

The Law Society of Western Australia  
Law Week 2010

## **Annual Sir Ronald Wilson Lecture 2010**

### ***On Being a Chapter III Judge***

The Hon Justice Michael Barker  
Federal Court of Australia

#### ***Acknowledgment***

1. I am honoured by the invitation of the President of the Law Society of Western Australia to present the 2010 Sir Ronald Wilson Lecture. In doing so I acknowledge, as Sir Ron would have expected me to, the traditional Aboriginal owners of the country on which we meet. Sir Ron was a fine man of deeply held personal and religious convictions. I first made his acquaintance when studying criminal law at the UWA law school around 1970. He was my lecturer. He was then a top Crown Prosecutor. When I next met him I was a young lawyer trying to make a mark as an advocate. I got to know Sir Ron more personally when I was one of the counsel assisting the WA Inc Royal Commission in 1991-92, and he was one of the three Royal Commissioners. I came to understand from working with him how he must have put the fear of God into an accused in days of yore. As the Commission's report was edited, I also learned lessons from Sir Ron's manual on the usage of the English language, including that if you wish to employ the word 'however' in a sentence, you should always commence the sentence with it. I regret to say, however, I invariably forget to do so! He had of course, in between times, been the first appointment to the High Court from Western Australia and then, following his retirement from the Court, the President of the Human Rights and Equal Opportunity Commission. I also saw him quite often when he was Chancellor of Murdoch University. I know he considered the crowning achievement of his professional life to be the Bringing Them Home report. Sir Ron's life in the law is a great example to us all.

#### ***Introduction***

2. From the time I commenced my law studies I have always maintained a special interest in the way law governs the conduct of governments and public officials, both in Australia and elsewhere. I subscribe to the ideal that a government of laws is better than one of people<sup>1</sup>. I accept the view that as important as individuals are to the betterment of society, none of us is bigger than society; that none of us has the right arbitrarily to rule others. Consequently, like many lawyers, especially public lawyers, I have always taken a keen interest in the development of public policy. And I still do. But I recognise that the function of a judge in society is different from that of a politician or a legislator and my interest and involvement in public policy, as a judge, is of a different order. While I recognise that the decisions that judges make affect the lives of individuals and help to shape the sort of community we live in,

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<sup>1</sup> In 1780 John Adams sought to establish 'a government of laws and not of men': *Massachusetts Constitution*, Part The First, art. XXX (1780); see also Aristotle's *Politics* 3.16: 'it is more proper that law should govern than any one of its citizens' and Dicey, AV '*An Introduction to the Study of the Law of the Constitution*'.

the contribution I make as a judge is primarily in declaring and applying the law ‘without fear or favour, affection or ill-will’<sup>2</sup>.

3. Judges, though, over the course of our nation’s history have found themselves in positions where, at the same time as they have held commissions as judges, they have undertaken other tasks of a non-judicial, executive kind. The most exceptional examples in modern times concern three High Court judges during and just after the Second World War<sup>3</sup>. During the Second World War, but before Japan’s entry into the war, Chief Justice Latham served as the Australian Minister in Japan. Justice Dixon, often considered to be Australia’s greatest judge and later Chief Justice of the High Court, was, between 1942 – 1944, the Australian Minister in the USA. Justice McTiernan was appointed by the Federal Government to inquire about a controversy over aircraft production. After the war in 1950, Justice Dixon travelled to South Asia to mediate, on behalf of the United Nations, between India and Pakistan in relation to Kashmir. He met with Prime Ministers of both countries and produced a report on the issue. These examples occurred with the encouragement and concurrence of the executive government and Parliament of the day. They also occurred in the climate of war where Australia’s very existence was considered to be under threat.
4. Less exceptionally many judges have undertaken non-judicial functions more closely resembling the judicial function, such as those of a Royal Commissioner or the presidential member of an administrative tribunal. When the National Native Title Tribunal was established under the *Native Title Act 1993* (Cth) Justice French, as the Chief Justice of Australia then was, became its first President. Currently a number of Federal Court judges hold commissions as presidential members of Commonwealth tribunals<sup>4</sup>. Prior to my appointment as a judge of the Federal Court of Australia, I was a judge of the Supreme Court of Western Australia and, for much of that period, simultaneously held the position of President of the State Administrative Tribunal of WA. The reason why judges are asked to undertake these types of roles obviously is because the qualities usually attributed to a judge – of independence and impartiality, and conceptual, analytical, organisational and decision-making skills – are considered important to the performance of the particular non-judicial function in question and public confidence in the work of such bodies.
5. For similar reasons, legislation often provides for judges to supervise hearings or issue warrants and authorisations that assist law enforcement agencies to pursue their investigations<sup>5</sup>. The performance of such non-judicial activities by a judge is intended to give the public confidence that in the process of investigation the civil rights of citizens and others will not be abused; that ‘the rule of law’ will be respected.
6. Judges are sometimes invited to fulfil other public roles in that area of society we call ‘civil society’, such as Chancellor of a university or member of a university Senate; or as the member of the board of a charitable or cultural organisation. In this one suspects the organisation concerned is again keen to benefit from the judge’s aura of impartiality and independence in the community and their recognised judicial skills.

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<sup>2</sup> *Federal Court of Australia Act 1976* (Cth), The Schedule

<sup>3</sup> Blackshield, AR; Coper M; Williams, G, *Oxford Companion to the High Court of Australia* (2001), “non-judicial function”, 502 – 503; Ayres, P, *Owen Dixon* (2003), Chapter 7: Wartime Work in Australia: 1939-1942.

<sup>4</sup> For example: Administrative Appeals Tribunal, Australian Competition Tribunal, Copyright Tribunal

<sup>5</sup> For example, under the: *Australian Crime Commission Act 2002* (Cth); *Australian Security Intelligence Organisation Act 1979* (Cth); *Bankruptcy Act 1966* (Cth); *Criminal Code Act 1995* (Cth); *Customs Act 1901* (Cth); *Inspector of Transport Security Act 2006* (Cth); *Surveillance Devices Act 2004* (Cth); *Telecommunications (Interception and Access) Act 1979* (Cth).

7. That judges take on public roles of the type mentioned in addition to their judicial roles is, I am sure, due in large measure to a broader sense of civic duty to contribute to the overall well-being of the Australian community, as much as it is to any personal, intellectual or emotional satisfaction they may derive from doing so.
8. Nonetheless, questions arise as to whether the performance of the judicial function is compatible with the performance of a range of non-judicial functions such that judges should avoid taking on non-judicial functions. This issue has two dimensions; first, a propriety dimension – whether as a matter of discretion, or ethics, judges should not be seen to undertake particular activities; and, secondly, a constitutional dimension - whether the fact of judicial appointment constrains what a judge can do apart from judging. The two dimensions no doubt are related.
9. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*<sup>6</sup> (*Wilson's case*), in 1996 the High Court of Australia (by a majority, Kirby J dissenting) decided that a Federal Court judge could not be authorised under the provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*ATSI Heritage Protection Act*) to undertake the interesting and important, but non-judicial, administrative function of reporting to the responsible Minister about the heritage of an Aboriginal site at Hindmarsh Island. Five of the seven judges of the Court expressed their opinion in a joint judgment in which they explained that they had come to this conclusion by reference to what they described as the “undoubted”<sup>7</sup> constitutional restrictions on the availability of a Chapter III Judge to perform non-judicial functions. This suggests that some judges – Chapter III judges – are less available than others in the integrated Australian legal system to perform non-judicial functions.
10. There are about 150 Chapter III judges in Australia today. The fact that there is such a small, exclusive group in a population approaching some 22,000,000, who have constitutional limits imposed on what they may do in a non-judicial capacity, fascinates me, particularly as I am now one of the Chapter III judges concerned! In this lecture I am interested to do essentially four things:
  - To identify what and who are Chapter III judges;
  - Ask why we need them;
  - Inquire into their terms of appointment; and
  - Explore the constitutional restrictions on their availability to undertake non-judicial functions.

### ***Who and what are Chapter III judges?***

11. The answers to these questions, at one level, are relatively simple, requiring one to identify the particular rules that provide for the appointment of a judge to a court under Chapter III of the *Commonwealth of Australia Constitution Act 1901* (the Constitution) and then to say who the appointees are. At another level it is reasonably complex, requiring one to inquire into constitutional history, including that of Britain which underlies the legal system we have

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<sup>6</sup> (1996) 189 CLR 1.

<sup>7</sup> 189 CLR at 8.

inherited from that country, and into the nature of judicial power, something informed by the method of the common law we also inherited from Britain.

12. I think it may ultimately be said that a Chapter III judge is a person who has been appointed to a court created by or under Chapter III of the Constitution, on the conditions of appointment prescribed by Chapter III, who exercises the judicial power of the Commonwealth. Perhaps it is enough to say a Chapter III judge is one appointed to a court created by or under Chapter III.
13. Thus on the face of it judges appointed to State and Territory courts are not Chapter III judges, at least not on this definition. The extent to which there may, nonetheless, be constitutional restrictions on their availability to perform non-judicial functions is something I will touch on later.
14. It is important to what I say now, and also to what I will explain later, to notice that the Constitution is divided into eight chapters. The first three deal with the institutions of government and what they can do. Chapter I establishes the Parliament. Chapter II establishes the Executive Government. Chapter III establishes the Judicature. The following five deal with Finance and Trade, The States, New States, Miscellaneous and Alteration of The Constitution.
15. In the famous 1956 *Boilermakers'* case<sup>8</sup>, the High Court settled an issue that had remained open since Federation concerning the extent to which the Constitution was imbued with a doctrine of separation of powers. The majority (Dixon CJ, McTiernan, Fullagar and Kitto JJ) having regard in part to the shape of the Constitution and the existence of Chapters I, II and III, held that judicial power was separated from the executive and legislative powers, and that<sup>9</sup>:

the Constitution does not allow the use of courts established by or under Chapter III for the discharge of functions which are not in themselves part of the judicial power or incidental thereto.

16. Proceeding with that principle in mind, we come to s 71, the first provision of Chapter III dealing with the Judicature, which provides that:

The 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 as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

17. This provision immediately identifies the 'judicial power of the Commonwealth' as its concern, and raises the spectre of a federal court system as its repository. But it also mentions 'other courts' which the Parliament may invest with federal jurisdiction. At the time of Federation of course the Colonies had their own legal systems and structures. Each had a Supreme Court from which appeals lay to the Privy Council in England. Plainly it was open at the outset of Federation for the Parliament to select other 'courts' in which to invest federal jurisdiction, including State Supreme Courts.

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<sup>8</sup> *R v Kirby; ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254

<sup>9</sup> 94 CLR at 271-272.

18. Section 75 describes the original jurisdiction of the High Court and s 76 enables additional original jurisdiction to be conferred on the High Court. Section 77(i) and (ii) enable the Parliament to describe the jurisdiction of other federal courts. Section 77(iii) confirms that the Parliament may confer federal jurisdiction on 'the court of a State'. But what of the role of the existing State Supreme Courts?
19. In this regard we should also notice that s 73 of the Constitution which deals with the appellate jurisdiction of the High Court. Section 73(ii) provides that the appellate jurisdiction of the High Court includes appeals from decisions 'of the Supreme Court of any State, or of any other court of a State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council' - a reference to the old Privy Council in London.
20. Through these various provisions one can begin to discern a Chapter III conception of an integrated Australian legal system with the High Court at the apex, as the ultimate appeal and Constitutional court, linking the federal and state legal systems and structures. Section 73, by referring to the Supreme Courts of the States, may be seen to assume the existence, and presumably the continuance of, State Supreme Courts as part of Australia's constitutional arrangements, something we will return to.
21. It is also apparent that s 71 creates, as a special, entrenched feature of Australia's constitutional arrangements, a High Court composed of a Chief Justice and two Justices. It may only be altered by an amendment made pursuant to Chapter VIII of the Constitution.
22. Under s 71, Parliament also has the power to create such other federal courts as it considers desirable. In doing so it can under s 77 choose to give a particular court a particular jurisdiction and set rules governing the constitution of the court. Unlike the High Court, these types of federal courts are not an entrenched feature of the Constitution. However, the judges appointed to these Chapter III courts, by reason of the terms of their appointment, are not so easily removed and the courts they constitute are not so easily abolished, as I will mention later.
23. In this regard, an important characteristic of a Chapter III judge, is that under s 72, judges of the High Court and of the other courts created by the Parliament are appointed on what are often called the 'Act of Settlement' conditions, namely, they:
  - Must be appointed by the Governor-General in Council – in effect on the advice of Cabinet;
  - Cannot be removed except by the Governor-General in Council, on 'an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'; and
  - Must receive such remuneration as the Parliament may fix, but which shall not be diminished during their term of office.
24. The appointed judges of the High Court and the federal courts and other courts invested with federal jurisdiction, then, exercise the 'judicial power of the Commonwealth'. Before we go further we should settle on some understanding of what is involved in the performance of the federal judicial function. This is important to understand because, in the light of the *Boilermakers* principle, a Chapter III court can only have federal judicial functions conferred on it, and almost by definition, a Chapter III judge has no other jurisdiction to exercise in his or her capacity as a member of such a court.

25. In the 1909 decision of the High Court in *Huddart Parker & Co Proprietary Ltd v Moorehead*<sup>10</sup> Griffith CJ focussed on the notion of ‘judicial power’ as used in s 71 saying that it meant :

... the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take such a decision.

26. Nearly 90 years later, in *Wilson’s* case<sup>11</sup> the joint judgment refined this understanding by stating that ‘the function of the federal judicial power’ is:
- The quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the Federation<sup>12</sup>;
  - Which is discharged by the ascertainment of facts, application of legal criteria and the exercise, where appropriate of judicial discretion; and
  - The result of which is promulgated in public and implemented by binding orders.
27. The court in stating this seems to have been careful to confine its comments to ‘federal’ judicial power, leaving open the possibility perhaps that state or territory judicial power has some other, less constrained content.
28. So, on this understanding, Chapter III judges are those who have been appointed to courts created by or under Chapter III of the Constitution. While the High Court started out with three members the pressure of business has seen its expansion to seven, which it now has – with a gender balance of three women and four men including the Chief Justice. Of those federal courts now in existence created by Parliament, the oldest is the Family Court of Australia, which was created by the *Family Law Act 1975* (Cth)<sup>13</sup>. There are currently 38 Justices of the Family Court of Australia<sup>14</sup> - 14 women including the Chief Justice, and 24 men. Next is the Federal Court of Australia, which was created by the *Federal Court of Australia Act 1976* (Cth)<sup>15</sup>. Today, there are 49 Justices of the Federal Court – 8 women and 41 men including the Chief Justice. The youngest is the Federal Magistrates Court, which was established in 1999 pursuant to the *Federal Magistrates Act 1999* (Cth)<sup>16</sup>. Today there are some 58 Federal Magistrates throughout Australia – with a gender balance of 18 women and 40 men including the Chief Federal Magistrate. In all, there are some 152 Chapter III judges - 43 women and 109 men.

### ***Why do we need Chapter III judges?***

29. We have begun to see the answer to this question revealed in the course of identifying Chapter III judges and the Act of Settlement conditions of their appointment.

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<sup>10</sup> (1909) 8 CLR 330 at 357

<sup>11</sup> 189 CLR at 11

<sup>12</sup> By referring to a ‘justiciable’ controversy I would take their Honours to mean one that is not hypothetical.

<sup>13</sup> By s 21.

<sup>14</sup> Including judges of the Family Court of Western Australia who hold dual commissions.

<sup>15</sup> By s 5.

<sup>16</sup> By s 8.

30. The constitutional struggles in England through the course of the 17<sup>th</sup> Century, that saw King Charles I lose his head, Cromwell rule during the Commonwealth period, the Restoration, then James II deposed in the Great Revolution of 1688, and the passage of the Bill of Rights in 1689, all culminating in the *Act of Settlement 1700*<sup>17</sup>, inform much of our current Australian understanding of the importance of having constitutionally protected Chapter III judges. Not having had quite the same constitutional circumstances to make good the practical point, these struggles from an imperial past have long underpinned our understanding in Australia of the importance of an independent judiciary to the protection of fundamental liberties and the maintenance of the rule of law in times of political stress. Intrinsic to our understanding is that no person is above the law and that the role of the courts is to state and enforce the law without fear or favour.
31. The recently appointed Chief Justice of the Federal Court, Chief Justice Pat Keane, has noted<sup>18</sup> that it was the French philosopher de Lolme who in 1775 first used the phrase “rule of law” in the sense with which we are today familiar. De Lolme said<sup>19</sup>:
- Indeed, to such a degree of impartiality has the administration of justice been brought in England that it is saying nothing beyond the exact truth to affirm that any violation of the laws though perpetrated by men of the most extensive influence, may, though committed by the special direction of the first servants of the Crown, will be publicly and completely redressed. And very lowest subject will obtain such redress, if he has but spirit enough to stand forth and appeal to the laws of his country. – Most extraordinary circumstances!
32. The operation of the unwritten British Constitution that de Lolme was observing in 1775, and that Montesquieu had earlier dwelled upon in his famous 1748 treatise *The Spirit of the Laws*<sup>20</sup>, disclosed that a separation of judicial powers from other governmental powers was an indispensable prerequisite to the practice of good government. The later United States Constitution was significantly influenced by separation of powers theory<sup>21</sup> and the separation of the branches of government as we see it in the Australian Constitution today was also borne of such ideas<sup>22</sup>.
33. Thus, in 1954, Kitto J was able to observe in *R v Davison*<sup>23</sup> that the doctrine of the separation of powers as developed in political philosophy “was based upon observation of the experience of democratic states and particularly upon observation of the development and working of the system of government which had grown up in England”.<sup>24</sup>
34. As explained earlier, in the famous *Boilermakers* case in 1956 the High Court held that the Constitution mandated a strict division of judicial power from the other branches of government.

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<sup>17</sup> Adams, GB. *Constitutional History of England* (1963), Chapter XV, 373ff

<sup>18</sup> Keane QC, P. ‘Judicial Power and the Limits of Judicial Control’ in Cane, P (ed), *Centenary Essays for the High Court of Australia* (2004).

<sup>19</sup> De Lolme, *Constitution of England* (1775), 371 cited in Keane QC, P. ‘Judicial Power and the Limits of Judicial Control’, 296.

<sup>20</sup> Montesquieu, Charles de Secondat, *The Spirit of the Laws* (Lawbook Exchange, 2005)

<sup>21</sup> See generally: Hamilton, A; Madison, J; Jay, J, *The Federalist* (Penguin Books, 1987) – first published in 1788.

<sup>22</sup> Zines, L, *The High Court and the Constitution* (5<sup>th</sup> Edn, 2008), Chapter 1: The Struggle for Standards; Winterton, G. “Another Bicentenary: The Influence of the United States Constitution in Australia” (1988) *March Quadrant* 5.

<sup>23</sup> (1954) 90 CLR 353.

<sup>24</sup> 90 CLR at 380-381.

35. In light of this background, in *Wilson's case*, in the joint judgment, their Honours emphasised<sup>25</sup> that the separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty, and to that end, the independence of Chapter III judges. Their Honours added<sup>26</sup> that the separation of the judiciary is “no mere theoretical construct” and that liberty is not secured merely by the creation of separate institutions, but also by separating the judges who constitute the judicial institutions from those who perform executive and legislative functions.
36. Their Honours then stated<sup>27</sup> that the separation of the judicial function from the political functions of government is a further constitutional imperative that is designed to achieve the same end, not only by avoiding the occasions when political influence might affect judicial independence, but by proscribing occasions “that might sap public confidence in the independence of the judiciary”.
37. They also made the point<sup>28</sup> that independence is especially important in a federal system, the point being that in a federal system the sharing of governmental functions between different levels of government is ultimately guaranteed by an independent judiciary. Each of the Commonwealth and State and Territory Governments of Australia necessarily places great store on the High Court of Australia independently and impartially determining the distribution of legislative powers between the Commonwealth and the States and Territories under the Constitution.
38. Ultimately, then, the answer to the question, “Why do we need Chapter III judges?” is to be discovered in our constitutional history. Without judges who exercise federal judicial power separately and securely from the influences of the other branches of government, the maintenance of the rule of law and the historic federal-state compact incorporated in the Constitution would be put at risk.
39. When one reflects on the constitutional history, both recent and long-past, that informs the operation of our Constitution today, the judicial oath that I and other Chapter III judges took (and indeed other State and Territory judges have taken) when we assumed our offices assumes its full significance. We, each of us promised that:

... [we] will well and truly serve [the Queen of Australia] in the Office of Judge ... and ... do right to all manner of people according to law without fear or favour, affection or ill-will.

### *How are Chapter III Judges appointed and for how long?*

40. **Terms of appointment:** I mentioned earlier s 72 of Chapter III which provides that judges of the High Court and of the other courts created by the Parliament shall be appointed by the Governor-General in Council, shall not be removed except on the ground of proved misbehaviour or incapacity, and shall receive such remuneration as the Parliament may fix, which shall not be diminished during their continuance in office.

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<sup>25</sup> 189 CLR at 11 – 12.

<sup>26</sup> 189 CLR at 12.

<sup>27</sup> 189 CLR at 12; by reference to *Fencott v Muller* (1982 – 1983) 152 CLR 570, at 608; see also *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330.

<sup>28</sup> 189 CLR at 12 – 13.

41. At the time of the establishment of the High Court in 1903, up until the Constitutional amendment of s 72 in 1977, a judge of the High Court, as other Chapter III judges, were appointed for life. The only way a judge's tenure could come to an end earlier than his or her death was upon resignation or, failing that, by removal on the ground of proved misbehaviour or incapacity. However, by virtue of a rare constitutional amendment in 1977<sup>29</sup> – sometimes referred to as 'the McTiernan amendment'<sup>30</sup> – the people of Australia voted to alter s 72. A Justice of the High Court now can only be appointed if they are younger than 70 and for a term expiring when they turn 70.
42. So far as other federal courts are concerned, s 72 provides that the appointment of a judge is for a term expiring upon attaining the age that is, at the time of appointment, the maximum age for judges of that court – but s 72 also provides that the maximum age can only be 70. The Parliament has the power, however, to make a law fixing an age that is less than 70 and may at any time repeal or amend such a law.
43. The *Family Law Act 1972 (Cth)*<sup>31</sup> and the *Federal Court of Australia Act 1976 (Cth)*<sup>32</sup> provide for the appointment of a judge by the Governor-General by commission, but otherwise make no express provision as to age limits. Accordingly, judges who were appointed after the 1977 amendment hold office for a term expiring upon their attaining the age of 70 years<sup>33</sup>. Under the *Federal Magistrates Act*, however, Federal Magistrates are expressly appointed until 70 years<sup>34</sup>.
44. In recent years the question has been asked whether federal judges are now, more than 30 years after the 1977 amendments, the victim of constitutionally required age-ist discrimination. In a recent article in *The Australian Financial Review*<sup>35</sup> a senior Melbourne barrister asked the question whether public resources are being wasted by obliging capable serving judges to retire simply because he or she has attained the age of 70.
45. I support the view that it is time to rethink the constitutional embargo on federal judges serving beyond the age of 70 and time to build more flexibility into the system<sup>36</sup>. It might be possible (subject to Chapter III issues), as in the case of federal judges in the US to create a Senior Judge category that permits an older judge to elect to reduce a full-time workload at a particular age, so as not to lose the wisdom, learning and experience of judges who have the desire and the capacity to continue to say 75 years of age<sup>37</sup>.

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<sup>29</sup> *Constitution Alteration (Retirement of Judges) Act 1977 (Cth)* (No. 83 of 1977)

<sup>30</sup> Blackshield, AR; Coper M; Williams, G, *Oxford Companion to the High Court of Australia* (2001), "McTiernan", 466-469.

<sup>31</sup> By s 22(2).

<sup>32</sup> By s 6.

<sup>33</sup> All current judges of the Family Court of Australia and the Federal Court are affected by the Amendment Act and must retire at age 70.

<sup>34</sup> See Schedule 1, cl 1(4).

<sup>35</sup> Moses SC, A, "It's time to raise the judicial retirement age" in *The Australian Financial Review*, Friday 9 April 2010, p 44.

<sup>36</sup> The same issues arises, I should note, for State and Territory judges who are appointed under State and Territory Acts for limited terms expiring at a similar age.

<sup>37</sup> As to the US position, see: 28 U.S.C. § 294 and 28 U.S.C. § 371; However, see the discussion in: Stras, D. and Scott, R "Are Senior Judges Unconstitutional?"(2007) *Cornell Law Review* 92.

46. A report of the Senate's Legal and Constitutional Affairs References Committee into Australia's Judicial System and the Role of Judges<sup>38</sup> has very recently touched on these issues. Late last year the Committee recommended that at the next Commonwealth referendum, a proposal should be put forward to amend s 72 to provide that federal judicial officers are appointed until an age fixed by Parliament<sup>39</sup>. The Committee also recommended that the Attorney-General recommend a protocol that provides guidelines to federal courts for the appropriate use of short and long term part-time working arrangements for judicial officers<sup>40</sup>. In my view these recommendations merit close consideration. At the least, if implemented, they would enable the age limit to be set from time to time to meet community expectations without the need for constitutional amendment, an historically infrequent and difficult process.<sup>41</sup> However, in my view, any such proposal should be premised on the current retirement age of 70 being specified as the minimum retirement age. The power of the Parliament to specify a retirement age for Chapter III judges should not become an indirect means by which the other branches of government secure control of the judicial branch.
47. I mentioned earlier, but the point should be emphasised, that once a person is appointed as a Chapter III judge, the appointment is good until the appointee resigns office, or is obliged to retire or is removed under the Constitutional provisions. Thus, if the Commonwealth Parliament later elects, in effect, to abolish the court to which the judge was appointed, the judge's commission as a judge continues even if there is no jurisdiction to be exercised on that particular court. For example, some years ago the Parliament created the Industrial Relations Court of Australia (IRCA)<sup>42</sup>. Later, the Executive and Parliament moved to divest IRCA of its jurisdiction and transfer it to the Federal Court<sup>43</sup>. By such means IRCA was in effect abolished. However IRCA continues to exist in name until such time as the last of the judges ceases to hold a commission. As a result, there are today a number of judges of the Federal Court of Australia who continue to hold commissions as judges of IRCA, a court with no jurisdiction.
48. In the case of all appointments to Chapter III courts, the Constitution says nothing about the personal attributes that a person should have for appointment to the court. However, individual Acts relating to the federal courts specify some basic qualifications. The *High Court of Australia Act 1979* (Cth)<sup>44</sup> provides that a person shall not be appointed to the Court unless he or she has been a judge of a court created by the Parliament or of a court of a State or Territory, or has been enrolled, generally speaking, as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than five years. That says very little about the qualities a potential appointee should demonstrate.

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<sup>38</sup> Senate Legal and Constitutional Affairs References Committee, 'Australia's Judicial System and the Role of Judges', December 2009.

<sup>39</sup> Recommendation 6, [4.28].

<sup>40</sup> Recommendation 9, [4.71].

<sup>41</sup> Of the 44 referendums held since Federation only 6 have passed successfully, the last in 1977.

<sup>42</sup> *Industrial Relations Act 1988* (Cth), s361, inserted by *Industrial Relations Reform Act 1993* (Cth), s56.

<sup>43</sup> *Workplace Relations and Other Legislation Amendment Act 1966* (Cth), Division 3 – Jurisdiction of the Industrial Relations Court. The Court will be formally abolished, pursuant to section 84 of that amending Act, 'on a day fixed by Proclamation, being a day on which no person holds office as a Judge of the Industrial Relations Court'.

<sup>44</sup> By s 7.

49. The same qualifications are specified for appointment to the Federal Court<sup>45</sup> and the Family Court of Australia, and there is a similar provision governing appointment to the Federal Magistrates Court. However, uniquely among the federal courts, the *Family Law Act* adds a proviso that a person should not be appointed to the Family Court unless, “by reason of training, experience and personality, the person is a suitable person to deal with matters of family law”.<sup>46</sup>
50. It is an interesting question whether the Parliament could validly exercise its legislative powers in respect of appointments in ways that significantly altered the standard qualifications for appointment to Chapter III courts so that, for example, the pool from which appointments could be made was artificially small. If this were to happen there would be complaints that such a law was calculated to undermine the functions of the judicial branch and so raise the Chapter III issues that I will shortly discuss in more detail.
51. **The appointment process:** The question of the most appropriate process for appointment of a Chapter III judge has been a matter of continuing debate in Australia for some years. While there has never been any serious discussion in Australia to the effect that judges, including Chapter III judges, should be elected – as judges are in a number of States in the United States – there has for some time been consideration given to more formal appointment processes that limit the possibility of persons being appointed as judges who are not appropriately professionally qualified, and to limit also the possibility of political influence in the appointment process.
52. One of the early leading supporters of a new appointment practice in Australia along those lines was Sir Garfield Barwick when Chief Justice of the High Court. In his 1977 address on “The State of the Australian Judicature”, Sir Garfield argued that:
- The time has arrived in the development of this community and of its institutions when the privilege of the Executive Government [to select the judiciary]... should at least be curtailed<sup>47</sup>.
53. Sir Garfield supported the establishment of a judicial commission comprised of judges, practising lawyers, academic lawyers and knowledgeable lay persons which would have a significant role in this process. He however declined to express a preference as to whether the proposed body should actually choose the judges or whether it should merely submit a shortlist of names to the Government, which would be obliged either to choose someone from that list or, if it went beyond it, to explain publicly why it had taken that course.
54. In the late 1970’s, however, the preponderance of informed Australian opinion seemed opposed to the judicial nominating commission mechanism. This appears to have been on the basis that commentators could scarcely believe that Executive Government would forgo its prerogative to make judicial appointments in an entirely independent manner<sup>48</sup>. The late Professor George Winterton, a leading Australian constitutional law scholar, supported the view that the power to appoint federal judges should remain with the Commonwealth Government, not merely for practical reasons (to avoid a constitutional amendment, which he considered would be difficult) but on the ground of principle, namely that because the

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<sup>45</sup> *Federal Court of Australia Act 1976* (Cth), s 6(2).

<sup>46</sup> *Family Law Act 1972* (Cth), s 22(2)(b).

<sup>47</sup> Sir Garfield Barwick, “The State of the Australian Judicature” (1977) 51 *Australian Law Journal* 480, 494.

<sup>48</sup> Winterton, G. “Appointment of Federal Judges in Australia” (1987) 16 *Melbourne University Law Review* 185, 207.

appointment of judges is an exercise of public power, it must be performed by those accountable to Parliament and the people<sup>49</sup>. Professor Winterton supported the establishment of a commission to shortlist of suitable candidates, including in respect of a High Court vacancy.

55. Following the 2007 general election, the new Attorney-General of the Commonwealth in the Rudd Labor Government, Mr Robert McClelland MP, almost immediately published new, non-statutory guidelines concerning the appointment of judges of federal courts created by the Parliament, though not in respect of the High Court. These guidelines, first published in early 2008<sup>50</sup>, indicate that vacancies in such courts will be advertised and expressions of interest or nominations for appointment invited in confidence. The guidelines also include a statement of the requisite qualities for appointment. The following demonstrated personal and professional qualities are called for:
- Legal expertise.
  - Conceptual, analytical and organisational skills.
  - Decision-making skills.
  - The ability to deliver clear and concise judgments.
  - The capacity to work effectively under pressure.
  - A commitment to professional development.
  - Interpersonal and communication skills.
  - Integrity, impartiality, tact and courtesy.
  - The capacity to inspire respect and confidence.<sup>51</sup>
56. As part of the new appointment process, the Attorney has also established a non-statutory independent appointments advisory panel to assess expressions of interest and nominations against the requisite qualities for appointments and develop a shortlist of candidates for consideration by the Attorney-General for recommendation to Cabinet.
57. Nothing in the statutory qualifications for appointment or the criteria for appointment published by the Attorney disqualifies persons who enjoy or have enjoyed other careers, for example in government. In common law countries like England, the United States, New Zealand and Australia the precedent for politicians turned judges is long-standing. The mention of Sir Garfield Barwick provides but one example. He was a leading Barrister, Attorney-General in the Menzies Liberal coalition Government and Chief Justice of Australia between 1964 and 1981. His nemesis, Lionel Murphy, was also a lawyer, an Attorney-General in the Whitlam Labor Government and a Justice of the High Court between 1975 and 1986. I have already mentioned the moves in the other direction when Chief Justice

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<sup>49</sup> Winterton, G. "Appointment of Federal Judges in Australia", 209.

<sup>50</sup> Attorney-General's Department, 'Judicial Appointments: Ensuring a strong and independent judiciary through a transparent process' (April, 2010).

<sup>51</sup> Department of the Attorney General, 'Requisite Qualities for Appointments':

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice\\_RequisiteQualitiesforAppointments](http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_RequisiteQualitiesforAppointments)

Latham and Justices Dixon and McTiernan were engaged as part of the executive manpower efforts during the second war.

58. Each of the first Chief Justice and Justices of the High Court of Australia in 1903 had been leading politicians and advocates for Federation in their respective colonies prior to the establishment of the Commonwealth of Australia and the High Court of Australia. Sir Samuel Griffiths, the first Chief Justice, a Queenslander, was twice Premier of the State of Queensland before his appointment as Chief Justice of Queensland (effectively by himself) in 1893. Sir Edmund Barton was also a lawyer, politician and Premier of New South Wales before Federation. Sir Edmund of course was also Australia's first Prime Minister. It is said he left politics for "the more leisured lifestyle" of a Justice of the High Court of Australia<sup>52</sup>. How times have changed! Justice O'Connor had also been a New South Wales Member of Parliament and Minister for Justice. He was Leader of the Government in Barton's first federal ministry before his appointment.
59. In the United States the appointment of members of Congress and the Executive Government to the United States Supreme Court is well documented. For example, in 1946 – in the same era that members of our High Court were actively involved in Executive activities – President Harry S Truman was responsible for the appointment of Secretary of Treasury, Fred Vinson, as Chief Justice of the Supreme Court. Prior to that Vinson had been a member of Congress and later a member of the US Court of Appeals. According to Truman's biographer, McCullough, in 1951 Truman approached Vinson to suggest that he should resign as Chief Justice to run as the Democratic Party's candidate for President of the United States upon Truman's decision not to seek re-election. Chief Justice Vinson, according to McCullough, declined and indicated to President Truman that he did not think it was appropriate for the office of Chief Justice to be seen as a "stepping stone" to the White House<sup>53</sup>.
60. Leaving aside for the moment appointments to the High Court of Australia, what seems to be apparent in the current appointments process for federal courts in Australia is a decided professionalising of the process that accentuates the separation of judicial power from other governmental powers. No longer is an appointment to a federal court seen, as it initially was in the case of Justice Barton to the first High Court of Australia bench, as a transition to a "more leisured lifestyle" for a politician. Indeed, the current appointment criteria suggest quite the contrary. The accent on high professional standing and capacity, as well as the ability to undertake a taxing workload until the age of 70 are highlighted. While this trend does not mean that appointments from politics to the bench may not happen in the future, it perhaps suggests they will be exceptional.
61. As I mentioned earlier, Professor Winterton considered that an advisory committee could also properly be engaged in the appointment process in respect of High Court vacancies. In principle, there is no reason why the current appointment process adopted in respect of other federal courts could not be adopted in respect of High Court vacancies. When the current Commonwealth Attorney-General introduced the new appointment process, he explained and has very recently confirmed<sup>54</sup>, that the new process would not apply in respect of High Court

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<sup>52</sup> Blackshield, AR; Coper M; Williams, G, *Oxford Companion to the High Court of Australia* (2001), "Barton", 53-56.

<sup>53</sup> McCullough, D. *Truman* (1992), "Chapter 17: Final Days", (Amazon Kindle electronic location: 18591)

<sup>54</sup> See generally: Attorney-General's Department, 'Judicial Appointments: Ensuring a strong and independent judiciary through a transparent process' (April, 2010).

vacancies because, in respect of the High Court, there is a small pool of potential appointees known to Government who are to be found serving on superior courts and in the upper echelons of the bar.

62. The Senate Legal and Constitutional Affairs References Committee in its recent report has supported the Attorney's innovations and expressed the view that it is appropriate for the Attorney to retain the final decision-making authority in respect of appointments. The Committee has recommended that when the appointment of a federal judicial officer is announced, the Attorney-General should make public the number of nominations and applications received for each vacancy. It also recommended that if the Government or Department prepared a shortlist of candidates for any appointment, the number of people on the list should also be made public<sup>55</sup>.
63. However, the Committee has gone further and has also recommended that the process for appointments to the High Court should be "principled and transparent", and that the Attorney-General should adopt a process that includes advertising High court vacancies widely, confirming that selection is based on merit. The committee has also supported the publication of selection criteria for appointment to the High Court. Whether or not these recommendations will be adopted, time will tell. In principle there is no reason why they cannot be.
64. I should also mention in passing that Australia does not have in its constitution a provision that empowers the Parliament to have any hand in the appointment approval process; nor does the Senate committee suggest it should. In this, the appointment process in Australia is different from that which exists in the United States of America, where the Senate has the express power of approving such federal appointments. I suspect that in Australia, because the High Court does not have the responsibility to construe the terms of a Bill of Rights and a due process clause, as does the US Supreme Court, it was never seen and still is not seen to have the same 'political' function as does that court and so the political interest in High Court appointments has been and is of a different order.
65. To make the point, I note that, in his recently published memoirs<sup>56</sup>, the late US Senator Ted Kennedy, takes some delight in recounting how in 1970, during the Nixon era, the Senate's Administrative Practices and Procedures Committee, which he chaired and had the primary responsibility to make recommendations on nominations, rediscovered the approval power. In one case, he and a number of other Committee members, but not a majority, were opposed to the President's nominee for the Supreme Court. The nominee had, in the past, apparently made statements that suggested he was supportive of white supremacists. The hearings in the committee dragged on and on and public opinion began to shift against the nominee. Questions of the nominee's professional competence were then raised. It was suggested the nominee was "mediocre". Kennedy says many consider the coup de grace against the appointment occurred when one of the Republican leaders supportive of the appointment was interviewed on radio and blurted out to the interviewer that even if the nominee was mediocre, there were lots of mediocre people in the country and they too were entitled to be represented on the Supreme Court.
66. **Removal process:** This leads us directly to the question of how in Australia Chapter III judges may be removed.

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<sup>55</sup> Recommendation 3, [3.23] and [3.24].

<sup>56</sup> Kennedy, EM, *A Memoir: True Compass*, 'Chapter 16: Nixonian Radicals'.

67. The effect of s 72 of the Constitution is that unless a Chapter III judge elects to resign his or her office prior to attaining the age of 70 years, they are secure in their appointment. The exception is spelt out by s 72(ii) which provides for removal on the ground of 'proved misbehaviour or incapacity'.
68. In Australia there are relatively few examples of the effectual use of this removal provision. In this Australia's constitutional practice is quite unlike that of the United States, where resort to the constitutional impeachment provisions<sup>57</sup> seems to have been had often enough since 1776<sup>58</sup> to put our judicial system in a very good light!
69. In Australia, the best modern example of the operation of s 72 of the Constitution (or State provisions like it) concerns steps taken to remove from the High Court, Sir Garfield Barwick's nemesis, Justice Lionel Murphy. This not an occasion to consider the details of the Murphy case, although those of you who were either not born or were too young to remember may need to revisit more formal accounts of what happened in relation to Justice Murphy between 1984 and 1986. It began with the publication of transcripts of tape recordings of telephone conversations which had been illegally intercepted by members of the New South Wales Police Force. It was claimed that the transcripts revealed the activities of persons associated with organised crime in that State. It was later revealed that the recorded conversations included conversations between Justice Murphy and one Morgan Ryan, a solicitor and close friend of Justice Murphy. It was claimed that Ryan was associated with leaders of organised crime. The transcripts were published in *The Age* newspaper and led to the establishment of two Senate Select Committee inquiries and two criminal trials, which ultimately acquitted Justice Murphy of the charges of interfering with the course of justice and, finally, the establishment of a Parliamentary Commission of Inquiry<sup>59</sup> whose work remained unfinished and was discontinued once it became known that Justice Murphy was suffering from a terminal illness.
70. Professor Geoffrey Lindell, another leading constitutional law scholar, has closely examined the "Murphy Affair" in retrospect noting<sup>60</sup> that none of the processes employed were

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<sup>57</sup> The US Constitution makes the following provision for the impeachment of federal officials:

Article 1, Section 2

Clause 5: The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article 1, Section 3

Clause 6: The Senate shall have the sole Power to try all Impeachments when sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside; And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Clause 7: Judgment in Cases of Impeachment shall not extend further and to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States; but the Party (defendant), convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.

Under this two part procedure, the House of Representatives is charged with initiating a process by bringing Articles of Impeachment against an accused official. The Senate, in turn, tries the accused on the charges provided by the House. Few guidelines exist for these Senate trials. A two thirds vote of the Senate is necessary to convict.

<sup>58</sup> Samuel Chase, an Associate Justice of the US Supreme Court, was the first Supreme Court Judge to be the subject of indictment in 1805. He was acquitted, see: Rehnquist, W, *The Supreme Court* (2002), Chapter 15.

<sup>59</sup> <sup>60</sup> Lindell, G. "The Murphy Affair in Retrospect" in Lee, HP & Winterton, G. *Australian Constitutional Landmarks* (2003).

successful in quelling or resolving the allegations advanced against Justice Murphy. Party political considerations tainted the effectiveness of the two Senate Committees that inquired into the matter. The House of Representatives did not seek to establish its own inquiries or support the establishment of a joint Parliamentary inquiry.

71. One of the real difficulties with the removal procedure under Chapter III is that, unlike the United States impeachment process which provides for the Senate to conduct a trial and for the House of Representatives to exercise the impeachment power, there is no division of functions between the Senate and the House of Representatives in the Commonwealth Parliament. As to what an appropriate means of assessing whether or not there is “proved misbehaviour or incapacity” for the purposes of s 72, is not agreed. The Murphy Affair illustrates that particular means of inquiry may be adapted to suit particular circumstances. However, as Professor Lindell has noted<sup>61</sup>, party politics can enter into any issue. In Justice Murphy’s case, party politics was almost bound to enter into the issue because there was always discontent concerning his appointment to the High Court and, as a personality, he had been a controversial person.
72. There is considerable doubt that any determination of the Parliament, that is to say, by an address from both Houses of the Parliament in the same session, praying for the removal on the ground of proved misbehaviour or incapacity, could be reviewed by the High Court. One would have thought, instinctively, that the Parliament’s own understanding of and adjudication on this ground would not present a justiciable issue, that is to say it should be considered a political decision in relation to which the High Court is not well-equipped to pass any useful opinion. In the United States, after *Nixon v United States*<sup>62</sup> the exercise of the impeachment power is “non-justiciable”, that is, is not open to review by the Supreme Court.
73. While the operation of s 72 is fraught with practical difficulties and legal uncertainties, I have little doubt that if the current removal proceeding had to be applied in respect of the sort of conduct that one observes in recent impeachment proceedings in respect of judges in the United States – where in one case the judge pled guilty to the ‘obstruction to justice’,<sup>63</sup> and in another is charged with participating in a ‘corrupt scheme’<sup>64</sup> - the removal proceeding would not be accompanied by the sorts of difficulties that were encountered in relation to the Murphy Affair.
74. What may be said of the s 72 removal process is that it is an intentionally complex process that respects the view that, while judges are accountable to the people, they should not easily be liable to removal. The same point has been made in a recent overview of the US impeachment process prepared by the US Congressional Research Service which has suggested<sup>65</sup> that the ‘complex and cumbersome’ process may represent ‘an effort by the

<sup>61</sup> Lindell, G. “The Murphy Affair in Retrospect”, 298-299.

<sup>62</sup> See *Nixon v United States* (1993) 506 US 224.

<sup>63</sup> On 19 June 2009 US District Judge Samuel B. Kent of the US District Court for the Southern District of Texas was the 14<sup>th</sup> federal judge to be impeached. A month earlier Judge Kent had pled guilty to obstruction of justice and was sentenced to 33 months in prison. He resigned from office on 30 June 2009 and the impeachment proceedings were subsequently dismissed: Bazan, E & Henning A, *Congressional Research Service*, “Impeachment: An overview of Constitutional Provisions, Procedure and Practice” (22 June 2009).

<sup>64</sup> In 2010, G. Thomas Porteous, a judge of the Eastern District of Louisiana was impeached for alleged involvement in a ‘corrupt scheme’. The trial is currently pending in the Senate: Smelcer, SN, *Congressional Research Service*, “The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice and Data” (April 9, 2010).

<sup>65</sup> Bazan, E & Henning A, *Congressional Research Service*, “Impeachment: An overview of Constitutional Provisions, Procedure and Practice” (22 June 2009), 24.

constitutional Framers to balance the need to provide a means of remedying such misconduct against the need to minimize the chance that this legislative power to intrude into the business or personnel of the other co-equal branches could itself be over-used or abused.’

75. **Complaint process:** In recent years, however, support for the establishment of judicial commissions, including a federal commission, along the lines of the New South Wales Judicial Commission established in 1986,<sup>66</sup> has received a degree of support from governments, judicial officers and the legal profession. The Senate Legal and Constitutional Affairs Reference Committee has recommended that the Commonwealth government establish a federal judicial commission modelled on the Judicial Commission of New South Wales that would, in addition to dealing with matters concerning sentencing and judicial education, also have a complaints handling function<sup>67</sup>.
76. Opposition to the establishment of a judicial commission for these purposes has focussed on the potential interference with judicial independence. Judges might be harassed and put under pressure. Vexatious complaints could see judges standing aside and thus wasting public resources and judicial time. A judge of an inappropriate rank on the commission might determine a complaint against a higher ranking judicial officer and generally speaking, the process of complaint might erode public confidence in the judiciary. Former Chief Justice of Australia, Sir Anthony Mason, whose comments in this regard have been relied upon by the Senate Committee, has however noted that the New South Wales Commission has worked well, effectively and fairly without endangering the independence of the judiciary or the reputation of individual judges, and that judicial time has not been wasted<sup>68</sup>.
77. If there were any suggestion that a complaints procedure could operate as a backdoor mechanism for altering the Act of Settlement removal provisions, one could expect the proposal to die a quick death, not the least for the reasons that it would seem quite inconsistent with Chapter III of the Constitution, as I will shortly explain. In broad terms, however, if a complaints procedure is designed to ensure the increased effective of the day to day administration of courts, then it may be considered to have a useful role to play. That is not to say, however, that complaint handling procedures within individual federal courts at the moment, lack efficacy.

#### *What Constitutional restrictions apply to Chapter III judges?*

78. I mentioned at the outset of my address that there is an important issue concerning what non-judicial functions a Chapter III judge – indeed any judge – can perform compatibly with his or her judicial functions. As I mentioned this issue has two dimensions; first, a propriety dimension – whether as a matter of discretion, or ethics, judges should be seen to undertake particular activities; and, secondly, a constitutional dimension - whether the fact of judicial appointment constrains what a judge can do apart from judging. The two dimensions no doubt are related.
79. When I was a young lawyer judges were, I think, encouraged, a little like children used to be, to be seen but not heard, and even then not to be seen too often in public outside the courtroom. This traditional approach to judicial conduct is well illustrated by the so called Kilmuir Rules which were laid down in Britain by the English Lord Chancellor, Viscount

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<sup>66</sup> Established by the *Judicial Officers Act 1986* (NSW), s5.

<sup>67</sup> Recommendation 10, [7.82] and [7.83].

<sup>68</sup> See [7.55] of the Senate Committee Report.

Kilmuir, in 1955 and held sway there for three decades. While these rules never formally had operation in Australia, I suspect they had their effect. The Lord Chancellor declined an invitation from the Director General of the BBC for serving judges to cooperate with, and possibly participate in a series of radio broadcasts about great judges of the past. The Lord Chancellor issued a statement in which he observed<sup>69</sup>:

So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance he makes in public except in the course of actual performance of his judicial duties must necessarily bring him within the focus of criticism.

80. Fortunately, by the time I was first appointed a judge of the Supreme Court of Western Australia in August 2002, not only had Sir Anthony Mason confounded convention by appearing on the ABC TV 4 Corners program to talk about the High Court and its judicial method, but the first edition of *The Guide To Judicial Conduct* had been very recently published on behalf of the Council of Chief Justices of Australia. To me the Guide signified a dramatic movement away from the sentiment expressed in the Kilmuir Rules. It eschewed the “monastic” lifestyle model of behaviour and encouraged judges to be involved in the community in which they live and enjoy the fundamental freedoms enjoyed by other citizens. These views have been carried forward into the second edition of the Guide, published in 2007. There it is stated<sup>70</sup>:

A public perception of judges as remote from the community they serve has the potential to put at serious risk the public confidence in the judiciary that is a cornerstone of our democratic society.

81. It is now widely accepted that the guiding principles to judicial conduct are:
- To uphold public confidence in the administration of justice;
  - To enhance public respect for the institution of the judiciary; and
  - To protect the reputation of the individual judicial officers and of the judiciary.
82. Taking these into account, there are three basic principles:
- Impartiality;
  - Judicial independence; and
  - Integrity and personal behaviour.
83. These principles are no mere aphorisms. They are of special importance in cases where a judge may be thought to have a close association with a party to a proceeding, rather than cases where the judge takes on a non-judicial function too closely aligned to the executive branch of government. If a judge were to act partially, or there was a reasonable apprehension that a judge would not bring an unbiased mind to the determination of issues before the court, then the principles of natural justice that govern the conduct of a court proceeding would be breached. The judge in such circumstances would be legally obliged to withdraw from the

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<sup>69</sup> Letter from Lord Chancellor Kilmuir to Sir Ian Jacob, 12 December 1959 in AW Bradley, *Judges and the Media, the Kilmuir Rules* (1986) *Public Law Review* 383, 385.

<sup>70</sup> Australian Institute of Judicial Administration for the Council of Chief Justices of Australia, *Guide To Judicial Conduct* (2007), 1.

proceeding. If a judge were to act otherwise than independently in the conduct of the proceeding, perhaps because of a perception that the judge had a relevant interest in the outcome of the proceeding or was too close to one of the parties, then the same issues of natural justice would arise.

84. It goes without saying that if a judge were actually moved to exercise his or her judicial functions at the instance of another party (for whatever reason) – as seems to have been the case in the recent impeachment example in the United States that I gave earlier – then there would be clear grounds for removal of that judge under a removal provision such as s 72 of the Constitution. Similarly, if the integrity or personal behaviour of a judge was such as to seriously question the capacity of judge to exercise judicial functions, then there may well be a case upon which the Parliament would consider there to be “proved misbehaviour or incapacity” for the purposes of removal under s 72 (or like provisions in State and Territory jurisdictions).
85. In this way, it may be seen that, so far as a Chapter III judge is concerned, s 72 of the Constitution, in providing for removal on the ground of proved misbehaviour or incapacity, sets constitutional boundaries concerning judicial performance. Put bluntly, Chapter III judges, like other superior court judges in Australia who have taken the oath of office I have mentioned and are affected by the Act of Settlement conditions of appointment, are not free to conduct themselves exactly in the same way that any other citizen might. Conduct that might be considered unexceptional if engaged in by some persons might, in the case of a judge, possibly constitute an instance of constitutional misbehaviour or incapacity. It may at the least cause questions to be asked. That may make a judge’s position untenable.
86. These same principles of impartiality, judicial independence, integrity and personal behaviour also extend to the institutional capacity of a judge to take on non-judicial public roles that are closely associated with the executive. In *Wilson’s* case, as I briefly explained earlier, the High Court held that the *ATSI Heritage Protection Act* did not authorise the nomination of a judge appointed under Chapter III of the Constitution to conduct enquiries and report to the Minister responsible for the administration of that Act. The High Court considered the function of reporting to the Minister under the Act was not constitutionally compatible with the holding of office as a judge appointed under Chapter III.
87. The background to this case flows from the holding in *Boilermakers’* case that judicial power cannot be exercised other than by a Chapter III court. However, a number of qualifications and exceptions to the *Boilermakers’* rule have been developed such that it has been considered, and still is, that an individual Chapter III judge may accept appointment to a non-judicial office or function as, what is called, a *persona designata* – a designated person.
88. In the 1985 decision of *Hilton v Wells*<sup>71</sup>, the majority of the High Court (Gibbs CJ, Wilson and Dawson JJ) commented<sup>72</sup> that if the nature or extent of the functions cast upon judges as *persona designata* - for example, where a statute purports to confer on a judge of a federal court the non-judicial function of authorising telephone intercepts - were such as to prejudice their independence or to conflict with the proper performance of their judicial functions, the principle of separation of judicial power underlying the *Boilermakers’* case would render the legislation invalid.

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<sup>71</sup> (1985) 157 CLR 57.

<sup>72</sup> 157 CLR at 73-74.

89. Ten years later, in *Grollo v Palmer*<sup>73</sup>, another case involving a judge as persona designate authorising telecommunication intercepts, the High Court developed a broader incompatibility principle to deal with these types of issues. Three different invalidity scenarios were contemplated<sup>74</sup>:
- The non-judicial functions might, as a practical matter, make the further performance of substantial judicial functions unlikely;
  - The performance of non-judicial functions might be such that the capacity of a judge to perform his or her judicial functions with integrity might be considered compromised or impaired;
  - The performance of non-judicial functions may be of such a nature that public confidence in the integrity of the judiciary as an institution, or in the capacity of an individual judge to perform his or her functions with integrity is diminished.
90. In *Grollo*, the majority of the Court considered the function of a Chapter III judge to issue a warrant was not incompatible with the primary judicial function. The joint judgment in *Grollo*, as the majority in *Wilson* later emphasised<sup>75</sup>, placed great weight on the independence of the function to be performed by Chapter III judges and on international practice, in coming to the conclusion that the condition of compatibility in the conferring of the power to authorise telephonic interception was satisfied.
91. In *Wilson's case*, however the Court came to a different conclusion concerning the application of the compatibility condition. The legislation did not purport to empower a judge as persona designata to perform a non-judicial function. Rather under s 10, the Minister had a power to nominate anyone to be a reporter for the purposes of the *ATSI Heritage Protection Act*. The Act then gave the Minister the power to make a declaration to protect “a significant Aboriginal area” after considering the reporter’s report. The Minister had received an application seeking the protection of land and waters, including Hindmarsh Island. He nominated Justice Jane Mathews, a Federal Court judge, to provide a report and her Honour accepted the nomination. Could she validly be nominated under the Act?
92. Five members of the court in a joint judgment, relying on the *Boilermakers’* case, considered the constitutional condition on the vesting of non-judicial power in (or the conferring of a non-judicial function on) a Chapter III judge is that the exercise of the power (or the performance of the function) be “compatible with performance of judicial functions”. Their Honours said that:
- When that condition is satisfied, judges not only are, but are seen to be, independent of the other branches of government. The appearance of independence preserves public confidence in the judicial branch.<sup>76</sup>
93. Their Honours were then confronted with the inconvenient truth that, for many years, judges generally, including judges appointed under Chapter III, had been conducting Royal

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<sup>73</sup> (1995) 184 CLR 348.

<sup>74</sup> 184 CLR, at 365.

<sup>75</sup> 189 CLR at 15.

<sup>76</sup> 189 CLR at 14.

Commissions and acting as the Presidential members of administrative appeals tribunals. Their Honours said<sup>77</sup> that:

- there is no general rule that every statutory function that was not strictly judicial must necessarily fail the incompatibility test;
  - the statute or the measures taken pursuant to the statute must be examined in order to determine whether the function is an integral part of, or is “closely connected” to the functions of the Legislature or the Executive Government;
  - if the function is not closely connected, no constitutional incompatibility appears;
  - next, an answer must be given whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive, other than a law or an instrument made under a law;
  - if an affirmative answer does not appear it is clear that the separation principle has been breached and is not capable of repair by the Chapter III judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the jurisdiction.
94. Their Honours then added<sup>78</sup> that if the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: is any discretion purportedly possessed by the Chapter III judge to be exercised on political grounds – that is, on grounds that are not confined by factors not expressly or impliedly prescribed by law?
95. As to the capacity of a Chapter III judge to conduct a Royal Commission, in principle the joint judgment considered that the principle of compatibility would not be breached, at least where the terms of reference and the mode of proceeding under legislation emphasised responsibility to act judicially in finding facts and applying the law, even if a report is ultimately delivered to the Executive Government.
96. As to a Chapter III judge who acts as a presidential member of an administrative appeals tribunal, their Honours considered<sup>79</sup> the function would satisfy the compatibility test if, under the legislation, it is performed independently of any instruction, advice or wish of the Executive Government.
97. When it came to the reporting function to be exercised by Justice Mathews under the *ATSI Heritage Protection Act*, the majority decided that the incompatibility test could not be satisfied. The joint judgment expressed this conclusion for a number of reasons<sup>80</sup>:
- The function of reporting is not performed by way of an independent review of an exercise of the Minister’s power, rather it is performed as an integral part of the process of the Minister’s exercise of power;
  - The performance of the function by a judge places the judge firmly in the echelons of administration, even liable to removal by the Minister before a report is made;

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<sup>77</sup> 189 CLR at 17.

<sup>78</sup> 189 CLR at 17.

<sup>79</sup> 189 CLR at 17-18.

<sup>80</sup> 189 CLR at 18 and 19.

- The usual judicial protections do not exist; the position is equivalent to that of a Ministerial advisor;
  - The reporter is not expressly required to hold a hearing, although may be obliged to do so by the requirements of procedural fairness; and
  - A determination of the competing interests of Aboriginal applicants and others with interests was essentially a political function. A reporter may choose to act independently of the Minister but the Act did not require the reporter to disregard Ministerial instruction, advice or wishes in preparing a report.
98. It followed that even though Justice Mathews no doubt would have followed a judicial or quasi-judicial procedure and a report might well evidence an independence of view as to the course she regarded as a desirable one for the Minister to follow, that was not the necessary requirement of the legislation. Accordingly, the Act did not authorise the nomination of a Chapter III judge to act in the reporter's role.
99. Justice Kirby in dissent considered<sup>81</sup> the actual duties of a reporter under the Act that would be performed by Justice Mathews were "considerably closer" to those of the holder of a judicial office, than the duties of an "eligible judge" who may provide a warrant for telephonic interception that was held to be a compatible function in *Grollo's* case. His Honour did not accept that Justice Mathews would in any way be involved in functions incompatible with those of a judge, as for example, involved in criminal investigation and prosecutorial duties. He emphasised that "the very reason for her appointment" was to provide a report that utilised the particular qualities which are normal to a judge in Australia: accuracy in the application of the law; independence and disinterestedness in evaluating evidence and submissions; neutrality and detachment; and efficiency and skill in the provision of a conclusion. Kirby J acknowledged that most of the functions of the reporter would be carried out in private, but considered that the same is often true of a Royal Commission and other inquiries. He did not consider that factor to be a necessary indicator of incompatibility in this case.
100. Cases such as *Grollo* and *Wilson* excite debate. Ultimately, they appear to rest, not so much on a strong difference about the relevant constitutional principles – the incompatibility test is generally accepted – but as to whether a strict or more generous application of the principle is required in the circumstances of the case.
101. There are those, however who dispute the rationale of the constitutional incompatibility rule and support a strict approach to separation of powers doctrine<sup>82</sup>. Professor Kristen Walker for example says the rule is 'vague and imprecise' and should not be used. She contends that the separation of judicial power works effectively to achieve its purposes only if it is strictly adhered to, including strict adherence to requirements that the judiciary not exercise non-judicial functions and that the personnel of the judiciary be distinct from the personnel of the other two branches of Government. She also expresses concern that there may be an incremental and unsatisfactory increase in the use of judges for non-judicial purposes if this is not done.

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<sup>81</sup> 189 CLR at 48.

<sup>82</sup> For example, see Walker, K. "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 *Public Law Review* 153

102. The proponents of a strict approach recognise that its adoption may mean that the community will lose the services of judges in a variety of different areas, including issuing warrants of various kinds, undertaking Royal Commissions and serving on tribunals. They recognise that these functions are best performed by persons who are independent of the Executive, as they offer some check on Executive power. They acknowledge that not to have judges available may involve some risks for good governance. However, as Professor Walker argues<sup>83</sup>, the selection of judges for these tasks may be said to place an excessive faith in judges, who after all are human beings and not necessarily or the only possessors of integrity and impartiality, and downplay the threat to the institution of the judiciary imposed by such appointments. She reasonably refers to the fact that retired judges or Commonwealth law officers could be used for such functions.
103. Justice John Dowsett of the Federal Court of Australia, on the other hand, writing extra-judicially<sup>84</sup>, has expressed the challenging view that the discomfort expressed by judges with involvement in non-judicial functions are “*judges’* concerns”, not those of the broader community<sup>85</sup>. Dowsett J says no doubt those who hold them consider they reflect the public interest. But he asks whether it is appropriate for judges to make the final decision as to how their training, skills, experience and systemic qualities should be employed, particularly where the representatives of the people have a different view.
104. Justice Dowsett says<sup>86</sup> that, although it is possible to understate the problem, in his view the present judicial view of this separation of powers is not consistent with public perceptions of the public interest. For example, it can hardly encourage public confidence in the judiciary that it resists involvement in the detection and prevention of terrorism. Judges may believe there is a good reason to resist such involvement, but it will not help them to maintain public confidence if the public is not convinced that their reasons are valid. Similarly, he asks, if the public considers that the judiciary is best qualified to investigate serious allegations of misconduct and incompetence at high levels in the public sector, should not the judges try to find ways of accommodating that view?
105. As I reflect on these contending views I am taken back to my State experience exercising the functions of both a judge of the Supreme Court of Western Australia and President of the State Administrative Tribunal. At the level of pragmatism, that a judge headed the organisation I think gave decisions of the Tribunal and recommendations of the Tribunal concerning reforms in the area of public administration a certain authority. Against this, the job of making administrative decisions is qualitatively different from making judicial decisions, even if the methods have similarity. The judge-president is engaged nearly fully in the work of the tribunal. Administrative decisions can sometimes be politically controversial and this can have the effect of embroiling an organisation like the Tribunal in political controversy. Courts by contrast seek to stand apart from overt political controversy. If a strict view of separation of powers applied in the State, no doubt good people detached from the executive government, with appropriate tenure could be found to assist the organisation successfully to meet its objectives. One shouldn’t then overstate the case that only a Chapter III judge or a State judge is a necessary prerequisite of the success of such tribunals.

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<sup>83</sup> Walker, K. “Persona Designata, Incompatibility and the Separation of Powers”, 163 – 164.

<sup>84</sup> Hon Justice Dowsett, “Judicial Qualities and Corruptive Good Customs” in Rahemtula, A (ed) *Justice according to law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (2006), 368.

<sup>85</sup> Hon Justice Dowsett, “Judicial Qualities and Corruptive Good Customs”, 372.

<sup>86</sup> Hon Justice Dowsett, “Judicial Qualities and Corruptive Good Customs”, 373.

106. My view though, again at the pragmatic level, in relation to the value of judicial involvement in the issue of warrants and like supervisory activities in aid of law enforcement investigations is much less ambivalent. While no doubt the public may draw comfort that the rule of law is protected through some judicial involvement in these processes, the processes are in fact quite unlike those of a review tribunal. They do not involve the determination of any controversy according to usual judicial processes. They do not occur in public. The judge is very much drawn into a non-judicial activity. The case for the appointment of persons other than judges, who are nonetheless independent of the Executive, to supervise such processes, is I believe compelling.
107. What might be said of the current incompatibility principle developed in *Wilson* is that it seems to have been borne of pragmatism, as its application seems to have been as well. The inconvenient truth, as I have called it, of the existing practice of Chapter III judges serving as presidential members of Commonwealth tribunals would have been put at serious risk if a pragmatic approach were not to have been adopted in *Wilson*. The court effectively sanctioned the existing practice of Chapter III judges serving as the heads of a number of Commonwealth tribunals that resembled courts in their decision-making practices. One wonders whether if at the time there had been more such Commonwealth tribunals headed by judges than the few that then existed, the court would have been quite so sanguine in its consideration of the issue. The more widespread the practice of judges heading administrative tribunals becomes, the more the High Court may be concerned that the public will begin to perceive the function of judges generally to be indistinguishable from those of a range of other public decision-makers who do not exercise the judicial power of the Commonwealth. If this perception were to develop there would be a case for fearing the reputation of the judicial branch of government would thereby be at risk of being diminished.
108. Further, the constitutional compatibility principle in *Wilson* seems to have been developed at the conceptual level without regard to the fact that there would be operational incompatibility if the judge as judge were obliged to deal with a proceeding in the court challenging a proceeding in the tribunal whether of the judge as presidential member or of a member of the tribunal. It is inconceivable on apprehended bias grounds that the judge could deal with the tribunal proceeding before the court.
109. Moreover, no consideration seems to have been given to the first scenario of invalidity in *Grollo* to the effect that the tribunal functions of the judge as presidential member might be so extensive as to make the performance of judicial functions, as a practical matter, unlikely.
110. While the discussion in the joint judgement (at pages 15-16) concerning the common law doctrine of incompatibility of offices and why it is not relevant to the constitutional doctrine may have some bearing on this issue, the operational incompatibility issues to which I refer seem not to have been expressly addressed.
111. It seems also that little consideration was given in *Wilson* to the use of State judges in the exercise of non-judicial functions. If the Kable doctrine, to which I will shortly turn, may mean that judges of State courts that exercise federal jurisdiction may be affected by the constitutional incapacity rules, then the widespread use of State judges as tribunal heads may need to be considered in the development of the incompatibility test and its application. *Kable v The Director of Public Prosecutions (NSW)*<sup>87</sup> was handed down very soon after *Wilson*. By a majority the Court held that the *Community Protection Act 1994* (NSW), which empowered

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<sup>87</sup> (1996) 189 CLR 51.

the Supreme Court of New South Wales to make an order for the detention of a named individual in prison for a specified period, was invalid.

112. Each of the majority judges wrote a separate judgment but accepted that the exercise of jurisdiction under the NSW Act was incompatible with the integrity, independence and impartiality of the Supreme Court as a court in which federal jurisdiction had been invested under Chapter III. In doing so, the Court accepted that the New South Wales Constitution does not embody a doctrine of the separation of legislative and judicial powers and the New South Wales Parliament may decide for itself in what institutions of government judicial power should reside. However, there are limitations arising from Chapter III on what a State parliament can do in this regard.
113. For present purposes, it is interesting to take the judgment of Justice McHugh, who has since retired from the Court, as an indicator of the arguments put to the Court and the Court's reasoning processes. McHugh J considered that State courts are part of an Australian judicial system. His Honour<sup>88</sup> found that s 73 of the Constitution implies the continued existence of State Supreme Courts by giving a right of appeal from them to the High Court, subject only to such exceptions as the Commonwealth Parliament enacts. His Honour considered that it necessarily followed that the Constitution has withdrawn from each State the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system. McHugh J<sup>89</sup> also considered it axiomatic that neither the Commonwealth nor a State could legislate in a way that might alter or undermine the constitutional scheme set out in Chapter III. His Honour then found, as did Toohey J, Gaudron J and Gummow J that the New South Wales Act requiring the Supreme Court of NSW to deal with one person in a particular way had a tendency to undermine public confidence in the impartiality of the Supreme Court of New South Wales and so infringed this principle.
114. There was some commentary after *Kable* to the effect that it reflected some high-water mark in Australian constitutional law and was unlikely to be repeated<sup>90</sup>. For example, in *Fardon v Attorney-General (Qld)*<sup>91</sup> where the High Court came to a different conclusion in relation to Queensland legislation in the same vein, Justice McHugh was at pains to emphasise that it is a "serious constitutional mistake" to think that either *Kable* or the Constitution assimilates state courts or their judges and officers with the federal courts and their judges and officers. He said that while the Constitution provides for an integrated court system that does not mean that what federal courts cannot do, state courts cannot do<sup>92</sup>. McHugh J stated<sup>93</sup> that there is nothing in the Constitution that would preclude the States from legislating so as to empower non-judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law.
115. However, the recent case of *International Finance Trust Company Ltd v New South Wales Crime Commission*<sup>94</sup> confirms that the *Kable* doctrine is alive and well, albeit by a narrow majority of the Court. The majority held that provisions in the *Criminal Assets Recovery Act 1990* (NSW) authorising the issue of restraining orders against the property of persons

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<sup>88</sup> 189 CLR at 111.

<sup>89</sup> 189 CLR at 115.

<sup>90</sup> See discussion in Wheeler, F. "The Kable Doctrine and State Legislative Power over State Courts" (2005) 20(2) *Australasian Parliamentary Review* 15-30.

<sup>91</sup> (2004) 223 CLR 575.

<sup>92</sup> 223 CLR at 598.

<sup>93</sup> 223 CLR at 600.

<sup>94</sup> (2009) 84 ALJR 31.

suspected of having engaged in serious crime were invalid. They took the view that once the Commission applied for an order, the Court was required to determine the application in the absence of the affected party and there was no opportunity for that order to be challenged. French CJ and the other judges in the majority considered that this aspect of the legislation, in effect denying the possibility of natural justice being afforded an affected party, was “incompatible with the judicial function of the Court”<sup>95</sup>. For that reason the Supreme Court as the repository of federal jurisdiction was unable to exercise such a non-judicial power.

116. The decision in *International Finance Trust Company* puts to rest any suggestion that the *Kable* doctrine can be dismissed as an aberration from a past era of the High Court. It confirms the Court remains concerned to emphasise that the judicial function is not a flexible concept that changes from Chapter III courts to State courts, at least State courts exercising federal jurisdiction, and that despite some concerns expressed in *Fardon*, that State courts should be free from the restrictions that apply to Chapter III courts (and presumably Chapter III judges too), Chapter III jurisprudence is now powerfully rooted in the High Court.
117. It seems to me that State legislators, within their sphere of legislative competence, will necessarily have to continue to ask themselves the question whether proposed State laws that purport to confer judicial functions on State courts that exercise federal jurisdiction or non-judicial functions on judges of State courts that exercise federal jurisdiction, will offend *Kable* principles. A shorthand way of raising the *Kable* issues will be to ask whether the functions in question could be conferred or undertaken by a Chapter III court or judge. If not, then the question of invalidity would at first blush appear to be a serious one for State legislators to consider.
118. It may well be that *Kable* doctrine supports the view that the incompatibility test derived from Chapter III can restrict the range of non-judicial functions that can validly be discharged by State courts invested with federal jurisdiction<sup>96</sup> and performed by State judges who constitute those courts. Even though judges of State courts may not strictly speaking be Chapter III judges, there would seem at least to be a prospect that the conferral of non-judicial functions on members of a State court may attract one or other of the three scenarios of incompatibility described in *Grollo*. For example, it might be argued that due to a range of non-judicial functions conferred on a State Supreme Court as a whole, or a range of non-judicial or *persona designata* functions accepted by a number of judges or a particular judge, that in a practical sense the Supreme Court or that judge is not available to exercise the federal jurisdiction that the Constitution by s 71 assumes it or the judge will be able to exercise.
119. The decision in *Kable* concerning the relationship between State Supreme Courts and principles derived from Chapter III of the Constitution has also been consolidated in the very recent case of *Kirk v Industrial Relations Commission of New South Wales*<sup>97</sup>, where the Court confirmed that Chapter III requires that there be a body fitting the description “the Supreme Court of a State” contained in s 73, and that it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. Accordingly, a provision in State legislation that purports to strip the Supreme Court of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State

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<sup>95</sup> 84 ALJR at 47.

<sup>96</sup> Wheeler, F. “The *Kable* Doctrine and State Legislative Power over State Courts” (2005) 20(2) *Australasian Parliamentary Review* 15-30.

<sup>97</sup> (2010) 239 CLR 531

legislature, because it purports to remove a defining characteristic of the Supreme Court of the State.

120. In stating these principles in *Kirk*, the High Court relied upon its earlier 2006 decision in *Forge v Australian Securities and Investments Commission*<sup>98</sup>. In *Forge*, the High Court dealt with an issue it had left open in an earlier case<sup>99</sup> as to whether the appointment of acting judges to a State court compromised the independence and impartiality of the Court in a way that contravened Chapter III. In *Forge*, a majority (Kirby J dissenting) held that the particular New South Wales provision enabling the appointment of an acting judge did not offend Chapter III, but the circumstances in which such a law might be considered invalid were canvassed<sup>100</sup>.
121. The fact that so much ink was spilt over the use of acting judges on State Supreme Courts in *Forge* goes to demonstrate the point. *Forge* may be considered a decision that not so much puts an end to the argument about whether, in effect, state courts exercising federal jurisdiction can be treated as Chapter III courts and state judges on State courts exercising federal jurisdiction can be treated as Chapter III judges, as to enliven a continuing debate on that point. If there is an integrated legal system in Australia involving Chapter III courts and State Supreme Courts and other State courts exercising federal jurisdiction, the question will remain why different standards should apply concerning the powers that can be conferred on different courts, and why judges who are appointed to such courts on *Act of Settlement* conditions should be the subject of different rules concerning the non-judicial functions they may undertake.

### ***Concluding remarks***

122. The move to restrict the non-judicial functions of a Chapter III judge is due to a particular interpretation of the Constitution that markedly separates the exercise of federal judicial power from the political branches of government. The High Court has evinced a special concern that the authority of courts in Australia needs to be maintained over time so that citizens, and the States in our Federation, have full confidence that the rule of law and the Constitution itself will be upheld. No doubt at times there will be differences of view as to how strictly the application of the separation of powers doctrine needs to be applied to this end. Current High Court authority and State arrangements display a pragmatic approach to the issue. However, Chapter III jurisprudence has been developed and continues to be developed by reference to deeply felt principle. Whether or not the constitutional incompatibility rule in respect of Chapter III judges laid down in *Wilson's case* will have an extended life, or the ambit of the rule that permits some non-judicial functions to be performed by such a judge will be tightened, and whether the rule will be extended to judges of State courts exercising federal jurisdiction, no doubt time will tell! However, one senses Chapter III jurisprudence in this area has not yet run its full course.

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<sup>98</sup> (2006) 228 CLR 45

<sup>99</sup> *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146

<sup>100</sup> See 228 CLR 45 at 88; Gummow, Hayne and Crennan JJ.