while awaiting trial on a criminal charge is not punitive in nature because the purpose of the imprisonment is to ensure that the accused person will come before the courts to be dealt with according to law”.

<sup>86</sup> *Ibid* 32. To the same general effect, see also *ibid* 10 per Mason C.J.; 46, 50 per Toohey J.; 71 per McHugh J. For a critical perspective on this finding in the context of the broader issues raised by *Lim’s Case*, see M.E. Crock, “Climbing Jacob’s Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia” (1993) 15 *Syd.L.R.* 338, 346-349.

<sup>87</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 28-29 per Brennan, Deane and Dawson JJ. (fn. omitted). Of the other members of the Court in *Lim*, only Gaudron J. and McHugh J. touched on this “constitutional immunity”. Although not unsympathetic to the views of Brennan, Deane and Dawson JJ., Gaudron J. was “not presently persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories [her Honour mentioned detention under mental health legislation and the pre-trial detention of a criminal accused] is necessarily and inevitably offensive to Ch.III” (*ibid* 55). See also *ibid* 65-66, 71 per McHugh J. expressing at least some degree of support for the views of Brennan, Deane and Dawson JJ. In *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, Gaudron J.’s doubts in *Lim* crystallized into the firm view that “a law authorising detention in custody is not, of itself, offensive to Ch III”. In her Honour’s opinion, the exceptions or qualifications which needed to be placed upon the *Lim* proposition were so many, that “it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power” (*ibid* 110 (fn. omitted)). Nonetheless, Gaudron J. recognized a constitutional prohibition similar to that of Brennan, Deane and Dawson JJ. in *Lim* based not on Ch.III, but instead grounded

Subsequently, in *Kruger v. Commonwealth*,<sup>88</sup> four members of the Court in separate judgments – Dawson, Toohey, McHugh and Gummow JJ. – implicitly affirmed these passages from *Lim*.<sup>89</sup> Their Honours agreed, however, that provisions of the *Aboriginals Ordinance* 1918 (N.T.) which, until their repeal in the 1950s, had authorized the removal of Aboriginal children from their families by the Chief Protector of Aborigines and their confinement in institutions or reserves did not infringe Chapter III of the Constitution (even assuming that laws referable to s.122 of the Constitution were so subject<sup>90</sup>). This was because the Ordinance indicated that the power of removal and detention was to be exercised for the non-punitive objective of the welfare and protection of the individuals concerned.<sup>91</sup>

Whatever view one takes as to the correctness of the above statements in *Lim* and their subsequent application in *Kruger*, they highlight a conundrum; once one abandons a rigid, formalistic conception of an Act of Attainder, by what means does one determine whether a legislated burden or disability imposed upon a specific person or group amounts to a punitive sanction indicative of trial by legislature? As Frankfurter J.

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in the principles of characterization – “subject to certain exceptions [her Honour mentioned s.51(ix), s.51(xix) and s.51(xxviii) and possibly s.51(vi) and s.51 (xxvi)], a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s.51 confers legislative power” (*ibid* 111). That many federal laws that amount to covert legislative judgments and punishments will in fact lack a supporting head of power in s.51 of the Constitution is illustrated by *Australian Communist Party v. Commonwealth (Communist Party Case)* (1951) 83 C.L.R. 1.

88 (1997) 190 C.L.R. 1.

89 *Ibid* 62 per Dawson J. (McHugh J. agreeing with Dawson J. on this aspect of the case); 84 per Toohey J.; 162 per Gummow J.

90 Toohey J., Gaudron J. and Gummow J. all inclined to this view. See *ibid* 84 per Toohey J.; 109 per Gaudron J. (but note her Honour’s qualifications in relation to self-governing territories); 162-176 per Gummow J. Brennan C.J., Dawson J. and McHugh J. restated the traditional view that the separation of powers does not apply in the territories. See *ibid* 44 per Brennan C.J. and 62 per Dawson J. (McHugh J. agreeing with Dawson J. on this aspect of the case).

91 *Ibid* 62 per Dawson J. (McHugh J. agreeing with Dawson J. on this aspect of the case); 84-85 per Toohey J. and 162 per Gummow J. Brennan C.J. did not consider this aspect of the case, simply affirming that s.122 of the Constitution stood apart from Chapter III. For the approach of Gaudron J., see above fn.87 of this chapter.

pointed out in *United States v. Lovett*, “[t]he fact that harm is inflicted by governmental authority does not make it punishment”:

“Figuratively speaking all discomfoting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.”<sup>92</sup>

Or as was said by Brennan J. in *Nixon v. Administrator of General Services*,<sup>93</sup> the Bill of Attainder clause, although a “bulwark against tyranny”<sup>94</sup> does not limit Congress “to the choice of legislating for the universe, or legislating only benefits, or not legislating at all”.<sup>95</sup> From the perspective of the separation of powers there is a distinction between legislative regulation of public or private activity (rule formulation) and legislative punishment directed at the past conduct of individuals or groups (rule application).<sup>96</sup> Although far from clear cut, this distinction must be preserved; it would be destructive of civil society and democratic values if Parliament were indeed confined to “legislating for the universe, or legislating only benefits, or not legislating at all”.<sup>97</sup> It follows that a substantive approach to Australian attainder jurisprudence demands the development of a test, or series of tests, to distinguish legitimate legislative regulation from unconstitutional legislative punishment.

#### **(d) Regulation v. Punishment in Australian Attainder Jurisprudence**

The United States Supreme Court, in distinguishing between “regulation” and “punishment” for the purposes of the Bill of Attainder clauses, has employed a factors approach (or, as it was described by four judges in *United States v. Brown*, a

<sup>92</sup> 328 U.S. 303, 324 (1946).

<sup>93</sup> 433 U.S. 425 (1977).

<sup>94</sup> *Ibid* 471 quoting *United States v. Brown* 381 U.S. 437, 443 (1965).

<sup>95</sup> *Nixon v. Administrator of General Services* 433 U.S. 425, 471 (1977)

<sup>96</sup> See above pp.284-286 of this chapter.

<sup>97</sup> See L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 644: “the concept of legislative ‘specification’ in this context [the bill of attainder clause] cannot be so broad as to swallow up all laws that impose some disabling limitation upon an ascertainable group. Even a law requiring airline pilots to be sighted, or brain surgeons to have steady hands, would otherwise be vulnerable to attack” (fn. omitted).

“meticulous multifold analysis”<sup>98</sup>) in which a series of considerations, inconclusive when taken in isolation, are together weighed and balanced against the backdrop of the circumstances of the case at hand. The considerations at the heart of this analysis are:<sup>99</sup>

1. the nature of the legislative burden or disability;
2. “whether the law under challenge ... reasonably can be said to further nonpunitive legislative purposes”;<sup>100</sup> and
3. “the specificity of the legislature’s designation of the persons to be affected”.<sup>101</sup>

Australian attainer jurisprudence demands adoption of a similar test;<sup>102</sup> indeed, McHugh J. in *Lim* came close to just such a factors approach in concluding that the provisions of the *Migration Act* 1958 (Cth) at issue in that case directing the detention in custody of certain administratively designated “boat people” during consideration of their applications for entry permits did not work a legislative usurpation of judicial power.<sup>103</sup> What follows then is an attempt to translate the American multifold analysis into the Australian setting, beginning with consideration of the nature of the legislative burden or disability.

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<sup>98</sup> 381 U.S. 437, 463 (1965) per White J. joined by Clark, Harlan and Stewart JJ. (dissenting).

<sup>99</sup> The factors approach, broadly as here set out, was endorsed by a majority of the Supreme Court in *Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841, 850-856 (1984) and *Nixon v. Administrator of General Services* 433 U.S. 425, 469-483 (1977). See also the statement of the factors approach in the minority opinion in *United States v. Brown* 381 U.S. 437, 462-463, 476-478 (1965) and L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 650-656. And see also Note, “Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez, and Speiser Cases” (1959) 34 *Indiana L.J.* 231, 238-239.

<sup>100</sup> *Nixon v. Administrator of General Services* 433 U.S. 425, 475-476 (1977) per Brennan J. joined on this aspect of the case by Stewart, Marshall, Blackmun and Powell JJ. (fn. omitted).

<sup>101</sup> *United States v. Brown* 381 U.S. 437, 462-463 (1965) per White J. joined by Clark, Harlan and Stewart JJ. (dissenting).

<sup>102</sup> See L. Zines, *The High Court and the Constitution* (4th ed) (1997) 209-210.

<sup>103</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 70-72. See also *Nicholas v. R.* (1998) 151 A.L.R. 312, 374 per Kirby J.

**(i) The Nature of the Legislative Burden or Disability**

The American cases often ask whether the legislative burden at issue in an attainder challenge falls within the category of burdens historically associated with Bills of Attainder or Bills of Pains and Penalties such as death, imprisonment, banishment or forfeiture of property.<sup>104</sup> To this list the Supreme Court routinely adds the sanction of exclusion from office or employment given that such exclusion founded successful attainder challenges in the mid-nineteenth century cases of *Cummings v. Missouri*<sup>105</sup> and *Ex parte Garland*.<sup>106</sup> In the Australian context, however, such direct historical analogues must be approached with a degree of caution.<sup>107</sup> The foundation of the Australian “attainder” doctrine is the implied constitutional prohibition upon legislative usurpation of judicial power; Parliament cannot engage, whether overtly or covertly, in the adjudgment and punishment of criminal guilt. Thus, in the first instance the relevant analogy or point of comparison is not with the Act of Attainder at common law, but the exclusive function of Chapter III courts.

The earlier-quoted passages from the joint judgment of Brennan, Deane and Dawson JJ. in *Lim* affirm that the nature of the legislative burden or disability will be an important factor in Australian attainder analysis, a legislative judgment being most strongly suggested by the non-curial visitation upon persons of sanctions traditionally associated with a judicial finding of guilt. Thus a number of members of the High Court have accepted that the detention of a person in state-directed custody is generally penal in nature. To repeat the words of Brennan, Deane and Dawson JJ. in *Lim*:

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<sup>104</sup> *Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841, 852-853 (1984); *Nixon v. Administrator of General Services* 433 U.S. 425, 472-475 (1977); *United States v. Brown* 381 U.S. 437, 462, 476 (1965). See also Note, “Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez, and Speiser Cases” (1959) 34 *Indiana L.J.* 231, 238. For the burdens historically associated with Acts of Attainder and Acts of Pains and Penalties, see above p.281 of this chapter.

<sup>105</sup> 71 U.S. 277 (1867).

<sup>106</sup> 71 U.S. 333 (1867).

<sup>107</sup> See L. Zines, *The High Court and the Constitution* (4th ed) (1997) 209.



“putting to one side [exceptional cases] ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt”.<sup>108</sup>

Or as McHugh J. conceded in the same case, “detention under a law of the Parliament is ordinarily characterized as punitive in character”.<sup>109</sup> Likewise in *Kruger* Toohey J. observed that “[i]n general terms, the power to order involuntary detention is an incident of judicial power”.<sup>110</sup> Gaudron J., however, has rejected the approach of Brennan, Deane and Dawson JJ. in *Lim*, maintaining in *Kruger* that “it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power”.<sup>111</sup> Nonetheless, from a civil liberties perspective the view put forward by Professor Zines – that one should at least “begin with a suspicion that incarceration by legislative decree is, in effect, a legislative punishment, placing the onus on the Commonwealth to show that (outside the accepted categories) it is not”<sup>112</sup> – seems eminently reasonable.

It should be pointed out, however, if only to emphasize the transformation which has taken place over the last few years in the High Court’s conception of Chapter III, that the administrative confinement of a citizen has not always been treated as raising separation of powers issues. For example, in the post-World War II case of *Little v. Commonwealth*,<sup>113</sup> a British subject sued for damages for false imprisonment in

<sup>108</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27.

<sup>109</sup> *Ibid* 71.

<sup>110</sup> (1997) 190 C.L.R. 1, 84. See also *ibid* 161-162 per Gummow J. and *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 132 per Gummow J.

<sup>111</sup> (1997) 190 C.L.R. 1, 110. See also the criticisms of the approach of Brennan, Deane and Dawson JJ. in *Lim* in G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 192-193 and G.J. Lindell, “Recent Developments in the Judicial Interpretation of the Australian Constitution” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 35 fn.136 simply describing the treatment of s.71 in *Lim* as “strained and unconvincing”.

<sup>112</sup> L. Zines, “A Judicially Created Bill of Rights?” (1994) 16 *Syd.L.R.* 166, 174. And, indeed, Professor Winterton would agree. See G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 193 fn.55.

<sup>113</sup> (1947) 75 C.L.R. 94.

relation to a period of internment over several months in 1942 directed by the Minister for the Army under National Security Regulations. Despite Dixon J.'s concession that the evidence tendered by the plaintiff "raised a very strong presumption that the orders had been mistakenly made and had no real foundation in any acts, conduct or tendencies of the plaintiff",<sup>114</sup> he refused to nullify the Minister's decision.<sup>115</sup> Admittedly, the case was argued in terms of administrative rather than constitutional law. Moreover, the constitutional validity of this type of regulation had already been upheld in the earlier decisions of *Lloyd v. Wallach*<sup>116</sup> and *Ex parte Walsh*.<sup>117</sup> Nonetheless, the lack of consciousness of any Chapter III issue in any of these three cases is worthy of note, particularly when conformity with s.71 of the Constitution played a part in other wartime decisions.<sup>118</sup>

Although a natural person can be placed in involuntary confinement, this is not possible in the case of an organization. Nonetheless, an organization can be declared unlawful and dissolved as was envisaged by s.4(1) of the *Communist Party Dissolution Act 1950* (Cth):

"The Australian Communist Party is declared to be an unlawful association and is, by force of this Act, dissolved."

Section 4 went on to provide for the vesting of the property of the defunct party in a government appointed receiver, any surplus of assets over liabilities to be paid to the Commonwealth (s.15(1)). Section 5 established a mechanism for the dissolution and divestiture of the property of other organizations associated with the communist

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114 *Ibid* 103.

115 *Ibid* 102-105.

116 (1915) 20 C.L.R. 299.

117 [1942] Argus L.R. 359. In relation to wartime detention, see the reservation of Brennan, Deane and Dawson JJ. in *Lim* in the passage quoted above text accompanying fn.87 of this chapter. The justification for wartime internment on the basis of ministerial opinion without trial was put, eg, by Williams J. in *Adelaide Company of Jehovah's Witnesses Inc v. Commonwealth* (1943) 67 C.L.R. 116, 161-162.

118 See, eg, *Victorian Chamber of Manufactures v. Commonwealth (Industrial Lighting Case)* (1943) 67 C.L.R. 413; *Rola Co. (Australia) Pty Ltd v. Commonwealth* (1944) 69 C.L.R. 185.

movement, effective upon the opinion of the Governor-General that the continued existence of such an organization would be prejudicial to the security and defence of the Commonwealth. Section 9 provided for the imposition of a series of disabilities upon communists, notably exclusion from Commonwealth employment, effective upon the opinion of the Governor-General that a given communist “is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth”.

As is well known, the *Communist Party Dissolution Act* did not survive High Court challenge and was struck down in *Australian Communist Party v. Commonwealth*<sup>119</sup> as lacking a supporting head of Commonwealth legislative power. Professor Zines, however, has argued that the above-mentioned provisions would today also be held to amount to a prohibited Act of Attainder.<sup>120</sup> In this regard, Zines points to the recitals in the lengthy preamble to the Act which attested to the legislature’s belief that the Australian Communist Party and communists had engaged, and continued to engage, in subversive and treasonable activities. Thus the facts of the *Communist Party Case* effectively supply a rare example of the legislative punishment of a named organization for a named offence or offences. To the extent that ss.5 and 9 of the Act burdened organizations associated with the communist movement and individual communists not directly, but as nominated by the Governor-General, they too must offend s.71 of the Constitution. For if Parliament could not itself single out such communist organizations or communists for what the recitals indicated were punitive sanctions, then it could hardly delegate that task of specification to the executive.<sup>121</sup> As Fullagar J. said of the *Communist Party Dissolution Act* in *Marcus Clark & Co. Ltd v. Commonwealth*:<sup>122</sup>

“The statute did not merely prescribe rules of conduct or create duties or impose prohibitions ... it imposed, of its own mere force and without the possibility of

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119 (1951) 83 C.L.R. 1.

120 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 207-208. In relation to the actual treatment of the Chapter III argument in the *Communist Party Case*, see above fn. 60 of this chapter.

121 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 207, but making this point in reverse.

122 (1952) 87 C.L.R. 177.

judicial intervention, what were really penalties upon a particular specified organisation [and] ... what were really penal consequences to the formation of an opinion of the Executive, not judicially examinable, that a person or a body of persons was engaged, or likely to become engaged, in activities prejudicial to defence.”<sup>123</sup>

Of course, it does not follow from the preceding paragraph that the dissolution of an organization, the forfeiture of property or exclusion from public office or employment will always found successful attainer challenges. The circumstances of each case are ultimately dispositive of the issue and those of the *Communist Party Dissolution Act* are unlikely to be repeated (that is, the conjunction of the three burdens mentioned on an identifiable group coupled with Parliament’s expression of opinion in the preamble). Moreover, it should be borne in mind that there are many situations in which the dissolution of an organization,<sup>124</sup> the denial of public employment, the legislative taking of property without just terms<sup>125</sup> and the legislative exaction of monetary burdens (many of which will bear the character of taxation or laws in anticipation of

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123 *Ibid* 253 (referred to in L. Zines, *The High Court and the Constitution* (4th ed) (1997) 207).

124 In *Australian Building Construction Employees’ and Builders Labourers’ Federation v. Commonwealth* (1986) 161 C.L.R. 88, a five member High Court unanimously upheld the validity of the *Builders Labourers’ Federation (Cancellation of Registration) Act* 1986 (Cth) which provided in s.3 that “[t]he registration of The Australian Building Construction Employees’ and Builders Labourers’ Federation under the *Conciliation and Arbitration Act* 1904 is, by force of this section, cancelled”. The Court specifically rejected an argument that s.3 amounted to a legislative usurpation of judicial power (although this argument was not cast in terms of the unconstitutionality of Acts of Attainder) pointing to the fact that deregistration of an industrial organization under the *Conciliation and Arbitration Act* was not a function exclusively judicial in character, Parliament being able to select those organizations entitled to participate in its legislative scheme (*ibid* 95). It would be wrong to assert, however, that the direct legislative exclusion of an industrial organization from participation in an industrial system like that established by the *Conciliation and Arbitration Act* could never found a successful attainer challenge. Accepting both that deregistration is not an exclusively judicial function and, in Professor Zines’ words on the characterization aspect of the *B.L.F. Case*, “[w]hat Parliament can give Parliament can take away” (L. Zines, “Characterisation of Commonwealth Laws” in H.P. Lee and G. Winterton (eds), *Australian Constitutional Perspectives* (1992) 49), it remains possible that Parliament has “taken away” in relation to a named organization because Parliament has adjudged that organization to be guilty of a criminal offence. Cf *American Communications Association v. Douds* 339 U.S. 382 (1950).

125 See, eg, *Mutual Pools & Staff Pty Ltd v. Commonwealth* (1994) 179 C.L.R. 155, 170-172 per Mason C.J.; 178-181 per Brennan J.; 187-191 per Deane and Gaudron JJ. and 221-224 per McHugh J.

taxation liabilities<sup>126</sup>) will have a well-accepted non-punitive character. Burdens with little or no association with traditional modes of judicial punishment such as the exclusion of an individual or group from participation in a legislative scheme<sup>127</sup> are probably less compelling indicators that Parliament has usurped judicial power.<sup>128</sup> Nonetheless, and bearing in mind the majority judgment in *United States v. Lovett*,<sup>129</sup> it remains possible that recourse to records of parliamentary debates or other extrinsic materials will cast a legislative burden, indifferent in itself, in the light of unconstitutional legislative punishment.<sup>130</sup>

**(ii) Whether the Law “Reasonably Can Be Said to Further Nonpunitive Legislative Purposes”**

In *Nixon v. Administrator of General Services*,<sup>131</sup> Brennan J. observed that the Supreme Court has often applied “a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes”, the absence of such purposes suggesting that “punishment of individuals disadvantaged by

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<sup>126</sup> Cf, however, the suggestion of Dawson and Toohey JJ. *ibid* 202 that an Act of the Commonwealth Parliament obliging “a specified person to pay the total value of his or her assets” to the Commonwealth may, in certain circumstances, “amount to a bill of attainder or of pains and penalties and so constitute a usurpation of judicial power in contravention of s.71 of the Constitution” (fn. omitted), their Honours noting that such a law may also fail for want of a head of federal legislative power in light of the requirement that a tax under s.51(ii) of the Constitution not be “arbitrary”. Referring to these remarks, Professor Zines has warned against the temptation in contemplating Acts of Attainder “to treat all consequences which some might regard as unjust or too severe as, in substance, punishment and, therefore, in breach of s.71” (L. Zines, *The High Court and the Constitution* (4th ed) (1997) 209). This warning should be heeded, but there is still no reason to doubt the view expressed by Dawson and Toohey JJ. – taking a substantive approach to the identification of prohibited Acts of Attainder, it would be precipitate to exclude the possibility that a monetary burden placed upon a specific person or group was in fact a legislated fine attendant upon a legislative finding of criminal guilt.

<sup>127</sup> See above fn.124 of this chapter. See also *Selective Services System v. Minnesota Public Interest Research Group* 468 U.S. 841 (1984).

<sup>128</sup> However, it is submitted that the exclusion of named individuals or an identifiable group of individuals from participation in legislative schemes which create “new property” entitlements such as social security benefits (see C.A. Reich, “The New Property” (1964) *Yale L.J.* 733) stand apart from this and should be closely scrutinized for conformity with Ch.III of the Constitution.

<sup>129</sup> See above pp.294-296 of this chapter.

<sup>130</sup> *Acts Interpretation Act* 1901 (Cth), s.15AB.

<sup>131</sup> 433 U.S. 425 (1977).

the enactment was the purpose of the decisionmakers”.<sup>132</sup> Even if such non-punitive legislative purposes are shown to exist, the legislative burden or disability should be tailored to achievement of those legitimate goals, his Honour recognizing that inquiry “into the existence of less burdensome alternatives by which [the] legislature ... could have achieved its legitimate nonpunitive objectives” is often useful in determining whether the legislature has engaged in illicit punishment of an individual or group.<sup>133</sup>

This analysis, with its focus on reasonable means to a legitimate end within power, translates readily into the Australian setting as a further factor to be taken into account in a substantive approach to the identification of Acts of Attainder. A legislative or administrative burden imposed upon an individual or group which appears at first blush to be penal or punitive in character (and thus suggestive of a legislative trial) might be shown upon closer examination to be both reasonably appropriate and adapted and proportionate to the achievement of some generalized social or economic objective within a subject matter of federal legislative power, a finding which would do much to deny that Parliament has trespassed into the prohibited sphere of rule application.

The relevance of these issues to Australian attainder jurisprudence is once again affirmed by *Lim* and *Kruger*. The so-called “exceptional cases” which Brennan, Deane and Dawson JJ. recognized in *Lim* as standing outside the “constitutional immunity” protecting citizens from involuntary detention by Commonwealth authority otherwise than following the exercise of federal judicial power were justified by their Honours on the basis of pursuance of a legitimate non-punitive objective. Thus, the pre-trial

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<sup>132</sup> *Ibid* 475-476 (fn. omitted). See also *Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841, 851-856 (1984) per Burger C.J. (expressing the opinion of a majority of the Court); *United States v. Brown* 381 U.S. 437, 476 (1965) per White J. with whom Clark, Harlan and Stewart JJ. joined (dissenting). Note also the approach of the Privy Council in *Kariapper v. Wijesinha* [1968] A.C. 717, 736-738 pointing out that the Ceylonese Act under consideration in that case was not an Act of Attainder because, apart from lacking an express declaration of guilt, it was directed to a legitimate non-punitive legislative purpose.

<sup>133</sup> *Nixon v. Administrator of General Services* 433 U.S. 425, 482 (1977). See also *United States v. Brown* 381 U.S. 437, 476 (1965) per White J. with whom Clark, Harlan and Stewart JJ. joined (dissenting) quoting from *Kennedy v. Mendoza-Martinez* 372 U.S. 144, 168-169 (1963).

detention of a criminal accused was not punitive in nature, being instead directed “to ensure that he or she is available to be dealt with by the courts”.<sup>134</sup> And although not spelt out in *Lim*, involuntary detention consequent upon mental illness or infectious disease clearly derives its non-punitive character from the fact that it serves both to protect the sufferer from the community and the community from the sufferer.<sup>135</sup> But were such a period of detention to extend beyond the duration of the illness, or were the severity of the illness not such as to warrant these public health measures, then the lack of reasonable proportionality of legislative means to ends would suggest unconstitutional legislative punishment.<sup>136</sup> From this perspective, the High Court’s somewhat brief justification of the removal and detention measures at issue in *Kruger* in terms of the welfare and protection of Aborigines can perhaps be criticized as paying insufficient regard to the specific tailoring of means to the legitimate end within power.

Two American cases provide classic illustrations of when an alleged Act of Attainder can, or cannot, be said to further non-punitive legislative purposes in the sense outlined. In *Cummings v. Missouri*,<sup>137</sup> the Supreme Court found invalid a provision of the Missouri Constitution which conditioned the right to serve in various offices and to practice various callings and professions – in the case of Cummings, that of a Roman Catholic priest – upon the taking of an oath denying involvement with the Confederacy in the recent Civil War. Clearly, the fact that someone had supported the Confederacy

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<sup>134</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 28. To the same effect see *ibid* 71 per McHugh J. And see also *Ngoc Tri Chau v. Director of Public Prosecutions (Cth)* (1995) 132 A.L.R. 430, 445 per Kirby P. (“[b]ail is not denied to an accused person as a punishment”).

<sup>135</sup> See *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 110 per Gaudron J. See also *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 88 per Dawson J. (but cf *ibid* 98 per Toohey J.).

<sup>136</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 33 per Brennan, Deane and Dawson JJ. observing that although a legislative provision authorizing executive detention of an alien for the purposes of expulsion or deportation is non-punitive in nature, this is true only to the extent that detention is statutorily limited to those purposes. See also *ibid* 65 per McHugh J.: “[i]f a law authorizing the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch.III of the Constitution”. And see also *ibid* 71 per McHugh J.

<sup>137</sup> 71 U.S. 277 (1867).

bore no relation to his capacity to serve the spiritual needs of Missouri Catholics.<sup>138</sup> Thus, this exclusion from a category of employment amounted to a Bill of Attainder, being a form of legislative punishment without judicial trial of those who had been associated with the secessionist states.<sup>139</sup> By contrast, *Dent v. West Virginia*<sup>140</sup> concerned a state statute which prohibited the practice of medicine in the state without a certificate attesting to the fact that the individual concerned had either graduated from a reputable medical school, had practiced medicine in the state continuously for a decade, or had been found qualified to practice medicine upon examination by the State Board of Health. When this law was challenged in the Supreme Court, the Court denied that *Cummings v. Missouri* was of any assistance to the plaintiff (who had a diploma from the American Medical Eclectic College of Cincinnati, Ohio) because “there is no arbitrary deprivation” of the right to engage in a profession or calling “where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society”.<sup>141</sup> As the Court concluded, the law under consideration “was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State”.<sup>142</sup>

Of course, in determining whether an Act of the Commonwealth Parliament which burdens a named individual or group of individuals amounts in substance to a legislative judgment, the question whether the Act is a reasonable means to a legitimate non-punitive end is unlikely to be raised in the stark form of the two examples above. In more recent Supreme Court cases raising attainder issues, that Court has examined both the text of the legislation under challenge and made extensive use of legislative history in ultimately attributing to Congress (as matters transpired) a non-punitive legislative

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138 *Ibid* 319-320 per Field J. delivering the opinion of the Court.

139 *Ibid* 320-325.

140 129 U.S. 114 (1889).

141 *Ibid* 122 per Field J. delivering the opinion of the Court.

142 *Ibid* 128.



purpose.<sup>143</sup> The High Court might be expected to be more restrained in its invocation of legislative history than its American counterpart. Yet, at the same time, in areas such as conformity with s.92 of the Constitution and the external affairs power, the High Court has been willing to scrutinize closely the tailoring of legislative means to ends within power and to strike down legislation which cannot be regarded as reasonably appropriate and adapted and proportionate to such a goal.<sup>144</sup> This experience will doubtless assist in distinguishing legislative regulation from legislative punishment.

**(iii) “The Specificity of the Legislature’s Designation of the Persons to be Affected”**

“[T]he specificity of the legislature’s designation of the persons to be affected”<sup>145</sup> is the third key factor to be weighed in a substantive approach to the identification of Acts of Attainder. In accepting that an Act of the Commonwealth Parliament imposing punishment upon named individuals or a specific group of individuals without a judicial finding of guilt would amount to a legislative judgment contrary to the separation of powers, the High Court in *Polyukhovich* appeared, speaking generally, to treat punishment and specificity as separate elements in its conception of an Act of Attainder.<sup>146</sup> Undoubtedly they can be so regarded. But a law which defines treasonable activities and renders them punishable by life imprisonment is clearly rule formulation being legislative regulation of future conduct; by contrast, a later law which declares that Fiona Wheeler has engaged in those same treasonable activities and is subject to life imprisonment is clearly rule application and amounts to a legislative judgment and punishment. Crucial to the distinction between legislative regulation and legislative punishment in these two examples is the degree of legislative

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<sup>143</sup> *Nixon v. Administrator of General Services* 433 U.S. 425, 476-483 (1977); *Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841, 853-856 (1984).

<sup>144</sup> See, eg, *Castlemaine Tooheys Ltd v. South Australia* (1990) 169 C.L.R. 436; *Commonwealth v. Tasmania (Tasmanian Dam Case)* (1983) 158 C.L.R. 1 (Brennan J. and Deane J.).

<sup>145</sup> *United States v. Brown* 381 U.S. 437, 462-463 (1965) per White J. joined by Clark, Harlan and Stewart JJ. (dissenting).

<sup>146</sup> See above fn.19 of this chapter. See also *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 70-72 per McHugh J.

specification,<sup>147</sup> which in the latter example is sufficiently confined to reduce the role of any court merely to identifying Fiona Wheeler as the named individual. In other words, the question whether Parliament has engaged in legislative regulation or legislative punishment involves consideration of issues of specificity. Hence those issues are here addressed as part of the “multifold” analysis aimed at demarcating regulation and punishment.

Leaving aside the treatment by Deane J. and Gaudron J. of retroactive federal criminal laws (dealt with separately below), the judgments in *Polyukhovich* do not delve deeply into the degree of legislative specification requisite for an Act of Attainder, undoubtedly because the *War Crimes Act* stood outside even the broadest description of this category of legislation. The most extensive discussion of specificity was that of Dawson J. who observed:

“Legislation will amount to a bill of attainder only where it is apparent that the legislature intended the conviction of specific persons for conduct engaged in in the past. The law may do that by penalizing specific persons by name or by means of specific characteristics which, in the circumstances, identify particular persons ... Alternatively, a bill of attainder may designate the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent.”<sup>148</sup>

Of this last mode of specification, Dawson J. clearly had in mind the situation where, for example, “communists” or the “Communist Party” are targeted as the objects of direct legislative sanctions.<sup>149</sup>

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<sup>147</sup> *United States v. Brown* 381 U.S. 437, 462-463 (1965) per White J. with Clark, Harlan, and Stewart JJ. (dissenting). See also *Nicholas v. R.* (1998) 151 A.L.R. 312, 375 per Kirby J. observing that if legislation “is highly selective and clearly directed at a particular individual or individuals, it is much more likely that it will amount to an impermissible intrusion upon, or usurpation of, the judicial power” (fn. omitted).

<sup>148</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 647. See also *Nicholas v. R.* (1998) 151 A.L.R. 312, 377 per Kirby J.

<sup>149</sup> See *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 and *United States v. Brown* 381 U.S. 437 (1965). Cf *American Communications Association v. Douds* 339 U.S. 382 (1950).

Accepting Dawson J.'s views on this aspect of Acts of Attainder, the question remains as to the practical leeway which the High Court will accord to the notion of specificity when legislation is directed, not to named individuals, but to persons possessing defined characteristics or group membership.<sup>150</sup> In *Cummings v. Missouri*,<sup>151</sup> an enactment was found to amount to a Bill of Attainder even though it was directed to those who had supported the Southern States in the Civil War – a large group – whose membership would have been difficult to ascertain had the law not been cast in the form of requiring the taking of an oath before serving in certain offices.<sup>152</sup> On the other hand, the two twentieth century Supreme Court findings of attainder concerned legislation which burdened named individuals<sup>153</sup> and members of a named group (the Communist Party)<sup>154</sup> respectively. In a subsequent decision, legislation directed to a named individual – former President Richard M. Nixon – was found not to constitute a Bill of Attainder on the basis that this specificity and accompanying burden were rationally explicable in the circumstances of the case and served legitimate non-punitive ends.<sup>155</sup> More recently, in *Selective Service System v. Minnesota Public Interest Research Group*,<sup>156</sup> the Supreme Court held that a provision of an Act of Congress denying financial aid for higher education to those male students who had failed, or who in the future failed, to register for the draft was not an Act of Attainder because, inter alia, such students could always secure the financial assistance in question by choosing to register, albeit late. Thus, the class targeted by the Act was not an “inescapable”

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150 The judgments of Toohey J. and McHugh J. in *Lim* suggest that their Honours at least will take a relatively narrow view of “identifiable persons”. See *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 50 per Toohey J. and 70-71 per McHugh J.

151 71 U.S. 277 (1867).

152 Cf *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 611 per Deane J.: “[a] statute which decreed that ‘any person’ who had supported the unsuccessful party in some past period of civil disturbance was, notwithstanding that he had contravened no then existing law, guilty of treason and subject to a death penalty would not be a Bill of Attainder in the strict sense in that a trial would be necessary to determine whether a particular accused had in fact supported the unsuccessful party and the actual sentencing would be by a court”.

153 *United States v. Lovett* 328 U.S. 303 (1946).

154 *United States v. Brown* 381 U.S. 437 (1965).

155 *Nixon v. Administrator of General Services* 433 U.S. 425 (1977).

156 468 U.S. 841 (1984).

one;<sup>157</sup> in the words of the Supreme Court, “appellees can become eligible for Title IV aid at any time simply by registering late and thus ‘carry the keys of their prison in their own pockets’”.<sup>158</sup>

*Lim’s Case* suggests that the High Court, in its conception of specificity, might be attracted to the *Selective Service* requirement of an inescapable class. In concluding that provisions of the *Migration Act* which directed the detention of certain administratively nominated “boat people” during consideration of their applications for entry permits did not infringe Chapter III of the Constitution, Brennan, Deane, Dawson and McHugh JJ. all relied, inter alia, on the circumstance that the *Migration Act* permitted a detainee at any time to bring her or his detention to an end by asking to be repatriated.<sup>159</sup>

Admittedly, their Honours used this fact to demonstrate the non-punitive nature of the detention regime, but it could equally be rationalized as founding an escapable class, albeit one facing Hobson’s choice.<sup>160</sup>

Before leaving the issue of specificity, it remains to make the point that although the classical Act of Attainder and usurpation of judicial power employs the mechanism of direct legislative specification, a legislature – especially in the context of responsible government – can achieve the same end by nominating a category of person as subject to what are in substance penal sanctions on the discretionary designation of the executive. Sections 5 and 9 of the *Communist Party Dissolution Act* illustrate this particular device. As indicated in the context of earlier discussion of these provisions, Parliament cannot empower the executive to do what Parliament cannot do itself.

Where Parliament nominates a group of persons as subject to penal sanctions on the

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<sup>157</sup> Comment, “The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause” (1962) 72 *Yale L.J.* 330, 339-340.

<sup>158</sup> *Selective Service System v. Minnesota Public Interest Research Group* 468 U.S. 841, 853 (1984) per Burger C.J. with White, Rehnquist, Stevens and O’Connor JJ. quoting from *Shillitani v. United States* 384 U.S. 364, 368 (1966).

<sup>159</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 33-34 per Brennan, Deane and Dawson JJ.; 72 per McHugh J.

<sup>160</sup> *Ibid* 72 per McHugh J. See also M.E. Crock, “Climbing Jacob’s Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia” (1993) 15 *Syd.L.R.* 338, 347.

opinion of the Minister that they possess certain defined characteristics or tendencies, the Minister's exercise of discretion would of course ordinarily be subject to judicial review on ordinary administrative law grounds. Such review should not be seen, however, as fulfilling s.71's requirement of a judicial trial in the case of the adjudgment and punishment of criminal guilt, for the reviewing court would simply be concerned with issues of ultra vires; it could not substitute a judicial for an administrative trial.

**(e) Conclusion in Relation to Acts of Attainder**

It is suggested then that taking a substantive approach to the identification of Acts of Attainder, the factors discussed above should be weighed and balanced in the context of the circumstances of the case at hand. This "multifold analysis" might seem to provide only limited guidance and minimal predictive value in concrete cases. Such a criticism is not without foundation. But it is a criticism which reflects both the undeveloped nature of Australian law in this regard and the preference for substance over form in this, as in a range of other areas, of constitutional law. The model here presented for distinguishing legislative regulation from legislative punishment can only be putative in the absence of a stream of authority anchored in the Court's recognition in *Polyukhovich* that a legislative adjudgment and punishment of criminal guilt is indeed contrary to the Constitution's adoption of the separation of powers.

Nonetheless, it is possible to essay some examples. As pointed out above, s.4 of the *Communist Party Dissolution Act* was clearly an Act of Attainder. The burden upon the Australian Communist Party (which was identified by name) was clearly punitive in nature for the reasons set out by Professor Zines. Moreover, s.4 could not be said to be reasonably appropriate and adapted or proportionate to a legitimate non-punitive end (presumably the security and defence of the Commonwealth) because it was in no way tailored to this objective. In like manner, if following his trial and acquittal, the Commonwealth had named Mr Polyukhovich in legislation specifically denying him an

old-age pension (a form of “new property” entitlement<sup>161</sup>) it is submitted that this too would amount to a usurpation of judicial power – in this particular factual context, the legislative burden could hardly be other than punitive and the result of an illicit legislative judgment of criminal guilt. Varying this last example somewhat, were the facts of *United States v. Lovett* repeated in the Australian setting, it is submitted that this too would infringe Chapter III.<sup>162</sup>

But to take a different example, what if the Commonwealth Parliament passed legislation prohibiting the employment of scientologists, Jehovah’s Witnesses or some other religious group by the Australian Security Intelligence Organization? Leaving aside the possible effect of s.116 of the Constitution on such a law, it operates to subject a readily identifiable group to a special disability. Moreover, the law is clearly an overbroad response to the need to ensure that persons who represent a risk to national security are excluded from government employment in security sensitive areas. Thus, it could not be argued that the law is reasonably appropriate and adapted to a legitimate non-punitive end. But is the sanction punitive in the first place? Is the law in substance a legislative judgment and punishment for past conduct (rule application) or simply the creation of a new, albeit unfair, rule for the future based on Parliament’s assessment of the sort of activity that the targeted group is likely to engage in (rule formulation)?

In the absence of any relevant legislative history admissible on this point, bare contemplation of the law provides no answer to this question. But it is submitted that if a substantive approach to the separation of federal judicial power is to be maintained, then this particular impasse should be resolved in favour of invalidity. For not only does this forestall evasion by Parliament of the constitutional prohibition, but Parliament nonetheless remains free at all times to enact legislation ensuring the maintenance of national security in public sector employment. However, Parliament must legislate directly to that end, and not via the specification of particular groups –

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<sup>161</sup> See generally C.A. Reich, “The New Property” (1964) 73 *Yale L.J.* 733.

<sup>162</sup> See above pp.294-296 of this chapter.

whether scientologists, Jehovah's Witnesses, members of the homosexual community, law lecturers or the like – as somehow collectively tainted by their conduct.

### 3. The Validity of Retroactive Federal Criminal Laws

As many Acts of Attainder either impose punishment for past conduct which was, in terms of the general criminal law, innocent when done, or, alternatively, augment the punishment attaching to past conduct at the time it was done, Acts of Attainder frequently fall into the category of retroactive or ex post facto criminal laws. This explains the “linking” in the United States Constitution of the express prohibitions upon these two species of enactment.<sup>163</sup> But is such a linkage also to be discerned in the Australian constitutional framework? Does the recognition on the part of the High Court that the Commonwealth Parliament cannot validly pass an Act of Attainder have ramifications for the ability of the Commonwealth Parliament to enact other categories of retrospective legislation? After all, as Professor Tribe has pointed out, “all retrospective legislation necessarily creates a fixed class”.<sup>164</sup> The question then is whether a retroactive criminal law, not amounting to an Act of Attainder, can be seen as an infringement of the doctrine of the separation of federal judicial power. As foreshadowed at the outset of this chapter, the High Court in *Polyukhovich* divided on this issue.

Deane J. and Gaudron J. in their separate judgments in *Polyukhovich* maintained that a Commonwealth Act “which operates to make criminal an act which was not a crime when done”,<sup>165</sup> would infringe s.71 of the Constitution – s.9 of the *War Crimes Act* in its application to Mr Polyukhovich being such a law. Deane J. offered the lengthier

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<sup>163</sup> *Nixon v. Administrator of General Services* 433 U.S. 425, 468 fn.30 (1977) per Brennan J. See Art.I, s.9, cl.3 and Art.I, s.10, cl.1 of the United States Constitution.

<sup>164</sup> L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) 649, fn.40. See also *Nicholas v. R* (1998) 151 A.L.R. 312, 391 per Hayne J. Interestingly, Professor Harrison Moore suggested that s.71 of the Constitution contains an implied prohibition against retroactive federal criminal laws. See W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) 315, 322-323 (also *ibid* 97) and G. Winterton, “Introduction to the 1997 Reprint” in W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) (1997 reprint) xlv.

<sup>165</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 608 per Deane J.

analysis in this regard. His Honour began by reiterating that “the adjudgment of guilt of a person accused of a criminal offence”<sup>166</sup> is an exclusively judicial function, Parliament being “incapable of substituting a legislative enactment of criminal guilt of an offence against a law of the Commonwealth for a trial by a Ch.III court”.<sup>167</sup> This is incontrovertible, as is the proposition that a crime “necessarily involves a contravention of a prohibition contained in an existing applicable valid law”.<sup>168</sup> But, in Deane J.’s opinion, at the heart of this aspect of the judicial function lay the question whether the accused “committed a past act which constituted a criminal contravention of the requirements of a valid law *which was applicable to the act at the time the act was done*”.<sup>169</sup> Thus, a Commonwealth Act operating to make criminal that which was not a crime when done:

“would go beyond the limits of the legislative function under a constitution structured upon the separation of judicial and legislative powers in that it would involve a usurpation and partial exercise of what lies at the heart of the exclusively judicial function in criminal matters, namely, the determination of whether the accused person has in fact done an act which constituted a criminal contravention of the then applicable law”.<sup>170</sup>

Such an Act would amount in essence to “a retroactive legislative declaration of past criminal guilt when in fact there was none”.<sup>171</sup> Moreover, it would also infringe the curial due process implication,<sup>172</sup> his Honour proclaiming that such a law “negates the ordinary curial process by enacting, and requiring a finding of, criminal guilt regardless of whether there was in fact any contravention of any relevant law”.<sup>173</sup>

The balance of Deane J.’s judgment in *Polyukhovich* was devoted to demonstrating that neither authority (the judgment in *R. v. Kidman*<sup>174</sup>) nor other considerations flowing

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166 *Id.*

167 *Ibid* 609.

168 *Ibid* 609-610.

169 *Ibid* 610 (emphasis added).

170 *Ibid* 614.

171 *Ibid* 612.

172 See above ch.6.

173 *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 612. See also *ibid* 614.

174 (1915) 20 C.L.R. 425.



from the Constitution as a whole derogated from these findings. Gaudron J. offered similar reasons for the invalidity of s.9 of the *War Crimes Act*, emphasizing, however, not the legislative usurpation of judicial power, but the view that the application by a Chapter III court of a retroactive criminal law “would involve it in an exercise repugnant to the judicial process”.<sup>175</sup>

Clearly, the above reasoning turns on the claim that the judicial function in a criminal trial involves determining whether the accused committed a past act which, at the time it was done, contravened a then applicable law. Anglo-Australian courts have in the past recognized and applied retrospective criminal laws.<sup>176</sup> Thus, Deane J. justified his lynchpin claim in terms of the repugnance expressed by courts and legal commentators over several centuries to the notion of *ex post facto* criminal law<sup>177</sup> as well as by pointing to the prohibitions upon *ex post facto* criminal liability contained in various international and domestic human rights instruments, including the Universal Declaration of Human Rights.<sup>178</sup> That human rights are central to this aspect of the judgments of Deane J. and Gaudron J. in *Polyukhovich* is underscored by the unsatisfactory nature of the distinction – at least in terms of the doctrine of the separation of powers<sup>179</sup> – which their Honours drew between the constitutionality of retrospective criminal and civil laws. Deane J. maintained that civil legislation “will not, however, contravene the doctrine of separation of powers merely because it retrospectively creates, extinguishes or alters civil rights and liabilities or because it requires the courts to recognize and enforce, in subsequent civil litigation, the retrospective operation of its provisions”.<sup>180</sup> According to his Honour, “the focus of

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<sup>175</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 706.

<sup>176</sup> Sampford and Palmer in their lengthy survey of retrospectivity in Australian statute law note that prior to *Polyukhovich*, retrospective criminal laws had been upheld by the High Court on two occasions – in *R. v. Kidman* (1915) 20 C.L.R. 425 and *Millner v. Raith* (1942) 66 C.L.R. 1 (A. Palmer and C. Sampford, “Retrospective Legislation in Australia: Looking Back at the 1980s” (1994) 22 *F.L.Rev.* 217, 250-251 fn.120).

<sup>177</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 609 (citing Blackstone), 610-611, 623.

<sup>178</sup> *Ibid* 611-612.

<sup>179</sup> L. Zines, “A Judicially Created Bill of Rights” (1994) 16 *Syd.L.R.* 166, 171.

<sup>180</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 608.

civil litigation is upon the determination of rights and liabilities under the law *as it exists at the time of the proceedings*”,<sup>181</sup> a proposition with which Gaudron J. agreed.<sup>182</sup> Thus:

“the boundary between what is permissible as falling within the limits of legislative power and what is forbidden as a usurpation of judicial power is likely to be blurred in civil matters. The reason is that both the legislature and the judicature may, within the limits of their respective functions under the doctrine of separation of powers, each settle questions of rights and liabilities under the civil law.”<sup>183</sup>

With respect, the last sentence of this quoted passage merely restates the relevant question, rather than supplying any answer; for what are the limits of the legislative and judicial functions under the doctrine of the separation of powers? And why is the focus of civil litigation, in contrast to criminal litigation, “the determination of rights and liabilities under the law as it exists at the time of the proceedings”?<sup>184</sup>

Ultimately, one is driven to the conclusion of Professor Zines that the distinction propounded by Deane J. and Gaudron J. between the validity of retrospective criminal and civil laws “relates to social values as reflected in historical considerations”.<sup>185</sup> If this is indeed the basis of the invalidity of a federal law making criminal that which was not a crime when done, then perhaps the more transparent approach of Toohey J. in *Polyukhovich* is to be preferred. Toohey J. recognized that certain retroactive federal

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181 *Id* (emphasis added).

182 *Ibid* 705: “[t]he function of a court in civil proceedings is the determination of present rights, obligations or liabilities”.

183 *Ibid* 608 per Deane J.

184 See D. Rose, “Judicial Reasonings and Responsibilities in Constitutional Cases” (1994) 20 *Mon.L.R.* 195, 201-202. And see generally on this issue, R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, 276-278.

185 L. Zines, *The High Court and the Constitution* (4th ed) (1997) 211. See also D. Rose, “Judicial Reasonings and Responsibilities in Constitutional Cases” (1994) 20 *Mon.L.R.* 195, 204-205 and R. Blackford, “Judicial Power, Political Liberty and the Post-Industrial State” (1997) 71 *A.L.J.* 267, 276. A great many retrospective civil laws can be viewed as socially beneficial and as consistent with respect for human autonomy and dignity. It is otherwise in the case of retrospective criminal laws which, particularly given their potential impact on the liberty of the individual, are widely regarded as contrary to fundamental notions of justice. See generally A. Palmer and C. Sampford, “Retrospective Legislation in Australia: Looking Back at the 1980s” (1994) 22 *F.L.Rev.* 217.

criminal laws may infringe s.71 of the Constitution, but nonetheless concluded that s.9 of the *War Crimes Act* in its application to Mr Polyukhovich was not such a law. Toohey J. reasoned from what he described as the “general abhorrence of retroactive criminal law”.<sup>186</sup> This abhorrence had been expressed over centuries in domestic and (latterly) international legal texts and was founded upon “a fundamental notion of justice and fairness”.<sup>187</sup> To this notion of justice and fairness, his Honour harnessed the curial due process implication: “[i]t is conceivable that a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch.III, especially if the law excludes the ordinary indicia of judicial process”, his Honour having stated in the preceding sentence that only if a law purports “to require a court to act contrary to accepted notions of judicial power” may a breach of Ch.III occur.<sup>188</sup> Section 9 of the *War Crimes Act* in its application to the information laid against Mr Polyukhovich, however, escaped this category of invalidity because it penalized conduct – murder – which was universally condemned by legal and moral codes. Thus, although s.9 operated with retrospective effect, it did not, to the extent that it was in issue on the facts of the case, target conduct from which an individual had “no cause to abstain”.<sup>189</sup>

This treatment of retroactivity suggests that Toohey J. may have some sympathy for the view expressed by Murphy J. in *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation*<sup>190</sup> that Chapter III of the Constitution “imports those principles of justice ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’”.<sup>191</sup> Such a view, which would lead to the entrenchment of a wide-ranging doctrine of substantive due process<sup>192</sup> in the exercise

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186 *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 687.

187 *Ibid* 688.

188 *Ibid* 689.

189 *Ibid* 690-691.

190 (1982) 152 C.L.R. 25.

191 *Ibid* 109.

192 See, as adopting this nomenclature in the Australian context, G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 190.

of federal judicial power, has received a measure of support from Professor Winterton who has argued that Chapter III “would surely invalidate Commonwealth legislation which required a court to enforce laws inconsistent with civilised standards of humanity and justice”.<sup>193</sup> It seems, however, that Professor Winterton regards this limitation on Commonwealth legislative power as confined to those extreme cases where, to adopt the words of Dawson J. in a related setting, “law and political reality coincide”,<sup>194</sup> for he otherwise rejects a substantive due process implication.<sup>195</sup> If this is indeed the position of Professor Winterton, then it can be supported; for a Chapter III court to lend its process to a rule of conduct mandating torture as a penalty for breach would destroy public confidence in the federal judiciary thereby imperilling the whole scheme of Chapter III. But outside these truly exceptional cases, which could conceivably involve a retroactive federal criminal law, the approach to retroactivity of Deane J., Toohey J. and Gaudron J. in *Polyukhovich* should be rejected: that of Deane J. and Gaudron J. for the reasons outlined earlier; that of Toohey J. because it offers no criteria, other than generalized notions of justice and fairness, as either justificatory or delimiting principles.<sup>196</sup>

Of the remaining Justices in *Polyukhovich*, Mason C.J., Dawson J. and McHugh J. dismissed in conventional terms the argument that Chapter III of the Constitution impliedly prohibits the enactment by the Commonwealth Parliament of retroactive criminal laws. Leaving aside the special position of Acts of Attainder, their Honours reasoned that the application of a retroactive criminal law like s.9 of the *War Crimes Act* involved a trial before a Chapter III court in the usual way (at which trial, it should be noted, Mr Polyukhovich was acquitted<sup>197</sup>). Thus, accepting the long established rule that Parliament is entitled to legislate with retrospective effect as exemplified by *R. v.*

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<sup>193</sup> *Ibid* 207.

<sup>194</sup> *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51, 74.

<sup>195</sup> G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 204-208.

<sup>196</sup> Cf, however, H. Roberts, “Retrospective Criminal Laws and the Separation of Judicial Power” (1997) 8 *P.L.R.* 170, 181-183.

<sup>197</sup> G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 201 fn.111.

*Kidman*,<sup>198</sup> no legislative invasion of the curial function was involved.<sup>199</sup> Perhaps unfortunately, however, Brennan J. did not need specifically to address this aspect of the case, his Honour concluding that s.9 of the *War Crimes Act* was invalid as it could not be characterized as being with respect to any head of Commonwealth legislative power.<sup>200</sup>

In light of this division of opinion in *Polyukhovich*, it remains an open question whether at least certain types of retroactive federal criminal laws infringe Chapter III.<sup>201</sup>

However, there remains opposition on the High Court to the approach in *Polyukhovich* of Deane J. and Gaudron J.,<sup>202</sup> and it must be doubted whether a majority of the High Court will embrace this particular proposition.

#### **4. Conclusion: Unifying Themes in Relation to Acts of Attainder and Curial Due Process**

In reflecting upon the discussion of the separation of federal judicial power as a source of implied freedoms in this and the preceding chapter, it should not be assumed that the curial due process implication and the prohibition upon Acts of Attainder stand isolated and apart. To the contrary, they are intimately connected by a rule of law theme. The object of the exclusive vesting of federal judicial power in Chapter III courts is the maintenance of the supremacy of law over arbitrary power. In the context of our legal traditions and history, this carries with it the requirement that that judicial power be

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<sup>198</sup> (1915) 20 C.L.R. 425.

<sup>199</sup> *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 531-540 per Mason J.; 643-651 per Dawson J.; 717-722 per McHugh J.

<sup>200</sup> But see Brennan J.'s approach to the characterization of a retrospective federal criminal law with respect to a purposive head of power (*ibid* 592-593).

<sup>201</sup> Note, however, the position taken by Gummow J. that *Polyukhovich* "decides that even a law, on its face imposing criminal liability in respect of past conduct which, at the time of its commission, did not contravene a law of the Commonwealth, does not, for that reason alone, usurp the exercise of the judicial power of the Commonwealth. The law will be valid if it leaves for determination by a court the issues which would arise at a trial under the law in question" (*Nicholas v. R.* (1998) 151 A.L.R. 312, 356 (fn. omitted)). See also *ibid* 392 per Hayne J.

<sup>202</sup> In *Mutual Pools & Staff Pty Ltd v. Commonwealth* (1994) 179 C.L.R. 155, McHugh J. stated that "[t]he power of the Parliament to pass retrospective criminal legislation is beyond doubt" (*ibid* 210). See also *Health Insurance Commission v. Peeverill* (1994) 179 C.L.R. 226, 263 per McHugh J. and above fn.201 of this chapter.

exercised by those courts fairly and impartially and according to the generalized rules of natural justice. But as pointed out earlier in this chapter, one of the key objections to the legislative exercise of judicial power in the form of an Act of Attainder or the like is the *absence* of due process – the rules of natural justice are *not* applicable to Parliament. Moreover, if judicial power is exercised by the legislative branch, existing rights can be conclusively determined on the basis of a purely political assessment of what the outcome of a “case” should be. However, this is anathema to the process of the courts and inimical to the rule of law. As Deane J. observed of the curial due process implication in *Polyukhovich*:

“It would, for example, be beyond legislative competence to vest jurisdiction to deal with a particular class of matter in a Ch.III court and to provide that, in the exercise of that jurisdiction, the judge or judges constituting the court should disregard both the law and the essential function of a court of law and do whatever they considered to be desirable in the public interest.”<sup>203</sup>

In other words, as Professor Detmold has said, it is the function of the courts to apply “reason”, not “will” – “will” being the preserve of the political branches.<sup>204</sup>

This interrelationship between the prohibition upon legislative judgments and the requirement of curial due process under a Constitution premised upon the separation of judicial power is further illustrated by the classical case of *Liyange v. R.*<sup>205</sup> which, in dealing with a situation of legislative interference with judicial power, straddles the two implications.<sup>206</sup> In *Liyange*, the Privy Council considered the validity of Ceylonese legislation which had been enacted in response to a failed coup d’etat. The legislation had a number of remarkable features. It was retrospective, in that it was deemed to

203 *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 607.

204 M.J. Detmold, *The Australian Commonwealth* (1985) ch.13.

205 [1967] A.C. 259.

206 See, for a comprehensive discussion of the subtle and sometimes technical issues which arise in this area, G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 193-199. An argument of legislative interference with judicial power was rejected in *Nicholas v. R* (1998) 151 A.L.R. 312 and *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563. For a successful invocation of this argument in the United States Supreme Court, see *Plaut v. Spendthrift Farm Inc* 514 U.S. 211 (1995).

commence on a date shortly before the coup had occurred. It was also specifically directed to the legal proceedings against the alleged participants in the coup (the appellants), being expressed to cease to operate after those proceedings had come to an end. The substantive effect of the legislation was to legalize the pre-trial detention of the appellants and to authorize the trial of the offences with which they had been charged by judge alone. The minimum penalty attaching to those offences was increased to ten years imprisonment and a new, wide-ranging offence, designed “to meet the circumstances of the abortive coup”<sup>207</sup> was created. In addition, the rules of evidence which would otherwise apply to the trial of this type of offence were altered, significantly diminishing the protections to which an accused was entitled. Finally, the legislation excluded any right of appeal from the trial court to the Court of Criminal Appeal.

Having found that the Ceylonese Constitution incorporated a separation of judicial from legislative and executive power,<sup>208</sup> the Privy Council struck down this legislation as “an interference with the functions of the judiciary”.<sup>209</sup> As their Lordships said:

“The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals ... The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere.”<sup>210</sup>

The same conclusion would undoubtedly be reached on the same facts by the High Court.<sup>211</sup> In *Liyange*, the legislative intention was to punish particular individuals for

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207 [1967] A.C. 259, 280.

208 *Ibid* 286-289.

209 *Ibid* 290.

210 *Id.*

211 *Australian Building Construction Employees' and Builders Labourers' Federation v. Commonwealth* (1986) 161 C.L.R. 88, 96 per Gibbs C.J., Mason, Brennan, Deane and Dawson JJ. specifically discussing the *Liyange Case*. See also to the same effect *H.A. Bachrach Pty Ltd v. Queensland* (1998) 156 A.L.R. 563, 568 per Gleeson C.J., Gaudron, Gummow, Kirby and Hayne JJ.

past conduct, but the legislature sought to achieve this objective not by the passage of a Bill of Attainder, but by the enactment of *ad hominem* legislation manipulating the process of the court and the substantive law it was to apply to the trial of the appellants in order to promote their conviction and punishment in a particular way. Any such attempt by a legislature to impose its political will on the outcome of the trial of specific persons by enacting legislation directed to the course of that trial alone is clearly an interference with the judicial process<sup>212</sup> and apt to undermine public confidence in the independence of the courts.<sup>213</sup>

The above-mentioned linkages between the prohibition upon legislative judgments and the requirement of due process in the exercise of judicial power, as well as their “merger” or “blending” in a case like *Liyange* is hardly surprising – after all, it is the exclusive vesting of judicial power in the judicial branch which enlivens each doctrine. The particular advantage of purposive reasoning, however, is that it is capable of emphasizing these linkages and sustaining a coherent and integrated approach to the separation of federal judicial power as a source of constitutional “rights” protection. Such a coherent and integrated approach is surely a desirable outcome in any area of the law, but particularly one which goes to the heart of the maintenance of the rule of law itself.

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212 *Australian Building Construction Employees’ and Builders Labourers’ Federation v. Commonwealth* (1986) 161 C.L.R. 88, 96 per Gibbs C.J., Mason, Brennan, Deane and Dawson JJ.

213 *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 189 C.L.R. 51.



## CONCLUSION – THE SEPARATION OF FEDERAL JUDICIAL POWER: A PURPOSIVE ANALYSIS

As part of the foundation of Western constitutionalism, the separation of powers is a purposive doctrine. As was shown in Chapter Three, its theoretical proponents embraced it not for aesthetic reasons of symmetry and “simplicity”<sup>1</sup> in government, but because they believed that the separate exercise of legislative, executive and judicial powers would enhance the overall quality of government to which a people were subject. The doctrine proceeds from the basic truth, demonstrated over the centuries and only too apparent in many nations today, that where all channels of State power coalesce in the one person or body, law becomes indistinguishable from individual will. By contrast, a constitutional separation of powers creates structural incentives for observance of the rule of law – the separate exercise of judicial power from legislative and executive power serves to isolate the judiciary from “the general will of the state”<sup>2</sup> and promotes the resolution of disputes between individual litigants by reference to pre-existing law in an independent and impartial manner.

The division of the functions of government into legislative, executive and judicial and the allocation of each to a matching arm or branch of government also recognizes that each power or function calls for different skills and expertise in its discharge and a different decision-making process. This “efficiency” or “specialization of function” rationale of the separation doctrine is not, however, entirely distinct from its primary role in promoting the supremacy of law over arbitrary power. The rule of law would be threatened were the administration of justice placed in the hands of persons unskilled in the application of law to disputes *inter partes*. More importantly, however, the content of “judicial power” has historically been shaped by collective societal decisions that particular public functions *should* be exercised in a manner independent of the political

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<sup>1</sup> *Le Mesurier v. Connor* (1929) 42 C.L.R. 481, 519 per Isaacs J. quoting Story.

<sup>2</sup> Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989) 158.

branches of government and according to a procedure designed to maximize decisional fairness and impartially.

The Australian Constitution does not contain an explicit commitment to the separation of powers. As this thesis has shown, the separation of federal judicial power, considered as a “fundamental principle”<sup>3</sup> of the Constitution, flows instead from a reading of ss.1, 61 and 71 in light of the general framework of the Constitution and against the backdrop of certain traditional legal and “political values”.<sup>4</sup> These values are those described in the preceding two paragraphs – what Windeyer J. termed “our inheritance of the British tradition of the independence of the judges”.<sup>5</sup> It was “impossible”, he declared, to construe the Constitution “on the assumption that Montesquieu had never lived – I say nothing as to Locke – or that those who framed our Constitution did not copy s.71 from s.1 of Art.III of the Constitution of the United States. We know that they did.”<sup>6</sup> Of course, as was discussed in Chapter One, whether the Australian framers positively intended to embrace an American style separation doctrine – albeit tempered by adoption of a system of responsible government – is a matter of conjecture. But the fact remains that the existence of a legally entrenched separation doctrine as part of the body of our constitutional law is not the result of pure “textualism”, but of reading the text in historical, social and political context.

Accepting that this is so, it follows that the values and objectives associated with the separation of federal judicial power should consciously inform and guide its application on the part of the High Court. Any other approach, it is submitted, would lack legitimacy and distort the constitutional fabric. As the work of Professor Zines has

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<sup>3</sup> *New South Wales v. Commonwealth (Inter-State Commission Case)* (1915) 20 C.L.R. 54, 88 per Isaacs J.

<sup>4</sup> G. Sawyer, “The Separation of Powers in Australian Federalism” (1961) 35 *A.L.J.* 177, 179 observing of the process of constitutional construction in the *Boilermakers’ Case* that “[u]nless political values and historically conditioned assumptions are recognized as part of the premises, the logic is defective”.

<sup>5</sup> *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 390.

<sup>6</sup> *Ibid* 392.

shown, it would certainly not succeed in expunging “values” from the interpretative process. A purely formalistic approach to the separation doctrine, for example, would simply involve the substitution of one set of values in constitutional construction (those historically associated with the separate exercise of judicial power by an independent judiciary) for another (those associated with “formalism” such as certainty, predictability and the maintenance of an ostensibly “apolitical” judicial posture).<sup>7</sup> But there is no reason to believe that the latter set of values should necessarily trump the former or that they are even attainable – on any approach “certainty” and “predictability” in the definition of judicial power seems an illusion. And in recent years as the High Court has increasingly focussed on “substance or effect”<sup>8</sup> in all aspects of its work, it has shown little inclination to cling to formalism in constitutional construction except for compelling reasons.<sup>9</sup>

A major advantage of a purposive approach to the separation of federal judicial power which this thesis has sought to highlight is the way in which it provides a mechanism for the principled adjustment of the separation doctrine both to the demands of a changing world and competing social objectives.<sup>10</sup> For example, the outcome in the *B.I.O. Cases* – long regarded as integral to our system of taxation administration – can only be understood as representing such an adjustment or balancing of interests, even if Isaacs J.’s dense and poorly constructed reasons in *Federal Commissioner of Taxation v. Munro* failed to bring this into clear relief. This type of “flexibility” or “adaptability” is a feature of purposive reasoning in constitutional law generally. Thus, as has been pointed out in the body of this work with reference to the *Cheatle Case*, a constitutional

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<sup>7</sup> L. Zines, *The High Court and the Constitution* (4th ed) (1997) 424-433, 444-449, esp. 445. In relation to “formalism” or “legalism” as a means of portraying the judicial process as an “apolitical” one, see generally B. Galligan, *Politics of the High Court* (1987).

<sup>8</sup> C. Saunders, “The Mason Court in Context” in C. Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 3; L. Zines, *The High Court and the Constitution* (4th ed) (1997) 445; A. Mason, “Trends in Constitutional Interpretation” (1995) 18 *U.N.S.W.L.J.* 237, 245.

<sup>9</sup> *Id.*

<sup>10</sup> In relation to this issue, see generally A. Mason, “Constitutional Interpretation: Some Thoughts” (1998) 20 *Adel.L.R.* 49, 52-54.

concept with a purposive dimension can remain fixed and unchanging, but those conceptions which fall within its terms vary over time.<sup>11</sup> Certain American constitutional scholars, focussing primarily on the separation of functions between Congress and President, have argued that it is only by reference to “functional” or purposive reasoning that the contemporary Supreme Court can hope to honour the original intent of the framers in adopting a separation of powers. According to these writers, a formalistic approach to application of the separation doctrine in the circumstances which face American government in the late twentieth century (so different in every respect from those of the 1780s) will only entrench outcomes at odds with what the framers intended.<sup>12</sup> As already noted, what the Australian framers intended in this regard is unclear. But as an established part of our constitutional structure, the separation doctrine must inevitably evolve, like other fundamental principles of the Constitution, against the backdrop of a changing world. From time to time it must also be balanced against, and to some extent subordinated to, other constitutional objectives. Where this is the case, it is preferable that this occur openly and explicitly and by reference to the constitutional principles and objectives at stake, rather than under a formalistic facade.

This thesis has documented a number of situations in which the High Court has adopted a purposive approach to the separation doctrine. The concept of innominate powers as articulated by Isaacs J. in *Munro* ensured that Chapter III courts would remain responsible for the exercise of those functions exclusively judicial in nature, but at the same time identified a range of other functions which Parliament, in a rapidly changing and increasingly uncertain world, could allocate to any one of the three branches of

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<sup>11</sup> Adapting *ibid* 53-54, in turn drawing from R. Dworkin, *Taking Rights Seriously* (3rd impression) (1981) 134.

<sup>12</sup> See, eg, M.S. Flaherty, “The Most Dangerous Branch” (1996) 105 *Yale L.J.* 1725; R.L. Brown, “Separated Powers and Ordered Liberty” (1991) 139 *U. of Pa L.Rev.* 1513; P.L. Strauss, “Formal and Functional Approaches to Separation-Of-Powers Questions – A Foolish Inconsistency?” (1987) 72 *Cornell L.R.* 488. See also E.D. Elliott, “Why Our Separation of Powers Jurisprudence Is So Abysmal” (1989) 57 *Geo.Wash.L.Rev.* 506. For a defence of “formalism” in the context of the United States separation doctrine see, eg, M.H. Redish and E.J. Cisar, “If Angels Were to Govern?: The Need for Pragmatic Formalism in Separation of Powers Theory” (1991) *Duke L.R.* 449.

government. As so conceived, the separation doctrine was able to adapt to the challenges of a new, more interventionist, era in government but simultaneously maintain its core commitment to preservation of the rule of law. The “incompatibility test”, given renewed prominence in the context of both the *persona designata* doctrine and the proposition established in *Kable v. Director of Public Prosecutions (N.S.W.)* explicitly invokes the objects and purposes of the separation doctrine in its application. And as was demonstrated in the final two chapters of this work, the curial due process implication and the prohibition upon legislative and executive judgments and punishments must also be understood as furthering the goals associated with s.71 of the Constitution.

But although the High Court’s treatment of the separation doctrine contains these purposive strands, this approach has not been consistently adhered to. For example, and as discussed in Chapter Five, the cases concerned with the meaning of “judicial power” have not always clearly understood the judicial function as an historical and normative construct. The main departure, however, from an approach to the separation doctrine grounded in its animating principles is the rule in the *Boilermakers’ Case*. Taken by itself, the language of the Constitution does not clearly indicate, one way or the other, whether the Commonwealth Parliament can validly legislate to confer non-judicial functions on federal courts. And as was argued at length in Chapter Four, when one turns from the constitutional text to the objectives which underpin Chapter III, the undoubted need to maintain public confidence in judicial independence and impartiality, even under a “limited”<sup>13</sup> federal constitution, does not in itself demand that federal courts be quarantined from every function bearing the label “legislative” or “executive”. Those labels lack precision in the functions they denote and a definitional rule (“is”<sup>14</sup> the function “legislative” or “executive” in character) remains a poor substitute for application of an incompatibility test which specifically inquires as to what is necessary

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<sup>13</sup> *The Federalist No. 78* in B.F. Wright (ed), *The Federalist* (1961) 491 (Hamilton).

<sup>14</sup> E.D. Elliott, “Why Our Separation of Powers Jurisprudence Is So Abysmal” (1989) 97 *Geo.Wash.L.Rev.* 506, 527.

to preserve the independence of the judiciary in the discharge of its vital constitutional functions.

At this particular moment in time, and in contrast to the position twenty-five years ago, the High Court has given little indication that it is prepared to revisit *Boilermakers*'. But with the rise of the incompatibility test in the areas marked out in *Grollo*, *Wilson* and *Kable*, the recognition of a number of implied "rights" or freedoms attributable to Chapter III and the legal community's continued disenchantment with legalism, it seems that the High Court is bound to have more frequent recourse to the objects and purposes of the separation doctrine in its developing Chapter III jurisprudence.

From the perspective then of the late 1990s and looking back over nearly a century of activity on the part of the High Court, the separation of federal judicial power has proven the most resilient of the fundamental implications of the Australian Constitution. This is "lawyers' law", an area which judges can call home, as opposed to the murky worlds of federalism and representative government where judges tread less confidently.<sup>15</sup> A purposive approach to the separation of federal judicial power provides a principled basis for the evolution of law in this area – an approach firmly tied to the traditions enshrined in Chapter III of the Constitution, but yet capable of adaptation to the next century of judicial interpretation of Australia's fundamental law.

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<sup>15</sup> See the observation of Sir Anthony Mason in A. Mason, "Constitutional Interpretation: Some Thoughts" (1998) 20 *Adel.L.R.* 49, 55.

## BIBLIOGRAPHY

### 1. OFFICIAL REPORTS

Microfilm, "Australasian Federal Convention Adelaide 1897-8" GRG 72 Series 8/12 (held in Chifley Library, ANU).

*Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) Australian Government Publishing Service, Canberra.

Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987) Commonwealth of Australia.

*Final Report of the Constitutional Commission* (1988) Australian Government Publishing Service, Canberra.

*Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April, 1891 (reprinted by Legal Books, Sydney, 1986).

*Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May, 1897 (reprinted by Legal Books, Sydney, 1986).

*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March, 1898 (vols 1 and 2) (reprinted by Legal Books, Sydney, 1986).

*Official Record of the Proceedings and Debates of the National Australasian Convention* (1891) Government Printer, Sydney.

*Parliamentary Debates* (Cth).

*Report of the Royal Commission on the Constitution* (1929) Commonwealth Government Printer, Canberra.

"Report from the Committee of Privileges Relating to Articles Published in the *Bankstown Observer*" in *Votes and Proceedings of the House of Representatives* 1954-1955, vol.1, 417.

## 2. BOOKS

H.B. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (6th ed) (1994) Oxford University Press, New York.

T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993) Clarendon Press, Oxford.

B. d'Alpuget, *Mediator: A Biography of Sir Richard Kirby* (1977) Melbourne University Press, Carlton, Victoria.

M. Aronson and B. Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney.

M. Aronson and J. Hunter, *Litigation: Evidence and Procedure* (6th ed) (1998) Butterworths, Sydney.

A.G. Austin (ed), *The Webb's Australian Diary 1898* (1965) Sir Isaac Pitman & Sons Ltd, Melbourne.

P. Bator et al, *Hart and Wescheler's: The Federal Courts and the Federal System* (2nd ed) (1973) Foundation Press, Mineola, New York.

W. Blackstone, *Commentaries on the Laws of England* vol.1 (1765) (facsimile ed, 1983, The Legal Classics Library, New York).

W. Blackstone, *Commentaries on the Laws of England* vol.3 (1768) (facsimile ed, 1983, The Legal Classics Library, New York).

W. Blackstone, *Commentaries on the Laws of England* vol.4 (1769) (facsimile ed, 1983, The Legal Classics Library, New York).

K. Booker, A. Glass and R. Watt, *Federal Constitutional Law: An Introduction* (2nd ed) (1998) Butterworths, Sydney.

J. Bryce, *Studies in History and Jurisprudence* vol.1 (1901) Clarendon Press, Oxford.



CCH, *Australian Federal Tax Reporter* vol.11, CCH, Sydney.

CCH, *Australian High Court and Federal Court Practice* vol.1, CCH, Sydney.

A.L-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993)  
Clarendon Press, Oxford.

A. Inglis Clark, *Studies in Australian Constitutional Law* (1901) Charles F. Maxwell,  
Melbourne.

A. Inglis Clark, *Studies in Australian Constitutional Law* (2nd ed) (1905)  
Charles F. Maxwell, Melbourne.

M. Coper and G. Williams (eds), *How Many Cheers for Engineers?* (1996) The  
Federation Press, Sydney.

W.B. Creighton, W.J. Ford and R.J. Mitchell, *Labour Law: Text and Materials* (2nd ed)  
(1993) Law Book Co. Ltd, Sydney.

L.F. Crisp, *Federation Fathers* (1990) Melbourne University Press, Carlton, Victoria.

Z. Cowen and L. Zines, *Federal Jurisdiction in Australia* (2nd ed) (1978) Oxford  
University Press, Melbourne.

M.J. Detmold, *The Australian Commonwealth* (1985) Law Book Co. Ltd, Sydney.

R. Dworkin, *Taking Rights Seriously* (3rd impression) (1981) Gerald Duckworth & Co.  
Ltd, London.

P.D. Finn, *Law and Government in Colonial Australia* (1987) Oxford University Press,  
Melbourne.

B. Galligan, *Politics of the High Court* (1987) University of Queensland Press, St Lucia.

R.R. Garran, *Prosper the Commonwealth* (1958) Angus and Robertson, Sydney.

- N. Gunningham, *Industrial Law and the Constitution* (1988) The Federation Press, Sydney.
- W.B. Gwyn, *The Meaning of the Separation of Powers* (1965) Martinus Nijhoff, The Hague.
- A.D. Hambly and J.L. Goldring, *Australian Lawyers and Social Change* (1976) Law Book Co. Ltd, Sydney.
- P. Hanks, *Constitutional Law in Australia* (2nd ed) (1996) Butterworths, Sydney.
- Hewart, *The New Despotism* (1929) Ernest Benn Limited, London.
- P. Hogg, *Constitutional Law of Canada* (1997) (student edition) Carswell, Toronto.
- P. Hogg, *Constitutional Law of Canada* (3rd ed) (1992) Carswell, Toronto.
- W.S. Holdsworth, *A History of English Law* (2nd ed) (1937) Methuen & Co. Ltd, London.
- L. Jaffe and N. Nathanson, *Administrative Law: Cases and Materials* (4th ed) (1976) Little, Brown & Co., Boston.
- D. Kerr, *The Law of the Australian Constitution* (1925) Law Book Co., Sydney.
- J.A. La Nauze, *The Making of the Australian Constitution* (1972) Melbourne University Press, Carlton, Victoria.
- P.H. Lane, *The Australian Federal System* (1972) Law Book Co. Ltd, Sydney.
- C.J. Lloyd, *Parliament and the Press: The Federal Parliamentary Press Gallery 1901-88* (1988) Melbourne University Press, Melbourne.
- J. Locke, *Two Treatises of Government* (edited by P. Laslett, 1988) (student edition) Cambridge University Press, Cambridge.

- F.W. Maitland, *The Constitutional History of England* (1963) Cambridge University Press, Cambridge.
- R. Mathews, *Australia's First Fabians* (1993) Cambridge University Press, Cambridge.
- Montesquieu, *The Spirit of the Laws* (A. Cohler, B. Miller and H. Stone trans. and eds, 1989), Cambridge University Press, Cambridge.
- W. Harrison Moore, *The Commonwealth of Australia: Four Lectures on the Constitution Bill 1897* (1897) George Robertson & Co., Melbourne.
- W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) John Murray, London.
- W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) Charles F. Maxwell, Melbourne.
- N. O'Neill and R. Handley, *Retreat From Injustice: Human Rights in Australian Law* (1994) The Federation Press, Sydney.
- J.A. Pettifer (ed), *House of Representatives Practice* (1981) Australian Government Publishing Service, Canberra.
- J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (reprinted by Legal Books, Sydney, 1995).
- J. Quick and L.E. Groom, *The Judicial Power of the Commonwealth* (1904) C.F. Maxwell, Melbourne.
- J. Rawls, *A Theory of Justice* (1972) Clarendon Press, Oxford.
- M. Richter, *The Political Theory of Montesquieu* (1977) Cambridge University Press, Cambridge.
- W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (1928) Macmillan, London.

- W.G. Ross, *A Muted Fury: Populists, Progressives, and Labour Unions Confront the Courts, 1890-1937* (1994) Princeton University Press, Princeton, New Jersey.
- G. Sawyer, *Australian Federal Politics and Law 1901-1929* (1956) Melbourne University Press, Carlton, Victoria.
- G. Sawyer, *Australian Federal Politics and Law 1929-1949* (1963) Melbourne University Press, Carlton, Victoria.
- G. Sawyer, *Australian Federalism in the Courts* (1967) Melbourne University Press, Carlton, Victoria.
- S. Shetreet and J. Deschenes (eds), *Judicial Independence: The Contemporary Debate* (1985) Martinus Nijhoff, Dordrecht.
- S. de Smith and R. Brazier, *Constitutional and Administrative Law* (7th ed) (1994) Penguin, Harmondsworth, Middlesex.
- G. Souter, *Acts of Parliament* (1988) Melbourne University Press, Carlton, Victoria.
- G.R. Stone, L.M. Seidman, C.R. Sunstein and M.V. Tushnet, *Constitutional Law* (2nd ed) (1991) Little, Brown & Co., Boston.
- D. Stuart, *Charter Justice in Canadian Criminal Law* (1991) Carswell, Scarborough, Ontario.
- L.H. Tribe, *American Constitutional Law* (2nd ed) (1988) Foundation Press, Mineola, New York.
- A.T. Vanderbilt, *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) University of Nebraska Press, Lincoln.
- M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) Clarendon Press, Oxford.

- G. de Q. Walker, *The Rule of Law: Foundations of Constitutional Democracy* (1988) Melbourne University Press, Carlton, Victoria.
- G. Winterton, *Parliament, the Executive and the Governor-General* (1983) Melbourne University Press, Carlton, Victoria.
- R.H. Woellner, T.J. Vella, L. Burns and S. Barkoczy, *Australian Taxation Law* (7th ed) (1997) CCH, Sydney.
- B.F. Wright (ed), *The Federalist* (1961) Belknap Press of Harvard University Press, Cambridge, Massachusetts.
- L. Zines, *The High Court and the Constitution* (3rd ed) (1992) Butterworths, Sydney.
- L. Zines, *The High Court and the Constitution* (4th ed) (1997) Butterworths, Sydney.
- L. Zines and G.J. Lindell, *Sawyer's Australian Constitutional Cases* (4th ed) (1982) Law Book Co. Ltd, Sydney.

### 3. ARTICLES, ESSAYS AND PAPERS

W.E. Ackerman, "Judges and Presidential Commissions" (1986) 53 *University of Chicago Law Review* 993.

M. Allars, "Theory and Administrative Law: Law as Form and Theory as Substance" (1996) 79 *Canberra Bulletin of Public Administration* 20.

R. Anderson, "Exclusiveness of Judicial Power of the Commonwealth" (1956-59) 3 *University of Queensland Law Journal* 71.

J. Badgery-Parker, "The Criminal Process in Transition: Balancing Principle and Pragmatism (Part 1)" (1995) 4 *Journal of Judicial Administration* 171.

J. Badgery-Parker, "The Criminal Process in Transition: Balancing Principle and Pragmatism (Part 2)" (1995) 4 *Journal of Judicial Administration* 193.

E. Barendt, "Separation of Powers and Constitutional Government" [1995] *Public Law* 599.

T. Bavin, "The Judicial Power of the Commonwealth (Part 1)" (1903) 1 *Commonwealth Law Review* 49.

T. Bavin, "The Judicial Power of the Commonwealth (Part 2)" (1904) 1 *Commonwealth Law Review* 97.

M. Bergman, "Montesquieu's Theory of Government and the Framing of the American Constitution" (1990) 18 *Pepperdine Law Review* 1.

R. Blackford, "Judicial Power, Political Liberty and the Post-Industrial State" (1997) 71 *Australian Law Journal* 267.

F.G. Brennan, "Limits on the Use of Judges" (1978) 9 *Federal Law Review* 1.

G. Brennan, "Courts, Democracy and the Law" (1991) 65 *Australian Law Journal* 32.

R.L. Brown, "Separated Powers and Ordered Liberty" (1991) 139 *University of Pennsylvania Law Review* 1513.

F.S. Burin, "The Theory of the Rule of Law and the Structure of the Constitutional State" (1966) 15 *American University Law Review* 313.

S.G. Calabresi and J.L. Larsen, "One Person, One Office: Separation of Powers or Separation of Personnel?" (1994) 79 *Cornell Law Review* 1045.

E. Campbell, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *Federal Law Review* 24.

E. Campbell, "Constitutional Protection of State Courts and Judges" (1997) 23 *Monash University Law Review* 397.

A. Castles, "The Voyage of the 'Lucinda' and the Drafting of the Australian Constitution in 1891" (1991) 65 *Australian Law Journal* 277.

A.L-T. Choo, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited" [1995] *Criminal Law Review* 864.

Comment, "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause" (1962) 72 *Yale Law Journal* 330.

M. Coper, "The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission" (1989) 63 *Australian Law Journal* 731.

M.G. Cowman, "Separation of Judicial Power: *Brandy v Human Rights and Equal Opportunity Commission*" (1995) 2 *Deakin Law Review* 119.

S. Crawshaw, "The High Court of Australia and Advisory Opinions" (1977) 51 *Australian Law Journal* 112.

M.E. Crock, "Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia" (1993) 15 *Sydney Law Review* 338.

- M. Crock and R. McCallum, "The Chapter III Courts: The Evolution of Australia's Federal Judiciary" (1995) 6 *Public Law Review* 187.
- A.R.N. Cross, "The Right to Silence and the Presumption of Innocence – Sacred Cows or Safeguards of Liberty?" (1970) 11 *Journal of the Society of Public Teachers of Law* 66.
- I. Dennis, "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination" [1995] *Cambridge Law Journal* 342.
- M.J. Detmold, "The New Constitutional Law" (1994) 16 *Sydney Law Review* 228.
- O. Dixon, "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590.
- O. Dixon, "The Separation of Powers in the Australian Constitution" (1942) *American Foreign Law Association, Proceedings No. 24*.
- O. Dixon, "Address of the Annual Dinner of the American Bar Association" (1942) 16 *Australian Law Journal* 192.
- J.J. Doyle, "Constitutional Law: 'At the Eye of the Storm'" (1993) 23 *University of Western Australia Law Review* 15.
- K.P. Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" (1995) 19 *Criminal Law Journal* 258.
- W.G.K. Duncan, "Modern Constitutions" in G.V. Portus (ed), *Studies in the Australian Constitution* (1933) Angus & Robertson Limited, Sydney.
- E. Donald Elliott, "Why Our Separation of Powers Jurisprudence Is So Abysmal" (1989) 57 *George Washington Law Review* 506.
- J.M. Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adelaide Law Review* 159.
- M.S. Flaherty, "The Most Dangerous Branch" (1996) 105 *Yale Law Journal* 1725.



- M. Gaudron, "Equality Before the Law with Particular Reference to Aborigines" (1993) 1 *The Judicial Review* 81.
- M. Gaudron, "Some Reflections on the Boilermakers' Case" (1995) 37 *Journal of Industrial Relations* 306.
- H. Gibbs, "The Separation of Powers – A Comparison" (1987) 17 *Federal Law Review* 151.
- S. Griffith, "Notes on Australian Federation: Its Nature and Probable Effects" (1896) Queensland Government Printer, Brisbane.
- W.B. Gwyn, "The Indeterminacy of the Separation of Powers and the Federal Courts" (1989) 57 *George Washington Law Review* 474.
- E. Handsley, "Do Hard Laws Make Bad Cases? – The High Court's Decision in *Kable v. Director of Public Prosecutions (NSW)*" (1997) 25 *Federal Law Review* 171.
- E. Henderson, "Trials, Tribunals and Tribulations: *Brandy v Human Rights and Equal Opportunities Commission*" (1995) 17 *Sydney Law Review* 581.
- B. Horrigan, "Is the High Court Crossing the Rubicon? – A Framework for Balanced Debate" (1995) 6 *Public Law Review* 284.
- M. Howell, "'Your Time is Up' – The Imposition of Time Limits for the Presentation of Cases at Hearings" (1996) 5 *Journal of Judicial Administration* 170.
- J. Huffman and M. Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74 *Minnesota Law Review* 1215.
- D.F. Jackson, "Practice in the High Court of Australia" (1997) 15 *Australian Bar Review* 187.

- J. Jaconelli, "Hypothetical Disputes, Moot Points of Law, And Advisory Opinions" (1985) 101 *Law Quarterly Review* 587.
- G. Kennett, "Individual Rights, The High Court and the Constitution" (1994) 19 *Melbourne University Law Review* 581.
- J.A. La Nauze, "The Inter-State Commission" (1937) 9 *Australian Quarterly* 48.
- P.H. Lane, "The Decline of the Boilermakers Separation of Powers Doctrine" (1981) 55 *Australian Law Journal* 6.
- J. Laws, "Law and Democracy" [1995] *Public Law* 72.
- M.P. Lehmann, "The Bill of Attainder Doctrine: A Survey of the Decisional Law" (1978) 5 *Hastings Constitutional Law Quarterly* 767.
- G.J. Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) The Federation Press, Sydney.
- G. Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383.
- L.J. Ludeke, "The Structural Features of the New System" (1994) *Australian Journal of Labour Law* 132.
- D. Malcolm, "The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate" (1992) 66 *Australian Law Journal* 247.
- B. Manin, "Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debates of 1787" in B. Fontana (ed), *The Invention of the Modern Republic* (1994) Cambridge University Press, Cambridge.
- A. Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Federal Law Review* 1.

- A. Mason, "Future Directions in Australian Law" (1987) 13 *Monash University Law Review* 149.
- A. Mason, "The Role of the Courts at the Turn of the Century" (1993) 3 *Journal of Judicial Administration* 156.
- A. Mason, "The State of the Judicature" (1994) 20 *Monash University Law Review* 1.
- A. Mason, "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) 1 *Australian Journal of Human Rights* 3.
- A. Mason, "Fair Trial" (1995) 19 *Criminal Law Journal* 7.
- A. Mason, "Trends in Constitutional Interpretation" (1995) 18 *University of New South Wales Law Journal* 237.
- A. Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in C. Sampford and K. Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) The Federation Press, Sydney.
- A. Mason, "A New Perspective on Separation of Powers" (1996) 82 *Canberra Bulletin of Public Administration* 1.
- A. Mason, "Defining the Framework of Government: Judicial Deference v. Human Rights and Due Process", paper delivered at Centre for Public Policy Workshop, Melbourne University, 7 June 1996 (copy on file with author).
- A. Mason, "Constitutional Interpretation: Some Thoughts" (1998) 20 *Adelaide Law Review* 49.
- A.T. Mason, "Extra-Judicial Work for Judges: The Views of Chief Justice Stone" (1953) 67 *Harvard Law Review* 193.
- K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 *Australian Law Journal* 449.

- K. Mason, "The Rule of Law" in P.D. Finn (ed), *Essays on Law and Government vol.1: Principles and Values* (1995) Law Book Co. Ltd, Sydney.
- G.J. McC, "Recent Cases" (1978) 52 *Australian Law Journal* 510.
- M. McHugh, "The Law-making Function of the Judicial Process – Part I" (1988) 62 *Australian Law Journal* 15.
- J.D. Merralls, "Judicial Power Since the Boilermakers' Case: Statutory Discretion and the Quest for Legal Standards (Part 1)" (1959) 32 *Australian Law Journal* 283.
- J.D. Merralls, "Judicial Power Since the Boilermakers' Case: Statutory Discretion and the Quest for Legal Standards (Part 2)" (1959) 32 *Australian Law Journal* 303.
- J. de Meyrick, "Whatever Happened to Boilermakers? (Part I)" (1995) 69 *Australian Law Journal* 106.
- A.J.H. Morris, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation" (1994) 68 *Australian Law Journal* 193.
- D. Mullan, "Quebec Unilateral Secession Reference: 'A Ruling that Will Stand the Test of Time'" (1998) 9 *Public Law Review* 231.
- Note, "Advisory Opinions on the Constitutionality of Statutes" (1956) 69 *Harvard Law Review* 1302.
- Note, "Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez, and Speiser Cases" (1959) 34 *Indiana Law Journal* 231.
- R. Orr, "*Kable v. DPP*: Taking Judicial Protection Too Far?" (1996) 11 *Australian Institute of Administrative Law Forum* 11.
- D.M. Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 *Criminal Law Journal* 315.

- A. Palmer and C. Sampford, "Retrospective Legislation in Australia: Looking Back at the 1980s" (1994) 22 *Federal Law Review* 217.
- C. Parker, "Protection of Judicial Process as an Implied Constitutional Principle" (1994) 16 *Adelaide Law Review* 341.
- D.C. Pearce, "Contempt of Parliament – Instrument of Politics or Law" (1969) 3 *Federal Law Review* 241.
- P. Phillips, "Advisory Opinions" (1928) 2 *Australian Law Journal* 87.
- S. Power, "Constitutional Validity of Enforcement Procedures Under Commonwealth Anti-discrimination Legislation – Response to Article by Anthony J H Morris QC" (1994) 68 *Australian Law Journal* 434.
- S. Ratnapala, "John Locke's Doctrine of the Separation of Powers: A Re-Evaluation" (1993) 38 *American Journal of Jurisprudence* 189.
- S. Ratnapala, "*Harry Brandy's Case* and its Implications for Taxation Administration in Australia" (1995) 18 *University of Queensland Law Journal* 233.
- J. Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195.
- M.H. Redish, "Separation of Powers, Judicial Authority, And the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*" (1989) 39 *DePaul Law Review* 299.
- M.H. Redish and E.J. Cisar, "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory" (1991) 41 *Duke Law Journal* 449.
- C.A. Reich, "The New Property" (1964) 73 *Yale Law Journal* 733.
- J. Reynolds, "A I Clark's American Sympathies and his Influence on Australian Federation" (1958) 32 *Australian Law Journal* 62.
- H. Roberts, "Retrospective Criminal Laws and the Separation of Judicial Power" (1997) 8 *Public Law Review* 170.

- D. Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Monash University Law Review* 194.
- R. Sackville, "Continuity and Judicial Creativity – Some Observations" (1997) 20 *University of New South Wales Law Journal* 145.
- C. Saunders, "The Mason Court in Context" in C. Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) The Federation Press, Sydney.
- G. Sawyer, "Separation of Judicial Powers in the Australian Constitution" [1957] *Public Law* 198.
- G. Sawyer, "Judicial Power Under the Constitution" in R. Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed) (1961) Law Book Co., Sydney.
- G. Sawyer, "The Separation of Powers in Australian Federalism" (1961) 35 *Australian Law Journal* 177.
- R. Shackleton, "Montesquieu, Bolingbroke, and the Separation of Powers" in R. Shackleton (D. Gilson and M. Smith eds) *Essays on Montesquieu and on the Enlightenment* (1988) Voltaire Foundation, Oxford.
- M. Sharp, "The Classical American Doctrine of 'The Separation of Powers'" (1935) 2 *University of Chicago Law Review* 385.
- "Staying a Trial for Unfairness: The Constitutional Implications" (1994) 18 *Criminal Law Journal* 317 (editorial).
- N.M. Stephen, "Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion" (1982) 13 *Melbourne University Law Review* 334.
- P.L. Strauss, "Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?" (1987) 72 *Cornell Law Review* 488.

- D.C. Thomson, "The Separation of Powers Doctrine in the Commonwealth Constitution: *The Boilermakers' Case*" (1958) 2 *Sydney Law Review* 480.
- J. Thomson, "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australia Constitution" in G. Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) Legal Books, Sydney.
- R. Treyde, "Enforcing Human Rights: The Response to *Brandy*" (1996) 7 *Public Law Review* 15.
- A. Twomey, "Reconciling Parliament's Contempt Powers with the Constitutional Separation of Powers" (1997) 8 *Public Law Review* 88.
- P.R. Verkuil, "Separation of Powers, The Rule of Law and the Idea of Independence" (1989) 30 *William and Mary Law Review* 301.
- K. Walker, "Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights" (1995) 25 *University of Western Australia Law Review* 238.
- K. Walker, "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 *Public Law Review* 153.
- M. Weinberg, "Criminal Procedure and the Fair Trial Principle" in P.D. Finn (ed), *Essays on Law and Government vol.2: The Citizen and the State in the Courts* (1995) Law Book Co., Sydney.
- F. Wheeler, "The Use of Federal Judges to Discharge Executive Functions: *The Justice Mathews Case*" (1996) 82 *Canberra Bulletin of Public Administration* 10.
- J.M. Williams, "'With Eyes Open': Andrew Inglis Clark and Our Republican Tradition" (1995) 23 *Federal Law Review* 149.

- J.M. Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'" (1996) 42 *Australian Journal of Politics and History* 10.
- J.M. Williams, "Re-thinking Advisory Opinions" (1996) 7 *Public Law Review* 205.
- J.M. Williams, "Introduction to the 1997 Reprint" in A. Inglis Clark, *Studies in Australian Constitutional Law* (1901) (1997 reprint, Legal Books, Sydney).
- G. Winterton, "Judges as Royal Commissioners" (1987) 10 *University of New South Wales Law Journal* 108.
- G. Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) The Federation Press, Sydney.
- G. Winterton, "Introduction to the 1997 Reprint" in W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) (1910) (1997 reprint, Legal Books, Sydney).
- W.A. Wynes, "The Decision in the Boilermakers' Case" (1957) 30 *Australian Law Journal* 614.
- G. Zdenkowski, "Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?" (1994) 18 *Criminal Law Journal* 135.
- L. Zines, "The Inter-State Commission: Its Origins, History, Role and Scope" in *The Inter-State Commission: A Guide to its Powers, Functions and Procedures* (1984) Australian Government Publishing Service.
- L. Zines, "Characterisation of Commonwealth Laws" in H.P. Lee and G. Winterton (eds), *Australian Constitutional Perspectives* (1992) Law Book Co. Ltd, Sydney.
- L. Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166.



L. Zines, "Social Conflict and Constitutional Interpretation" (1996) 22 *Monash University Law Review* 195.

L. Zines, "The States and the Constitution" in G. Moens and R. Mortensen (eds), *Essays in Honour of Richard Darrell Lumb* (working title) (forthcoming) (copy on file with author).