

---

# Executive toys: Judges and non-judicial functions

Hon RS French\*

---

*Judges today are asked to perform a variety of non-judicial, administrative functions, such as issuing search warrants or preventative detention orders. But are these the kinds of things that judges should do? Responses to this question are often “knee-jerk”; they are not part of the judicial function and the judge can become an agent of the Executive. In this article, Chief Justice French refers to the doctrine of the separation of powers in the Australian context to show that such knee-jerk responses are not helpful; it is important to develop a sense of the history and traditions of the judicial role and its proper limits and a sense of those things which are incompatible with it.*

## INTRODUCTION

The judicial task in contemporary society is demanding and relentless. One case rolls off the production line after another. All are conducted, as Bentham once said, “in the face of the public”. Particularly in the area of criminal law, the public, through the media, does not hesitate to offer critiques of the judges’ work.

For those exposed to this ongoing pressure, there may be a kind of guilty pleasure in retreating into chambers with a friendly police officer and someone from the Director of Public Prosecutions, reading an affidavit or two full of secondhand evidence from unidentified informers and issuing, in secret, and without reasons, a warrant for the clandestine interception of a criminal suspect’s conversations. There is a variety of such diverting non-judicial jobs on offer. Recently under the *Terrorism (Preventative Detention) Act 2006* (WA) provision was made for judges of the Supreme Court to issue preventative detention orders in relation to pending terrorist acts and also covert search warrants. Judges of the District Court who hold commissions as acting judges of the Supreme Court constitute the court under the *Supreme Court Act 1935* (WA) so a commission as an acting Supreme Court judge might arguably suffice.

There is a question whether these are the kinds of things judges should do. Frequently there are knee jerk responses to those questions. Such things are simply beyond the pale, not part of the judicial function. The judge issuing such warrants becomes a play thing of the Executive – an executive toy.

In this article I endeavour, by reference to the untidy history and content of the doctrine of separation of powers in its Australian setting and its application to the role of judges, to show that knee jerk responses are not particularly helpful in this difficult area. It is important to develop a sense of the history and traditions of the judicial role and its proper limits and a sense of those things which are incompatible with it. That sense will not always yield clear-cut answers but it may form the basis of developing reasonably sensible approaches to these difficult problems, hopefully on a collegial basis.

## THE COURTS OF THE STATES: ELEMENTS OF A SINGLE NATIONAL JUDICIAL SYSTEM

When the six Australian colonies became States of the Federation in 1901 each had a well-established Supreme Court modelled on the Supreme Court of Judicature in England. Queensland, New South Wales, Victoria and South Australia had intermediate trial courts. All had courts of summary jurisdiction. Appellate jurisdiction was exercised by Full Courts of the Supreme Courts and, on

---

\* Chief Justice of the High Court of Australia. This article is based on a paper delivered at the District Court Judges’ Conference, Joondalup, Western Australia, 11 April 2008.

appeals from the summary courts, could be exercised by single judges of the Supreme and District or County Courts. Appeals to the Privy Council from decisions of the Supreme Courts existed as of right or by leave.

The structures of the judicial systems of the colonies did not change at federation. They have continued substantially unaltered save that District or County Courts have been created in all States except Tasmania. Supreme Courts and Magistrates Courts have been established in the Northern Territory and the Australian Capital Territory. There is also a Supreme Court of the Norfolk Island Territory. Courts of Appeal have been created in New South Wales, Victoria, Queensland and Western Australia. In addition there have developed over time a variety of State and federal specialist tribunals.

It is an important historical fact that at federation the Supreme Courts of the colonies were courts of high standing. This was reflected in Ch III of the *Constitution* which allowed for federal jurisdiction to be exercised by the State courts – the so called “autochthonous expedient”. The relevant provisions are ss 71, 75, 76 and 77.

Section 71 of the *Constitution* vests the judicial power of the Commonwealth in the High Court of Australia, such other federal courts as the Parliament creates and such other courts as it invests with federal jurisdiction. By s 77 the Parliament may invest any court of a State with federal jurisdiction in any of the matters referred to in ss 75 and 76. These include matters arising under the *Constitution* and involving its interpretation and matters arising under any laws made by the Parliament. That so-called “autochthonous expedient” was rejected in the United States because of the perceived parochialism and lack of independence of State courts in that country. The Australian State Supreme Courts at the time of federation were seen as being of a uniformly high standard which, as Professor Sawyer observed, was a situation “in marked contrast with that which obtained in the United States shortly after its establishment”.<sup>1</sup>

At federation, Henry Bourne Higgins argued for the deferment of the establishment of the High Court and that the supervision of the *Constitution* should be left to the State Supreme Courts. They were, after all, bound by the *Constitution* by virtue of covering clause 5. Notwithstanding that argument the *Judiciary Act 1903* (Cth) was passed in 1903 and provided for a High Court comprising a Chief Justice and two justices. Section 39 of that Act, subject to some exceptions and the limitations of their jurisdictions as to locality, subject matter or otherwise, invested State courts with federal jurisdiction in all matters in which the High Court has original jurisdiction or can have original jurisdiction conferred upon it. The exceptions related to the exclusive original jurisdiction of the High Court in matters defined in s 38 which was extended in 1907 to matters including the limits inter se of the constitutional power of the Commonwealth and the States and the limits inter se of the constitutional powers of any two or more States.<sup>2</sup> So the State courts in 1903 had jurisdiction in matters arising under the *Constitution* or involving its interpretation and in matters arising under laws of the Commonwealth Parliament.<sup>3</sup> The Federal Court which, prior to 1997, had limited jurisdictions granted under particular statutes, was given general federal jurisdiction like that of the States by the enactment of s 39B(1A)(b) of the *Judiciary Act*.

Because of the provisions of the *Judiciary Act* and covering clause 5 of the *Constitution*, the State courts have, and have had since 1903, large areas of jurisdiction in common in matters arising under federal law and in matters involving the *Constitution* and its interpretation. Constitutional adjudication in Australia is decentralised. Subject to the notice and removal provisions of the Act it can be undertaken by all courts albeit the final arbiter is the High Court as Australia’s ultimate constitutional court. As the Australian Law Reform Commission pointed out in its report on the judicial power of the

---

<sup>1</sup> Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967), pp 20-21; see also Barwick, “The State of the Australian Judicature” (1977) 51 ALJ 480 at 482.

<sup>2</sup> *Judiciary Act 1903* (Cth), s 38A.

<sup>3</sup> *Judiciary Act 1903* (Cth), s 39.

Commonwealth,<sup>4</sup> less than 8% of constitutional matters notified each year under s 78B of the *Judiciary Act* attract the intervention of the Commonwealth Attorney-General. The Commission found that there was unanimous support for the decentralised model. Any change to it could cause the High Court to be swamped with relatively minor constitutional issues, jeopardise its general appellate jurisdiction and generate the need for a new court of final appeal in non-constitutional matters.

The State courts also administer the common law which has sometimes been referred to as the unwritten law of the States and Territories. The notion that post-federation there was only one common law for the whole of Australia is now well established. It was foreshadowed by Quick and Garran:<sup>5</sup>

Throughout the Commonwealth of Australia, the unlimited appellate jurisdiction of the High Court will make it – subject to review by the Privy Council – the final arbiter of the common law in all the States. The decisions of the High Court will be binding on the courts of the States; and thus the rules of the common law will be – as they always have been – the same in all the States. In this sense, that the common law in all the States is the same, it may certainly be said that there is a common law of the Commonwealth.

Judgments of the High Court in the 1990s explicitly endorsed the proposition that there is but one common law of Australia. In *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112, McHugh J said:

Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State.

In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 it was said in the joint judgment of the court:

The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form “one system of jurisprudence”.

In *Lipohar v The Queen* (1999) 200 CLR 485 at 505, in their joint judgment Gaudron, Gummow and Hayne JJ adopted the statement made by McHugh J in *Kable*.

In addition to federal jurisdiction and the jurisdiction in relation to the common law there are many State statutes which follow common forms or reflect uniform legislative arrangements. The State Constitutions themselves have features which derive from the 19th century Imperial equivalent of constitutional word processors, albeit there have been changes over the years since federation.

## THE JUDICIARY IN WESTERN AUSTRALIA: CONSTITUTIONAL FOUNDATIONS

The Western Australian judiciary carries out its functions within a legal framework provided by Constitutions of the Commonwealth and the State and statutes made under them. It is useful briefly to review the essential elements of that framework.

In 1889 the Legislative Council of Western Australia passed a Constitution Bill to provide for responsible government in Western Australia. That Bill had to be enacted by the Imperial Parliament because it went beyond legislative powers conferred on colonial legislatures by the then existing *Australian Colonies Government Act 1850* (Imp). The *Constitution Act 1890* was scheduled to an Act of the British Parliament entitled *The Western Australian Constitution Act 1890*.

In 1893, when the population of Western Australia had reached 60,000, the *Constitution Act Amendment Act 1893* (WA) was passed. It effectively removed from the Act of 1889 provisions relating to the composition of the Legislative Assembly and Legislative Council and dealt comprehensively with the franchise and qualifications for membership of the two Chambers.

In 1899 the *Constitution Acts Amendment Act 1899* (WA) was enacted. Its purpose was to amend the *Constitution Act 1889* (WA) and to amend and consolidate other amending Acts. This amendment continued a process of amoeba-like division which had begun in 1893 and led to the contents of the original 1889 Act being distributed through that Act, the Act of 1899 and the *Electoral Act 1907* (WA).

<sup>4</sup> Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report 92 (2001).

<sup>5</sup> Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901; 1976 reprint), p 785.

At the end of the 19th century the Western Australian Constitution could be found in the *Constitution Act 1889* (WA), the *Constitution Acts Amendment Act 1899* (WA), the *Constitution Act 1890* (WA), the *Colonial Laws Validity Act 1865* (Imp) and possibly the *Australian Colonies Government Act 1850* (Imp). In 1901, the Western Australian Constitution was further redefined by the *Commonwealth of Australia Constitution Act 1900* (Cth) which provides in s 106:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

An important element of the Commonwealth *Constitution* affecting the State judiciary was Ch III because of the provision it made for federal jurisdiction to be vested in State courts.

## STATE AND COMMONWEALTH CONSTITUTIONAL PROVISIONS RELEVANT TO STATE COURTS

The *Constitution Act 1889* (WA) presently comprises nine parts. Part I is entitled “Parliamentary”. There is no separate part of the Western Australian Constitution that explicitly deals with the Executive, although there is a reference to the Office of Governor in Pt IIIA. Part V is entitled “Legal” and Pt IV “Judicial”. Section 58 of Pt V continued in existence all courts of civil and criminal jurisdiction and all legal commissions within the colony at the commencement of the Act (s 58). The commissions of the serving judges of the Supreme Court were also continued and those commissions, along with the commissions of “all future judges” were to “continue, and remain in force during their good behaviour, notwithstanding the demise of Her Majesty (whom may God long preserve), any law, usage, or practice to the contrary notwithstanding” (s 54). A judge could be removed by Her Majesty upon the address of both Houses of the Legislature of the Colony (s 55). The *Constitution Amendment Act 1899* (WA) was concerned with the legislature in Pt I and the Executive in Pt II. It has no distinct provision relating to the judiciary.

The Supreme Court of Western Australia which predated responsible government, was continued in existence by the *Constitution Act 1889* (WA) and thereafter by statute made pursuant to the legislative powers conferred by the State Constitution. Thus s 6 of the *Supreme Court Act 1935* (WA) continues in existence “the previously established court called the Supreme Court of Western Australia”. It is a Superior Court of Record and consists of:

- (a) any judge holding office under an appointment made under section 7A(1);
- (b) any acting judge holding office under an appointment made under section 11;
- (c) any auxiliary judge holding office under an appointment made under section 11AA;
- (d) any commissioner holding office under an appointment made under section 49;
- (e) any master holding office under an appointment made under section 11A; and
- (f) any acting master holding office under an appointment made or deemed to have been made under section 11D.

The jurisdiction of the court is broadly defined in s 16(1)(a). It is invested with:

... the like jurisdiction, powers and authority within Western Australia and its dependencies as the Courts of Queen’s Bench, Common Pleas, and Exchequer, or either of them, and the judges thereof, had and exercised in England at the commencement of the *Supreme Court Ordinance 1861*.

Section 16(3) provides that:

The jurisdiction vested in the Court and the judges thereof shall include all ministerial powers, duties, and authorities incident to any and every part of such jurisdiction.

The District Court of Western Australia was created by the *District Court of Western Australia Act 1969* (WA). Its criminal jurisdiction and powers are those of the Supreme Court in respect of any indictable offence, save that it has no jurisdiction to try an accused person charged with an indictable offence in respect of which the maximum term of imprisonment that can be imposed is imprisonment for life or strict security life imprisonment (s 42(2)). In its civil jurisdiction the court has the same jurisdiction to hear and determine and may exercise all the powers and authority that the Supreme Court has and may exercise from time to time in relation to various specified categories of action (s 50). Jurisdiction is subject to a limit on money sums that may be recovered. Jurisdiction includes

jurisdiction with respect to (s 50(1)(f)):

all other actions or matters in respect of which jurisdiction is given to the Court by or under this or any other Act.

A District Court judge has, for the purposes of the Act, in addition to the powers and authorities conferred upon the judge by the Act, "... all the powers and authorities of a judge of the Supreme Court ...". The court or a District Court judge also has, as regards any action or matter within jurisdiction, the power:

- (a) to grant, and shall grant in the action or matter such relief, redress or remedy, or combination of remedies either absolute or conditional; and
- (b) to make any order that could be made in regard to any action or matter, and shall in each such action or matter give such and the like effect to every ground of defence or counterclaim equitable or legal, in a full and ample manner as might or ought to be done in the like case by the Supreme Court or a judge thereof.

The Magistrates Courts in their various statutory manifestations have existed in Western Australia for a long time. Recently the *Magistrates Court Act 2004* (WA) established a court called "The Magistrates Court of Western Australia" as a Court of Record (s 4). The court has the jurisdiction conferred on it by that Act and by other written laws (s 9). Its civil jurisdiction is set out in the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (s 10). Its criminal jurisdiction is defined in s 11 by reference to "simple offences" and indictable offences that can be dealt with summarily. And although committal has been traditionally regarded as an administrative act, the court's criminal jurisdiction includes jurisdiction "to commit a person charged with an indictable offence to the District Court or the Supreme Court for trial or sentence".

Interestingly, and unlike the provisions of the *Supreme Court Act* and the *District Court Act*, magistrates are given "functions". These are conferred by s 6, thus:

- (1) A magistrate has the functions imposed or conferred on a magistrate by laws that apply within Western Australia, including this Act and other written laws.
- (2) A magistrate has and may perform any function of a registrar.
- (3) With the Governor's approval, a magistrate –
  - (a) may hold concurrently another public or judicial office or appointment including an office or appointment made under the law of another place; and
  - (b) may perform other public functions concurrently with those of a magistrate.

However, a magistrate cannot be appointed to an office that does not include any judicial function without his or her consent (s 6(4)).

The question whether a magistrate is a judge was recently considered by the Full Court of the Federal Court in *Clarke v Federal Commissioner of Taxation* (2008) 171 FCR 1; [2008] FCAFC 51. Mr Clarke was a stipendiary magistrate in the State of South Australia who served on the Childrens Court and the Youth Court of that State. He contended that he was exempt from the Superannuation Contribution Surcharge by virtue of s 7 of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) (the Assessment and Collection Act). That Act provides in s 7:

This Act does not apply to a person who is a member because he or she is a judge of a court of a State at the commencement of this Act.

Answering a question of law referred to it by the Administrative Appeals Tribunal, the Full Court of the Federal Court held that Mr Clarke was a judge of a court of a State within the meaning of s 7. The question involved the construction of the provision of the Assessment and Collection Act and an examination of the role of the magistrate and the Magistrates Court in South Australia. The court observed that there was no great significance in the fact that South Australian legislation drew a distinction between judicial officers on whom the title "judge" was bestowed and judicial officers on whom the title "magistrate" was bestowed. This simply referred to the place of the Magistrates Court in the hierarchy of the courts established by the State as in other States and Territories and at Commonwealth level.

The courts of the States, including the Magistrates Courts, are receptacles of federal jurisdiction. The constitutional authority for the conferring of federal jurisdiction on State courts comes from

Ch III of the Commonwealth *Constitution* and, in particular, ss 75, 76 and 77. Section 75 sets out the subject matter of the original jurisdiction of the High Court. That is the jurisdiction conferred directly upon the High Court by the *Constitution*. Section 76 specifies the subjects of the additional original jurisdiction which can be conferred on the High Court by the Commonwealth Parliament. Section 77 confers on the Parliament the power to make laws defining or conferring federal jurisdiction as follows:

- With respect to any of the matters mentioned in the last two sections, the Parliament may make laws:
- (i) defining the jurisdiction of any Federal Court other than the High Court;
  - (ii) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States;
  - (iii) investing any Court of a State with federal jurisdiction.

The most comprehensive conferral of federal jurisdiction on State courts was effected by s 39(2) of the *Judiciary Act*, which provides:

The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:

- (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.
- ...
- (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

Section 39(2) of the *Judiciary Act* is, of course, not the only source of federal jurisdiction conferred on State courts. Federal jurisdiction is conferred by many other statutes with respect to particular subject matters.

## SEPARATION OF POWERS

The concept of legislative, executive and judicial powers can be traced back to Greek philosophers, including Plato and Aristotle. Aristotle, in Book IV of *Politics*, characterised State power as deliberative, magisterial and judicative. He did not propose that those powers should be exercised by different departments of State. But a necessary preliminary to a doctrine of separation of powers was the identification of the powers to be separated.

The concept of separation of powers emerged in the 15th century writings of John Fortescue, Chancellor to King Henry VI. He wrote of “the advantages consequent from that political mixed government which obtained in England”. The King could not despoil the subject without making ample satisfaction of the same. He could not lay taxes, subsidies or impositions of any kind upon the subject. He could not alter the laws or make new ones without the express consent of the whole kingdom and Parliament assembled. As to the inhabitants, they could not be sued at law but before a judge where they would be treated with mercy and justice according to the laws of the land. Neither were they impleaded in point of property or arraigned for any capital crime however heinous but before the King’s judges and according to the laws of the land.<sup>6</sup>

There was perhaps a greater emphasis in the writings of the 16th and 17th century upon the separation of the legislative from the executive power by reference to the respective roles of the King-in-Council and the King-in-Parliament. The concept of judicial and executive separation was not without its challenges. They were exemplified in the famous exchange in 1612 between Sir Edward Coke, Chief Justice of the Court of Common Pleas and King James I. James I believed in the divine right of Kings to govern. The Crown had established a court entitled “The Court of High Commission” which was an administrative tribunal with jurisdiction over the church. It did not decide its cases according to law or any particular rules. Its decisions were not subject to any appeal. It sought to extend its authority beyond church affairs. The Court of Common Pleas issued a writ of

---

<sup>6</sup>Fortescue, *de Laudibus Legum Angliae* (c 1470) reprinted by Legal Classics Library (1984), pp 139-146.

prohibition against the Commission's proceedings. On Sunday, 10 November 1612, the judges of the Court of Common Pleas were summoned to the King. The Archbishop of Canterbury said that the judges were delegates of the King and that the King could decide any cause for himself. Coke told the King that all cases were to be determined in a Court of Justice according to law. The King said:

But I thought law was founded on reason, and I and others have reason as well as judges.

In the reply attributed by Bracton to Coke, he said:

True it is, that God has endowed your Majesty with excellent science and great endowments of nature. Your Majesty is not learned in the laws of your realm of England and causes which concern the life or inheritance of goods or fortunes of your subjects are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it.

Subsequently Coke was removed from office.

The separation of executive from legislative powers developed following the *Bill of Rights of 1689*. The *Act of Settlement 1701* provided for the judges to have security of tenure during good behaviour. The King's power to remove a judge could be exercised only on an address of both Houses of Parliament.

The general concept of separation of powers has been described as "part of the general currency of political thought" in England after 1650, but only one of a number of elements in the changing Constitution.<sup>7</sup> The rather pragmatic and organic character of the English Constitution was reflected in the less than perfect separation of powers particularly between the judiciary and the other arms.

Until recently the judges of the highest Court of Appeal in England, the House of Lords, were members of the Upper Legislative Chamber. The occupant of the highest judicial office in England, that of Lord Chancellor, was also a member of the Cabinet. He was the Speaker in the House of Lords. He presided over debates and questions. He was a Government Minister and the Head of the Department responsible for Court and Tribunal Services in England, Wales and Northern Ireland, legal aid and a host of other matters. He also occasionally exercised his right to sit as a judge. A former Lord Chancellor, Lord Mackay of Clashfern, said:

When I was Lord Chancellor, I sat as a judge quite a lot. I felt strongly that if I had any talent it was in that area, and since I was being paid a reasonably high salary I should do what I could to work for that. Upon becoming Lord Chancellor, I had been previously a Lord of Appeal in Ordinary – I was supported in the belief by a letter from one of the professional associations of barristers inviting me on no account to stop sitting as a judge. I felt encouraged, therefore, to do so.<sup>8</sup>

The Supreme Court of the United Kingdom, which replaces the House of Lords, has been established by the *Constitutional Reform Act 2005* (UK). It will take over the judicial functions of the House of Lords and some of the Privy Council's functions in 2009. Section 24 of the Act provides that persons who were Lords of Appeal in Ordinary immediately before the commencement of the Act will become the judges of the Supreme Court. The Senior Lord of Appeal will be the President of the Court.

Theoretical enunciation of a clear separation of powers doctrine which inspired its development in the United States in particular was that of the French political thinker, Montesquieu, reflected in his book, *The Spirit of Laws*, published in 1748. Although it is said that he was greatly influenced by the English Constitution after 1688 he did not evidently understand how imperfect the separation of powers was in practice in England.

An often-quoted passage from Montesquieu's book defining the doctrine is:

Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

<sup>7</sup> Munro, *Studies in Constitutional Law* (2nd ed, Oxford University Press, 2005), p 297.

<sup>8</sup> HL Debs Vol 657, 12 February 2004 cited in Jowell and Oliver, *The Changing Constitution* (5th ed, Oxford University Press, 2004), p 326, fn 17.

Montesquieu's views greatly influenced the drafters of the United States' Constitution. James Madison in *The Federalist Papers* quoted the passage although he recognised how impractical it was to avoid any admixture of the three arms of government.<sup>9</sup> He accepted that direct appointment of judges by the people would not be feasible because "peculiar qualifications being essential in the members the primary consideration ought to be to select that mode of choice which best secures those qualifications, secondly because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them".<sup>10</sup> He wrote:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected to the constitutional rights of the place.<sup>11</sup>

It is interesting to see a practical validation of that view in its application to appointments to the United States Supreme Court particularly having regard to controversies of a few years ago about whether the Commonwealth Attorney-General should be able to interview prospective appointees to the High Court. Before Oliver Wendell Holmes was appointed to replace Associate Justice Horace Gray, who resigned in 1902, Theodore Roosevelt wrote to Senator Henry Cabot Lodge of Massachusetts observing that a majority of the court had upheld the policies of the Republic Party in the Congress and had rendered a great service to mankind and the nation. He characterised the minority on the court as standing for "reactionary folly". He wanted to know whether Holmes was in sympathy with his government's view before he could feel justified in appointing him. He asked Lodge to arrange for Holmes to "come down here and spend a night with me and then I can make the announcement on the day that he left after we had talked together". Holmes was appointed and while some of his less consequential decisions met Roosevelt's expectations, not all. Indeed, following his dissent in one case, Roosevelt remarked "out of banana I could have carved a justice with more backbone than that".<sup>12</sup>

When Chief Justice Rehnquist wrote about the Supreme Court in 1987 he remarked upon its independence from the legislative and executive branches of government. He also acknowledged that it was subject to the presidential use of the appointment power but pointed to institutional pressures which tended to overcome the residual loyalty to the appointing president:

He identifies more and more strongly with the new institution of which he has become a member, and he learns how much store is set by his behaving independently of his colleagues. I think it is the institutional effects, as much as anything, that have prevented even strong presidents from being any more than partially successful when they sought to pack the Supreme Court.

He put it another way when he described his colleagues as "independent as hogs on ice".

The separation of the legislature, the Executive and the judiciary is reflected in the arrangement of the Commonwealth *Constitution*. Chapter I entitled "The Parliament" vests the legislative power of the Commonwealth in the federal Parliament. Chapter II entitled "The Executive Government" vests the executive power of the Commonwealth in the Queen and provides that it is exercisable by the Governor-General as the Queen's representative. Chapter III entitled "The Judicature" provides that the judicial power of the Commonwealth shall be vested in the High Court of Australia and such other federal courts as the Parliament creates or invests with federal jurisdiction.

At the Commonwealth level the separation between legislature and Executive in Australia is of less significance than the separation of those two arms of government and the judiciary. Under responsible government, Ministers of the Crown are Members of the Parliament and answerable to it. Parliament also delegates legislative power to the Executive. On the other hand, Sir Harry Gibbs observed:

---

<sup>9</sup> *The Federalist Papers*, Vol 2 No 47, p 96.

<sup>10</sup> *The Federalist Papers*, Vol 2 No 51, p 117.

<sup>11</sup> *The Federalist Papers*, Vol 2 No 51, pp 117-118.

<sup>12</sup> Rehnquist, *The Supreme Court – How it Was – How it Is* (William Morrison and Co Inc NY, 1987), pp 242-244.



Such is the theoretical dominance of the legislature in Australia – theoretical because in fact the executive often controls it – that it has never even been suggested that the legislature might infringe the executive power.<sup>13</sup>

The separation of powers between the judiciary on the one hand and the legislature and the Executive on the other is sharp and is anchored by provisions of the *Constitution* which provide for the tenure of judges.<sup>14</sup> The judicial power of the Commonwealth can only be exercised by a court composed of judges with the tenure for which Ch III of the *Constitution* provides: *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v The Commonwealth* (1915) 20 CLR 54. And, as the court held in the *Boilermakers' case*, it is not open to create a tribunal under Commonwealth law which exercises both judicial and non-judicial powers notwithstanding that some of its members may be appointed consistently with Ch III of the *Constitution*.<sup>15</sup>

The High Court has been firm against attempts to confer judicial powers upon non-judicial bodies. The application of that principle has sometimes caused inconvenience but is under no serious challenge.<sup>16</sup>

The boundary between judicial and non-judicial functions defines, albeit imperfectly, the limits of the functions that the legislature can confer upon courts at the Commonwealth level. There is an associated question and that is the extent to which an administrative function can be conferred upon a judicial officer, not sitting as a judge, but as *persona designata*. This is particularly relevant to the functions commonly conferred on judges, both federal and State, relating to the issue of various kinds of warrants, including search warrants, telephonic interception warrants and, more lately, preventative detention orders and the like. It is important, however, in considering the constitutional validity and the propriety of conferring such functions on judges, to bear in mind the rather untidy constitutional and historical context in which they are conferred. It is helpful to give some consideration to the limits of the judicial function which has been most intensively discussed in the context of judicial power under the Commonwealth *Constitution*. Although that discussion depends upon the provisions of the Commonwealth *Constitution*, it has wider implications for arguments about separation of powers which is more conventional than constitutional at the State level.

### JUDICIAL POWER: THE INTERFACE WITH EXECUTIVE FUNCTIONS

At the heart of the judicial power of the Commonwealth is “the power which any 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”.<sup>17</sup> So expressed the judicial function can be explained in terms of a simple model of syllogistic reasoning which involves the following steps:

1. Determining the principle of law as the major premise.
2. Ascertaining the facts.
3. Applying the principle of law to the facts as found to determine rights or liabilities.
4. Awarding remedies where necessary to give effect to the rights or liabilities determined.

While this simple model represents the core of the judicial function undertaken by most judges on a day to day basis, it is not the whole story. As Sir Owen Dixon pointed out in *R v Davison* (1954) 90 CLR 353, historically the elements of controversy between subjects and the determination of existing rights and liabilities were “entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law” (per Dixon CJ, McTiernan J at 368). Examples offered included directions as to the administration of trusts, orders relating to the maintenance and guardianship of infants and declarations of legitimacy. The issue of warrants of execution was an example of an incidental administrative function which was nevertheless supported by the judicial power. It has always been accepted that non-judicial functions may be conferred as an incident of

<sup>13</sup> Gibbs, “The Separation of Power – A Comparison” (1987) 17 Fed Law Rev 151 at 156.

<sup>14</sup> *Constitution of the Commonwealth of Australia*, s 72.

<sup>15</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>16</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

<sup>17</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffiths CJ).

judicial power. In the *Boilermakers' case* it was said:

It must not be forgotten that s 51(xxxix) expressly empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the federal judicature. What belongs to the judicial power or is incidental or ancillary to it cannot be determined except by ascertaining if it has a sufficient relation to the principal or judicial function or purpose to which it may be thought necessary.

In *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, Deane J observed however that:

The executive government cannot absorb or be amalgamated with the judicature by the conferral of non-ancillary executive functions upon the courts.

There are debatable functions conferred on courts involving the exercise of power to require a person to answer questions or produce documents in aid of an administrative investigation. An interesting example is the examination procedure under the *Corporations Act 2001* (Cth).

Part 5.9 of the *Corporations Act* authorises the court to summon a person for examination about a corporation's examinable affairs upon application by an eligible applicant. An eligible applicant may include the Australian Securities and Investments Commission or a liquidator or administrator of a corporation or of a deed of company arrangement. Such examinations are conducted before the court. On the face of it they stand well to one side of the core of the judicial function. They are an investigative or inquisitorial information-gathering exercise for the purposes of the regulator or external administrators. Nevertheless, they have a considerable ancestry. The first bankruptcy statute in England, the 1842 Act, provided for the examination of third persons about a debtor's estate. The earliest such provision in the Companies Laws of the United Kingdom was s 15 of the *Joint Stock Companies Winding Up Act 1844* (UK). That section empowered the court to summon and examine persons who were thought to be capable of giving information about the property and past transactions of the company. Its primary purpose was to assist the liquidator in locating the assets.

Section 115 of the *Companies Act 1862* (UK), empowered the court to summon before it any person whom it might deem capable of giving information concerning the trade dealings, estate or effects of the company. The examination was in private. Chitty J referred to it as the "Star Chamber" clause: *Re Greys Brewery Company* [1883] 25 Ch D 400 at 408. The power has broadened over the years. Australian Companies Acts were modelled on the English companies legislation and so reflected similar powers.

There has been occasional judicial comment about the appropriateness of courts and judges undertaking the examination function. In 1988 Northrop J referred to the investigative character of the examination procedure under s 541 of the *Companies (Victoria) Code* and said it was "inappropriate" for a judge of the Federal Court to conduct such a process:

... examination is not a court hearing in the true sense. It is not the exercise of judicial power. It is part of an investigative procedure ... in my opinion it would not be appropriate for a judge of the Federal Court to conduct examinations of an investigatory nature, and not truly judicial.<sup>18</sup>

His Honour transferred the matter to the Supreme Court of Victoria. Whether he felt that the stream of the judicial power under a State Constitution was less clear and more amenable to spilling over its banks is not apparent. The Supreme Court of Victoria said of the procedure that:

Essentially this procedure is administrative and does not result in judicial decisions as to any parties' rights, except decisions as to the manner in which the examination itself should be conducted.<sup>19</sup>

In the context of a court-ordered winding up in *Gould v Brown* (1998) 193 CLR 346, Brennan, Toohey and Kirby JJ said of the function of the court in conducting an examination that although not involving the determination of rights and liabilities of adversaries it was incidental to the winding up:

---

<sup>18</sup> *Re Monadelphous Engineering Associates (NZ) Ltd (in liq); Ex parte McDonald* (1988) 7 ACLC 220.

<sup>19</sup> *Friedrich v Herald & Weekly Times Ltd* [1990] VR 995 at 1003.

The incidental character of the function and the traditional supervision exercised by the court in performing it are sufficient to stamp it with a judicial character.<sup>20</sup>

Importantly, what the jurisprudence relating to these court-ordered examinations demonstrates is that the scope of the judicial power is not entirely confined within a neat logical Montesquieuan definition. It is also defined by reference to the historical functions of the courts. To this extent the judicial power of the Commonwealth draws upon the historical and traditional practices of the English courts and the Supreme Courts of the States.

The historical incidence of investigative functions exercised by courts was discussed in *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490; 226 ALR 570. The case concerned the validity of s 76 of the *Service and Execution of Process Act 1992* (Cth). Under that section the Supreme Court of a State, in which a subpoena is issued by a tribunal for a person to give evidence before the tribunal, may give leave to serve the subpoena out of the State. In support of a challenge to the validity of the provision it was submitted to the High Court that the exercise by the courts of investigative functions did not occasion or support the issue and service of process under s 51(xxiv) of the *Constitution*. There was therefore said to be no foundation for an extension by analogy in respect of the investigative functions of tribunals. In the joint judgment of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, their Honours said:

From a time well before federation, the courts of the Australian colonies, like those in England and elsewhere in the Empire, exercised a range of administrative and investigative functions. Provisions for the examination of judgment debtors, bankrupts and officers of failed corporations are in point ... the equity jurisdiction of the Supreme Courts with respect to bills of discovery (or preliminary discovery in more recent parlance) provides another instance of an investigative procedure. So also the Courts of Marine Inquiry, established in the Australian colonies. Likewise the next of kin inquiry in an administration suit, conducted in New South Wales by the Master in Equity.

Within the confines of the judicial power of the Commonwealth, courts exercising federal jurisdiction may carry out functions which have a “chameleon” character. That is to say, when exercised by an administrative agency they are administrative in character. When exercised by a court, they are judicial in character. Isaacs J who coined the term “chameleon” to describe such functions said that the existence of such powers could not be denied without seriously affecting “the recognised working of representative government”.<sup>21</sup>

Under s 19 of the *Extradition Act 1988* (Cth) if a person has been arrested on a provisional warrant, backed by a warrant issued by a requesting State, a magistrate determines eligibility for surrender. In so doing the magistrate is exercising an administrative function and not the judicial power of the Commonwealth.<sup>22</sup> The decision of the magistrate is subject to review by the Federal Court or the Supreme Court of the relevant State or Territory. The court can confirm the magistrate’s order or quash it and direct the magistrate to order the release of the person. The determination of eligibility made by the magistrate empowers the Attorney-General to decide whether or not the person is to be surrendered. The court, upon a review of the magistrate’s determination, does not determine whether the person will be extradited. That matter is left to the Attorney-General. In its review proceedings under s 21 of the *Extradition Act* the court is limited to the materials that were before the magistrate.

In a case argued at first instance in the Federal Court and ultimately in the High Court in 2000 and 2001, it was contended that the function conferred on the Federal Court was “quintessentially administrative”. The determination of eligibility did not decide rights and obligations. The contention failed at first instance, in the Full Court of the Federal Court and ultimately in the High Court.<sup>23</sup> The court referred to its decision in *Aston v Irvine* (1955) 92 CLR 353. That case concerned the provisions

<sup>20</sup> *Gould v Brown* (1998) 193 CLR 346 at 388.

<sup>21</sup> *Commissioner of Taxation (Cth) v Munro* (1926) 38 CLR 153 at 175-179; see also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373 (Kitto J).

<sup>22</sup> *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528.

<sup>23</sup> *Pasini v United Mexican States* (2002) 209 CLR 246.

of the *Service and Execution of Process Act 1901* (Cth) which provided for the issue of warrants by a magistrate or Justice of the Peace and the review of the issue of such warrants by a judge. The review process was held to be an exercise of the judicial function.

What these authorities indicate is that while the separation of the judicial power from the executive and the legislative power is constitutionally mandated by the Commonwealth *Constitution*, that mandate does not define hard boundaries. What softens the boundaries is the inclusion within the scope of judicial power of traditional and historical functions of the courts not limited to hearing and deciding disputes, and the fact that some functions are administrative in the hands of an administrative agency and judicial in the hands of a court.

Separation of powers is not mandated under State Constitutions for State courts. As Anne Twomey has pointed out in *The Constitution of New South Wales*:

From the very beginning of responsible government in New South Wales, it was not considered inappropriate for judges to perform non-judicial tasks or offices. For example, Sir Alfred Stephen was simultaneously Chief Justice of the Supreme Court and a Member of the Legislative Council, including, for a period, President of the Legislative Council. He also later performed the role of Administrator while still Chief Justice. Even today, the Chief Justice of the Supreme Court, following tradition, holds the office of Lieutenant-Governor in New South Wales and therefore fills the Governor's constitutional role when the Governor is absent [footnotes omitted].<sup>24</sup>

Consistently with that constitutional proposition there may be conventional recognition of the desirability of separation of powers in the way in which the three organs of government exercise their powers and the functions they assume. There is a history of State courts declining, from time to time, to make judges available for non-judicial functions. An example in New South Wales arose in 1920 when the Chief Justice of the Supreme Court refused to allocate a judge to inquire into the adequacy of parliamentary salaries. He thought the bench had sufficient work to do without dealing with affairs extraneous to its constitutional role. Questions have arisen from time to time about whether serving judges should conduct Royal Commissions and Special Commissions of Inquiry.

When such functions are assumed by judges they are taken not to be part of the judicial function. They are functions frequently conferred on judges *persona designata* rather than as members of their courts and are subject to the consent of the judge. This is particularly so with respect to the issue of various kinds of administrative warrants.

Before turning to that question, however, it is helpful to go back to federal jurisdiction and the proposition that there are certain administrative functions which may be conferred upon judges which are incompatible with their exercise of a judicial power of the Commonwealth. That doctrine does not apply directly to State courts. Incompatibility does arise when a State court is asked to carry out a function which would be inconsistent with its constitutional status as a repository of federal jurisdiction. It has only limited potential in its application to administrative functions which may be conferred upon State judges acting *persona designata*. Here it would seem the limitations must largely be conventional.

### **NON-JUDICIAL FUNCTIONS INCOMPATIBLE WITH JUDICIAL POWER**

Where a judge of a federal court exercises a function, not as a judge but as *persona designata*, which is incompatible with the conferring upon that judge of a judicial power of the Commonwealth, then the administrative function may be held to be invalid.

That proposition was tested in 1995 in connection with the issue of telecommunication interception warrants. Under the *Telecommunications (Interception) Act 1979* (Cth) the power to issue telecommunication interception warrants in specified circumstances was conferred on any federal judge who consented to being appointed as an "eligible judge" and who was so appointed. Evidence was obtained for use in a criminal prosecution from intercepts of telephone calls. The interceptions had been performed by Australian Federal Police pursuant to a warrant issued by a judge of the Federal Court under the Act. The subject of the intercepts commenced a proceeding in the Federal

---

<sup>24</sup> Twomey A, *The Constitution of New South Wales* (Federation Press, 2004), p 747.

Court claiming that the provisions relating to the issue of the warrants were invalid. A case was stated and the question reserved for the consideration of the Full Court of the Federal Court. The proceeding was then removed into the High Court pursuant to s 40(1) of the *Judiciary Act*.

In *Grollo v Palmer* (1995) 184 CLR 348, the High Court held by majority (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ, with McHugh J dissenting) that the relevant provisions of the Act were valid. The majority held that while the power to issue a warrant must be exercised “judicially” this did not of itself characterise the power as a judicial power. The power to issue warrants was not part of the judicial power of the Commonwealth because it did not involve an adjudication to determine the rights of the parties.

The court held that there was no necessary inconsistency with separation of powers required by Ch III of the Commonwealth *Constitution* if non-judicial functions were vested in individual judges detached from the court. But the power to confer such functions on judges as designated persons was subject to the conditions that the judge must consent and that the function must not be incompatible with the performance of judicial functions or the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power. The function conferred on federal judges to issue warrants was held not to be incompatible with their status and independence, the exercise of their judicial power or the maintenance of public confidence in the exercise of the judicial power of the Commonwealth.

The joint judgment discussed the concept of incompatibility of function beginning with the cautionary observation of Mason and Deane JJ in *Hilton v Wells* (1985) 157 CLR 57 at 69 that:

The ability of parliament to confer non-judicial power on a judge of a Chapter III court, as distinct from the court to which he belongs, has the potential, if it is not kept to within precise limits, to undermine the doctrine in the Boilermaker’s case.

Mason and Deane JJ also quoted Cardozo CJ, who wrote of the separation of powers under the Constitution of the State of New York in *In Re Richardson* 160 NE 655 at 657 (1928) and said:

From the beginnings of our history, the principle has been enforced that there is no inherent power in executive or legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfillment of judicial duties ... The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed ...

The joint judgment in *Grollo* cited with approval the observations of Mason and Deane JJ who followed the approach taken by Cardozo CJ. They said that in the United States, as in Australia, it had been recognised that non-judicial functions may be entrusted to judges personally and not in their capacity as judicial officers but on the footing that a duty of acceptance could not be imposed. They also said that the recognition in Australia and the United States was subject to the general qualification that what was entrusted to a judge in his individual capacity was not inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power.

The court also referred to the decision of the Supreme Court of the United States in *Misteritta v United States* 488 US 361 (1989) where it was said that not every kind of extra-judicial service under every circumstance necessarily accords with the *Constitution*. Just because the *Constitution* does not absolutely prohibit a federal judge from assuming extra-judicial duties, does not mean that every extra-judicial service is compatible with, or appropriate to continuing service on the Bench:

The ultimate inquiry remains whether a particular extra-judicial assignment undermines the integrity of the Judicial Branch.

The court discussed the ways in which the incompatibility condition could arise. There might be such a permanent and complete commitment to the performance of non-judicial functions that the further performance of substantial judicial functions by that judge would not be practicable. The non-judicial functions might be of such a nature that the capacity of the judge to perform his or her judicial role with integrity would be compromised or impaired. The non-judicial functions might be of

such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial role with integrity would be diminished.

It was argued in *Grollo* that judicial integrity was compromised and public confidence in the exercise of the jurisdiction of the Federal Court prejudiced by conferring power on judges of the Federal Court to issue interception warrants.

There was an obligation on the judge not to disclose the information on which he or she may have decided to issue a warrant. Bias might be apprehended in any case in which the validity of an interception warrant were in issue by reason of the large proportion of Federal Court judges who were eligible judges. The court described these arguments as “troubling” but said that they could be met by the adoption of appropriate practices. A judge who had issued a warrant in a particular matter could ensure that he or she did not sit on any case to which it related. Nevertheless the whole proceeding was surrounded with secrecy. No reasons were given for the judge’s decision. It was an “unreviewable in camera exercise of executive power to authorise a future clandestine gathering of information”. The majority said (at 367):

Understandably a view might be taken that this is no business for a judge to be involved in much less the large majority of the judges of the Federal Court.

At the same time the court recognised that it was precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them against serious crime that “... some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common laws protection of privacy and property (both real and personal), be authorised to control the official interception of communications”. The court considered that the professional experience and cast of mind of a judge was a desirable guarantee that the appropriate balance would be kept between law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.

The court also referred to the Fourth Amendment to the United States Constitution which guarantees protection “against unreasonable searches and seizures” and has been held to require prior judicial warrants authorising electronic surveillance. In *United States v United States District Court for the Eastern Districts of Michigan* 407 US 297 at 317 (1972) the court said:

The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be unreasonably exercised.

A similar approach was taken in Canada. The role of the court in the legislative plan was described as “the guardian of the public interest”.<sup>25</sup> The High Court in *Grollo* noted also that the laws of most of the Australian States and Territories confer powers on designated judges to issue warrants for the interception of private communications. The court footnoted references to the Listening Devices Acts of the various States including the *Listening Devices Act 1978* (WA).

The *Grollo* judgment was delivered on 21 September 1995. On 6 September 1996 the court delivered judgment in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1.

Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provided for an application to be made to the Minister by Aboriginal people seeking the preservation or protection of a specified area from injury or desecration. The Minister could make a declaration in relation to the area after receiving a report from a person nominated by him and after considering that report and any representations attached to it.

Justice Jane Matthews, a serving judge of the Federal Court, was nominated to provide the Minister with a report relating to the protection of Hindmarsh Island in South Australia. The court held her appointment to be invalid as incompatible with her commission as a judge of the Federal Court.

In its judgment (from which only Kirby J dissented), the court restated with emphasis the separation of powers between the judiciary and the legislative arms of government. The words of Professor Harrison Moore describing the separation as a “great cleavage” were cited. The majority

---

<sup>25</sup> *Lyons v The Queen* (1984) 14 DLR (4th) 482 at 513.

judges described the judicial function thus (at 11):

The function of the federal judicial branch is 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. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government.

The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and the independence of Chapter III judges.

The court held that the essentially political function of the report in making recommendations to the Minister, the requirement to furnish advice on questions of law and the close connection of the reporter's function to the ministerial decision-making power were all relevant to the finding that the role was incompatible with that of a Ch III judge.

The boundary line dividing functions compatible with the exercise of a federal judicial commission and functions incompatible is not a bright line. The High Court in *Wilson* allowed that the conduct of a Royal Commission could be compatible with judicial office depending on its terms of reference and enabling legislation. The role of judges on the Administrative Appeals Tribunal was compatible because of its independence from the legislature and the executive government. In taking on non-judicial tasks, however, there was a risk that the judge and, by association in the public mind, the judiciary as a whole, might be drawing upon capital – the capital being the confidence and authority deriving from the special character of judicial office and its independence of the Executive and legislature.

Judges of the Federal Court carry out many non-judicial functions. They sit with non-judicial members on the Australian Competition Tribunal, the Defence Force Discipline Appeal Tribunal, the Federal Disciplinary Appeal Tribunal and the Copyright Tribunal. Three judges of the Federal Court are members of the Australian Law Reform Commission.

There has been little evidence at the federal level of any consistent policy on the part of the Executive which would define a basis for any limits on the appointments of judges to non-judicial tasks. I suspect the same is true at the State level. Absent any such policy, there is a risk that persons who are not judges may be induced to accept non-judicial office of a difficult or controversial character with the offer of a contemporaneous, though initially “nominal” appointment to a court.

The same volume of the Commonwealth Law Reports in which *Wilson* appeared also reported *Kable v Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51. That case did not concern non-judicial functions exercised by State judges acting *persona designata*. It concerned a jurisdiction conferred upon the Supreme Court of New South Wales by the *Community Protection Act 1994* (NSW) which was held incompatible with the integrity, independence and impartiality of the Supreme Court as a court in which federal jurisdiction had been invested under Ch III. The *Community Protection Act* empowered the Supreme Court to make an order for the detention of a specified person in prison for a specified period if satisfied on reasonable grounds that the person was more likely than not to commit a serious act of violence and that it was appropriate, for the protection of a particular person or the community generally, that he be held in custody. The Act authorised the making of a detention order against a named individual and no other.

In the course of the judgments there were reflections on the separation of powers doctrine under State Constitutions. The court held that the New South Wales Constitution did not embody a doctrine of the separation of legislative and judicial powers. McHugh J put it starkly when he said he could see nothing in the New South Wales Constitution that would preclude the State legislature from vesting legislative or executive power in the New South Wales judiciary or judicial power in the legislature or Executive. Nor was the federal doctrine of the separation of powers directly applicable to the State of New South Wales. Federal judicial power could be vested in a State court although that court exercises non-judicial as well as judicial functions. The Commonwealth *Constitution* recognised that the

jurisdiction, structure and organisation of State courts and the appointment, tenure and terms of remuneration of their judges is not a matter within the legislative power of the federal Parliament. This did not, however, prevent implications being drawn from the Commonwealth *Constitution* about the powers of State legislatures to abolish or regulate State courts or to invest them or their judges with non-judicial powers or functions.

The State courts were part of an Australian judicial system and neither the Commonwealth nor a State could legislate in a way that might alter or undermine the constitutional scheme set up by Ch III. McHugh J put it thus (at 116):

Because the State Courts are an integral and equal part of the judicial systems set up by Chapter III, it also follows that no State or Federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power. Thus, neither the parliament of New South Wales nor the parliament of the Commonwealth can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power. Neither parliament, for example, can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power.

His Honour went on to say that although non-judicial functions could be vested in the Supreme Court, they could not be so extensive or of such a nature that it would lose its identity as a court. And relevantly to the exercise of administrative functions by State court judges acting *persona designata*, he said:

Furthermore, although nothing in Chapter III prevents a State from conferring executive government functions on a State Court judge as *persona designata*, if the appointment of a judge as *persona designata*, gave the appearance that the Court as an institution was not independent of the executive government of the State, it would be invalid. No doubt there are few appointments of a judge as *persona designata* in the State sphere that would give rise to the conclusion that the court of which the judge was a member was not independent of the executive government.

He referred to the practice of Chief Justices acting as Lieutenant Governors and Acting Governors.

The *Kable case* was not concerned with the conferring on State judges of executive functions to be exercised by them *persona designata*. It may be, as McHugh J foreshadowed, that there are circumstances in which such appointments would be incompatible with the perceived integrity and independence of the State court in such a way as to affect its capacity to receive and exercise federal jurisdiction. That is a question which has not yet been answered.

### **STATE JUDGES EXERCISING COERCIVE ADMINISTRATIVE FUNCTIONS**

There are no doubt many statutes under which State judges may be authorised, with their consent, to exercise coercive administrative functions conferred on them either by federal or State laws. At the extreme there may be questions about whether the conferral of such functions is valid having regard to Ch III of the *Constitution*. However, generally speaking constitutional challenges based on the *Kable* principle have not been successful.

It is useful briefly to mention some of those cases. In *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 a challenge was brought to s 6 of the *Magistrates Act* (NT). The section provided for the Administrator of the Territory to fix the remuneration of the Chief Magistrate. Special terms and conditions were fixed for the first two years of Magistrate Bradley's appointment. Further determinations were made during that time to cover the balance of his office. The court held that s 6 did not compromise or jeopardise the integrity of the Territory magistracy or the judicial system. Nor was it apt to lead reasonable and informed members of the public to think that the magistracy was subject to the influence of other branches of government in exercising a judicial function. In so holding, the court found that the *Kable* principle was applicable to Territory courts which can be required to exercise federal jurisdiction. No exhaustive statement of what constitutes the relevant minimum characteristic of an independent and impartial tribunal was possible. The court held that the Act generally was intended to advance the status of the magistracy in the Territory and that the relevant provisions were not incompatible with its independence and impartiality.

Another unsuccessful challenge was taken in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 which concerned the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The Act



empowered the Supreme Court to make orders for the detention of dangerous offenders beyond the expiry of their sentences and alternatively for their release on conditions. The court held by majority that the Act did not impair the institutional integrity of the Supreme Court so as to be incompatible with its position as a repository of federal judicial power. Gleeson J observed that *Kable* did not mean that a court's opinion of its own standing was a criterion of the validity of a law (at 593). McHugh J again made the point that the doctrine of separation of powers derived from the Commonwealth *Constitution* did not apply as such in any of the States. Chapter III could be invoked to invalidate State legislation purporting to invest jurisdiction in State courts "only in very limited circumstances" (at 598).

Yet another unsuccessful attempt to invoke *Kable* was *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45. This was a challenge to the validity of the appointment of acting judges to the State Supreme Court. In the joint judgment of Gummow, Hayne and Crennan JJ their Honours rejected the proposition that such appointments taken alone deprived the Supreme Court of the character of a court or the capacity to satisfy the minimum requirements of judicial independence. They referred to the long-standing history of the practice which went back before federation (at 68). Here, as in the application of the separation of powers doctrine at the federal level, history informed principle.

In 2008 the High Court considered a challenge to provisions of the *Corruption and Crime Commission Act 2003* (WA) which provides for the Supreme Court to review a decision of the Commissioner of Police to issue a fortification notice. In *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; (2008) 242 ALR 191 the High Court held the review provision in s 76(2) valid notwithstanding that it provided for non-disclosure of information given to the court in the course of the review where disclosure might prejudice the operations of the Commissioner. Importantly, the court had the power to determine whether the information fell into that category.

The only successful challenge based on *Kable* in recent times concerned the *Criminal Proceeds Confiscation Act 2002* (Qld). Section 30 of that Act authorised a restraining order to be made to prevent a person dealing with subject property. The Supreme Court was required to hear an application for such an order in the absence of the person whose property was the subject of the application and without that person having been informed of it. The Court of Appeal held the section invalid. Williams JA characterised the legislation as making a "mockery of the exercise of the judicial power in question". The only entity entitled to place material before the court was the State:

Effectively the provision directs the Court to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the Court of the capacity to act impartially.<sup>26</sup>

There are two kinds of circumstances in which State judges may be confronted with the problematical mix of judicial and non-judicial functions. The first situation may arise where an administrative function is conferred upon a State court and becomes part of the duty of that court. The second case, in which administrative functions are conferred *persona designata* subject to the consent of the relevant judge, is a matter within the control of the judges. They may, by withholding their individual consents, effectively avoid the imposition of the function. There is, of course, as the High Court pointed out in *Grollo*, a balance between the undesirability of exercising clandestine executive functions on the one hand and ensuring that if they have to be exercised it is done by somebody who is able to adopt a judicial approach to it. These are normative questions that do not always attract clear-cut or easy answers. Indeed, reasonable minds may well differ on what the proper answers are.

## CONCLUSION

It is important for judges to consider the principles upon which they respond to the imposition of administrative functions or the consensual conferring of such functions. Such responses should be informed by an understanding of the nature and history of the judicial function.

---

<sup>26</sup> *Re Criminal Proceeds Confiscation Act 2002 (Qld)* (2004) 1 Qd R 40. For a more recent consideration of the *Kable* issue since this paper was delivered, see *K-Generation v Liquor Licensing Court* (2009) 83 ALJR 327; [2009] HCA 4.