

SEPARATION OF POWERS IN THE AUSTRALIAN CONSTITUTION:

Themes and Reflections

The separation of powers is legally entrenched in the Constitution of the Commonwealth of Australia. It must, however, be accommodated with the principle of responsible government adapted to Australia's federal structure and which tends to the unification of the branches, not separation. Different consequences flow when comparing the separation of the "political" branches (executive and legislative) *inter se*, on the one hand, and their separation from the judicial branch on the other. How these subtle differences may prevent the application of a thorough-going separation of powers in Australia will be addressed, drawing lessons from the difficulties arising from the dual inheritance of American and British constitutional principles.

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I. Introduction

1 This article will attempt to set out the particular constitutional principles and limitations which derive from the "public law doctrine" of the separation of powers legally entrenched in the Australian Constitution.¹ It will also attempt to provide an appreciation of the Commonwealth of Australia as a jurisdiction which melds the essentially American doctrine of the separation of powers – in its legal entrenchment if not its philosophical origins – with the principle of responsible government that, along with Britain's other constitutional progeny, it has derived from the UK and has adapted to Australia's federal structure. The difficulty in achieving a workable accommodation arises from the opposing tendencies of each doctrine. Whereas responsible government tends to the unification of the branches of government subject to parliamentary supremacy, the separation of

1 The Australian Constitution is contained in s 9 of the Commonwealth of Australia Constitution Act 1900. Further reference to the Constitution and the sections contained therein shall refer to "the Constitution" and relevant section.

powers tends to both an equality and separation of the branches. This is less problematic with respect to the judicial branch because the unifying tendency of responsible government affects more the relationship between the legislative and executive branches. Different consequences thus flow when comparing the separation of the “political” branches *inter se*, on the one hand, and their separation from the judicial branch on the other. How these subtle differences may prevent the application of a thorough-going separation of powers in Australia will be addressed. Moreover, there are aspects of the issues which thereby arise that have a more universal relevance for all jurisdictions which adopt a separation of powers: hence the comparative relevance of the observations which follow.

2 In Australia, the separation of powers doctrine is not expressly provided for in the Constitution but rather is regarded as being legally entrenched by implication. This implication derives from the separate vesting, in separate chapters, of the legislative, executive and judicial power of the Commonwealth respectively in the Parliament, the Executive Government and the federal courts provided for in ch III of the Constitution (“Chapter III courts”).² The last-mentioned include the High Court, federal courts created by Parliament and also state courts in which Parliament vests federal jurisdiction.³ When interpreting the doctrine in order to identify and define principles governing inter-branch relationships, two related factors must be taken into account: first, the peculiarities of the particular branch power being considered; secondly, the extent to which other constitutional principles override, interfere with or affect the principles which may otherwise derive from the separation of powers. The latter was the very first point made by George Winterton in the leading Australian treatise on executive power, *Parliament, the Executive and the Governor-General*.⁴

The Australian Constitution embodies four great constitutional principles: representative government, federalism, the separation of powers and responsible government under the Crown. Representative government is common to all democratic polities, but the other three are not and, indeed, *coexist in Australia in a state of uneasy equilibrium*. [emphasis added]

3 This “uneasy equilibrium” stems from the fact that while the framers were familiar with, and generally adopted, Westminster principles of responsible government – which had already been applied in their respective colonies – they were also concerned with establishing

2 *R v Kirby, ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, affirmed *sub nom Attorney-General for Australia v R* [1957] AC 288.

3 See ss 71 and 77(iii) of the Commonwealth Constitution.

4 George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at p 1.

a *federal* commonwealth. Overlaid, therefore, with the dominant British principles of responsible government and parliamentary supremacy (government ministers being members of Parliament and to which they were accountable, maintaining the confidence of the lower house as a prerequisite to their ministerial position, and the Crown's representative acting only ministerial advice) was the federal model they adopted from the US. This model provided for a central government and legislature with enumerated powers, the balance to the states and a *legal* separation of powers; although with less obvious, and oft-implied, "checks and balances". While parliamentary supremacy was tempered by its subjection to the Constitution – and hence, virtually axiomatically, to judicial review – responsible government, which tends to fusion and hierarchy with parliament supreme,⁵ could not be so easily accommodated with the separation of powers which tends to separation and branch equality. Because of these countervailing tendencies, a layer of complexity is added to the determination of the relevantly applicable separation-of-powers principles. How rigorously, therefore, may a court enforce the separation of powers where responsible government is similarly entrenched? As Winterton noted, "much of the uncertainty surrounding federal executive power in Australia stems from the contradictions inherent in the simultaneous operation of the British and American principles".⁶ There are fewer difficulties with judicial power as it stands outside the relationship between the political branches *inter se*, and the High Court has been able to apply a more rigorous and clearly defined separation of *judicial* power, as will be seen below.

4 The status of the separation of powers as a constitutionally entrenched *legal* rule was not inevitable in Australia. It came about more by judicial interpretation of the structure of the Constitution than by any clear intention of the framers (which was either lacking or, at best, ambivalent)⁷ or express words in the text to that effect.⁸ Its emulation of the US Constitution,⁹ which separately vested government power in separate chapters, was also influential. Thus, the High Court in *R v*

5 The classic example is the famous case in the UK, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, the decision in which was reversed by legislation, the UK War Damage Act 1965 (c 18).

6 George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at p 1.

7 See Fiona Wheeler, "Original Intent and the Doctrine of the Separation of Powers in Australia" 7 *Public Law Review* 96 at 99 and Hoong Phun Lee *et al*, *Winterton's Australian Federal Constitutional Law* (Peter Gerangelos gen ed) (Thomson Reuters, 3rd Ed, 2013) at paras 13.10 and 12.08–12.09.

8 See Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 559–562.

9 The Constitution of the United States.

*Kirby, ex parte Boilermakers' Society of Australia*¹⁰ (“Boilermakers”) (endorsed by the Privy Council) held that from the Constitution could be implied a *legal* separation of powers. The separation of judicial power was applied very strictly. In addition to prohibiting the vesting of “the judicial power of the Commonwealth” (or power incidental thereto) in any body other than the courts for which ch III provides, it limited the power of these Chapter III courts to the exercise of this power alone: other powers, such as arbitral or administrative, was (and still is) constitutionally prohibited to them.¹¹ If the reasoning in this case was applied more universally to separation-of-powers issues, the separation of legislative and executive power *inter se*, despite the countervailing influence of responsible government, must similarly be applied with rigour.

5 Yet, this strict application of the doctrine, especially its purist isolation of Chapter III courts from the potentially contaminating influences of the exercise of non-judicial power, has not been without its critics. In addition to the ambivalence of the framers and the countervailing influence of responsible government, previous High Court jurisprudence¹² would suggest that the separation of powers ought to apply more according to the flexible British approach. Sensitivities relating to administrative efficiency were invoked to suggest a less rigorous approach, one which accommodated a fusion of legislative and executive power, albeit the former supreme, with a more rigorous separation of judicial power to ensure the courts’ institutional independence, though not as rigorous as *Boilermakers*. The high formalism of *Boilermakers*, impugned by its critics, is attributed to the strong influence of Sir Owen Dixon, both as puisne justice and Chief Justice, in his judicial and extrajudicial writings.¹³ Even in *Boilermakers* itself, Williams J, referring to the Constitution’s structure, stated in a most compelling dissent:¹⁴

But the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity. And with the model of the Constitution of the United States as a guide, its authors were almost bound to frame it in this way. But the

10 (1956) 94 CLR 254.

11 See *New South Wales v Commonwealth* (1915) 20 CLR 54.

12 George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) ch 4, part 5, at p 85 and ch 5.

13 See George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at pp 57–58 and “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at p 187.

14 *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; see also John M Finnis, “Separation of Powers in the Australian Constitution” (1968) 3 *Adelaide Law Review* 159 at 161.

persons elected or appointed to exercise the legislative and executive powers are not kept separate or distinct. The position is exactly the contrary ... [emphasis added]

6 Nevertheless, the assertion by Sir Owen that he could “discover no reason in the form or text of Australian constitution why the legal implications of the separation of powers should have been as full as they have been in the United States”¹⁵ has not resulted in High Court decisions which have given clear expression to such an assertion. On the contrary, the court has affirmed the subjection of the Executive to legislative control,¹⁶ and otherwise adopted a liberal, functional approach to issues relating to their separation.¹⁷ It is, however, a different matter when it comes to the separation of judicial power which will be considered first.

II. Separation of judicial power

7 Section 71 of the Constitution, within ch III, provides that “[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts [including State courts] as it invests with federal jurisdiction”.¹⁸ Section 72 provides for judicial independence at an institutional level by protecting federal judges’ salary and tenure: appointment until the age of 70¹⁹ and dismissal only for proved misbehaviour or incapacity on address from both houses of Parliament in the same session.

8 From the provisions of ch III and the separation of judicial power, the High Court has held that certain consequences flow. As Sawyer put it, the effect of *Boilermakers’* was to give meaning to the tripartite structure of the Constitution such that it “must in general be regarded not as a convenience of drafting, but as a series of mandatory

15 Sir Owen Dixon, Australian Minister to the United States, “The Separation of Powers in the Australian Constitution”, address delivered at the Lawyers’ Club, New York City (3 December 1942) published by the American Foreign Law Association, at p 5, cited in George Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at p 187.

16 See, eg, the majority reasoning in *Brown v West* (1990) 169 CLR 195 at 202 and cases referred to therein.

17 See, eg, the case of *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 on delegated legislation below at para 44.

18 The last is referred to as “the autochthonous expedient”.

19 Previously, they had been appointed for life. This was changed in 1977 to 70 years of age by constitutional amendment.

propositions implying negatives”.²⁰ Some of these relate to the Constitution and powers of courts, tribunals, arbitral and administrative bodies. Others, usually implied, relate to the protection of certain individual and civil rights. The former can be summarised into two basic principles which, when expanded, may sometimes meld with the latter:

(a) The judicial power of the Commonwealth (and power incidental thereto) may only be vested in a “Chapter III court”.²¹ This is regarded as the “first limb” of the separation of judicial power.

(b) The second limb – “the *Boilermakers’* principle” – is that a Chapter III court may only exercise this judicial power. It is prohibited from exercising any other power and thus Parliament is constitutionally prohibited from vesting such other non-judicial power in such a court.²²

9 The first limb ensures that federal judicial power is exercised only by those judges who enjoy guaranteed protections of tenure and salary.²³ Its injunction creates the imperative for a clear, or at least workable, definition of “the judicial power of the Commonwealth”. The core elements thereof were set out in the early (now classic and oft-cited) definition:²⁴

[T]he 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.

10 Subsequent High Court decisions have emphasised the following elements: (a) the adjudication of rights and obligations, (b) according to *existing* law, (c) resulting in the making of a conclusive, authoritative and *enforceable* decision. An exercise of judicial power “creates a new charter by reference to which the question [relating to the rights and obligations in issue] is in future to be decided as between those persons or classes of persons”.²⁵ Thus, in *Waterside Workers’*

20 Geoffrey Sawer, “The Separation of Powers in Australian Federalism” (1961) 35 *Australian Law Journal* 177 at 178.

21 *New South Wales v Commonwealth* (1915) 20 CLR 54.

22 *R v Kirby, ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

23 *New South Wales v Commonwealth* (1915) 20 CLR 54.

24 *Huddart, Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330 at 357, per Griffith CJ.

25 *R v Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

*Federation of Australia v J W Alexander Ltd*²⁶ (“*Alexander*”), legislation was held invalid in so far as it conferred upon the Court of Conciliation and Arbitration the power to enforce its *arbitral* awards (for example, by the imposition of penalties) because that power was judicial: the crucial distinction being that:²⁷

[J]udicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties, as they exist ... at the moment the proceedings are instituted; whereas the function of the arbitral power ... is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other. [emphasis added]

Such power of enforcement (or indeed any other aspect of Commonwealth judicial power) could not be exercised by this “court” because its judges did not have the protection of tenure (and salary), and hence independence, provided for in Chapter III.

11 While the first limb has remained unquestioned and well-established, the second (*Boilermakers*²) limb has, rather, been the source of quite a degree of judicial and academic criticism as already noted. In *Boilermakers*², the powers of the Court of Conciliation and Arbitration, examined in *Alexander*, were again in issue.²⁸ In *Alexander*, it appears to have been assumed that if its judges were furnished with the relevant protection of salary and tenure, there would be no constitutional bar to their exercise of judicial power (including enforcement) in addition to their non-judicial arbitral functions; thus combining specialist judicial and non-judicial functions in that court. Indeed, following that case, the court was in fact reconstituted to provide life tenure to its chief judge.

12 But it was the constitutional validity of this combination of judicial and non-judicial functions in the reconstituted court which was challenged some 30 years later in *Boilermakers*². The case was brought to impugn the jurisdiction of the court to impose a fine on an industrial union for non-compliance with court orders enjoining compliance with an industrial award. The majority held that the separation of judicial power prohibited the Arbitration Court from validly enforcing compliance with its awards as this constituted an exercise of the judicial power of the Commonwealth. As its principal functions were arbitral, it could not also exercise judicial power as this would breach the first limb. The corollary is that had the court’s functions been held to be principally judicial, its arbitral functions would have been invalidly

26 (1918) 25 CLR 434.

27 *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463.

28 *R v Kirby, ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

conferred in breach of the second limb. As a result, the court had, again, to be reconstituted into two separate bodies, one exercising exclusively judicial, and the other exclusively arbitral, functions. Thus, it was no longer possible to achieve the efficiencies resulting from non-judicial functions being vested in Chapter III courts in such areas as industrial arbitration.

13 By a combination of the first and second limbs, industrial (and other) tribunals could not enforce their own awards, decisions or orders, and recourse had to be had to a Chapter III court, which would require some degree of re-hearing on legal grounds, for enforcement purposes. And, such a court, as a separate body, would only be able to exercise its judicial functions, not the related administrative or arbitral functions. Such strictures have resulted in the need for subtle inquiry, both in the drafting of legislation and also in any resulting judicial consideration of it, as to the precise nature of powers conferred on courts and administrative tribunals: did they constitute the judicial power of the Commonwealth or were they simply non-judicial arbitral or administrative powers?²⁹

14 This was evidenced in a number of subsequent cases in which, despite noting the subtleties involved, the High Court has, nevertheless, maintained the second limb of the separation of judicial power arising from *Boilermakers*.³⁰ These subtleties can cause considerable difficulty in individual cases, as will be seen.

III. Principles derived from first limb of separation of judicial power

A. *Institutional issues*

15 On the basis of the first limb, it has been held that administrative tribunals cannot themselves enforce their declarations, directions or orders; neither can they do so by the expedient of simply having them registered in a federal court and thus, *ipso facto*, having them thus rendered orders of a Chapter III court. Provisions to that

29 See Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 559–562; see also Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at pp 216–217.

30 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352.

effect in the act which established the Human Rights and Equal Opportunity Commission were held invalid.³¹ The High Court reasoned that the mere act of registering the Commission's orders in the court's registry, thus making the Commission's non-binding administrative determination both binding and enforceable, would have rendered the functions of the Commission an exercise of the judicial power of the Commonwealth. It not being a Chapter III court, such a power could not be validly vested in it.³² Similarly, the High Court originally held that Commonwealth judicial power could not be delegated to masters and registrars (that is, non-judicial officers) of federal and state courts. With regard to the latter, the High Court initially held that it could not do so because the term "court" in ss 71 and 77(iii) of the Constitution included only its judges.³³ This was subsequently overruled,³⁴ and in *Harris v Calladine*, the High Court articulated the principles that apply to non-judicial officers of federal courts.³⁵ Mason CJ and Deane J stated³⁶ that the delegation of some part of the jurisdiction, powers and functions by the Federal Court as a court to its officers is permissible only to a limited extent and that the delegation remained consistent with the control and supervision of the court's jurisdiction by its judges, including the reservation of important aspect of contested matters for judges and the availability of appeal to judges.

16 On the other hand, certain powers of adjudication placed in the hands of specialist bodies, apart from arbitral bodies, have, despite similarities, been held not to be judicial power, and thus validly invested. For example, statutory powers were given to the Corporations and Securities Panel to make determinations of "unacceptable" conduct in relation to share acquisitions and related activity, to determine the existence of "unacceptable circumstances" taking the "public interest" (broadly defined and based on commercial considerations) into account. It could make orders prohibiting the disposition of shares or the exercise of voting rights (including blocking a takeover). These were held to be non-judicial powers and thus validly conferred. These were subject to judicial review and the power of enforcement was given to the courts. The Panel's powers were held to be more akin to arbitral powers,

31 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

32 See *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 and *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 relating to the functions of the Takeovers Panel, held to be non-judicial and validly vested.

33 *Kotsis v Kotsis* (1970) 122 CLR 69, applied in *Knight v Knight* (1971) 122 CLR 114.

34 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49.

35 *Harris v Calladine* (1991) 172 CLR 84.

36 *Harris v Calladine* (1991) 172 CLR 84 at 95.

creating a new set of rights and obligations, as opposed to the making of a determination as between litigants as to existing legal rights.³⁷

B. “Bills of attainder”

17 If Parliament cannot vest the Commonwealth’s judicial power in any body except a Chapter III court, it follows that neither can it vest such a power in itself. Thus, it is prohibited from enacting an act of attainder (imposing the death penalty) or of pains and penalties (a lesser sentence) – “bill of attainder” – as this would constitute an exercise of judicial power by the Legislature.³⁸ An act may still be a Bill of Attainder if it penalises not merely “specific” or “specified” persons³⁹ but a class of persons or “group” the members of which are known or relatively easily ascertainable.⁴⁰ Thus, the distinction between a merely retroactive criminal law – otherwise permissible – and a bill of attainder may be one only of degree, depending upon the generality of the law and the degree to which, at the time of enactment, it was possible to ascertain to which persons it applied.

18 But if the protections thus afforded are to be real and not illusory, the application of this principle must go to matters of substance and not mere form. In a recent case, impugned state legislation cancelled three specified mining licences. This was in response to recommendations made by the Independent Commission Against Corruption in New South Wales which were based on its findings of the existence of corruption which led to the granting of the licences. It was argued that the legislation was a bill of attainder despite the absence of a reference to the commission of any offence and any suggestion that the cancellation constituted a penalty. The High Court stated that legislation, to be characterised as a bill of attainder, must be a “legislative determination of breach by some person of some antecedent standard of conduct” and an “imposition on that person (alone or in company with other persons) of punishment consequent upon the determination of the breach”.⁴¹ Because the legislation did not “fasten upon” any of the findings of corrupt conduct and did not impose legal burdens on any of the licence holders, these requirements were not met in either form or substance. The legislation rather reflected Parliament’s view that the procedure for the granting of these licences had been tainted by corrupt

37 See *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.

38 *Polyukhovich v Commonwealth* (1991) 172 CLR 510 at 539, 612, 686, 706–707 and 721; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 70.

39 *Polyukhovich v Commonwealth* (1991) 172 CLR 510 at 535 and 536, per Mason CJ.

40 *Polyukhovich v Commonwealth* (1991) 172 CLR 510 at 646, 686 and 721, per Dawson, Toohey and McHugh JJ respectively.

41 *Duncan v New South Wales* (2015) 255 CLR 388 at 408.

conduct and that it was in the public interest that the licences be cancelled. The actions of any persons who may have been involved were still subject to the criminal law.

C. *Executive detention*

19 “Executive detention” relates to the involuntary detention of persons by the executive branch. Where such detention can be characterised as an exercise of the judicial power of the Commonwealth then *prima facie*, it is unconstitutional because it has not resulted from a decision of a Chapter III court. The guiding principle in Australia derives from *Chu Kheng Lim v Minister for Immigration*⁴² (“*Lim*”), in which three justices⁴³ held that it would be beyond the legislative competence of Parliament, based on the separation of judicial power, to invest the Executive Government 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”.⁴⁴ Their Honours continued:⁴⁵

The reason why that is so, 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 in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt ...

20 The exceptions identified were: (a) an accused’s custody pending trial; (b) the involuntary detention of persons afflicted by infectious disease or mental illness; (c) the traditional powers of Parliament to punish for contempt; and (d) the imprisonment by military tribunal for breach of military discipline.⁴⁶ If Parliament sought to authorise executive detention outside these exceptional categories, it would be unconstitutionally purporting to do that which only a court could do: “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”.⁴⁷

21 Winterton, while appreciating the “significant strike for personal liberty” which this decision represented, also identified a weak point in the reasoning, *viz*, “the assumption that all involuntary

42 (1992) 176 CLR 1.

43 The three justices were Brennan, Deane and Dawson JJ.

44 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

45 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

46 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

47 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

detention (except the recognised exceptions) is necessarily punitive”.⁴⁸ Hence, the significance of Gaudron J’s qualification, fortified by her otherwise liberal approach to the separation of powers, that she was “not presently persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch III”.⁴⁹ As the reasoning in the line of cases following *Lim* has developed, it has been Gaudron J’s qualification which has been the more influential. The current position would appear to be that, generally speaking, while the *Lim* principle applies, with the exceptions noted therein, these exceptions are not a closed set and they may reflect a more general principle by which to determine the validity or otherwise of executive detention. The restatement of the principle by Gummow J in *Fardon v Attorney-General (Qld)*⁵⁰ more accurately reflects the current position: “the “exceptional cases” aside, the involuntary detention of a citizen in custody by the state is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts”.

22 The discrimen is no longer whether the detention is “penal or punitive in character”. “The formulation”, his Honour explained, “emphasises that the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose”.⁵¹ As for the “exceptional cases”, it is difficult to formulate a generally applicable principle. It is possible to say that involuntary detention by the Executive will not breach the separation of judicial power if the legislation which so authorises it permits the detention only in order to fulfil the permitted purpose and no other, so long as the legislation is otherwise within Commonwealth legislative competence. Thus, in the most common situation of the detention of asylum seekers, as a majority of the High Court recently held in *Plaintiff M68 v Minister for Immigration and Border Protection*,⁵² legislation which authorises such detention will not breach ch III if the detention is authorised *only to the extent necessary to make effective* the expulsion and deportation of “aliens” arriving illegally. A power to make a law “with respect to ... aliens” can be found in s 51(xix) of the Constitution.

48 “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at pp 192–193.

49 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 55.

50 (2004) 223 CLR 575 at 612, [80].

51 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612, [80].

52 *Plaintiff M68 v Minister for Immigration and Border Protection* (2016) 327 ALR 369 at 377, [38]–[40].

D. *Interference with judicial functions*

23 Aside from ensuring that federal judicial power is exercised exclusively by Chapter III courts, the separation of judicial power also requires that their “decisional independence” be protected. This independence refers to the “ability of the courts to *interpret* and *apply* ... substantive legal principles in the specific context of an individual adjudication, free from control or interference by the purely political branches”.⁵³ This is a discrete form of independence from the non-case-specific institutional independence they enjoy by virtue of the protection of tenure and salary of judges. The most fundamental principle in this regard is that there can be no executive or legislative direction to the court as to the outcome of any particular case, or aspects thereof. Thus, the impugned legislation in the *Lim* case which expressly prohibited a court from ordering the release from custody of any “boat people” was held invalid for seeking to interfere with the judicial power of the Commonwealth:⁵⁴

In terms, s 54R [the offending provision] is a *direction* by the Parliament to the courts as to the *manner* in which they are to exercise their jurisdiction. It is one thing for the Parliament ... to grant or withhold jurisdiction. It is a quite different thing for Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. [This] constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates. [emphasis added]

24 A number of refinements and qualifications to this basic principle have been advanced. These seek to balance and accommodate this decisional independence of the judicial branch with the undoubted power of Parliament to enact new law, generally applicable, which may affect rights and obligations, including those in issue in litigation.⁵⁵ Such law should not be invalidated merely because of the happenstance of pending or concluded litigation in which it may have an effect. Thus, the High Court has accepted that “Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be

53 Martin Redish, “Federal Judicial Independence: Constitutional and Political Perspectives” (1995) 46 Mercer L Rev 697 at 699.

54 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

55 These were originally identified by George Winterton in “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at p 185 and elaborated upon in comparative perspective involving a number of jurisdictions in Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Hart Publishing, 2009).

the subject of legislative declaration or action”⁵⁶ But such legislative declaration or action cannot “interfere ... with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings”⁵⁷

25 This distinction between a new law (or amendment to law) validly applicable in particular cases and one which is an unconstitutional *direction* that “interferes with the judicial process itself” is often difficult to apply. It can be said that Parliament may amend the law prospectively in order to overrule the effect of a judicial decision so long as it is a general amendment to the law and not directed only to a successful litigant. If it were, it may be prohibited as a bill of pains and penalties. Similarly, this can also be achieved by retrospective general legislation which alters the legal rights and obligations upon which the decision was based, thus rendering the decision irrelevant, otiose.⁵⁸ For example, the High Court regarded as valid legislation which effectively overturned a previous High Court decision that had held that no aspect of the matrimonial causes jurisdiction vested in state courts could be exercised by master or registrars but only its judges. This was held valid despite pending proceedings challenging a decision of a state Supreme Court in this jurisdiction in which the change in the law was very significant to the outcome. Although that previous High Court decision was not overruled, it had been rendered irrelevant.⁵⁹

26 On the other hand, any attempt by the political branches to set aside the decision of a Chapter III court would not be valid: the decision must stand, but its affects may be ameliorated in the ways indicated above. The “legislature may *overrule* a decision, though it may not *reverse* it” [emphasis in original].⁶⁰ However, US precedents – and there is no reason why this should not apply in Australia – would indicate that it may waive the benefit of a decision in its favour.⁶¹

56 *R v Humby, ex parte Rooney* (1973) 129 CLR 231 at 250, per Mason J, affirmed by the majority in *Australian Building Construction Employees’ and Builders’ Labourers’ Federation v Commonwealth* (1986) 161 CLR 88 at 96.

57 *Australian Building Construction Employees’ and Builders’ Labourers’ Federation v Commonwealth* (1986) 161 CLR 88 at 96.

58 *R v Humby, ex parte Rooney* (1973) 129 CLR 231; *Australian Building Construction Employees’ and Builders’ Labourers’ Federation v Commonwealth* (1986) 161 CLR 88; *Robertson v Seattle Audubon Society* 503 US 429 (1992).

59 *R v Humby, ex parte Rooney* (1973) 129 CLR 231. For other Australian and US examples, see Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Hart Publishing, 2009) chs 2–4.

60 John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney Legal Books, Reprint 1976) at p 722; see also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117.

61 *United States v Sioux Nation of Indians* 488 US 371 at 395–402 and 406–407 (1980). For more discussion on this principle and other qualifications to the
(cont’d on the next page)

27 In the case of legislation which affects rights and obligations at issue in pending litigation, such legislation will be valid so long as it does not actually direct the court as to how to adjudicate and decide the issues. Where the legislation is of general application, it is less likely to offend this principle.⁶² Even if directed more specifically to particular persons, it will still be valid so long as the judicial process itself is not interfered with, and the legislation is not otherwise, a bill of pains and penalties. Thus, in *Australian Building Construction Employees' and Builders' Labourers' Federation v Commonwealth*,⁶³ legislation which directly deregistered a named trade union was held valid even though it became operative when that union had litigation pending in the High Court challenging the decision of the Conciliation and Arbitration Commission that it had engaged in conduct which permitted the Minister to cancel its registration. This was because Parliament did have power to deregister the union directly, by force of statute, and it did so without in any way interfering with the processes of the court.⁶⁴ It merely rendered otiose the pending proceedings.

28 The leading case in which legislation was struck down for unconstitutionally interfering in a pending case, because in effect it directed the outcome, remains *Liyanage v The Queen*⁶⁵ in Commonwealth jurisdictions. This case involved a pending prosecution against those accused of conspiring to overthrow the government of Ceylon (as it then was). The legislation purported to amend the criminal law more easily to capture the conduct of the Accused, legalise retrospectively the detention of particular criminal suspects, amend the law of evidence in their particular trial to make evidence more easily admissible even if otherwise inadmissible under the general law, and prescribed a more severe punishment for the particular Accused upon conviction. It was to cease to be operative upon the completion of the trial of those charged. The Privy Council held this to be “a grave and deliberate incursion into the judicial sphere”: “the pith and substance of [the legislation] was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals”.⁶⁶ Further:⁶⁷

general rule protecting final judgments, see Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Hart Publishing, 2009) ch 5.

62 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 579; *United States v Schooner Peggy* 5 US 1 Cranch 103 at 110 (1801).

63 (1986) 161 CLR 88.

64 See also *Nicholas v The Queen* (1998) 193 CLR 173 and *Duncan v Independent Commission against Corruption* (2015) 256 CLR 1.

65 [1967] 1 AC 259.

66 *Liyanage v The Queen* [1967] 1 AC 259 at 290.

67 *Liyanage v The Queen* [1967] 1 AC 259 at 290.

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 ... [emphasis added]

Determining on which side of the line particular legislation will fall, as the Board correctly recognised, can be a question of some nicety and much depends on the particular circumstances and facts which the court must consider.⁶⁸ Greater vigilance, and rigour, will no doubt be applied in circumstances involving a criminal trial given that the liberty of the subject is at stake. But if the legislation, such as that struck down in *Lim*, unambiguously purports to direct a court exercising federal jurisdiction as to the manner in which it should decide a particular case, or to overrule a decision of such a court as between the parties, it would be invalid as an unconstitutional interference with the judicial power of the Commonwealth.

IV. Principles derived from second limb of separation of judicial power

A. *Persona designata*

29 *Boilermakers'* prohibits the exercise of non-judicial functions by Chapter III courts. To what extent does this prohibition extend to the appointment of judges to non-judicial roles? In a decision which may be regarded as the precursor to *Boilermakers'*, the High Court held that the Commonwealth Parliament could not validly authorise it to provide an advisory opinion. This is because the Chapter III courts may exercise only that judicial power provided for in that chapter: the High Court's constitutionally conferred original jurisdiction,⁶⁹ that which Parliament may confer on it,⁷⁰ its appellate jurisdiction over both State and federal matters⁷¹ and the federal jurisdiction which Parliament could vest in other federal courts and state courts over matter prescribed therein.⁷² None of these sections, including s 76, authorises Parliament to confer jurisdiction on any "matter" other than those referred to therein.

68 *Liyanage v The Queen* [1967] 1 AC 259 at 289–290. For a detailed consideration of these questions and an exploration of a useful test and indicia of unconstitutional direction, including a discussion of *Liyanage v The Queen*, see Peter Gerangelos, "The Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes From the United States" (2005) 33 *Federal Law Review* 391.

69 Commonwealth Constitution, s 75.

70 Commonwealth Constitution, s 76.

71 Commonwealth Constitution, s 73.

72 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

A “matter” was interpreted by the majority as “the subject matter for determination in a legal proceeding” and not just “a legal proceeding”.⁷³ Thus, the granting of an advisory opinion was not a “matter”. And, following *Boilermakers*,⁷⁴ in a decision which seemed to appropriate its high formalism, the High Court more recently held⁷⁵ that the “cross-vesting scheme”, by which state jurisdiction was vested in federal courts and *vice versa*, was invalid because ch III did not expressly permit such state jurisdiction to be vested in federal courts. This was despite any inconvenience to courts and litigants which may result and despite the absence of an express prohibition on such vesting.⁷⁵ Chapter III was read as an *exclusive* charter for the vesting of federal jurisdiction and thus impliedly prohibited the vesting of any jurisdiction, including state jurisdiction, in the Chapter III courts not expressly stated therein.

30 Following *Boilermakers*,⁷⁶ consideration had to be given to the broader question of whether non-judicial functions could be vested in federal judges in “a personal capacity” and not as part of their role as members of the court, thus distinguishing between a federal court and the judges who constitute it. The rationale behind *Boilermakers* becomes relevant here. The majority there had regard to the principal policy consideration: the need to appreciate the fundamental importance of the judicature in a federation upon whom rests “the ultimate responsibility for the maintenance and enforcement of the boundaries with which governmental power might be exercised ... upon [which] the whole system was constructed”.⁷⁶ The Privy Council similarly emphasised this: “the absolute independence of the judiciary” was “the bulwark of the constitution against encroachment whether by the legislature or the executive. *To vest in the same body executive and judicial power is to remove a vital constitutional safeguard*” [emphasis added].⁷⁷ This differed subtly to the policy rationale underlying the first limb of the separation of powers which emphasised the need to guarantee institutional independence (by protecting salary and tenure) in order to protect the liberty of the subject and ensuring that subjects can have their rights and obligations determined by a court without interference by the government or Parliament.⁷⁸ Indeed, in the first

73 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

74 *Re Wakim* (1999) 198 CLR 511.

75 This decision was highly controversial and subject to trenchant criticism: see Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 1285–1287; James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 656.

76 *R v Kirby, ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 276.

77 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 540–541.

78 *R v Davison* (1954) 90 CLR 353 at 381, *per* Kitto J: “safeguard of individual liberty”; *R v Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* (1970) (cont’d on the next page)

constitution which legally entrenched the separation of powers – the US – this particular concern to ensure judicial independence was a most significant catalyst.⁷⁹ These more obvious policy foundations may help explain why the first limb of the separation of powers doctrine has never really been questioned.

31 The second limb, although probably now well-settled, has been object of a degree of criticism.⁸⁰ This is basically because the policy considerations upon which it was based have not been as convincing. Is it really necessary to prevent federal courts from exercising any non-judicial functions to ensure that the judicial branch is not encroached upon by the political branches and not to have its independence compromised? Barwick CJ, for example, remarked that the principle was “unnecessary ... 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 the courts exercising that power.”⁸¹ Functionalist concerns were clearly apparent in the appeals to efficiency and good administration.⁸²

The decision leads to excessive subtlety and technicality in the operation of the Constitution without ... any compensating benefit. [I]t 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.

32 Mason J (as his Honour then was) generally concurred with these reservations⁸³ and, in his non-judicial writing, expressed a preference that a “purposive functional” approach be adopted to revisit and qualify the *Boilermakers’* principle along the lines suggested in the

123 CLR 361 at 390, *per* Windeyer J; *R v Quinn, ex parte Consolidated Foods Corp* (1977) 138 CLR 1 at 11, *per* Jacobs J: “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 parliament and the executive”; *Re Tracey, ex parte Ryan* (1989) 166 CLR 518 at 574, *per* Brennan and Toohey JJ and at 579, *per* Deane J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 521, *per* Deane J.

79 See the discussion in Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Hart Publishing, 2009) at pp 10–13.

80 *Gould v Brown* (1998) 193 CLR 346; *Re Wakim, ex parte McNally* (1999) 198 CLR 511; *Momcilovic v The Queen* (2011) 245 CLR 1. In the view of the present writer, the dissent of Williams J in *R v Kirby, ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 remains compelling: see especially 306.

81 *R v Joske, ex parte Australian Building Construction Employees and Builders Labourers’ Federation* (1974) 130 CLR 87 at 90.

82 *R v Joske, ex parte Australian Building Construction Employees and Builders Labourers’ Federation* (1974) 130 CLR 87 at 90.

83 *R v Joske, ex parte Australian Building Construction Employees and Builders Labourers’ Federation* (1974) 130 CLR 87 at 90.

earlier *R v Federal Court of Bankruptcy, ex parte Lowenstein*⁸⁴ case, “where ... non-judicial functions could be reposed in a federal court unless they were incompatible with the functions of a court”⁸⁵ This reference to an incompatibility test was echoed by the compelling dissent of Williams J in *Boilermakers*,⁸⁶ who reasoned that the issue of whether non-judicial functions could be vested in Chapter III courts was to be determined by reference to the inconsistency or incompatibility of those functions with judicial functions. There developed a compromise position: various non-judicial functions could be vested in federal judges so long as it was in their “personal capacity” (*persona designata*) and distinguishable from their role on the court. Thus, federal judges in Australia have been appointed, *personae designatae*, as Royal commissioners, chairmen of government committees and even ambassadors to foreign nations.⁸⁷ Such overseas postings which separate a judge completely from judicial work is probably less objectionable to part-time extrajudicial work which entails the judge continuing to sit as a judge while simultaneously fulfilling executive functions.

33 Nevertheless, even the most famous judicial holder of ambassadorial position (to the US during World War II), Sir Owen, had second thoughts about the appropriateness of this: “I am not sure that it was right”, he would later write, “I do not wish it to be thought that ... I altogether approve of what I myself did”⁸⁸ Similar reservations about their engagement with extrajudicial duties were expressed by Roberts, Frankfurter and Jackson JJ of the US Supreme Court.⁸⁹ Albeit retrospective, such doubts are justified. These extrajudicial duties did require deep engagement in executive affairs and accordingly make this very difficult to reconcile with the precepts of independence and the insulation from the political branches of government which underlie, and provide the rationale for, the *Boilermakers*’ principle.⁹⁰ Leslie Zines has pointed out that, if reliance alone was placed “on the policy reasons

84 (1938) 59 CLR 556.

85 Anthony Mason, “A New Perspective on Separation of Powers” (1996) 82 *Canberra Bulletin of Public Administration* 1 at 5.

86 *R v Kirby, ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 541–544.

87 For details, see Fiona Wheeler, “Federal Judges as Holders of Non-Judicial Office” in *The Australian Federal Judicial System* (Brian Opeskin & Fiona Wheeler eds) (Melbourne University Press, 2000) at pp 446–451; see also Hoong Phun Lee *et al*, *Winterton’s Australian Federal Constitutional Law* (Peter Gerangelos gen ed) (Thomson Reuters, 3rd Ed, 2013) at p 1287.

88 J D Holmes, “Royal Commissions” (1955) 29 *Australian Law Journal* 253 at 272 (commentary by Sir Owen Dixon).

89 George Winterton, “Judges as Royal Commissioners” (1987) 10 UNSW Law Journal 108 at 116–117.

90 George Winterton, “Judges as Royal Commissioners” (1987) 10 UNSW Law Journal 108 at 124.

given in the *Boilermakers' case*, this would render “unconstitutional” the use of federal judges for extrajudicial government work.⁹¹

34 Others have been critical of the very notion of *persona designata*. How is it possible to distinguish between the judge as a member of a court and his “personal capacity”? Sir Anthony Mason, extrajudicially, commented that the concept “has a distinctly artificial flavour about it ... Rationality would be advanced if the concept were jettisoned and replaced by the incompatibility test”.⁹² This represents a serious challenge to the *Boilermakers' principle* itself: by removing *persona designata* completely, and replacing it simply with an incompatibility test, is one then saying that *irrespective of the capacity in which they are acting*, federal judges may be vested with non-judicial functions so long as these are not incompatible with their judicial functions? If so, does this not represent a return to Williams J reasoning at least in so far as this particular issue is concerned?

35 These issues wound their way through a number of cases in which the position initially emerged that both *persona designata* and incompatibility played a role. In *Hilton v Wells*,⁹³ all judges accepted the *persona designata* exception, although Mason and Deane JJ noted the artificiality of the distinction upon which it was based: an intelligent observer might regard this, “with some degree of justification”, as “an elaborate charade”.⁹⁴ Hence, their qualification that, to act validly *persona designata*, the prior consent of the judge is necessary and the non-judicial role cannot be seen as an unavoidable attachment to judicial office. In *Grollo v Palmer*⁹⁵ (“*Grollo*”), legislation was held valid which authorised a “person who is” a judge to issue a warrant for telecommunications interception – not an exercise of the judicial power of the Commonwealth – if that person so consented to be nominated as an “eligible judge” and conferred in their personal capacity. Moreover, the issuing of a warrant was not incompatible with the judge’s judicial functions. Dissident voices could still be heard – in *Grollo*, that of McHugh J – that the *persona designata* doctrine was artificial. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁹⁶ (“*Wilson*”), these principles were applied in circumstances where a federal judge had been appointed *persona designata* to report to the relevant Minister on heritage protection issues affecting indigenous

91 Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at p 214.

92 Anthony Mason, “A New Perspective on the Separation of Powers” (1996) 82 *Canberra Bulletin of Public Administration* 1 at 5.

93 (1985) 157 CLR 57.

94 *Hilton v Wells* (1985) 157 CLR 57 at 84.

95 (1995) 184 CLR 348.

96 (1996) 189 CLR 1.

persons. The legislation was held invalid because the reporting function, especially to a Minister, was incompatible with her judicial functions. A majority joint judgment⁹⁷ referred to the policy consideration of securing individual liberty by separating the judicial power and ensuring a separation of personnel between the judicial and political branches. The basis for the incompatibility was that the judge would be seen as being so deeply engaged with advising the Government that it would result in a diminution in public confidence in the independence and integrity of the judicial branch and/or in the capacity of the judge to perform with integrity his functions.

36 The relevant factors applicable in such cases were stated to be as follows:⁹⁸ the degree of connection with the functions of the legislative or executive branches (to what extent they were an integral part thereof); and the degree to which it could be exercised independently of any instruction from these branches. It is also necessary to determine whether any discretion possessed by the judge in the circumstances is exercisable on political grounds, that is, “grounds that are not confined by factors expressly or impliedly prescribed by law.”⁹⁹ Relevant to this consideration is whether the function to be performed “must be performed judicially”, “without bias” and pursuant to the requirements of natural justice. If this is not the case, then “it is unlikely that the performance of the function will be performed free of political influence”.¹⁰⁰ For the majority in this case, the fact that the judge was effectively advising a Minister on a matter of policy involving the consideration, adjustment and balancing of competing interests led it to the conclusion that the functions were incompatible with judicial functions. Of course, reasonable minds may differ, as the dissentient voices in many of these cases shows.¹⁰¹ Other circumstances where incompatibility would arise were those where (a) the judge’s non-judicial role was so onerous as to make impracticable the further performance of substantial judicial functions or (b) the nature of the non-judicial functions was such that there would be a compromise or impairment of the judge to perform his judicial functions with integrity.

97 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 14, Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

98 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

99 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

100 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

101 James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at pp 273–275.

37 A further refinement was added when a plurality of three justices in *Wainohu v New South Wales*¹⁰² adopted the view, earlier stated by Gaudron J in *Wilson*, that functions which may not otherwise meet the incompatibility requirements may, nevertheless, be regarded as validly conferred *persona designata* if judges have *historically* had such functions conferred on them (such as the issuing of warrants) and hence, to the extent that such a view is ever endorsed by the court, these may add a further refinement to an already complex issue.

V. Further principles relating to separation of judicial power

38 While the two limbs above-mentioned have garnered the bulk of judicial attention, there is a further aspect to the separation of judicial power which may be open to possible future refinement. Winterton had noted:¹⁰³

The 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 particular power, but was unconcerned with the manner in which the judiciary performs its functions.

While there has been some judicial and academic support for this notion, its practical effect remains unclear. There have been *dicta* to the following effect: the provisions of ch III “not only identify the possible repositories of Commonwealth judicial power. They also dictate and control the manner of its exercise”;¹⁰⁴ federal judicial power must be exercised “in accordance with the judicial process”¹⁰⁵ and a law which required or authorised federal judicial power to be exercised “in [a] manner which is inconsistent with the essential character of a court or with the nature of judicial power” would be invalid.¹⁰⁶

39 The underlying suggestion is that federal judicial power must be exercised pursuant to *procedural* due process. Thus, at the very least, the requirements of natural justice must be observed¹⁰⁷ and judicial power

102 (2011) 243 CLR 181 at 226, *per* Gummow, Hayne, Crennan and Bell JJ.

103 George Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at p 187.

104 *Leeth v Commonwealth* (1992) 174 CLR 455 at 486–487, *per* Deane and Toohey JJ.

105 *Leeth v Commonwealth* (1992) 174 CLR 455 at 502, *per* Gaudron J.

106 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, *per* Brennan, Deane and Dawson JJ.

107 *Leeth v Commonwealth* (1992) 174 CLR 455 at 470, *per* Mason CJ, Dawson and McHugh JJ.

must be exercised “fairly”.¹⁰⁸ But what precise limits do these requirements impose? Much depends on context. As James Stellios pointed out, the High Court has “left open the question of what common law rules are essential to judicial process and which can be modified or changed by Parliament”.¹⁰⁹ There have been *dicta* which have suggested that open and public enquiry itself gives protection to due process. One justice went so far as to say that ch III was based “on the assumption of traditional judicial procedures, remedies and methodologies”.¹¹⁰ To the extent that such views prevail, it would seem that common law rules and procedures would remain protected.

40 Thus, because this would result in an unfair trial, the High Court has held that a court may grant a stay of proceedings in circumstances where an indigent accused is unable to procure legal representation, through no fault of his own, when being prosecuted for a serious offence.¹¹¹ The principle of a “fair trial” in the context of the judicial power of the Commonwealth was “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 Chapter III of the Constitution designates”.¹¹² But while a “fair trial” is guaranteed to this extent, the same cannot be said of any privilege against self-incrimination which remains susceptible to legislative regulation.¹¹³ The legislative provision of mandatory sentencing, even though it may severely limit judicial discretion in sentencing, has also been held not to breach the separation of powers. It is not a usurpation of judicial power, and nor does it give rise to any incompatibility with the courts’ institutional integrity.¹¹⁴

41 However, the High Court has also had to consider the situation of a statutory authorisation of compulsory interrogation by relevant (non-judicial) authorities of a person charged with an offence. The position would appear to be that such a power could not be exercised once the matter had come within the cognisance of the courts and could not be used for the purposes of a pending suit. This was because it would be an exercise of the legislative power to interfere in judicial

108 *Dietrich v The Queen* (1992) 177 CLR 292 at 326, *per* Deane J and at 362, *per* Gaudron J.

109 James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 301.

110 Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607.

111 *Dietrich v The Queen* (1992) 177 CLR 292.

112 *Dietrich v The Queen* (1992) 177 CLR 292 at 326, *per* Deane J.

113 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

114 *Magaming v The Queen* (2013) 252 CLR 381.

proceedings, and the power to conduct such proceedings is exclusively vested in the Chapter III courts.¹¹⁵ More recently, a person who was summonsed to give evidence before a Royal Commission successfully obtained an injunction from the High Court restraining the Commissioner from examining that person in respect of matters which related to offences for which he had been charged. Not to restrain the Commissioner might have resulted in an interference with the due administration of justice. Only one judge, however, expressly based his decision on the separation of powers and the exclusive vesting of judicial power in the federal courts.¹¹⁶ As Stellios has noted: “[i]f the action was considered – as all the court agreed – to be an interference with the due administration of justice it is difficult to see how a federal statute authorising it could be consistent with Ch III of the Constitution.”¹¹⁷

42 However, beyond these basic requirements of procedural due process there has been no clear adoption of further principles relating to due process concerns. There have been dispersed *dicta* reaching out to the notion of the protection of elements of *substantive* due process (for example, “equality”) but the High Court has restrained its hand from venturing into this territory in order to establish binding principles.¹¹⁸

VI. Separation of legislative and executive powers

43 As may be seen from the previous sections, the separation of *judicial* power has yielded a body of principles maintaining the separation of the judicial branch from the non-judicial branches, at times quite strictly. This is not quite the case with the separation of the executive and legislative branches *inter se*; a consequence, as indicated,

115 See *Huddart, Parker v Moorhead* (1909) 8 CLR 330, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 and the discussion in James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at pp 302–303.

116 *Hammond v Commonwealth* (1982) 152 CLR 188.

117 James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 303.

118 Much has been written on this question and it is beyond the scope of this paper to explore this further. One of the most-cited comments on ch III’s implied requirement of proper judicial process is that of Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 606–607. For a further exploration of these issues, see George Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at pp 199–205, Hoong Phun Lee *et al*, *Winterton’s Australian Federal Constitutional Law* (Peter Gerangelos gen ed) (Thomson Reuters, 3rd Ed, 2013) at pp 1344–1348, Fiona Wheeler, “Original Intent and the Doctrine of the Separation of Powers in Australia” (1996) 7 *Public Law Review* 96 at 99 and Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 585–590.

of the principle of responsible government also entrenched in the Constitution.¹¹⁹ It is also a consequence of the extreme difficulty, if not impossibility, of defining “executive power” purely conceptually, in the abstract, to provide it with inherent substantive content. This is not resolved by defining its role as that power to execute the laws and carry out those functions which it is expressly authorised to carry out by a constitutional instrument.¹²⁰ Beyond this, it is virtually impossible to determine in the abstract and purely conceptually whether any particular power which it may exercise is inherently “executive” in nature. Moreover, it is very difficult to separate what cannot be defined.¹²¹

44 This becomes apparent in the High Court’s treatment of delegated legislation. Despite the separation of powers, it was held permissible, subject to narrow limitations, for the Legislature to delegate its lawmaking power to the Executive. It could hardly have been held otherwise given the increasing reliance on delegated legislation by modern government. Writing extrajudicially, Dixon J stated: “[l]egal symmetry gave way to common sense”.¹²² In the leading case, *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*¹²³ (“*Dignan*”), it was acknowledged, even by that champion of the separation of powers, that the existence of the power to delegate “may be ascribed to a conception of the 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”.¹²⁴ Of course, the delegation can only be authorised by primary legislation and its exercise must remain subject to legislation. And, a delegation may not be so broad or uncertain as to render it a law which could not be said to be with respect to one of the Commonwealth’s legislative heads of power,¹²⁵ nor can it be

119 Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at p 218.

120 For a more detailed discussion on this point, including a historical overview, see Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 382–392.

121 See George Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in *Future Directions in Australian Constitutional Law* (Geoffrey Lindell ed) (The Federation Press, 1994) at pp 190–191; see also Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at pp 208–218 and *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

122 Owen Dixon, “The Law and the Constitution” [1935] *Law Quarterly Review* 590 at 606.

123 (1931) 46 CLR 73.

124 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101–102.

125 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101, Dixon J.

so broad as to amount to a law about legislative power *per se* as opposed to delegation (for example, legislation which simply authorised the making of regulations “upon the subject of trade and commerce with other countries and amongst the States”, being the precise subject matter of s 51(i) of the Constitution). This would be an impermissible abdication of legislative power, not a delegation.¹²⁶ And, if the delegation was to the Executive Government, which remains responsible to Parliament as opposed to a body which is not, this certainly remains a relevant factor supporting validity.¹²⁷

45 That the limits suggested are only of partial efficacy is evidenced by the argument that the legislation in *Dignan* should probably have been held invalid: it was a very broad delegation of power to the governor-general to make regulations “with respect to the employment of transport workers, and in particular for regulating the engagement, service or discharge of transport workers”, and any regulations thus made were to have the force of law irrespective of “anything in any other Act”.¹²⁸ It is sufficient for present purposes to note the very liberal approach which is taken, with policy considerations playing a significant role, in contrast to the more rigorous approach taken to judicial power. A similarly liberal approach has been taken in the US, despite the absence of responsible government. As Congress is the delegate of the sovereign people, it should not be able to delegate its legislative power. And yet, it has been allowed to do so where there is the “limitation of a prescribed standard”,¹²⁹ and there are “intelligible principles” to govern the exercise of any discretion by the delegate.¹³⁰ As Stellios has pointed out, however, even these requirements have been interpreted extraordinarily liberally so that, in substance, it is “difficult to discern any limits on the power”.¹³¹

46 The difficulties do not stop here. There are a number of factors intrinsic to the very notion of “executive power” which hinder its separation from the legislative branch; at least, if there is no further express constitutional definition of the power attributed to the Executive and no express constitutional statement as to the exclusivity of its

126 See James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 202.

127 See James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 202.

128 For an excellent discussion of these questions in this and subsequent cases, see James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 202.

129 *United States v Chicago Milwaukee St Paul and Pacific Railroad Co* 282 US 311 at 324 (1931).

130 *Whitman v American Trucking Associations Inc* 531 US 457 at 472 (2001).

131 See James Stellios, *Zines’s The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 200.

exercise by the Government. The Australian Constitution only partially assists in this regard. Some powers are expressly vested in the Governor-General by the Constitution,¹³² for instance, issuing writs for lower house elections;¹³³ appointment of civil servants;¹³⁴ acting as commander-in-chief of the armed forces;¹³⁵ and appointing federal judges.¹³⁶ These are powers which must be exercised on advice. The Governor-General also has certain “reserve powers” which can be exercised without advice, or even contrary to it. These are provided for expressly: appointment of Minister of State, the Prime Minister;¹³⁷ dissolving the lower house;¹³⁸ dissolving both houses;¹³⁹ and dismissing Ministers, including the Prime Minister.¹⁴⁰

47 These express constitutional grants are not, however, exhaustive of the content of the Commonwealth’s executive power. Beyond these, the Constitution, in s 61, provides for the general executive power of the Commonwealth. Section 61 does not define this power beyond its statement that it “is vested” in the Queen, “is exercisable by the Governor-General” and “extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth”. The substantive content and ambit of this power must be discerned from these words, especially the “execution” and “maintenance” limbs thereof.

48 Few problems are caused by the “execution” limb: the relationship between the Commonwealth’s executive and legislative power is at its most straightforward when the Executive Government is exercising a power conferred upon it by statute, executing Commonwealth laws or meeting the obligations imposed upon it by specific provisions of the Constitution. In relation to the last-mentioned, this would include ensuring that the essential institutions of the Commonwealth are adequately funded and resourced, that the functioning of Parliament, the departments of state and the armed forces and the administration of justice (including the payment of civil servants and federal judges) is being facilitated and provided for. It is responsible also, for example, for the collection of customs and excise duties.¹⁴¹ With respect to the execution of laws made under the

132 Some of such powers are to the Governor-General alone, others to “the Governor-General in Council”.

133 Commonwealth Constitution, ss 32 and 33.

134 Commonwealth Constitution, s 67.

135 Commonwealth Constitution, s 68.

136 Commonwealth Constitution, s 72.

137 Commonwealth Constitution, s 64.

138 Commonwealth Constitution, ss 5 and 28.

139 Commonwealth Constitution, s 57.

140 Commonwealth Constitution, s 64.

141 Commonwealth Constitution, s 86.

Constitution, the Executive Government can only act within the boundaries of the law which it is executing.¹⁴²

49 Executing Commonwealth laws, however, merely ascribes a functional role to the Government. Where Commonwealth laws authorise the Government to act in certain ways, or give it power to do so, the content of executive power is defined by the law itself. In these circumstances, the tenets of responsible government and parliamentary supremacy can apply unambiguously: the Executive may only exercise those powers, or execute those laws, for which Parliament has provided and in relation to which it is subject to judicial review. Because Parliament can amend or abrogate such powers by legislation, these executive powers remain under legislative control. This is consistent with the separation of powers in that the Legislature enacts laws which the Government executes and the power of the Government is defined and limited by statute, which can of course be amended or repealed.

50 That the Government, “the Crown”, is bound by statute is axiomatic. The only issue is whether Parliament intends to bind the Crown by any particular statute. This issue is resolved by simple statutory interpretation assisted by an assumption that legislation expressed in very general terms does not bind the Crown¹⁴³ and also by taking into account the factors set out in *Bropho v Western Australia*,¹⁴⁴ that is, in addition to the text of the statute, its subject matter and “disclosed purpose and policy”.¹⁴⁵ The High Court has stated that, in addition, relevant factors are the nature of the mischief the statute is seeking to redress, the general purpose and effect of the statute and the nature of the activities of the Executive Government which would be affected if the Crown were bound.¹⁴⁶

51 Consistently with both responsible government and the separation of powers, it is also likely the case that while Parliament cannot abrogate those powers expressly conferred by the Constitution upon the Governor-General, it may regulate the manner in which those powers are exercised. Thus, for example, while Parliament may not authorise a judicial commission to appoint federal judges under s 72, that power being expressly vested in the Governor-General in Council,

142 *Brown v West* (1990) 169 CLR 195 at 202.

143 *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410.

144 (1990) 171 CLR 1.

145 *Bropho v Western Australia* (1990) 171 CLR 1, approved *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 26–27.

146 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 26 and 37.

their appointment may probably be made conditional upon the approval of a judicial commission.¹⁴⁷

52 However, when one turns to examine the non-statutory powers of the Government, the issue of the separation of legislative and executive powers becomes considerably more complex. As the executive power is formally vested in the Queen by s 61 of the Constitution, the non-statutory powers include those prerogatives¹⁴⁸ and capacities¹⁴⁹ of the Crown (sometimes generically referred to as “the prerogative”) recognised by the common law which are impliedly incorporated by s 61 through its terms or simply by the fact that the Commonwealth government is a government of the Queen.¹⁵⁰ Accommodating both the separation of powers and responsible government causes the least difficulties when these non-statutory executive powers are treated as emanating from the common law. For, being common law, they are inherently subject to statute and accordingly subject to regulation or even abrogation by Parliament. In other words, it is the common law which gives substantive content to these powers. They are not derived *a priori* from a notion of inherent power which resides in the Government merely by virtue of it being the Government.

53 That is not to say that these common law powers do not give rise to complex issues. But these relate more to the determination of the intention of Parliament to oust or abridge the prerogative in any particular statute in the absence of express words to that effect, the line of cases which flow from *Attorney-General v De Keyser’s Royal Hotel*.¹⁵¹ But that Parliament can do so is not in doubt either in the UK or

147 See George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at pp 100–101 and the concurring view in Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at p 374; see also Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 490–495.

148 These include the power to conduct foreign relations, execute treaties, declare war, make peace, coin money, pardon offenders and confer honours. For a recent detailed discussion, see Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 445–451.

149 Those capacities which it shares with other legal persons, *eg*, entering into contracts, forming companies and trusts, disposing of property, *etc*.

150 See Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 437–438. That the common law continues to inform the content of non-statutory executive power is maintained in most recent cases dealing with executive power: *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

151 [1920] AC 508.

Australia.¹⁵² Therefore, to the extent that the content of these non-statutory executive powers derives from the common law, the question simply does not arise as to whether there is a pocket of executive power immune from legislative control. Thus, there is no room for an argument that such a power is protected by the doctrine of the separation of powers.

54 It was the traditional view in Australia that the common law not only defined the content of Commonwealth executive power, it also determined its *ambit* in its “depth” dimension; that is, the precise actions which the Commonwealth could undertake within its sphere of competence. This sphere was traditionally determinable by reference to the ambit of the Commonwealth’s *legislative* competence in light of federal limitations (“breadth”).¹⁵³ In the depth dimension, being defined in content and ambit by the common law, the non-statutory executive powers were always thus subject to legislation as indicated. In the breadth dimension, the subject matter of such action was limited to the sphere of Commonwealth legislative competence and thus the powers were always within reach of Commonwealth legislation. This legislative competence is defined principally in s 51 of the Constitution, which sets out the various heads of Commonwealth legislative power. In other words, consistently with responsible government, and not inconsistently with the separation of powers in the Australian context, the legislative power led the executive power. Moreover, this interpretation of s 61 ensured that even an expansive or creative interpretation of the “maintenance” limb of s 61 could not be used to extend non-statutory executive power beyond the limits permitted by the common law. This was very important for civil liberties concerns in that it ensured that there could be no self-defining power “to maintain” the Constitution and the potential abuse of such a power in an “emergency” – potentially also defined by an overweening executive – and that no executive power could exist which was beyond legislative control. Additionally, the common law itself is quite solicitous of civil liberties and does not generally support the use of coercion excepting in emergencies such as war, invasion and other extreme events. And, the courts have tended to avoid recognising a prerogative power which may interfere with the life, liberty or property of the subject.¹⁵⁴

152 For a fine examination of the Australian position, see George Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (2004) 25 *Adelaide Law Review* 21.

153 This “depth” and “breadth” analysis, which has provided invaluable analytical perspective, was originally coined by George Winterton in *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) chs 2 and 3.

154 See *A v Hayden* (1984) 156 CLR 532.

55 Further limiting executive power, there abides in the common law prerogatives a certain quality which distinguishes them “as being out of the ordinary course of the common law”.¹⁵⁵ The relevant historical antecedents in the constitutional conflicts in England resulting in the revolution settlement of 1688–1689 has meant that not only is the prerogative always subject to Parliament, it also constitutes a mere residue¹⁵⁶ which cannot be expanded upon. It may only be made applicable, if possible, to novel circumstances.¹⁵⁷ This further ensures that non-statutory executive power is limited and that, ultimately, Parliament is supreme, subject to the Constitution.

56 While the precise content of the common law prerogatives may remain difficult to discern in certain circumstances, many prerogatives and executive capacities are well-settled and of continuing modern relevance. As Winterton observed, “the prerogative constitutes a substantial body of principles, rules and precedents, established over hundreds of years, the subject of considerable literature and heritage shared with comparable nations such as the UK, Canada and New Zealand”.¹⁵⁸ The common law thus constitutes a source of legally discernible principles to determine the validity of executive action in circumstances where there is no relevant statute. Given the extraordinary nature of executive power, the potential for its abuse, and its expansive capacity especially in emergencies, it is reassuring that courts are able to rely on legally discernible criteria to ascertain the validity of its purported exercise. They will thus be able to stare down an executive determined to exercise a power the legal basis of which may be questionable. It is likewise reassuring that, in any event, the power is inherently subject to legislation, its exercise being but an interim measure pending legislation.

57 The symmetry in what has been referred to as the “common law view”¹⁵⁹ has been lost to a certain degree with the discovery by the High Court of inherent non-statutory power in s 61 beyond the common law. The content of this power is (generally) derived from the status of the Commonwealth government as an independent national government in a federation and enables it to undertake action for the benefit of the

155 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226.

156 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 at 573; *British Broadcasting Corp v Johns* [1965] Ch 32 at 79; *Ruddock v Vadarlis* (2001) 110 FCR 491 at 501.

157 George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at pp 120–122.

158 George Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (2004) 25 *Adelaide Law Review* 21 at 35.

159 See Nicholas Condylis, “Debating the Nature and Ambit of the Commonwealth’s Non-statutory Executive Power” (2015) *Melbourne University Law Review* 385.

nation in circumstances where only a national government can undertake such action efficaciously. This power has been referred to loosely as an executive “nationhood” power and given express recognition in 2009 by the High Court in *Pape v Commissioner of Taxation*¹⁶⁰ (“*Pape*”) and in subsequent High Court cases.¹⁶¹ It currently replaces the common law as the ultimate ambit of non-statutory executive power. The defining criteria for its valid exercise are highly influenced by the words of Mason J in *Victoria v Commonwealth and Hayden*¹⁶² (or “the AAP case”):

There is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) [the incidental legislative power] and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation ...

58 The recognition of such an inherent executive power in s 61 has not been without its critics, including the present author.¹⁶³ While it is beyond the scope of this paper to examine these criticisms in detail, those which relate to the separation of powers will be mentioned. The principal criticism is the inability to give content to this power by which its separation can be enforced, albeit the majority in *Pape* preferred a deductive approach based on the facts of each case and eschewing an exhaustive definition beyond the influence of the Mason J criteria. Thus, in *Pape*, French CJ held that s 61 rendered valid the Commonwealth’s fiscal stimulus (essentially a payment of money directly to individual tax payers whose income was below a certain tax threshold) in response to the “Global Financial Crisis” in 2008. This was on the grounds that it was within the scope of s 61 for the Government to spend money “to support a short term fiscal stimulus strategy to offset the adverse effects of a global financial crisis on the national economy”.¹⁶⁴ The other justices in the majority stated similarly, though more expansively, that “the Executive Government is the arm of government capable of and empowered to respond to a crisis, be it war, natural disaster or financial crisis on the scale here”.

160 (2009) 238 CLR 1.

161 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; *Williams v Commonwealth (No 1)* (2012) 248 CLR 156; *Williams v Commonwealth of Australia (No 2)* (2014) 252 CLR 416.

162 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397. These criteria resonated in the reasoning of the majority in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23–24, *per* French CJ and at 99, *per* Gummow, Crennan and Bell JJ.

163 Peter Gerangelos, “The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, ‘Nationhood’ and the Future of the Prerogative” (2012) 12 *Oxford University Commonwealth Law Journal* 97.

164 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23–24.

59 Of course, the difficulty which immediately presents itself is the subjectivity of such a determination. The majority judgments were able to rely on the fact that it was not contested that the financial crisis was very exceptional in its global seriousness.¹⁶⁵ But if it had been contested, on what basis would they have been able to decide on the exceptional nature of the crisis and whether the national government alone was able to take efficacious action for the benefit of the nation? Indeed, was there in fact a “crisis” at all? The relevant constitutional fact – the sufficiency of the financial crisis to invoke a successful application of the implied national power – is rendered extremely difficult for judicial determination in the absence of more precise legally discernible criteria. Indeed, even on these apparently agreed facts, the minority of three justices were not able to accept that the magnitude of the crisis warranted executive action pursuant to the nationhood power.

60 The novelty of this approach lies in the recognition of *inherent* content to executive power yet without providing clearly defined criteria in its determination beyond nationhood considerations. If there is such inherent content to s 61 beyond the common law, which is not *per se* subject to legislation, it becomes an issue whether such inherent content is immune from parliamentary control, being sourced directly in the constitutional text and vested exclusively in the Executive Government. Given its *direct* constitutional source, and its exclusive vesting in the Executive Government, will not the separation of powers intervene to protect such executive power from legislative interference or usurpation?

61 The answer to this question depends, first, on how successfully the position can be maintained that there is such a thing as “executive power”, which can be defined meaningfully, at a purely conceptual abstract level, either alone or at least by reference to the Anglo-Australian historical and constitutional context. The efficacy of such an undertaking is a prerequisite to any meaningful discussion of *inherent* executive power. Secondly, if it can, then to what extent do the principles of responsible government and Anglo-Australian constitutional history since 1688, which require parliamentary supremacy over the Executive, override the demands of the separation of powers for separation between the branches?¹⁶⁶

62 Turning to the first, it has never been the case that an *inherent* content to executive power has been recognised, at least since 1688.

165 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 69, 95, 96 and 98.

166 Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at p 384.

Moreover, leading Australian constitutional lawyers have maintained that it is not possible to understand executive power at a purely abstract conceptual level or to attribute inherent content to it.¹⁶⁷ It is for this reason that these commentators believed that the balance between efficacious government and ordered liberty was best served, at least in common law jurisdictions, if both the ambit and substantive content of executive power was determined by the common law with its legally-discernible principles. Zines thus stated that “[t]he reason why making treaties and declaring war are executive powers is not because of any inherent meaning of the concept but because of events in English history and their effect on the common law”.¹⁶⁸ When the initial express denial of this position occurred in a Federal Court decision where express recognition was given to an executive “nationhood” power, he opined – in vain as it turned out — that it “should not be followed”.¹⁶⁹ The case in point, *Ruddock v Vadarlis*,¹⁷⁰ recognised a non-statutory executive power in the Government to authorise Commonwealth authorities, absent statutory authorisation, to use coercion to maintain Australian borders against “friendly aliens”, that is, in a context not involving armed invasion. The common law either did not permit or, at the very least, was too uncertain to permit such coercive action as was exercised in that case. Zines and others drew attention to the “highly subjective” nature of this determination,¹⁷¹ a viewpoint which had already been expressed by Winterton in relation to previous and milder manifestations of this phenomenon based on the use of Mason J’s criteria in the *AAP* case, abovementioned: “[f]irst, what is the criterion for determining what executive power flows from the ‘character and status of the Commonwealth as a national government’”?¹⁷² When it was suggested that scientific research and investigation are examples of government undertakings this permitted, themselves unobjectionable, Winterton’s response was that this was a mere assertion “not derived by

167 See Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at p 359, “The Inherent Executive Power of the Commonwealth” (2005) 16 *Public Law Review* 279 and George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at pp 66–68.

168 Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th Ed, 2008) at p 358.

169 Leslie Zines, “The Inherent Executive Power of the Commonwealth” (2005) 16 *Public Law Review* 279 at 281.

170 (2001) 110 FCR 491.

171 Leslie Zines, “The Inherent Executive Power of the Commonwealth” (2005) 16 *Public Law Review* 279 at 292; see also Simon Evans, “The Rule of Law, Constitutionalism and the *MV Tampa*” (2002) 12 *Public Law Review* 94 and “Developments – Australia – *Ruddock v Vadarlis*” (2003) 1 *International Journal of Constitutional Law* 123.

172 George Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (2004) 25 *Adelaide Law Review* 21 at 27.

legal reasoning from its premise”.¹⁷³ Moreover, determining which power(s) may derive from the mere fact that certain powers are peculiarly adapted to a nation “are political questions unsuited to judicial determination”.¹⁷⁴ As the present author has written elsewhere:

There is little to be gained ... by speculating in the abstract as to which powers are inherently ‘executive’ in nature and thence proceed to determine that such powers must be exercised by the body which constitutes ‘the executive’ in any polity; that is of course, unless one is speculating as to an ideal state of affairs. ... That ‘the executive’ ... exercises a particular power in any particular polity from time to time is purely a function of the constitution, laws, conventions and usages of that polity which pertain at the time the power is being exercised.

63 If sole reliance is increasingly being placed on a “nationhood” power, rather than the common law and its legally-discernible criteria, it will be increasingly difficult for the courts to skirt political controversy. Moreover, unlike the prerogative, which is a mere residue, the nationhood power permits of an ever-pregnant executive power whose limits cannot easily be discerned. These concerns are not entirely overcome by French CJ’s conservative approach to this question in *Pape*, in which his Honour expressly referred to¹⁷⁵ the earlier warning of Dixon J that:¹⁷⁶

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.

64 Yet, despite the fact that judicial *dicta* and academic commentary have noted the difficulties in defining “executive power” in the abstract¹⁷⁷ and the dangers inherent to such an approach – an ever-expanding and self-defining power – this is the situation which must now be faced. Fortunately, in Australia at least, and if High Court maintains this position, such a power can only ever be an interim one until Parliament acts to regulate or abrogate it: the High Court has stated unambiguously that s 61 executive power cannot be immune

173 George Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (2004) 25 *Adelaide Law Review* 21 at 27.

174 George Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (2004) 25 *Adelaide Law Review* 21 at 28.

175 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 24.

176 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

177 See Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 430–431 for judicial *dicta* and pp 384–385 for the extensive academic chorus.

from legislative control despite the existence of the separation of powers and despite its direct source in the constitutional text. As the majority of the High Court stated in *Brown v West*:¹⁷⁸

Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope ... [emphasis added]

65 This position was expressly reaffirmed post-*Pape* in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*¹⁷⁹ by Gageler J, who alone of the justices in that case examined s 61 power in detail.¹⁸⁰ This would strongly indicate that any suggestions to the contrary by certain academic commentators in the past, albeit in a minority,¹⁸¹ will not be accepted by the High Court and that the position so unambiguously stated in *Brown v West* will be maintained.

66 The argument that any inherent power in s 61 is not subject to legislative control can be stated thus:

- (a) Firstly, this power, to the extent that it is no longer exclusively derived from the common law, is derived rather directly from a constitutional provision.
- (b) Secondly, this constitutional provision vests the power exclusively into the hands of the Executive Government.
- (c) Thirdly, being derived expressly from the text, it thus overrides any contrary rule which may derive from an *implication* of either responsible government or the separation of powers in the Constitution.

Given that the recognition of inherent executive power invokes the spectre of John Locke's "prerogative" in order to safeguard the very existence of the polity, its system of government and its power to function as such – "[t]his power to act according to discretion, for the public good, without the prescription of the law, *and sometimes even*

178 (1990) 169 CLR 195 at 202.

179 (2016) 327 ALR 369.

180 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369 at 395, [121]–[122].

181 See the views of Jack Richardson and Kevin Ryan referred to in Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 490–494.

against it” [emphasis added]¹⁸² – it is reassuring that the High Court appears to have taken the position it has with respect to complete legislative control over executive power. This ensures that any such power taken in an emergency is, nevertheless, subject to legislative revision and control (and *prima facie* judicial review) albeit even after the event. However, unlike those powers which derive from the prerogative, this power, being derived directly from a constitutional provision, cannot be abrogated entirely (or indeed at all) or removed into the hands of Parliament. At best, Parliament’s control over it is regulatory. But the degree and efficacy of such regulation remains uncertain.¹⁸³ This presently constitutes one of the most pressing issues in Australian constitutional law. At least, if this power is to resemble Locke’s “prerogative”, the very high threshold envisaged by Locke for its valid invocation will, it is hoped, be adopted.

VII. Conclusion

67 It is clear that a degree of asymmetry is created by the Australian Constitution’s entrenchment of the separation of powers together with a system of parliamentary responsible government. This is manifested in the different approaches which have been taken to the separation of judicial power from the political branches, on the one hand, and that of the separation of the executive and legislative powers *inter se* on the other. While the former can be maintained with some degree of certainty, and in relation to which US legal decisions can be persuasive, the latter remains rather uncertain. If there is adopted, as appears to have occurred, a notion of *inherent* executive power, the problem of definition arises: how can one separate a power whose contours are so uncertain? Some degree of separation can only be maintained if there is a more certain basis for definition beyond purely abstract conceptual reasoning such as could be provided by the common law (as presently developed by Australian courts).¹⁸⁴ But if the common law is the source, how can separation be maintained given that it is inherently subject to legislation? If some degree of precise content is given to “the executive power of the Commonwealth” incrementally as a consequence of legal decisions responding to particular exercise of such power in emergency

182 John Locke, “Second Treatise” in *Two Treatises of Government* (Peter Laslett ed) (Cambridge University Press, 1988) at p 375.

183 See Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia: History, Principles and Interpretation* (Cambridge University Press, 2015) at pp 490–494.

184 See Nicholas Condylis, “Debating the Nature and Ambit of the Commonwealth’s Non-Statutory Executive Power” (2015) *Melbourne University Law Review* 385 and Peter Gerangelos, “The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, ‘Nationhood’ and the Future of the Prerogative” (2012) 12 *Oxford University Commonwealth Law Journal* 97.

or exceptional situations – not by abstract conceptual reasoning – then it may be possible to say that s 61 executive power has some contours which can be protected by separation. Even so, such separation is limited because the High Court insists on the subjection of all executive power, whatever its source, to parliamentary control. Thus, it would mean that the power cannot be removed from the hands of the Executive (like the power to tax has been and as other common law powers may be) but it can probably be regulated. The point is that it is not so much the separation of powers which defines the crossroads of executive and legislative power: It is rather the nature of these powers *per se* which intersect with the demands of responsible government, parliamentary supremacy and the imperatives of the textual basis of these powers. It is here that the historical English element in the Constitution is more dominant than the US influence, thus relegating the separation of powers to lesser prominence. But it is better to say that these historical influences are accommodated to achieve a uniquely Australian, autochthonous resolution.
