LECTURES ON

Northern Territory Public Law

Graham Nicholson

LECTURES ON NORTHERN TERRITORY PUBLIC LAW
CPD Lectures delivered by Graham Nicholson on behalf of the Law Society Northern Territory from 2005 to 2015

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FOREWORD

by Michael Grant QC

former NT Solicitor-General, now Chief Justice of the NT Supreme Court

The grant of self-government to the Northern Territory in July 1978 was a bold and novel experiment. Section 122 of the *Constitution*, which provides for the Commonwealth Parliament to make laws for the government of any territory accepted or acquired by the Commonwealth, appears in Chapter VI, entitled "New States". Both the *Constitution of the United States* and the *British North America Act* 1886 (Imp) contained "territories" clauses which were used as models for s 122. Territories within the contemplation of those clauses were peripheral areas administered by the United States and Canada in accordance with long-standing British colonial practice, usually to exploit their resources or strategic location, and often in preparation for their eventual admission as new states or provinces. The colonial practice was that such territories were subject to the exclusive legislative authority of the federal government, were generally denied self-government, and had populations which might not be accorded full citizenship rights or representation in the institutions of government.

Against that background, the expectation in 1901 was that British New Guinea, Norfolk Island, Lord Howe Island and Fiji, together with the Northern Territory of South Australia, would become Commonwealth territories. Moreover, there was no intention on the part of the framers of the *Constitution* that upon acquisition or acceptance these places would necessarily enjoy the benefit of metropolitan institutions such as parliamentary representation or a criminal justice system which provided for trial by jury. There is very little discussion in the Constitutional Debates concerning the nature or prospective evolution of territories, beyond a consensus that the Commonwealth Parliament should have the broadest power to make such provision for the territories as it saw fit. The plenary nature of that power notwithstanding, it is unlikely the framers of the Constitution had within their contemplation the creation of a self-governing territory.

That absence of intention notwithstanding, it is now accepted by the High Court that the grant of self-government has created a new self-governing polity under the Crown with separate political, representative and administrative institutions: a representative of the Crown in right of that polity; and a Legislative Assembly with power to make laws for the peace, order and good government of the Territory, which is a plenary power of the same quality as that enjoyed by the legislatures of the States. While those features of self-government would now appear to be beyond question, the interaction between s 122 and the other provisions of the *Constitution*, for which no express provision is made in the document, is far from settled. So, too, is the Territory's future constitutional development far from settled. It has been said that the exercise of judicial authority in the Territory and its relationship with Chapter III of the *Constitution* is a matter involving "baroque complexities and many uncertainties". The extent to which the Commonwealth's legislative authority in respect of territories is subject to the various constitutional guarantees has been the subject of conflicting theories and decisions. The response of the Commonwealth Parliament to the enactment of euthanasia legislation by the Territory operates as a reminder of the fragility of the grant of self-government. The 1998 Statehood referendum, and the recent renewal of the push for Statehood, has focused attention on the constitutional and politico-legal issues which must be addressed before that process may be brought to fruition.

These are among the issues addressed by Mr Nicholson in the series of lectures he has delivered over the past decade as part of the Law Society's continuing professional development program. Those papers form this compilation, and there is no person better qualified than Mr Nicholson to speak in this field. He is Australia's leading expert on the constitutional structure and history of the self-governing Northern Territory. As the modest biographical note at the start of this compilation records, Mr Nicholson first came to work in the Territory in 1974 and assisted in planning for self-government. More accurately, he was active and instrumental in the dealings with the Commonwealth which led to the enactment of the *Northern Territory (Self-Government) Act 1978*. Following the grant of self-government, he was appointed as the new body politic's first Crown Solicitor. Together with the Territory's first Solicitor-General, Ian Barker QC, he set up structures still in place today, dealing with such fundamental constitutional matters as the Administrator's satisfaction that the subject matter of legislation falls within the scope of the Territory's executive authority.

Mr Nicholson subsequently held appointment as Crown Counsel for the Territory for almost 20 years, during which time he was the academic and intellectual architect of the submissions made by the Territory to the High Court concerning the Territory's constitutional structures and its place within the broader Australian *Constitution*. During his time as Crown Counsel, he was one of the Territory's principal sources of advice in relation to legislative and executive proposals which involved constitutional issues. The opinions he wrote as Crown Counsel are a continuing source of reference and guidance for public lawyers in the Territory.

In addition to his legal professional duties, Mr Nicholson has also been active as a researcher and academic; he co-edited "Selected Constitutional Documents on the Northern Territory", which is the definitive compilation of primary source documents in relation to the Northern Territory's constitutional history, he contributed substantially to the text "Australia's Seventh State" (1988: North Australia Research Unit), which is the seminal text in relation to proposals for a grant of Statehood to the Northern Territory; he was the legal adviser to the Legislative Assembly Select Committee on Constitutional Development; drafted the bulk of the Discussion Papers and the Draft Constitution leading up to Constitutional Convention and Referendum on Statehood in 1998; and was subsequently legal adviser to the Statehood Steering Committee established under the auspices of the Legislative Assembly Legal and Constitutional Affairs Committee. Mr Nicholson was also a lecturer in Constitutional Law for many years at the Charles Darwin University (CDU), and subsequently an Adjunct Professor within the institution. He has published extensively in relation to the Northern Territory's constitutional position.

I have attended most of the lectures comprising this compilation. Revisiting the papers for the purpose of writing this Foreword has been both informative and interesting. They provide a valuable resource and it is appropriate they have been collated and published in this form.

Solicitor-General's Chambers
26 January 2016

INTRODUCTION

by Tass Liveris

President of the Law Society Northern Territory

The constitutional history of the Northern Territory is unique, rich and complex. The development of the Northern Territory's constitutional status over the decades was extremely important and is ongoing, with the constitutional structures of the Northern Territory enjoying scrutiny by the High Court of Australia from time to time.

As the Territory's first Crown Solicitor and later as Crown Counsel, Graham Nicholson was an instrumental and central figure in the Territory's self-governing structure, right from the heady pre-self-government days of 1974 and well beyond. As the Foreword by the Solicitor-General notes, Mr Nicholson's legacy from those years has endured.

In this series of lectures, Mr Nicholson has presented issues of great complexity in a way that has engaged with a wide array of audiences at all levels and has attracted popular appeal.

The preservation of the lectures in this publication, in this way, is a fitting recognition of their ongoing utility and relevance as a resource tool. It is also a fitting recognition of the vast contribution Mr Nicholson has made to the Northern Territory.

Tass Liveris
President – Law Society Northern Territory

ACKNOWLEDGEMENTS

from the Author, Graham Nicolson

My sincere appreciation to Law Society Northern Territory for sponsoring the publication of my past lectures and in particular for the excellent work of Marian Wilson of the Society in the preparation of this publication, and Bella Basilides for organising the lectures. Also to the Law Society Public Purpose Trust for financing this publication. I am grateful to the former Northern Territory Solicitor General Michael Grant QC, now Chief Justice of the Northern Territory Supreme Court, for his Foreword.

ABOUT THE AUTHOR

Graham Nicholson graduated with LLB (Hons) from University of Western Australia in the 60s. He practised law briefly before coming to work in Darwin in 1974 with the Commonwealth Department of the Northern Territory. He quickly became a member of a constitutional study group and witnessed the first meeting of the fully elected Legislative Assembly. Returning to Darwin after Cyclone Tracy, Graham assisted with legal issues concerning the recovery before transferring to the Commonwealth Attorney-General's Department. He became the first member of the NT Department of Law in 1977, advising the Executive Member for Law and assisting in planning for self-government. Compulsorily transferred to the NT Public Service on Self-Government in 1978, Graham became the first NT Crown Solicitor and later the NT Senior Crown Counsel and signed the Bar Roll. Graham was legal adviser to the various Legislative Assembly Committees on Constitutional Development for many years. He has an LLM (UQ) and was also Adjunct Professor in Law to Northern Territory University (now CDU) for many years. Graham is also a PHD candidate at CDU. He took early retirement from the Department in 1998 but still advises the NT Government and other institutions from time to time from his office in Kuranda, Queensland.

DEDICATION

I dedicate this work to my late uncle Keith Nicholson,
who always encouraged and supported me in the law

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Litigation based on the Northern Territory Self-Government Arrangements 2005

Introduction

Since the grant of self-government to the Northern Territory of Australia (the Territory) by Commonwealth legislation[1] on 1 July 1978, the Territory has occupied a fairly unique constitutional position in Australian law. The nearest any other constitutional arrangements come to that of the Territory are those applicable to the Australian Capital Territory[2] and Norfolk Island[3]. These latter examples have important differences as well as similarities to the position of the Territory. The similarities arise as all three continue to be territories of the Commonwealth notwithstanding their respective grants of self-government[4], and all three have had a form of self-government conferred on them by an Act of the Commonwealth Parliament. Beyond this there are considerable differences. Not even these commonalities apply to the six existing States in the federation[5]. The constitutional position of the self-governing Northern Territory is quite unlike that of those States[6], therefore most grounds for litigation based on the constitutional position of those States under the Constitution have no relevance to the Territory. It might be said in loose political or common parlance that the Territory is already a de facto State, and it may be largely treated as such by the other constitutional players in Australia, and in this sense that description may have some merit. But this is not accurate as a matter of constitutional law. Accordingly, it is clearly necessary to have an

1 *Northern Territory (Self-Government) Act 1978* of the Commonwealth, No 58 of 1978 (in this lecture called the "*Self-Government Act*"). This Act has been amended on a number of occasions since so an up-to-date copy should be sought.

2 *Australian Capital Territory (Self-Government) Act 1988*, No 106 of 1988 (Cth), also *A.C.T. Self-Government (Consequential Provisions) Act 1988*, No 109 of 1988 (Cth).

3 *Norfolk Island Act 1979*, No 25 of 1979 (Cth).

4 That is, all three of these territories come under the operation of section 122 of the Commonwealth Constitution, each as a territory, the government of which is a Commonwealth responsibility. The Australian Capital Territory also has a special status under section 52 (i) of the Constitution in relation to the "*seat of government of the Commonwealth*". In relation to the territorial status of the ACT and the Northern Territory see *Capital Duplicators v ACT* (1992) 177 CLR 248. As to the Northern Territory alone see the line of cases going back to *Lamshed v Lake* (1958) 99 CLR 132. In relation to Norfolk Island see *Berwick Ltd v Gray* (1976) 133 CLR 603.

5 The existing (original) States as colonies existed before the creation of the Commonwealth of Australia in 1901, and were continued as the component States of the new federation by the Commonwealth Constitution. See definition of "The States" in section 6 of the *Commonwealth of Australia Constitution Act* and Chapter V of that Constitution. They therefore have a constitutionally guaranteed existence and do not depend for that existence on any Commonwealth legislation.

6 The Northern Territory, still being a territory of the Commonwealth, notwithstanding the grant to it of self-government, is not a "State" for the purposes of the Constitution, and hence references to a "state" or to the "states" in the Constitution do not include it. The same reasoning applies to the *Australia Act 1986*. The Northern Territory is not a component part of the federation, although it is part of Australia - Final Report of the Northern Territory Statehood Working Group, (Northern Territory Edition, May 1996), 8; Keyzer, "The 'Federal Compact', the Territories and Chapter III of the Constitution", (2001) 75 ALJ 124.

adequate knowledge of the unique constitutional position of the Northern Territory if seeking to advance legal arguments based on those Territory self-governing arrangements, whether by way of attack or defense.

The *Self-Government Act* of the Territory was enacted by the Commonwealth Parliament under section 122 of the *Commonwealth Constitution*, the "*Government of territories*"[7]. This is the same head of power used by the Commonwealth since the Territory first came to be a Commonwealth territory in 1911[8]. In that sense the grant of self-government in 1978 was part of, and was a continuation of, a process of constitutional reform in and for the Territory over many years. What was particularly new about the grant on 1 July 1978 was that it included for the first time the creation of a new body politic under the Crown in its own right, that is, a new Territory political entity, separate from the Commonwealth and the Crown in right of the Commonwealth[9]. That new political entity was given most of the trappings of a separate body politic on the traditional Westminster pattern of what has been called responsible government. It has Ministers drawn from the membership of the Territory legislature and appointed by the head of government for the Territory[10]. Largely by convention those Ministers should enjoy the confidence of a majority of the members of the Territory legislature, and be dismissed by the head of government if they lose that confidence. The Ministers collectively form the Government of the Territory through a conventionally based Cabinet as well as the official Executive Council of the Territory[11]. It is only those Ministers and that Executive Council who can officially advise the head of government, at least in non-transferred matters[12].

In addition, there is a fully elected Legislative Assembly as the Territory legislature, although the existence of that body in a fully elected form preceded the grant on 1 July 1978[13]. It is from this body the Territory

7 S. 122 *"The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."*

8 *Northern Territory Acceptance Act 1910*, No 20 of 1910 (Cth), also *Northern Territory (Administration) Act 1910*, No 27 of 1910 (Cth) (now repealed apart from the operation given to it as amended by section 68 of the *Self-Government Act*), and see also the *Northern Territory Surrender Act (1907)*(SA); and generally Heatley and Nicholson, Selected Constitutional Documents on the Northern Territory, (NT Department of Law, 1989), Chapter 10.

9 *Self-Government Act*, 4th Preamble, section 5, Part IV, Section 51. The separate status of the "*Crown in right of the Northern Territory*" has been recognised in a variety of Commonwealth legislation. See also discussion in *R v Toohey: Ex pt NLC* (1981) 151 CLR 170, *AG v Minister for Aboriginal Affairs* (1989) 25 FCR 345; *Capital Duplicators Pty Ltd v NT* (1992) 177 CLR 248; *Waters v Acting Administrator* (1993) 46 FCR 462; *Wake & Gondarra v NT* (1996) 5 NTLR 170; *Scott v Northern Territory* (2003) 194 ALR 593; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90. See also Nicholson, "The Constitutional Status of the Self-Governing Northern Territory", (1985) 59 ALJ 698.

10 *Self-Government Act*, sections 34-38.

11 *Self-Government Act*, section 33.

12 *Self-Government Act*, sections 32 (2), 33 and 35, *Waters v Acting Administrator of the NT* (1993) 46 FCR 462, and see the *Northern Territory (Self-Government) Regulations*, Statutory Rule No 168 of 1978 as amended from time to time (the "*Self-Government Regulations*"). See also discussion below of such transferred matters.

13 *Self-Government Act*, Part III Division 2. The first fully elected Territory legislature, the Legislative Assembly of the Northern Territory, occurred in 1974 as a result of amendments to the *Northern Territory (Administration) Act*. That Legislative Assembly was continued in existence by section 59 of the *Self-Government Act*.

Ministers are chosen and, to which, in legal theory, they are accountable. It is therefore the legislative arm of the new Territory polity.

Since the amendments to the *Self-Government Regulations* in 1979, the new Territory body politic has had general governmental responsibility for the courts of the Territory, from the Supreme Court down[14]. This completes the three traditional arms of any government, legislative, executive and judicial.

There is now no doubt the grant of self-government to the Territory is in general terms a valid exercise of the Commonwealth's powers under the government of territories in section 122 of the Constitution. In view of relevant judicial decisions and judicial commentary, it is submitted that it is not open to argue to the contrary[15].

I consider these self-governing arrangements in more detail below by reference to Territory legislative powers, executive powers, judicial powers and jurisdiction, financial considerations, geographical limitations and other Commonwealth constitutional limitations. This is undertaken from the point of view of any potential litigation based on these arrangements, whether by way of attack or defense. I do not consider in this lecture how this might change if the Territory became a new State.

Territory Legislative Powers

Litigation will sometimes give rise to questions whether the legislative powers of the self-governing Northern Territory are wide enough to sustain particular exercises of that power. The Territory legislation in question may be alleged to be within, or beyond, that power, depending on the perspective of the person so arguing. This can be simply a question of assessing the scope of Territory legislative power under the *Self-Government Act* measured against the exercise of power, or it can be a question of whether that Territory legislation conflicts with the Constitution or any other relevant Commonwealth legislation.

Any consideration of such arguments will often begin with a consideration of the plenary nature of the Territory's grant of legislative power in section 6 of the *Self-Government Act*. It is a power "*… to make laws for the peace, order and good government of the Territory*". Left unqualified by

14 Commonwealth Statutory Rules No 205 of 1979 amending the *Northern Territory (Self-Government) Regulations*. These were accompanied by some Commonwealth legislation including the repeal of the *Northern Territory Supreme Court Act (Cth)* by the *Northern Territory Supreme Court (Repeal) Act 1979 (Cth)*, No 85 of 1979, and by some Northern Territory legislation, including the enactment of the *Supreme Court Act*. The transfer of responsibility for the courts of the Territory to the new Territory polity does not imply any infringement of the independence of the judiciary. See generally *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2002] FCAFC 297, (2002) 218 CLR 146.

15 This position was established at an early date after the grant – see Nicholson, op. cit. Subsequent court decisions have consistently indicated the general validity of the grant. A challenge to the validity of the *Australian Capital Territory (Self-Government) Act 1988* was mooted in *Re Davison* [1997] HCA 42, McHugh J commenting that it would have little prospects of success, and also in a subsequent hearing in (1997) 16 Leg. Rep. 10 per Gaudron J, but it never came to anything.

legislation, this is on current authorities as wide a grant of legislative power with respect to the territorial area in question as it is possible to grant[16], unqualified as to subject matter. The orthodox view is that the words used are not words of limitation, but words of extension. It may well signify that the legislature itself is a plenary and independent legislature, and not some mere subordinate body to another and greater legislative body, nor some mere delegate with some inferior or limited grant of power[17]. While expressed as a power to legislate for the peace, order and good government "*of the Territory*", thereby suggesting the need for some tangible connection, geographical or otherwise, with or to the Territory, it is a grant of power that also carries with it an extra-territorial dimension, discussed under a separate heading below[18].

But of course the words used in section 6 of the *Self-Government Act* are not legislatively unqualified. Section 6 incorporates some limitations in its wording. Of note are the opening words "*Subject to this Act…*", clearly indicating the grant is subject to all the provisions of the *Self-Government Act*[19]. For example, the power does not extend to the making of Territory laws that would interfere with the absolute freedom of Territory-State trade, commerce and intercourse, contrary to section 49 of that Act, nor for the making of Territory laws as to the acquisition of property otherwise than on just terms contrary to section 50 (1) of that Act. The enactment by the Commonwealth of the *Euthanasia Laws Act 1997*[20] added a further express limitation to the grant of Territory legislative power. Many other limitations are contained in that Act either in its express terms or perhaps arising by necessary implication from those terms[21].

Section 6 of the *Self-Government Act* contains other limitations by the express use of the words therein *"with the assent of the Administrator or the Governor-General, as provided by this Act…"*.

16 *Generally, Powell v Apollo Candle Co Ltd* (1885) 10 AC 282; *R v Burah* (1878) 3 AC 889; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 per Gummow J at 604-607, and other cases; see discussion in Twomey, The Constitution of New South Wales (2004, Federation Press), 168-171; Selway, The Constitution of South Australia (1997, Federation Press), 63-64; Blackshield and Williams, Australian Constitutional Law and Theory (3rd Ed., 2002, Federation Press), Chapter 11. As to the Northern Territory see cases cited in Nicholson, op. cit., at footnote 36, plus *R v Toohey; Ex pt NLC* (1981) 151 CLR 170 per Wilson J at 279; *Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248 per Mason CJ, Dawson and McHugh JJ at 263-267, Brennan, Deane and Toohey JJ at 268-271, 281-283; *Wake and Gondarra v Administrator of the NT* (1996) 5 NTLR 170 per Martin CJ and Mildren J at 177-178, but see the dissent of Angel J at 185 et seq.; *Wynbyne v Marshall* (1997) 117 NTR 11, 7 NTLR 97; *Kruger v Commonwealth* (1997) 190 CLR 1; *Northern Territory v GPAO* (1999) 196 CLR 553; *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, and see Blackshield and Williams, op. cit., 271 – 272.

17 Nicholson, op. cit., *Capital Duplicators Pty Ltd v ACT*; *Scott v Northern Territory*.

18 See heading "Territory Geographical Limitations" below.

19 *Namatjira v Raabe* [1958] NTJ 608 per Kriewaldt J at 615. Arguably Territory laws would have been subject to the terms of the *Self-Government Act* in any event even without these introductory words.

20 No 17 of 1997. That Act had the effect of limiting the operation of the Rights of the *Terminally Ill Act 1995 (NT)*.

21 Most of these have yet to be judicially investigated. There is an interesting question as to the extent to which any breach of the procedural provisions of the *Self-Government Act* concerning the internal workings of the Territory legislature can be judicially relied upon in any attack on the validity of Territory legislation.

Thus the validity of any Territory legislation is dependent upon assent being given in accordance with that Act – no such assent, no valid law. Assent can be given by the Administrator in the first instance in the case of any proposed Territory law[22], but if the proposed law deals in whole or part with a non-transferred matter[23], the Administrator may also reserve the proposed law for the Governor-General's pleasure. The Governor-General may then grant assent thereto[24]. In the usual course of events, the Administrator will have received advice through the Territory Executive Council that a proposed law deals only for or in relation to a transferred matter[25], and by convention will have assented to that law in accordance with that advice under section 7 (2)(a) of the *Self-Government Act*. If the Administrator receives advice that the proposed Territory law deals in whole or part with a non-transferred matter, he/she will in the normal course first seek the instructions of the relevant Commonwealth Minister under section 32 (3) of the *Self-Government Act*, and then exercise his/her powers under section 7 (2)(b) of that Act[26].

There seems to be little doubt that proper procedural observance of these provisions in sections 7 and 8 of the *Self-Government Act* is necessary for valid Territory law-making, including as to the correct identification of proposed laws between transferred and non-transferred matters. So much was indicated in *Wake and Gondarra v Northern Territory*[27]. This is presumably because it is an integral, mandatory and justiciable part of the law-making process imposed by the *Self-Government Act*, and not just a matter of the internal workings of the legislature[28]. In this respect, there is no equivalent in the law-making processes in the States[29]. The Administrator may be the head of government of the separate self-governing Territory, but he/she still wears two hats – one Territory and one Commonwealth.

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22 *Self-Government Act*, section 7.

23 That is, a matter not specified in the regulations under section 35 of the *Self-Government Act* as being a matter in respect of which Ministers of the Territory are to have executive authority. The Act seems to contemplate that all governmental matters in the Territory, at least in so far as they arise under Territory laws or proposed Territory laws, will either deal with a transferred matter or a non-transferred matter, the difference depending on whether the matter in question is specified in the regulations made under section 35 of that Act. The proper interpretation of this aspect of the *Northern Territory (Self-Government) Regulations* will be discussed below.

24 *Self-Government Act*, section 8.

25 *Self-Government Act*, section 7 (2)(a), read with section 33 (1). Most proposed Territory laws deal only with transferred matters.

26 By established practice, the advice in the first instance to the Administrator as to whether a matter is a transferred matter or not is given through the Attorney-General of the Northern Territory, which is in turn based on advice from the Territory Department of Justice.

27 (1996) 5 NTLR 170. See also *Administration of Norfolk Island v Pitcher* (2005) 144 FCR 572.

28 Traditionally the courts have shown reluctance to intervene in the internal workings of a Parliament – see Hanks, Constitutional Law in Australia, (2nd Ed., 1996, Butterworths), Chapter 4; Hanks, Keyzer and Clarke, Australian Constitutional Law: Materials and Commentary, (7th Ed., 2004, Lexus Nexus Butterworths), Chapter 5, but with notable exceptions. The point was not raised in argument in *Wake & Gondarra v Northern Territory*.

29 There is no such division in a State. Old powers of reservation and disallowance of proposed State laws went with the *Australia Act 1986*, sections 8 and 9. The only issue of relevance in a State context is whether the State legislation, once enacted and assented to, infringes the constitutional division of legislative power in the Constitution – a question that is not relevant to the position of territories. The Governor of a State has a unitary form of constitutional allegiance in assenting to State laws.

It is to be noted that even if the Administrator assents to a Territory law, whether dealing with a transferred matter or not, the Governor-General can still disallow that law within six months of assent[30].

This leaves the question of potential conflict between Territory laws and other Commonwealth legislation or with the Constitution.

It is now well established that a Territory statute cannot conflict with any other Commonwealth statute still in force, whenever that Commonwealth law was enacted. The Commonwealth law always prevails. But the exact legal nature of the test of conflict, apart from the situation where the test is spelt out in Commonwealth legislation[31], needs consideration. Arguably it cannot simply be assumed that it is exactly the same test as between inconsistent State and Commonwealth laws under section 109 of the Constitution[32].

It is clear that territory laws are a form of subordinate legislation, and hence it is not to be expected that this territory law-making authority would extend to the granting of power to make laws inconsistent with or repugnant to Commonwealth laws. But we have seen, at least in self-governing territories, that their laws are not enacted as a mere delegate of the Commonwealth Parliament but as part of an independent, plenary grant of power. The appropriate test between the two classes of laws has been put in terms of an inability of a territory law to affect the operation of a law of the Commonwealth or to destroy or to detract from a right conferred by a Commonwealth law unless the law so provides, expressly or by implication[33].

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30 *Self-Government Act*, section 9. In practice, a power that is not exercised. As a matter of convention, it certainly should not be exercised in so far as the Territory legislation in question deals solely with transferred matters. (Note: section 9 has since been repealed).

31 As in the ACT, see *Wylkian Pty Ltd v ACT Government* [2002] ACTSC 97, citing section 28 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*. There is no similar section of general application in the *Northern Territory (Self-Government) Act 1978*. However particular Commonwealth Acts may have a provision for the superior force of that legislation, and sometimes for regulations made under that legislation and even industrial awards, orders or agreements made under that legislation, over Territory legislation. The *Self-Government Act* itself contains such a provision in section 53 (7) based on an inconsistency-type test. See also the *Workplace Relations Act 1996 (Cth)*. It might be thought to be somewhat remarkable that an industrial award or workplace agreement involving the Territory Government or other employer and a union or employee can have greater legal force than a Territory Act, a position continued under the current *Commonwealth Work Choices Amendment Act*.

32 Although the cases under section 109 have been said to be "helpful signposts" – *AG v Minister for Aboriginal Affairs* (1989) 25 FCR 345 per Lockhart J. See also *Breavington v Godleman* (1988) 169 CLR 41 per Deane J at 138; *Frost v Stevenson* (1937) 56 CLR 528 per Evatt J at 603. Section 109 involves a contest between quite different legislative powers, differently derived and both constitutionally protected in a federal context. State laws give way to inconsistent Commonwealth laws only whilst those Commonwealth laws remain in force, and those State laws can revive if and when those Commonwealth laws cease to be in force. The position between Commonwealth and territory laws is different in that it involves the laws of a superior legislature and those of a subordinate legislature created by that superior legislature.

33 *R v Kearney; Ex pt Japanangka* (1984) 158 CLR 395 per Brennan J at 418, Deane J concurring, a test frequently quoted since. See generally Nicholson, op. cit., footnote 55. Also *Northern Territory v GPAO* per Gleeson CJ, Gummow J and Kirby J.

This test may perhaps be better described as that of repugnancy[34] rather than inconsistency and, as such, it is possible that it is a somewhat narrower test[35]. In most cases the difference may be insignificant.

There is no doubt that Territory laws, being derived from an exercise of Commonwealth legislative power under section 122 of the Constitution, must be able to operate consistently with and/or not repugnantly to the Constitution, otherwise they will be invalid[36]. This will include at least some of those cases where the Constitution gives the Commonwealth Parliament exclusive legislative powers, and also where the Constitution excludes any legislative power to either polity[37].

There are no manner and form requirements imposed on Territory legislation as there is for State legislation under section 6 of the *Australia Act 1986*[38].

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34 *Webster v MacIntosh* (1980) 49 FLR 317; cited in *Pritchard v Racecage Pty Ltd* (1996) 64 FCR 96 at 121; *Northern Territory v GPAO*. A test traditionally used as between imperial and colonial legislation – *Union Steamship Co of NZ Ltd v Commonwealth* (1925) 36 CLR 130; *Frost v Stevenson*. It is also used between ordinary legislation and subordinate legislation – Pearce & Argument, Delegated Legislation in Australia, (2nd ed., 1999, Butterworths), Chapter 19.

35 *Flaherty v Girgis* (1987) 162 CLR 574 per Mason ACJ, Wilson and Dawson JJ at 596. In *Northern Territory v GPAO*, Kirby J at 636-639 thought that inconsistency and repugnancy were interchangeable – see footnote 317 to that case – a view he repeated in *Yougarla v WA* (2001) 207 CLR 344 at footnote 139, citing *Union Steamship of NZ Ltd v Commonwealth* at 148; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463; *NT v GPAO* at 579-580. But see Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Yougarla v WA* at paragraph 17, citing Dixon J in *Frost v Stevenson* at 572.

36 An example of an argument to this effect was in *Capital Duplicators Pty Ltd v ACT*. See *also Svikart v Stewart* (1994) 181 CLR 548 for an opposite result. As to recent cases concerning the limitations arising from Chapter III of the Constitution, see Re Wakim, Ex pt McNally; *Spinks v Prentice* (1999) 198 CLR 511; *Re Governor, Goulburn Correction Centre; Ex pt Eastman* (1999) 200 CLR 322; *North Australian Aboriginal Legal Aid Service Inc v Bradley*. There is a large body of case law as to which provisions of the Constitution, including constitutional guarantees such as section 116, are capable of applying in and to territories. It is beyond the scope of this lecture to consider this case law.

37 *Capital Duplicators Pty Ltd v ACT* as to the inability of a (mainland) territory to impose a duty of excise. The exclusive Commonwealth powers may be express or implied in the Constitution. An example of a total exclusion of any legislative power is the implied freedom of communication in political matters, which does extend to territories – see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd (*1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568; *Kruger v Commonwealth* (1997) 190 CLR 1 at 126-128; *Inder-Smith v Tudor-Stack* [2004] NTSC 48; *Meryerhoff v Darwin City Council* [2005] NTSC 19. See Nicholson, "The Concept of 'One Australia' in Constitutional Law", (1997) 25 Fed L Rev 282 at 287.

38 Although as noted, valid Territory legislation must comply with some procedural aspects at least of the *Self-Government Act*. It is doubtful, in view of the provisions of section 27 of the *Self-Government Act*, that the NT can legislate to entrench its own Territory legislation, either by requiring a special majority vote in the Legislative Assembly for passage, or by imposing some other requirement such as a prior Territory referendum for validity. Contrast the power of the ACT Legislative Assembly in section 26 of the *Australian Capital Territory (Self-Government) Act 1988*.

In the States there is a limitation on the extent to which State legislatures can validly legislate to bind the Commonwealth and its instrumentalities, officers and agents[39]. It is uncertain as to how far any such limitation applies in relation to self-governing territories[40].

While it is clear that Commonwealth laws made in reliance on section 122 of the Constitution will prevail over inconsistent State laws under section 109 of the Constitution[41], it is not clear whether valid Territory laws, which in a sense are made indirectly in reliance on section 122, will also prevail over inconsistent State laws under section 109. The latter issue can be relevant given the extraterritorial aspect of Territory law-making powers[42].

Territory Executive Powers

The creation of a new Territory body politic under the Crown in 1978 necessarily involved the creation of a new head of executive or governmental powers and authority attaching to that new political entity. And as the decision was taken by the Commonwealth to frame the new Territory polity on the Westminster style of government, with Territory Ministers chosen from the membership of and responsible to the Territory legislature[43], those Ministers in turn advising a head of government titled the "Administrator"[44], it was axiomatic that the new grant of executive power and authority

39 *Commonwealth v Cigamatic* (1962) 108 CLR 372 and later cases, including *Re Residential Tenancies Tribunal of NSW and Henderson; Ex pt Defence Housing Authority* (1997) 190 CLR 410, discussed by Twomey, "*Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another*", (2003) 13 Federal L Rev 507. See also the *Judiciary Act* 1903 (Cth) and the ALRC Report No 92 on The Judicial Power of the Commonwealth, A Review of the *Judiciary Act* 1903 and Related Legislation Chapter 28.

40 As to the position in the Northern Territory see *Minister for Arts, Heritage and the Environment v Peko-Wallsend* (1987) 15 FCR 297 per Wilcox J at 297-298; *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 46 FCR 342 per French J at 408-410, and subsequently on appeal to the Federal Court, and from there on appeal to the High Court, as to which note the judgment of Gummow J; *Margarula v Minister for Resources and Energy* (1998), Sackville J, 11 February 1998 unreported, and on appeal (1998) 86 FCR 195; *Canberra Aero Club and Federal Airports Corporation* [1998] ACTTT 17. Also The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and related legislation, op. cit. In the Commonwealth Attorney-General's Department Legal Briefing No 36, it states that since the decision of the High Court in *Re Residential Tenancies Tribunal of NSW and Henderson: Ex pt Defence Housing Authority*, it seems likely that a law of the Territory which seeks to regulate activities or transactions in which the Commonwealth may choose to engage in the exercise of its executive capacities would be held to be capable of binding the Commonwealth - www.ags.gov.au/publications.agspubs/legalpubs/legalbreifing. This is not the case in the ACT - Section 27 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth). But this view of the Commonwealth Department takes the matter no further than that in the States, and fails to expand on the position given the quite different constitutional position of the self-governing Northern Territory vis-à-vis the Commonwealth. This includes the fact that the Commonwealth has created the self-governing Territory by its own Act, that it reserves certain Territory executive authority to itself within that self-governing arrangement (see below), and that it retains final absolute control over the Territory under the Territories power. It is respectfully submitted that the view of French J on this matter is the preferable one.

41 *Lamshed v Lake* (1958) 99 CLR 132; also *Attorney-General of WA, Ex rel Ansett v Australian National Airlines Commission* (1976) 138 CLR 492; *Northern Territory v GPAO*; *AMS v AIF* (1999) 199 CLR 160.

42 See below.

43 *Self-Government Act*, sections 31, 34-37. In part this Territory system rests on the constitutional conventions as to responsible government, as recognised by the courts. See Nicholson, op. cit., *Waters v Acting Administrator of the NT*.

44 In fact, a continuation of the Office of Administrator from pre-self-government days – see *Self-Government Act*, section 58, although with a new, divided role.

would be focused on those Ministers[45]. Unlike the legislative division of power in the Australian federal constitutional arrangements, a decision was also taken by the Commonwealth to impose a division of power and authority between the Commonwealth and the new Territory polity by reference to the executive rather than to the legislature[46]. The effect of the *Self-Government Act*, read with the *Self-Government Regulations* made under section 35 of that act, is to grant a detailed but very broad range of executive power and authority in specified matters to the self-governing Territory through its constitutional officers and institutions[47], but with a residue thereof expressly reserved to the Commonwealth[48]. These are what have already been described as the transferred matters and the non-transferred matters, in the sense that the Commonwealth has transferred[49] some of its executive powers and authority with respect to the Territory to the new Territory polity, but not all of them. References are made in the *Self-Government Act* to this division arising under section 35 in several sections[50].

Thus the determination of whether a particular matter is a transferred matter or not under that Act will determine, amongst other things, the scope of the executive powers and authority of the new Territory polity.

This will not be of concern in relation to the Administrator, in so far as it is clear that he/she can exercise the powers and authority of his/her office whether or not a matter for governmental decision is a transferred matter[51]. The only question for consideration in this context is whether the

45 Although formally the Administrator remains the head of government of the new Territory polity – see *Self-Government Act*, section 32.

46 There can be no constitutional objection to this method, given the broad, plenary nature of section 122 of the Constitution. It is a method previously used elsewhere, for example, in Northern Ireland, although extending to both legislative and executive powers. In the Territory's case it does, however, leave the potential anomaly that there can be Territory legislation which the Territory Ministers are incapable in law of administering, at least without Commonwealth consent or in other circumstances sufficient to bring it within Regulation 4 (3), (4), (5) or (6) of the *Self-Government Regulations*. See discussion below.

47 As to the broad nature of the grant see *R v Toohey*; Ex pt NLC; *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345; *Waters v Acting Administrator of the NT*; *Wake & Gondarra v Northern Territory*; *Margarula v Minister for Resources and Energy*, and note the discussion below.

48 The reserved Commonwealth matters are set out in Regulation 4 (2) of the *Self-Government Regulations*. Other reserved heads of Commonwealth executive power and authority necessarily arise from the provisions of other Commonwealth Acts applying in the Territory and expressly or impliedly incorporating certain executive or administrative functions. Clearly this division between transferred and non-transferred matters does not limit Commonwealth executive power and authority arising under Chapter II of the Constitution, applying Australia wide and not federally restrained – *Johnson v Kent* (1975) 132 CLR 164.

49 "*Transferred*" is not the equivalent of an abdication of those powers and authority. Legally it seems the Commonwealth can take all or any of them back again by a later amendment of the *Self-Government Regulations*. The Commonwealth cannot abdicate any of its executive powers under Chapter II of the Constitution.

50 Sections 7 (already discussed, and not including the power of disallowance in section 9), 32 (3), 33 (1), 35 of course, 69 (5) and 71 (2).

51 But note the different powers of the Administrator and consequences thereof in relation to the power of assent to proposed laws under section 7 of the *Self-Government Act*, discussed above.

Administrator received the appropriate advice thereon[52]. In the case of a transferred matter he/she should have first received the advice thereon of his/her Territory Ministers, including through the Territory Executive Council[53]. In the case of a non-transferred matter, he/she should have first sought and received the instructions from the relevant Commonwealth Minister[54].

Whether or not the Administrator is the representative of the Crown in and for the Territory[55], it is clear that he/she can exercise the prerogatives of the Crown[56] in the Territory in so far as they involve the government of the Territory[57]. Again, in that exercise, the differentiation between transferred and non-transferred matters will still apply, if only for the purpose of determining from whom the Administrator should seek advice or instructions.

The Administrator also has a variety of powers and functions under the *Self-Government Act* itself, not reliant on any Territory legislation for example, the issuing of writs for elections for the Legislative Assembly[58] and the appointment of Territory Ministers[59]. No reference is made in these provisions as to whether they deal with transferred matters or not. They do not appear to be covered in the list of transferred matters in the *Self-Government Regulations*. It would follow that under section 32 (3) of the *Self-Government Act*, the Administrator is subject to any instructions of the Commonwealth

52 This gives rise to the question of what is the legal result of the Administrator's action if he/she acts on the wrong advice or instructions – that is, if a transferred matter is mistaken for a non-transferred matter, or vice versa. If this occurs in the context of section 7 of the *Self-Government Act*, it appears to be a matter going to the validity of the Administrator's action and justiciable. If it is some other matter arising merely under Part IV of the *Self-Government Act* then the answer may not be so clear. It may well amount to a breach of convention, but query would it result in invalidity? Fortunately, because of the broad nature of the grant of executive authority to Territory Ministers, and given the fact that the vast majority of governmental decisions are now made at ministerial level or by government officials, the question would rarely arise. The writer is unaware of any past examples. The issue was apparently not raised in *Waters v Acting Administrator of the NT*, it being assumed that the appointment of Queen's Counsel was a transferred matter.

53 *Self-Government Act*, section 33 (1). The writer takes the view that this provision is not exhaustive, and that in accordance with convention an individual Territory Minister may also be able to advise the Administrator in a transferred matter. But under the *Interpretation Act (NT)* section 34, where the Administrator is exercising a power or function under Territory legislation, then except in specific cases mentioned in that section, it must be with the advice of the Executive Council. In other cases, for example under the Royal prerogative, and on the basis of the controversial doctrine of the reserve powers of the Crown, it might be argued that the Administrator could legally exercise his/her powers in such a matter without any Territory ministerial or executive council advice. The scope of this capacity in the Territory is untested, and may be unlikely to arise for judicial testing.

54 *Self-Government Act*, section 32 (3). It appears from this subsection that there is no obligation on that Commonwealth Minister to give such instructions. But if instructions are given then they should be followed by the Administrator. It is inconceivable that an Administrator would not follow them.

55 See discussion in Nicholson, op. cit, *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212; *Waters v Acting Administrator of the NT*.

56 The writer takes the broader view as to the content of the Royal prerogative in this context, extending to all non-statutory powers and functions relevant to Territory Government, and not just those powers and functions unique to the person of the Crown.

57 *Self-Government Act*, section 31. Thus, for example, the Administrator exercised the prerogative of granting a pardon in the *Chamberlain case* on the advice of his Territory Ministers.

58 Section 15.

59 Section 36.

Minister in such matters. In practice, it may be uncommon for such instructions to be given; rather, the Administrator may act on the unofficial advice of the Chief Minister in such matters[60].

In the case of any governmental executive powers or authority exercised by the Territory Executive Council or by Territory Ministers, it seems this has to occur within the confines of the grant of executive authority to Territory Ministers under section 35 of the *Self-Government Act*[61]. Any such action outside of those confines is liable to be struck down by the courts as being beyond Territory executive power and authority[62], particularly if it occurs in the context of the exercise of a statutory power or function. It would seem to follow as a matter of logic that this also extends to Territory public bodies and officials falling within the 'umbrella' of the new Territory body politic and its public administration where they exercise any aspect of Territory executive powers and authority, particularly if this occurs in the context of the exercise of a statutory power or function. Again, the very broad nature of the grant of Territory executive authority will mean that any question of exceeding that authority will rarely arise. *Justiciability* in such cases will of course also depend upon the normal rules of judicial review and other principles of administrative law apart from any question of whether there is a transferred matter or not.

It follows that it is necessary to examine the actual wording of the *Self-Government Regulations* to assess their scope and effect in so far as they define what are transferred matters. Regulation 4 is the relevant provision. Sub regulation (1) thereof set out a long list of specific matters in respect of which Territory Ministers have executive authority under section 35[63],

60 It does not necessarily follow that such decisions are justiciable in the courts.

61 Arguably section 35, as exercised in the making of the *Self-Government Regulations*, at present provides an exhaustive code of the executive authority of Territory Ministers, although such executive authority can no doubt be conferred by other Commonwealth Acts. In that case, it will presumably be covered by Regulation 4 (5)(b) of the *Self-Government Regulations* in any event, see below. It can't be conferred by a Territory Act.

62 This will normally only arise under specific Territory legislation which confers powers or functions on Territory Ministers, or as incidental thereto. However it can arise in other cases, for example, in advising the Administrator in the exercise of the Royal prerogative – see *Self-Government Act*, section 31.

63 Specific "*matters*" within Regulation 4 (1) that have been judicially considered include the following:
"The legal profession" – Waters v Acting Administrator of the NT
"*Maintenance of law and order and the administration of justice*" – *Wake and Gondarra v Northern Territory*; *Wynbyne v Marshall* per Mildren J
"*Land, public and private (including internal waters)" – Jango v Northern Territory* [2006] FCA 318 at paragraph 712
"Private law" – Wake and Gondarra v Northern Territory
"Civil liberties" – Wake and Gondarra v Northern Territory
"Public health" – Wake and Gondarra v Northern Territory; Northern Territory v Skywest Airlines Pty Ltd (1987) 48 NTR 20, per O'Leary CJ at 39.
"Child, family and social welfare" – Wake and Gondarra v Northern Territory
"Community, cultural and ethnic affairs" – Wake and Gondarra v Northern Territory
"Mining and minerals…" - Newcrest Mining (WA) Ltd v Commonwealth; Margarula v Minister for Resources and Energy; Administration of Norfolk Island v Pitcher
"Surface transport regulation (including….roads and bridges)" – Jango v Northern Territory
"Public works" – Administration of Norfolk Island v Pitcher; Jango v Northern Territory
"Inquiries and administrative reviews" - Administration of Norfolk Island v Pitcher
"Industry (including ……building and manufacturing)" - Administration of Norfolk Island v Pitcher

but subject to the reserved Commonwealth matters in sub regulation (2)[64] and also to the reading down provision in sub regulation (4)[65]. It is supplemented by sub regulation (5). Sub regulations (1) and (5) are both expressed to be "*in respect of*" the specified matters, thus echoing the wording of section 35. These latter words are capable of having a widening effect, and support the view that the list of matters is not to be read narrowly or pedantically. In this regard, Black CJ stated recently in *Administration of Norfolk Island v Pitcher*[66], in the context of provisions in the *Norfolk Island Act 1979* similar to section 7 of the *Self-Government Act*:

> *…there is no warrant for a narrow view to be taken of the concept of a proposed law which makes provision "only for or in relation to matters specified in Schedule 2" (s 21(5)) or "only for or in relation to matters specified in Schedule 2 or 3 or both". S 21 (2) (a). When viewed in relation to Schedule 2 matters, the object of the provision is not to narrow the plenary powers already conferred upon the Legislative Assembly or the responsibilities of the Executive Council of Norfolk Island, by imposing a requirement for external assent. Rather, the evident object is to guard against disturbance of the balance that the NI Act seeks to make between the exercise of the plenary powers of the self-governing Territory and the retention of Commonwealth oversight and authority in relation to matters considered by the Parliament to be of Commonwealth concern.*
>
> *Consistently with the objects of the Norfolk Island Act it cannot have been intended that the naturally broad scope of the matters set out in Schedule 2 was to be effectively narrowed, and thus proposed laws taken out of the domain of Norfolk Island authority and responsibility, by an expanded notion of what "makes provision only for or in relation to" a matter.*

Nicholson and Edmonds JJ in the same case made similar remarks, going into some detail on the broad meaning of "*in relation to*". They discounted the view that the word "*only*" in section 21 (2) (a) of the *Norfolk Island Act*, equivalent to the same word in section 7 (2)(a) of the *Self-Government Act*, had a limiting effect on the scope of transferred matters, citing *Pritchard v Racecage Pty Ltd* [67] and other cases.

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64 The reservation to the Commonwealth of executive authority as to or relating to the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953 (Cth)* and rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. Note in this respect paragraph (g) of sub regulation (5), discussed below.

65 The reading down provision, having regard to the effect of the *Self-Government Regulations* generally and other Commonwealth legislation, so as to preserve the scope of Territory executive authority in so far as not inconsistent therewith.

66 (2005) 144 FCR 572.

67 (1997) 72 FCR 203.

The words "*in relation to*" in this context must have, on this reasoning, a similar meaning to the words "*in respect of*" as used in and under section 35 of the *Self-Government Act*. The latter words are said to have the widest possible meaning[68]. They parallel the words used in section 51 of the Constitution, which have also been interpreted as having a widening meaning.

Sub regulation (3) of Regulation 4 seeks to ensure that any one head of Territory executive authority in sub regulation (1) does not derogate from, or to affect the generality of, any other head in sub regulation (1)[69], but subject to sub regulations (2) and (4).

Sub regulation (5) of Regulation 4 grants additional heads of Territory executive authority "*in respect of*" the matters listed in it. It is comprised of eight paragraphs. Unlike sub regulation (1), sub regulation (5) is not limited by the Commonwealth reservations in sub regulation (2) in the case of a matter that also comes within sub regulation (1)[70].

Paragraph (a) of sub regulation (5) picks up executive authority arising under Territory legislation enacted under sections 12[71], 13[72] and Part V[73] of the *Self-Government Act*.

Paragraph (b) of sub regulation (5) has two aspects: the first picks up matters in respect of powers, etc of the Administrator, a Territory Minister or officer of the Territory under any Commonwealth Act in force in the Territory other than the *Self-Government Act*. This is extended by paragraph (c) to subordinate action taken under a Territory enactment for the purposes of, and to the extent provided by, that other Commonwealth Act.

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68 *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 per Mann CJ; cited with approval in *Powers v Maher* (1959) 103 CLR 478 per Kitto J at 485; *State Government Insurance Office (Q) v Crittenden* (1966) 117 CLR 412 per Taylor J at 416; *Workers Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 per Wilson and Gaudron JJ at 646-647, Deane, Dawson and Toohey JJ at 653-654. See also *Cunard's Trustees v Inland Revenue Commissioners* (1946) 174 LT 133 at 136; *L Vogel and Son Pty Ltd v Anderson* (1968) 120 CLR 157 per Kitto J at 162.

69 A point made by Black CJ in *Administration of Norfolk Island v Pitcher*.

70 Sub regulation (6) of Regulation 4. If a matter does not also come within sub regulation (1) then it is unclear if a matter under sub regulation (5) is entirely free of the Commonwealth reservations in sub regulation (2). It certainly is free if under in paragraph (g), discussed below, whereas it is not if under paragraph (d), see also below. The writer tends to the view that paragraphs (a), (b), (c), (e), (f), (g) and (h) of sub regulation (5) are entirely free of Commonwealth reservations under sub regulation (2).

71 Territory legislation as to powers, privileges and immunities of the Legislative Assembly.

72 Territory legislation as to membership and election of the Legislative Assembly.

73 Territory legislation as to the finances of the self-governing Territory body politic and the receipt, expenditure and control thereof.

The second aspect of paragraph (b) picks up matters in respect of powers, etc of the Administrator, a Territory Minister or an officer of the Territory by or under a Territory "*enactment*"[74] or an agreement or arrangement between the Territory on the one hand and the Commonwealth or a State or States on the other under paragraph (f)[75]. There are a number of such inter-governmental agreements or arrangements, some of which are lodged for public inspection under Regulation 4A. They have been successfully relied upon in some cases to confer in themselves Territory executive authority[76].

Paragraph (d) picks up the making of all subordinate Territory instruments under Territory enactments, other than those in paragraphs (c) or (f), providing they don't make provision for or in relation to a reserved Commonwealth matter under Sub regulation (2). Paragraph (e) extends this to matters under such instruments.

Paragraph (g) includes as a transferred matter Territory enactments making provision in general terms for matters under sub regulation (1) and only incidentally extending to reserved Commonwealth matters under sub regulation (2). In addition, paragraph (h) provides a general incidental matter attaching to any other head of Territory executive authority[77].

The scope of these provisions is clearly very broad in terms of Territory executive authority despite their complexity. This very fact means challenges to Territory executive action based on an alleged lack of executive authority are going to be infrequent. The challenges brought so far have not succeeded on this ground. As a small note of caution, the Territory's executive authority is specified by Commonwealth regulation rather than in an Act, so care needs to be taken when contemplating litigation based on matters of Territory executive authority to ensure there are no recent amendments to the *Self-Government Regulations*[78].

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74 That is, a law passed by the Territory Legislative Assembly or by its predecessor the Legislative Council – see *Self-Government Act*, section 4 (1), definition of "*enactment*". I do not read this provision as conferring Territory executive authority generally under any Territory enactment, as this would in large part supersede the specific grants of executive authority in sub regulation (1). Rather, it seems to me that the "*enactment*" referred to in paragraph (b) is the same as in paragraph (f), namely, an enactment to give effect to any such inter-governmental agreement or arrangement.

75 Note that paragraph (f) picks up the negotiation of, or the giving effect to, any such inter-governmental agreement or arrangement.

76 *Margarula v Minister for Resources and Energy*; *Newcrest Mining (WA) Ltd v Commonwealth*.

77 This incidental power was invoked by the Commonwealth to uphold the ability of the Territory to hold a Statehood Constitutional Convention in 1998 without supporting Territory legislation – see Heatley and McNab, "The Northern Territory Statehood Convention 1998", (1998) 9 Pub L Rev, 155 at 157 and footnote 22. See also "Territory Financial Considerations", page 26.

78 The most recent amendment to the *Self-Government Regulations* is Statutory Rules No 287 of 1998 as to surface transport regulation to include railway-related matters as a transferred matter.

Territory Judicial Power and Jurisdiction

At the time of the granting of Self-government to the Territory in 1978, there were several Territory courts in existence, notably the Supreme Court of the Northern Territory under the *Northern Territory Supreme Court Act* of the Commonwealth[79], the Local Court[80] and the Court of Summary Jurisdiction[81], the latter two courts being constituted by a Territory Magistrate or Justices of the Peace under Territory legislation. The new Ministers of the Territory, while having been expressly granted initial executive authority with respect to "*maintenance of law and order and the administration of justice (including legal aid and correctional services)*," were expressly denied executive authority with respect to "*the legal profession, the sheriff or juries*"[82]. In addition, they had no executive authority with respect to the Territory Supreme Court as it was established under Commonwealth legislation. This exclusion was partly for reasons of concern in the relevant department in Canberra about transferring responsibility for the Supreme Court, plus control of legal practitioners, to the newly self-governing Territory, and partly because the Commonwealth was in the process of building a new Supreme Court building in Alice Springs at the time through its contractors.

But following later representations to the Commonwealth, it was subsequently decided to transfer responsibility for legal practitioners and for all Territory courts to the self-governing Territory. This was affected by the repeal of the *Northern Territory Supreme Court Act,* by new Commonwealth legislation[83], by the simultaneous enactment by the Legislative Assembly of the *Supreme Court Act*[84], by amendments to the *Self-Government Regulations* by Statutory Rule No 205 of 1979 and other actions [85]. The latter amendments added the matters of *"courts (including the procedures of the courts and the remuneration of the judiciary but not including the construction, at Alice Springs, of buildings for use by superior courts)"* and "*the legal profession*"[86] to the executive authority of Territory Ministers.

Effective on 1 October 1979, the Supreme Court became the superior court of the self-governing Territory with a new Chief Justice appointed by the Administrator on the advice of Territory Executive Council on that day, the appointee being Sir William Forster CJ[87]. However the Court was in effect a continuation of the previous Territory Supreme Court[88].

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79 *Commonwealth Act No 11* of 1961. Prior to that, the Supreme Court was established under Territory ordinance. Note that the third recital to the *Self-Government Act* states:
"AND WHEREAS the Parliament has made provision for the government of the Northern Territory by the Northern Territory (Administration) Act 1910 and for a Supreme Court of the Northern Territory of Australia by the Northern Territory Supreme Court Act 1961;".

80 *Local Court Act (NT)*.

81 *Justices Act (NT)*.

82 *Self-Government Regulations*, Regulation 4 (2)(d).

83 See footnote 14 above. Note also the amendment to the *Judiciary Act* at that time, discussed below.

84 Ibid.

85 Heatley and Nicholson, op. cit, Chapter 29.

86 At the same time, regulation 4 (2) (d) was deleted.

87 Heatley and Nicholson, op. cit., 348. Prior to this the office was called "*Chief Judge*".

88 *Supreme Court Act*, sections 3-8.

At the time of this transfer, an appeal from a decision of a single judge of the Supreme Court lay to the new Federal Court of Australia under the *Federal Court of Australia Act* 1976 (Cth). This was changed in 1986 when the Territory Court of Appeal was brought into existence under the *Supreme Court Act*[89]. There is in turn a right of appeal to the High Court from the Territory Supreme Court by special leave of the High Court[90]. It seems that even though there is no provision in section 73 of the Constitution for such a further appeal to the High Court[91], as it is a territory court established under section 122 of the Constitution and not a federal court[92], it lies outside of section 73 and the appeal is constitutionally valid[93].

Nor can there be any constitutional objection to the fact that the Territory Supreme Court is established by the legislation of a self-governing Territory legislature and not directly by the Commonwealth Parliament under and in accordance with sections 71 and 72 of the Constitution. This result flows whether or not particular High Court justices fully support the dualist approach to Territory courts and their jurisdiction outside of Chapter III of the Constitution[94] or not.

89 Part III of the *Supreme Court Act*. See also Criminal Code (NT), Part X Division 2 as to the Court of Criminal Appeal. *The Federal Court of Australia Act* was amended at the same time.

90 *Judiciary Act*, section 35 AA, as added in 1985. Normally such an appeal will be from the Territory Court of Appeal or the Court of Criminal Appeal and not from a single Judge of the Supreme Court. An application to appeal to the High Court from a single Supreme Court Judge was refused by the High Court in *Northern Territory v Mengel* (1995) 129 ALR 1. Note that under section 40 of the *Judiciary Act*, if a cause or part of a cause arising under the Constitution or involving its interpretation is pending in a court of the Territory, the High Court must, upon the application of the Attorney-General of the Commonwealth, a State, the ACT or the Northern Territory, order its removal into the High Court.

91 Unless that territory court can and is exercising "*federal jurisdiction*", which on the predominant High Court view is not possible. It is beyond the scope of this lecture to enter upon the debate as to the extent to which territory and federal courts exercise federal jurisdiction in territories.

92 See discussion below. Federal courts must be established by the Commonwealth Parliament under section 71 of the Constitution and their judges must be appointed in accordance with section 72 thereof.

93 *R v Bernasconi* (1915) 19 CLR 629; *Mainka v The Custodian of Expropriated Property* (1924) 34 CLR 297; *Porter v R* (1926) 37 CLR 432 (Knox CJ and Gavan Duffy J dissenting); Porter being cited with approval in this respect in *Spratt v Hermes* (1965) 114 CLR 226 at 239-240, 256-257, 260-261, 266, 275-276, 279; *Capital TV and Appliances Pty Limited v Falconer* (1971) 125 CLR 591 (holding that there is a right of appeal from a territory court to the High Court but only if conferred by legislation – it is not constitutionally guaranteed); *Kruger v Commonwealth* (1997) 190 CLR 1 per Gummow J at 168-176; *Gould v Brown* (1998) 193 CLR 346 per Brennan CJ and Toohey J at 380, Gummow J at 460, but note McHugh J at 426-427; *Re Wakim; Ex Pt Mc Nally*; *Spinks v Prentice*, per Gummow CJ and Hayne J at 594-596; *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*, per Gaudron J at 338-341, Gummow and Hayne JJ at 348-349 , but see Kirby J at 370-383; *North Australian Aboriginal Legal Aid Service v Bradley*.

94 See, for example, the dissenting judgment of Kirby J in *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*. There are now a number of decisions of the High Court supporting the view that there is power by territory legislation to validly establish territory courts to exercise original jurisdiction under section 122 of the Constitution outside of that conferred by section 75 of the Constitution read with section 77, or by the Commonwealth Parliament under section 76 of the Constitution read with section 77. This power clearly extends to the legislature of self-governing territory. This must be so, otherwise it would not be possible to have a comprehensive judicial system for a territory that had its own legislature and a grant of self-governing powers. The majority in the last-mentioned case, which included McHugh J, has now firmly established the principle, if it wasn't already clear as a result of *Spratt v Hermes*, that the judges of territory courts do not have to be appointed and hold office in accordance with section 72 of the Constitution. See also *Fittock v R* (2003) 217 CLR 508; *North Australian Aboriginal Legal Aid Service v Bradley*. It is beyond the scope of this lecture to enter into the detail of the constitutional debate about the dualist view as to territories and Chapter III of the Constitution and its critics.

The grant of plenary legislative power to the Legislative Assembly of the Territory, discussed above, is clearly wide enough to enact Territory legislation for this purpose, and to deal with all matters incidental thereto, such as matters of the jurisdiction of the Court[95], the regulation of the Territory legal profession, Court officers, such as the sheriff, and juries. In the case of the Territory Supreme Court this is confirmed by various items of Commonwealth legislation[96], but of course subject to the superior force of any such legislation.

It must therefore follow that it is open for the legislation of the self-governing Territory to also validly establish and confer jurisdiction on other Territory courts by its own Territory legislation. This extends to the conferring by Territory legislation of rights of appeal from inferior Territory courts to the Territory Supreme Court[97], and also to the conferring of powers of judicial review on that Supreme Court over inferior Territory courts and their decisions[98].

This legislative grant of power is wide enough to enable special arrangements to be made for the remuneration of particular Territory judicial officers and for the term of their appointment and their removal[99], for acting Territory judicial appointments[100], for the conferral, transfer or cross-vesting of Territory jurisdiction on or to State and federal courts[101], for the exercise by the Territory Supreme Court of State or federal jurisdiction under reciprocal cross-vesting legislation[102], for the grant by the Territory Supreme Court of mandamus, prohibition or an injunction against an officer of the Commonwealth in a proceeding arising in, or under a law in force in, the Territory[103], for the creation and imposition by Territory courts of mandatory sentencing provisions for certain offences[104], and no doubt dealing with a host of other orders, remedies, penalties or other actions, all having some minimal connection to the Territory.

95 Subject to any provisions in Commonwealth legislation.

96 For example, Part IXA of the *Judiciary Act*.

97 For example, see section 19 of the *Local Courts Act (NT)*. Note *Supreme Court Act*, Section 14 (1)(e).

98 This power of judicial review can extend, in accordance with the Supreme Court Rules and applicable principles of administrative law, to the review of decisions (including in some cases of recommendations) of Territory tribunals and other bodies and certain public officers.

99 *North Australian Aboriginal Legal Aid Service v Bradley*.

100 *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*. The widespread appointment of acting judicial officers is presently the subject of High Court litigation.

101 *Gould v Brown*; Re Wakim; Ex pt McNally; *Spinks v Prentice*; *Bateman Project Engineering Pty Ltd v Pegasus Gold* (2000) 10 NTLR 69; *Scott v Northern Territory* (2005) 15 NTLR 158.

102 *Scott v Northern Territory*, and see the complimentary Commonwealth, State and Northern Territory cross-vesting legislation.

103 *Supreme Court Act (NT)* section 14 (1)(d), and note *Judiciary Act*, section 67C (b) and see *Alcoota Aboriginal Corporation v Gray* [2002] NTSC 48.

104 *Wynbyne v Marshall*.

In the case of the trial of indictable offences in the Territory, including for offences against a law of the Commonwealth, the existing authority supports the view that this can be without a jury[105]. Territory courts and their judges/magistrates may exercise both judicial and non-judicial powers under Territory legislation without infringing the separation of powers doctrine in the Constitution[106], and non-judicial officers may exercise aspects of Territory judicial power[107]. Courts of the Territory clearly have wide jurisdiction in actions involving the self-governing Territory body politic and its officers[108], and there is provision for the Territory Supreme Court to have jurisdiction in actions involving the Commonwealth or an officer of the Commonwealth[109].

In addition to any jurisdiction conferred on Territory courts by Territory legislation, it is clear that jurisdiction can be validly conferred on them by Commonwealth legislation. There are a number of examples of this[110], including on inferior Territory courts. By the same token, Commonwealth legislation may restrict the jurisdiction of territory courts[111]. The High Court can remit matters to a Territory court that has jurisdiction[112], and may remove any cause arising under the Constitution or involving its interpretation from any territory court into the High Court[113].

105 *R v Bernasconi*, deciding that section 80 of the Constitution does not apply in territories, a decision that has never been over-ruled. But this case may yet be overturned, see *Fittock v R*.

106 Nicholson, "Constitutionalism in the Northern Territory and Other Territories", (1992) 3 Pub L Rev 50 at 56, footnote 42, but subject to the application of the principle in *Kable v DPP* (2000) 205 CLR 337 as far as it goes – see also discussion in *North Australian Aboriginal Legal Aid Service v Bradley*. But note J Stellios, "Federal Dimensions to the ACT Human Rights Act" (2005) AIAL Forum No 47, 35.

107 *Kruger v Commonwealth*, per Brennan CJ, Dawson J, McHugh J concurring, Gummow J seeing the necessity of reopening certain past High Court decisions, but note Toohey and Gaudron JJ. In view of the decision in *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*, confirming the view that territory courts are not federal courts and the judges thereof do not have to be appointed in accordance with section 72 of the Constitution, it is difficult now to see how the federal separation of powers doctrine under Chapter III of the Constitution could be applied to territory courts, bodies and officers. To find otherwise would put at risk a whole host of Territory legislation conferring routine non-judicial power on Territory judicial officers, including magistrates, and the setting up of Territory administrative tribunals and other decision-making bodies.

108 As to the Territory Supreme Court. see *Supreme Court Act*, section 14 (1)(a)(ii) and (d). As to other Territory courts, only within the other limits of their jurisdiction. See below as to the ability of the Territory body politic to sue and be sued.

109 *Supreme Court Act*, section 14 (1)(a)(iii) and (d), and note *Judiciary Act*, sections 56, 67B and 67C (b) and (c).

110 Eg: *Environment Protection (Northern Territory Supreme Court) Act 1978 (Cth)*, *Judiciary Act* sections 56, 67B, 67C, 68, *Family Law Act 1975 (Cth)*, *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, etc.

111 Eg: the *Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)* contains some exceptions and limitations on federal jurisdiction that would otherwise be cross-vested into the Territory Supreme Court. A court, including a Territory court, cannot proceed if a proceeding involves a matter arising under the Constitution or involving its interpretation without first giving reasonable notice to the attorneys-general of the Commonwealth, States, the ACT and the Northern Territory – *Judiciary Act*, section 78B.

112 *Judiciary Act*, section 44 and see *Scott v Bowden* [2002] HCA 60.

113 *Judiciary Act*, section 40.

The jurisdiction conferred by the *Supreme Court Act* on the Territory Supreme Court includes, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to South Australia immediately before the surrender of the Territory by that State to the Commonwealth on 1 January 1911[114]. The words *"in relation to the Territory"* have been interpreted broadly, capable of extending to events beyond the geographical limits of the Territory where there is some minimal connection with the Territory. This applies at least within the territorial sea adjoining the Territory[115] and well beyond Territory limits if so authorised by Territory legislation[116], and in either case having that minimal connection[117]. Thus it can extend to the cross-vesting of superior court jurisdiction either way under Territory legislation as already indicated, including by way of the Territory Supreme Court ordering the exhumation of a body buried in another state under cross-vested state jurisdiction[118]. The service of the process of the Territory Supreme Court out of Australia is authorised by Order 7 of the Supreme Court Rules. The extra-territorial operation of Territory legislation is discussed generally below.

Territory Financial Considerations

As a necessary concomitant of the creation of a separate Territory self-governing body politic under the Crown in 1978, it was necessary to provide that body with the necessary financial powers for those aspects of the government of the Territory for which it was responsible. To this end, the fourth preamble to the *Self-Government Act* recites that, as part of conferring Self-government on the Territory, the Parliament considers it desirable:

> *…to give the Territory control over its own Treasury.*

Further, Part V of the *Self-Government Act* as amended, headed "*FINANCE*", inserts a variety of provisions as to the public moneys of the Territory and their receipt, expenditure and control[119], the withdrawal of those public moneys[120], borrowing by the Territory or a Territory authority from the

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114 *Supreme Court Act*, section 14 (1)(b). This is supported by section 67C (c) of the *Judiciary Act*. These provisions pick up a very wide grant of jurisdiction given to the Supreme Court of South Australia as the superior court of that State, including inherent and incidental jurisdiction, at common law or otherwise, and also conferred federal jurisdiction at that time. This provision is taken from a similar provision in the now repealed *Northern Territory Supreme Court Act 1961 (Cth)*. See *Mitchell v Barker* (1918) 24 CLR 365; R v Bull (1974) 131 CLR 203. Prior to 1 January 1911, the Territory was a part of the State of South Australia – see Nicholson, (1985) 59 ALJ 698, op. cit.

115 *R v Bull.*

116 *Traut v Rogers* (1984) 27 NTR 29, potentially extending into the area of a State. Whether such extraterritorial jurisdiction should be exercised may depend upon other factors such as considerations of public policy and forum non conveniens – *Cope Allman (Australia) v Celermajer* [1968] 11 FLR 488.

117 *Cotter v Workman* [1972] 20 FLR 318. Service of Supreme Court process elsewhere in Australia no longer requires any connection with the territory concerned as a result of the *Service and Execution of Process Act 1992 (Cth)* and see *Dawson and ors v Baker and ors* (1994) 120 ACTR 11 per Higgins J.

118 *Scott v Northern Territory*.

119 Section 44 and see definitions in section 43.

120 Section 45.

Commonwealth[121] and the capacity of the Commonwealth Auditor-General to audit the accounts of the Territory[122].

Once again, the parameters of this new Territory responsibility are to be determined by reference to the grant of executive authority to Ministers of the Territory under the *Self-Government Act*[123]. Financial powers are a specific aspect of the executive powers exercised by those Ministers and other Territory officials and institutions.

But there is in fact no specific head of executive authority granted to Ministers of the Territory under section 35 of the *Self-Government Act* and the *Self-Government Regulations* expressly dealing generally with matters of Territory finance. Certain matters are specified in Regulation 4 (1), including certain kinds or remuneration, Territory insurance and banking, taxation and the provision of certain kinds of credit, but none of these matters are wide enough in themselves to cover all aspects of Territory public finance. However the conduct by government in matters of public finance is an essential element of modern government and is necessarily incidental to all other matters within the executive authority of any government. That being so, matters of Territory public finance must be within Territory executive authority under the incidental power in Regulation 4 (5)(h) read with Regulation 4 (1) and (3) of the *Self-Government Regulations*[124].

This is not to say the Territory Government can do whatever it wishes as to Territory public finances; the receipt, expenditure, control and investment of Territory moneys must still take place under and in accordance with Territory legislation[125]. Territory taxation must be imposed by legislation of the Territory legislature in accordance with established constitutional principles. The Territory must comply with any financial requirements imposed on it by or under Commonwealth legislation[126] or otherwise imposed on it by law. But subject thereto, the *Self-Government Act* grants considerable legislative and executive flexibility to the self-governing Territory in the conduct of its financial affairs. The Territory, as a separate body politic under the Crown, has the normal incidents of a distinct legal entity, can acquire, hold and dispose of property[127], can enter into contracts[128], incur legal liabilities and sue and be sued[129].

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121 Section 46.

122 Section 48. In fact this power is not utilised as the Territory Auditor-General now performs this function.

123 Discussed above under the heading "Territory Executive Powers".

124 *Northern Territory v Skywest Airlines Pty Ltd*, per O'Leary CJ at 39, Kearney and Asche JJ concurring.

125 This flows from the wording of Part V of the *Self-Government Act*. In accordance with established constitutional principles, public moneys can only be appropriated by legislation – see *Combet v Commonwealth* [2005] HCA 61, 221 ALR 621.

126 Eg: under the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992* (both Cth).

127 And see *Self-Government Act*, sections 69 and 70, and note the limitation in section 50(1) thereof. Also *Crown Lands Act (NT)* and the *Lands Acquisition Act (NT)*.

128 See *Self-Government Act*, sections 31 and 71, *Contracts Act (NT)* and *Northern Territory v Skywest Airlines Pty Ltd*.

129 See discussion below under the heading "*The self-governing Territory as a Litigant*".

Territory Geographical Limitations

The plenary grant of legislative power in section 6 of the *Self-Government Act* extends, in its terms, to the whole of the Northern Territory[130]. The grant of executive authority to Territory Ministers must also extend to the whole of the Territory, including in the execution and maintenance of Territory laws[131]. And prima facie the jurisdiction of Territory courts must extend likewise.

A grant of plenary legislative powers to an independent legislature of a specific geographic area has been long been interpreted by the courts as carrying an extra-territorial element, including into adjoining waters of the territorial sea[132] and even beyond, providing there is some minimal connection in that legislation with the area concerned[133].

That there is such extraterritorial legislative grant of power in the case of the self-governing Territory and its legislation has been judicially affirmed, capable of operating both offshore and elsewhere in Australia[134]. This is an adjunct to the plenary nature of the grant of legislative powers of the Territory Legislative Assembly as to the peace, order and good government of the Territory, discussed above. It is also an indirect effect of the wide scope of section 122 of the Constitution, which has consistently been interpreted as potentially having an extra-territorial effect, capable of supporting Commonwealth legislation expressed to have effect outside of the limits of the territory concerned where there is a sufficient nexus or connection with the territory in question[135]. The test of that connection would seem to

130 The definition of the geographic area of the Territory derives from the Royal Letters Patent dated 6 July 1863 annexing the Territory to South Australia; see Nicholson, op. cit., 105 and 152. See also *Risk v Northern Territory* (2002) 210 CLR 392.

131 And see *Self-Government Act*, section 31.

132 The territorial boundaries to seaward of the States of Australia and the Territory end at low water mark around the coast, subject to bays and gulfs forming part of the State or Territory and other internal waters, and do not include the territorial sea adjoining thereto – *NSW v Commonwealth* (1975) 135 CLR 337; *Commonwealth v Yarmirr* (2001) 208 CLR 1, and see the *Seas and Submerged Lands Act 1973 (Cth)*.

133 *Croft v Dunphy* [1933] AC 156; *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337; *Pearce v Florenca* (1976) 135 CLR 507 and other cases. This power has now been expressly confirmed, in the case of the Commonwealth by section 3 of the *Statute of Westminster* 1931 (Imp) as adopted by the *Statute of Westminster Adoption Act 1942 (Cth)*, and in the case of the States by section 2 (1) of the *Australia Act 1986*. There is no such express provision in and for the Territory while it remains a territory of the Commonwealth.

134 *Traut v Rogers*; affirmed by Gummow J in *Newcrest Mining (WA) Ltd v Commonwealth*. It is subject of course to any overriding Commonwealth legislation. See also the cross-vesting cases whereby under complimentary Commonwealth, State and Territory legislation the Territory is able to legislatively vest the jurisdiction of the Territory Supreme Court in other superior courts of the Commonwealth and the States, and to enable the Territory Supreme Court to exercise the jurisdiction of those other superior courts, including as to events occurring outside the Territory - *Gould v Brown*; *Re Wakim; Ex pt McNally*; *Spinks v Prentice*; *Scott v Northern Territory*. Service of Supreme Court process beyond territorial borders has always been possible under Court Rules providing there is a sufficient connection with the Territory concerned – *Cotter v Workman*.

135 *Lamshed v Lake*; *Berwick v Gray*; *Attorney-General of WA; Ex rel Ansett v Australian National Airlines Commission*; *Newcrest Mining (WA) Ltd v Commonwealth*; *AMS v AIF* and other cases. These cases affirm the view that when the Commonwealth Parliament legislates for a territory under section 122, it does so as the national Parliament and not as some form of limited local legislature, and can by appropriate wording in the legislation do all things necessary to give effect to that legislation for the territory, including by way of giving the legislation an extra-territorial operation. The scope of this power has recently been tested in the High Court challenge to the Commonwealth's Workplace Choices legislation, in which the Territory intervened. See also Hopper, "Territories and Commonwealth Places: The Constitutional Position", (1999) 73 ALJ 181 at 186 – 189.

be whether the Territory legislation in question displays the necessary nexus or relationship with the subject matter of the power under which it was exercised, namely, whether it is a law "*for the peace, order and good government of the Territory*" in terms of section 6 of the *Self-Government Act*[136]. Given the Commonwealth Parliament has relied on section 122 to grant Self-government to the Territory, and has similarly relied on section 122 to confer wide plenary legislative powers on the Territory Legislative Assembly to make laws for the peace, order and good government of the Territory, it follows that unless it has expressly withheld or otherwise qualified any extra-territorial powers in that grant and conferral or in other Commonwealth legislation, then none should be implied. This power extends both to seaward and into the area of the States of Australia. There is no general reason why the legislation of one Australian jurisdiction can't operate in another Australian jurisdiction[137].

The extra-territorial power of the self-governing Territory and its legislature in waters adjoining and beyond Territory limits has now been confirmed and codified by Commonwealth legislation under the Commonwealth's extremely broad constitutional powers as to matters beyond the limits of Australia. Following the Offshore Constitutional Settlement[138], the Commonwealth Parliament enacted a raft of legislation to divide legislative and other authority offshore between the Commonwealth on the one hand and the States and Territory on the other.

This includes the *Coastal Waters (Northern Territory Powers) Act 1980 (Cth)*[139], which provides that the legislative grant of power in section 6 of the *Self-Government Act* extends to the making of Territory laws within the coastal waters of the Territory[140], and out beyond to the adjacent sea area of the Territory[141], plus the sea-bed and sub-soil and airspace thereof, but in the latter area only for specified purposes, and also Territory fisheries laws in Australian waters under an arrangement to which the Commonwealth and the Territory were parties and which provided for management in accordance with Territory law[142]. Section 7 (b) thereof states this does not derogate from any power, apart from that Act, to make laws for the Territory having extra-territorial effect[143].

136 Compare *Newcrest Mining (WA) Ltd v Commonwealth*, per Gummow J.

137 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

138 Which in turn followed the High Court decision in *NSW v Commonwealth*.

139 See also *Coastal Waters (Northern Territory Title) Act 1980 (Cth)*.

140 That is, the territorial sea of Australia adjacent to the Territory and any sea on the landward side thereof not otherwise within the limits of the Territory. The territorial sea of Australia is currently 12 nautical miles wide, measured from the baselines drawn under the *Seas and Submerged Lands Act*. However the *Coastal Waters (Northern Territory Powers) Act* limits the extension of Territory law-making powers offshore by reference to the "*coastal waters of the Territory*" to 3 nautical miles from those baselines – section 4 (2) of that Act.

141 That is, the adjacent area in respect of the Territory drawn under the *Petroleum (Submerged Lands) Act 1967 (Cth)*.

142 Section 5. See *Fisheries Management Act 1991 (Cth)*; *Fisheries Act* No 58 of 1988 as amended (NT), and see *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* [2001] FCA 98.

143 The use of the word "*laws*" here suggests some recognition of the extra-territorial potential of Territory legislation apart from this Act.

This Commonwealth legislation has been implemented in general terms by an extension of Territory law offshore, other than as to the criminal law, by the *Off-shore Waters (Application of Territory Laws) Act* of the Territory[144].

In the case of criminal laws, the *Crimes at Sea Act 2000* of the Commonwealth picks up the Commonwealth-State-Territory cooperative scheme to apply Territory criminal laws to the inner part of the adjacent sea area of the Territory, and is complimented by the *Crimes at Sea Act* of the Territory[145].

In addition, other Commonwealth legislation confers legislative and other authority on the self-governing Territory in the adjacent sea area in specific matters[146].

The self-governing Territory as a litigant

Once it is accepted that the self-governing Territory has been validly established as a separate body politic under the Crown[147], it must follow from this separate legal existence that it has the normal incidents of such a body politic, including the capacity to be a litigant in its own right in any court of competent jurisdiction[148].

This capacity has now been incorporated into the *Crown Proceedings Act* of the Territory[149]. This enables proceedings to be brought, inter alia, by or against the Territory Crown, in the same way as proceedings between subjects, and subject to the same procedural and substantive law. If brought against the Territory Crown the proceedings should be entitled the "*Northern Territory of Australia*"[150]. The term "*Crown*" is expressed in this Act to include a Territory Minister[151],

144 No 45 of 1985 as amended. This Act was cited in High Court judgments in *Commonwealth v Yarmirr*.

145 No 73 of 2000.

146 For example, *Petroleum (Submerged Lands) Act 1967 (Cth)* – see in particular section 5A (1A) (2) and Schedule 2, sections 11, 11A, 11B, 12 and see *Petroleum (Submerged Lands) Act (NT)*; *Offshore Minerals Act 1994 (Cth)* – see in particular sections 5, 13, 16, 428-434, 436; S*ea Installations Act 1987 (Cth)* – see in particular sections 5, 9, 10, 47-50. Also A*boriginal Land Rights (Northern Territory) Act 1976 (Cth)*, section 73 (1)(d) and see *Aboriginal Land Act No 106 of 1978* as amended (NT) Part III; note *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust*; *Gumana v Northern Territory* (2005) 141 FCR 457, 218 ALR 292.

147 See discussion above under the heading "*Introduction*". This is notwithstanding the fact that no such capacity to litigate is expressed in the *Self-Government Act*. It is necessarily implied, and note in this regard section 72 of the latter Act and sections 67B and 67C (a) of the *Judiciary Act*.

148 *Northern Territory v Skywest Airlines Pty Ltd* (1987) 48 NTR 20.

149 No 51 of 1993, replacing the *Claims By and Against the Government Act* of 1978. See *Munday v ACT* [1998] ACTSC 62.

150 Section 5.

151 *Interpretation Act (NT)*, section 18, definition of "*minister*".

an instrumentality or agency of that Crown or a "*prescribed person*"[152]. The power to litigate is subject to the immunities of the Crown[153] and any right to confidentiality in the public interest[154]. Injunctive relief, other than a mandatory injunction, is expressly made available against the Crown[155]. There are restrictions on the enforcement of judgments against the Crown[156], but the Crown may enforce its judgments in the same way as between subjects[157]. There are special requirements for service on the Crown and for endorsements on the proceedings[158], and there are restrictions on the service on subpoenas and other processes on Territory Ministers for their appearance[159]. The Attorney-General for the Territory has a right of intervention in certain proceedings[160]. A court may order service of a notice on the Territory Attorney-General if certain issues arise and may adjourn the case for that purpose[161].

Conclusion

The grant of self-government to the Northern Territory in all its aspects is clearly very broad. The prospects of successfully litigating issues based on alleged constitutional/legal deficiencies or defects in the Territory self-governing arrangements[162] are, in general terms, not very promising.

152 Section 4. There are no current regulations prescribing any person – see the *Crown Proceedings Regulations* No 48 of 1993. It is clear that in some cases judicial relief may also be sought against the Administrator of the Territory, but it is not appropriate to join the Administrator in his/her personal capacity, and in some cases certain judicial relief should not be sought against the Administrator in his/her executive capacity. There is also the problem posed by the fact that in the self-governing Territory the Administrator in his/her executive capacity wears two hats, discussed above. It is both proper and sufficient, in actions against the Territory, to join the Territory Attorney-General as representing the Territory Crown – *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 per Wilson J at 404. It may also be appropriate, depending on the alleged facts, to join some other Territory Minister with executive responsibility in the matter sought to be litigated. Such responsibility is to be determined by the appropriate Administrative Arrangements Order made under section 35 of the *Interpretation Act (NT)*. Servants and agents of the Crown can usually be joined individually in their official capacity and/or by their principal.

153 *Crown Proceedings Act*, section 6.

154 Ibid, section 9.

155 Ibid, section 8.

156 Ibid, section 11 and note the *Judiciary Act*, section 67E.

157 Ibid, section 12.

158 Note the Territory *Supreme Court Rules*, Rule 6.04, providing for service, in the case of the Territory or the Crown in right of the Territory, on the Territory Attorney-General or on the Solicitor for the Northern Territory.

159 *Crown Proceedings Act*, sections 13 and 14.

160 Ibid, section 17.

161 Ibid, section 18 and see section 78B of the *Judiciary Act* and the Territory *Supreme Court Rules*, Order 19.

162 Taking into account not only the *Self-Government Act* and Regulations, but all applicable Commonwealth legislation as well as the Constitution.

CHAPTER 2

Sources of Law in the Northern Territory 2007

The aim of this lecture is to examine the sources of law in the Northern Territory ("NT") in so far as those sources give rise to law recognised as such by legal practitioners and members of the NT society generally. This is done on the premise that it is essential for legal practitioners to have a sound grasp of the law of the jurisdiction in which they practice and the legal sources of that law.

Terminology

The word "*source*", in the context of the phrase "*source of law*", is not a term of precise meaning. On its face, the word "*source*" suggests a different meaning from that of the word *"law*". That is, it is something from that which the law is derived. All forms of law have some historical origin, which might be described as a *"source*". Any dictionary meaning would probably relate "*source*" to words like "*origin*" or to "*fountain-head*" or even "*support*". Thus at one extreme, the word "*source"* may be used to refer to some causal factor clearly quite different from the "*law*" itself. This may be some past custom which could not be said to be a form of law, some public policy decision, some ethical rule or even some religious teaching[163]. For convenience, these may be called *"informal"* sources of law. I do not propose to consider such examples in this lecture.

And yet it may be possible to find examples where the terms "*source*" and *"law",* used in connection with each other, have an interchangeable meaning. One form of law is the source of another form of law. For convenience these can be called the "*formal*" sources of law.

Thus it can be said that international law, in so far as it is recognised as a genuine system of law, is a source of domestic Territory law[164]. While it is increasingly apparent that international law is impacting on contemporary national domestic law, I do not propose to consider this complicated interaction in any detail in this lecture.

163 In one sense religious teachings are a form of law. Thus principles of Christianity as taught by the Anglican Church were treated as part of English law up until the 19th Century. But in today's pluralist society, religious teachings per se are no longer regarded as part of the law of the land.

164 Mason, "International Law as a Source of Domestic Law", in Opeskin and Rothwell (Eds.) International Law and Australian Federalism, (1997) 210 at page 222. . In most cases international law does not automatically become part of domestic law but must be implemented by domestic action. It can, however, have an interpretive effect on domestic law in some cases. This is beyond the scope of this lecture.

On the other hand, the special position of Aboriginal customary law, and whether and in what circumstances that is a source of Territory law, is particularly relevant in the Territory context and is dealt with later[165].

Given the dominant nature of the Australian domestic law and legal system, as originally derived from the British legal inheritance, these last two examples can be seen as being illustrative of a type of law inhabiting a different legal realm and jurisdiction which have become a source of "*law*" in the dominant Australian domestic legal context.

More immediately, it could be said that a primary formal source of Territory law is to be found in the Commonwealth Constitution, and in particular in section 122 thereof, providing as the section does wide and exclusive[166] Commonwealth legislative power over its territories. Given the entrenched domestic legal nature of this Constitution and its status at the pinnacle of Australian domestic law, one is taken back to a concept akin to some kind of grundnorm underlying the notion of domestic law in Australia[167]. Thus in one sense, all NT law, apart from any subsisting Aboriginal customary law not yet been made a part of, or recognised by, the common law or legislation[168], is sourced in Australian constitutional law. The very existence of the Territory as a legal and political entity with its own system of law now depends upon the Constitution and action taken pursuant to it.

But to understand the full constitutional position relevant to formal sources of law in the Territory, it is necessary to go back even earlier to the domestic legal effect of European settlement in Australia, and its British legal inheritance. I will deal with this later under historical constitutional considerations.

One domestic law may be a formal source of another domestic law, both laws being from the same jurisdiction. Thus in one sense a statute which empowers the making of subordinate legislation can be said to be a source of that subordinate legislation. A common law rule[169] codified by statute can be said to be the source of that statute. Taken one step further, there is some debate as to whether domestic statutory law may be a source of law in the judicial shaping of the common law[170]. This fine point is not examined in this lecture.

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165 Note that the phrase "*source of law*" was used in the Final Draft Constitution for the NT in relation to Aboriginal customary law – Foundations for a Common Future, the Report of the NT Legislative Assembly Sessional Committee on Constitutional Development, November 1996, Vol 1, clause 2.1.1, pages 8 -73. See also NT Law Reform Committee, Report on Aboriginal Customary Law (2003), Recommendation 11.

166 Read with section 111 of the Constitution.

167 See below.

168 See below.

169 By the common law in this context is meant the common law of Australia, and which for convenience is taken to include the law of equity in so far as it is in operation in Australia. As a source of law it is really the law that has been created by judicial precedent over time, firstly in England, and now in Australia.

170 *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49.

In between the formal sources of law and the informal sources of law is what has been described as the quasi-formal sources of law. These can include constitutional conventions, generally being of weak strength in the context of NT Self-Government[171], administrative quasi-legislation, codes of practice (including professional codes of practice), and government circulars, directives and benchmarks[172].

In general, the word "*source*" is used in this chapter in the formal sense of a source that is itself of a legal nature, usually described itself as a "*law*", and having some causal connection to, although not necessarily identical with, the "*law*" or class of "*laws*" being considered as being sourced in the former.

For present purposes, the word "*law*" seems a little easier to define. In this context, the word is used in the primary sense of that which would be recognised by legal practitioners in the Territory and the relevant administrative and judicial institutions of the dominant legal system as being the law in force for the time being of the Territory and capable of being enforced as such. The enforcement of that law will normally take place through Territory judicial and other institutions, or through national judicial and other institutions having jurisdiction in the Territory or over Territory matters. Ultimately it is the High Court in the Australian legal system that may determine what is the law of the Territory in this primary sense, given that Court's vast original and appellate jurisdiction as the ultimate domestic court of the land. The High Court, in its judicial opinions, does more than simply express an opinion as to, or to declare, what is already the law of the Territory; it determines, in appropriate cases coming before it, the actual law relevant to the particular case[173]. But the High Court may not be called upon, nor may it need, to determine all the sources of that law[174]. It is only concerned with the determination of the law of the dominant legal system in Australia.

This view of law is a traditional, positivist notion of law, used for convenience in this lecture to describe the law of the dominant legal system without getting into a jurisprudential debate over the nature of law.

Matters for Consideration

Of course this lecture will be looking at the different classes of law in the NT and their sources, but the fact there are different classes of law gives rise to another consideration: the question must be addressed as to whether those different classes of laws occupy different levels of importance and priority in the legal system. If they do, then there will be a hierarchy of laws within the one jurisdiction.

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171 As recent Commonwealth intrusions into NT transferred matters under the Self-Government arrangements have shown.

172 For a good summary of formal, informal and quasi-formal sources of law in another context, see White and Willcock, The Scottish Legal System, (3rd Ed., Lexis Nexis, 2003), Chapter 4.

173 Thus the ratio of a High Court decision is more than just a judicial opinion. It is a determination of both the sources of the law in question and that law itself, at least until that ratio is overturned in a later High Court case. See *Jack O'Toole v Charles David Pty Limited* (1991) 171 CLR 232 at pages 245-246.

174 Such as Aboriginal customary law, except in so far as that law has been recognised by, or become part of, the law of that dominant legal system, see below.

Clearly legal practitioners need to have not only a good knowledge of the laws and its sources, but the hierarchy within and among those laws. Associated with this must be a good knowledge of the methodology for determining conflicts or inconsistencies among those different classes of laws in that hierarchy. This is very important in the federal system which applies in Australia. It is even more important where the self-governing NT, with its own system of laws, occupies a subsidiary constitutional position outside that federal structure. This Territory self-governing position is clearly in a constitutionally inferior position to that of the component states of the federation under the Constitution.

Thus much turns on the special constitutional position of the Territory. A good place to begin this consideration of NT sources of law is therefore to be found in the constitutional basis of Territory law.

Historical Considerations of a Constitutional Nature

It is now widely accepted that prior to European settlement of Australia and its annexation by the Crown in right of the United Kingdom, the landmass of Australia was occupied by indigenous Aboriginal peoples with their own systems of laws[175]. The continuing relevance of those Aboriginal laws as a source of Territory law will be considered under a later heading.

The constitutional position from a domestic legal perspective clearly changed upon the annexation of the Australian landmass by the Crown in the 18th Century. New sources of law thereupon came into operation.

In relation to the part of Australia which became the NT, the initial Crown annexation only extended from the east coast of Australia to the 135th degree of longitude[176], thus encompassing only part of the land now in the Territory. Thus part of the area which was to become the Territory became part of the original colony of New South Wales. This area was subsequently extended westwards to the 129th degree of longitude by Royal Letters Patent dated 16 July 1825, thus encompassing all of what is now the Territory. Out of this was carved the Province of South Australia up to the 26th degree of south latitude by Royal Letters Patent dated 19 February 1836.

For a short period the area of the Territory was included in the separate Colony of North Australia in 1846, but this was later revoked in the same year[177].

In 1859 the Colony of Queensland was established, and the area of which Colony was subsequently extended westwards up to the 138th degree of longitude by Royal Letters Patent dated 13 March 1862.

175 Eg: *Milirrpum v Nabalco Pty Ltd* [1970] 17 FLR 141 per Blackburn J at pages 265 – 268 in relation to the north-east corner of what is now the Territory. See discussion below.

176 Royal Commissions to Governor Phillip dated 12 October 1786 and 2 April 1787.

177 Gallop J in *Rogers v Squire* (1978) 23 ALR 111 at page 117 said that New South Wales laws revived in the short lived Colony once the Colony was revoked.

This left the present area of the Territory as a discreet area, physically separate from but still technically part of New South Wales. Following extensive negotiations, the area of the Territory was annexed to South Australia by Letters Patent dated 6 July 1863. The Territory thereby ceased to be part of New South Wales[178].

The prevailing English legal view was that upon the settlement of an English colony, the settlers took with them so much of the then English domestic law as was capable of application to the circumstances of the new colony[179]. That English law applied to the new colony as the law of that new colony, not just as the law of the new settlers, and as such became the primary source of law for that new colony. This was at first thought to apply to the Colony of New South Wales on the basis that it was "*without settled inhabitants or settled law"*[180], but this view was much later qualified in *Mabo No 2* to allow common law recognition of subsisting Aboriginal customary rights and interests to land. The latter case made it clear that English law in force at the time of settlement still applied to the new Colony in Australia to the extent it was capable of doing so, but not to the total exclusion of pre-existing Aboriginal customary law, at least in relation to land[181].

Being a British colony, the Imperial Parliament possessed unlimited legislative jurisdiction over the new Colony of New South Wales from its establishment. Prior Imperial legislation automatically applied to the new Colony according to its terms from settlement if suitable to the condition of the Colony. Thereafter the Imperial Parliament could and did legislate for the new Colony. In addition, authority could be granted to colonial legislative authorities to legislate for the new Colony, provided that legislation was not repugnant to English law[182]. The first colonial legislative body was established for New South Wales in 1823, although the Governor had purported to exercise some legislative power before that date.

But what date was to be taken as the reception date for English law, both statute and other laws, in New South Wales? This was fixed by the *Australian Courts Act 1828* (Imp)[183] to remove any doubts[184].

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178 For a history of the various founding constitutional and other documents, see Nicholson, Selected Constitutional Documents on the Northern Territory, (NT Department of Law, Darwin, 1989), Chapters 2 -5. As for the sources for the framing of Australian boundaries see McLelland, "Colonial and State Boundaries in Australia", (1971) 45 ALJ 671.

179 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at pages 26, 34-39, Mason CJ and McHugh J concurring, Deane and Gaudron JJ at pages 79-80.

180 *Cooper v Stuart* (1889) 14 App.Cas., per Lord Watson at page 291.

181 A matter discussed further below.

182 The capacity for colonial legislatures to legislate in a manner repugnant to English law was brought to a head by the decisions of Justice Boothby in South Australia in the 1850s and 1860s. This lead to the enactment of the *Colonial Laws Validity Act 1865 (Imp)* 28 &29 Vict c. 63, , which confirmed the validity of certain prior South Australian legislation that had been assented to, and provided that the doctrine of repugnancy to English statutes was limited to those extending to a colony by express words or necessary intendment. Other Imperial legislation applying in a colony was amenable to later colonial legislation.

183 9 Geo IV c.83.

184 This date also applies to Victoria and Tasmania.

This Act set the date for the introduction of English law to New South Wales at 25 July 1828[185]. There was no doubt that the common law of England had been received in New South Wales as from the actual date of British settlement.

All this had very limited practical relevance in the area to become the NT as there were very few settlers living there at the time, and the Aboriginal peoples living there would presumably have had no knowledge of the application of English law to them. In theory at least, there was a body of law, both Imperially derived and thereafter from the Colony of New South Wales itself, applicable in the area which became the Territory in so far as it was part of New South Wales. This continued to be the position up until the annexation of the area to South Australia in 1863. In fact that law had virtually no practical effect at the time in the Territory. The more important question was whether any of that body of law carried over and continued in force with the annexation of the Territory by South Australia. This question is significant given the beginnings of permanent British settlement of the Territory from about the time of that annexation.

The Province of South Australia as a separate colony was established in 1836. The new Governor was authorised to make laws for the Province from its inception[186]. English law in force at that time, in so far as it was capable of application to the Province, was received upon the settlement of the Province. The reception date for that English law was later legislatively fixed at 28 December 1936[187]. A body of Provincial laws was enacted from that time onwards, firstly by the Governor and later by the appropriate South Australian legislative body.

The Royal Letters Patent which annexed the NT to South Australia in 1863 did not expressly provide for the application of laws to that Territory, nor did the Imperial legislation supporting those Letters Patent[188] do so. It was, however, assumed in South Australia that the whole body of South Australian law then in force, both Imperial and South Australian, applied to the annexed Territory according to its terms[189]. As a corollary, it must have been assumed that laws of New South Wales simply ceased to apply to the Territory from annexation. This of course would have made virtually no difference as far as the application of English common law was concerned, although it was conceivable that the different reception dates between New South Wales and South Australia might possibly have had some legal

185 Castles, "The Reception and Status of English Law in Australia", (1963) 2 Adelaide Law Review, 1.

186 Selway, The Constitution of South Australia, (Federation Press, 1997), 5.

187 *Language of Acts Act 1872* No 9 (SA), section 3 as follows:
"III. In all questions as to the applicability of any laws or statutes of England to the Province of South Australia, the said province shall be deemed to have been established on the twenty-eighth day of December, one thousand eight hundred and sixty-two."
This Act repealed the *South Australian Act* 6 & 7 Vict. No 2 of 1843. The *South Australian Act* carried over and was applied as a law of the Territory upon the Territory's surrender to, and acceptance by, the Commonwealth in 1911 – see below. It was only repealed in its application to the Territory on 1 July 1978 by the new *Interpretation Act (NT)*, section 2 (2) and Part 4 of the Schedule thereto.

188 See in particular 24 & 25 Vict. c. 44 (1861).

189 The South Australian Parliament legislated to apply many of its laws to the Territory from 1863, including in some cases by reference to pre-annexation South Australian laws.

consequences as to the application of Imperial statutes in the Territory. In terms of the applicable colonial legislation it was of course, and still is to some extent, of considerable importance.

In *Rogers v Squire*[190], Gallop J had cause to consider this matter obiter[191]. He compared the Imperial legislation authorising the creation of the Province of South Australia and expressly excluding the operation in the new Province of existing New South Wales laws, with the Letters Patent creating Queensland in 1859 and which provided for existing New South Wales laws to continue in force in Queensland. He expressed difficulty about drawing a conclusion on this point in the case of the annexation of the Territory by South Australia, but came down on the side of opining that the existing New South Wales laws as at annexation continued in force in the Territory[192] to the exclusion of earlier South Australian laws. This of course was subject to any later South Australian legislation applicable to the Territory.

Commenting on this view in *Newham v Diamond Leisure Pty Ltd*[193], Mildren J noted that Gallop J's attention had not been drawn to section 2 of the *Northern Territory Justice Act 1884 (SA)*, which provided that the laws of South Australia, except for certain statutes set forth in the Schedule thereto, shall be, and since 22 September 1863, deemed to have been laws of the NT so far as applicable thereto. Mildren J went on to note the provisions of the later *Sources of Law Act* (NT) of 1985, to a large extent modeled on the earlier 1884 Act, and picking up as Territory law any South Australian law in force immediately before 22 September 1863. This included the common law and statutes of England applicable to South Australia, but with the same exceptions as the 1884 Act. This determined the laws applicable in the Territory at that date, to the exclusion of other laws. The latter Act also clarified that the reception date for the Territory was the same as for South Australia, namely 28 December 1836.

Thus there continued to be a large body of South Australian law, both pre and post 1863, which applied as law in the Territory from annexation according to its terms. This position continued up until the surrender of the Territory to, and acceptance by, the Commonwealth on 1 January 1911 under section 111 of the Constitution[194]. From that time on South Australia ceased to have power to legislate for the Territory, that power being replaced by Commonwealth legislative power under section 122

190 At page 118.

191 The writer understands that His Honour's views on this point followed an earlier view of the late Mr Ron Withnall. No mention of the point was made on appeal to the Federal Court – *Squire v Rogers* (1979) 39 FLR 106.

192 Apart from statutes passed in NSW during the short period of the Colony of North Australia.

193 (1994) 4 NTLR 111.

194 As to the validity of this surrender and acceptance see *Paterson v O'Brien* (1978) 138 CLR 276. The surrender was affected by *The Northern Territory Surrender Act, 1907 (SA)* and the agreement with the Commonwealth dated 7 December 1907 as scheduled thereto. That Act is still in force in relation to the Territory as a law of the Territory. The position of the Territory as a Commonwealth territory is discussed under a later heading of this lecture.

of the Commonwealth Constitution[195]. But existing South Australian law as at 1911 continued in force in the Territory until repealed or replaced by new Commonwealth or Territory legislation. This position was as a consequence of the express provisions of the *Northern Territory Acceptance Act 1910 (Cth)*, to which the agreement with South Australia for the surrender and acceptance of the Territory dated 7 December 1907 was scheduled. Section 7 (1) of the latter Act provided that all laws in force in the Territory at the time of the acceptance[196] shall continue in force, but may be altered or repealed by or under any law of the Commonwealth[197].

The relevance of South Australian legislation in the Territory has to a large extent become academic, in that most South Australian laws enacted up to the surrender of the Territory to the Commonwealth in 1911, and continuing thereafter in force in the Territory, have now been reviewed in a series of Territory legislative exercises in which they have been repealed or replaced in their application to the Territory. There remains a small body of such legislation still in force in the Territory. An up-to-date list can be found in the Current Northern Territory Legislation Database, Index of Legislation, as at 1 January 2007[198].

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195 Section 122 provides in part:
"The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth…."
This has been interpreted by the courts as a plenary, exclusive grant of legislative power to the Commonwealth Parliament in respect of Commonwealth territories, virtually unlimited as to subject matter.

196 I January 1911.

197 See also section 5 of the *Northern Territory (Administration) Act 1910*, providing that such continued South Australian laws were to have effect in the Territory as if they were laws of the Territory. A copy of this Act as assented to is contained in Heatley and Nicholson, Selected Constitutional Documents on the Northern Territory, pages 208-210. The combined operation of these two Commonwealth provisions could have the effect that old South Australian laws could continue in force in the Territory even if they had since ceased to be in force in South Australia after the surrender. The effect of section 7 was considered in cases such as *Buchanan v Commonwealth* (1913) 16 CLR 315; *Holmes v Permanent Trustee Co of NSW Ltd* (1932) 47 CLR 113; *Stephens v The Queen* (1978) 139 CLR 315; *R v Kearney*; Ex pt Japanangka (1984) 158 CLR 395; *Margarula v Minister for Resources and Energy* per Sackville J, 11 February 1998; *Cubillo v Commonwealth* (2001) 112 FCR 455; *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388. In *Gumana v Northern Territory* [2007] FCAFC 23, it was stated that Section 7 may be authority for the view that the common law has been put on a statutory basis, citing *O'Neill v Mann* (2000) 175 ALR 742. However the effect of section 7 was not to freeze existing South Australian laws as Commonwealth legislation as at 1 January 1911 – see *Kean v Commonwealth* (1963) 5 FLR 432 per Bridge J at pages 436-437, and note *Newcrest Mining (WA) Ltd v Commonwealth*, discussed below. Section 7 itself makes it expressly clear that old South Australian laws continued in force by the section can later be altered by or under any law of the Commonwealth.

198 Or in any later Territory Index of Legislation. Go the Territory Department of the Chief Minister net site at http://www.nt.gov.au/dcm/legislation/current.html, then go to *"to view historical legislation tables and Index to Legislation"*, then in that Index go to *"Acts of the State of South Australia in force in the Northern Territory (listed numerically)"*. There are only six South Australian Acts listed. This List is not guaranteed to be accurate so further research is usually advisable to check on the current status of any particular South Australian Act in the Territory. Also check to see if there have been any very recent changes to the List.

For legislative history purposes the matter of old South Australian legislation can still be said sometimes to be of relevance in the Territory even though the relevant South Australian Acts may no longer be in force in the Territory[199]. And of course the reception date for the common law of England[200] and of Imperial statutes still has the force of law in the Territory and can sometimes still be of relevance.

As to the status of Imperial statutes applying in the area of the NT, there is no doubt the Commonwealth Parliament can legislate to override such Imperial statutes (other than the *Commonwealth of Australia Constitution Act 1900* and the Constitution it incorporates) if that Commonwealth legislation is otherwise within the federal division of legislative power in the Constitution, and probably even beyond that regardless of the federal division of power– see the *Statute of Westminster Adoption Act 1942*, *Australia Act 1986*. The same power now extends to the States and their legislatures, including any new States – see the *Australia Act 1986*. The position as to NT legislation and its ability to override applicable Imperial legislation in this respect is not as clear, but almost certainly includes an equivalent power under the umbrella of the Commonwealth. This latter view was taken by the NT Court of Appeal in *Highway v Tudor-Stack*[201]. Some States as well as the Australian Capital Territory have undertaken a legislative review of Imperial statutes still operating in their jurisdiction, but as far as is known to the author this has not yet been done in the NT[202].

Federation

The commencement of federation in 1901 upon the proclamation of the *Commonwealth of Australia Constitution Act 1900 (Imp)* only made one major change to the sources of law in the Territory. The Territory continued to be part of South Australia, but South Australia became an original State in the federation rather than a colony. The application of existing South Australian legislation to the Territory continued, subject to the new Constitution[203]. The South Australian Parliament continued to have power to legislate for the Territory, again subject to the new Constitution[204]. However the creation of the new Commonwealth Parliament, with power to legislate in federal matters in the states, created a new source of law for the Territory.

199 It has often been found to be relevant for the purpose of Aboriginal land rights or native title – see, for example, *Lansen v Olney* (1999) 100 FCR 7, *WA v Ward*; *Attorney-General (NT) v Ward* (2002) 213 CLR 1.

200 There can be little doubt now that a competent legislature in Australia can legislate to override the common law, there generally being no common law rights that run so deep as to be beyond legislative competence. But see the discussion in *Wake v Northern Territory* (1996) 5 NTLR 170, also discussed in *Wynbyne v Marshall* (1997) 117 NTR 11, 7 NTLR 97. The courts will insist on a clear intention to so override common law rights – *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 and other cases. The relevant common law is now the common law of Australia, a point made by the High Court in *Lange v Australian Broadcasting Corporation* (1997)189 CLR 520 and other cases, and which may not now necessarily be the same as the common law of England.

201 [2006] NTCA 4.

202 See McDermott, Imperial Statutes in Australia and New Zealand,; Carney, The Constitutional Systems of the Australian States and Territories (Cambridge U P, 2006), Chapter 5.

203 Constitution, section 108.

204 Constitution, section 107.

Where there was any inconsistency between South Australian legislation and any new Commonwealth legislation, the latter prevailed[205]. Thus such Commonwealth legislation became, and has remained, a primary source of law for the Territory, second only to the Constitution itself.

In this regard, there is no doubt the area of the NT was subject to the operation of that Commonwealth Constitution from its proclamation and to any valid Commonwealth laws enacted thereunder. So much is evident from the definition of "*The States*" in section 6 of the *Commonwealth of Australia Constitution Act 1900 (Imp)* to expressly state *"including the northern territory of South Australia*,". Also, section 5 of the latter Act provides that Act, which includes the Constitution in section 9 thereof,

> *and all (valid) laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and of every part of the Commonwealth[206], notwithstanding anything in the laws of any State*….

The only way of expressly altering that Constitution was and still is by a successful national referendum under section 128 thereof. It follows that the Constitution has comprised, since 1901, the primary national law in force in Australia, including in the NT. It has sometimes been described judicially as the "*supreme law*" of Australia[207]. It cannot be overridden or dispensed with by any Australian legislation. It is an integral aspect of Australian national sovereignty, the claim to which is beyond judicial challenge in Australian courts[208].

The Northern Territory as a Commonwealth territory

The method by which the Territory was surrendered by South Australia and accepted by the Commonwealth as from 1 January 1911 has already been described above. At that point, the power of the Commonwealth to legislate from the Territory under section 122 of the Constitution cut in[209]. It was no longer a federally restrained power. Existing Commonwealth legislation capable on its terms of applying in and to the Territory continued in force, subject to later Commonwealth amendment or repeal. Thereafter the Commonwealth Parliament could legislate generally for the Territory without limit as to subject matter. Section 109 of the Constitution ceased on its terms to be applicable to enable Commonwealth legislation to override any old South Australian legislation still in force in the Territory or any new Territory legislation, to be replaced by new priority rules, discussed below.

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205 Constitution, section 109. It is not proposed to enter into a detailed consideration of section 109 here.

206 This term clearly includes the Territory – *Spratt v Hermes* (1965) 114 CLR 226 per Barwick CJ at pages 244-247.

207 Eg: *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 per Kirby J at page 181.

208 *Coe v Commonwealth* (1979) 53 ALJR 403; *Mabo v Queensland (No 2)*, per Brennan J at pages 31-32.

209 See also the exclusive jurisdiction provision in section 111 of the Constitution.

From the time of the surrender and acceptance of the Territory there was an additional power granted by the terms of Commonwealth legislation to legislate in a subordinate manner just for the Territory. Initially this power was given to the Governor-General to make ordinances having the force of law in the Territory under the terms of the *Northern Territory (Administration) Act 1910*[210]. Later this power was conferred on the Territory Legislative Council, now the fully elected Territory Legislative Assembly[211].

However no legislative provision was made at the time of surrender and acceptance for the priority between these two streams of legislation, Commonwealth and Territory[212], both in force in the Territory at the same time. This matter was later resolved by judicial decision in the light of the relevant legislation and the general subordinate nature of the Territory grant of legislative power. In so doing, this effectively settled the hierarchy or priority of laws for the NT.

The test as between Commonwealth and territory legislation was originally cast in terms of repugnancy. Thus in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*[213], Dixon J said the statutory power of the Governor-General to make ordinances for the ACT could not be read as authorising the making of such ordinances repugnant to a Commonwealth statute. The territory legislative power, created by Commonwealth legislation, could not be exercised in a manner incompatible with a law made by the Parliament itself. In more recent times this test has been expressed in terms of inconsistency or repugnancy[214], and there are judicial views suggesting these two terms may be interchangeable in a territory context[215]. The test has also been put as the inability of a territory law to affect the operation of a law of the Commonwealth or to destroy or detract from a right conferred by a Commonwealth law unless that law so provides, either expressly or by implication[216]. The exact test does not matter greatly for present purposes, as it is only necessary to establish the superior force of Commonwealth legislation[217].

There is no doubt this test applied to the Territory under the *Northern Territory Acceptance Act 1910*, notwithstanding that neither that Act nor the *Northern Territory (Administration) Act 1910* so expressly provided. By way of comparison, a similar question arose from the commencement of Territory Self-government in 1978[218]. This arose because of the wording of section 57 (1) of the *Northern*

210 Act No 27 of 1910, operative from the same time as the *Northern Territory Acceptance Act 1910*, section 13.

211 *Northern Territory (Self-Government) Act 1978*, section 6. There can be no constitutional doubt as to the validity of this grant of territory legislative power. It is clearly within power under section 122 of the Constitution. See, for example, *Berwick v Gray* (1976) 133 CLR 603. It is no longer a subordinate power, but has a plenary effect as an independent head of legislative power attaching to a separate arm of the Crown in right of the Northern Territory.

212 Including old South Australian statutes still in force in the Territory.

213 (1929) 42 CLR 582 at page 588. Also *Webster v McIntosh* (1980) 489 FLR 317 at pages 320-321.

214 *University of Wollongong v Metwally* (1984) 158 CLR 447 at page 463.

215 Nicholson, "Litigation based on the Northern Territory Self-Government Arrangements" (2006) CDP delivered in Darwin, 8 and footnotes 34 and 35.

216 *R v Kearney; Ex pt Japanangka* (1984) 158 CLR 395 per Brennan J at page 418, Deane J concurring, and see Nicholson, op. cit., footnote 33.

217 Note that some specific Commonwealth legislation provides its own test as between Commonwealth and Territory laws.

218 See discussion under the following heading.

Territory (Self-Government) Act 1978[219]. This subsection provides that, subject to the Act, on and after the commencing date in the Act, all existing laws of the Territory have the same operation as they would have had if the Act had not been enacted, subject to alteration or repeal by or under a (Territory) enactment. Any suggestion that "*existing laws of the Territory*" in this subsection picked up Commonwealth legislation operating in the Territory, and hence were subject to later amendment or repeal by Territory legislation, was dispelled in *Northern Territory v GPAO*. In this case, Gleeson CJ and Gummow J pointed out the phrase "*existing laws of the Territory*" was defined in section 57 (3) of that Act to exclude a (Commonwealth) Act or an instrument made under such an Act[220]. It followed that Territory laws could thereafter amend or repeal all other kinds of laws of the Territory continued in force on Self-government, except for Commonwealth Acts and instruments under Commonwealth Acts[221].

This presumably will continue to be the position as long as the Territory remains a territory of the Commonwealth. Section 109 of the Constitution will continue to have no application as between Commonwealth laws and Territory laws.

Northern Territory Self-Government

Self-government was granted to the Northern Territory on 1 July 1978 under the *Northern Territory (Self-Government) Act 1978 (Cth)*. At that stage there was already a functioning Territory Legislative Assembly with plenary power to make laws for the NT, and a whole body of existing Territory laws. That Assembly was continued in existence by this Act. As noted above, by section 57 of the Act[222], but subject to that Act, all existing laws of the Territory continued to have the same operation after Self-government as if enacted under the Act. This picked up South Australian laws still in force in the Territory at that date, Imperial laws still in force in the Territory, the common law and old Territory Laws and ordinances still in force[223], including subordinate legislative instruments, but subject in each case to later Territory legislation.

Thus it can be said that Self-government made very little difference to the sources of law in the Territory. The major change lay in the creation of a separate body politic under the Crown known as the Northern Territory of Australia.

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219 Already discussed above.

220 *Northern Territory v GPAO* (1999) 196 CLR 553 at pages 578-579.

221 Note that this is essentially a different question as to whether the Territory legislature can validly enact laws that bind the Commonwealth or the Crown in right of the Commonwealth. It is not necessary to discuss this issue in this lecture.

222 And note section 73 of the *Northern Territory (Self-Government) Act*. Section 57 has been considered in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (which also considered the effect of Section 69 (3) of the same Act as to whether it froze the terms and conditions of existing interests at Self-government or whether it was merely a transitional, conveyancing provision); *Margarula v Minister for Resources and Energy,* (1998) 86 FCR 195; *Northern Territory v GPAO* , per Gleeson CJ and Gummow J at pages 578-579; Hayne J concurring; subsequently cited in *W A v Ward*; *AG (NT) v Ward* (2002) 213 CLR 1 at paragraph 132; *The Alyawarr, Kajtetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at page 594; *Jango v Northern Territory* (2006) 152 FLR 150.

223 Territory legislation was called an "*Ordinance*" up until Self-government, but was thereafter called an "*Act*" – see *Interpretation Act 1978 (NT)*.

The Position of Aboriginal Customary laws as a Source of Territory Law

The question here is to ascertain the extent to which Aboriginal customary law is a source of law in the NT. In this regard, it is now accepted that, in respect of many indigenous people in the Territory, their customary laws are seen as being binding on and between them[224]. As will be seen later, as a result of *Mabo No 2*, it is now too late to argue, even from the perspective of the dominant legal system, that Aboriginal customary laws have no operation or effect in the Territory. From this flows the primary question, namely, to what extent are these customary laws recognised in or absorbed by the dominant legal system of Territory law, applicable to all people in the Territory. To the extent that *Mabo No 2* gave common law recognition to aspects of those customary laws, it must follow that those customary laws are a source of law within that dominant legal system. Yet, on the other hand, it is clear from *Mabo No 2* and subsequent Australian case law that subsisting Aboriginal customary laws are not, in every respect, recognised by or absorbed into the dominant legal system. Thus the question of recognition or absorption is one of extent.

To consider this topic more fully, it is necessary to consider the history of the introduction of English law into Australia and its establishment as the dominant system of law. Under the old terra nullius[225] doctrine of the common law, for a new territory settled by British subjects and regarded as being virtually uninhabited, the hypothesis was there was no local law already in existence in the territory[226]. As Australia was treated by the courts from an early date as being in this category as a matter of law, it followed that no legal recognition was given to the customary law of its Aboriginal inhabitants at the time of British settlement. From a British legal perspective, it was as if those customary laws, and any rights under them, did not exist. Statements in official Imperial documents relating to the founding of the Australian colonies and expressed sympathetically to Aboriginal rights and interests, in so far as they ever came before Australian courts, were generally treated as mere expressions of benevolence.

But of course we now know there were systems of Aboriginal customary law in operation inter-se among the relevant Aboriginal inhabitants of Australia at the time of settlement, and those systems of law continued after settlement subject to their ongoing maintenance by the Aboriginal peoples concerned and to the operation of the introduced law. Within the introduced dominant legal system, it was very quickly appreciated after settlement that there were difficulties in applying received English law to the social condition of the indigenous peoples of Australia, in circumstances in which those people had little or no knowledge of that law.

224 Indigenous customary law seems to have survived to a much greater extent in the Territory than elsewhere in Australia.

225 Literally meaning land belonging to no-one.

226 *Mabo (No 2),* per Brennan J at 36.

Doubts were expressed as to whether the Aboriginal inhabitants could be described as British subjects[227] and whether the introduced law could be applied to them. Notwithstanding this, from a fairly early date it appears the colonial courts applied the introduced law as best they could to those indigenous peoples on the same basis as non-indigenous settlers[228], and declined to take judicial notice of indigenous customs and practices[229], except for very limited purposes such as in fixing the penalty upon a conviction.

This view has been carried through to more contemporary times with the decision of the High Court in *Walker v NSW*[230], in which the High Court decided the common law did not recognise Aboriginal customary criminal law, and that everyone in Australia was equal before the one law[231]. Mason CJ added even if it be assumed Aboriginal customary law had survived British settlement, it was extinguished by the passage of criminal statutes of general application.

In *Milirrpum v Nabalco Pty Ltd*[232], Blackburn J expressly acknowledged the indigenous peoples of Australia had, at settlement, recognisable systems of law[233]. This was perhaps the clearest authoritative statement yet made within the dominant Australian legal system that there was in fact a dual or pluralist system of laws[234] operating in Australia since settlement. Notwithstanding this, Blackburn J was not prepared to extend some form of common law recognition to those laws, at least in so far as indigenous communal title to land was concerned. Consequently, from the perspective of the dominant legal system there was only one system of law in Australia.

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227 Castles and Gill, "Canadian Supreme Court Clarifies Mabo Paradox". [1997] Aboriginal Legal Bulletin 3, at page 4. It is now clearly established that Aboriginal persons had the status of British subjects from the time of settlement – *Mabo No* 2 per Brennan J at page 38.

228 *R v Jack Congo Murrell* (1836) 1 Legge Rep 72. This case came to be accepted as establishing that the colonial courts had jurisdiction over Aboriginal people regardless of whether Aboriginal laws were relevant to the offence – see *Tuckiar v The King* (1934) 52 CLR 335; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 261-262; *R v Wedge* [1976] 1 NSWLR 581. However it has been suggested that this is based on a misreading of the decision in *Murrell* – see Castles and Gill, op. cit, at page 5. That article cites the different approach to recognition of customary law in *R v Bonjon* (Port Phillip Patriot, 30 September 1841).

229 For example, *R v Neddy Monkey* (1861) 1 Wyatt and Webb Rep (L) 40; *R v Cobby* (1883) 4 LR (NSW) 179; *R v Charlie* (1953) NTJ 205.

230 (1994) 182 CLR 45.

231 For this purpose, the dominant legal system in Australia can be treated as one legal system, applicable to all people within Australia, even though the laws are derived from different sources, Commonwealth, State and Territory.

232 At pages 265-268.

233 At pages 265-268. See also Members of the *Yorta Yorta Community v Victoria* (2002) 214 CLR 422 at pages 442-443; Carney, The Constitutional Systems of the Australian States and Territories, op. cit., pages 35 - 36.

234 It can be described as being dualist or pluralist in nature, depending on whether Aboriginal customary law is seen as one system of law or a number of different systems of law.

That case was followed by the Woodward Report[235] into Aboriginal land rights in the Territory, which in turn lead to the enactment by the Commonwealth of the *Aboriginal Land Rights (Northern Territory) Act 1976*. That Act draws upon Aboriginal customary law in so far as the task of the Aboriginal Land Commissioner is to enquire into and report on whether there are traditional Aboriginal owners of the land claimed[236]. The definition of "*traditional Aboriginal owners*" in the Act[237] brings into play matters of local descent groups, common spiritual affiliations and Aboriginal traditions, all of which in some sense can be said to be related to matters of Aboriginal customary law. As such they can be said to be a source giving rise to that Act. But the Act goes on to provide for a qualified freehold grant of title to the recommended land by the Commonwealth, rather than recognising any title to the land akin to that recognised by customary law.

Prior to the decision in *Walker v NSW*, the High Court decided *Mabo v Queensland (No 2)*[238]. In this case the principle of the non-recognition of customary law communal native title to land expressed in *Milirrpum* was in effect reversed. The concept of terra nullius was rejected by the High Court in its application in Australia. There was judicial acceptance Aboriginals did have customary law systems of title to land, whether title was communal, group or individual. While the Crown was held to have acquired the radical title to the land upon settlement as part of the acquisition of sovereignty, this was held not to be inconsistent with the continuance of any customary native title rights to that land. Where the land at the time of settlement was already subject to subsisting customary rights and interests to and in that land, the Court held that the Crown's radical title was burdened with those rights and interests until such time as they were extinguished. Native title had its origin in, and was given its content by, the traditional laws acknowledged by, and the traditional customs observed by, the indigenous inhabitants of the territory in question[239]. In this way, native title rights were recognised by the common law even though not a common law tenure[240].

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235 Aboriginal Land Rights Commission First and Second Reports, Woodward J, (AGPS Canberra, 1973 and 1974).

236 Section 50.

237 Section 3 (1). See also section 71 (1) and see NT Law Reform Committee, Report on Aboriginal Customary Law (2003), pages 37-38.

238 (1992) 175 CLR 1.

239 Brennan J at page 58.

240 Brennan J at page 61. Common law recognition apparently does not by itself transform the customary rights and interest into some other form of common law title - they remain rights and interests as defined by their customary incidents – see *Wik Peoples v Queensland* (1996) 187 CLR 1 per Brennan CJ at 84, Kirby J at 213; *Fejo v Northern Territory* (1998) 195 CLR 96 at page 128; *Members of the Yorta Yorta Aboriginal Community v Victoria* at pages 453-454; *Northern Territory v Alyawarr* (2005) 145 FCR 442. These rights and interests could continue to evolve after settlement in accordance with traditional law or custom – *Mabo No 2* per Deane and Gaudron JJ at 110. On one view, it may be that these customary rights are, upon recognition, converted into some form of common law proprietary interest equating with those customary rights and interests – a common law native title, but for present purposes this does not greatly matter – the fact is that these customary law rights and interests are a source of law within the dominant legal system.

Mabo was concerned with islands in the Torres Strait which were a part of Australia, but the decision has been extended to the rest of Australia and to Aboriginal native title. Thus in this way Aboriginal customary law rules as to the rights and interests in land and to the use of land have had a direct operation on the common law of Australia. In this sense customary law has become a particular source of the general law in force in the Territory, applicable to all persons in Australia. But the question arises as to whether this common law recognition is limited to matters connected to land and the use of land, or whether it extends to the recognition of other aspects of Aboriginal customary law.

The decision in *Mabo* is not of great help on this latter question. Virtually all of the discussion in the judgments in that case was limited to land matters, although Deane and Gaudron JJ stated the introduction of so much of the common law as was reasonably applicable to the circumstances of the new colony left some room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law[241]. But the artificiality of distinguishing between customary land rights and other rights, when these are both based on indigenous systems of law, has been commented upon[242]. The courts in other common law jurisdictions such as Canada seem to have gone further in this respect than *Mabo*[243]. It has been argued that the long-standing common law acceptance of local custom in the United Kingdom is a precedent for a wider recognition of Aboriginal customary law in Australia. The decision in *Walker* has prevented any such wider recognition of indigenous customary law, at least as far as the criminal law is concerned[244]. But this case seems to go further, to in effect hold that there can be no system of Aboriginal customary criminal law in operation since the introduction of general criminal laws, not even just among the Aboriginal peoples themselves. To the extent there was prior Aboriginal customary criminal law, it was apparently extinguished by the interaction between the introduced dominant legal system and Aboriginal traditional legal systems.

To date, there has been no subsequent Australian case prepared to extend common law recognition of Aboriginal customary law and any rights or interests thereunder, where it survived settlement and has continued to survive in practice, much beyond that in *Mabo*[245].

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241 At page 79.

242 Castles and Gill, op. cit., Selway, The Constitution of South Australia, op. cit., page 4.

243 Castles and Gill, op. cit.

244 Although Aboriginal customary law still has a variety of impacts on NT criminal law, for example, as to matters of sentencing, in matters of bail and fitness to plead, and as to the defences of provocation, duress and authorisation.. Special rules apply to the interrogation of Aboriginal people as a result of *R v Anunga* (1976) 11 ALR 412. The NT Director of Public Prosecutions has guidelines concerning the discretion to prosecute that allow Aboriginal customary law considerations to be taken into account. As to sentencing matters, see *Sentencing Amendment (Aboriginal Customary Law) Act 2004* (No 1 of 2005), amending the *Sentencing Act (NT)*, and the *Crimes Amendment (Bail and Sentencing) Act 2006* (No 171 of 2006), amending the *Crimes Act (Cth)*.

245 See, for example, *Jones v Public Trustee of Qld* [2004] QCA 269, but see *Mason v Triton* (1994) 34 NSWLR 572. The matter was raised in argument, but put aside, in *Wik*, see Kirby J at page 215.

But of course Aboriginal customary law continues to operate inter-se in many Aboriginal communities in the Territory that still practice it and recognise it as binding on themselves, even if not recognised by the dominant legal system. It did not cease to be operative in this practical sense upon British settlement. It simply was not operative for the purpose of the common law and for the purposes of application and enforcement under the dominant legal system[246]. For Aboriginal purposes, where their customary law has continued in operation inter-se within their traditional society from the time of settlement up to the present day, it continues to warrant identification as a system of law (or systems of law) according to its terms and scope. In many cases this would involve no direct conflict with the dominant legal system. The common law concept of extinguishment developed by the High Court is not necessarily a part of that customary law or even the same as any equivalent principles in that customary law[247].

Notwithstanding the limitations of the *Mabo* doctrine, it was said in *John Bulun Bulun v R & T Textiles Pty Ltd*[248] per Von Doussa J that Australian courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law. Evidence of customary law could be used as a basis for the foundation of rights recognised within the Australian legal system apart from matters of land. Thus it was held that the traditional customary laws as to Aboriginal artistic works, designed to prevent any misuse of those works, did give rise to a fiduciary duty in that case enforceable under the Australian legal system. This was not to treat the traditional laws and customs as part of the prevailing legal system; rather it was to treat those laws and customs as part of the factual matrix which gave rise to rights and obligations under the prevailing legal system. Thus in this more limited sense Aboriginal customary law can be said to be a source of the general law in the Territory.

And there is one other sense in which Aboriginal customary law can be said to be a source of Territory law, namely, through statutory recognition or absorption. In the case of land matters, this has in fact occurred through the enactment by the *Commonwealth of the Native Title Act 1993*. Under this Act, "*native title*"[249] is recognised and protected in accordance with the Act[250]. Binding determinations as to the existence of native title can be made. Whether such a title is recognised by the common law as a customary right and interest, or whether it is converted into

246 From this perspective it can be argued that all customary law ceased to operate as "*law*" from the time of settlement except in so far as the common law otherwise provided.

247 *Western Australia v Ward* (2000) 170 ALR 159 per North J at page 329; see Dorsett, "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry" [2002] MULR 3. However the traditional law would cease to exist if the traditional society that it was a part of ceased to exist after settlement, or if that society ceased to recognise it as binding law after settlement – see Members of the Yorta Yorta Aboriginal Community at paragraphs 49 – 55.

248 [1998] 157 ALR 193, 41 IPR 513. See also *Foster v Mountford* (1976) 29 FLR 233.

249 As that term is defined in section 223, extending to hunting, gathering and fishing rights, and note section 211.

250 Section 10 and note section 4 (1).

a statutory title by operation of this Act[251], the fact remains that Aboriginal customary law as to native title can be said to be a direct source of that statutory law.

There are numerous other examples where it can be said that, directly or indirectly, aspects of Aboriginal customary law are a source of statutory law in force in the Territory, not limited to land matters. Thus it is that for various specific purposes Aboriginal tribal marriages are recognised by statute, although not as a "*marriage*" under the *Marriage Act (Cth)*. The examples are too many to list in this lecture. A good, fairly up-to-date summary of the relevant legislation is found in Background Paper 3 of the Northern Territory Law Reform Committee's Inquiry into Aboriginal Customary Law[252].

In many ways, therefore, various aspects of Aboriginal customary law can now accurately be described as a source of Territory domestic law even when viewed from the perspective of the dominant legal system.

Conclusions on Northern Territory Systems of Law

My conclusion from the foregoing analysis is that, like it or not, the NT does have a dualist or pluralist form of law and legal systems, but those systems operate together in a manner whereby only one legal system, the dominant legal system, applies generally to all people. Aspects of Aboriginal customary law have become recognised by or absorbed into the dominant legal system, and to this extent it is possible to say the two systems have merged, perhaps better expressed in terms of the former having become a source of law for the latter. But in other respects, where there has been no such recognition or absorption, this duality or plurality still remains, even if not recognised by the dominant legal system. Wherever the two systems intersect, the British-derived legal system remains legally dominant over Aboriginal customary law and Aboriginal legal systems. This dominance flows from the principles as to the acquisition of Crown sovereignty and of the law applicable on British settlement, which themselves are principles of the dominant legal system[253]. Statements that Australia only has one law and one legal system may be accurate from the closed perspective of the dominant legal system, but do not necessarily reflect the true position in the Territory where Aboriginal customary law continues to be observed and practiced.

251 Either by operation of the non-extinguishment principle in the *Native Title Act*, or by the making of a determination of native title under that Act – see *Gumana v Northern Territory* (2005) 141 FCR 457 per Selway J at paragraphs 127-133, cited in Storey, "Dealing in Native Title", (2007) 26 ARELJ 56.

252 NTLRC 2003.

253 Although to some extent at least rooted in international law.

The Hierarchy of Laws in the Northern Territory

From the foregoing discussion it is possible to chart in broad terms a Territory hierarchy of laws[254] applying in the Territory at the present day[255] and recognisable as such by Territory courts.

At the pinnacle of this hierarchy is the Commonwealth Constitution[256].

After this comes Commonwealth legislation applying in the Territory, whether or not this legislation also applies elsewhere in Australia[257].

After this comes Commonwealth legislative instruments made under such Commonwealth legislation[258], and any Commonwealth administrative actions having the force of law.

Following this is current Territory legislation[259]. This includes old Territory ordinances enacted prior to Self-government and still in force and former South Australian legislation operating in the Territory and continued in force under the *Northern Territory (Self-Government) Act* and not since having been amended or repealed[260].

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254 Note that an attempt to construct a binding constitutional hierarchy of Territory laws was attempted in the Final Draft Northern Territory Constitution prepared by the Standing Committee of the NT Legislative Assembly on Constitutional Development, dated December 1996, clauses 2.1 and 2.2.

255 This assumes that the relevant laws are valid laws.

256 I leave to one side the status of the *Statute of Westminster* as adopted in Australia and the *Australia Act 1986* because of their limited relevance to the Territory as a territory of the Commonwealth. The position as to Imperial legislation applying in Australia has already been discussed above.

257 For this purpose it does not matter if the Commonwealth legislation can be constitutionally supported under section 122 of the Constitution, or some other section of the Constitution, or both.

258 There is an interesting legal question whether subordinate Commonwealth legislation has a superior legal operation to NT legislation. In some cases this must be so, as with the *Northern Territory (Self-Government) Regulations*. In other cases, Commonwealth legislation expressly provides for such a superior operation – for example, section 18 of the *Workplace Relations Act 1996* as amended. But in other cases it may not be so clear. NT legislation is, in one sense, a form of subordinate Commonwealth legislation derived from a grant of power in the *Northern Territory (Self-Government) Act*, although when viewed from the perspective of the grant of NT Self-government, it is entirely separate and independent of the Commonwealth as part of a plenary grant of legislative power to the legislature of a separate arm of the Crown and a separate body politic.

259 As the Territory is not a State in the federation, it has no constitution of its own that might have some entrenched status beyond that of ordinary Territory legislation. The prevailing view is that the NT Legislative Assembly has no power of itself to entrench any of its own legislation to give it a superior force and operation, all questions in the Assembly having to be decided by a majority of votes – section 27 of the *Northern Territory (Self-Government) Act*.

260 There is also the possibility that some State legislation with extra territorial operation could be in operation in the Territory for certain purposes under the relevant conflict of law rules and the full faith and credit provisions of the Constitution, section 118.

On a par with this last item is any old Imperial legislation which applied as law in area of the Territory from the reception date[261], or which was enacted by the Imperial Parliament after the reception date and was so expressed or clearly intended to apply in the area of the Territory[262], and which has not since been amended or repealed in its application to the Territory.

Under this is current Territory legislative instruments made under that Territory legislation and any Territory administrative actions having the force of law.

Finally there is the common law of Australia[263], including any aspects of Aboriginal customary law which are a part of, or are recognised by, that common law[264].

Matters of Aboriginal customary law not a part of, or recognised by, the common law or by statute are relegated to another status again, and only have force as traditional law as between the Aboriginal people inter-se who still recognise them as being binding on them. In some cases, if not in all cases, that customary law will be regarded as having been extinguished by the dominant legal system. In any event it cannot be applied and enforced in the dominant legal system.

261 There is still some Imperial legislation in this category that is still in force in the Territory.

262 There is very little Imperial legislation in this category still in force in the Territory.

263 This category in the hierarchy of Territory laws may depend on whether the view is correct that the common law in its operation in the Territory has acquired statutory force – see above. If it has, it is still amenable to alteration by later Territory legislation.

264 But not where that Aboriginal customary law has been incorporated into or otherwise given the force of legislation – see discussion above.

CHAPTER 3

The Relevance of International Law to Australian and Northern Territory Domestic Law 2008

What I would like to do in this lecture is to elaborate on the place on international law in the Northern Territory and its legal system. The aim is to assist the legal practitioner in deciding the extent to which it is permissible to take international law rules, principles and agreements into account when formulating advice and making submissions on Australian and NT domestic law. The legal test to be applied in this context, as always in Australian domestic legal matters, is - what would be the law on this topic acceptable to and enforceable by domestic Australian courts in their decisions, and in particular, to and by the High Court of Australia?

The relevance of international law to domestic legal practitioners is increasingly becoming apparent. Sir Anthony Mason said in an address to the Australian Branch of the International Law Association:

> *International law is becoming increasingly important in Australia, as it is in other countries, both in the political arena and in the formulation and interpretation of the law. Technological advances on a scale not previously dreamed of have revolutionized global communication. This in turn has created for the first time what can realistically be called a world community, in which national societies are more and more influenced by international patterns, standards and opinions. Just as the Australian economy is not insulated from international movements in trade and finance, so also we are affected by, and must take account of, views and ideas that have gained international currency. And, as a nation which prides itself on its legal traditions and its adherence to the rule of law, we must take account of developments in international law.*[265]

It might be argued in response to this comment that a majority of the Justices on the High Court have, in more recent times, taken a more conservative approach to the place of international law in Australian domestic law, and as a result the comments of the former Chief Justice are not quite so applicable today. This may in part reflect a certain level of anxiety among some members of the legal profession about the erosion of national sovereignty and law in Australia by the impact of international

265 "International Law and the Australian Practitioner", paper presented at a Seminar conducted by the International Law Association in Sydney on 16 October 1993 (Martin Place Papers No 3).

law and politics[266]. It may be correct to say that legal positivist concepts still largely prevail on the present High Court[267] and among the profession generally, with emphasis on the role and authority of the Australian nation-state. But the influence of international law on the Australian domestic legal system is a reality, and the nature of that reality must be considered and impartially assessed. No Australian court is now going to hold that international law is of no relevance domestically. And with the increasing momentum towards globalisation and other contemporary factors, there is a question whether this influence will increase in the future, a matter considered at the end of this lecture. It is certain that Australia cannot stand outside and be isolated from the great global developments of our time. And the law must accompany, or at least have some regard to, those developments, otherwise there may be a hiatus or obsolescence in the law or it may lack reality.

It follows, in the author's view, that a good knowledge of this relationship between these two tiers of law, at least from the domestic Australian legal perspective, is essential for the practitioner. This may be particularly so for NT practitioners, located as they are geographically near to a number of other countries.

Please note I am not considering in this lecture the question of the scope of Commonwealth constitutional power in matters of international law[268], except in relation to the status of the self-governing NT and its role in relation to international and domestic law.

Australian Domestic Law

This domestic law comprises, for present purposes, the Commonwealth Constitution, both Commonwealth and NT legislation[269] and the common law of Australia[270] . It is possible to identify the domestic law in force in the NT with reasonable precision. For further guidance on this topic see the previous lecture "*Sources of Law in the Northern Territory*". There I discussed the sources and nature of the law in the NT and referred briefly to the influence of international law on NT law. However I did not discuss in detail that influence. In one sense this lecture is a follow-on from that previous lecture.

266 See Charlesworth, Chiam, Hovell and Williams, "Deep Anxieties: Australia and the International Legal Order" (2003) Syd L Rev 1.

267 Discussed below.

268 This has been extensively dealt with elsewhere in the context of the federal system and is only of limited relevance to the Northern Territory. This is because the Commonwealth Parliament retains an extremely wide grant of legislative power in relation to the Territory whilst it remains a Commonwealth territory, virtually unlimited as to subject matter. This is discussed below. Otherwise practitioners are referred to the case law on the external affairs power in the Commonwealth Constitution.

269 Including subordinate legislation of both.

270 Including the rules of equity.

Public International Law

There may be more difficulty in identifying the scope and content of international law. This is because it is not a comprehensive system of law, there are many uncertainties around the fringes of this law, its interpretation and application, and it is fast evolving form of law through various ongoing processes. Some may still argue it is not a true system of law at all, applying positivist notions of law[271]. Rather it may be seen as a comprising various normative rules of comity or the like, applying to the relations between nation-states and usually observed by them. But it is submitted that the view that it is not *"real"* law is no longer acceptable, even in Australian domestic courts. It is now widely accepted as a useful and important form of law[272], although of a different nature to Australian domestic law. Cases such as *Mabo v Queensland* (No2)[273] recognise as much, Brennan J stating the International Covenant on Civil and Political Rights exerts a powerful influence on the common law and that international law is a legitimate and important influence on the development of the common law[274]. And international law as such is specifically recognised in both Commonwealth and NT legislation[275].

For present purposes, I deal below with specific categories of international law, being international agreements, international declarations etc, and international customary law, and consider how each impacts on the domestic law in Australia.

The Dualist Approach to Law in Australia

As Balkin points out[276], legal positivists were the major proponents of what is called the "*dualist*" approach, based on the consensual theory of international law as between nation-states. It was therefore a corollary to this approach that international law and domestic law were seen as two quite separate legal orders. Domestic law was based in the will of the sovereign (or state) and bound the individuals in that sovereign state; international law was based on the collective will of sovereigns (or states) and bound those sovereign states. International law did not, on this view,

271 Professor John Austin, a legal positivist, said laws "*properly so-called*" were limited to the commands of a sovereign, whereas international law fell into the category of laws "*improperly so-called*".

272 Even if there are sometimes real difficulties of interpretation and enforcement. There are still skeptics on this issue; for example, Goldsmith and Posner, The Limits of International law, (OUP, 2005). These writers tend to view international law simply from the perspective of big power politics.

273 (1992) 175 CLR 1 at p 42.

274 Mason CJ and McHugh J concurring. This case discussed further below.

275 Eg: the *International Criminal Court Act 2002 (Cth)*, section 12 and the O*ffshore Petroleum Act 2006 (Cth)*, section 447, the *Crimes at Sea Act (NT)* section 7 and the *Sale of Goods (Vienna Convention) Act (NT)*, section 3 and Schedule. It is hardly surprising that international law as such is not mentioned in the Commonwealth Constitution, given the colonial status of Australia at the time of commencement of that Constitution and the fact that the Imperial Government still conducted matters of an international nature in 1900 on behalf of the whole British Empire.

276 R Balkin, 'International and Domestic Law' in Blay, Piotrowicz and Tsamenyi (eds), Public International Law: An Australian Perspective, (OUP, 1997), 119-121.

become part of domestic law until it was transformed or incorporated[277] into the domestic law by some domestic legal act.

The other major approach, the monist approach, regards international law and domestic law as all part of the same system, both binding on individuals[278].

There is said to be a third theoretical approach, the " *harmonisation*" approach, that the two fields of law are in fact one, but the domestic court should obey the domestic jurisdictional rules where there is any clear conflict between the two.

Fortunately for present purposes we do not need to get too deeply into the theory. It is clear Australia inherited through the received common law a predominantly dualist approach[279], and that the influence of this approach is still quite marked in Australia today. The actual legal position in Australia can only be ascertained by analysing the decided cases in Australia.

Judicial Notice

In appropriate cases, as will be seen below, where the matter is relevant to the issue for decision before an Australian court, that court can have reference to and, for some purposes at least, take into account, international law[280]. And it is said for this purpose the court may take judicial notice of international law[281]. This is expressly extended to treaties and acts of state of a foreign country by the *Uniform Evidence Act 1995* of the Commonwealth[282] and by the *Evidence Act (NT)*[283]. In addition, a treaty or other international agreement referred to in a Commonwealth or NT Act may be taken into account

277 The concept of incorporation reflects to a large extent the difference in views between the dualist and the monist approaches –incorporation can be taken to mean automatic incorporation into domestic law. This view has found some favour in England, at least in so far as international law is not inconsistent with domestic law – see Lord Denning in *Trendex Trading Corporation Limited v Central Bank of Nigeria* [1977] QB 529, Lord Atkin in *Chung Chi Cheung v the King* [1939] AC 160 . The position in Australia is discussed below.

278 Arguably, as international law and domestic law draw ever closer under the pressures of globalisation, regionalism and other influences, and as international law increasingly reaches down to the level of the individual and the rights of the individual, the world is heading more and more towards the monist position. Some countries have already adopted constitutionally such a position. Australia is not yet in that category.

279 And notwithstanding that in earlier centuries in England the dualist approach did not command universal acceptance. The dualist approach is evident in cases such as *Walker v Baird* [1892] AC 186. *Regina v Keyn* (1876) 2 Ex D 63 is said by many writers to be the authority for the view that international law must be transformed by some domestic legal act to make it part of domestic law.

280 The High Court frequently has regard to international law principles without any special requirement as to evidentiary proof.

281 As to the position in England, see Brownlie, Principles of Public International law (6th Ed., OUP, 203) 40. In *Chung Chi Cheung v the King*, Lord Atkin said that "*the courts acknowledge the existence of a body of rules which nations accept among themselves."* Quaere, if international customary law is not automatically incorporated into Australian domestic law, must it be proved in the same manner as foreign law for a domestic court to have regard to it?

282 Section 174.

283 Section 27.

by domestic courts in the interpretation of that Act[284]. The jurisdiction of the Crown to give the court a certificate with respect to certain international affairs is also confirmed by legislation[285].

The Commonwealth and the Northern Territory

The Commonwealth Government represents Australia internationally. Its executive power in the Constitution[286] enables it to carry out this role, including by way of entering into international agreements, and in the territories of the Commonwealth that power is not federally restrained[287]. Likewise its legislative power in relation to the territories of the Commonwealth, exercised through the Commonwealth Parliament, is not federally restrained[288], but is extremely wide.

But the position of the NT, even with a grant of Self-government[289], is quite different. That self-governing entity does not have a grant of legislative or executive power in relation to external or foreign affairs generally. And its legislation is subordinate to any Commonwealth legislation and must give way in the case of any inconsistency between the two[290]. In the case of NT legislation, it must be capable of fitting within the traditional formula of the "*peace, order and good government*" of the Territory[291], a formula which has been held to be capable of encompassing a degree of extra-territorial effect[292]. In the case of NT executive authority, it is limited to matters within the purview of the administration of the government of the Territory[293] and, in the case of transferred matters, cognisable by the Territory Executive Council and Ministers, with reference to the specific matters listed in the *Northern Territory (Self-Government) Regulations*[294]. This would extend to the maintenance of any laws of the Territory that have a lawful extra-territorial effect.

Thus there is little doubt the self-governing NT cannot enter into agreements binding at international law, nor can it authorise or prevent the Commonwealth Government entering into them[295]. But as has been

284 *Acts Interpretation Act 1901 (Cth)* as amended, section 15AB (2)(d); *Interpretation Act (NT)*, section 62A (2)(d).

285 *Uniform Evidence Act 1995*, section 145.

286 Constitution, Chapter II.

287 *Johnson v Kent* (1974) 132 CLR 166.

288 Constitution, section 122.

289 *Northern Territory (Self-Government) Act 1978* and Regulations (Cth).

290 See lecture "Litigation based on the Northern Territory Self-Government Arrangements", 2005. This is not an application of section 109 of the Commonwealth Constitution.

291 *Northern Territory (Self-Government) Act*, section 6. There is an extraterritorial dimension to this grant if there is a sufficient nexus between the law in question and the Territory. But the NT legislature does not have an express grant of extra-territorial legislative powers, at least not until it becomes a new State – compare *Australia Act 1986*, section 2 (1).

292 *Traut v Rogers* (1984)27 NTR 29, cited in *Newcrest Mining v Commonwealth* (1997).190 CLR 513 per Gummow J.

293 *Northern Territory (Self-Government) Act*, sections 31-32.

294 Commonwealth Regulation No 102 of 1978, made under section 35 of the Act. See lecture "*Litigation based on the Northern Territory Self-Government Arrangements*", 2005.

295 There seems no doubt that the NT cannot validly intrude upon the Commonwealth's international powers of agreement. But the self-governing NT can enter into agreements and arrangements with the Commonwealth or the States – see *Northern Territory (Self-Government) Regulations*, Reg 4 (5).

mentioned, the self-governing NT still does have certain plenary powers, legislative and executive, within the Territory. It follows, in my view, it can validly legislate to give effect in Territory domestic law, with geographical effect in the Territory, to international agreements made by other entities and other matters of international concern, providing that the Territory legislation does not conflict with any Commonwealth legislation. The *Sale of Goods (Vienna Convention) Act (NT)* is such an example[296]. And the executive power of the self-governing NT will extend to the administration of that legislation once enacted[297].

And of course the courts of the Territory have a similar grant of jurisdiction and judicial powers with respect to the Territory as do other courts in Australia, in the sense that Territory courts can take judicial note of international law and can apply it where domestic legislation and precedent would allow same.

International Agreements[298] and Australian Domestic law

Treaties and other international agreements can be considered under four basic categories for present purposes:

1. Those which are expressly implemented into, and become part of, the domestic law by the direct effect of Commonwealth or Territory legislation. Australia will already be a party to those international agreements.

2. Those which are referred to expressly in Commonwealth or Territory legislation with a view to the legislative implementation of all or any of their terms, but without making the international agreements themselves a part of domestic law. Australia will also normally be a party to those international agreements.

3. Those which are not referred to expressly by Commonwealth or Territory legislation but where that legislation obviously seeks to implement some of the principles or rules contained in them in domestic law. Australia may not necessarily be a party to these international agreements.

4. Those which are simply approved by Commonwealth legislation, in whole or part. The purpose of such legislation could have something to do with Australia's signature or ratification thereto, although legislation is not essential for this purpose. This may be preparatory to Australia becoming a party to those international agreements.

296 See also the *Marine Pollution Act (NT)* section 7, referring to the International Convention for the Prevention of Marine Pollution from Ships of 1973.

297 Providing the matters requiring administration and dealt with in the legislation are transferred matters under the *Northern Territory (Self-Government) Act 1978 (Cth)*.

298 Agreements binding at international law, including treaties.

Category 1

Where an international agreement is implemented into Australian or NT law by legislatively making that agreement a part of the domestic law, there can be no duality. An example is the *Diplomatic Privileges and Immunities Act 1967 (Cth)*[299], implementing specific articles of the Vienna Convention on Diplomatic Relations and declaring them to be part of the law. Any such international agreement will have the same domestic status as the legislation, with the potential to create domestic legal rights and obligations on the part of individuals according to its terms, enforceable in domestic courts.

However this approach is not the norm in practice; usually the legislation will contain the provisions said to implement the international agreement[300], without making the agreement itself a part of domestic law. It may be sometimes difficult to determine whether the scheduling of an international agreement to legislation is intended to make that agreement part of domestic law or not, it being a matter of statutory interpretation. Normally it will require clear legislative words to support the conclusion that a domestic legal operation was intended affecting legal rights and obligations capable of giving rise to individual causes of action. Mere scheduling is unlikely to do this[301].

There are a variety of reasons for this practice, not least of which is the "soft" use of language in international agreements and the difficulty in distinguishing between international ideals or aspirations, and international legal obligations[302]. This leads straight to Category 2.

299 Act No 16 of 1967, section 7 and Schedule.

300 The High Court requires a degree of correspondence between international obligations in any agreement and the Commonwealth legislation said to implement those obligations, in order to bring the legislation within the external affairs power of section 51 (29) of the Commonwealth Constitution. However, as pointed out earlier in this paper, this is only relevant in a federal sense and does not limit Commonwealth power with respect to its territories.

301 Thus in *Dietrich v R* (1992) 177 CLR 292, Toohey J said that the ratification of ICCPR by Australia did not make it part of Australian domestic law, and that while the scheduling of ICCPR to the *Human Rights and Equal Opportunity Act 1986 (Cth)* gave the Commission power to investigate and conciliate alleged breaches of the rights contained in ICCPR, it did not create justiciable rights for individuals – at 359-360. In *Minogue v Williams* [2000] FCA 125, the Full Court of the Federal Court upheld this approach notwithstanding section 13 (2) of the *Acts Interpretation Act 1901 (Cth)*, stating that ICCPR is not scheduled for the purpose of creating or conferring statutory rights, but for more limited purposes. See also *Lim v Minister for Immigration etc* (1992) 174 CLR 1.

302 As to the *soft* use of language in international agreements, see A*pplicant A v Minister for Immigration etc* (1997) 190 CLR 225 at 231, 240, 255, 275 and 293. This may reflect the reality of international compromise and the desire for flexibility in domestic implementation.

Category 2

This is the situation where Commonwealth or NT legislation specifically refers to some international agreement, either by scheduling or otherwise, with a view to the implementation of some or all of its provisions in domestic legislation. In this situation, the High Court has made it very clear that the agreement has no legal effect in domestic law[303], so as to affect domestic legal rights and obligations, unless it is so implemented by domestic legislation[304]. The fact Australia has ratified the international agreement and it has come into force, binding on Australia at international law, does not alter this result[305]. This is a strictly dualist approach, consistent with the approach which favours transformation of international law into domestic national law, in this case by domestic legislation. If there is such legislative implementation, then the terms of that legislation will determine the domestic legal rights and obligations thereby created, not the international agreement itself. However, as will be seen later, certain presumptions operate which may allow reference to the provisions of the international agreement in interpreting the legislation.

This category is apparently not dependent upon Australia becoming a party to the international agreement prior to legislating.[306]

Category 3

This is where Commonwealth or NT legislation refers in some way to an international agreement but does not seek to implement its terms domestically. In such a case the agreement has no direct effect in domestic law to create legal rights and obligations. But the agreement may have some interpretive effect, discussed below.

Category 4

This is where the domestic legislation simply approves an international agreement or an aspect of same[307]. The result is much the same as for Category 3.

303 With limited exceptions, discussed below.

304 Simsek v McPhee (1982) 148 CLR 636; *Tasmanian Wilderness Society v Fraser* (1982) 153 CLR 270; *Dietrich v R* (1992) 177 CLR 292 and other cases; see also the NT Supreme Court in *Lenin Limbo v Little* (1989) 65 NTR 19, [1989] NTSC 44.

305 There is no obligation in Australian domestic law to implement an international agreement to which Australia is a party – *Dietrich v* R, above, per McHugh J.

306 In a State of the Commonwealth this would presumably still be an "*external affair*" under section 51 (29) of the Constitution, although normally Australia would become a party prior to the domestic implementing legislation.

307 For example, the *International Labour Organisation Act 1947 (Cth)*, approving the Constitution of ILO as scheduled.

Exceptions in the Case of International Agreements

It used to be thought that treaties concerning war and peace and certain other matters were automatically legally binding domestically without legislative implementation. However this may be limited to treaties terminating a state of war[308].

International Declarations, Recommendations, Resolutions etc.

Such international actions will not normally create international obligations, that is, unless they are declaratory of international customary law[309]. And they certainly have no domestic legal effect in terms of creating legal rights and obligations unless implemented by domestic Commonwealth or NT legislation.

Domestic legislation Contrary to International Law

The High Court has established there is no obligation on the Commonwealth Parliament in legislating to conform to international law[310]. This apparently applies even if Australia is a party to an international agreement and is subject to international obligations thereunder. There is no domestic legal obligation on Australia to legislate domestically to implement that agreement, nor is any resultant domestic legislation challengeable in domestic courts merely on the ground it does not conform to, or is contrary to, the agreement[311]. This extends to subordinate legislation[312]. It apparently applies even if there is a non-derogable international obligation arising under an international agreement in the nature of jus cogens[313].

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308 *Chow Hung Ching v R* (1948) 77 CLR 449 at 478.

309 Such has been suggested for the Universal Declaration of Human Rights 1948. The position as to customary international law is discussed below. Kirby J sometimes referred to the Universal Declaration as having an influence on Australian law – see *Newcrest Mining v Commonwealth* (1997) 190 CLR 513.

310 *Polites v Commonwealth* (1945) 70 CLR 60

311 See *Horta v Commonwealth* (1994) 181 CLR 183 per Mason CJ, Brennan, Deane, Dawson, Toohey Gaudron and McHugh JJ at 191, 195. However, as stated, this may be a ground in a particular case for challenging Commonwealth legislation in force in a State and enacted in reliance on section 51 (29) of the Commonwealth Constitution.

312 *Tuitupou v Minister for Immigration etc* (2000) 60 ALD 361; *Holani v Minister for Immigration* etc (High Court, special leave refused, S96/1999, 17 March 2000).

313 An example might be the international prohibition on torture, said to be a jus cogens obligation, and arising under the international Convention against Torture etc of 1975, which was implemented by the *Crimes (Torture) Act 1988 (Cth)*. See also the Geneva Conventions on torture and the Statute of the International Criminal Court. The latter Act makes torture a crime in Australia. Compare the controversy in USA where there were questions whether certain military actions were in breach of the international standards on torture. The President vetoed a Bill to ban torture in 2008. The writer cannot comprehend how it may be obligatory on states at international law to uphold certain fundamental international standards going to the very basis of civilised behaviour without any possibility of derogation, while at domestic law the same states are free to ignore those same standards or to legislate in breach thereof. Torture should not, for example, be permissible under any system of law, international or domestic. The writer suggests that the present domestic approach is taking the dualist concept to absurd and hypocritical lengths and that the time is ripe for domestic jurisprudence to change on this matter.

However, as will be seen below, courts will endeavour to interpret domestic legislation consistently with international law where applicable. The Australian domestic courts, however, have no power to overturn domestic legislation just because it clearly conflicts with international law, including law in international agreements to which Australia is a party and imposing international obligations on Australia[314].

Customary International Law including Jus Cogens[315]

It is in this area of the law that the debate between the dualist school and the monist school is most pronounced. There is a body of international law which is not dependent upon international agreement, but has grown up over a long time by common acceptance and practice among nation states[316], to the point it has acquired the status of customary law, binding on all states. This practice can be proven by widespread incorporation into international agreements, but not necessarily by that means. Long state practice may be sufficient. In some cases this law has come to be regarded as being of such fundamental importance that no state may derogate from it – that is, it has acquired the status of a norm called jus cogens[317].

The English courts of the 18th Century developed the proposition that international law, including international customary law (in so far as it could be established), was automatically incorporated into English domestic law and became part of that law[318]. This view was repeated by Lord Denning in the *Trendtex Case*[319] more recently, although the exact legal position in the UK appears to be somewhat uncertain. It was accepted, however, that this could not override valid domestic legislation, but it could affect the common law.

However this proposition as to incorporation has yet to be clearly accepted in Australia, and there are a range of views among the Australian judiciary. In *Polites v Commonwealth*[320], although it was not essential to deal with international customary law and Australian law, Williams J stated that where the former had been established to the satisfaction of the courts it is recognised and acted upon as part of municipal law in so far as not inconsistent with municipal statute law and law declared by the courts[321].

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314 *Minister for Immigration etc v B* (2004) 219 CLR 365 per Kirby J – no power or jurisdiction in a federal court to order the release of illegal entry children under mandatory detention pursuant to a valid Commonwealth statute.

315 Peremptory norms of international law, from which no state may derogate.

316 See the Statute of the International Court of Justice, article 38 (1)(b) – *"international custom, as evidence of a general practice accepted as law"*.

317 See the Vienna Convention on the Law of Treaties of 1969, article 53.

318 *Triquet v Bath* (1764) 3 Burr 1478 and other cases.

319 See reference above.

320 (1945) 70 CLR 60.

321 At 80-81. It is not clear from this whether recognised international customary law could alter the common law. This is even more complicated where international customary law develops and changes over time – do the changes automatically flow on to alter the domestic law?

In *Chow Hung Ching v R*[322], Latham CJ stated

> *International law is not as such part of the law of Australia (Chung Chi Cheung v The King (1939) AC 160, and see Polites v Commonwealth (1945) 70 CLR 60), but a universally recognised principle of international law would be applied by our courts: West Rand Central Mining Co v The King (1905) 2 KB 391 at 406.*

Dixon J in the same case rejected the automatic incorporation proposition as being *"without foundation"*, and that the "*true view*" was international law was not a part, but is one of the sources, of Australian law. Each rule of international law had to be individually examined to ascertain whether it had been received into Australian municipal law and in this way had become a source of law[323].

Kirby J, while sitting on the NSW Court of Appeal, developed the concept that while international customary law was not automatically part of Australian domestic law, it could be used as a source of law to fill lacuna in the common law or in guiding the courts in the construction of domestic legislation[324], and that it was at least as authoritative as antiquarian English law[325].

The issue came before the Federal Court in *Nulyarimma v Thompson*[326]. Commenting on this case, Charlesworth, Chiam, Hovell and Williams have said[327]:

> *…Australian judges have expressed different opinions on whether customary international law can otherwise form part of Australian law. In 1999, in the case of Nulyarimma, the Federal Court was asked to determine whether the customary international legal prohibition on genocide formed part of Australian law. No legislation had been passed, at that time, to criminalize genocide. The Federal Court was divided. Two judges, Justices Wilcox and Whitlam, essentially found that a person could not be prosecuted or punished for genocide in Australia without legislation that specifically declared genocide a crime under Australian law. Australia had passed the Genocide Convention Act 1949 to approve Australia's ratification of the genocide Convention, but this legislation did not of itself criminalize genocide in Australian law and no legislation had been passed since that time to do so. Despite the absence of relevant legislation, Justice Merkel, in dissent on this point, recognized principles of customary law as a source of Australia common law. As there was no Australian law that conflicted with the prohibition on genocide, Justice Merkel found that this particular customary international rule could apply in Australia.*

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322 (1949) 77 CLR 449 at 462.

323 At 473.

324 *Cachia v Hanes* (1991) 23 NSWLR 304, Kirby J in dissent. His comments were not picked up in the subsequent High Court decision, (1994) 179 CLR 403. As to Kirby's comments on statutory construction, see the separate heading below.

325 *Jago v District Court of NSW* (1988) 12 NSWLR 558. Kirby J's comments were not picked up in the subsequent High Court decision (1989) 168 CLR 23.

326 (1999) 165 ALR 621. See also *Sumner v UK* [1999] SASC 456 per Nyland J at paragraphs 29 – 32.

327 No Country is an Island: Australia and International Law, (2006, UNSW Press), 33-34.

Note all three Justices accepted that the prohibition on genocide formed a part of customary international law, a universal crime and a norm of a peremptory nature (jus cogens). But for two of the Justices, this was not sufficient to incorporate the international prohibition into Australian domestic law. A subsequent application for special leave to appeal to the High Court was rejected by three members of that Court, including Kirby J[328]. The High Court specifically declined in that application to rule on the status of international customary law in Australian law, stating the issue did not directly arise on the facts of the case. On the basis of this decision, it cannot be said the legal point has yet been finally resolved in Australia[329].

This issue has not since been considered in detail in any Australian superior court.

International Law and the Commonwealth Constitution

Kirby J, in a series of cases, developed the idea that where there was ambiguity in the Commonwealth Constitution there was a strong presumption that the Constitution is not intended to violate fundamental human rights and human dignity, particularly having regard to contemporary international law[330]. In *Bennett v Commonwealth*[331], Kirby J extended this view to the interpretation of section 122 of the Constitution - the territories power.

This reflects the approach generally of Kirby J to constitutional interpretation, perceiving as he does the evolution in meaning of the Constitution in response to its developing context both in Australia and worldwide, and having particular regard to developments in fundamental international human rights, and his lack of regard for originalism as a method of interpretation.

However this view has been refuted by various other Justices of the High Court[332], to the point where it cannot be said to represent the law in Australia.

328 C18/1999, 4 August 1999.

329 See also the decision of Martin CJ in *Lenin Limbo v Little*, rejecting the use of international law principles as to the legality of nuclear weapons and the Nuremberg principles as a defence in a domestic prosecution.

330 Eg: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 418 but note Gummow and Hayne JJ at 384; *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513 at 657-658; *Sinanovic v R* (1998) 154 ALR 702 at 708; Re Minister for Immigration etc Ex pt Epeabaka (2001) 179 ALR 296 at 314; *Levy v Victoria* (1997) 189 CLR 589 at 644-645; Re East Ex pt Nguyen (1998) 196 CLR 354 at 380-381; Al-*Kateb v Godwin* (2004) 219 CLR 562 but note Gleeson CJ; *Thomas v Mowbray* [2007] HCA 33; .

331 [2007] HCA 18 at paragraph s 144-149.

332 Eg: *AMS v AIF* (1999) 199 CLR 160 per Gleeson CJ McHugh and Gummow JJ at 180; Kartinyeri, above; Al-Kateb above; Re Wooleys (2004) 225 CLR 1 per Gleeson CJ*; XYZ v Commonwealth* [2006] HCA 25 per Gleeson CJ. See also *Inder-Smith v Tudor-Stack* [2004] NTSC 48 per Martin CJ.

Presumptions and the Interpretation of Domestic Legislation

This is another area where, to some extent, the differences of judicial views reflect the dualist and monist debate. The basic presumption in domestic law, of long standing, is that domestic legislation, in so far as its language permits, is presumed not to violate established rules of international law[333]. This applies particularly where there is some ambiguity in the legislation, "*ambiguity*" in this context usually being interpreted fairly widely[334]. It also applies to help resolve uncertainty or ambiguity in judge-made law[335]. The presumption applies to international law both in international agreements and also in international customary law[336]. And it applies to both Commonwealth and NT legislation[337].

In *Teoh*, Mason CJ and Deane said the presumption in relation to international agreements and legislation applied, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the agreement, in order to give effect to Australia's international obligations[338]. This might be a thought to be a slightly wider approach to that adopted earlier by Mason J, to the effect that an international agreement could only be used to resolve an ambiguity in legislation where the legislation was intended to give effect to that agreement[339]. However Gleeson CJ has expressed the view that there is no such inconsistency[340].

In more recent years, some members of the High Court appear to have taken a somewhat more conservative view of the presumption. Gleeson CJ in *Coleman v Power*[341] raised the difficulty of referring to recent international law obligations in relation to a State statute enacted many years before. He said this rule of interpretation (the presumption) had to be approached with some care. With the increased volume and complexity of international law it could no longer be assumed Parliament legislated with international law in mind[342]. And the real task of the courts was to ascertain the intention of the legislature. It is clear that Kirby J in the same case did not agree with this restrictive approach; he sees the duty of the courts to interpret legislation in the light of relevant contemporary circumstances, national and international.

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333 In Australia see *Jumbunna Coal Mine NL v Victorian Coal Miners' Assn* (1908) 6 CLR 309 per O'Conner J at 363.

334 *Lim v Minister for Immigration etc* (1992) 176 CLR per Brennan, Deane and Dawson JJ; *Minister for Immigration etc v Teoh,* (1995) 183 CLR 273 per Mason CJ and Deane J at 287-288; *AMS v AIF* (1999) CLR per Gleeson CJ, McHugh and Gummow JJ..

335 *Dietrich v R* (1992) 177 CLR 292 per Mason CJ and McHugh J at 306.

336 *Minister for Immigration etc v Teoh* (1995) 183 CLR 273 per McHugh J at paragraph 35, citing other cases.

337 The presumption must, by its nature, apply to all forms of domestic Australian legislation. This includes State legislation – see *Coleman v Power*, below.

338 See also *Lim v Minister for Immigration etc* (1992) 176 CLR 12 per Brennan, Deane and Dawson JJ at 38.

339 *D & R Henderson v Collector of Customs (NSW)* (1974) 48 ALJR 132 at 135; *Yager v R* (1977) 139 CLR 28 at 43-44.

340 *Coleman v Power* (2004) 220 CLR 39.

341 At paragraphs 17-20.

342 See also *Al-Kateb v Godwin* (2004) 219 CLR 562 per Gleeson CJ.

Must there be an ambiguity in legislation for the presumption to apply? The view has been expressed that there must be an ambiguity in the legislation[343], but this has been denied by Kirby J[344].

Elsewhere Kirby J has adopted the view that where domestic courts are deciding issues of human rights in which international law is relevant, they are exercising international jurisdiction, and they should give effect to interpretive principles defensive of human rights[345]. He clearly gives the presumption a more forceful legal status where international human rights are concerned[346]. He even suggests that a (state) law which provides for extreme cases in breach of fundamental human rights could, in truth, not be a law at all[347]. However where the purpose of the legislation is clear and it is otherwise valid, such that it intended to override international law on human rights, then even Kirby J accepts a court cannot use that international law to change the meaning of the legislation[348].

The views of Kirby J are clearly out of step with at least a majority of the present High Court members. The presumption is now too well established in domestic law to be dispensed with, but its application in future cases requires some care and restraint. More often than not, it may be that a decision will have to be taken as to whether to run the presumption at all in argument before the courts. The alternative may be to run the presumption relating to the preservation of common law rights and freedoms or that of implied protections under the Commonwealth Constitution, without any reference to international law[349].

International Law, Teoh's Case and Administrative Law

In some cases it may be expressed or implied in domestic legislation that administrative decision makers should have regard to aspects of international law when making domestic decisions of an administrative nature. This is more likely where domestic legislation under which the decision is to be made refers to an international agreement. But the more difficult situation is where there is no such legislative reference. The question in such cases is whether the domestic decision-maker can or should have regard to some aspect of international law in making an administrative decision, and whether failure to do so is subject to judicial review. The grounds under which such review could be sought are various, including breach of the rules of natural justice or a legitimate expectation.

343 *Dietrich v R (*1992) 177 CLR 292, per Mason CJ and McHugh J.

344 *Behrooz v Department of Immigration etc* (2004) 219 CLR 486 at paragraph 127.

345 *Coleman v Godwin* (2004) 220 CLR 39 at paragraph 168.

346 *Thomas v Mowbray* [2007] HCA 33 at paragraph 380.

347 *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 at paragraph 75.

348 Re Wooleys (2004) 225 CLR 1; *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 at paragraphs 29- 31, 75-76..

349 This apparently was the case in *Evans v NSW* [2008] FCAFC 130, where there was a challenge to the NSW regulations made concerning Catholic World Youth Day.

In *Teoh's case*[350], a majority of the High Court held that an international convention to which Australia was a party and which was ratified by Australia, even though not yet implemented by legislation in domestic law, could give rise to a legitimate expectation under Australian law on the part of persons the subject of executive government decision-making that certain interests will be taken into account, with an opportunity to be heard, before the decision was made. In this case it was the Convention on the Rights of the Child[351], incorporating the principle of the best interests of a child as a primary consideration. The majority[352] took the view that by entering into the Convention, the Australian Executive Government had held out to the world that it would abide by the obligations under it. It was said not to be relevant that the person affected did or did not actually know about the Convention provisions, as the test was an objective one. Only McHugh J dissented, holding that there was no such legitimate expectation, with Gaudron J relying more on community standards, supported by the Convention, in coming to the same result as the majority.

This case was subsequently much discussed, with some criticism of the basis of the majority decision. There were attempts in some jurisdictions to overrule it by executive statement, but the case was subsequently applied by lower courts, those statements notwithstanding. *Teoh* was reviewed by the High Court in *Re Minister for Immigration etc.; Ex pt Lam*[353], a case in which it was apparently not essential on the facts to deal with *Teoh*. However McHugh and Gummow JJ in one judgment[354], plus Hayne J[355] and Callinan J[356], questioned the correctness of *Teoh*[357]. It is possible that the High Court may, in an appropriate case in the future, consider an argument to overrule *Teoh,* although this may, to some extent at least, depend upon the future composition of that Court, as well as on any national and international developments which may impact upon the domestic effect of international law. It is noteworthy that decisions, at least by a majority, of superior courts in the UK, Canada and the Privy Council on appeal from Trinidad and Tobago have taken a position not unlike that in *Teoh*[358].

350 *Minister for Immigration etc v Teoh,* (1995) 183 CLR 273.

351 U N Convention on the Rights of the Child, ratified by Australia on 17 December 1990 and entering into force for Australia on 16 January 1991. The Convention was also declared to be an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

352 Majority judgment of Mason CJ and Deane J plus that of Toohey J.

353 (2003) 214 CLR 1.

354 They indicated that the views of McHugh J in *Teoh* should be accepted as representing the law in Australia, and that further attention would be required to the basis upon which *Teoh* exists.

355 Hayne J stated that further consideration was required of *Teoh* but that this was not necessary in the present case.

356 Callinan J said that *Teoh* was the high water mark of the application of the doctrine of legitimate expectation, and questioned the whole basis of this as a separate doctrine.

357 The other Judge, Gleeson CJ, did not express an opinion on this point.

358 Mayo Moran, "Shifting Boundaries: The Authority of International Law", Chapter 7 of Nijman and Nollkaemper (Eds), New Perspectives on the Divide Between National and International Law (2007, OUP).

Developing the Common Law of Australia and International Law

The common law has traditionally been developed by the domestic judiciary on a case by case basis, with usually only incremental modifications from time to time. The influences on such developments have also traditionally been domestic in origin. We have seen how treaties implemented in domestic legislation could affect the interpretation of that legislation, but it was not thought the common law could be influenced by international law in much the same way.

But with the rapid development of international law in the 20th Century, including in its impact on individual rights, it was only a matter of time before the effect of this on the common law would arise for consideration. In Australia, some judgments of Murphy J[359] and then some lower court decisions of Kirby J[360] pointed to an expansion of the role of international law in its effect on the common law. These fell for consideration in the *Mabo case*[361], mentioned above, where international law was described and a "*legitimate and important influence*" on the development of the common law of Australia, allowing the High Court to take into account international law principles on the European settlement of new areas occupied by indigenous peoples living traditional lifestyles, their rights, and the domestic legal concept of terra nullius.

But limitations soon appeared on this approach to the common law. In *Dietrich v R*[362], the claimed right of an indigent accused to counsel at public expense based on a provision of the International Covenant on Civil and Political rights, to which Australia was a party but which had not been implemented as part of Australian law, was rejected by the High Court. To do so was said to be equivalent to recognising a right that did not previously exist. Rather, the role of international law on the development of the common law was seen as being limited to where the common law was uncertain or ambiguous. The appeal of the applicant was allowed by the majority, but in line with an approach since commonly used, his claim was said to be based on a common law right, in this case the right to a fair trial.

Subsequent cases have confirmed international law can still be referred to in the development of the common law in appropriate cases, although there was no requirement for the common law to conform to international law. In *Teoh,* Mason CJ and Deane J[363] said international conventions were a "*legitimate guide*" in the development of the common law, but cautioned that "*the courts should act in this fashion, with due circumspection"* [364]where the convention had not yet been implemented by legislation into domestic law. Walker suggests this indicated a clear desire to retain a significant degree of judicial discretion in the use of treaties in the development of the common law[365], a view which she said was not surprising but which indicated the courts were not yet sure of what their role was.

359 For example, in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

360 For example, in *Jago's case*, mentioned above.

361 (No 2) (1992) 175 CLR 1 at 42.

362 (1992) 177 CLR 292.

363 Gaudron J agreeing on this point.

364 (1995) 183 CLR 273 at 304.

365 "Treaties and the Internationalisation of Australian Law", in Courts of Final Jurisdiction (1996, Federation Press) at 216.

Since that view was expressed, some justices on the High Court have continued to express reservation about the use of international law to affect the development of the common law. Thus in *Western Australia v Ward*[366], Callinan J said:

> *There is no requirement for the common law to develop in accordance with international law. While international law may occasionally, perhaps very occasionally, assist in determining the content of the common law, that is the limit of its use. The proposition that international law – itself often vague and conflicting – demands that the common law of Australia be moulded in a particular way, apparently without regard for precedent, the conditions in this country, or the fact that governments and individuals may have reasonably relied on the law as it stands is unacceptable. To embrace it would be to deny that Australian courts have long shaped the law for the particular circumstances of this country without the need to resort to shifting prescriptions often designed for different times, places and circumstances.*

But notwithstanding this conservative approach, Kirby J has continued to judicially enunciate a much broader approach to the influence of international law on the development of the common law. Thus in the *Behrooz Case*[367], he said both by the common law, and by force of such provisions of international law as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, infringement of fundamental rights is not lawful in Australia unless sustained by a clear expression of an unmistakable and unambiguous intention in valid legislation. He referred to earlier decisions of the High Court in *Coco v R*[368], expressing the view that Australian law should not be interpreted as breaching fundamental common law rights except by clear, express enactment, and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[369], where similar views were expressed by several Justices. It is very doubtful the majority of the present High Court Justices would share this view where reference to fundamental human rights at international law was sought to be made in domestic legal argument. Whether that will continue to be the case into the future is not clear.

366 (2002) 213 CLR 1 at paragraph 958.

367 (2004) 219 CLR 486 at paragraph 128. See also *Dow Jones v Gutnick* (2002) 210 CLR 575 at paragraphs 116, 119.

368 (1994) 179 CLR 427 per Mason CJ, Brennan, Gaudron and McHugh JJ at paragraphs 8-13.

369 (2002) 213 CLR 543.

Other Indirect Effects of International Law

As we have seen, normally the legal relations between nation-states do not, of themselves, affect the legal rights and obligations of persons in Australia, at least until those legal relations are incorporated into domestic Australian law.

But the taking of a step in those international relations, whilst of itself not creating domestic legal rights and obligations, may be a step in a process which, as a whole, may have that effect[370]. That is, the taking of a step in relation to an international agreement may, depending on the circumstances, have legal implications in Australian domestic law affecting persons, and permitting the domestic courts to take the agreement into account.

Thus in *Peko-Wallsend Ltd v Minister for Arts, Heritage & Environment*[371], a Commonwealth Cabinet decision was made to nominate Kakadu Stage 2 for inclusion in the World Heritage List under the World Heritage Convention, to which Australia was a party. This would have had the effect of preventing mining by a proclamation of the Governor-General under the *World Heritage Properties Conservation Act 1975 (Cth)*. It was held at first instance[372], having regard to the position, including the provisions of the Convention, that this decision was subject to judicial review for the failure to take into account the interests of the miners under the rules of natural justice.

This went on appeal in *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd*[373], where the decision below was reversed. But this view on appeal was not taken on the ground that the decision in question was based on the exercise of the Royal prerogative or that the Court could not have regard to the Convention; rather the view was based on the non-justiciability of the exercise by the Crown of its powers under an international convention, a principle based on the inappropriateness of domestic courts intervening in those particular circumstances and otherwise of uncertain scope. It was also considered that natural justice had been accorded on the facts.

370 *Re Ditfort; Ex pt DCT* (1988) 19 FCR 347 per Gummow J at 370, cited by McHugh and Gummow JJ in *Minister for Immigration etc v Lam* (2003) 214 CLR 1 at 100. See also *Hicks v Ruddock* [2007] FCA 299 per Tamberlin J.

371 (1986) 70 ALR 523.

372 Federal Court of Australia, Beaumont J.

373 (1987) 15 FCR 274, 75 ALR 218.

The Monist/Dualist Debate: The Future

Putting to one side the question of the possible emergence of any new international legal order, with a system of world law based on an intentional unification of national and international law and a new structure of legal priorities, perhaps on some federal model, the question is – what can we expect from the High Court in future?

This is a complex issue and raises many considerations. At present we seem to be bogged down on the question of the primary relevance and importance, from the domestic perspective, of national law as against international law, which in turn reflects the perceived importance of national sovereignty as against the widening effects of globalisation. The courts may make assertions that their role is to act in strict accordance with the Commonwealth Constitution and the separation of powers between the Executive and the Parliament that it incorporates, a Constitution which brings the domestic courts into legal existence and which in turn reflects the will of the Australian people, but increasingly this may be seen as denying the international realities under which the Australian nation and its peoples now operate.

This continued emphasis on the part of most Australian jurists on national legal considerations in Australia supports the rigid division still made by Australian courts between national and international law, leading to a dualist approach. But this is happening when the world scene is moving beyond such a rigid division; international law is experiencing exponential growth, extending into nearly all areas of human activity, with consequent increased attention by domestic courts. The movement towards greater degrees of global interaction, co-operation and integration seems unstoppable. We have seen international law reach down below the level of the nation-state, for example, to the level of the individual. And in several areas there has been a blurring between national and international law, leading to complex issues about observance of the international rule of law. One of these areas has been in the movement towards regionalism, where international relations and law intrude into the domestic arenas of member-nations[374]. Another area has been in the increasing movement of non-government actors into the trans-national arena of law[375]. The courts will need to deal with the demands of litigants and their representatives in proper law contractual choices[376], in international forum shopping, in complex litigation crossing national borders with international implications and in other ways. These developments can be seen as gradually transcending the dualist/monist debate and the notion of a clear divide between the two systems of law.

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374 See, for example, the wide use of international law made by the House of Lords in *A(FC) v Secretary of State for the Home Department* [2004] UKHL 56.

375 Christine Chinkin, "Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law", Chapter 6 of Nijman and Nollkaemper (Eds), New Perspectives on the Divide Between National and International Law (2007, OUP). See the call by Kirby J for the development of trans-national law on the internet in *Dow Jones v Gutnick* (2002) 210 CLR 575 at paragraph 119.
Trans-national law is increasingly becoming of importance in a global commercial environment and is now taught in Australian law schools.

376 Which may involve the application of international rules of law.

All this points to the fact that international law is destined to assume ever greater levels of importance, and will increasingly be difficult for domestic courts to ignore or sidestep. The issue is tied up not only with law, but also with that of politics and ideology, and it tends to be seen in conjunction with the current debate as to whether Australia should have a Bill of Rights. In fact these are quite separate issues. A domestic Bill of Rights would be part of domestic law, and may not necessarily be consistent in all respects with international law on the same subject. We can only wait to see when and how these various influences will flow over into any increased role for international law in Australian domestic jurisprudence in the future.

Legal Aspects of Judicial Review of Northern Territory Governmental Decisions: And the Case for a Judicial Review Act (NT) 2009

Introduction

In this lecture, I will be reviewing the law in the Northern Territory of Australia (hereafter abbreviated as "NT" or "Territory") as to the judicial review by NT courts of various decisions of the Administrator of the NT and Ministers of the NT as well as NT officials/employees/statutory authorities[377] in matters lying within the executive authority of the self-governing NT[378]. I will not be considering the judicial review of Commonwealth decisions affecting the NT except in a few cases by way of comparison. Nor is it the purpose of this lecture to consider the various forms of statutory administrative appeal or merits review by general administrative tribunals now found in other parts of Australia as well as federally, often in place of specialist tribunals set up to deal with a particular type of matter.

However in the course of this lecture I will consider whether there is a case for enacting a Judicial Review Act in the NT which reforms the existing system of judicial review by the Supreme Court of the NT. As part of this consideration, I will consider briefly the question whether judicial review in a possible future NT statutory reform should extend to review on the merits, or whether this should be left to some other form of administrative review.

Inherited System of Judicial Review in NT

Reception for that area, if not before. As noted in my previous CPD lecture[379], this date, for the NT, is now legislatively fixed at 28 December 1836. According to the widely accepted legal view, English settlers of the land brought with them so much of the law of England as was capable of application to the circumstances of the new British colony. This included the common law and the rules of equity as to administrative law at that time.

377 But not of bodies corporate that are independent of government, even if exercising certain functions as part of some public scheme – see *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

378 See Northern Territory (Self-Government) Act 1978 (Cth) and Regulations thereunder, and see my CPD lecture "Litigation based on the Northern Territory Self-Government Arrangements".

379 Sources of Law in the Northern Territory, my CPD lecture, August 2007.

English law never developed a separate system of administrative law applicable to government decision-making as distinct from the general law. But the English common law courts had developed a form of judicial review by way of the prerogative writs, such as certiorari, prohibition and mandamus[380]. These writs were hemmed in by all kinds of restrictions and limitations, perhaps in part reflecting the traditional immunity of the Crown from suit[381], perhaps in part reflecting their intermittent separate development by the Royal courts. Equity added to these remedies by introducing certain equitable remedies capable of applying to governmental decision-making, such as injunctions[382] and declarations[383]. This was in very broad terms the state of English administrative law at the time of its reception in the Territory.

Behind these remedies lay the judicial acceptance, in the lead up to the Glorious Revolution and the demise of the Stuart Monarchy, of a basic aspect of the rule of law – namely, that every official act had to be legally justified, either by or under legislation, or to some extent under the royal prerogative as part of the common law[384]. Historically most official acts in England were exercises of that prerogative, and hence the prerogative writs were developed to oversee its exercise. By way of contrast, the pattern in the Australian colonies was, and has continued to be, that most official acts were and are taken under legislation, and the remedies of judicial review have had to be adapted accordingly.

Very little change was made legislatively to this system of law in the Territory from its first settlement and for a long time thereafter. Administrative law remedies were infrequently relied upon in the NT in the 19th Century. The system of South Australian courts applied from annexation of the Territory to that Province in 1863, and those courts exercised jurisdiction in administrative law matters in the Territory up until the surrender of the Territory to the Commonwealth in 1911.

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380 These writs and their limitations are discussed below.

381 Modified by the South Australian *Claimants Relief Act* No 6 of 1853, creating a statutory procedure for a petition of right to the Governor where the Crown was sought to be pursued in litigation, and then by *South Australian Act No 12 of 1865-66*. After the surrender and acceptance by the Commonwealth of the Territory in 1911, suits against the Crown in Northern Territory matters were dealt with in the *Judiciary Act 1903 (Cth)*. The position in the Territory as far as the self-governing Crown in right of the Territory is now governed by the *Crown Proceedings Act (NT)*, No 51 of 1993, replacing the Claims By and Against the *Government Act of 1978*. See also sections 67B and 67C of the *Judiciary Act (Cth)*, added in 1979 with the transfer of responsibility for the Territory Supreme Court from the Commonwealth to the self-governing Territory, and also section 14 of the current *Supreme Court Act (NT)* and see *Alcoota Aboriginal Corporation v Gray J.,* [2002] NTSC 48 per Martin CJ at paragraphs [233] and [234].

382 See discussion below.

383 The declaration seems to be of Scottish origin. Historically in England, declaratory relief had been granted by the Court of Exchequer, but not commonly by the Court of Chancery. This was remedied in the 19th century by legislative provision or rules in England and in various colonies, including in South Australia, empowering superior courts to grant declarations of right whether or not other relief was sought. The present provision in the Northern Territory is contained in section 18 of the *Supreme Court Act (NT)*.

384 *Entick v Carrington* (1765) 19 St Tr 1030, 77 ER 1352; *Roncarelli v Duplessis* (1959) SCR 121.

New arrangements applied from the creation of the new Commonwealth body politic and the adoption of the Commonwealth Constitution in 1901 and the introduction of the federal system of courts[385] to deal with federal administrative matters, but we are not concerned with this aspect in this lecture[386].

From the surrender and acceptance of the Territory in 1911, a Supreme Court of the Territory and other Territory courts were established to apply the general law, including administrative law, in the Territory[387]. This was much later supplemented by a few specialist Territory tribunals and other bodies with specific administrative jurisdiction.

This position has not greatly changed since the grant of Self-government to the Territory on 1 July 1978, except that shortly thereafter the Supreme Court of the Territory was established, and still is established, by Territory legislation[388]. Matters concerning nonfederal administrative law are now within the executive province of the self-governing Territory, its Legislature[389] and Ministers of the Territory[390]. But the judicial role of Territory courts did not change much with the grant of Self-government, apart from the significant fact that Territory courts had now to contend with a new range of governmental decision-making by the new Territory body politic under the Crown[391], its servants, officers, instrumentalities and agents, separate from the Commonwealth. The decision-making of these new entities automatically became subject to judicial review in the courts in accordance with the same system of administrative law except in so far as that was modified by valid legislation[392].

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385 Initially the High Court of Australia in 1903, later added to by other specialist federal courts and more recently the Federal Court of Australia and now the Federal Magistrates Court.

386 Practitioners should refer to federal administrative law principles, not dealt with in this paper, as they often are relevant to the resolution of Territory matters, given the fact that the Territory remains a Commonwealth territory under section 122 of the Commonwealth Constitution, the grant of Territory Self-Government notwithstanding, and that many administrative decisions in or concerning the Territory are made under Commonwealth legislation. In addition, the cross-vesting of jurisdiction between the Territory Supreme Court and the Federal Court must be borne in mind.

387 The *Supreme Court Ordinance No 9 of 1911*. This gave the new Supreme Court in the Territory all the jurisdiction and powers of the Supreme Court of South Australia immediately prior to the surrender and acceptance of the Territory – section 4. This is discussed further below.

388 *Supreme Court Act* No 109 of 1979 as amended (NT). Another important change was the establishment of a Territory Ombudsman by Territory legislation.

389 The Legislative Assembly of the Northern Territory.

390 *Northern Territory (Self-Government) Act 1978 (Cth)*. See generally my CPD lecture"Litigation based on the Northern Territory (Self-Government) Arrangements".

391 As to the existence of a separate Crown in right of the self-governing Territory, see my CPD lecture"Litigation based on the Northern Territory Self-Government Arrangements" and note footnote 9 thereto.

392 There was no express legislative provision that applied the principles of judicial review to the decision-making of this new Territory body politic under the Crown, its servants, officers and agents, as at the grant of Self-government in 1978, although the courts have never doubted this application. Being an arm of the Crown, there seems to be no good reason to doubt this. To some extent this was clarified by sections 67B and 67C of the *Judiciary Act (Cth)*, added in 1979, which give express legislative recognition to the application of the principles of judicial review in certain circumstances involving the new Territory body politic or officers of the Territory. Also section 14 of the current *Supreme Court Act (NT)*, enacted at the same time. But these provisions seem to merely confirm that there was jurisdiction to judicially review decisions of the new NT body politic under the Crown, its Ministers, officers, servants, agents and instrumentalities as from the grant of Self-government on 1 July 1978.

There is no doubt that the Supreme Court of the Territory, from its inception upon acceptance of the Territory by the Commonwealth in 1911 up until the present day, has had very wide powers to exercise jurisdiction in matters involving the inherited system of administrative law in the Territory. This has allowed that Court to take into account any judicial modifications of that administrative law, particularly through decisions of the High Court of Australia[393]. But as will be seen, not a great deal has occurred legislatively in the Territory to alter the inherited system of law as administered by that Supreme Court over the last century or so, except perhaps at the margins.

By way of comparison, there have been substantial changes in federal administrative law in the same period[394], and the establishment of new federal courts to deal with same. The concept of judicial review remains as a part of the general law of the Territory, it is well established and alive, but its basis, scope and administration, while having changed dramatically at federal law in matters impinging upon the Territory, have not changed anywhere near to the same extent in Territory law as in federal law.

Jurisdiction of the Supreme Court of the Territory.

The Supreme Court of the Territory is and remains the main judicial forum in the Territory for seeking judicial relief at administrative law in other than federal matters[395]. This includes both common law and equitable relief. As noted above, the jurisdiction for this has been inherited by statutory reference to the jurisdiction of the Supreme Court of South Australia immediately before 1911. The Supreme Court of South Australia was at that time, and still is, a superior court of unlimited civil and criminal jurisdiction in relation to South Australia, including jurisdiction to grant prerogative relief and with concurrent jurisdiction in law and equity[396]. It is worth a brief consideration of the position from this South Australian inheritance through to its application in and to the Territory, as this is still of relevance today.

Wide civil jurisdiction was originally conferred on the Supreme Court of South Australia by the Act of 1837, 7 Wm IV c 5 as amended and later consolidated in the *Supreme Court Act*, 19 Vict. 1855-1856, No 31[397].

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393 The High Court has now pronounced upon the existence and scope of Australian common law, as distinct from English common law. The two systems of law are now not always the same, including in the area of administrative law.

394 See in particular the *Administrative Appeals Tribunal Act 1975 (Cth)* and the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. Note that by virtue of the definition of "*enactment*" in section 3 of the latter act, read with section 19A and Schedule 3 thereof, the scheme of that Act does extend to decisions under certain NT laws specified in Schedule 3, and can extend to other decisions under Territory laws, not involving matters in respect of which Ministers of the Territory have executive authority, by declaration in Commonwealth regulations under that Act. No such declaration presently exists.

395 And, to some extent, jurisdiction in federal administrative law matters also, although subject to choice of forum and cross vesting. Note that the Local Court of the Territory has no power to grant prerogative relief – *Local Courts Act (NT)*, section 14. There is no intermediate-level NT court.

396 Selway, The Constitution of South Australia (1997, Federation Press), 113.

397 See also the *Equity Act 1866* No 20 of 1866-1867 and the *Supreme Court Procedure Act* No 7 of 1866-1867 and see *Scott v Northern Territory* [2005] NTCA 1, per Martin CJ at paragraphs [16], [17] and [18].

The power of that Court and its judges to issue prerogative writs in connection with matters occurring in the colony was subsequently confirmed by the *Supreme Court Act 1867* No 8 of 1867[398]. The *Judicature Act* changes in England for the joint administration of law and equity were followed by *South Australian Act No 116 of 1878*[399] in relation to the Supreme Court of South Australia. Thus although the jurisdiction in relation to the Territory of the Supreme Court of South Australia was taken away from it at the beginning of 1911 by the terms of the legislation enacted in relation to the surrender and acceptance, the law that Court had applied up to that date continued to be apply in the Territory thereafter until otherwise amended by later Territory legislation.

The provisions of the 1911 *Supreme Court Ordinance*[400] first established the Supreme Court of the Territory followed the establishment of the NT as a Commonwealth territory under section 122 of the Commonwealth Constitution. It provided for the jurisdiction of that new Supreme Court by reference to the equivalent jurisdiction of the Supreme Court of South Australia, as set out in section 4 of that Ordinance.

That Territory jurisdiction was carried forward when the Territory Supreme Court was re-established by Commonwealth legislation in the *Northern Territory Supreme Court* Act 1961 – see section 15(2). The effect of section 15(2) was in turn preserved in the *Judiciary Act (Cth)*, section 67C (c), added in 1979, and commencing at the same time as the repeal of the *Northern Territory Supreme Court Act 1961*[401]. This operated contemporaneously with the re-establishment of the Territory Supreme Court under Territory legislation. Reference should now be made to comparable provisions in section 14(1) (b) and (c) of the current *Supreme Court Act (NT)*[402], discussed below.

These provisions run concurrently with the legislative removal of the historic inability to sue the Crown in any of its capacities. The ability to sue the Crown in right of the Territory and its officers, instrumentalities and agents is now confirmed by the *Crown Proceedings Act (NT)*[403].

The present jurisdiction of the Supreme Court of the Territory expressly extends to suits between the Commonwealth and the Territory in respect of a cause of any description, whether in law or equity[404].

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398 *R v Bull* (1974) 131 CLR 203 per Barwick CJ at 230.

399 That South Australian act continued in force in the Territory until its repeal by the *Supreme Court Ordinance Repeal Ordinance 1965* No 42 (NT). See now the current *Supreme Court Act (NT)*, Part IV.

400 The *Supreme Court Ordinance No 9 of 1911.*

401 *Northern Territory Supreme Court (Repeal) Act 1979 (Cth)*, No 85 of 1979. See also *Supreme Court Act (NT)*, section 14 (1)(b).

402 See generally the discussion in *R v Bull* (1974) 131 CLR 203, where the High Court referred to section 15(2) of the 1961 Act and where Barwick CJ made the point that the jurisdiction of the Territory Supreme Court is entirely statutory.

403 Act No 51 of 1993 as amended, previously the *Claims by and against the Government Act 1978 (NT)*. The latter Act commenced on the grant of Self-government.

404 *Judiciary Act (Cth)*, section 67B; *Supreme Court Act (NT)*, section 14 (1)(a)(i).

It is also expressed to extend to any suit between the Territory and any other person[405]. These suits extend to administrative law causes of action. This is expressly confirmed in part in that the jurisdiction extends to matters in which an injunction or declaratory order or a writ of mandamus, prohibition or certiorari are sought by the Commonwealth against the Territory or an officer of the Territory[406]. The Supreme Court of the Territory also has express jurisdiction in a matter where a writ of mandamus or prohibition or an injunction or other relief is sought against an officer of the Territory, being a proceeding arising in, or under a law in force in, the Territory, whether or not the Commonwealth is involved[407]. In addition the cross-vesting legislation[408] gives the Supreme Court of the Territory jurisdiction in matters vesting in the Federal Court[409] and State supreme courts, which can potentially extend to administrative law matters.

These express grants of particular jurisdiction are in addition to the general grant of original civil and criminal jurisdiction that the Supreme Court of the Territory has as a superior court of general jurisdiction by reference to that of the Supreme Court of South Australia immediately before 1 January 1911 in relation to the State of South Australia[410]. This means the Supreme Court of the Territory has very wide jurisdiction in matters of administrative law in the Territory involving the Crown in right of the Territory, its servants, officers, agents and instrumentalities, subject to the particular legal limitations attaching at common law or at equity to the form of judicial relief sought. It can safely be assumed if the Territory, or the Crown in right of the Territory, or its servants, officers, agents or instrumentalities, is involved in litigation in that Court, the matter will have the necessary relationship to the NT required to support the litigation. It is a concurrent jurisdiction to grant relevant judicial relief at both common law and in equity.

But is a jurisdiction which must be exercised in accordance with legally established causes of action. It cannot be exercised on any grounds the Court sees fit just because the court perceives there to be an administrative or other error. Thus it may be exercised in accordance with the law as to the various prerogative writs, or as to equitable or statutory forms of relief. A breach of a public law duty does not, by itself, give rise to a private right of action[411]. In either case it is subject to the limitations and conditions attaching to same, both substantive and procedural, applying at common law or in equity or by statute. It is also subject to any established legal immunities and privileges.

Each of the forms of judicial relief in administrative law will now be very briefly considered[412] in their application to the Territory.

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405 *Supreme Court Act (NT)*, section 14 (1)(a)(ii).

406 *Judiciary Act*, section 67C (a); *Supreme Court Act (NT)*, section 14 (1)(d). This applies the other way around as well.

407 *Supreme Court Act (NT)*, section 14 (1)(d).

408 *Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)* and equivalent State and NT Acts.

409 With some exceptions, see the *Commonwealth Cross-vesting Act*, above.

410 *Supreme Court Act (NT)*, section 14 (1)(b) and (c). The express jurisdiction conferred by Part IXA of the *Judiciary Act (Cth)* is expressly stated in section 67F (2) to be without derogation to any other jurisdiction conferred on that Supreme Court.

411 Selway, op. cit, 256 and footnote 145, citing several authorities.

412 This is not a detailed discussion of this subject as this is beyond the scope of this paper.

Prerogative Writs

These writs are a specialised aspect of the Supreme Court's supervisory jurisdiction at common law, originally utilised in respect of inferior courts and tribunals, but over time in England and Australia extended by judicial precedent to include other statutory bodies as well as servants, officers and agents of the Crown. In the NT, they are now initiated by originating motion rather than by writ, in seeking a judgment or order of the Court for review for relief or a remedy in the nature of certiorari, mandamus, prohibition and quo warranto[413]. The relief or remedy must be sought by originating motion within 60 days of when the grounds first arose[414]. This procedural reform does not otherwise alter the substantive law applicable to prerogative writs and does not abolish or replace those writs[415].

All prerogative relief in administrative law is discretionary[416], and the courts have recognised various grounds upon which the discretion may be exercised against granting relief. For example, where it would interfere with criminal proceedings or committal proceedings, where there is a right of appeal, laches[417], etc. The relief can be excluded by statute if in sufficiently clear terms[418], although the courts will lean against such an interpretation of the legislation if possible[419].

All prerogative relief in administrative law can only be granted on recognised legal grounds which the courts have developed over time. These grounds are not discussed in detail in this lecture.

Certiorari lies to quash a judicial decision already made, including a decision already made by a person or body where there was a duty to act judicially even if it was only an administrative decision which

413 *Supreme Court Rules (NT)*, Rule 56.01. The simplified single procedure for the 4 writs follows the statutory change first introduced in England in 1938 but does not otherwise alter the substantive law – De Smith, Judicial Review of Administrative Action (4th Ed., 1980, Stevens & Sons), at 584. The writ of habeas corpus is dealt with in Rule 57 of the *Supreme Court Rules (NT)* and is not canvassed in this paper.

414 Ibid, Rule 56.02, subject to a limited power to extend time in special circumstances.

415 This does not appear to be affected by the proposed new Civil Procedure Rules in the NT and the Practice Direction on Trial Civil Procedure Reforms, believed to be commencing on 1 January 2010, except perhaps indirectly in a procedural sense. Quaere, does the 60 day limitation period from the time the grounds for review first arose (or longer in proven special circumstances) in the existing Supreme Court Rules for seeking judicial review sit comfortably with the proposed pre-writ or pre-originating motion procedures in these proposed new Civil Procedure Reform provisions? The latter provisions contemplate a possible exception to these proposed pre-writ and pre-originating motion procedures for claims that are statute barred, but not expressly as to the short limitation period in the Rules for judicial review (assuming this is to remain). The essence of judicial review at present is that there must be a speedy application to the Court, otherwise the complainant must rely on ordinary civil remedies in tort or contract or at equity for which there is a much longer limitation period.

416 Although it is said that prohibition may issue as of right in some cases.

417 The limited time specified in the *Supreme Court Rules (NT)* for seeking this relief, mentioned above, would normally exclude this ground.

418 For example, the Supreme Court has no power to grant prerogative relief against the Local Court or an officer of the Local Court – *Local Courts Act (NT)*, section 35, but note the power to transfer Local Court proceedings into the Supreme Court. See also *Community Welfare Act (NT)*, section 62ZG, *Commercial Arbitration Act (NT)*, section 38, *Care and Protection of Children Act (NT)*, section 183, *Electoral Act (NT)*, section 262, *Stock Diseases Act (NT)*, section 46 and *Valuation of Land Act (NT)*, section 31.

419 It is not possible to enter upon a detailed discussion of the law on this matter in this lecture.

had some legal effect or legal consequences. To obtain this relief there must have been some breach of the recognised administrative law grounds for judicial review. Any party aggrieved by the decision has standing to seek the relief. Traditionally the relief was not available against the Crown per se, but it clearly is available against officers and servants of the Crown, including Ministers of the Crown, where they are under a duty to act judicially[420]. It is not usually sought against the official representative of the Crown[421], and may be more appropriately sought by joining the Attorney-General[422].

Prohibition lies to prevent a person or body proceeding in breach of the recognised administrative law grounds for judicial review[423] or in reliance on a decision made in breach of those grounds. The decision sought to be prevented must be a judicial decision, but this includes a decision by a person or body where there is a duty to act judicially even if it would only be an administrative decision that would have some legal effect or legal consequences. It lies in the space of time between when a decision is made to proceed in breach and before the decision is finalised. The same rules as for certiorari apply in obtaining this form of relief against the Crown, although traditionally the rules as to standing to obtain this form of relief were wider than for certiorari.

Mandamus lies to compel the person or body to whom or which it is directed to perform that person's or that body's public duty[424]. It does not lie to compel the performance of a private duty or action by a private body. It only lies to compel performance, and not where there is some legal error in actual performance. Where the decision-maker has discretion as to a particular decision, mandamus will only compel the exercise of the discretion in accordance with the law, and not the way in which the discretion should be exercised. Traditionally mandamus does not lie against the Crown[425] or a Minister or servant of the Crown to compel the performance of a duty owed to the Crown. However the restriction against a Minister or servant of the Crown has been avoided by the persona designata rule, such as where a person has been designated by a statute to perform some public duty. An applicant for mandamus must have a special interest in the subject matter to have standing.

Quo Warranto lies to challenge the title of a person occupying a public office[426]. It does not lie to challenge the legality of the office itself, nor the validity of an exercise of the powers of the office by the person occupying the office.

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420 This duty is interpreted widely in this context.

421 In the Territory, in relation to the Crown in right of the Territory in matters in respect of which the self-governing Territory and its Ministers have executive authority, this means the Administrator of the Territory appointed under the *Northern Territory (Self-Government) Act 1978 (Cth)*. Query, whether this rule has been altered in respect of actions against the self-governing Territory or an officer of the Territory by section 67C of the *Judiciary Act (Cth)*, section 14 of the *Supreme Court Act (NT)* and the *Crown Proceedings Act (NT)*.

422 *R v Toohey*; *Ex pt NLC* (1981) 151 CLR 170.

423 Other than perhaps an error of law within jurisdiction.

424 Selway, op. cit, says at 237 that the distinction between public and private rights remains unexplained.

425 *FAI Insurances v Winneke* (1982) 151 CLR 342.

426 Such as a defacto officer.

Equitable Relief

The most common form of equitable relief at administrative law is the injunction. An injunction is an order of the Court which directs a person or body to do or not to do something. The former is a mandatory injunction, and the latter a prohibitory injunction. The latter is available against the Crown in right of the Territory, a Minister of the Territory and an instrumentality or agency of the Crown in right of the Territory as well as any "*prescribed person*"[427]. However a mandatory injunction is not available against the Crown in right of the Territory or any such Minister, instrumentality or agency[428].

An injunction may be sought where certiorari or prohibition might otherwise be sought, but is not appropriate where mandamus would be sought. Traditionally the injunction has been granted to prevent the invasion of a private right. However it can now be used to restrain the invasion of a Territory governmental action which would affect a private right, and where that action would offend any administrative law ground and be ultra vires. In the latter case the private litigant must be able to show some associated threat to a private right or some special damage, that is, unless that litigant is able to bring a relator action through the Attorney-General. Otherwise only the Attorney-General may bring a suit for an injunction to restrain an invasion of a public right. The remedy is discretionary on normal equitable grounds.

The Territory Supreme Court has express legislative power to grant injunctions, either unconditionally or on terms and conditions[429]. An injunction may be granted at any stage of judicial proceedings in the Territory Supreme Court, and even before the commencement of proceedings in that Court in urgent cases without prior notice[430]. Injunctions may be granted in interim or final form.

Declaration of Right

The Supreme Court of the Territory has statutory power, in relation to a matter within its jurisdiction, to make binding declarations of right, whether or not any consequential relief is or could be claimed[431]. But it must determine legal rights and not be merely abstract or hypothetical[432]. Such a form of relief can be used in administrative law proceedings to challenge a decision that is illegal or ultra vires, or to challenge a decision-making process before it is completed. However being declaratory of rights only, it cannot be used to quash a previous decision, and some other judicial relief will be required to do this. It is a discretionary remedy, the discretion being exercisable on the normal judicial grounds. A person seeking a declaration must have a special interest in the matter. It is available against the Crown.

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427 *Crown Proceedings Act (NT)*, section 8(1). At present, the regulations made under that Act have not prescribed any person. But it seems likely that the list in the Act is not meant to be exhaustive.

428 *Crown Proceedings Act (NT)*, section 8(2), but see *Environment Protection (Northern Territory Supreme Court) Act 1978 (Cth)*, section 5 (a).

429 *Supreme Court Act (NT)*, section 69. A Territory Mining Warden also has power to grant injunctions for specific statutory mining purposes – *Mining Act (NT)* section 152.

430 *Supreme Court Rules (NT)*, Order 38.

431 *Supreme Court Act (NT)*, section 18 (1); *Supreme Court Rules (NT)*, Rule 13.05.

432 *Queensland Mines v NLC* (1991) 1 NTLR 66; *Wulaign Association v Minister for Racing and Gaming* (1991) 78 NTR 1.

Governmental Immunities from Judicial Review

Before proceeding in court against any part of the administrative apparatus of the Territory or the Crown in right of the Territory, it is necessary to consider whether the evidence sought to be relied on in support of the attack on the impugned action, or the impugned action itself, is subject to any form of exclusion from being put in evidence of is subject to legal immunity from suit (non-justiciable), at least as far as the Crown is concerned. These matters take various forms. Here following we briefly consider Crown privilege (public interest immunity), legal professional privilege, immunities from judicial review based on grounds of irrationality (administrative law unreasonableness) or procedural impropriety and the presumption of Crown immunity in statutes.

Crown privilege is now commonly called public interest immunity. It is derived from the common law and is part of the prerogatives of the Crown, although in the Territory there is still a statutory equivalent found in the Part IVA of the *Evidence Act*[433]. This Part depends for its operation on the furnishing of a certificate from the Attorney-General (NT) in the case of a document or record, and on the written approval of the Attorney-General in the case of oral evidence. It is directed at preventing disclosure in evidence of matters concerning the Executive Council of the Territory[434] and the Territory Cabinet[435]. Subject to any certificate or approval under that Part, nothing in the Part affects the prerogatives of the Crown or the operation of any law requiring the court to prohibit the disclosure of any communication on public interest grounds[436]. This allows common law privilege, or public interest immunity, still to operate in Territory law. It is understood this Part is not commonly used by the Territory.

Under the common law doctrine, being a rule of evidence, material otherwise relevant and admissible must be excluded by the court if its admission would be injurious to the public interest. It is not a true form of privilege, in that it can be claimed by anyone with a sufficient interest or by the court of its own motion, and it cannot be waived by any individual[437]. This is because it exists to protect the public interest. It is not lost for fraud. Hence it does not attach automatically to matters arising out of senior levels of government, for example, to the proceedings of Cabinet[438]. The court undertakes a balancing of interests test whenever the immunity is claimed, weighing the public interest in non-disclosure against the public interest in the court having access to all relevant and admissible evidence. The court can be expected to place emphasis on the public interest in protecting confidential cabinet documents, to be displaced only in exceptional circumstances. But at lower levels of government, it will generally be less easy to mount a successful argument as to public interest immunity.

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433 *Evidence Act (NT)* Part IVA.

434 *Northern Territory (Self-Government) Act 1978 (Cth)*, section 33.

435 A non-statutory body operating on Westminster lines and comprising the Ministers of the Territory. Major Territory Government decisions are usually made at this level. Cabinets generally operate in confidence on the basis of collective responsibility.

436 *Evidence Act (NT)*, section 42G.

437 Although a Minister of the Crown may be able to waive it in appropriate cases.

438 *Sankey v Whitlam* (1978) 142 CLR 1; *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

Evidence on matters of national security was previously one aspect as to which public interest immunity commonly attached at common law. This is now dealt with by the *National Security Information (Criminal and Civil Proceedings) Act* of the Commonwealth. That act binds the Crown in each of its capacities[439].

Evidence of matters subject to a valid claim to legal professional privilege will be excluded unless that privilege is itself excluded in specific cases by statute. This includes evidence of matters the dominant purpose of which[440] is the giving of confidential legal advice and assistance given by in-house government legal advisers[441], either by way of legal advice to the government and its departments, servants, agents and instrumentalities, or by way of communications by those legal advisers or the governmental client with third parties for the purpose of pending or contemplated litigation.

There are also a category of legal decisions of a governmental nature which are not subject to judicial review under any of the causes of action mentioned above. Selway describes these as decisions which are immune from review on the grounds of irrationality (that is, unreasonableness on Wednesbury principles[442]) or procedural impropriety (natural justice)[443]. He states this is because they involve significant policy elements, and are more in the nature of legislative decisions rather than executive or judicial ones[444].

439 Section 5.

440 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49.

441 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 163 CLR 54.

442 See footnote 3 above as to this ground of judicial review.

443 But not on the grounds of any form of illegality. See also Finn, "The Justiciability of Administrative Decisions: A Redundant Concept?" (2002) Fed L Rev 9. Note that Wednesbury unreasonableness has been maintained as aground for statutory judicial review in those Australian jurisdictions that have legislated.

444 Selway, op. cit., 252-253.

In this category he includes:

- Some, if not all, Cabinet decisions[445], particularly where the public interest requires complex policy or political issues to be taken into account;
- Some exercises of the Royal prerogative[446], including in foreign affairs[447], the appointment of judges[448] and Queen's Counsel[449], and the exercise of the prerogative of mercy;
- Decisions respecting governmental funding allocations[450], at least in the absence of representations and undertakings[451];
- Decisions respecting the maintenance of peace and good order, including ex officio indictments[452] and prosecution discretions[453];
- The making of delegated legislation[454].

445 *FAI v Winneke (*1982) 151 CLR 342; *South Australia v O'Shea* (1987) 163 CLR 378; *.Attorney-General (NSW) v Quin* (1990) 170 CLR 1. This category may include at least some decisions of an Executive Council.

446 But not all exercises of the prerogative – *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

447 *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 75 ALR 218, and see Horan, "Judicial Review of Non-Statutory Executive Powers" [2003] Fed L Rev 15; Finn, "The Justiciability of Administrative Decisions: A Redundant Concept?" [2002] Fed L Rev 9.

448 Normally the appointment of judicial officers, an administrative action, will be immune from judicial review, although see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Nth Aust Legal Aid v Bradley* (2004) 218 CLR 146. Judicial officers are immune from civil proceedings in respect of their actions in the course of the performance of their duties – *Fingleton v R* [2005] HCA 34; (2005) 216 ALR 474; (2005) 79 ALJR 1250. Note the provisions of the *Evidence Act (NT)* section 49Z, Magistrates Act (NT) section 19A, and the *Evidence Act (Cth)* section 129, although these provisions relate to the judicial exercise of power.

449 *Waters v Administrator for NT* (1994) 119 ALR 557.

450 Although this would not prevent court challenges on constitutional grounds - C*ombet v Commonwealth* (2005) 224 CLR 494; *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009).

451 See *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, where an action, based on lack of procedural fairness in the closure of a country hospital, failed.

452 Barton v R (1980) 147 CLR 75.

453 It appears that at common law, such decisions to prosecute are immune from judicial review – see M Flynn, "Human Rights, Prosecutorial Decisions and Judicial Review – The Emergence of Missing Links?", paper prepared when the author was a lecturer in law at NTU, now Charles Darwin University. However those decisions may be reviewable under statutory judicial review regimes – *Smiles v FCT* (1992) 37 FCR 538.

454 Note that the making of delegated legislation can be challenged at common law for improper purpose - *R v Toohey*; Ex pt NLC (1981) 151 CLR 170, and presumably for other forms of illegality. In addition, delegated legislation may be struck down at common law for unreasonableness in the sense that the making of the delegated legislation might as a consequence be held to not have taken place within the ambit of the power in the principal legislation – Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" [2002] Fed L Rev 8. This qualifies the normal rule that legislative action is not subject to judicial review. The making of legislation by a plenary legislature as part of its normal law-making activity is immune from judicial review except in limited cases involving specific constitutional requirements of a procedural nature such as valid manner and form provisions or where it offends the procedure in the Constitution. This is a topic beyond the scope of this lecture.

In addition, it is necessary to consider whether legislation contains any express statutory immunity from judicial review[455]. The courts will generally lean against such provisions unless the legislative intention is clear. Courts will be particularly reluctant to interpret such legislation as excluding judicial review on the grounds of any form of illegality[456].

The last matter to be referred to briefly under this heading is the presumption of Crown immunity from the operation of legislation[457]. This rule has now been limited to a narrow compass[458], but in appropriate cases can still operate.

Should Judicial Review extend to the merits?

It is quite clear the inherited system of judicial review in the Territory does not extend to the review of administrative decisions merely on the merits. It is necessary to bring any application for judicial review within one or more of the accepted grounds for review, none of which are only merits based. On the other hand, the Territory presently has a hit and miss approach to the merits review of some administrative decisions but not others. No general legislative system of administrative review before an administrative tribunal has yet been set up in the Territory.

This is a matter dealt with in the NT Law Reform Committee's Reports Nos 1 and 29 of 1991 and 2004 respectively. The difference between administrative review before a special administrative tribunal and judicial review before a court is referred to in the second of these two reports, citing Sir Gerard Brennan in Twenty Years Forward[459]. Judicial review by the courts is limited to declaring and enforcing existing rights and obligations, based on admissible evidence according to law. It has not traditionally encompassed review on the merits at common law. Review on the merits has traditionally been left to statutory forms of appeal, operating within certain limits, or more recently to specialist tribunals. Australian superior courts have been concerned to maintain the distinction between judicial review and review on the merits[460] .

455 Eg: *Local Court Act (NT)*, section 35, and see *Woodward v Loadman* [2005] NTSC 6.

456 This subject is beyond the scope of this lecture.

457 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.

458 *Bropho v Western Australia* (1990) 171 CLR 1.

459 At page 9.

460 *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 per Gleeson CJ and McHugh J and Gummow J in relation to the ground of unreasonableness. See also *Attorney-General (NSW) v Quin* (1990) *170* CLR 1 per Brennan J at 35-36.

But in suggesting a total statutory reform of judicial review in the Territory, there is a question whether the grounds for judicial review should be extended to encompass review on the merits. This suggestion, if implemented, could overlap with certain existing appellate provisions and also with the role of certain specialist tribunals with a power of review, or perhaps even replace them. Such a proposal would no doubt give rise to financial and procedural considerations, but the primary consideration would seem to be whether the Supreme Court was the appropriate body to assume such a general administrative jurisdiction to review a broad range of administrative decisions on their merits. It would take that Court well beyond review based on existing legal rights and obligations and would involve it in considerations of evidence as well as of administrative practicality, advisability, rationality and policy. On balance, the author leans against such a proposal.

The alternatives are either to leave the existing hit and miss position in the Territory as it is as far as review on the merits is concerned, or to establish by legislation a general administrative review tribunal for NT administrative decisions[461]. This lecture does not seek to take a position on either of those two options, but leaves the matter open for discussion.

Judicial Review – Statutory or at Common Law?

It is not proposed in this lecture to go through the various grounds at common law upon which judicial review could be based[462]. These are of general application to common law judicial relief, and can be obtained by going to any of the relevant text books. Selway has conveniently categorised them under the headings of "*illegality*", *"irrationality*" and "*procedural impropriety*"[463]. What is to be discussed under this heading is the fact that in several Australian jurisdictions these grounds have been reduced to statutory form as part of a legislative scheme for judicial review[464]. This legislation has been enacted as a result of the view that there were a number of legal technicalities, anomalies and legally uncertain aspects among these grounds at common law and at equity, these being in addition to the various limitations, above summarised, on the various forms of prerogative writs and other types of judicial review at common law and at equity. It is worth looking at what some of the commentators have said on this matter.

461 As recommended by the NT Law Reform Committee.

462 These common law grounds should be distinguished from those grounds provided under statutory judicial review schemes, as they do not correspond in all respects.

463 This is taken from Lord Diplock in *Council for Civil Service Union v The Minister for the Civil Service* [1985] AC 374.

464 For example, the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*, the *Judicial Review Act 1991* of Queensland, *the Judicial Review Act 2000* of Tasmania and the *Administrative Decisions (Judicial Review) Act 1989* of the ACT, mentioned further below.

The Statute Law Revision Committee in Victoria stated in its Report of 1968:

> *Much has been written about the shortcomings of the prerogative writs when viewed in the light of the changing administrative structure of the Executive. It would serve little purpose to incorporate a catalogue of the various criticisms here in view of the fact that obviously they have wide acceptance. There is general agreement that the system surrounding the writs is immersed in technical procedural snares which delay, and in some instances prevent, proper review by the courts….*
>
> *In terms of the individual seeking a just solution to his problem, the ramifications of judicial review by these methods are at best frustrating. The salient feature of interest to him in these proceedings – the legality of the administrative act or decision at issue – appears to be subordinate to seemingly endless legal argument as to the propriety of the method of review employed. Such exchanges will involve him in substantial costs and may not succeed in supplying him with a firm solution to his problem….*[465]

The Committee recommended the establishment of a special administrative appeals body.

The Kerr Report of 1971 made similar comments:

> *There is a complex relationship between the principles of review and the remedies available and technical limitations diminish the effectiveness of remedies which at first sight appear to be fairly comprehensive. Substantive principles are often concealed in what appear to be procedural restrictions… Our survey has led us to the view that there is ample room for simplifying the principles of review and the remedies available.*[466]
>
> *It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd.*[467]

The Kerr Report recommended a simple statutory procedure in the court which should set out the legal grounds for review[468]. This was in addition to its recommendation to establish an administrative appeals tribunal to review certain decisions on their merits. Further, it recommended this statutory judicial review should include review of decisions, including in appropriate cases reports and recommendations,

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465 Extracted from Commonwealth Administrative Review Committee Report, August 1971, Parliamentary Paper No 144 of 1971, 27 (herein called the "Kerr Report").

466 Kerr Report, paragraph 21, page 9.

467 Ibid, paragraph 58, page 20.

468 Recommendation 3, paragraphs 251 and 390.3.

of ministers, public servants, administrative tribunals, but not of the Governor-General[469]. It went on to make a number of consequential recommendations[470]. A person aggrieved should be able to apply for and receive reasons for the decision[471]. These recommendations were later incorporated in large part in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In broad terms this model was later used, upon the grant of Self-government to the Australian Capital Territory, in the *Administrative Decisions (Judicial Review) Act 1989* of that jurisdiction.

The Western Australian Law Reform Commission has recommended the statutory reform of judicial review in that state along the lines of the Commonwealth model[472]. It also recommended the abolition of the prerogative writs.[473] The Report of the Commission stated:

> *The Commission has found that there is a definite need for reform in this area of the law. We base this conclusion on our own research and on the submissions we have received in response to our Discussion Paper. The need for reform is indicated on the grounds that the current procedures pertaining to judicial review are complex and highly technical. Some of these complexities stem from unnecessary inconsistencies in procedures between prerogative and equitable remedies. In addition, we consider that there are defects in the existing substantive law and that it is a deficiency in current law that there is no general entitlement to written reasons for administrative decisions.*[474]

Some other Australian jurisdictions have since followed this statutory model for judicial review, at least in broad terms[475], although there are some differences. For example, the Commonwealth model is limited to decisions under an "*enactment*", whereas the Queensland Act extends to certain non-statutory actions[476]. Other States have preferred to adopt the shorter model of a single judgment or order to review in the nature of the four main prerogative writs[477] as part of the Rules of Court.

469 Recommendation 4, paragraphs 253, 265 and 390.4.

470 Recommendations 5, 6 and 7, paragraphs 254-259, 263 and 390.5-7.

471 Recommendation 8, paragraphs 266 and 390.8. There is no general law duty for an administrative decision maker to give reasons - *Public Service Board of NSW v Osmond* (1986) 159 CLR 656

472 *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

473 Final Report on Judicial Review of Administrative Actions, WALRC 95 (2002).

474 Ibid, page 5.

475 *Judicial Review Act 1991 of Queensland*, the *Judicial Review Act 2000* of Tasmania.

476 Ibid, section 4 (b). A proposal to also abolish the prerogative writs was made in the Queensland Parliament in 1991 when the bill was in the house but was abandoned upon objections being made – see Thomas J, "Administrative Jurisdiction: The Jewel in the Crown", (1998) 9 Pub L Rev 43 at 48. The *Judicial Review Act* now provides for the substitution of the prerogative writs by the grant of an order, relief or remedy in the nature of a writ of mandamus, prohibition or certiorari – Part 5. The Tasmanian Supreme Court has held that it has power to make similar orders – *Tasman Quest Pty Ltd v Evans* [2003] TASSC 110, 13 Tas R 16.

477 *NSW Supreme Court Act 1970*, section 69, Victorian Supreme Court (General Civil Procedure Rules 2005, Rule 56, NT Supreme Court Rules, Rule 56, discussed above. In South Australia, a modified version has been incorporated in the Supreme Court Rules 2006, Rules 199 – 201. Western Australia still has the different prerogative writs, but note the recommendations of the WA Law Reform Commission in WALRC 95, discussed above.

While this latter approach may have avoided some of the difficulties in choosing the right writ, it does not amount to the comprehensive reform advocated by the Kerr Report.

It should be noted that because of the provisions of section 75 (v) of the Constitution[478], and also of section 67C of the *Judiciary Act 1903(Cth)*[479], it is probably not possible for the NT by its legislation to abolish or replace the prerogative writs altogether. But like the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*, it is open for the Territory to legislate to provide a form of statutory judicial review as an alternative to the prerogative writs.

There has apparently been no detailed consideration of a possible statutory judicial review regime in the Territory since the grant of Self-government in 1978, at least not to the writer's knowledge. The Territory Law Reform Committee did recommend the establishment of a system of administrative review[480] similar to the model established by the Commonwealth[481], using the Victorian or Western Australian equivalent. This recommendation has not been acted upon as yet. But that Committee did not deal with a possible statutory system of judicial review though the Supreme Court.

Chief Justice Brian Martin addressed a meeting of the Australasian Study of Parliament Group in Darwin in 2003[482] where he stressed the great importance of judicial review through impartial and independent superior court to the maintenance of the rule of law in a modern society like the Territory, particularly in ensuring administrative action is taken with lawful authority in accordance with the correct procedures. This, he said, upholds and supports the actions of parliament by giving proper effect to the legislation it enacts. But he did not go into any detail as to possible reform of judicial review law.

One advantage of enacting Territory legislation on this subject at this time is that there is already a working legislative model in Australia[483], and there has been enough time for a body of Australian case law to develop to clarify its operation and effect[484]. It is not as though the Territory would be

478 The High Court is given, by section 75 (v) of the Constitution, automatic original jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Such a matter may be remitted by the High Court to the Supreme Court of the Territory – *Judiciary Act*, section 44 (1). Section 44 (2) does not appear to ban such remittal under section 38 (e) of that act, as the latter section only makes the High Court's original jurisdiction exclusive of State courts. This is confirmed by section 67C (b) of the *Judiciary Act*, which gives the Supreme Court of the Territory jurisdiction where a writ of mandamus or prohibition is sought against the Commonwealth or an officer of the Commonwealth, being matters arising in the Territory or under laws in force in the Territory. Query, does this invalidate Rule 56 of the Supreme Court Rules of the Territory? Probably not, as those Rules do not purport to abolish or replace the common law prerogative writs.

479 *Judiciary Act*, section 67C (a) and (b).

480 Report on the Review of Administrative Decisions and an Administrative Tribunal, NTLRC 29, 29 September 2004.

481 *Administrative Appeals Tribunal Act 1975 (Cth)*.

482 "Parliamentary Government: Under Threat From the Courts?" ASPG Annual Conference, 18-19 July 2003.

483 It is in fact one model throughout Australia, with only minor variations to the general scheme of each of the Acts.

484 There is no doubt that the considerations bearing upon the meaning of expressions used in state judicial review acts that were borrowed from the *Commonwealth Act* also apply to those State Acts – *Griffith University v Tang* (2005) 221 CLR 99 per Gleeson CJ.

introducing new, experimental legislation. On the whole, the legislation elsewhere in Australia on this subject has worked reasonably well, at least as far as can be ascertained.

The view has been expressed that judicial review through the courts is no longer the main avenue for obtaining administrative justice[485]. But it clearly does remain an important safeguard for correcting illegal or manifestly irrational or procedurally unfair administrative decisions. The absence of a general administrative appeals tribunal in the Territory makes judicial review even more important[486]. Of course, judicial review will not be an adequate remedy by itself in all administrative matters; it has to be part of a wider system. This is because there will be limitations on the scope of any system of judicial review by its very nature, even in a simplified statutory format. Thus to take advantage of it, it requires a person to go to the trouble and difficulty of going to court, usually a daunting task. And as noted, judicial review does not presently lie to remedy administrative decisions merely on their merits. It does not override the decision of the decision-maker except on recognised and justifiable legal grounds.

But without a system of judicial review in some form there would be real dangers to the application of the rule of law in the Territory. It is a fallback remedy, when other simpler remedies do not suffice but where there is a justifiable legal case for a remedy. Arguably, in a modern constitutional democracy under the rule of law[487], we must have an effective system of judicial review applicable to Territory governmental decisions. It is a judicial safeguard, performed by independent judges on established legal grounds and within proper legal parameters, and designed to ensure the proper and fair application of the law as between an administrative decision-maker and those directly affected by the decision. If there is to be such a system, then it seems manifestly reasonable that it be in modern, simplified, statutory form, free of archaic technicalities and inconsistencies, and more user-friendly to the government, to the practitioner and to the public. The added benefit is that there is few added cost implications of such a statutory reform, no new statutory bodies need be created, and no added governmental staffing is required. It is highly unlikely such a statutory reform would lead to a flood of extra court cases.

While this lecture does not enter upon the detail of the suggested reform, it is recommended that serious consideration be given to the enactment in the Territory of a statutory form of judicial review along the lines of legislation elsewhere in Australia.

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485 Creyke, "Administrative Justice – Towards Integrity in Government" [2007] MULR 29. In the Territory, the Territory Ombudsman and the easy access to members of the NT Legislative Assembly may be more important factors in obtaining administrative redress. But neither provide legal remedies as of right.

486 The author is not arguing here that there need not be a system of general administrative review in the Territory before an appropriate administrative tribunal established by statute – merely that this is another matter for consideration at some other time or place.

487 The rule of law underlies the Constitution – see cases listed by Selway in "The Principle Behind Common Law Judicial Review of Administrative Actions – The Search Continues" [2002] Fed L Rev 8 at footnote 76. Dicey may have been the first to proclaim that judicial review of administrative action was fundamental to the rule of law.

The Revival of Proposals for a Grant of Territory Statehood: Some Unresolved Constitutional Issues 2011

Introduction

This is the fifth in a series of lectures I have given in recent years to the Law Society of the Northern Territory on major constitutional and legal issues affecting the NT. The subject of Territory Statehood has been chosen this time because of the proposals to hold a constitutional convention in the Territory in the near future. I do not want to enter into the political pros and cons of a grant of Statehood; what I would like to do in this lecture is to discuss a couple of the major unresolved constitutional issues that bear upon such a grant being successfully made. They are not exhaustive of such issues.

Let me say first that, in my view, there are no completely unresolvable constitutional and legal issues to the grant of Statehood to the NT, complex as some of those issues may be. The primary barriers to a successful grant are political, not constitutional/legal. Part of the constitutional/legal difficulties are because there has never been a grant of Statehood post federation in this country, hence issues of that nature have not yet been properly tested in Australian domestic courts. Overseas precedents are of very limited value. But it is clear the founders of the federal Constitution intended that new entities should be able to become new States in the Australian federation, including by the mechanism in section 121 thereof[488], if there is the political will to do so. This no doubt includes the NT as a separate self-governing Territory of the Commonwealth, where the prevailing view is that it is able to be turned into a new State. As will be seen below, there may be one or more constitutional/legal issues of such present uncertainty; concerned persons may need certainty in respect of them before the grant of Statehood is finalised. Hence that issue or those issues may need to be judicially tested as part of the process of granting Statehood before the grant comes into effect. There is a mechanism proposed to deal with this. But these issues are very few, and ultimately if there is a strong enough political will in all the right quarters to create a new State, then it will happen.

This is not to underestimate the complexity of the constitutional issues involved, particularly if statehood is to be granted by the mechanism provided in section 121 of the federal Constitution. The alternative of using a national referendum to grant Statehood may, if properly drafted, be able to overcome all such difficulties, but the political dangers of successfully using this method weigh heavily against it.

488 The other option is by constitutional referendum under section 128 of the federal Constitution to create a new State. This mechanism has been used in other countries, perhaps where constitutional change is not so difficult. But in Australia this method is not favoured. It may require a referendum majority in every State because of federal representation issues.

The issues I wish to concentrate upon in this lecture are, firstly, the matter of constitutional entrenchment; that is, whether it is constitutionally possible for a new Territory constitution, upon a grant of Statehood, to validly entrench some or all of its provisions in some manner beyond future change by an simple majority vote of the members of the new State parliament present and voting in the normal legislative way. I choose this issue because it seems to me unlikely that Statehood will ever be granted to the Territory unless certain key provisions are entrenched in the new State constitution in some manner, or are otherwise secured in some legally certain manner, beyond future change by legislation of the new State passed by the simple majority vote. I have in mind in particular the possible entrenchment of certain Aboriginal rights guarantees[489], but like the constitutions of the existing States, there may be other key provisions in this category[490]. I am not presently concerned with the detail of those rights; nor am I concerned with the validity of entrenched provisions in existing State constitutions (that is, in the original States)[491]. I am only concerned at this time with the constitutional arguments and mechanisms which might be used to validly entrench any such provisions in a new State constitution at the time of the grant of Statehood. This needs to be clarified as far as possible.

The other issue to be discussed in this lecture is that of the federal Parliamentary representation of the new State. It seems reasonably clear that a new State must have at least some such parliamentary representation, presumably in both the House of Representatives and in the Senate. But it also seems clear that there is no constitutionally guaranteed minimum representation in either such House for a new State, unlike the original States[492]. There is a widely expressed constitutional discretion vested by the federal Constitution in the federal Parliament to grant such representation to a new State[493]. The exercise of this power will no doubt be the subject of political concern, not only to any new State and the federal Government, but also to the existing States. The federal political balance is a fine one, delicately poised and dynamic, and any change which affects it obviously will raise political considerations.

But here is the rub: because the membership size of the two federal Houses are directly connected and made proportionate to each other by the nexus formula in the federal Constitution[494], there is an unresolved constitutional issue as to the effect of any grant of federal representation to a new State on that formula and, as a result, on the effect of such a grant on the respective numbers of members

489 I do not enter into the question in this lecture as to what those rights should or might be. This is a topic on its own, upon which views will differ, and would require a lengthy consideration, beyond this lecture.

490 The relevant Committee of the Legislative Assembly of the NT on constitutional development previously recommended that the whole new State constitution be entrenched, see below.

491 In this regard, I note the view, as yet not fully tested judicially, that the entrenched provisions of existing State constitutions that have been inserted by State parliaments, apart from those that are in respect of the constitution, powers or procedure of those State parliaments as set out in the manner and form provisions of Section 6 of the *Australia Act 1986*, may be invalid. See Prof Twomey, below.

492 Federal Constitution, sections 7 and 24 as to an "*Original State*". The Northern Territory, although annexed to the Province of South Australia prior to 1901 and continuing as from 1901as part of an Original State, was not by itself an original State. It was subsequently surrendered to the Commonwealth in 1911.

493 Ibid, section 24, discussed below.

494 The so-called two for one nexus.

of the House of Representatives for each existing State. If as a matter of constitutional law the federal representation granted to a new State directly affects that formula, then it may bring results for some existing States that are more favourable than for other existing States. The constitutional effect of a grant of federal representation to a new State on this constitutional formula is an unresolved issue and one that also needs to be clarified.

This last issue is quite apart from the wider question, perhaps only political in nature, as to the options concerning the extent and conditions of such a grant of representation to a new State and their respective political merits, and whether existing States will be satisfied with any particular level of grant of federal representation to a new State. I do not enter upon this issue in this lecture.

In relation to both issues, I discuss whether an approach to the High Court will be necessary to clarify the law.

There are certainly other constitutional issues which deserve to be raised in relation to the proposals for NT Statehood, and I am happy to entertain questions thereon, but time does not allow an exploration of them in this lecture.

Issue 1 - Constitutional Entrenchment

It seems most unlikely Statehood would be granted to the Territory in the foreseeable future without some constitutional security for provisions protective of certain Aboriginal rights. The demands of Aboriginal groups and spokesmen for such guarantees have been loudly voiced and need not be repeated here. Persons of Aboriginal descent already make up about 30 per cent of the Territory population, and this percentage may well increase[495]. Given that a Territory referendum on Statehood will almost certainly precede any such grant, Aboriginal voters will form a significant part of the Territory voting population, as was obvious from the 1998 Referendum on Statehood. At present, NT Aboriginals and their rights have virtually no constitutional protection beyond simple majority parliamentary votes in either the Commonwealth or the NT legislatures[496]. Whether this may change as a result of the current debate on national constitutional recognition of Aboriginals leading to some constitutional change is something which cannot presently be determined.

This means the potential for and validity of any constitutional entrenchment in a new NT State constitution of certain Aboriginal rights, and possibly for other provisions, may well be a key debating ground in any campaign for Territory Statehood. This could, for example, take the form of a negotiated framework agreement between NT Aboriginal representatives and the NT Government, as advocated in the Kalkaringi and Batchelor Statements, that agreement to be given some kind of constitutional

495 It has been estimated that it will rise to 34.5 per cent by 2031.

496 The recent federal intervention in the Territory, with suspension of statutory provisions against racial discrimination, is illustrative of the comparatively weak constitutional protection of Aboriginal rights in Australia. See also the ongoing debate over a nuclear waste dump on Aboriginal land in the Territory.

status upon the subsequent grant of Statehood[497]. As far as possible it is desirable that this matter of the capacity for valid constitutional entrenchment be legally clarified in advance of any such grant. The question is - is entrenchment of certain rights in a new NT State constitutional context legally possible? The absence of any relevant judicial precedent in the unique Australian context makes this difficult to be absolutely sure. For present purposes it comes down to a matter of constitutional analysis.

In this respect we are assisted by a variety of constitutional views of relevance which have already been expressed. The relevant Committee of the Territory Legislative Assembly on constitutional development initially took the view that constitutional entrenchment of a new State constitution was not only possible, but was desirable that it should be done[498]; its draft Constitution so provided[499]. This provision survived the 1998 Territory Constitutional Convention on Statehood in a simplified form, but the Territory Statehood Referendum which followed failed to secure majority voting-public support[500].

Subsequently the Central Land Council in 2006 raised with the Statehood Steering Committee the query whether constitutional entrenchment would be legally effective to protect matters such as Aboriginal land rights on any grant of Statehood. The Council was concerned that entrenchment in a new State constitution might not offer sufficient guarantees. This matter was referred to me by the Statehood Steering Committee for advice[501]. It is in order for me to now reveal that advice without breaching professional confidence as it has already been publicaly considered in some detail by Professor Twomey in her valuable contribution in a journal[502].

In summary, my opinion was it was legally possible to entrench provisions in a new State constitution at or before the time of the grant of Statehood. Those existing constitutional provisions would be carried forward on and from the grant by force of section 106 of the federal Constitution, and its existence could be made a term or condition of the grant by section 121 thereof. It is of course assumed for this purpose that those constitutional provisions for entrenchment would be expressed in clear and unambiguous language[503]. The contrary view that entrenchment was not constitutionally possible did not, in my opinion, take into account the combined operation of sections 106 and 121 of the federal Constitution, and the inapplicability of section 6 of the *Australia Act 1986* in that situation.

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497 The Long Road to Statehood, House of Representative Standing Committee on Legal and Constitutional Affairs, Report, May 2007, at pages 53-59.

498 Sessional Committee of the Legislative Assembly of the Northern Territory on Constitutional Development, Report "Foundations for a Common Future" Vol 1, 5-4 (November 1996).

499 Ibid, 8-77, clause2.4.

500 Report of the Statehood Convention, Vol 1, April 1998. It has been commented that it was not clear from its wording whether that referendum question was on the proposed new Constitution as adopted at the Convention or on the grant of Statehood generally.

501 At that time I was legal adviser to that Committee, since resigned.

502 Ass Prof Anne Twomey, "A Constitution for a new State: Dilemmas for the Northern Territory", (2007) 18 PLR 200, discussed below. See also Twomey, the *Australia Act 1986*, (Federation Press, 2010). My advice is dated 26 July 2006.

503 See Kirby J in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at paragraph 158.

Section 106 of the federal Constitution provides:

> *Saving of Constitutions*[504].
> *106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.*[505]

Section 121 thereof, which provides for the creation of new States and is considered to be appropriate for a grant of Statehood to the Territory, provides:

> *New States may be admitted or established.*
> *121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.*

Section 106 might appear on its face to be a manner and form provision, enabling the future entrenchment of provisions by a State parliament in a State constitution until altered thereafter in accordance with that entrenched mechanism. But the predominant judicial dicta does not support this conclusion. Rather, section 106 seems to be regarded as more of a transitional provision, carrying over and continuing a pre-existing constitution of a body politic, with its existing plenary legislative and other powers, into the new status of a State constitution upon the grant of Statehood, but subject thereafter to the federal Constitution[506] and presumably also the operation of the *Australia Act 1986*. Section 106, it seems, does not confer power thereafter on an operating State parliament to insert new manner and form provisions in the State constitution beyond that provided in section 6 of the *Australia Act*, only a power to amend that constitution in accordance with its existing provisions for change already in that constitution. Section 106 may also have some relevance as to the protection of a State constitution from later Commonwealth impact in addition to or in association with the protection provided by the *Melbourne Corporation case* doctrine[507].

That the States[508] have a plenary grant of legislative powers (subject to a foreign relations limitation,

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504 The meaning of *"constitution"* in this context has yet to be conclusively determined by the *High Court – New South Wales v Commonwealth* [2006] HCA 52 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

505 "*State*" clearly includes a new State. See also definition of "*The States*" in section 6 of the *Commonwealth of Australia Constitution Act 1900*.

506 See in particular Gleeson CJ, Gummow, Hayne and Heydon JJ in *Attorney-General(WA) v Marquet* (2003) 217 CLR 545 at paragraph 80. See also Carney, The Constitutional Systems of the Australian States and Territories, (2006 Cambridge UP) at pages 190-191.

507 (1947) 74 CLR 31.

508 This includes a new State – see section 16 (1) of The *Australia Act*.

see below) is confirmed by section 2 (2) of the *Australia Act*, but this is expressly made subject again to the federal Constitution by force of section 5 (a) of the *Australia Act*[509]. The federal Constitution always prevails over any other Australian law as the supreme domestic law of Australia. But that federal Constitution does not expressly deal with manner and form matters in relation to existing State legislatures. There may be force in the Twomey view, at least for existing States, and presumably also for the future actions of the legislature of a new State, that the only manner and form provision that permits the valid entrenchment of any provisions in State constitutions by way of a legislative act of a State parliament is now that which complies with section 6 of the *Australia Act*[510], namely:

> *Manner and form of making certain State laws*
> *6. Notwithstanding sections 2 and 3 (2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.*

Section 2 of the *Australia Act* provide:

> *Legislative powers of Parliaments of States*
> *2. (1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.*
>
> *(2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.*

509 By section 5 (a), section 2 of The *Australia Act* is made subject to the *Commonwealth of Australia Constitution Act* and the Commonwealth Constitution.

510 A view put forward by Prof Twomey in her article, op. cit. Carney, in his book, The Constitutional Systems of the Australian States and Territories (2006, Cambridge UP) appears to lend support for this view, at least unless the UK Parliament has a power of entrenchment, for example under the principle in *The Bribery Commissioner v Ranasinghe* [1965] AC 172 – see Chapter 6. I have elsewhere expressed the view that it would not be advisable to rely on *Ranasinghe* in this context. Twomey accepts that section 6 only applies where a State legislature seeks to enact legislation that would create a manner and form provision. It can have no application on its terms where the manner and form provisions are imposed by some other method, such as at the time of the creation of a new State and before the new State parliament has had the opportunity to act, or where they are contained in a constitution of a body politic that subsequently becomes a new State. If section 6 does cover the field, it can only be in relation to the enactment of manner and form provisions by an existing State parliament. In my view it can have no operation in respect of the manner and form provisions already contained in a body politic's constitution where that body politic seeks a grant of Statehood post federation on the basis of that constitution.

The exact purpose or mischief to which section 2 (2) is directed is not entirely clear from the discussions of the framers of the *Australia Act*. Initially the provision was thought necessary in response to suggestions that States had no power to legislatively affect the powers of the United Kingdom with respect to the States, including the prerogative[511]. The States came to the view that it was necessary to confirm their plenary legislative powers once the *Australia Act* were enacted, except of course as to external relations. But there was never any suggestion I know of to the effect that the subsection could have an operation which could be used to limit the effect of the federal Constitution, including as to the creation of new States with their own constitutions and as to the terms and conditions thereof.

Professor Twomey puts forward the view that as section 2 (2) of the *Australia Act* was intended to be a plenary grant of power to State legislatures, that it can only be cut down by section 6 of those Acts. As arguably the legislative powers of the UK Parliament are said to be supreme and unlimited such that it is incapable of entrenching its own legislation, there is as a result of the subsection no power to impose manner and form requirements by an Act of a State parliament (except in so far as the *Australia Act* expressly confer it in section 6). It follows from section 2 (2), in her view, that the provision should also be read very broadly, consistent with the inability of a State parliament to bind itself , and there is in fact no such power in State legislatures outside of section 6[512]. This includes new State legislatures by definition. As a consequence, she raises doubt as to the validity of any manner and form provisions in a new State constitution beyond that permitted by section 6 of the *Australia Act*.

But as section 2 (2) of the *Australia Act* is expressly made subject to the federal Constitution, it is still necessary to consider whether there is some power under the federal Constitution to validly specify or permit a manner and form creative capacity in the constitution of a new State at or before the grant of Statehood and binding on a new State legislature thereafter. This is quite distinct from the question whether a new State parliament can legislate to create manner and form provisions. This is a matter that I considered in my previously mentioned advice, in which I relied upon the operation of sections 106 and 121 of the federal Constitution to conclude that there was such a power.

In this regard, the former Territory Legislative Assembly Committee on Constitutional Development took the view on my advice that the constitution of the Territory as a new State should be brought into operation immediately before the grant of Statehood so it was clear it had the benefit of the operation

511 Twomey, the *Australia Act 1986*, op. cit., 205-208.

512 Twomey concludes from this that some of the entrenched provisions in existing State constitutions may be invalid. I do not seek to challenge this view.

of section 106 of the federal Constitution, even on a narrow reading thereof[513]. This would enable the Commonwealth to recognise the validity of a manner and form capacity attaching to the Territory legislature in that new constitution while it was still a Commonwealth Territory and subject to the plenary and virtually unlimited legislative powers of the Commonwealth Parliament under section 122 of the federal Constitution[514]. It follows in my view that section 106 of that Constitution would have the effect of continuing in force, on and from the grant of statehood, that existing Territory constitution as in force immediately before the grant, including the provisions as to manner and form therein. The effect of section 106, on this view, would arguably be to continue the constitution of that former Territory, with its own legislature, and with all the limitations then existing on the legislative powers of that Territory legislature, as the constitution of the new State, with its own new State parliament, being a continuation of that former Territory legislature and constitution, and still subject to the same limitations, including any manner and form provisions.

The difficulty with this view, as Professor Twomey points out, and as already discussed above, is that the prevailing view of section 106 does not confirm an operation which would support the making thereunder of manner and form provisions by a State parliament by ordinary legislation to alter its constitution[515]. Twomey's comments are relevant to the question whether section 106 is itself capable of supporting the valid enactment by a State parliament of manner and form provisions in a State constitution in addition to or beyond that provided in section 6 of the *Australia Act*, or whether this is a matter for section 6 alone. This seems to be a quite different question from whether section 106 continues in force, as from a grant of new Statehood made post-federation,

513 See comments of Brennan CJ in *McGinty v Western Australia* (1996) 186 CLR 140 at 171-173, to the effect that one of the purposes of section 106 was to confer on new States substantially the constitutions of the antecedent colonies, which were continued as the constitutions of the respective new States subject to the *Constitution Act* and the federal Constitution. Section 106, unlike sections 107 and 108, is not limited to former colonies. The same reasoning can apply to a self-governing Commonwealth territory with its own constitution. There is no constitutional requirement for a pre Statehood entity to have a constitution as such, but if it does have one then section 106 would seem to operate upon it upon the grant of Statehood. No doubt some drafting techniques would be required to change references in that constitution from the status of a Territory to that of a new State immediately upon the grant of Statehood taking effect.

514 In my opinion, section 122of the federal Constitution in relation to Commonwealth territories is virtually unlimited as to subject matter and is wide enough to enable the Commonwealth Parliament, directly or indirectly, to enable a territory legislature to impose valid manner and form provisions on that legislature in a binding manner. So much has been done in a qualified manner for the ACT – *Australian Capital Territory (Self-Government) Act 1988*, section 26. There is no suggestion of which I am aware that this provision is invalid. In like manner the Commonwealth could confer a constitution on another self-governing territory body politic that included a capacity to impose such manner and form provisions.

515 Twomey, op. cit at 208 -209. I also referred to this dicta in my previous advice. These dicta and comments were generally made in the context of existing States and their constitutions, including the continuance of existing manner and form provisions in former colonial constitutions once they became the original States of the new federation in 1901, and do not specifically address the position of a body politic and its constitution when seeking a grant of Statehood post federation and the effect of that grant on that constitution.

the constitutions of bodies politic which already contain valid manner and form provisions applicable to their legislatures at the time of the grant of Statehood[516]. This latter position is not a case of a State parliament legislating for manner and form, the only situation to which section 6 is addressed.

It is to be noted that Kirby J in *Yougarla v Western Australia*[517] took the view that section 106 did not exclude pre-federation Imperial manner and form provisions which formed part of the constitution of the State[518]. This view would seem to be correct, at least up to the enactment of the *Australia Act* and the replacement of those Imperial provisions by those Acts. This being so, one might ask by way of analogy why should not existing and valid manner and form provisions in some other body politic's constitution (not yet a State) be continued in force by section 106 upon a grant of Statehood. Absent some other restriction of superior legal force, there is clearly nothing to prohibit a body politic (other than an existing State, but including a Commonwealth territory under section 122 of the federal Constitution), from having its own entrenched provisions in its constitution[519].

But given the judicial dicta and now the comments of Twomey, I thought it wise to also seek in aid some other provision of the federal Constitution other than just section 106 to support any existing manner and form provisions in force immediately before the grant of Statehood, in order to give them continued legal force on and from the grant of Statehood. In this respect, I also relied in my earlier advice on the power of the federal Parliament in section 121 of the federal Constitution to admit or establish a new State, making or imposing "*such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.*" As noted, this section has consistently been nominated as providing the most appropriate method for granting Statehood to the Territory. But again, the lack of any judicial precedents on the scope and exercise of this power, in particular the scope of, and the extent to which it is permissible to make, valid terms and conditions, creates a difficulty.

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516 It could be answered in response that even if the constitution of such a body politic contained such a manner and form capacity before the grant of Statehood, that the effect of sections 2 (2) and 6 of The *Australia Act*, upon the grant of Statehood, would thereafter be to discontinue those manner and form provisions, on the basis of the apparent view of Twomey that section 6 was exhaustive and, together with section 2 (2), would not allow the continuance of those manner and form provisions on and from the grant of Statehood, but would otherwise leave the legislative powers of the new State parliament intact. But it seems to me that this would amount to a rewriting of the new State constitution and not give full effect to section 106 in its carrying forward of that constitution intact subject only to that federal Constitution, and hence contrary to section 5 (a) of the *Australia Act* and the superior operation of the federal Constitution. The former view seems to me to be an excessively expansive interpretation of the operation of the *Australia Act* and to the application of the UK notion of parliamentary sovereignty in the very different Australian context, beyond that of the field intended to be covered by section 6 of the *Australia Act*, and would give superior operation to section 2 (2) over the federal Constitution itself, contrary to section 5 (a) of the *Australia Act*. The immediate forerunner of section 6, in the *Imperial Colonial Laws Validity Act 1865*, was intended to have an operation that was expansive of colonial legislative powers and not restrictive of them. It ensured that the legislatures of the former self-governing colonies had a qualified power to introduce manner and form provisions but otherwise had a plenary grant of legislative power for the colony. This qualified power of the new States and their parliaments was certainly carried forward at federation – see *McGinty's case* and the *Yougarla case*.

517 (2001) 207 CLR 344 at 375-380.

518 See also Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Yougarla's case* at paragraph 64.

519 This would be in particular so if the power to entrench was expressly conferred by a superior legislature, such as the federal Parliament in the case of a self-governing territory.

The power to make or impose terms and conditions in section 121 is expressed extremely broadly. But this does not necessarily mean it is unlimited by any other provisions of the federal Constitution. For example, it has been argued with some force that this power could not be validly used to exclude the application of certain constitutional guarantees in relation to a new State which would otherwise be applicable to any State[520]. These constitutional guarantees are mostly, by their own terms, applicable to original and new States. Taking it a little further, it has been argued that this power might not enable the Commonwealth Parliament to validly alter the federal division of legislative powers between the Commonwealth and the States in sections 51 and 52 of the federal Constitution in relation to a new State, at least not on a permanent basis. Twomey herself notes the limitations on the terms and conditions power, raising uncertainty as to how far that power is capable of extending.

But it seems to me the power to admit or establish a new State must include power to admit or establish an existing body politic already with its own constitution, on the basis that it becomes the constitution of the new State. So much is contemplated by section 106 of the federal Constitution, already discussed[521]. The latter section does not create that constitution, but continues an existing constitution in force immediately before the grant of Statehood as the new State constitution. If it is the case that an extant body politic already has a constitution in some form at the time it seeks a grant of Statehood, regardless of whether it is specifically called a "*constitution*" as such, then that constitution will become, with necessary changes to reflect the change of status to a new State effected under section 121 of the federal Constitution, the constitution of the new state by force of section 106. This is necessarily a part of the work of that section. But in a sense it is also a part of the operation of section 121, given it is under this section that not only is the grant given legal effect such that an entity becomes a new State in the federation, but also the terms and conditions of that grant are determined. If the Commonwealth grants Statehood to a body politic with its own constitution, then you cannot divorce that body politic from its own constitution, where the constitution defines the essential nature of the body politic and to which it owes its very existence[522]. But the body politic, with its own constitution in force prior to the grant of Statehood, cannot by itself through its legislature establish and give legal effect to Statehood, with that constitution as the constitution of the new State. It is Commonwealth legislative action under section 121 of the federal Constitution which does this. The conversion of an existing constitution into a new State constitution is an inherent part of the grant of Statehood.

I see no good reason[523] why such a constitution in force prior to a grant of Statehood that is either flexible or rigid in terms of law-making, and continued in force from the grant of Statehood by force of the federal Constitution, will not continue to be correspondingly flexible or rigid in terms of that

520 For example, section 92 of the federal Constitution. This was a view endorsed by Toohey J in a speech given in Darwin.

521 The prevailing judicial view seems to be that the constitution of a political body that is continued in force by section 106 of the federal Constitution takes its legal effect post Statehood by force of that federal Constitution. But this does not mean that the Commonwealth Parliament can thereafter freely legislate with respect to that constitution.

522 This existing constitution will almost certainly already contain provision for a legislature of some kind, with its own powers and procedures for law-making, including (possibly) a manner and form provision.

523 Putting to one side the arguments discussed above as to section 106 of the federal Constitution read with the *Australia Act*.

law-making thereafter[524]. It is admitted or established on this basis, and the constitution in that form is continued in force from the grant of Statehood by force of section 106 of the Constitution. It is not open to a lesser law, the *Australia Act*, which itself is expressed to be subject to the Constitution on this point, to require or mandate otherwise. There is no condition precedent to a grant of Statehood that such an existing constitution must be flexible in nature, and in my opinion the new State can be admitted or established by and under the Constitution with either an entrenched or flexible constitution. In my view it is not open to a lesser law to require that the constitution of a new State must be flexible from day one of the grant even though the new State is admitted or established as a new State, and its existing rigid constitution is continued, by force of and under the federal Constitution.

Twomey expresses a concern that if the new State constitution takes its force and effect from sections 106 and 121 of the federal Constitution, there could be a concern the federal Parliament might be able to later amend that constitution. This is not really an argument which goes to the validity of a rigid new State constitution. And in any event the relevant Committees of the Territory Legislative Assembly made several recommendations seeking to limit this risk[525]. Further, any such new State constitution is protected both by the terms of section 106 itself[526], and the view that once the power in section 121 is exercised by the Commonwealth to grant Statehood, that power is thereafter exhausted[527] and cannot later be utilised again by the federal Parliament[528]. There is also the *Melbourne Corporation case* doctrine which would seem to be available if any attempt was made by the federal Parliament to legislate later on new State constitutional matters covered by that doctrine[529].

There are of course no judicial authorities on the operation and scope of the section 121 terms and conditions power in relation to manner and form provisions, and the relevant operation and effect of section 106 of the federal Constitution in this context has yet to be fully explored by the High Court, so the resolution of the matter in issue is not entirely free from doubt. Yet given the importance of this issue of entrenchment in the NT should it seek a grant of Statehood, it is perhaps one of those matters which might be considered for inclusion in any clarificatory approach to the High Court between

524 I do not read the federal Constitution, nor the *Australia Act* read with that Constitution, as requiring that a new State constitution be flexible and non-rigid from the very moment of the grant of Statehood, for reasons already given. Note that even in the drafting of the original New South Wales Constitution a colonial attempt was made to entrench some of its provisions in the draft but this was disallowed by the Imperial authorities on the basis that they were unused to the notion of an entrenched constitution– Gibbs CJ in *Western Australia v Wilsmore* (1982) 149 CLR 79. This no doubt reflected the nature of constitutional law in the UK.

525 The Committee strongly recommended a "*home grown constitution*", not one imposed by the Commonwealth, to be drawn up by Territorians and adopted at a Territory referendum, without any Commonwealth input or changes. It would then be up to the Commonwealth to either accept or reject that constitution as so adopted. If it accepted it, the Commonwealth would enact the necessary legislation under section 121, on the basis of that Territory constitution as so adopted, to grant Statehood. In a sense the constitution as so adopted would be referred to in the Commonwealth legislation as the constitution of the new State as if a term or condition of the grant. This matter is also considered in my advice dated 26 July 2006 at pages 16-17.

526 Although expressed to be subject to the federal Constitution.

527 A spent power.

528 This is discussed in my advice dated 26 July 2006.

529 The exact scope of this doctrine has yet to be fully defined but there is no doubt that it will have the effect of protecting certain provisions of a State constitution, including in a new State constitution.

the passage of the federal *Statehood Act* and its commencement, along with the matter of federal representation of the new State, discussed next[530]. I personally do not think such an approach to the High Court is necessary for this entrenchment issue, but others may well disagree.

Issue 2 - Federal Representation

Section 7 of the federal Constitution provides in part:

> *7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.*
>
> *Until the Parliament otherwise provides there shall be six senators for each original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.*

The term "*Original States*" means such States as are part of the Commonwealth at its establishment[531]. Section 24 of the federal Constitution provides:

> *The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.*
>
> *The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-*
>
> *(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of senators;*
> *(ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.*[532]
>
> *But notwithstanding anything in this section, five members at least shall be chosen in each Original State.*

530 See discussion under next heading.

531 *Commonwealth of Australia Constitution Act 1900*, section 6.

532 Conveniently to be called the two for one nexus.

It is clear that upon a grant of Statehood to the NT, it would not be an "Original State" for the purposes of sections 7 and 24. Hence it would not be entitled to the benefit of the guarantee of a minimum of six senators in the Senate nor continued parity with the other states if this number of senators is increased[533]. Nor is a new State entitled to the benefit of the guarantee of a minimum of five members of the House of Representatives in section 24.

On the other hand, it would seem the words "*State*" and "*States*" in those two sections would, prima facie, apply to a new State except where used in conjunction with "*Original*".

At the same time, there is dicta which strongly supports the view that the NT as a new State must have some representation in both Houses of Parliament[534]. This flows from the use of the words "*extent of representation*" in section 121 of the federal Constitution[535], thus contemplating some minimum level of representation at least. Apart from this, it seems unthinkable a new State would be created without some such representation.

The High Court has determined the phrase "*people of the Commonwealth*" as used above in section 24 does not include the people of a territory of the Commonwealth, and hence the senators and members of the House of Representatives from the NT and the ACT as Commonwealth Territories are not to be counted for the purpose of determining the two for one nexus in section 24.[536] But it is not judicially clear if this phrase comprehends the people of a new State, such that its senators and members are to be taken into account for the purpose of the two for one nexus in the section.

My attention to this uncertainty was first drawn to this issue some 30 plus years ago when first researching the possibility of a grant of Statehood to the NT. In particular I was aware of the comments of Professor Leslie Zines in a paper for an earlier Constitutional Convention[537], indicating a view that the two for one nexus would not apply to a new State[538]. There was also an opinion by the former Commonwealth Solicitor-General Dr Gavan Griffith QC[539] to like effect. In addition there are some High Court dicta which seem to indicate a similar view[540];

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533 Currently 12 senators per original State.

534 See comments in the judgments in the two High Court territory representation cases, *Western Australia v Commonwealth* (1975) 134 CLR 201 and *Queensland v Commonwealth* (1977) 139 CLR 585.

535 Assuming this section is used to create the NT as a new State.

536 Attorney-General (NSW); ex rel *McKellar v Commonwealth* (1977) 139 CLR 527.

537 Proceedings of The Constitutional Convention, Vol II, Adelaide, 26-29 April 1983, Appendix H, "Representation of Territories and New States in the Commonwealth Parliament".

538 This is cited in footnote 41 to my paper "The Procedures to Statehood" given at the Statehood Convention in Darwin in 1998.

539 Dated 15 August 1984. His view was based on the proposition that the application of the nexus would constrain the unlimited power of the federal Parliament under section 121 of the federal Constitution.

540 *Western Australia v Commonwealth* (1975) 134 CLR 201 per Barwick CJ at 228-229; Attorney-General (NSW); Ex rel McKellar, op. cit, per Jacobs J at 565-566; *Queensland v Commonwealth* (1977) 139 CLR 585 per Aickin J at 617-619. See also McGinty v Western Australia (1996) 186 CLR 140 per McHugh J at 240.

other commentators have also agreed[541]. However the late Sir Maurice Byers QC, another former Commonwealth Solicitor-General, expressed the view that the matter was not free from doubt[542]. In part, the political concern is that if there is no nexus applicable to a new State, it could conceivably be used to swamp either House of the Parliament with new State senators and members, although this seems an unlikely possibility in political terms. Even short of that, it could be used to change the relationship between the two Houses where there is a close political division in terms of party numbers in each House, and hence affect the political balance – for example, in joint sittings[543].

This doubt gives rise to some difficulties, however. Upon first researching this matter, it became clear to me that legal certainty was required on this legal issue before a grant of Statehood came into effect[544]. It was essential to know for sure whether the two for one nexus and quota requirement would apply to the NT as a new State and its people – if it did, then a new calculation of the quota would have to be made upon a grant of Statehood, with a consequent electoral redistribution of House of Representative seats around all the States, not just in the new State. The result, given the low comparative population of the NT, the potential for a significant grant of Senate representation to the new State and the question whether the new State is limited by the quota in determining the number of seats in the House of Representatives[545],

541 C Tappere, "New States in Australia: The Nature and Extent of the Commonwealth Power under Section 121 of the Constitution", (1987) 17 Fed L Rev 224 at pages 231-232.

542 Opinion dated 12 March 1981, referred to in the Final Report to COAG of the Northern Territory Statehood Working Group of May 1996, pages 24-25. See also The Long Road to Statehood, House of Representative Standing Committee on Legal and Constitutional Affairs Report, May 2007, at page 43.

543 Section 57 of the Constitution. Of course any grant of representation to the NT as a new State will have some effect on the federal balance anyway. Query are political considerations of this kind legitimate tools of constitutional interpretation – Murphy J at one stage thought not but there are other views – see Tappere, op.cit., at page 233.

544 I first researched this matter at length in an unpublished draft paper prepared in the early 1980s - "Legal Aspects of Statehood for the Northern Territory" Vol 2, pages 250-267. The matter was pursued internally within the Department of Law until discussed by the Northern Territory Statehood Working Group and included in its Final Report to COAG of May 1996. It was subsequently proposed for discussion and comment in a draft Discussion Paper on terms and conditions, prepared for the NT Legislative Assembly Sessional Committee on Constitutional Development after that Committee had made its Report to the Legislative Assembly on Paragraph 1 (a) of its Terms of Reference in November 1996, but events overtook that Committee's work and the Discussion Paper was never endorsed by the Committee and issued. It is understood that there were in-house discussions between the Chief Minister and the relevant Commonwealth Government politicians upon the possible terms and conditions of a grant of Statehood in the lead up to the NT Statehood Convention in 1998, which presumably included representation issues, but that these discussions were not very productive.

545 I understand that on quota, if the NT became a new State it would be presently be entitled to one, maybe two, members of the Australian House of Representatives. I am not up with the present quota and population figures. It is of course possible that the NT as a new State might find adherence to the quota quite acceptable providing it receives increased Australian Senate representation. On the other hand, the NT as a new State may be reluctant to accept less than the current level of representation in the Australian House of Representatives of two members. If this was more than the entitlement on quota then there would be a question, under section 24 of the federal Constitution, of its validity, discussed below.

may well be an increase in the overall number of seats for that House going to some of the more populated original States[546]. The only original State you could predict with some confidence that would not thereby receive more members in the House of Representatives would be Tasmania[547]. And even then, its representation in that House in comparison to the larger States would be affected in proportional terms. It seemed to me the original States would not agree to a grant of Statehood unless there was legal certainty in this matter. And in any event it would be most unfortunate and undesirable if the choice made in this matter was to be challenged in the courts after the grant of Statehood took effect.

Of course, if the two for one nexus does not as a matter of law apply to a new State and its people, then there would be no need for a new calculation of the quota and a redistribution of House of Representatives electorates around Australia upon the grant of Statehood. The only question for the existing States then would be whether they were prepared to accept the numerical level and terms of the grant of senatorial and MHR representation to the new State[548], with the new State senators presumably fitting in to the rotational system in the Australian Senate[549] for the first time. This position would seem to provide the simplest solution, provided of course it is constitutionally correct. Unfortunately, because there has never been a new State in Australia post-federation, there is no way of knowing for sure if it is legally correct up to this time.

As indicated, if this is not constitutionally correct, there would also be a concern as to the extent of the entitlement of the new State to members of the Australian House of Representatives. The present allocation to the NT of two MHRs as a Territory of the Commonwealth under section 122 of the federal Constitution seems to suit both major political parties. But if the NT as a new State only met one and a bit quotas under section 24 thereof[550], and assuming for present purposes that section 24 did constitutionally apply to a new States[551],

546 Depending on the number of senators the NT was granted as a new State. Thus if it received four (initial) senators as a new State, there would be, under the nexus, eight more Australian House of Representatives members, of which the NT would only get some of them, leaving a balance to be distributed around the original States on the revised quota. In the report "The Long Road to Statehood", op. cit., at page 68 and Appendix F, it was calculated that as at 2007, if the NT had been given a total of four senators at Statehood, by force of the two for one nexus it would require the creation of two additional electoral divisions for the NSW House of Representatives and one additional electoral division in each of Victoria, Queensland and South Australia.

547 Because it has the constitutional minimum of five members of the House of Representatives (MHRs) but is below five quotas on its population.

548 The effect of which would be lessened by the fact that the NT already has federal representation with full voting rights in both federal Houses of Parliament.

549 Section 13 of the Constitution.

550 Section 24 requires more than one half of a quota to receive one more MHR. The population of the NT fell below an entitlement to 2 MHRs based on quota in 2003, necessitating an amendment to the *Commonwealth Electoral Act* in 2004 to maintain that level of representation.

551 Other than where it refers to "*Original State*".

then unless the effect of section 121 of the federal Constitution is to override this quota limitation on the number of members of the Australian House of Representatives per State, the NT as a new State would be limited to one MHR, a reduction on what it is presently entitled[552].

This latter issue turns on the constitutional meaning and effect of the words in section 121 *"including the extent of representation in either House of the Australian Parliament, as it thinks fit"*[553]. If this gives the federal Parliament, upon granting Statehood, a very broad discretion to provide for such numerical level of representation of a new State in the Australian House of Representatives as the federal Parliament thinks fit, unimpeded by the relevant requirements of section 24 in this respect, then an (initial?) grant of representation in excess of quota may be valid – but this is not constitutionally clear. The preferred or more convenient view may be that the discretion in section 121 is sufficient to take the representation of a new State outside of the operation of section 24, at least for the purposes of the quota and the two for one nexus.

But again it provides an added reason for seeking judicial clarity on the matter before the grant of Statehood takes effect. I have consistently argued that an approach to the High Court would be necessary[554], to be brought after the passage of the Commonwealth Statehood legislation enacted pursuant to section 121 of the Constitution[555] but before the commencement of the grant of Statehood, seeking to confirm whatever approach was taken in that legislation on this point was constitutionally correct. I adhere to this view.

Conclusion

I have sought to highlight in this lecture the two major constitutional issues concerning a grant of Statehood to the NT on which clarification will or may be sought at the highest domestic judicial level prior to that grant taking effect. This is based on the assumption that the method used to affect the grant is in section 121 of the federal Constitution. I personally think such an approach to the High Court is only necessary on the second of these two issues (representation). But this is a constitutional view only, on a matter which involves both political and constitutional considerations, and on which views may differ.

This is not to say that there are not other constitutional issues of concern surrounding any such grant apart from these two issues, and I am happy to discuss any of them.

552 Of course if the NT population results in the Territory, at and after the time of the grant of Statehood, having more than one and half quotas then this particular problem would disappear.

553 Compare section 122 which allows representation in the federal Parliament "*to the extent and on the terms which it thinks fit*".

554 See my paper "The Procedures to Statehood", op. cit., at pages 22 and 27. This option is seriously canvassed in the Final Report to COAG of the Statehood Working Group, op. cit., page 30. See also opinion of Prof Colin Howard of 31 October 1986 in Appendix 4 to "Australia's Seventh State" (Loveday and McNab (Eds)) at pages 164-165. See also "The Long Road to Statehood", op. cit., page 43.

555 So as to ensure that there was a live matter before the High Court on which it could rule, and not just by way of seeking an advisory opinion.

The NT Judiciary and the Transition of the NT to Statehood - Chapter III of the Constitution, the Judicature 2012

Introduction

This is the sixth in a series of lectures I have given in recent years to the Law Society of the Northern Territory on major constitutional and legal issues affecting the NT. The subject of Territory Statehood has again been chosen because of the proposals, although presently deferred, to hold a constitutional convention in the Territory. I do not want to enter into the political pros and cons of a grant of Statehood. What I would like to do in this lecture is to discuss the present constitutional position of the NT Judiciary under Chapter III of the national Constitution as determined by the High Court, and how that bears upon the transition to a future grant of Statehood. In doing so, I wish to advance the fairly obvious argument that it is necessary for the transition to be as smooth as possible, in constitutional and in other respects. And in my view, the constitutional provisions for granting Statehood, read with Chapter III, should be interpreted in this light, that is, there is a necessary implication and purpose in these provisions of the Constitution and they are designed to facilitate a smooth transition to Statehood of a politico/legal entity capable of being granted Statehood[556] as well as for the essential institutions of that entity.

But first let me repeat part of what I have said previously, namely, there are no completely irresolvable constitutional and legal issues to the grant of Statehood to the NT, complex as some of those issues may be. The primary barriers to a successful grant are political, not constitutional/legal. Part of the constitutional/legal difficulties are because there has never been a grant of Statehood post federation in this country, hence the issues have not yet been properly tested in Australian domestic courts. Overseas precedents are of very limited value. But it is clear the founders of the federal Constitution intended that existing political entities should be able to become new States in the Australian federation, including by the mechanism in section 121 thereof[557], if there is the political will to do so. This no doubt includes the NT as a separate self-governing territory of the Commonwealth, in respect of which the prevailing view is that it is constitutionally able to be granted Statehood. And as discussed below, a new State must have its own judiciary, including a supreme court of the new State, with the constitutional status ascribed to it by Chapter III of the Constitution. Ultimately if there is a strong enough political will in all the right quarters to create a new State in the NT, it will happen.

556 There is little doubt but that the NT as a territory of the Commonwealth under section 122 of the Constitution is so capable.

557 Section 121 is discussed below. The other option is by national constitutional referendum under section 128 of the federal Constitution to create a new State. This mechanism has been used in other countries, perhaps where constitutional change is not so difficult. But in Australia this latter method is not favoured.

Issue 1 – Description in brief of the present NT Judiciary, including in relation to Australian courts generally

The self-governing NT body politic under the Crown and its Ministers of the Territory[558] have, since the grant of Self-government by Commonwealth Act in 1978[559] and the making of the relevant Commonwealth Regulations in 1979[560], a grant of executive authority in respect of "*Courts (including the procedures of the courts and the remuneration of the judiciary….".* This grant is complemented in a legislative sense by the plenary and wide grant of legislative power to the NT Legislative Assembly concerning the peace, order and good government of the Territory under the same Commonwealth Act[561].

These two grants enable the self-governing NT to deal with all legislative and executive matters concerning NT courts and the NT Judiciary or as incidental thereto, including the establishment of Territory courts, their jurisdiction[562], and the appointment and terms of condition of Territory Supreme Court judges and Territory magistrates, subject always to the overriding control of the national Constitution and to the superior force of any Commonwealth legislation enacted under the very wide Territories power in section 122 of that Constitution relevant to NT courts and judiciary.

Pursuant to these grants of power, NT legislation has established the Supreme Court of the Northern Territory, a superior Court with extremely wide civil and criminal jurisdiction in respect of the Territory[563], not limited to specific matters or causes of action. This grant is also not limited to matters of federal jurisdiction as contained in Chapter III of the Constitution[564]. It includes matters arising under the common law and equity, as well as matters arising under legislation in force in the Territory[565]. Further, this jurisdiction includes a statutory appellate jurisdiction from certain inferior Territory courts[566]. Appeals from a single judge of the Supreme Court lie to the appellate courts of

558 That is, Ministers of the NT Government chosen from the members of the Government party in the NT Legislative Assembly.

559 *Northern Territory (Self-Government) Act 1978 (Cth)*.

560 *Northern Territory (Self-Government) Regulations* as amended by No 205 of 1979, regulation 4 (a). Note also the matters of executive authority as to the *"legal profession*", "*Legal aid*", "*Maintenance of law and order and the administration of justice*".

561 *Northern Territory (Self-Government) Act 1978*, section 6.

562 *Supreme Court Act (NT)* Part II Division 2. Some particular matters of jurisdiction are still dealt with by Commonwealth legislation – eg: *Judiciary Act 1903 (Cth)* sections 67B and 67C.

563 *Supreme Court Act (NT)*. This is a continuation of the Territory Supreme Court as in existence before the grant of Self-government and the 1979 amendments to the *Northern Territory (Self-Government) Regulations*, that Supreme Court having been previously established by Commonwealth legislation, the *Northern Territory Supreme Court Act 1961 (Cth)*, now repealed. Originally the Supreme Court was set up by early Territory ordinance.

564 Discussed further below. But it does include matters of federal jurisdiction, or matters by analogy with federal jurisdiction, by reference to that jurisdiction in the Supreme Court of South Australia, by virtue now of section 67C of the *Judiciary Act 1903 (Cth)*, previously section 15(2) of the *Northern Territory Supreme Court Act 1961 (Cth)*, now repealed.

565 This includes under Commonwealth legislation applying in the Territory, subject to any contrary intention expressed in Commonwealth legislation in a particular case. See Spratt v Hermes (1965) 114 CLR 226.

566 *Local Court Act (NT)* Section 19, *Justices Act (NT)*, Part VI..

that same court in both civil[567] and criminal matters[568]. From there, appeals lie to the High Court by special leave of that Court[569]. Territory Supreme Court judges can also exercise jurisdiction in certain tribunals such as the Motor Accidents (Compensation) Appeal Tribunal established under Territory legislation[570].

The NT has basically a two tier system of Territory courts, that is, the Supreme Court and what may be generally described as the inferior or magistrate's courts. There is no intermediate system of district courts as there are in the States. Thus, for example, there is the Local Court[571], the Court of Summary Jurisdiction[572], the Work Health Court[573], the Youth Justice Court[574] and the SMART Court[575], all established by Territory legislation. There are also some Territory statutory tribunals which appear to exercise judicial power (in part at least), those tribunals also being established under Territory legislation[576]. None of the members of these Territory courts and tribunals meet the security of tenure provisions of section 72 of the Constitution[577]. Nor may they meet the separation of powers doctrine developed from Chapter III of the Constitution in relation to the federal judicature[578].

The Supreme Court of the Northern Territory is integrated into the nation-wide cross-vesting of jurisdiction scheme with state supreme courts and the Federal Court of Australia and the Family Court of Australia under complimentary Commonwealth and Territory legislation[579], the validity of which in relation to the Territory has been upheld by the High Court.

It is clear the Federal Court and Family Court can also exercise federal jurisdiction in the Territory under particular Commonwealth legislation operating in the Territory[580].

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567 *Supreme Court Act (NT)* Part III.

568 *Criminal Code* (NT) Part X, Division 2.

569 *Judiciary Act 1903 (Cth)* Section 35AA. The existing High Court authorities support the validity of this conferral of appellate jurisdiction on the High Court, see below.

570 *Motor Accidents (Compensation) Act (NT)*.

571 *Local Court Act (NT)*; also *Small Claims Act (NT)*; *Care and Protection of Children Act (NT)*.

572 *Justices Act (NT)*, Part IV Division 1.

573 *Work Health Administration Act (NT)*, and see the *Workers Rehabilitation and Compensation Act (NT)*.

574 *Youth Justice Act (NT)*.

575 *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court Act 2011(NT)*.

576 Eg: Lands, Planning and Mining Tribunal established by section 4 of the *Lands, Planning and Mining Tribunal Act (NT)*; the Northern Territory Licensing Commission established under the *Northern Territory Licensing Commission Act (NT)* and see the *Liquor Act (NT)*; the Agents Licensing Board established under the *Agents Licensing Act (NT)*.

577 But the existing authorities posit that section 72 does not apply to territory courts, see below.

578 But that doctrine, in my opinion, does not apply in and to territories and territory courts, see below.

579 *Jurisdiction of Courts (Cross-vesting) Act (Cth)* and *Jurisdiction of Courts (Cross Vesting) Act (NT)*.

580 *Northern Territory v GPAO* (1999) 196 CLR 553, Re Wakim; Ex pt McNally (1999) 198 CLR 511; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605.

Issue 2 – Constitutional Requirements for there to be a new State Judiciary & Impact Thereon of Chapter III of the Constitution

Given the view[581], supported by dicta in the High Court, that the NT is eligible constitutionally to be given a grant of Statehood by the Commonwealth under the Constitution, this grant would most likely take place under section 121 of that Constitution[582].

Section 121 thereof, which expressly provides for the creation of new States, provides:

> *New States may be admitted or established.*
> *121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.*

This section says nothing about the existence of a supreme court of the new State or about any other courts of the new State. But the constitutional implication is there will at least be a superior court with wide civil and criminal jurisdiction in respect of the new State, such as a supreme court, as part of a new State judicial system, if for no other reason but this is essential for the maintenance of the rule of law in the new State. In this regard, the definition of "*The States*" in section 6 of the covering clauses to the *Constitution Act* defines that term to include such colonies or territories as may be admitted or established by the Commonwealth as (new) States. From this it is possible to conclude the several references in that Constitution to the "*Supreme Court of a State*"[583] must include the supreme court of a new State; in other words, implying there must be such a court in a new State. It is also arguable that the provisions of section 106 of the Constitution, continuing the constitution of a new State as at the admission or establishment of that new State, includes those constitutional provisions providing for the supreme court of that new State from it prior existence, including as the supreme court of a self-governing territory[584]. The term "*constitution*" in this context seems wide enough to include the provisions for the fundamental judicial arrangements for a new State. Those provisions are to be carried forward into Statehood, but subject, as section 106 states, to the Constitution.

What then is the constitutional impact of Chapter III of the Constitution, the federal "*judicature*", on those provisions so carried forward into a new State?

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581 A view which I have consistently advocated over a number of decades and as to which, as far as I am aware, there has been no counter view expressed as a matter of constitutional law.

582 The only other method available is by successful national referendum under section 128 of the national Constitution to amend that Constitution to create the new State.

583 Constitution, section 73 (ii) and the last two paragraphs thereof.

584 *McCawley v R* [1918] HCA 55; (1918) 26 CLR 9.

Well, it is certainly clear the supreme court of the new State and the other new State courts will not be federal courts within that Chapter, if they ever were. Hence section 72 in that Chapter can have no application to them, effectively putting those courts beyond Commonwealth control[585]. On the other hand, there will be a constitutional right of appeal from the new State supreme court to the High Court under section 73 of that Chapter. And federal original jurisdiction within sections 75 and 76 of that Chapter will be capable of being conferred by the Commonwealth Parliament on any such new State courts under section 77(iii) of that Chapter[586]. The cross-vesting arrangements would no doubt be made to continue uninterrupted. But the separation of powers doctrine will have no application to those new State courts and their judges unless the doctrine is expressed in or can be implied from the new State constitution[587].

So in the context of the proposal for the NT to obtain a grant of Statehood, with its own system of new State courts, this is the ultimate constitutional position of those courts to which the proposal is directed. There is no apparent constitutional ability to vary this end result. It seems highly unlikely the terms and conditions power in section 121 of the national Constitution could be validly used by the Commonwealth Parliament to vary this constitutional position, for example by giving the Commonwealth some additional control or power over the new State courts and their members or by limiting in some way the functions or powers of those new State courts and their members. To do so would arguably be in effect to alter the national constitutional provisions themselves. And it may be an infringement, not only of section 106 of that Constitution, but possibly also the doctrine in the *Melbourne Corporation case*[588], protecting the essential functions of a State.

585 Section 122 of the national Constitution would no longer being applicable to the new State.

586 Subject to the application of the *Kable Doctrine*, see next footnote. The Commonwealth terms and conditions of Statehood, expressed in statutory form, might deal with the vesting of federal jurisdiction.

587 *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Kable v DPP* (1996) 189 CLR 51, although this result is subject to the principle originally enunciated in that latter case that functions cannot be conferred on courts, including State courts, that substantially impairs their institutional integrity and are therefore incompatible with the exercise of federal judicial power in the role of those courts as a repository of federal jurisdiction. It is a principle based on the view that Australia has an integrated system of courts with a single standard of justice. - *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513.

588 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

Issue 3 – Existing Application of Chapter III of the Constitution to the NT Judiciary under Self-government

As will be seen from the discussion under the next heading of this lecture, I will be arguing that in interpreting Chapter III of the Constitution in relation to self-governing territories such as the NT, and perhaps to territories generally under section 122 of that Constitution[589], a factor to be legitimately taken into account and given weight is the fact the Constitution discloses a constitutional purpose in that those territories may well be being prepared for and may become new States in the future[590]. Hence in my view the provisions of Chapter III should be interpreted, in relation to the judiciary of a territory, in a way which would facilitate a smooth transition to Statehood and to the constitutional position of a new State judiciary discussed above. I will discuss this matter in more detail under the next heading. For the purposes of this heading, I will discuss the constitutional position of the Territory Judiciary at present, as found by the High Court, in order to see whether that position is consistent with the mode of interpretation I am arguing for.

The early High Court took a strict view of the non-application to territories of the whole of Chapter III of the Constitution – "*The Judicature*." It drew a clear distinction between States of the Commonwealth within the federal system on the one hand and territories on the other – the disparate view. Applied to Chapter III, it read that Chapter as having no application in and to territories[591]. It is a principle which still exerts considerable support, although with the evolution of the idea that there is only one Commonwealth under the Constitution, applicable to Australia as a whole according to its terms, including to territories, it is an idea that to a large degree has retreated in more recent times. In relation to the Judicature, despite recent judicial recognition that Australia has one integrated court system, this retreat has not been taken to the maximum degree, and in my opinion, there are very good reasons why it should not do so[592]. The strongest recent support for the more disparate approach in the context of Chapter III might be said to have been McHugh J in *Gould v Brown*[593] and *Northern Territory v GPAO* [594], as well as strong evidence for this approach disclosed in cases such as *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*[595] and *Capital TV and Appliances v Falconer* [596].

589 Apart from the seat of government of the Commonwealth, which is apparently not eligible for a grant of Statehood.

590 In fact, covering clause 6, definition of "*The States*", in the *Constitution Act* expressly contemplates that *"territories"* may become new States in the Federation. Section 124 of the national Constitution expressly contemplates that this includes (non-exhaustively) the separation of "*territory*" from an existing State to become a new State. The word "*territory*" may be used in either a political sense (covering clause 6) or a geographical sense (section 124) or perhaps both.

591 Eg: in *R v Bernasconi* (1915) 19 CLR 629, with reference to the non application of section 80 of the Constitution, trial by jury, to territories. This decision, although since judicially questioned, has survived to the present day, but see *Fittock v R* [2003] HCA 19; 217 CLR 508. See also *The King: Ex pt Yee* (1926) 37 CLR 432 per Viscount Simonds.

592 Discussed under the next heading.

593 (1998) 193 CLR 346.

594 Discussed below.

595 (1999) 200 CLR 322.

596 (1971) 125 CLR 591

In addition to this disparate approach, it was established in Re *Judiciary and Navigation Acts*[597] that the Commonwealth could not legislatively confer federal judicial power and jurisdiction, original or appellate, beyond the heads in Chapter III of the Constitution. In *R v Kirby; Ex parte Boilermakers' Society of Australia* it was recognised that only courts properly established could exercise the judicial power of the Commonwealth within Chapter III of the Constitution, and it was not possible to look beyond this to confer jurisdiction on other bodies. The court flirted with the idea that Chapter III might have some wider application in territories, but noted the authorities to the contrary. Dixon CJ, McTiernan, Fullagar and Kitto JJ stated:

> *26. To this interpretation of Chap. III an objection is made which rests upon the decisions given under s. 122 with respect to the appeal to this Court that has been given from the courts of Territories. It has been decided that the courts of the Territories falling under s. 122 are not governed by the judicature provisions. A trial on indictment for an offence against a law of a Territory need not be by jury: for s. 80 has no application. A law of the Territory is not a law of the Commonwealth within that section. It was so held in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629. Nevertheless by an exercise of legislative power derived from s. 122 an appeal may be given to this Court from a court of a Territory. That was decided in Porter v. The King; Ex parte Yee [1926] HCA 9; [1926] HCA 9; (1926) 37 CLR 432 by Isaacs, Higgins, Rich and Starke JJ., Knox C.J. and Gavan Duffy J. dissenting. This seems at first sight to be inconsistent with the decision in Re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257 which was that the jurisdiction of the High Court, as of other federal courts when created, arises wholly under Chap. III of the Constitution. The reconciliation depends upon the view which the majority adopted that the exclusive or exhaustive character of the provisions of that chapter describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part. Isaacs J. expressed this view as follows: "I accordingly accept the latter case (scil. in Re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257) as authoritatively determining that 'the judicial power of the Commonwealth', within the meaning of Chapter III., and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629, that of the Commonwealth proper, which means the area included within States. Beyond that the decision in the later case does not apply. It follows that, if there be appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts" (1926) 37 CLR, at p 44 . It would have been simple enough to follow the words of s. 122 and of ss. 71, 73 and 76 (ii.) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. As s. 80 has been interpreted there is no difficulty in avoiding trial by jury where it does apply and otherwise it would only be necessary to confer upon judges of courts of Territories the tenure required by s. 72.*

597 (1921) 29 CLR 257.

But the High Court did not go down the path of a more integrated approach to territory courts within Chapter III. This exhaustive view of Chapter III as to the scope of federal jurisdiction has been followed in the main ever since, but leaving territory courts largely outside of it. Thus in *Ruhani v Director of Police*[598], the view was affirmed by a majority that Chapter III of the Constitution was exhaustive of the original and appellate jurisdiction of the High Court (itself a federal court). Only Kirby J disagreed. The majority view remains that the jurisdiction of territory courts arises by under and by virtue of legislation made under section 122 of the Constitution and is not confined by sections 73, 75 and 76 and hence is not federal in nature[599]. This is in my opinion a necessary view given that territory jurisdiction must be capable of covering the whole panoply of matters capable of arising in the territory and requiring judicial resolution, without being so confined.

It also followed from this view that territory appeals to the High Court lay outside of section 73 of the Constitution and were hence not constitutionally guaranteed. However, such appeals could be granted by legislation enacted under section 122 of that Constitution. The first case dealing with this is *R v Bernasconi*[600]. This came to the High Court by way of a case stated from the Territory of Papua, but was dealt with as an appeal under the *Papua Act*. No objection was taken to this mechanism as the general approach of the Court was that territory judicial matters were outside Chapter III[601].

In *Porter v The King*; Ex *pt* Yee[602], Isaacs J held that a NT ordinance could confer validly a right of appeal from a Territory court, it not being a federal court, to the High Court, and that this was an exercise of section 122 of the Constitution. Higgins, Rich and Starke JJ concurred in separate judgments. Knox CJ and Gavan Duffy J dissented on the basis that section 73 was exhaustive of appeals to the High Court, and NT courts were not federal courts.

598 (2005) 222 CLR 489.

599 Although as I have already noted, jurisdiction conferred on a federal court by Commonwealth legislation within sections 75 or 76 of the Constitution, and operating in a territory, is now accepted as being federal jurisdiction.

600 (1915) 19 CLR 629. See also *Mitchell v Barker* (1918) 24 CLR 365.

601 A different result was reached in *Mainka v Custodian of Expropriated Property* (1924) 34 CLR 297, where Isaacs J found the Central Court of the Territory of New Guinea was a federal court, and thus an appeal lay to the High Court under section 73. However in *Porter v The King; Ex pt Yee*, Isaacs J was able to distinguish the earlier decision on the basis that the constitutional head of power in *Mainka*, depended upon New Guinea being under an international mandate to the Commonwealth and hence was a federal court. It was not a case of a tribunal simply erected under section 122 of the Constitution.

602 (1926) 37 CLR 432.

This majority view that territory appeals lay outside section 73 became the established view[603] and various appeals were brought to the High Court (by leave) under it over some decades[604]. But this view, according to some Justices, continued to sit uncomfortably with the view in Re *Judiciary and Navigation Acts*[605] that Chapter III of the Constitution was exhaustive of the original and appellate jurisdiction of federal courts, and no jurisdiction could be conferred by the Commonwealth outside of it, even for territories. This was analysed in the *Boilermakers' case*[606] per Dixon CJ, McTiernan, Fullagar and Kitto JJ, noting a choice had to be made between this exhaustive view, in which case territory courts would be federal courts, and the view that territory courts were section 122 courts and outside of Chapter III, that Chapter being only concerned with the federal system proper. They noted the prior decisions supporting the latter view. The disparate view was later endorsed by, and perhaps even taken further by, the Privy Council on appeal[607], which described the legislative power with respect to territories as a "*disparate and non-federal matter*"[608].

The position on appeals to the High Court outside of section 73 was confirmed in *Capital TV and Appliances v Falconer*[609], a case involving an appeal to the ACT Supreme Court and a further appeal to the High Court. It was held that there was no constitutional right of appeal, only a statutory right of appeal (if one exists), and that territory courts were not federal courts. Arguably this settled the matter of appeals[610]. The High Court continued to hear appeals from territory courts under the relevant statutory right of appeal[611].

However isolated judicial comments continued to be made on this matter seeking a more integrated approach. Thus in *NT v GPAO*[612] , it was held by a majority that the Family Court exercising jurisdiction in the NT under a Commonwealth Actwas exercising federal original jurisdiction under Chapter III of the Constitution. Gaudron J cast doubt on the view that appeals to the High Court from territories lay outside section 73, although in the light of authority she was prepared to let the current decisions stand.

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603 *Chow Hung Ching v R* (1948) 77 CLR 449.

604 See *Spratt v Hermes* (1965) 114 CLR 226 per Barwick CJ at 239.

605 (1921) 29 CLR 257.

606 *R v Kirby, Ex pt Boilermakers' Society of Australia* (1955-56) 94 CLR 254, and on appeal to the Privy Council (1957) 95 CLR 529, discussed further below.

607 (1957) 95 CLR 529.

608 At 549.

609 (1971) 125 CLR 591.

610 The status of appeals to the High Court from territory courts was considered in passing in *Gould v Brown* (1998) 193 CLR 346. It was not a satisfactory decision as the Court split 3:3 over the validity of the cross-vesting legislation. The majority was made up of Brennan CJ, Toohey and KirbyJJ. The first two expressly stated that section 73 of the Constitution did not prevent the vesting in the court of appellate jurisdiction under section 122, following existing authority.

611 Despite some judicial disquiet, eg: Gaudron and Gummow JJ in *Kruger v Commonwealth* (1997) 190 CLR 1. In relation to appeals from territories, Gummow J saw two difficulties with the view that territory appeals stand outside Chapter III. First was the exhaustive nature of Chapter III. Second was the integrated nature of Australian law and single system of jurisprudence, with the High Court constitutionally at the apex, suggesting the Australian Parliament should not have the right to grant or deny appeal to the High Court from territories. But these views are not reflected in the current authorities of the High Court on the place of territories in Chapter III of the Constitution.

612 (1999) 196 CLR 553.

As against this, the decision in *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*[613] confirmed once and hopefully for all that territory courts were section 122 courts and not federal courts. This was not an appeal but an application to the High Court for habeas corpus.

Appeals have continued to be brought from the courts of the NT to the High Court, eg *Attorney-General of NT v Chaffey*[614]. I conclude that on the present state of authority, territory appeals to the High Court stand outside of section 73 of the Constitution and are capable of being supported by legislation enacted under section 122 of the Constitution. Such appeals continue to be brought under the *Judiciary Act (Cth)*[615].

It is fair to say the attack of some members of the High Court on the disparate approach to the Constitution and territories generally has been going on for some time, based on the assertion that there was only one Commonwealth, States and territories included. The lack of symmetry and uniformity in the application of the Constitution throughout Australia, including to territories and to territory courts, has troubled these Justices, although in my view unnecessarily so in relation to Chapter III. The first strong and authoritative support for this more integrated view was in *Lamshed v Lake*[616]*;* however this was not a Chapter III case. The judgment of Dixon CJ was content to rely on *Bernasconi* as to the non-applicability of Chapter III to territories, but not in relation to various other sections in the Constitution. In relation to the status of Commonwealth laws made for territories under section 122 of the Constitution, Dixon CJ took the view that they were laws of the national Parliament, having effect throughout the Commonwealth, and not just local laws for a territory[617].

In *Spratt v Hermes*[618], the applicability of Chapter III to territories directly arose, although the facts involved judicial review of an ACT magistrate in relation to a charge under a Commonwealth Act. The primary question decided in the affirmative was that section 76(i) of the Constitution was capable of applying in territories, using a more integrationist approach to the place of territories within the Constitution. But the case also provides support for the view that territory courts were not federal courts and hence were not subject to section 72 of the Constitution. The Justice most supportive of the old disparate approach was Kitto J.

In *Capital TV & Appliances v Falconer*[619], the Barwick Court had to deal with the status of the Supreme Court of the ACT, holding it to be a territory court, not a federal court. This confirmed the view that section 72 of the Constitution had no application in and to territories and their courts,

613 (1999) 200 CLR 322.

614 [2007] HCA 34.

615 Section 35AA.

616 (1957) 99 CLR 132, per Dixon CJ.

617 I have no quarrel with this view.

618 (1965) 114 CLR 226.

619 (1971) 125 CLR 591.

and in doing so established there were dangers in taking the more integrated view too far in relation to Chapter III. As a result, territory courts were not subject to Commonwealth control in the appointment and removal of their members and their security of tenure. By inference they were not also courts within section 71 of the Constitution. Leaving that aside, a more integrationist approach was still evident to some degree in the approaches of some of the Justices in that case. There was much discussion about the operation of section 76(ii) of the Constitution in territories, the Court holding that it was capable of applying to Commonwealth laws made under the Territories ower in section 122 of the Constitution[620]. What was missing, in my opinion, was some kind of rational theory and basis as to why some of the provisions of Chapter III were capable of applying in and to territories and territory courts and why some were not.

The 1997 decision of *Kruger v Commonwealth*[621] dealt in large part with the *Aboriginals Ordinance 1918 (NT)*. In an interesting passage on territories and Commonwealth judicial power, Gummow J summarised the territory cases, thereby indicating the quandary the Court was in. He stated:

> *The judicial power and the Territories*
> *Chapter III operates to achieve the independence of the judiciary for two related ends: (i) the institutional separation of the judicial power so that the courts might operate as a check, according to law, on the other arms of government; and (ii) protection of the independence of the judiciary to ensure the determination of controversies free from domination or improper influence by other branches of government and in accordance with judicial process[486]. Chapter III gives effect to the doctrines of the separation of the judicial power from other functions of government and of judicial review which are essential integers of the federal structure of government [487]. It also serves the personal interests of litigants (individual, corporate and government) in having their controversies resolved by an independent judiciary [488].*
>
> *Certain decisions of this Court have sought, explicitly or otherwise, to explain the content and nature of that part of "the exclusive jurisdiction of the Commonwealth", within the meaning of s 111 of the Constitution, as pertains to the judicial power. Provision as to the legislative aspect of the "exclusive jurisdiction of the Commonwealth" in relation to the Territory is made by s 122 and, in some respects, by s 51 of the Constitution [489]. Section 61 embraces the executive power in relation to such a Territory. An answer both simple and close to the text would have been given by a decision that, conformably with s 61 as to the executive power of the Commonwealth, provision was made by s 71 as to the judicial power of the Commonwealth in relation to the Territories.*

620 At pages 605-6.

621 (1997) 190 CLR 1.

In R v Kirby; Ex parte Boilermakers' Society of Australia [490], Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament.

Later, after referring to R v Bernasconi [491] and Buchanan v The Commonwealth [492], Windeyer J said [493]:

Nevertheless and although, because of the eminence of those who gave the judgments and of their close knowledge of the genesis of phrases of the Constitution, it may seem boldly unbecoming to say so, I do not think that the conclusion that Chap III, as a whole, can be put on one side as inapplicable to matters arising in the territories is warranted by its actual language.

In my view, there is much to be said for the proposition that the text of the Constitution, which must be controlling, places the territorial courts within the scheme and structure of Ch III. However, as will appear, at least two subsequent decisions of this Court stand in the way of acceptance of that proposition. It is true that controversies arising in the Territories might involve wholly or exclusively disputes as to rights and liabilities conferred or imposed pursuant to the general law rather than federal statute law. But s 7(1) of the Northern Territory Acceptance Act 1910 (Cth) provided:

All laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth.

Such a provision excluded the possibilities of a legal vacuum and of the surrender and acceptance of the Territory being equivalent to the cession of territory by one power to another by treaty, so that the ceded territory became part of the nation to which it was annexed [494]. Further, in the Province of South Australia, it had been regarded as axiomatic that from the beginning of European occupation the common law and English and Imperial legislation would apply under the common law principles on the reception of law in settled colonies [495]. Finally, there may be a "matter [a]rising under" a law made by the Parliament, within the meaning of s 76(ii) of the Constitution, although its interpretation is not involved; it is sufficient that the right or duty in question in the matter owes its existence to federal law or depends upon it for its enforcement [496][622].

622 Citing *LNC Industries Ltd v BMW (Australia) Ltd* [1983] HCA 31; (1983) 151 CLR 575, a case involving subordinate Commonwealth legislation operating in a State.

Hence, the force in the statement, with reference to the position in the Australian Capital Territory, made by Dixon J in Federal Capital Commission v Laristan Building and Investment Co Pty Ltd [497]:

It may well be that all claims of right arising under the law in force in the Territory come within this description [ie, within s 76(ii)], because they arise indirectly as the result of the Seat of Government Acceptance Act 1909 (see s 6), and the Seat of Government (Administration) Act 1910 (see ss 4 to 7 and 12).

However, on the appeal in Attorney-General of the Commonwealth of Australia v The Queen [498], the Privy Council for the time being foreclosed any development to implement these views by a dogmatic statement that Ch III was to be regarded as "exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part". That obliged Dixon CJ, in Lamshed v Lake [499], to accept that Ch III "may be treated as inapplicable so that laws made mediately or immediately under s 122 are primarily not within the operation of the Chapter" (emphasis added).

Then, in Spratt v Hermes [500], although many aspects of the subject were discussed, two points were decided. The first was that the Commonwealth legislation supported by s 122 may create or authorise the creation of courts with jurisdiction with respect to occurrences in or concerning a Territory without observance of the requirements of s 72 of the Constitution, so that the stipendiary magistrate hearing the charge in question under the Post and Telegraph Act 1901 (Cth) was validly appointed. Secondly, a court of a Territory having the appropriate local jurisdiction may enforce in relation to acts occurring within the Territory a law made by the Parliament upon a subject-matter falling within s 51 of the Constitution and, as was the case with the 1901 statute, intended to operate throughout the Commonwealth. This is so, even though the Territory court is not one in which the judicial power of the Commonwealth is vested within the meaning of s 71 of the Constitution [501].

Capital TV and Appliances Pty Ltd v Falconer [502] is authority for the proposition that the Supreme Court of the Australian Capital Territory, created and constituted by the Australian Capital Territory Supreme Court Act 1933 (Cth), was not a federal court nor a court exercising federal jurisdiction within the meaning of s 73 of the Constitution[503]. The consequence was that no appeal lay by force of s 73 of the Constitution. A law passed under s 122 of the Constitution might confer a right of appeal to the High Court from territorial courts, whether or not the matter in issue otherwise was one of federal jurisdiction. However, no such law applied to the instant case and the appeal was dismissed as incompetent. Nor was there any legislation conferring jurisdiction to grant special leave [504].

As it presently appears to me, and contrary to the submissions for the plaintiffs, it would be necessary at least to reopen these decisions if Ch III were to be given that operation in relation to the Territories described in Boilermakers by Dixon CJ, McTiernan, Fullagar and Kitto JJ [505]. This operation would follow from the "simple" reading of Chapter III such that the courts and laws in force in a Territory were federal courts and laws made by the Parliament or made pursuant to such laws.

The treatment in some of the earlier decisions of the constitutional footing for the exercise of judicial power in the territories appears to have been blighted in several respects. First, there is the proposition that controversies which arise under some laws made by the Parliament will involve the exercise of federal jurisdiction whilst others will involve the exercise of jurisdiction which is "territorial" and "non-federal". This does not sit well with the established doctrine that the Constitution is to be read as one coherent instrument, so that s 122 should not be treated as "disjoined" from the rest of the Constitution[506].

Secondly, to treat the scope of Ch III as reflecting the division of legislative power between the Parliament and the legislatures of the States gives insufficient weight to the heading of Ch III. This is simply "THE JUDICATURE". It also gives the term "federal" in the phrase "federal courts" as it appears in s 71 and in succeeding provisions too narrow a meaning. Many heads of federal jurisdiction embrace justiciable controversies of a nature and character unknown in the anterior body of general jurisprudence in the Australian colonies. Griffith CJ pointed to this early in the history of this Court, with reference to the then disputed border between South Australia and Victoria [507]. In addition to actions between States, the controversies include those arising under the Constitution or involving the interpretation of its provisions (including s 122 itself), and those where an injunction, prohibition or mandamus is sought against a Commonwealth officer[508]. This renders inapt any analogy to the division of legislative power effected by s 51.

Thirdly, the absence, save in covering cl 5, in the Constitution of reference specifically to territorial courts and, in particular, the absence of specific identification thereof in Ch III have encouraged the belief that the creation and composition of territorial courts and the exercise of jurisdiction by them is a matter entirely for the legislature; yet, as was pointed out by Dixon CJ, McTiernan, Fullagar and Kitto JJ in Boilermakers (in the passage set out before in these reasons), the terms of s 122 and ss 71, 73 and 76(ii) are consistent with a contrary view.

Fourthly, there has been, at least before the amendments made in 1977 to s 72 of the Constitution, some apprehension lest the life tenure previously provided for in s 72 be requisite in all courts exercising jurisdiction in relation to the Territories.

At a time when the external Territories included or were expected to include populations then regarded as being in a backward state of development, there was an evident apprehension as to what would be involved in the extension there of the Australian legal system in all its incidents, including trial by jury. Further, both in this country [509] and the United States [510], it has become clear that delegation of some part of the jurisdiction, powers and functions of a federal court to its officers is, upon certain conditions, permissible and consistent with the federal judicature provisions made by the respective Constitutions.

The first consideration is nowhere more evident than in the judgment of Isaacs J in R v Bernasconi. The Court there decided, on a case reserved by the Central Court of Papua, that the accused's deemed request for a jury had been rightly refused and that s 80 of the Constitution was inapplicable. Isaacs J said [511]:

[Section 122] implies that a 'territory' is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers. It is in a state of dependency or tutelage, and the special regulations proper for its government until, if ever, it shall be admitted as a member of the family of States, are left to the discretion of the Commonwealth Parliament. If, for instance, any of the recently conquered territories were attached to Australia by act of the King and acceptance by the Commonwealth, the population there, whether German or Polynesian, would come within s 122, and not within s 80. Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system."

The difficulties of applying Chapter III of the Constitution to territories became more evident in the split decision of the cross-vesting case *Gould v Brown*[623]. Gaudron J commented in her judgment that it was impossible to reconcile the different views on Chapter III in this regard[624]. With regard to section 76(ii) of the Constitution, she thought it could apply to laws made under section 122[625], but she may well have only been talking about laws of the Commonwealth Parliament, not laws of a territory legislature. McHugh J took the view that sections 75 and 76 of the Constitution were an exhaustive description of federal original jurisdiction and that territories stand outside the federal system[626].

623 (1998) 193 CLR 346 .

624 See comments of Kirby J also.

625 At paragraph 65.

626 Kirby J disagreed with this view.

In *Northern Territory v GPAO*[627], the High Court held that section 76(ii) of the Constitution read with section 77 thereof permitted the conferral of jurisdiction on federal courts in matters arising under laws made for territories under section 122 of the Constitution, applying *Capital TV and Appliances v Falcone*r. In GPAO, the Court was considering an inconsistency issue between the *Family Law Act (Cth)* and the *Evidence Act (Cth)* operating in the Territory on the one hand, and the *Community Welfare Act (NT)* on the other, so the issue raised a matter arising under a law of the Commonwealth Parliament operating in the Territory. But the Justices considering the phrase "*Arising under any laws made by the Parliament*" in section 76(ii) of the Constitution only did so in the context of laws of the Commonwealth Parliament, not a law of a territory legislature. There was a territory law involved, but it was sufficient that a matter arose under a law of the Commonwealth Parliament to invoke that jurisdiction. McHugh J with Callinan J took the conservative view that territories stood outside Chapter III. As to section 76(ii), they stated:

> *Indeed the only powerful argument in support of applying Ch III to s 122 is that s 76(ii) refers to the conferral of jurisdiction "arising under any laws made by the Parliament". But given the many considerations which point in the opposite direction, this seems too weak a foundation for applying Ch III as a whole to the territories …However, the terms of s 76(ii) and 77(i) seem wide enough to confer original jurisdiction on this Court and original and appellate jurisdiction on a federal court in respect of matters arising under a s 122 law.*

Re Governor, Goulburn Correctional Centre; Ex pt Eastman[628] firmly upheld the view that courts established under section 122 of the Constitution, in that case the ACT Supreme Court as originally established by the Commonwealth Parliament, were territory courts, not federal courts. This decision was handed down after the action in 1992 whereby the ACT was granted Self-government, and the *ACT Supreme Court (Transfer) Act (Cth)* provided that the *Supreme Court Act (Cth)* was to become an "*enactment*" which the ACT legislature could amend or repeal[629]. In the judgment of Gummow and Hayne JJ, citing the passage of Brennan, Deane and Toohey JJ in *Capital Duplicators*[630] to the effect that the territory legislature was erected to exercise its own powers and not the (Commonwealth) Parliament's powers, it was not a mere delegate of the Commonwealth but exercised its own plenary and independent legislative powers as part of the Territory's grant of Self-government.

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627 (1999) 196 CLR 553.

628 (1999) 200 CLR 322.

629 Kirby J saw this as a fiction and that the Supreme Court was still a court established by the Parliament.

630 (1993) 178 CLR 561. See also Mason CJ, Dawson and McHugh JJ at 265 266 in the same case. Further, see *R v Toohey*: *Ex pt Northern Land Council* (1981) 151 CLR 170; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38; (1997) 190 CLR 513; *Fittock v R* [2003] *HCA* 19; 217 CLR 508, although note the integrationist view of Kirby J; *NT Power Generation v Power and Water Authority* [2004] HCA 48; *Burgundy Royale Investments v Westpac Banking Corporation* (1987) 18 FCR 212; *Attorney-General v Minister for Aboriginal Affairs* (1989) 25 FCR 345.

In *North Australian Legal Aid v Bradley*[631], McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ stated:

> *Re Governor, Goulburn Correctional Centre; Ex parte Eastman established that s72 of the Constitution had no application to the Supreme Court of the Australian Capital Territory because that Court was not a court "created by the Parliament" within the meaning of s72 of the Constitution. It followed that there was no objection based upon the tenure requirement of s72 to the appointment of an acting judge in that Court. Although in Eastman and in earlier cases other views have been stated on this subject, for these proceedings the point should be taken as settled.*

As a result a similar approach was taken by the High Court in that case to NT magistrates.

The end result is, in my opinion, notwithstanding various expressions of judicial disquiet over the continuance in part of the disparate approach to territories and Chapter III of the Constitution, on the existing High Court authorities, territory courts are not fully incorporated into the federal judicial system under that Chapter, and in my view for good reasons. Territory courts remain courts of the territory established under section 122 of the Constitution and are not federal courts within Chapter III and are not subject to section 72 of the Constitution. This applies in particular to territory courts established by the legislatures of self-governing territories. In so far as those courts exercise their jurisdiction, as conferred by territory legislation enacted under section 122 of the Constitution, or inherently as superior courts of general jurisdiction, it is territory jurisdiction, not federal jurisdiction. They may have conferred on them by Commonwealth legislation original jurisdiction in federal matters within Chapter III of the Constitution by analogy with the federal jurisdiction of a State, such as in section 67(c) of the *Judiciary Act (Cth)* by reference back to section 15(2) of the now repealed *Northern Territory Supreme Court Act 1961*, but this cannot be a conferral of federal jurisdiction within section 77(iii) of the Constitution[632]. Commonwealth or territory legislation may also confer appellate jurisdiction on a federal court (including on the High Court) from territory court decisions, but this appellate jurisdiction is not constitutionally within section 73 of the Constitution.

I am also of the view that the federal separation of powers doctrine, which arises by implication from the provisions of Chapter III of the Constitution in relation to the federal judicature, has no application in and too territories and territory courts and tribunals, although there is no defining High Court decision specifically to that effect[633]. But this result does, in my view, follow from the fact that territory courts have been held not to be federal courts exercising federal jurisdiction under Chapter III.

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631 [2004] HCA 31; 218 CLR 146.

632 Which is expressly limited to state courts. However it may be original federal jurisdiction under section 76 (ii) of the Constitution.

633 Although I accept the principle in *Kable*, previously referred to, does apply in territories to territory courts. As to separation of powers see reasons of Kearney J in *Jones v North Australian Aboriginal Legal Aid Service Inc and Norman, 17 March 1986,* No 719 of 1985. The decision in *R v Kirby, Ex parte Boilermakers' Society of Australia* ("Boilermakers' case") (1956) 94 CLR 254 lends support for this view. See also the discussion in *Kruger v Commonwealth* (1997) 190 CLR 1.

Issue 4 – Smooth Transition of NT Judiciary to Statehood – Proper Criteria for Constitutional Interpretation?

The primary provision in the Constitution as to territories of the Commonwealth is section 122, the territories power, and it is noteworthy this is contained within Part VI of the Constitution, entitled "*NEW STATES*." That section sits between section 121, enabling the Commonwealth Parliament to admit or establish new States in the Commonwealth[634], and section 124[635], enabling a new State to be formed by separation of territory from an existing State or by the union of two or more existing States or parts of those States. These constitutional circumstances of a textual nature indicate fairly clearly that one of the main purposes of having such territories is to prepare them for a future grant of Statehood within the Australian federation if it is decided to do so[636].

This is to be compared with the provisions for the Territory of the ACT, which, as the "*seat of government*" of the Commonwealth, or at least containing that seat of government, has its own constitutional support in section 52(i) of the Constitution. As such it is subject to the exclusive legislative power of the Commonwealth under that provision. Of course the seat of government cannot become a new State whilst that Territory has that status.

That a main purpose of Commonwealth territories was to prepare them for a future grant of Statehood is indicated in the Convention Debates leading up to federation. Thus Alfred Deakin called territories "*embryo states*" and Edmund Barton said the provision as to territories should remain under the heading "*New States*" because it refers particularly to that kind of territory which afterwards develops into a new State[637]. Earlier Barton had referred to territories in a primitive state of development as being in a "*transition state*", governed by the Commonwealth[638].

That this was a main purpose of territories of the Commonwealth subsequently received comment in High Court cases. Thus in *Jolley v Mainka*[639], Evatt J spoke of section 122 of the Constitution as envisaging a process of gradual approach of the territory towards inclusion within the existing organisation of the Commonwealth[640].

634 The most likely provision for granting Statehood to the NT.

635 Section 123 deals with the alteration of the limits of an existing State and is not presently so relevant.

636 This includes the possibility of a grant of federal representation of those territories in the Commonwealth Parliament, but without the constitutional guarantees of "*Original States*" in the Constitution.

637 Official Record of the Debates of the Australasian Federal Convention, Melbourne 1898 Vol IV, 257, although the possibility that some territories might not become new States for many years, if not at all, was noted at 698. See also Quick & Garran, The Annotated Constitution of the Australian Commonwealth, (1976 Legal Books from the 1901 edition), 969.

638 Ibid, Adelaide 1897, Vol II, 1015.

639 (1933) 49 CLR 242 at 279.

640 See also *Bennett v Commonwealth* [2007] HCA 18 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ at para 10, citing *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (2005) 222 CLR 439.

In *Berwick v Gray*[641], the High Court made it clear that section 122 was adaptable and could include both direct administration of a territory by the Commonwealth or the creation of separate territorial administrative institutions with its own territory fiscus. No doubt this included its own system of territory courts.

In *WA v Commonwealth*[642], Barwick CJ stated:

> *Section 122, of course, cannot be read in isolation. It must be read with the Constitution as a whole. It is in a part of the Constitution dealing with the creation of new States and the acquisition and government of Territories. But that part is in its nature incidental, in a sense peripheral, to the central and dominant purpose of the Constitution. The Constitution Act called into existence a new colonial polity, an indissoluble Federal Commonwealth (see recital and covering cl. 3). It was to be federal in the sense that it was to have States forming part of it and that governmental powers should be distributed between the new polity and the States which were parts of it (see covering cl. 6, ss. 51, 82, 106 and 107).*[643]

Gibbs J stated:

> *The position of the Northern Territory of South Australia and of British New Guinea, which at federation were likely to become Territories of the Commonwealth, was in no way comparable with that of the States. They were, and long remained, in fact as well as in legal theory, "in a state of dependency or tutelage" (R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629, at p 637). The Territory in which the seat of government was to be established was not yet in existence. When the Constitution was framed it was of course contemplated that the Territories might so develop in status that they might be allowed representation in the Parliament, or might even be established as States and admitted to the Commonwealth.*[644]

Mason J stated:

> *It has not been suggested that s. 122, viewed in isolation, is an insufficient source of legislative power to sustain the law now in question. But it has been asserted in accordance with received doctrine that s. 122 cannot be read as though it was a segregated head of power disconnected from the rest of the provisions of the Constitution. One must "treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories" (see per Kitto J. in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132, at p 154).*[645]

641 (1976) 133 CLR 603.
642 (1975) 134 CLR 201.
643 At 226.
644 At 248.
645 At 268-9.

And again:

> *…in the shape of s. 122, takes account of the prospective possibility that Parliament might deem it expedient, having regard to the stage which a Territory might reach in the course of its future development, to give it representation in either House by allowing it to elect members of that House. To the framers of the Constitution in 1900 the existing condition of the Territories was not such as to suggest the immediate likelihood of their securing representation in either House, but the possibility of such a development occurring in the future was undeniable. The prospect of its occurrence was foreseen and in my view it found expression in s. 122.*[646]

Jacobs J spoke of:

> *the specific language of s. 122 with its vision of a future Commonwealth*[647].

In *Capital Duplicators v ACT*[648], Mason CJ, Dawson and McHugh JJ stated:

> *Section 122 forms part of Ch. VI of the Constitution which bears the heading "New States". Section 121 enables the Parliament to admit to the Commonwealth or establish new States. Plainly enough, Ch. VI, in particular ss. 121 and 122, contemplates that a Commonwealth territory may advance to Statehood. In the course of its evolution towards Statehood, it is natural, indeed inevitable, that a territory will be progressively endowed with institutions appropriate to self-government. That has been the history of democratic development in this country and in many parts of what was formerly the British Empire and is now the Commonwealth of Nations. Section 122 was and is the source of legislative power for the advancement of the territories along this path towards the final step of Statehood, at which point s. 121 becomes the relevant source of power.*[649]

646 At 270, referred to in Northern Territory v GPAO (1999) 196 CLR 553 per Gaudron J at para 42.
647 At 275.
648 (1992) 177 CLR 248.
649 At 266.

Brennan, Deane and Toohey JJ stated:

> *Section 122 is found in Ch. VI of the Constitution – "New States". Section 121, which provides for the admission of new States to the Commonwealth, relates not only to territories which are parts of existing States (ss. 123 and 124) but also to "such colonies or territories as may be admitted into or established by the Commonwealth as States"(82). These latter colonies and territories were not part of the Original States (82). In the Convention Debates, the forerunner of s. 122 was seen primarily, though not necessarily, as designed to provide for the provisional government of territories as they moved towards Statehood (83). When the Commonwealth was established (84) there were no Commonwealth territories. At that time the territories which were foreseen as possible territories of the Commonwealth included not only the northern territory of South Australia but also the Fiji Islands and British New Guinea (85). The possibility of territories of magnitude and importance being admitted to the Commonwealth as new States after a period of political development must have been contemplated (86). There is thus no reason to construe s. 122 as precluding the creation of a representative legislature for a territory as a step in its political development with a view to its ultimate admission as a new State.*[650]

In *Kruger v Commonwealth*[651] , Gaudron J noted that section 122 has a purposive element. She stated:

> *It may be taken that s 122 of the Constitution has a purposive element in that it authorises laws "for the government of [a] territory".*

There are plenty of judicial authorities which State courts must, when interpreting purposive powers in the Constitution, take that purpose into account[652].

It can be seen from the above quotations that the constitutional purpose behind section 122 of the Constitution is not just to provide for the governance of territories of the Commonwealth, but also to allow for their progressive constitutional development, if appropriate up to a grant of Statehood within the federal system. At that point section 121 of the Constitution takes over. The purpose of section 122 is not just to provide for territorial governance generally, but to provide for that governance in a manner which allows the territory to develop constitutionally. As Deakin said, one has to think of territories as "*embryo states*".

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650 At 271. See also Gaudron J at 288-9. Also *Kruger v Commonwealth* (1997) 190 CLR 1 per Brennan CJ.

651 (1997) 190 CLR 1.

652 Eg: *New South Wales v Commonwealth* [2006] HCA 52 per Callinan J; *Australian Communist Party v Commonwealth* ("Communist Party case") [1951] HCA 5; (1951) 83 CLR 1 per Fullagar J; *Commonwealth v Tasmania* ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1 per Brennan J; *Ruhani v Director of Police* [2005] HCA 42; (2005) 222 CLR 489 per Gummow and Hayne JJ.

Such a development is of course an ongoing process, culminating in either total independence[653] or a grant of Statehood within the federal system[654]. The transition to Statehood is something that obviously has to be planned. The political, administrative and judicial institutions of the territory and their officers need to be in a form they can readily participate in the transition to Statehood without disruption. Thus the existing territory courts and their existing jurisdiction and its contemporary exercise have to be able to seamlessly transit to new State courts and their jurisdiction. Existing territory tribunals have to be in the same position. In my view the Constitution must be interpreted to facilitate that purpose in section 122, and other sections of the Constitution in relation to territories must be interpreted in a complimentary manner. In other words Chapter VI of the Constitution, "*New States*," has the purpose of facilitating a smooth transition of a territory and its institutions under section 122[655] thereof into a new State under section 121 thereof, and this must affect the relationship between the Territories power and the rest of the Constitution.

As part of that transition, this must mean in the interpretation and application of Chapter III of the Constitution to territories and territory courts, courts must take that potential transition into account. If they do not do so, there is the potential for disastrous constitutional and legal results, both during the development of the territory up to the grant of Statehood and thereafter.

Applying this approach to NT courts established by Territory legislation under section 122, in particularly to the courts of the self-governing NT, and section 72 of the Constitution, one can immediately see the judicial wisdom of not treating those courts as federal courts within that latter section. No State courts are subject to section 72 of the Constitution as they are State courts, not federal courts. The members and officers of those State courts are appointed under and subject to their own State law. As part of the transition from an existing self-governing Territory to a new State, almost certainly the existing Territory courts would be continued as new State courts and the existing members and officers of those courts would be continued in the same positions, subject to the new State constitution. It would be totally inappropriate if the members of those Territory courts, the responsibility for which had already been transferred to the self-governing Territory, had to hold office under section 72 and be appointed by the Commonwealth, with the security of tenure and the remuneration and other terms and conditions as determined in that section. This is particularly so given existing judicial office holders in the self-governing Territory have already been appointed by the Territory Government under and subject to the terms of Territory legislation since 1979[656]. It would be inappropriate if those members had to be appointed by the Commonwealth under section 72 of the Constitution whilst members of the judicial arm of a self-governing territory, and if they were then continued in office on and from a grant of Statehood on quite different terms to those under section 72.

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653 As in PNG.

654 The obvious path and most likely outcome for the NT.

655 Or by action under section 124.

656 The date that responsibility for Territory courts were transferred to the self-governing Territory and the *Supreme Court Act (NT)* was enacted. A somewhat similar position applies to the self-governing ACT.

Further, it is clear that State courts exercise only State jurisdiction, except where federal jurisdiction is conferred upon them by Commonwealth legislation under section 77(iii) of the Constitution in matters under sections 75 or 76 thereof. If territory courts were to be held to be federal courts (contrary to the prevailing judicial view) then they would only be exercising federal jurisdiction, even if a part of a self-governing territory. And that jurisdiction would be limited to matters under sections 75 or 76 of the Constitution, the scope of which is totally inadequate for a general territory jurisdiction. On one view this could not extend, under Section 76(ii), beyond jurisdiction conferred on those territory courts by legislation of the Commonwealth Parliament itself[657], a position quite inconsistent with a grant of territory Self-government where that grant includes responsibility for territory courts[658]. Once that territory became a new State, the jurisdiction of those territory courts would revert to being State jurisdiction. This change of status could have unforeseen legal consequences, particularly for litigation then in train[659]. This would not be such a problem for jurisdiction being exercised by the Territory Supreme Court under section 67C (b) of the *Judiciary Act (Cth)* by analogy with the federal jurisdiction exercisable by the Supreme Court of South Australia.

There is no pressing reason why territory courts should be treated as federal courts for the purposes of appeals to the High Court under section 73 of the Constitution. Unlike State courts, there is no constitutional guarantee of such appeals in the case of territory courts unless they were to be treated constitutionally as federal courts (contrary to the prevailing judicial view). However there is an existing statutory right of appeal from the NT Supreme Court to the High Court, mentioned above, and there is no suggestion that the statutory appeal will be abrogated in future. Once the Territory becomes a new State, that right of appeal will be guaranteed under section 73.

The fact that section 80 of the Constitution, located within Chapter III, and requiring trial by jury of indictable offences against any law of the Commonwealth, has been held not to apply in a territory[660] does not concern me in this context. Even if the High Court was to change course and apply this section in territories, it only applies to the relevant offences under "*any law of the Commonwealth*", which almost certainly does not include the laws of a self-governing territory[661]. There would be no change to this position upon a grant of Statehood to the territory.

657 See the introductory words to section 77 of the Constitution.

658 As is already the case in the NT.

659 For example, a range of matters within federal jurisdiction are exclusive of the several courts of the States but not of the courts of territories – *Judiciary Act 1903 (Cth)* section 38. Compare section 67C of that Act.

660 See *R v Bernasconi*, above, and note *Fittock v R* [2003] HCA 19; 217 CLR 508.

661 Contra Kirby J in Fittock. See cases noted under footnote 76.

The federal separation of powers doctrine does cause a serious problem for territory courts and tribunals if it was to be judicially extended to territory courts and tribunals on the basis that territory courts were federal courts. In the NT there have been occasions when Territory judicial officers have exercised non judicial powers perhaps going beyond the *persona designata* rule[662]. Even more serious is the fact that judicial powers have been and are exercised by non-judicial officers in various Territory statutory tribunals[663]. In either case the officers have not been appointed in accordance with section72 of the Constitution, discussed above. If the separation of powers doctrine was to be held to apply in a territory to territory courts and tribunals it would undoubtedly cause legal havoc[664]. This in itself would seem to be inconsistent with the grant of Territory Self-government, in that the separation of powers doctrine is purely federal in nature. The adverse effect of any application of that doctrine would only be removed once the territory became a new State[665], although the position of litigation then in train may be more problematic in such a case. However, in my opinion, the doctrine does not apply to territory courts and tribunals, particularly where they are part of a self-governing territory.

Conclusion

I have sought to highlight in this lecture an argument as to why the present constitutional position, in the terms I have outlined, of the High Court in relation to territory courts and their jurisdiction and Chapter III of the Constitution is both constitutionally justifiable and also reasonable, having regard to the nature of territories and the purpose of the Territories power. There are very good reasons why the present prevailing constitutional position should be maintained, and why the High Court should not move to change that position by the further integration of territory courts and territory jurisdiction within Chapter III. There is no doubt the present prevailing position will facilitate a smooth transition of a self-governing territory into a grant of Statehood within the federal system.

662 The rule that it is permissible to add non-judicial functions to a judicial officer providing the appointment or assignment is addressed to the individual person.

663 See discussion above as to various Territory tribunals currently operating.

664 The same does not apply to the application of the *Kable Doctrine*.

665 Subject of course to the terms, if any of relevance, of the new State constitution.

The Fragility of Northern Territory Self-Government: A Constitutional Perspective 2013

Introduction

This is the seventh in a series of lectures I have delivered in recent years to the Law Society of the Northern Territory on major constitutional and legal issues affecting the NT. My more recent lectures in this series have focused on aspects of a possible grant of Statehood to the Territory, but it seems such a grant is on the backburner for the time being. It is then an opportune time to reflect on the existing grant of Self-government to the Territory, which has now been in operation for 35 years. This is a long enough time to make some evaluation of its strengths and weaknesses from a constitutional perspective. I stress that I do not wish to be drawn into a consideration of the political pros and cons of Self-government, its political value and political limitations or weaknesses[666]. This is a matter for political commentators and relevant interest groups[667]. Rather, I will address some of the constitutional weaknesses of Self-government as revealed from both the law and the practice in recent decades. In doing so, I may possibly produce a result which may challenge the perception of some that Self-government is a stable and long serving form of constitutional government, capable of meeting the needs of the Territory into the indefinite future. But I leave it to you to draw whatever conclusions you may wish in the light of my comments.

Background to Northern Territory Self-Government

The basic framework of Territory Self-government will be familiar to many of you so it is only necessary at this stage to briefly outline some of its salient features.

666 I immediately declare my personal involvement in the grant of Self-government, having been active in Territory constitutional development for some years prior to the grant in 1978 until well after it. I therefore tend to see the grant as somewhat of a success in constitutional terms. It has survived a number of judicial and other challenges, to emerge largely unscathed, but as will be argued in this lecture, subject to a significant degree of fragility in terms of its future potential operation and scope. For an earlier analysis of Territory Self-Government, see lecture "Litigation based on the Northern Territory Self-Government Arrangements".

667 I do make the comment however that excessive centralisation of government is not a good thing in itself. Having experienced government in the NT prior to the grant of Self-government in 1978, I found that in many matters of Territory concern only, it meant government by unaccountable senior Commonwealth public servants, the relevant Commonwealth Minister being just too busy to deal with the minutiae of government. This in my opinion was a bad form of governance.

The first feature is that the bare bones of NT Self-government are, in constitutional terms, contained primarily in an ordinary Commonwealth Act, the *Northern Territory (Self-Government) Act 1978*[668], enacted under the plenary and almost unlimited legislative power of the Commonwealth Parliament in section 122 of the Commonwealth Constitution in respect of territories of the Commonwealth[669]. It is still in force, although having been amended a number of times.

This Act continued the then existing legislative power of the fully elected Territory Legislative Assembly to make laws for the peace, order and good government of the Territory[670]. Thus the legislative mechanisms for the NT continued largely unchanged with the grant of Self-government. There was a necessary change, however, implied in the overall terms of that Act from its inception, and that is that the Legislative Assembly became, on Self-government, the legislative arm of the new Territory body politic under the Crown, separate from the body politic under the Crown that is the Commonwealth Government[671]. Previously it existed within the overall framework of the Commonwealth's governance arrangements for the Territory without any such separate arm of the Crown.

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668 Act no 58 of 1978, commencing 1 July 1978, plus subsequent amendments.

669 Of which the NT is undoubtedly one.

670 Section 6. The Legislative Assembly became fully elected in 1974 when it changed from the Legislative Council. Its existence under the *Northern Territory (Administration) Act 1910* was continued by the *Northern Territory (Self-Government) Act 1978*, section 59. The power to make laws is subject to the Administrator's assent, or, in the case of proposed laws that do not only make provision for or in relation to a section 35 matter, the possibility of reservation to the Governor-General. The former power of disallowance of Territory laws by the Governor-General where assented to by the Administrator in section 9 of the latter ahas now been repealed – *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* No 166 of 2011.

671 Being separate from the Commonwealth grant of legislative power, the NT grant of legislative power under Self-government is not as a mere delegate of the Commonwealth, but on the other hand is not an abdication of Commonwealth legislative power either. Thus in *Scott v Northern Territory of Australia & Anor* [2003] FCA 658, Madwick J stated at para 58.

> *"The High Court in Fittock v The Queen [2003] HCA 19 has recently reaffirmed that a "law of the Commonwealth" for the purposes of the Constitution does not include a NT law. The NT Parliament is not a mere agent or delegate of the Commonwealth c.f. Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51; (1992) 177 CLR 248 at 281-3."*

In *Capital Duplicators Pty Ltd v Australian Capital Territory* [1992] HCA 51; (1992) 177 CLR 248, Mason C.J., Dawson and McHugh JJ stated:

> *"In the same case, (Victorian Stevedoring)", Evatt J. expressed the view (57) that the Parliament "is not competent to 'abdicate' its powers of legislation". His Honour went on to explain(57) that this is:*
>
> *"because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned."*
>
> *Likewise, in Giris Pty. Ltd. v. Federal Commissioner of Taxation, Barwick C.J. said(58):*
>
> *"No doubt whilst the Parliament may delegate legislative power it may not abdicate it."*
>
> *"There are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power. And, in the present case, Parliament not only retains its power of repeal, but also provides, by means of ss. 29 and 35, for the disallowance of enactments of the Assembly. Moreover, as will appear, the nature of the plenary power conferred by s. 122 of the Constitution is such that it necessarily extends to the making of such arrangements for the Territory as are contained in the Self-Government Act."*

That Act also established the new and separate executive authority of the new Territory body politic, a body politic under the Crown[672], separate from the executive power of the Commonwealth Government, and exercised through the Administrator of the Territory and the Ministers of the Territory chosen from the members of the Legislative Assembly on the Westminster pattern of responsible government[673]. The Act also provides for the new and separate financial arrangement for the new Territory body politic with its own Treasury[674]. But the Act only contains the bare framework in this regard. For the scope of this new grant of executive authority, it is necessary to go to Commonwealth Regulations made under the Act[675] by the Governor-General in federal Executive Council from time to time[676]. These Regulations enumerate the matters in respect of which Ministers of the Territory are to have executive authority. The clear implication is outside of these matters, the Ministers of the Territory have no executive authority[677], even if arising under Territory legislation[678].

672 See section 51(1).

673 Part IV.

674 Part V.

675 See section 35, and note that the power to make regulations in section 75 only applies up until 30 June 1979.

676 The *Northern Territory (Self-Government) Regulations*, initially made in 1978 and amended a number of times since. These are discussed further below.

677 Although the Administrator has the capacity to act in other matters outside of a Territory Minister's executive authority, advised by the relevant Commonwealth Minister(s). In this regard the Administrator can wear two different "*hats*" – see my 1985 article, op. cit. The Ministers of the Territory may also be vested with executive authority by operation of an agreement or arrangement between the Territory and the Commonwealth: see *Northern Territory (Self-Government) Regulations, Reg 4(5) (b)*, (g). By way of example, Reg 4(2) of the *Self-Government Regulations* provides the areas of Territory executive authority specified in subreg 4(1) -- which include such matters as "*Regulation of businesses*", "*Industrial safety*", "*Mining and minerals*" and "*Public health*" -- shall not be construed "*as including or relating to the mining of uranium or other prescribed substances within the meaning of the Atomic Energy Act 1953*". This limitation on the Territory's executive authority in relation to prescribed substances led to an agreement between the Commonwealth and the Territory following the grant of Self-government that conferred a conditional executive authority on the responsible Territory Minister to exercise the duties, powers and functions under the *Mining Act* (as then in force) and the *Mine Management Act* in relation to prescribed substances. The condition on the Territory Minister's executive authority was in the form of an obligation to consult with the Commonwealth Minister in relation to the grant or renewal of authorities relating to the mining of prescribed substances, and to follow the Commonwealth Minister's advice in relation to those matters. That agreement was given legislative force by section 7A of the now repealed *Mining Act (NT)*, which section commenced on 3 January 1979. That arrangement remains in place, and is discussed further below in the body of this lecture in the context of derogations from the grant of Territory Self-government.

678 Fortunately the list of matters in respect of which Ministers of the Territory have executive authority is very broad, so the question does not arise very often. And it is assisted by the decision of the Full Court of the Federal Court in *Administration of Norfolk Island v Pitcher* [2005] FCAFC 179 to the effect that the legislative enumeration of self-governing powers for a Commonwealth territory should not be interpreted narrowly, but rather should be seen as establishing a balance between the exercise of the plenary powers of the a self-governing territory and the retention of Commonwealth oversight and authority in relation to matters considered to be of Commonwealth concern. See also *Wake & Anor v Northern Territory of Australia & Anor* (1996) 5 NTLR 170 at 179-184 per Martin CJ and Mildren J.

The Act did not deal with the third of the three traditional arms of government, that is, the Territory judiciary[679]. However by a combination of Commonwealth Acts[680] and Territory legislation in 1979, plus amendments to the *Self-Government Regulations*, responsibility for the Territory judiciary was transferred to the new body politic in that year[681]. This completed the three traditional arms of any government established broadly on the Westminster pattern - legislative, executive and judicial.

These features were examined in more detail in my article "The Constitutional Status of the Self-Governing Northern Territory"[682], with most of the comments still being relevant and applicable. I commented therein that the Self-government arrangements constituted a substantial grant of local autonomy to the (self-governing) Territory, to be exercised through the institutions and offices established by the Act.

But the question remains as to how strong a grant of Territory Self-government it was and is. Clearly it is unlike a State in the Australian federation, each State having an express constitutionally guaranteed status and position in that federation in accordance with the clear terms of the Commonwealth Constitution. It can be said the States are *"entrenched"* in that Constitution, a position which presumably can only be changed by a successful national referendum[683]. The Commonwealth Parliament is a legislative body with expressly enumerated constitutional powers in relation to the States. It is a limited legislative body in this sense, even though its powers have been said to be plenary. It has no capacity by itself to alter the federal relationship as provided in that Constitution, nor to diminish or revoke the powers and responsibilities of a State as therein provided. It can as a Parliament legislate to encroach on those State powers and responsibilities within certain limits, but only in so far as that Constitution so allows it in particular situations and only in so far as the legislation survives any judicial scrutiny. So far, the primary ways in which the Commonwealth has done the latter is either by more fully utilising its existing enumerated heads of legislative power[684], with the superior ability to make its legislation prevail over inconsistent State laws, or by using its predominant financial muscle over the States to induce certain results, including its exclusive powers over customs and excise duties and in effect over national income tax, plus its power to make conditional financial grants to the States[685]. Unlike the position in Commonwealth territories, such as the NT, the Commonwealth Parliament cannot legislate to repeal or amend State legislation or to reduce State legislative power.

679 Although note the third recital or preamble to the Act, mentioning that the Commonwealth Parliament had made provision for the Supreme Court of the Territory by the *Northern Territory Supreme Court Act 1961*, a Commonwealth Act.

680 Again in reliance on section 122 of the Commonwealth Constitution.

681 This comprised both the Territory Supreme Court under the *Supreme Court Act* of the Territory and also lesser Territory courts and tribunals.

682 (1985) 59 ALJ 698.

683 Section 128 of the Constitution. There is a view that the federal nature of the Constitution cannot even be changed by a successful national referendum.

684 Generally interpreted widely by the High Court.

685 Section 96 of the Constitution.

The Territory as a self-governing body politic does not have the advantage of an express, constitutionally guaranteed status and position and is not fully part of the federal system. Nor is the Commonwealth Parliament restricted to an enumerated list of legislative powers with respect to its territories, even if self-governing. Section 122 of the Commonwealth Constitution has been consistently interpreted by the superior Australian courts as providing that the Commonwealth Parliament is not limited by reference to subject matter in legislating with respect of its territories[686]. This judicial view has not changed with the grant of Self-government[687]. As long as the Commonwealth legislation has the appropriate degree of connection (nexus) with the territory affected, it will be valid under the Territories power in section 122 of the Constitution, subject to a few express or implied federal constitutional guarantees held to be applicable in and to territories[688].

An Implied Constitutional Guarantee of Self-Government?

Is there some sort of legal argument that once a political entity is granted Self-government, it cannot be taken away again, at least without its consent? Such an argument has been advanced from time to time, but the question is whether it is just a political argument, or a matter of a constitutional convention, or whether it might be enforceable in a court of law.

This is a matter I addressed in my 1985 article, where I stated the endowment of Self-government totally depends for its support upon the enactment of legislation by the Commonwealth Parliament, and that in legal theory at least it could be withdrawn by that same body. But in footnote 23 to that comment, I stated:

> *It may be contrary to convention for the Commonwealth to withdraw any powers of self-government granted to a territory. The [federal] Attorney-General's Department, in its submission to the Joint Parliamentary Committee on the Constitutional Development of the Northern Territory in 1974 said that such a withdrawal had not happened in Australia's history, that it would be politically unthinkable for the Australian Parliament to undo what a previous Parliament had enacted in respect of the constitutional development of its Territories and that it would only be done in times of revolt or disorder (see First Report, Parliamentary Paper No. 281, at p. 8). A.C. Castles,*

686 This view has prevailed since the early days of federation. The territories of the Commonwealth have been judicially viewed as being in the nature of Commonwealth dependencies, being in a state of tutelage, and fully subject in all respects to Commonwealth legislative power. This view is supported by section 111 of the Commonwealth Constitution, placing a surrendered territory, such as the NT, under the exclusive jurisdiction of the Commonwealth. For early examples of this see *Buchanan v Commonwealth* (1913) 16 CLR 315 and *R v Bernasconi* (1915) 19 CLR 629.

687 Nor would there seem to be very good legal arguments to expect any change in this view. It is based on the wording of section 122 of the Constitution, and applies as long as the territory remains a Commonwealth territory, even if self-governing. The grant of Territory Self-government has not been interpreted as some form of abdication of or restriction on federal legislative power. This is explained further in my 1985 article, op. cit.

688 For example, the requirement that Commonwealth legislation acquiring property be on just terms. For a long time the prevailing judicial view was that this guarantee did not apply in territories, but the High Court has more recently moved away from this view.

> *"The Northern Territory of Australia", in A. P. Blaustein and D. B. Blaustein (eds), Constitutions of Dependencies and Special Sovereignties (June 1980), Vol. III, goes further and suggests in relation to the Northern Territory that where the grant of legislative authority is accompanied by a concomitant grant of local executive power over prescribed subject matters, the grant may conceivably construed as one which cannot be revoked. Certainly any substantial retraction of the grant would cause serious practical difficulties.*

In a somewhat similar vein, Saunders and Smith suggested if Territory Self-government is to mean anything, a convention will have to develop whereby the Commonwealth refrains from legislative or executive interference with the Territory's functions thereunder[689] .

But it is not clear from the commentators in the former of these contributions as to whether they would extend this principle beyond constitutional convention or politics to a legally enforceable constitutional right. Saunders and Smith restricted their comments to a matter of constitutional convention only. Commenting on this, Lockhart J stated in *Attorney-General (NT) v Minister for Aboriginal Affairs*[690]:

> *69. The very basis of self government of the Northern Territory is the Self Government Act which is a statute resulting from the exercise of the Commonwealth's plenary power under s. 122 of the Constitution. Whether the Commonwealth would exercise its power to revoke the Self Government Act doubtless would depend upon conventions and political practices.*

Thus His Honour clearly thought the *Northern Territory (Self-Government) Act 1978* did not have some superior constitutional status above ordinary Commonwealth legislation. In general terms there is nothing in the Commonwealth Constitution which appears to give any special status to territories of the Commonwealth upon which have been devolved certain autonomous governance rights, such that those rights cannot later be withdrawn[691]. Any such form of devolution is going to require Commonwealth legislation to be effective, and there is some doubt that the Commonwealth Parliament can validly entrench its own legislation against later change by its normal majoritarian legislative procedures. And in any event no attempt has been made to give the *Northern Territory (Self-Government) Act* any such entrenched status. In one sense this situation may be said to be no more than the application of the rule enunciated in *Kartinyeri v Commonwealth*[692]

689 "Identifying the Conventions Associated with the Commonwealth Constitution" (1980), a paper prepared for Standing Committee D of the Australian Constitutional Convention, held in Adelaide in April 1983 Vol II, Appendix G, 26."

690 (1989) 25 FCR 345 at paragraph 65.

691 The position may be much the same in the United Kingdom under its devolution arrangements – its primary force seems to be political. See *Devolution for Scotland in the Uk Constitutional Framework,* by Bora Balci, http://www.law.ed.ac.uk/eyl/03repbora.htm.

692 [1998] HCA 22; 195 CLR 337 at paragraph 13.

per Brennan CJ and McHugh J:

> *The power to make laws includes a power to unmake them [24]. Thus the powers conferred on the Parliament under s 51 extend to the repeal, in part or in whole, of what the Parliament has validly enacted [25]. In Deputy Commissioner of Taxation v Moorebank Pty Ltd [26], Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said in reference to s 64 of the Judiciary Act:*
>
> *It is neither a constitutional provision nor an entrenched law. Its authority is that of an Act of the Parliament which can be expressly or impliedly amended or repealed, either wholly or in part, by a subsequent Act and whose application or operation to or with respect to cases falling within the provisions of a subsequent Act will be excluded to the extent that such application or operation would be inconsistent with those subsequent statutory provisions: see, eg Goodwin v Phillips[27].*

It follows in my opinion that the Commonwealth Parliament retains, in constitutional terms, its full plenary legislative power with respect to the grant of Territory Self-government, capable of being used to enlarge or diminish that grant as it sees fit and enacts accordingly. If there are any restraints on the exercise of that power[693], they must be found either in any relevant constitutional convention, considered next, or in the politics of the particular situation.

Constitutional Convention?

It is necessary at this point to consider whether any relevant constitutional convention has developed in the NT since the grant of Self-government which may protect that grant from later revocation or change. If there is any such constitutional convention, we need to assess its strength.

Constitutional conventions have long been known in the Westminster system of responsible government, what Bagehot called "*Cabinet government*". The interesting thing about this system as practiced in Westminster is that it is not based on a written constitution, unlike Australia, but rather is based on the common law and ordinary legislation supplemented by constitutional conventions. While the common law and legislation duly enacted are enforceable in the courts of law, the general view is that constitutional conventions are not. And yet the latter play a pivotal role in the working of the UK Government. Dicey wrote:

> *The one set of rules are in the strictest sense "law", since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge made maxims known as the common law) are enforced by the courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction be called collectively "the law of the constitution".*

693 Apart from the few express or implied constitutional limitations in the Commonwealth Constitution.

> *The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed "the conventions of the constitution," or constitutional morality.*[694]

Although constitutional conventions may not be directly enforceable in a court of law, it is clear in the Westminster system we have inherited in Australia, they are of such importance the courts will have regard to them as deemed necessary, at least as a matter of background to some other cause of action[695].

Thus the system whereby the head of state or his/her representative acts on the advice of the ministers responsible to the relevant parliament is said to be a necessary feature of self-government within the inherited British system of government[696]. This is of course relevant to the position of the Territory Administrator acting on the advice of his/her Territory Ministers, at least in respect of matters in respect of which those Territory Ministers have executive authority[697]. Therefore this is clearly a matter to which the courts will have regard in any constitutional issue where the nature of the system of government and its processes are relevant. These constitutional conventions are judicially noticed and may influence the interpretation of statutes, at least through the presumption that the parliament concerned did not intend to breach any such convention[698].

But the courts have resolutely refused to enforce directly a constitutional convention as if it was an enforceable rule of law by itself, and will not utilise it as forming its own independent cause of action, even if it is of great constitutional importance[699]. There must be either an express statement of the convention in an enforceable legal manner such that it is intended to be enforceable through the courts, or it must be legally implied from the relevant constitutional documents in such an enforceable manner, before the convention will itself give rise to its own cause of action for any breach[700].

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694 Dicey, Introduction to the Study of the Law of the Constitution (9th Ed., 1945).

695 Eg: *Mann v Carnell* [1999] HCA 66; 201 CLR 1 per McHugh J.

696 *Mackay v AG for British Columbia* (1922) 1 AC 457 at 461(PC), cited with approval in *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421 at 448; also *Commonwealth v Kreglinger & Fernau Ltd* (1925) 37 CLR 393 at 411 and 413; *McGraw-Hinds (Aust.) Pty Ltd v Smith* (1979) 144 CLR 633 per Murphy J; also comments about conventions in *Commonwealth v Queensland* (1975) 134 CLR 298; *AG for Australia (Ex pt McKinlay) v Commonwealth* (1975) 135 CLR 1.

697 See *Waters v Acting Administrator of the NT* (1993) 46 FCR 462.

698 *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597 at 612.

699 Re Resolution to Amend the Constitution [1981] 1 SCR 753; (1981) 125 DLR (3d) 1.

700 An example of a non-enforceable convention might be the dismissal of PM Whitlam by GG Kerr in 1975 at a time when Whitlam still had the confidence of a majority of the members of the House of Representatives, and the appointment of Fraser as PM in Whitlam's place, even though Whitlam could not then guarantee supply. Many would argue this was a breach of the constitutional convention that the Prime Minister must be the person having the confidence of the majority of members in the lower House of Parliament. But there was no resultant court action based on the breach. Any such action would potentially have been complicated by the fact that two members of the High Court had tendered advice on the matter to Kerr prior to the dismissal.

And even if a constitutional convention applicable to Territory Self-government, going to its very heart as a constitutional system, was to be held to be legally enforceable, it would presumably have no more legal force than the Commonwealth Act that established Territory Self-government. It still would not constitute some form of entrenched constitutional guarantee of Self-government. I therefore conclude that in so far as NT Self-government incorporates some basic constitutional conventions associated with the Westminster system of government, these are not beyond change by the Commonwealth Parliament exercising its plenary legislative powers under section 122 of the Commonwealth Constitution.

The Euthanasia Example

I am reinforced in this latter view by the events surrounding the enactment of euthanasia legislation, both in the Territory and through the Commonwealth Parliament. Briefly, by way of assistance to our legal memories, Mr Perron MLA sponsored the enactment of the *Rights of the Terminally Ill Act 1995* through the Territory Legislative Assembly, providing for a system of assisted euthanasia on certain conditions. This Act was presumably assented to by the Administrator[701] on the advice of his Territory Ministers on the basis that the Bill as passed only made provision for or in relation to a matter in respect of which those Territory Ministers had executive authority under sections 7 and 35 of the *Northern Territory (Self-Government) Act*. If otherwise, the Administrator would have had the option of reserving the Bill for the Governor-General's pleasure, but there was no such reservation in this case.

The validity of this Act was challenged in *Wake v Northern Territory of Australia*[702] and its validity was upheld 2:1 per Martin CJ and Mildren J, Angel J dissenting. In doing so, the majority Justices held the Act only made provision for section 35 matters. In other words, it dealt with a matter the executive responsibility for which had passed to the self-governing Territory and its Ministers. The new Act entered into effect in the Territory and some cases of euthanasia occurred in the Territory, those actions said to have been taken in reliance on that Act.

701 I do not have access to the actual written advice tendered to the Administrator by his Territory Minsters in relation to the assent to this proposed law.

702 (1996) 5 NTLR 170.

Subsequently, the Commonwealth Parliament moved to enact the *Euthanasia Laws Act 1997, in effect overturning prospectively the Territory Rights of the Terminally Ill Act and denying the Territory Legislative Assembly and other territory legislatures*[703] *the power to enact such laws*[704]*. But it was the manner in which this was done that is particularly significant for present purposes. Not only was this Act a partial retraction of both the legislative and executive powers and authority of the self-governing Territory, but it was done against the fierce opposition of the Territory Government and many of its people. Arguments mounted by the Territory that this would be an infringement of the conventions of Self-government received sparse consideration by federal parliamentarians.*

703 It was not applied to the States for concerns it might have been constitutionally beyond power.

704 Schedule 1 of the *Euthanasia Laws Act 1997* amended the *Northern Territory (Self-Government) Act* to provide as follows:

> *"After Section 50 Insert 50A Laws concerning euthanasia*
>
> *(1) Subject to this section the power of the Legislative Assembly conferred by Section 6 in relation to the making of laws does not extend to the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.*
>
> *(2) The Legislative Assembly does have power to make laws with respect to:*
>
> *(a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and*
>
> *(b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and*
>
> *(c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and*
>
> *(d) the repealing of legal sanctions against attempted suicide.*
>
> *Application*
>
> *For the avoidance of doubt, the enactment of the Legislative Assembly called the Rights of the Terminally Ill Act 1995 has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act."*

There have been proposals to repeal section 50A but these have not passed into law. There is a legal question as to whether any such repeal would revive the NT legislation absent any express provision in the repealing legislation, given that the *Rights of the Terminally Ill Act* still remains on the NT statute book. . *The Euthanasia Laws Act 1997*, the *Northern Territory (Self-Government) Act* and any repealing Bill (if passed) are or would all be Commonwealth legislation. Accordingly, its operation would be governed by the *Commonwealth Acts Interpretation Act*. Section 8 of the *Acts Interpretation Act* provides that, in the absence of a contrary intention, the repeal of a Commonwealth Act does not revive anything not in force at the time at which the repeal takes effect. As the *Euthanasia Laws Act 1997* provides expressly that the *Rights of the Terminally Ill Act* has no force or effect (apart from its operation prior to the Commonwealth Act taking effect), that would appear to be position appertaining at the date of any repeal effected by this new Bill (if passed), and the repeal would not operate to revive the *Rights of the Terminally Ill Act* unless the repealing Commonwealth legislation provided expressly for that result. Although there may be some room for a contrary argument, that is clearly the better view.

A Territory Legislative Assembly Remonstrance document[705] *was received by the federal Parliament but given minimal consideration. The federal Bill was introduced* through separate but concurrent sittings of the House of Representatives in a side chamber, rather than with full debate in the normal Parliamentary Chamber[706]. And most of the federal debate centered on the merits or otherwise of euthanasia, with very little discussion of the resultant erosion of the powers of Territory Self-government[707].

This episode demonstrates to my mind that arguments based on the importance, authority and permanency of Territory Self- government, its basic constitutional legislation and its constitutional conventions, will carry little weight in federal circles when either the national interest or perceived federal matters are at stake, or when the subject of debate is seen by federal parliamentarians as being of sufficient interest and political value to override or simply ignore issues of Self-government. In these cases, there may well be a tendency for the federal Parliament to utilise its plenary legislative powers under section 122 of the Commonwealth Constitution to override any Territory legislation or to diminish or otherwise change Self-government. This can include amendments to the *Northern Territory (Self-Government) Act* itself[708]. We are inevitably drawn to the conclusion that the primary restraint on this happening is only political in nature[709].

The Fragility of the Grant of Territory Executive Authority

The comments so far on matters of fragility have concentrated on superior Commonwealth legislative power, capable of overriding the exercise of Territory legislative power[710]. But there is another weakness in the manner in which executive authority has been conferred on Ministers of the Territory, with all the consequences this has for the legality of Ministerial and other Territory governmental actions. I have already made some brief reference to this matter, above.

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705 The Remonstrance containing grievances in regard to restriction on the plenary grant of power of the NT was presented to the President of the Senate, the Honourable Margaret Reid, and the Speaker of the House Representatives the Honourable Bob Halvorson MP on 27 October 1996. The text is set out on Appendix 1 to this lecture.

706 I assume it was thought that other parliamentary business was more important.

707 Apart from that of the Territory representatives in the Commonwealth Parliament.

708 It has been amended a number of times.

709 Any suggestion of a constitutional convention protecting a grant of Self-government from later revocation or change is also undermined by the recent experience in Norfolk Island (which is discussed further below in the body of this lecture). *The Norfolk Island Act 1979* was subject to significant amendment by the operation of the *Territories Law Reform Act 2010*. Although many of the provisions in that amending Act were directed to matters of public and financial administration, it did represent a significant change to the grant of Norfolk Island Self-government. Although those changes were said to be the result of a process of consultation, there were significant financial pressures on Norfolk Island which made acceptance of the Commonwealth's proposals inevitable. Of course, the circumstances in Norfolk Island may be distinguished from those obtaining in the NT. This is discussed later in this lecture.

710 There are plenty of judicial authorities which support the view that Commonwealth legislation is of superior legal force to territory legislation. I have discussed this elsewhere.

This issue arises from Part IV of the *Northern Territory (Self-Government) Act*. While section 31 of that Act confers executive power in wide terms, when this is read with sections 33(1) and 35 thereof, it immediately becomes apparent that the grant of executive authority to the self-governing Territory is not as wide as the corresponding very wide grant of legislative power in section 6 thereof. There is no coterminalty between the two[711]. The grant of Territory executive authority is apparently limited as a matter of law to matters specified by Commonwealth Regulations made under section 35[712]. The matters were, and still are, listed in the *Northern Territory (Self-Government) Regulations*, as amended from time to time. They are expressed by reference to enumerated subject matters in some detail, arguably covering very broad grounds[713], and have been added to on several occasions since 1 July 1978. But they remain just Regulations, made by the Governor-General on the advice of his/her Commonwealth Ministers. They can be changed much more easily and quickly than the enactment of Commonwealth legislation through the Parliament[714]. This mechanism could conceivably be used to limit or reduce Territory executive authority in the future and thereby create legal impediments to Territory governmental decision-making, even without any corresponding legislative change. I hasten to add this has not happened so far as far as I am aware[715], and hence should not be over-emphasised.

The Fragility of the Grant of Territory Financial Powers

A necessary corollary to the establishment of a new, self-governing body politic under the Crown, separate from the Commonwealth, was to give that new body politic control over its own finances[716]. So much is recorded in the fourth preamble to the *Northern Territory (Self-Government) Act 1978*[717]. Part V of that Act, entitled "*Finance*", in turn establishes the "*public moneys of the Territory*", to be regulated by a Territory enactment[718]. There is capacity for the Territory to establish its own audit mechanism although it can use the Commonwealth Auditor-General[719]. Otherwise no Commonwealth statutory controls over NT governmental finances exist[720].

711 A phrase I coined in an internal document by the Constitutional Study Group in the Department of the Northern Territory in 1974.

712 This is the view apparently taken in the *Waters* and *Wake cases*, and in Norfolk Island in *Pitchers case*.

713 And as we have seen, not to be interpreted narrowly.

714 Although subject to later tabling and possible disallowance in the Commonwealth Parliament.

715 I would be interested to know if it has ever been threatened. As far as I know it has not.

716 Sometimes called "*fiscus*".

717 The fourth preamble recites, inter alia, "*to give the Territory control over its own Treasury*".

718 Sections 43–45.

719 Section 48.

720 But note the *Commonwealth Auditor General Act 1997* was amended in 2011 to provide that the Commonwealth Auditor-General may also conduct a performance audit of a "*Commonwealth partner*", which might include a state or self-governing territory. A person or body is a "*Commonwealth partner*" if the Commonwealth provides money for a particular purpose and that person or body receives the money because it has agreed to use it in achieving the Commonwealth purpose or has entered into a contract which relates to the Commonwealth purpose.

But of course the Territory derives the majority of its funds from the Commonwealth[721] by tied and untied grants in accordance with financial arrangements between them from time to time. This can include loans from the Commonwealth[722]. And of course the Commonwealth is also a direct provider of funding for various Commonwealth programs in the Territory. Subject thereto, I understand the Territory is treated on much the same basis as the States in intergovernmental financial arrangements, including through the Commonwealth Grants Commission processes.

While I do not claim to have any particular expertise with regard these financial arrangements between the Commonwealth and the NT, arguably the present greater dependency of the latter on Commonwealth funding from various sources compared to the States could place the Territory in a somewhat weaker position than that of the States in matters of self-governance. This is of course primarily an intergovernmental financial issue rather than a constitutional issue, but it potentially could have constitutional implications. If the NT Government was to ever get into serious financial difficulties[723], then until such time as it was less dependent on Commonwealth funding it would have a more limited ability to remedy this from its own sources of revenue or savings. In such circumstances it might, in an extreme case, have to look to the Commonwealth for special financial support, although this has not yet happened, and hopefully it would never be necessary. If it did, it could conceivably invite greater Commonwealth involvement in and control of Territory finances and other matters, as is illustrated by the example of recent events in the Territory of Norfolk Island[724]. Of course the actual position in this respect of the NT is quite different to that of Norfolk Island. The latter is quite unlike the NT in many vital respects, Norfolk Island being a very small island Territory with a very small resident population and with limited revenue capability and resources. So this comparison cannot be taken very far[725].

From the point of view of private investors in the NT, the conclusions reached in this chapter on matters of Territory governance should be less of concern. What has been described as the present weaker constitutional position of the self-governing Territory can be regarded from the point of view of investors as leaving the NT with a stronger financial status than the States, given the Territory remains with the constitutional status of a Commonwealth territory for which the Commonwealth still retains ultimate constitutional responsibility notwithstanding the grant of Territory Self-government. It is clear the Territory remains within the "*exclusive jurisdiction*" of the Commonwealth under section 111 of the Commonwealth Constitution and subject to the Commonwealth Parliament's plenary and extremely wide legislative powers under section 122 of that Constitution. The grant of Territory Self-government by ordinary Commonwealth legislation cannot alter this constitutional position because of the superior legal force of the Constitution itself. The Commonwealth can therefore

721 In fact I understand a much higher percentage of the Territory Government's total funds come from this source than for any State of Australia.

722 Section 46.

723 And I am not suggesting this has occurred.

724 Discussed below.

725 See an earlier footnote to this paper, and compare the position of Puerto Rico in the USA, which is not yet a State in the USA federation but has its own government.

be regarded in a sense as the guarantor of NT viability as long as it remains a Commonwealth territory. Because of this, I place no stress in this context on the weaker constitutional position of the self-governing NT compared to that of the entrenched constitutional position of the Australian States[726]. Added to this, the guarantee of just terms upon any acquisition of property, as contained in that Commonwealth Constitution[727] and also in the *Northern Territory (Self-Government) Act 1978*[728], acts as a guarantee of the safety of any such investments.

Other examples of a Derogation from the Powers and Authority of Northern Territory Self-Government

There have been a number of examples of the extension of federal powers at the expense of the States, with a flow on effect to territories, some of these occurring by agreement and by reference of powers. When occurring on a uniform Australia-wide basis, and not on a discriminatory basis against the NT only, or against territories only, they are not matters of present concern. Rather they are matters involving Australia-wide issues which go to the heart of the Australian federation.

Aboriginal Land Rights

The enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* preceded the grant of Territory Self-government in 1978, so it cannot really be included in this present consideration of any extension of Commonwealth powers[729]. In any event, rights in respect of Aboriginal land under that Act were expressly excluded from the grant of executive authority to Ministers of the Territory by Regulation 4(2) (b) of the *Northern Territory (Self-Government) Regulations*[730] read with section 35 of the *Northern Territory (Self-Government) Act*[731]. So this was treated as a form of an exception to the grant of Territory Self-government from its inception. Discussions as to whether this discriminates against the NT, in that the States do not have similar federal legislation[732], have more to do with a possible future grant of Statehood to the Territory. Arguably they are not of present relevance[733].

This leaves a few other examples which arguably did amount to a Commonwealth derogation from the powers of the self-governing NT, which I now consider.

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726 Discussed above.

727 Section 51 (xxxi), now held by the High Court to be applicable in territories, and reversing an earlier view.

728 Section 50. No similar provision applies to State governments and State laws.

729 Except perhaps in so far as it was impacted by the more recent Territory intervention, discussed below.

730 Except as affected incidentally or pursuant to an agreement or arrangement with the Commonwealth or as authorised by another Commonwealth Act - see Regulation 4(5) of those Commonwealth Regulations.

731 Although the Territory Legislative Assembly was left with some legislative power to make laws on particular topics concerning Aboriginal land without running into inconsistency with Commonwealth legislation.

732 *The Native Title Act 1993 (Cth)* of course applies across Australia, including to the NT.

733 There may, however, be arguments arising from particular amendments to the *Aboriginal Land Rights (Northern Territory) Act* enacted since the grant of Self-government that some may wish to raise in the present context.

Nuclear Waste Dump & Uranium Mining Generally

The history of the Commonwealth's attempt to establish a nuclear waste dump in Australia provides one relevant example in this regard. At one stage the Commonwealth looked to establish such a facility in outback South Australia. The South Australian Parliament responded with the *Nuclear Waste Storage Facility (Prohibition) Act of South Australia*[734] . The Commonwealth went ahead anyway and tried to acquire land in that State on urgency for this purpose, but this met a stumbling block in the Federal Court decision in *South Australia v Slipper*[735] . The NT Legislative Assembly also responded with the *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2004*[736] when potential sites in the Territory were identified. In enacting this latter Act, it was no doubt considered that the existing exemption in the *Northern Territory (Self-Government) Regulations*[737] from Territory executive authority of the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953 (Cth)* would not thereby be infringed[738]. But the Commonwealth responded to this by enacting the *Commonwealth Radioactive Waste Management Act 2005*[739] and one other Act. This Commonwealth Act overrode any contrary State or Territory laws, and enabled the Territory Chief Minister to nominate a site in the Territory (other than Aboriginal land), or a Land Council to nominate a site on Aboriginal land in the Territory, the Commonwealth Minister then having an absolute discretion to approve the nominated site for a nuclear waste dump. It is said that:

> *Amendments passed in 2006 to the CRWMA override Aboriginal Land Rights Act procedures requiring informed consent from all affected people and groups. Indeed, these changes explicitly stated that site nominations from Land Councils are valid even in the absence of consultation with and consent from traditional owners.*
>
> *Under the amended process, Muckaty, 120 km north of Tennant Creek, was nominated by the Northern Land Council.*

There was of course considerable controversy resulting from what was arguably a heavy-handed Commonwealth approach to establishing a waste dump, singling out the Territory for special treatment, and hence arguably in partial reduction of the powers of Territory Self-government[740]. This was only resolved when the Commonwealth enacted the *National Radioactive Waste Management Act 2012*[741], repealing the earlier Commonwealth legislation. This new Act provides for the selection of a site for a radioactive waste management facility on voluntarily nominated land within Australia generally.

734 No 68 of 2000. Other States also legislated.

735 [2004] FCAFC 164.

736 No 58 of 2004.

737 Regulation 4 (2)(a).

738 This not being a case of *"mining"* but of returning waste to the ground after its use.

739 No 145 of 2005.

740 Although on one view, such legislation was within Commonwealth legislative power, even if applying in a State, perhaps under the external affairs power or the defence power or otherwise under some implied power in the Commonwealth Constitution, subject to any acquisition of property on just terms.

741 No 29 of 2012.

There was another case some few years ago where the Commonwealth expressed concern about the Territory Government's handling of regulatory aspects of uranium mining in the Territory. This occurred at about the same time as the controversy over the proposed nuclear waste dump in the Territory. The Commonwealth Minister was reported as saying he was taking back control of that mining from the NT Government in order to facilitate more mining[742]. The question is whether this amounted to a retraction, or a threat of retraction, of some Territory self-governing powers.

By way of background to this example, unlike other minerals, uranium resources in the territories are the property of the Commonwealth under the *Atomic Energy Act 1953*. This has been the case since the grant of Territory Self-government in 1978. Mineral resources in the States (including uranium) are, by way of comparison, the property of the Crown in right of the States[743]. As already noted, the Commonwealth has expressly reserved executive authority over the mining of uranium and other prescribed substances in the NT by means of the *Northern Territory (Self-Government) Regulations*.

Since 1978, the regulation of uranium mining in the NT has been shared between the Commonwealth and NT governments by virtue of a series of intergovernmental agreements. The arrangement has been characterised as one whereby the Commonwealth focuses on the environmental protection of the Alligator Rivers Region (containing the Ranger and Jabiluka mine sites) while the NT Government oversees the day-to-day regulation of uranium mining. The grant of mining titles to mine prescribed substances in the Territory has been left, by the terms of general Territory mining legislation, in the hands of the relevant Territory Minister, but to be exercised in accordance with, and to give effect to, the advice of the relevant Commonwealth minister and not otherwise[744]. In effect the Commonwealth retains virtually complete control of all aspects of the mining of these prescribed substances in the Territory, acting in some matters through the Territory Government by arrangement and facilitated by Territory legislation. Accordingly, given the Commonwealth has retained ultimate responsibility for this form of mining since the grant of Territory Self-government, it seems to me it is not possible to regard this as an example of the retraction, or the threat of retraction, of some self-governing Territory powers.

Commonwealth Intervention

One further example which deserves mention in this context is the ongoing Commonwealth intervention in NT Aboriginal affairs. I immediately disclaim any particular knowledge of the details of this intervention as it occurred since I left the Territory and I have not so far had cause to examine it closely. I also wish to avoid any debate in this lecture about the political aspects of the intervention. But a few general comments can be made both about the responsibilities and powers of the self-governing NT for Aboriginal affairs in the Territory, and about how these may have been affected legally by the intervention.

742 This threat was not actually carried out.

743 There has been a recommendation that this should change to give the NT title to these minerals like the States, but with greater Commonwealth regulatory control Australia-wide – see Review of Regulatory Efficiency in Uranium Mining, Final Report: December 2008.

744 See now the *Mineral Titles Act* of the Territory, section 187.

Under the terms of the *Northern Territory (Self-Government) Act*, the Territory Legislative Assembly inherited full plenary legislative powers over all aspects of Aboriginal affairs in the Territory, subject of course to any overriding Commonwealth legislation applicable in the Territory, including the *Aboriginal Land Rights (Northern Territory) Act 1976*[745]. As has been seen above, Ministers of the self-governing Territory were also given very wide grant of executive authority over a considerable range of matters capable of affecting or relating to Aboriginal affairs in the Territory, with one relevant and express exception, being rights in respect of Aboriginal land under the last mentioned Commonwealth Act[746]. But at the same time the Commonwealth Parliament has a very wide constitutional grant of legislative power, applicable Australia-wide, as to people of the Aboriginal race for whom it is deemed necessary to make special laws[747]. So arguably for present purposes there will only be a question of any derogation from the grant of Territory self-governing powers in so far as the Commonwealth legislates and takes action, with effect in the Territory alone, in respect of any matters of Aboriginal affairs[748], and not with effect Australia-wide. The question in this context is whether the ongoing Commonwealth Intervention amounts to such a derogation[749].

For this purpose, I needed an overall summary of the Intervention, but without too much political commentary. I hope you are going to forgive me, but I found this in the Wikipedia entry on the subject[750]. I reproduce the parts of it needed for my purposes in the following quote (with some minor editing):

> ***Northern Territory National Emergency Response***
> *The Northern Territory National Emergency Response (also referred to as "the intervention") was a package of changes to welfare provision, law enforcement, land tenure and other measures, introduced by the Australian federal government under John Howard in 2007 to address claims of rampant child sexual abuse and neglect in Northern Territory Aboriginal communities. Operation Outreach, the intervention's main logistical operation conducted by a force of 600 soldiers and detachments from the ADF (including NORFORCE) concluded on 21 October 2008.*[1]

745 A Commonwealth Act.

746 *Northern Territory (Self-Government) Regulations*, Regulation 4 (2)(b).

747 Commonwealth Constitution, section 51(xxvi), applicable since the successful national referendum in 1967.

748 Other than as to rights to Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

749 This is quite a different question to asking whether any such derogation is unconstitutional. Given the Commonwealth's extensive plenary legislative powers in its territories, not limited to Aboriginal affairs, and also no doubt its extremely wide executive powers in its territories, it can be argued that generally speaking the constitutionality of the Intervention is beyond question. There seems little chance of successfully challenging the Intervention in the courts on constitutional grounds. An attempt to do so failed in *Wurridjal v Commonwealth* [2009] HCA 2, on the grounds that although there may have been an acquisition of property effected by the Intervention legislation, the fact the legislation did provide for compensation for any acquisition did amount to just terms as required by section 51(xxxi) of the Commonwealth Constitution.

750 Please feel free to offer comment on the legal accuracy of the Wikipedia summary. See also summary in *Wurridjal v Commonwealth* [2009] HCA 2 per Kirby J at paragraph 232.

The package was the Federal government's response to the Territory government's publication of Little Children are Sacred, but implemented only two out of ninety-seven of the report's recommendations. The response has been criticised, but also received bipartisan parliamentary support. The current Prime Minister Julia Gillard has and continues to support the response, though her predecessor Kevin Rudd did make some adjustments to its implementation. The Emergency Response has since been lapsed and is being replaced by the Stronger Futures Policy.

…

The response was introduced during the lead-up to the 2007 federal election, at which the incumbent Coalition government led by John Howard, in office since 1996, was defeated. The policy was criticised as rushed and poll-driven, although it gained the broad support of the Rudd Labor opposition and some Aboriginal leaders.

The response also came at a time of increasing debate over the future of federalism in Australia, in particular the proper extent of federal power into areas of government traditionally managed by the states and territories. It was one of a number of federal interventions enacted in 2007.

…

The policy was initially insulated from criticism because of the sensitive nature of the issue and the fact that the national Parliament faces no constitutional barriers to overruling the Northern Territory government, unlike the governments of Australia's states, which have some constitutionally preserved areas of legislative power.

Legislation

The legislation introduced as part of the package included:

- *the Northern Territory National Emergency Response Bill 2007;*
- *the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007;*
- *the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007;*
- *the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008; and*
- *the Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.*

Notably, Clause 132 of the first Bill stated that the provisions of it are classified as 'special measures' under the Racial Discrimination Act 1975 and therefore exempt from Part II of the act. While the main elements of the intervention were otherwise kept in place, this exemption from provisions of the Racial Discrimination Act was brought to an end in 2010.

Measures

The $587 million package came into effect with the passage of the Northern Territory National Emergency Response Act 2007 by the Australian Parliament in August 2007. The nine measures contained therein were as follows:

- *Deployment of additional police to affected communities.*
- *New restrictions on alcohol and kava*
- *Pornography filters on publicly funded computers*
- *Compulsory acquisition of townships currently held under the title provisions of the Native Title Act 1993 through five year leases with compensation….*
- *Commonwealth funding for provision of community services*
- *Removal of customary law and cultural practice considerations from bail applications and sentencing within criminal proceedings*
- *Suspension of the permit system*[751]
- *Quarantining of a proportion of welfare benefits to all recipients in the designated communities and of all benefits of those who neglect their children*
- *The abolition of the Community Development Employment Projects (CDEP).*

Some of these measures were no doubt within existing Commonwealth legislative and governmental responsibilities, upon which no Territory action could be taken or had been previously been taken. But bearing in mind these measures were only applied in the NT, it seems almost beyond argument that at least some aspects of the Intervention constituted a derogation from the powers of Territory Self-government. By acting in the way the Commonwealth did, with superior legal force and effect over any Territory law, it must, as a matter of law, thereby have reduced the scope of the self-governing powers of the Territory to that extent. I leave it to others to engage in a detailed assessment of the extent of this derogation should they wish[752].

751 For entry onto Aboriginal land.

752 I assume this issue of derogation has been less controversial for the Intervention than, say, the euthanasia example, given it is my understanding the Territory Government generally supported the Intervention.

The Norfolk Island Self-Government Experience

The Norfolk Island experience is of some relevance, in that it is a Territory of Australia and although only a small island with limited population[753], it was given a grant of self-governing powers by ordinary Commonwealth legislation[754], in much the same way in constitutional terms as the NT[755]. This followed the High Court decision in *Berwick v Gray*[756], to the effect that Norfolk Island was a territory of the Commonwealth and fully subject to section 122 of the Commonwealth Constitution. Further, it held that it was possible for the Commonwealth Parliament to endow such a territory with separate political, representative and administrative institutions, having control of its own finances.

But in an illustration of the fragility of territory Self-government, a few years ago the Norfolk Island Government ran into financial difficulties when the tourist industry collapsed. It found itself having to approach the Commonwealth for emergency assistance, which was granted. One report indicated the Island Government was unable to pay its bills, that is, without this emergency assistance it would have been insolvent[757]. There was an immediate fear this would result in the Island losing its self-governing powers.

There had been a review of the governance situation of Norfolk Island going back some years earlier[758], which had recommended a number of changes relating to public accountability through finance and performance audits, access to the Commonwealth Ombudsman, protecting the disclosure of personal information to public agencies and the availability of merits review of decisions affecting rights and entitlements. These recommendations had not yet been implemented. The Commonwealth Government decided, in the light of the changes to the Island's recent financial situation, to proceed with the implementation of these recommendations as well as other changes.

753 Said to be about 2000 people. By way of comparison, the NT comprises in area one sixth of the whole Australian continent, with a much larger population even though less than any of the States. The NT also has far greater revenue raising capacity, a much greater wealth of natural resources and a greater diversity in matters of trade, commerce and industry. The proposals to change the constitutional arrangements for Norfolk Island, discussed below, arose from the difficulties presented in having a self-governing entity which has such a small population, no political parties, an executive comprising roughly half its Assembly, and no taxation structure or base sufficient to sustain Self-government and the provision of government services at a comparable level. Those considerations do not have application to the NT.

754 *Norfolk Island Act 1979*.

755 But with some differences. For instance, many Commonwealth Acts did not apply on Norfolk Island, including taxation, medical and social welfare benefits, and the matters the new self-governing territory were given control of were more limited in some respects than the NT and more expansive in other respects.

756 (1976) 133 CLR 603.

757 This was indicated in the Norfolk Island Economic Development Final Report, Department of Regional Australia, Regional Development and Local Government, March 2012.

758 Joint Standing Committee on the National Capital and External Territories, 2003 Report – Quis Custodiet Ipsos Custodes? – Inquiry into Governance on Norfolk Island.

These changes were contained in the *Territories Law Reform Bill of 2010*[759]. The Bill did not, as feared, revoke the Island's grant of Self-government. The Legislative Assembly's powers to make laws for the Island remained, as did most of the matters of Territory executive authority. But it did make changes to Island electoral procedures, and gave the Governor-General, the Island Administrator[760] and the Commonwealth Minister responsible for Island affairs a greater say in Territory legislative matters. It also introduced significant Commonwealth financial and audit controls and required greater transparency in Island Government. The jurisdiction of the Administrative Appeals Tribunal and the Commonwealth Ombudsman are extended to the Island, and the *Freedom of Information Act* and the *Privacy Act* are also extended to the Island.

Chief Minister Buffett was reported as saying of this Bill:

> *The bill before federal Parliament is really set on rolling back self-government for us on Norfolk Island. It means there will be a greater degree of Australian Government processes applied, whereas at this moment they are run almost exclusively by our government. It is almost back to the colonial system.*

Whether this was an overstatement or not does not much matter for present purposes, but it does indicate a grant of territory Self-government carries with it a clear but unspoken condition, namely, the self-governing entity has to govern in a transparent, responsible and financially viable manner in the eyes of the Commonwealth. If it does not do so and has to seek emergency assistance from the Commonwealth, it will come at some cost to the powers or privileges of Self-government. No constitutional argument which may be put forward by the self-governing body is likely to be able to prevent this.

759 Which became the *Territories Law Reform Act* No 139 of 2010.

760 A position more approximating a Commonwealth official.

Lessons to be learnt?

The aforementioned examples provide a good lesson for us as to the fragility of any grant of Territory Self-government. The constitutional position of any self-governing territory government in the Australian constitutional system is not that strong, although the exact position may vary depending on nature of the territory concerned[761]. This puts a particular onus on territory governments in the way they govern their territories. Good territory government thus becomes a constitutional imperative. Any Commonwealth intervention in territory affairs, if it occurs, is likely to mean increased Commonwealth controls, most likely to be exercised under new Commonwealth legislation applying in the territory concerned. Commonwealth emergency financial assistance is likely to bring the same result[762]. Even a sequence of bad territory governmental decisions or actions could conceivably lead to Commonwealth frustration and embarrassment such as to provide impetus for the imposition of such controls.

The main barriers to a reduction in territory self-governing powers lie in the political arena. A Commonwealth Government must be able to politically justify any revocation of those powers. Thus in the euthanasia example, the importance and wider interest in this subject trumped any concern about the erosion of territory powers. In the case of the NT Intervention, concern over the treatment of Aboriginal children provided the political support for such a wide ranging intervention. That level of political support was perhaps somewhat lacking with the nuclear waste dump example. In the Norfolk Island case, the need for Commonwealth emergency financial assistance gave the extension of Commonwealth controls some credibility.

But given the politics surrounding any such grant of territory Self-government, it seems likely that only in an extreme case would it result in a total end to territory Self-government and a reversion to full Commonwealth control. This would require legislation through the Commonwealth Parliament, and may run into difficulties with the just terms requirement for any resultant acquisition of property from any person[763]. As the Commonwealth Attorney-General's Department stated, it may be politically unthinkable for the Commonwealth Parliament to undo what a previous Parliament had enacted in respect of the constitutional development of its territories and this would only be done in times of revolt or disorder.

761 And possibly also the length of time of the grant of Self-government and its success and support.

762 Or in the alternative, a cut in existing territory funding arrangements. For example, see the recent report "PM dismayed over territory's 'grog tap'"", AAP, 26 April 2013, stating *"JULIA Gillard has made a veiled threat to cut some federal funding if the Northern Territory refuses to restore its banned drinker register."*

763 Commonwealth Constitution, section 51 (xxxi), applying to any acquisition of property from any "*State or person*". This may not include from a self-governing territory body politic under the Crown, but would include individuals and corporate entities, including statutory bodies corporate.

Appendix 1
THE REMONSTRANCE

The Legislative Assembly of the Northern Territory with respect and humility addresses itself to – The Honourable The President and Members of the Senate; and The Honourable The Speaker and Member of the House of Representatives in Parliament assembled.

Whereas:- The Commonwealth Parliament conferred by way of the *Northern Territory (Self-Government) Act 1978*, a substantial grant of self-governing powers on the Northern Territory with its own legislature (the Legislative Assembly of the Northern Territory) with a plenary grant of legislative power for the peace, order and good government for the Northern Territory, with its own new body politic under the Crown with a wide grant of executive power (see *Northern Territory (Self-Government) Act Regulations*) and with its own judicial system.

Whereas:- In 1995 the Legislative Assembly of the Northern Territory enacted the *Rights of the Terminally Ill Act* and the Administrator assented to that Act.

Whereas:- The Full Court of the Northern Territory Supreme Court held in Wake and *Gondarra v Northern Territory* that the *Rights of the Terminally Ill Act* was within the legislative and executive powers of the self-governing Northern Territory.

Whereas:- A Bill entitled the *Euthanasia Laws Bill 1996* was introduced into the House of Representatives by the Honourable Member for Menzies. This Bill seeks to restrict the plenary grant of legislative power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978*.

Whereas:- The *Euthanasia Laws Bill 1996* constitutes a direct attack on the self government powers of the Northern Territory.

Whereas:- The Legislative Assembly of the Northern Territory is fully elected on democratic principles to represent the people of the Northern Territory and to act on their behalf. The Legislative Assembly of the Northern Territory presents its grievances to the Commonwealth Parliament.

THE GRIEVANCES

1. The Northern Territory having been granted self-governing powers, the duly elected representatives of the people of the Northern Territory are aggrieved that there should be any attempt to diminish these self governing powers by the proposed enactment of the Euthanasia Laws Bill 1996.

As Witness:- The Northern Territory and its residents have had a long history of seeking autonomy in control of their own affairs. However up until 1978 the Northern Territory was largely controlled by Commonwealth Ministers and public servants from Canberra.

This changed in 1978 with the passage of the *Northern Territory (Self- Government) Act 1978*, in which the Commonwealth Parliament publicly recorded that it was "desirable by reason of the political and economic development of the Northern Territory, to confer self-government on the Territory, and for that purpose to provide, among other things, for the establishment of separate political, representative and administrative institutions in the Territory and to give the Territory control over its own Treasury:" (see 4th preamble to the *Northern Territory (Self-Government) Act*.

That Act created or recognised all three traditional arms of government (legislative, executive and judicial), and thereby granted the Northern Territory self-government separate from the Commonwealth.

The legislative arm of this grant, the Legislative Assembly of the Northern Territory was given plenary powers to make laws for the peace, order and good government of the Territory (see s.6 *Northern Territory (Self-Government Act 1978*).

The High Court has since recognised that the grant of legislative power is not exercised as a mere delegate of the Commonwealth Parliament but is in fact exercised by self-governing Territories in their own right. The Legislative Assembly of the Northern Territory is fully elected on democratic principles to represent the people of the Northern Territory and has full power and authority to make laws on matters such as voluntary euthanasia.

Whilst the Commonwealth Parliament has constitutional power to make laws for the government of the Northern Territory and the Legislative Assembly of the Northern Territory can't make laws that are inconsistent with laws of the Commonwealth which apply in the Northern Territory, the Commonwealth parliament has never before sought to take away any of the legislative powers conferred upon the Northern Territory's Legislative Assembly.

It is one of the conventions of self-government in the Westminster tradition that once self-government is granted to a political entity, it should not thereafter be taken away except in the most extreme circumstances, for example, war or civil disturbance. See submission of the Commonwealth Attorney-General's Department to the Joint Parliamentary Committee on the Northern Territory,

page 8 of Parliamentary Paper No.281 of 1974 where it also states that it would be politically unthinkable to take away such powers after they had been granted.

The *Euthanasia Laws Bill* as introduced in the House of Representatives seeks to directly diminish the plenary grant of legislative powers to the Legislative Assembly of the Northern Territory conferred by s.6 of the *Northern Territory (Self-Government) Act 1978*.

The Bill if enacted would be in clear breach of the above mentioned convention and would constitute an undermining of the principles of self-government.

2. The duly elected representatives of the people of the Northern Territory are aggrieved that the *Euthanasia Laws Bill 1996* would, if enacted, terminate the future operation of a law already lawfully enacted by the Legislative Assembly of the Northern Territory.

As Witness:- The *Euthanasia Laws Bill 1996*, if enacted, would have a dual effect. It would not only result in the diminution of the plenary legislative powers of the Northern Territory Legislative Assembly as per 1 above, but it would also terminate the operation of an existing Northern Territory law lawfully enacted and assented to, namely the *Rights of the Terminally Ill Act 1995*.

The Commonwealth Parliament has never previously enacted legislation to terminate a law of the Northern Territory lawfully enacted. The *Euthanasia Laws Bill* would in this respect also be in breach of the conventions of self-government.

3. The duly elected representatives of the people of the Northern Territory are aggrieved that the enactment of the *Euthanasia Laws Bill 1996* will create uncertainty as to the operation of other existing laws of the Northern Territory.

As Witness:- *The Euthanasia Laws Bill 1996* proposes to diminish the legislative power of the Legislative Assembly of the Northern Territory in respect of certain forms of intentional killing and the assisting of a person to terminate his or her life. It is not limited to preventing the enactment of a *Rights of the Terminally Ill Act*. This has the capacity to create uncertainty as to the validity of a number of other existing Northern Territory laws and possible future laws. For example laws regarding criminal responsibility. It is highly undesirable that there should be any uncertainty in respect of such laws.

4. The duly elected representatives of the people of the Northern Territory are aggrieved, given the significance of the matter, that it is proposed to enact the *Euthanasia Laws Bill 1996* through a separate but concurrent sittings of the House of Representatives in a side chamber, rather than with full debate in the normal Parliamentary Chamber.

As Witness:- The *Euthanasia Laws Bill 1996* raises issues of great public importance. The most important of these is the constitutional question of whether a parliament, having once granted self-governing powers to another political entity, can thereafter unilaterally take back that grant in whole or part. This a point of fundamental constitutional significance, with ramifications going well beyond the Northern Territory.

The second point of public importance is whether under existing constitutional arrangements in Australia it is appropriate for the Commonwealth Parliament to determine issues concerning voluntary euthanasia.

A third issue of public importance is the merits or otherwise of legally recognising voluntary euthanasia. These issues of public importance are matters of considerable public interest, which the representatives of the Northern Territory consider if they are to be considered by the Commonwealth Parliament at all, should not be assigned to a side chamber of the Commonwealth Parliament.

5. The duly elected representatives of the people of the Northern Territory are aggrieved that the Commonwealth Parliament, in debating the *Euthanasia Laws Bill 1996*, is proposing to enact legislation for self-governing that constitutionally it could not enact for existing States.

As Witness:- Under s.51 of the Australian Constitution the Commonwealth Parliament has no legislative power in respect of the subject matter of voluntary euthanasia. This is a 'state type' matter.

Since the grant of self-government to the Northern Territory in 1978 the Commonwealth Parliament as a general rule has not sought to legislate for the Northern Territory in 'state type' matters except in respect of specific reserve powers. (See Regulation 4(2) under the *Northern Territory Government (Self-Government) Act 1978*.) The subject of voluntary euthanasia is not such a reserved power.

The Commonwealth Parliament has no power to either diminish the legislative power of a State parliament or to terminate a State law. The only power of the Commonwealth Parliament is to enact laws on matters for which it has Federal responsibility under Section 51 of the Constitution. Such laws would override a State law under S109 of the Constitution to the extent of any inconsistency.

6. The duly elected representatives of the people of the Northern Territory are aggrieved that the *Euthanasia Laws Bill 1996* would, if enacted, be inconsistent with the undertakings that have already been given for a grant of Statehood for the Northern Territory.

As Witness:- The Northern Territory is progressing along a path of constitutional development. The grant of self-government was an important step in that process but does not amount to a grant of Statehood. With a view to facilitating the future grant of Statehood, the Commonwealth already treats the Northern Territory as far as possible as if it were a State, for example, for financial purposes through the Grants Commission process and the Loans Council.

The proposal for a grant of Statehood now has general support from most Australian governments including the Commonwealth, although no time lines have yet been fixed.

To now enact the *Euthanasia Laws Bill 1996*, being a Bill that deals with 'state type' matters under the Constitution, would be to act contrary to the general progression towards Statehood and create future impediments to such a grant.

Constitutionally the *Euthanasia Laws Bill 1996*, if enacted, could only operate in the Northern Territory up until the grant of Statehood but not beyond that date (subject to the terms and conditions under s. 121 of the Constitution, although there are strong arguments that such terms and conditions could not be used to support the validity of the *Euthanasia Laws Bill* after a grant of Statehood). On this basis the *Euthanasia Laws Bill* if enacted would only be of transitional effect.

Given such a limited effect, the duly elected representatives of the Northern Territory are aggrieved that the Commonwealth Parliament should be used in this ad hoc fashion to undermine the principles of self-government and to create impediments to the future constitutional development of the Northern Territory.

The Prayer:-
The Legislative Assembly of the Northern Territory humbly prays that the Parliament of the Commonwealth of Australia give consideration to the grievances herein set out and seek means to alleviate the distress of the people of the Northern Territory by not proceeding further with the *Euthanasia Laws Bill 1996*.

And your petitioners as in duty bound will ever pray.

Dated this 10th day of October, 1996

The Honourable T.R. McCarthy, MLA
The Honourable S.L. Stone, MLA
Mrs M.A. Hickey, MLA
The Honourable M.A. Reed, MLA
The Honourable B.F. Coulter, MLA
The Honourable S.P. Hatton, MLA
The Honourable E.H. Poole, MLA
The Honourable D.G. Burke, MLA
The Honourable F.A. Finch, MLA
The Honourable D.W. Manzie, MLA
The Honourable M.J. Palmer, MLA
Mr P.F. Adamson, MLA
Mr T.D. Baldwin, MLA
Mrs L.M. Braham, MLA
Dr R.S.H Lim, MLA
Mr P.A. Mitchell, MLA
Mr R.A. Setter, MLA
Mr J.D. Bailey, MLA
Mr S.J. Stirling, MLA
Mr J.L. Ah Kit, MLA
Mr N.R. Bell, MLA
Ms C.M. Martin, MLA
Mr M.J. Rioli, MLA
Mr P.H. Toyne, MLA
Mrs C.N. Padgham-Purich, MLA

The Impact of the High Court Decision on the Intervention (Wurridjal) and its Relevance to the Constitutional Guarantees Applicable to the Self Governing Northern Territory 2014

Introduction

In this lecture, I will consider the implications of the recent High Court decision in *Wurridjal v Commonwealth of Australia* [2009] HCA 2, handed down on 2 February 2009, with the NT as intervener. All seven High Court Justices participated in the decision in six written judgments. The case constituted a challenge to the validity of the national intervention legislation into NT Aboriginal issues, the argument in turn being based on section 51(xxxi) of the Commonwealth Constitution[764], that is, the requirement that Commonwealth legislation providing for the acquisition of property from any State or person must be on just terms. The Commonwealth demurred to the challenge on this basis. The result went in favour of the Commonwealth, that is, the demurrer was upheld.

I will consider the approach of each of the Justices in that case shortly. In the result, it is not so much the question of which side won the case which is important for present purposes, but more the interpretation of the various Justices to the application of section 51 (xxxi) of the Constitution to the NT as a Territory of the Commonwealth which is important. But beyond that, there is a wider question as to the implications of the adopted interpretation in this case for the other constitutional guarantees contained or implied in that Constitution in their purported application in or to Commonwealth territories such as the NT[765]. This is perhaps the area of most interest to practitioners. As we know,

764 "*51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-*

(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws:"

765 Territories are not each a "*State*" in the Constitution – see the definition of "The States" in section 6 of the *Commonwealth of Australia Constitution Act 1900*, which at the time of enactment included *"the northern territory of South Australia"* as part of the new State of South Australia, and which continued to be the case, but only up until the surrender of the NT to the Commonwealth in 1911, becoming a Commonwealth territory. I don't think the argument that because the NT was only joined to the Province of South Australia by 1863 Letters Patent until the Sovereign otherwise decided, therefore it was never lawfully surrendered by the new State of South Australia to the Commonwealth in 1911, has any legal legs whatsoever. There is no legal doubt the NT was lawfully surrendered in 1911 to the Commonwealth under section 122 of the Constitution and hence ceased to be part of the State of South Australia, and that territorial status has not since been changed, hence it remains a territory of the Commonwealth.

there is nothing equivalent to a Bill of Rights in that Constitution[766], but there are a variety of provisions therein that are in the nature of constitutional guarantees[767] and which must be observed or complied with because of the superior legal force of the Constitution. The primary application of these guarantees is to the Commonwealth as a legal entity and/or to the States, or to the federal system comprising the Commonwealth and the States. But the present question addressed in this lecture is which of them also have some application in or to Commonwealth territories such as the NT[768]. Practitioners need to know with some certainty which of these various constitutional guarantees are of relevance and must be taken into account when advising on NT matters.

I don't think I need to go into the facts of *Wurridjal* in any detail. Most practitioners will be aware of the National Intervention in NT indigenous affairs, at least in general terms, and will have their own views on it. I have my own views on the Intervention – I have consistently been opposed to it, particularly since the legislation suspended the operation of the *Racial Discrimination Act* in relation to the Intervention legislation. The prohibition on racial discrimination is, at international law, almost certainly in the category of jus cogens, a peremptory norm from which no derogation is permissible in any circumstances. But because of Australia's dualist domestic legal situation, it seems we can by Commonwealth legislation override such a fundamental prohibition even though that is not possible at international law. A strange anomaly you would think, drawn from the inherited concept of the absolute sovereignty of the nation state, a concept which itself no longer accords with modern realities. I personally believe in a world legal regime, as part of the global rule of law, which inter alia prevents any such derogation at any law level of human society. But I need to point out that such views are not at all relevant for the purposes of or pursued in this lecture. If anyone would like to pursue these matters in relation to the Intervention then I recommend they read the judgments in the case and other relevant literature.

In any event, the facts of this case are not so critical to the purpose of this lecture except in so far as they bear upon the constitutional interpretation point. What can be relevantly said is the facts in dispute in this case involved certain aspects of the Aboriginal Intervention in the NT, such as, for example, leases of Aboriginal land required by the Commonwealth pursuant to Commonwealth legislation and the statutory abolition of certain rights to control entry onto Aboriginal land, and which it was argued constituted, as a matter of constitutional law, a compulsory acquisition of property without the provision of just terms contrary to the constitutional guarantee in section 51 (xxxi) of the Constitution. I will discuss this particular constitutional guarantee, and the ways in which it has been interpreted by the High Court, later on in this lecture.

But first a brief constitutional background on the changing interpretive approach of the High Court over time to constitutional guarantees and its application in and to Commonwealth territories. Others have written much more learned papers on this topic so I will keep it brief.

766 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 per Deane J at paragraph 9 of his judgment.

767 That term is loosely applied for the purposes of this lecture, see below.

768 In previous lectures I have made the point that there is no doubt the NT still retains the status of a Commonwealth territory notwithstanding the grant of Self-government.

The Disparate and Integrative Approaches to Constitutional Interpretation

History tells us that at the time of federation in 1901, there were no Commonwealth territories then in existence. The federation originally comprised the six original States plus the new Commonwealth of Australia, with the new State of South Australia being described to include the NT. The founders of federation, in framing the new Constitution, were almost entirely concerned with the federation comprising the States and that new Commonwealth body politic. Little consideration was given to future territories and their place in that new Constitution, and what discussion there was mostly centered on Chapter VI of the new Constitution, entitled "*New States*". And as some of the founding fathers were appointed to the new High Court from its commencement, it was not surprising this approach to the new Constitution was maintained. The first Commonwealth territory to come into existence was Papua in 1905. The NT was added to the list in 1911.

From early days the High Court took what is often called the disparate approach to territories and the Constitution. That is, those territories stood outside the federation comprising the Commonwealth and the States, the Constitution being concerned with *"one indissoluble Federal Commonwealth*[769]*"*. Territories stood outside the federation proper, and hence most of the provisions of the Constitution had no application to those territories, even if those provisions were not expressly applied or limited to a "*State"* or *"States*".

The disparate approach was exhibited in two early cases, *Buchanan v Commonwealth*[770] and *R v Bernasconi* [771], the latter not yet having been overruled on the constitutional guarantee in section 80 of trial by jury and its non-application to territories. In the first of these two cases, Isaacs J stated that territories were not "*fused"* with the Commonwealth, and hence the Territories power in section 122 of the Constitution was not restricted by constitutional restrictions directed at Commonwealth taxing bills. This comment was repeated in the second of these two cases, that case holding that section 80, trial by jury, did not apply in and to the Territory of Papua.

But the High Court later on exhibited some difficulties in its search for a formula that covered the extent to which section 122 stood outside the Constitution on the one hand, and the extent to which the various provisions of Constitution did apply in and to such territories. A full analysis of the relevant cases is not possible in this lecture[772]. Over time, the pure disparate view was gradually abandoned by the High Court in favour of a more piece-meal approach to constitutional interpretation, section by section.

769 *Commonwealth of Australia Constitution Act*, First Preamble.

770 (1913) 16 CLR 315.

771 (1915) 19 CLR 629.

772 Readers are referred to texts and other articles by leading authors that discuss the main High Court cases. In particular see Brownhill, "The Long Road to the Constitutional Guarantee of Just Terms for Territorians", (1910) 1 NTLJ 252, for a discussion of the cases on acquisition of property on just terms which preceded *Wurridjal*.

This development is well described by French CJ in *Wurridjal*[773] as follows:

> *The Territories power and the "just terms" requirement*
>
> *46. The position of the Commonwealth Parliament with respect to its territories was regarded at and shortly after federation as that of "a quasi-sovereign government" which could "rule the territory as a dependency, providing for its local municipal government as well as for its national government" [89]. The power conferred upon the Parliament by Section 122 of the Constitution, to make laws for the government of the Territories, was seen as unconstrained by limits defining the federal distribution of legislative power[90]. The Commonwealth could exercise "all the powers of an unitary government" over the Territories [91]. This view of Section 122 reflected what has been called a "disparate power" theory of the Territories power [92]. Broadly speaking it found expression in the decisions of this Court on Section 122 over the first 50 years of the federation, albeit not without some misgivings [93].*
>
> *47. Dixon J foreshadowed a change of approach in Australian National Airways Pty Ltd v The Commonwealth [94] when he observed [95]:*
>
> > *For my part, I have always found it hard to see why s 122 should be disjoined from the rest of the Constitution.*
>
> *The question, relevant to this case, namely whether s 122 is subject to the just terms requirement in s 51(xxxi), had not been decided at that time although it had been left open by Latham CJ in Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth [96]. The disparate theory continued to have life into the late 1950s as indicated by the Privy Council's description of the Territories Power, in the Boilermakers' Case, as "a disparate and non-federal matter"[97]. It was also reflected in the judgments of Brennan CJ and Dawson J in Kruger v The Commonwealth [98] and by Brennan CJ, Dawson and McHugh JJ in Newcrest Mining (WA) Ltd v The Commonwealth [99].*

773 Other authors who have considered this matter, apart from those writing in text books, include:

Finlay, "*The Dual Nature of the Territories Power of the Commonwealth*", (1969) 43 *Australian Law Journal* 256; Horan, "*Section 122 of the Constitution: A 'Disparate and Non-Federal' Power"* [1997] *FedLawRw 3*; (1997) *25(1) Federal Law Review 97*; Nicholson, "*The Concept of 'One Australia' in Constitutional Law and the Place of Territories"* [1997] *FedLawRw 11;* (1997) *25(2) Federal Law Review 281*; Pauling and Brownhill, "*The Territories and Constitutional Change*" [2007] AdelLawRw 3; (2007) 28(1) Adelaide Law Review 55; Zelling, "*The Territories of the Commonwealth*", in Else-Mitchell (ed), Essays on the Australian Constitution, 2nd ed (1961) 327 at 330ff; Zines, "*Laws for the Government of Any Territory: Section 122 of the Constitution*" [1967] FedLawRw 4; (1966-1967) 2(1) Federal Law Review 72.

48. *The integrationist approach of Dixon CJ found its voice, in the year after Boilermakers, through a majority of the Court in Lamshed v Lake [100]. In that case the Court upheld the application to a State of a law made under s 122. Dixon CJ (Webb, Kitto and Taylor JJ agreeing) expressly rejected the proposition that s 122 operated to appoint the Commonwealth Parliament "a local legislature in and for the Territory with a power territorially restricted to the Territory" [101]. The laws made under s 122, he said, were "laws made by the Parliament of the Commonwealth and s 5 of the covering clauses makes them binding on the courts, judges and people of every State notwithstanding anything in the laws of any State"[102].*

49. *In his judgment in Lamshed Dixon CJ considered the possible application, to laws made under s 122, of other provisions of the Constitution generally affecting legislative power. He could see no reason why s 116 should not apply and it was "easy to find" in Ch I provisions which would appear on their face to link up with a territory. One example was the incidental power conferred by s 51(xxxix) [103]. He did not, however, apply any close analysis to that general question, no doubt because its resolution was not necessary for the disposition of the case.*

50. *In concurring with the Chief Justice, Kitto J asserted the necessity of "adopting an interpretation which will treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories" [104]. The decision in Lamshed was followed, in the Western Australian Airlines Case [105], with respect to the extension, into the States, of laws made for the Territories.*

51. *In Spratt v Hermes [106] support was expressed by some, but not all, members of the Court for a theory of s 122 as a provision of the Constitution integrated with other legislative powers. Barwick CJ said it was a mistake "to compartmentalize the Constitution, merely because for drafting convenience it has been divided into chapters" [107]. There was no warrant for segregating s 122 from the rest of the Constitution [108]. Windeyer J's judgment was to like effect [109]:*

> *The Constitution must be read as a whole, an instrument of government for a nation and its people, the Commonwealth of Australia.*

Menzies J moved further in rejecting the proposition that Section 122 conferred a legislative power somehow outside the federal system [110]:

> *To me, it seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of 'the Federal System'.*

52. *The discounting by Barwick CJ of the significance of the particular place of s 122 in the Constitution had support from the Convention Debates. Deakin had raised a question about the location of the section in the New States chapter rather than cl 53, which became s 52, relating to the exclusive powers of the Commonwealth. In an exchange with Barton, Deakin conceded [111]:*

> *It is logical where it is, and it would also be logical if included in clause 53. However that is a question for the Drafting Committee.*

53. *Barwick CJ accepted that the power conferred by s 122 was "non-federal in character" but said that this did not mean it was "not controlled in any respect by other parts of the Constitution" [112]. It was a question of construction whether any particular provision of the Constitution had a controlling operation upon it [113]. As Professor Zines has pointed out, the judgments of Barwick CJ, Menzies and Windeyer JJ were all "generally ... in accordance with the spirit of Lamshed v Lake in opposing the 'separation' theory" [114]. The observations made by Barwick CJ, quoted above, were cited with evident approval by Brennan, Deane and Toohey JJ in Capital Duplicators Pty Ltd v Australian Capital Territory [115] and by the plurality in Bennett v The Commonwealth [116].*

54. *In its application to s 51(xxxi) the question of construction of which Barwick CJ had spoken in Spratt v Hermes was answered in the negative in an ex tempore judgment delivered by a unanimous Court in Teori Tau [117]. The brief reasoning which led to that answer may be summarised as follows [118]:*

    1. *Section 122 is general and unqualified. It confers a power to make laws for the compulsory acquisition of property.*
    2. *Section 51 is concerned with federal legislative powers as part of the distribution of legislative power between the Commonwealth and the States.*
    3. *Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power.*
    4. *Section 122 is not limited or qualified by s 51(xxxi) or any other paragraph of s 51.*

The Court said [119]:

> *While the Constitution must be read as a whole and as a consequence, s 122 be subject to other appropriate provisions of it as, for example, s 116, we have no doubt whatever that the power to make laws providing for the acquisition of property in the territory of the Commonwealth is not limited to the making of laws which provide just terms of acquisition.*

The Court is invited to overrule that decision.774

The Decision in *Newcrest Mining (WA) Ltd v Commonwealth*[775] should be noted at this point, in which three Justices took a more integrative approach to this matter in relation to the operation of section 51 (xxxi) in the NT, requiring just terms[776], and one other Justice[777] took the view that the Commonwealth legislation in question in that case could be supported under another head of Commonwealth legislative power apart from placita (xxxi) and hence just terms were required.

It can be seen from this discussion that the question of whether *Teori Tau* should be overruled does raise wider questions as to whether the past varying approaches generally of the Court to the place of territories in the Constitution should be re-examined. For this purpose, it is necessary to analyse the various High Court judgments in *Wurridjal*[778] from the point of view of assessing their relevance to the topic of this lecture.

774 No other Justice in *Wurridjal* gave such an expansive consideration to these issues.

775 (1997) 190 CLR 513.

776 Gaudron, Gummow and Kirby JJ.

777 Toohey J.

778 *Wurridjal* has been considered in a number of articles; examples are as follows:

Brennan, "Territory Exceptionalism and Indigenous Property Holders: Federalism, Rights Protection and the Australian Constitution" (2010) 2:1 City University of Hong Kong Law Review, 117; Brennan, "Wurridjal v Commonwealth The Northern Territory Intervention and Just Terms for the Acquisition of Property", [2009] 33 MelbULawRw 957, also "The Northern Territory Intervention and Just Terms for the Acquisition of Property" [2011] UNSWLRS 17; Brownhill, "The Long Road to the Constitutional Guarantee of Just Terms for Territorians, (1910) 1 NTLJ 252; Grant QC, "Teori Tau, Wurridjal, Just Terms and the Integration of the Territories into the Federal Structure",(2009) 2 Balance 22; Greenwood, "The Commonwealth Government's Northern Territory Emergency Response Act: Some Constitutional Issues" (2009) Volume V, Cross-Sections, 21; Stubbs, "The Acquisition of Indigenous Property on Just Terms: Wurridjal v Commonwealth", (2011) 33 Syd L Rev 119.

An Analysis of Wurridjal - The Six Judgments of the Seven Justices

1. French CJ

It is clear His Honour was greatly influenced by the integrative approach, even if not basing his decision entirely on this approach. He expressed this preference for this approach several times, at least in relation to Commonwealth legislative powers "*where the language of the Constitution so permits*"[779]. The fact that placita (xxxi) refers to an acquisition from "*any State or person*[780]" did not dissuade him from his approach – in fact he indicated that it strengthened his decision on this matter. He would overrule *Teori Tau*. In my opinion, his judgment indicates that in future cases he would be almost certain to apply this general integrative approach to other sections of the Constitution in so far as the language of the Constitution permits.

2. Gummow and Hayne JJ

Their Honours also indicated a preference for "*a retreat from the 'disjunction' seen in that case [Teori Tau] between s 122 and the remainder of the structure of government established and maintained by the Constitution*" and hence overruled *Teori Tau*. In my opinion it is probable from this joint judgment that in future cases they would apply this general approach to other sections of the Constitution so far as they could. Of course Gummow J has now retired from the Court, so that question no longer arises in relation to His Honour.

3. Kirby J

His Honour was strongly in favour of overruling *Teori Tau*, although for a variety of reasons, including by reference to international law, rights to property and also because of his beneficial approach to legislation affecting Aboriginals. He called on the Court to '*correct the unsatisfactory state of its doctrines in relation to Territories, their people and courts*'[781]. He clearly favours an integrative approach[782], and in my opinion would have applied this general approach, while still on the bench, in future cases to other sections of the Constitution so far as he could. Of course His Honour has now retired from the Court so this question no longer arises in relation to His Honour.

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779 At paragraph 74. The full quote is:

"Section 51 of the Constitution confers powers upon the Parliament to make laws for the "peace, order, and good government of the Commonwealth" with respect to the various matters set out in that section. Consistently with covering cl 5 the Court held in Berwick Ltd v Gray that "the Commonwealth" for which the Parliament may make such laws extends to the external territories of Australia [167]. A fortiori, it covers the internal territories. Section 122 authorises laws which, while they must be for the government of a territory, may have application in the States [168]. The legislative powers of the Commonwealth Parliament are generally capable of application to the States and Territories[169]. These considerations indicate that an integrated approach to the availability of legislative powers and limits on them throughout the Commonwealth is to be preferred where the language of the Constitution so permits. That conclusion favours, although it is not determinative of, the proposition that s 122 is subject to limitations on legislative powers which are of general application."

780 This may not include a self-governing territory body politic, a matter alluded to in my other lectures.

781 At paragraph 287.

782 As was also seen in the *Newcrest case*.

4. Heydon J

His Honour did not decide the constitutional point, agreeing with the majority decision on other grounds. He regarded the Court's jurisprudence on the application of placita (xxxi) to territories as unsettled. Of course His Honour has now retired from the Court so the question of what approach he would take in later cases no longer arises in relation to His Honour.

5. Crennan J

Her Honour also did not decide the constitutional point, agreeing with the majority on other grounds. It is difficult to say what approach she would adopt in the future on this matter.

6. Kiefel J

Her Honour also did not decide the constitutional point, agreeing with the majority on other grounds. She would appear to go as far as Toohey J in *Newcrest*, holding that the legislation in question in *Wurridjal* could be supported under a head of Commonwealth legislative power other than placita (xxxi), and hence required just terms. Whether she would go further than this in the future is uncertain.

Thus of the seven Justices in this case, out of those still on the bench as at the date of writing, two generally supported the integrative approach, two who have since retired from the bench generally supported the integrative approach, and two who are still on the bench did not express a view on the matter. But a majority of four did overrule *Teori Tau*. Hence the constitutional guarantee of just terms in section 51 (xxxi) of the Constitution now applies to acquisitions of property in a territory by or pursuant to Commonwealth legislation.

Note as an aside that in relation to the NT and its legislation, a similar statutory guarantee applies under section 50 of the *Northern Territory (Self-Government) Act*[783], applicable to NT legislation.

In *JT International SA v Commonwealth of Australia* [784]Hayne and Bell JJ stated:

> *As was most recently pointed out in Wurridjal v The Commonwealth [206], the relationship between constitutional provisions which forbid or restrain some legislative course and others which appear to permit that course without restraint is a subject of importance beyond s 51(xxxi).*

783 NT legislation is legislation of a separate self-governing territory under the grant by the Commonwealth of plenary legislative powers to the self-governing NT's legislature, that legislature not being a mere delegate of the Commonwealth Parliament, and hence section 51 (xxxi) is not applicable to NT legislation. See *Attorney-General for the Northern Territory v Chaffey*; *Santos Limited v Chaffey* [2007] HCA 34; *Attorney-General (NT) v Emmerson* [2014] HCA 13.

784 [2012] HCA 43.

In *Queanbeyan City Council v ACTEW Corporation Ltd*[785], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated at paragraph 7:

> *For it is established by subsequent authorities, the most recent of which is Wurridjal v The Commonwealth [6], that s 122 is not disjoined from the body of the Constitution.*

But these two comments do not take the matter very much further.

It is noteworthy that in *Attorney-General (NT) v Emmerson*[786], Gageler J stated the NT Supreme Court, established by NT legislation, was a court in which the "*judicial power of the Commonwealth*" can be vested within the meaning of section 71 of the Constitution. Together with other State and territory courts, he said it is a court within Chapter III of the Constitution. This of itself is suggestive of an integrative approach when compared to previous High Court decisions. However I do not propose to get involved in matters of judicial power and jurisdiction in this lecture other than in relation to section 80 trial by jury.

I am not otherwise aware of any other views expressed in any forum by the three Justices appointed to the High Court since *Wurridjal* was decided on the matter of the relationship between territories and constitutional guarantees. Those Justices are Bell, Gageler and Keane JJ. I would welcome any contributions on this point.

In *Lewis v Chief Executive Department of Justice and Community Safety and Sentence Administration Board of the Australian Capital Territory*[787], Refshauge ACJ in the Supreme Court of the ACT stated:

> *307. The position of the territories of the Commonwealth, including their courts, has, however, come under continuing consideration by the High Court and some of the long-decided approaches are being reconsidered. Thus, for example, the Court has held in Wurridjal v Commonwealth [2009] HCA 2; (2009) 237 CLR 309 that the just terms requirement of s 51(xxxi) of the Australian Constitution applied to laws of the Commonwealth Parliament providing for the acquisition of property in the Northern Territory, overruling Teori Tau v Commonwealth [1969] HCA 62; (1969) 119 CLR 564. No doubt there will be further development as what has been described as an "integrationist approach" to s 122 of the Australian Constitution (see Wurridjal v Commonwealth at 345; [48] (per French CJ)) is explored and developed.*

785 [2011] HCA 40.

786 [2014] HCA 13.

787 [2013] ACTSC 198.

Conclusion on Wurridjal and the Wider Constitutional Issue

It follows in my view that we have not yet heard the last word from the High Court on the relationship between territories and constitutional guarantees, other perhaps than in relation to section 51 (xxxi) of the Constitution. Having said that, there are strong grounds for assuming that Court will take a more integrative approach to the matter in the future consistent with the decision in *Wurridjal*. While the comments on the matter in the judgments in that case may have been largely restricted by the context of that case to the application of placita (xxxi) of section 51 of the Constitution to territories, I think that case did indicate that a probable shift has been going on in judicial thinking towards a more integrative approach generally. This shift is consistent with events in recent decades, including the successful constitutional amendment to section 128 of the Constitution in which territory electors are now taken into account in national referenda[788], the grant of Self-government to several territories including the NT and the growing importance and increasing population of such territories generally. It seems the disparate approach may have much less appeal to the Court in the future, although much may turn on the exact words used in the particular constitutional provision under consideration.

On the other hand, in my view it may be too early to assert that the High Court decision in *Wurridjal* embodied a full integrationist approach to section 122 generally, such as has been asserted by some commentators. It might, for example, be argued that every provision in the Constitution should be presumed to apply in and to territories unless there are compelling reasons to the contrary[789]. But in my view, this is an approach that cannot yet be said to be finally settled and will depend upon the future approach of individual Justices and the particular provisions of the Constitution under consideration. In particular, the application of constitutional provisions to self-governing territories such as the NT must take into account the situation where a new arm of the Crown in its own right has been created for a territory, separate and distinct from the Crown in right of the Commonwealth, a new territory government in effect legally separate and distinct from the Commonwealth Government, the grant of self-government applying to all three traditional arms of government, legislative, executive and judicial. In my view, this must affect the interpretation of certain express references in the Constitution such as to the "*Commonwealth*"[790] or to "*laws of the Commonwealth*", with the result that it appears to limit the application of the full integrative approach[791]. And there are some provisions in the Constitution while will probably never be judicially extended to territories because of their clear wording limiting them to the States[792]. To do otherwise would be to virtually obliterate the distinction between States and territories. I do not believe the High Court will go this far.

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788 Pursuant to a successful 1977 referendum amending section 128 of the Constitution.

789 A view something to this effect was advocated by Gaudron J in *Capital Duplicators v ACT* (1992) 177 CLR 248 at 288, but it has not found favour with other members of the High Court apart perhaps Kirby J.

790 Where used in the sense of a reference to the Crown in right of the Commonwealth, that is, to the Commonwealth Government.

791 Such a limitation is in my view appropriate given the NT is a prospective candidate for a future grant of Statehood and in many ways is already treated as a de facto State.

792 This includes, but is not limited to, sections applicable to "*Original States*" – sections 7 and 24. This will become more obvious from the discussion of particular guarantees below.

Particular Constitutional Provisions to be Considered

So let us now apply my conclusion in this regard to some other constitutional guarantees. The constitutional guarantees[793] I would like to consider in this lecture are:

1. The right to vote provisions of section 41;
2. The discrimination and preference provisions in sections 51(ii), 99 and 117;
3. The State banking and State insurance provisions in section 51(xiii) and (xiv);
4. Trial by jury in section 80;
5. Trade etc. among the States in section 92;
6. Inconsistency between State and Commonwealth laws in section 109;
7. Taxation on State property in section 114;
8. Freedom of religion in section 116;
9. The "*Kable*" doctrine; and
10. The implied freedom of communication doctrine.

There may be other provisions which could be looked at in this general category, but this list will suffice for present purposes.

I will also comment briefly on certain High Court dicta that may favour a parallel judicial doctrine in the case of constitutional provisions limited to a "*State*" in the Constitution. This will involve a consideration of cases such as *Breavington v Godleman* [794], which was concerned with the constitutional recognition of laws etc., and the application of constitutional provisions expressed to be applicable only to a State or States, and whether a like provision can be extended in some manner to territories by judicial determination.

793 I use the word '*guarantees*' fairly loosely in this lecture.

794 (1988) 169 CLR 41.

1. The Right to Vote Provisions of Section 41

Section 41 of the Constitution provides:

> *41 Right of electors of States*
> *No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.*

This provision is in the form of a constitutional guarantee – if you have a right to vote at elections for the lower house of a "*Parliament of a State*", you cannot be prevented from voting in elections for either House of the Commonwealth Parliament. On the face of it, a "*State*" does not include a territory of the Commonwealth. Unless the High Court might seek in the future to extend the meaning of "*State*" in this section to include a territory by judicial determination, this position will stand. In my view it is most unlikely the High Court would so act. Nothing in *Wurridjal* assists in this regard.

2. The Discrimination and Preference Provisions in sections 51(ii), 99 and 117

Section 51 sets out the main heads of non-exclusive legislative power of the Commonwealth Parliament. As to taxation, it provides:

> *51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
> *(ii) taxation; but so as not to discriminate between States or parts of States;*

Compare this to bounties, as to which section 51 provides:

> *51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
> *(iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;*[795]

As to section 51 generally, since *Wurridjal*, and almost certainly before it, it could not and cannot be argued that section 51 has no application at all in territories on the basis that it was only concerned with the federal division of legislative powers between the Commonwealth and the States. On the contrary, each placitum of section 51 may, as a matter of constitutional interpretation,

795 Note under section 90 of the Constitution, bounties on the production or export of goods is an exclusive Commonwealth power. Section 90 has been held to also apply to territories and their territory legislatures – *Capital Duplicators v ACT* (1992) 177 CLR 248. Presumably section 51 (iii) of the Constitution also applies to territories.

apply in and to territories, depending on its terms, and whether or not the Commonwealth legislation can also be supported under section 122 of the Constitution. But does this mean the taxation power in section 51 (ii) applies in territories, even though the prohibition on discrimination is expressed to only apply between States or parts of States?

It seems to me, applying the reasoning in *Wurridjal,* it is most likely the High Court would extend the Commonwealth Parliament's taxation power to apply in and to territories, even though the prohibition on discrimination therein is expressed by reference to the States or parts of States only. It is to be recalled that the placitum of section 51 under consideration on *Wurridjal,* namely (xxxi), included a reference to an acquisition from a "*State*", but this did not result in the non-application of the placitum in territories.

This result would, however, require an overturning of the raison d'etre of the decision in *Buchanan*, namely, that section 51(ii) of the Constitution has no application in territories, at least in respect of laws made by the Commonwealth Parliament. In that case the High Court was not dealing with taxing laws of the Commonwealth Parliament, but the Court still held that, applying the disparate approach, section 51(ii) was inapplicable to territories, and hence section 55 of the Constitution[796] did not have to be complied with.

If the High Court was to extend section 51(ii) to territories, I would argue that it only applies to taxation laws of the Commonwealth Parliament, and not taxation laws enacted by the legislature of a self-governing territory[797].

I would also argue by reference to the words "*throughout the Commonwealth*" that the power as to bounties, and the requirement they be uniform, operates throughout Australia as a whole, including territories[798]

Now to Section 99. It provides:

> *99 Commonwealth not to give preference*
> *The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.*

796 Laws imposing taxation to only deal with imposition of taxation.

797 Compare *Capital Duplicators v ACT* (1992) 177 CLR 248.

798 See discussion below in relation to section 118 and see *Capital Duplicators v ACT* (1992) 177 CLR 248 as to the application of section 90 of the Constitution to self-governing territories, and excluding territory legislation, including presumably as to bounties.

Here again we have an express prohibition on certain preferences by reference to any State or part of a State. It includes "*revenue*", but also extends to trade and commerce. In this case it is not a legislative head of power, just a prohibition directed at the Commonwealth. On the face of it, it is limited to between States or parts of States. Thus unless the High Court was willing in the future to extend this prohibition to territories by some means [799], which in my view is unlikely, it must follow that neither this prohibition, nor the prohibition in section 51 (ii), can also extend to territories.

Section 117 of the Constitution provides:

> *117 Rights of residents in States*
> *A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."*

This is in the form of a constitutional guarantee against any disability or discrimination based on residence in any "*State*". It is not expressed to extend to any disability or discrimination based on residence in a Commonwealth territory as compared to another territory or a State. In my view, unless the High Court might seek in the future to extend the meaning of "*State*" in this section to include a territory by judicial determination, this position will stand. In my view it is most unlikely that the High Court would so act.

3. The State Banking and State Insurance Provisions in Section 51(xiii) and (xiv)

Section 51 provides:

> *51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
> *(xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;*
> *(xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;*

These are two further placita of the Commonwealth Parliament's non-exclusive heads of legislative power. Their particular interest for present purposes are the exclusions of State banking or State insurance, including State banking or State insurance extending beyond the limits of the State concerned. Leaving aside the question whether the High Court might seek in the future to extend the meaning of "*State*" to include a territory in these placita, which in my view is most unlikely, can these exclusions have any operation in territories?

799 A matter discussed below.

In Lamshed v *Lake*[800], Dixon CJ, in pursuance of a more integrationist approach, stated obiter it rather taxed credulity to believe, inter alia, that a State bank trading in a territory was not within placitum (xiii) nor State insurance trading in a territory within placitum (xiv)[801]. In the light of *Wurridjal,* this seems to me to be correct. On the other hand this would not seem to include any banking or insurance of a self-governing territory.

4. Trial by Jury in Section 80

Section 80 of the Constitution, within Chapter III "*The Judicature*" provides:

> *80 Trial by jury*
> *The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

The relevant issue for present purposes is whether this constitutional requirement of trial by jury applies to trials of offences against any law of the Commonwealth committed in a territory, or whether it is limited to such trials against a law of the Commonwealth either in a State or beyond the limits of any State and external to Australia as a whole. Note the second part of the section is limited expressly to a State where that type of offence was committed in a State, but the second part extends to such offences not committed within any State. This would seem to cover any extra territorial offences committed in the seas beyond Australia. But would it include such an offence committed in a territory?

R v Bernasconi[802] is still authority for the proposition that section 80 has no application in territories. But it is a very early case, reflecting the then disparate approach of the early High Court. In that case a *Papua Ordinance* provided for the trial of certain indictable offences should be without jury. The High Court unanimously held that the guarantee of trial by jury in section 80 had no application to a Commonwealth territory. Griffith CJ thought Chapter III of the Constitution had no application to territories and Isaacs J expressed a similar view. Gavan Duffy and Rich JJ agreed with the Chief Justice.

800 (1958) 99 CLR132.

801 At page 143.

802 Cited above.

But of course it is no longer possible to say that, apart from section 80, Chapter III is incapable of any application to territories. While territory courts are not federal courts[803], and appeals to the High Court can be granted from territory courts outside of Chapter III of the Constitution[804], it is clear that courts exercising jurisdiction in a territory can be invested with federal jurisdiction under section 76 of the Constitution[805]. The question of the extent to which Chapter III is capable of application to territories and territory courts has yet to be finally resolved and is beyond the scope of this lecture. But it is no longer possible to assert that Chapter III has no such application at all, a position, to some extent at least, undermines the decision in *Bernasconi*. Nor would it seem open any longer to argue a criminal law statute enacted by the Commonwealth Parliament, operating in a territory, is not a "*law of the Commonwealth*" for the purposes of section 80 of the Constitution[806]. The continuing correctness of *Bernasconi* has been questioned, but the point has yet to be judicially decided. Having regard to the decision in *Wurridjal*, it is difficult to conclude, merely from the references to a "*State"* in the second part of section 80, that the section has no application to territories.

As to the meaning of "*any law of the Commonwealth*" in section 80[807], arguably this does not include a law of a self-governing territory legislature. Whether a territory law, including under a grant of territory Self-government, is such a law of the Commonwealth for the purposes of section 80 was a matter considered in *Fittock v R*[808] but not decided[809]. It clearly does now include every law made by the Commonwealth Parliament whatever the constitutional power under or by reference to which that law is made or supported, including the Territories power in section 122[810]. I would argue that a law passed by the legislature of a self-governing territory, that territory being a body politic under the Crown separate and apart from the Commonwealth body politic under the Crown, is not capable of being a law of the Commonwealth for this purpose.

I incline to the view that should the issue of the correctness of *Bernasconi* be raised squarely again in a court, involving a Commonwealth criminal statute operating in a territory and conferring no jury trial for an indictable offence, and an application be made to the High Court to overrule *Bernasconi*, it is likely that it would succeed and *Bernasconi* would be overruled.

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803 *Spratt v Hermes (*1965) 114 CLR 226; *Capital TV & Appliances v Falconer* (1971) 126 CLR 591; *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (1999) 200 CLR 322.

804 *Porter v R*; Ex pt Yee (1926) 37 CLR 432.

805 *NT v GPAO* (1999) 196 CLR 553; *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (1999) 200 CLR 322 and other cases.

806 *Lamshed v Lake* (1958*)* 99 CLR 132; *Spratt v Hermes* (1965) 114 CLR 226 and other cases.

807 And elsewhere in the Constitution.

808 [2003] HCA 19.

809 I would argue that with a grant of self-government to a territory, creating an arm of the Crown separate from that of the Commonwealth, and with its own territory legislature, that the laws made by such a legislature are not laws of the Commonwealth for this purpose.

810 *Spratt v Hermes* (1965) 114 CLR226 per Barwick CJ at 247.

5. Trade etc. among the States in Section 92

The main part of section 92 of the Constitution provides:

> *"92 Trade within the Commonwealth to be free*
> *On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

Here we have a specific constitutional command as to a form of freedom "*among the States*". On the face of it, it is limited in its operation to among States only, not including territories, except perhaps in so far as the trade, commerce or intercourse is among two or more States but crossing a territory in the journey[811]. The section was considered in *Lamshed v Lake*[812], in which the High Court was not prepared to extend its operation to Commonwealth legislation dealing with trade and commerce and intercourse between a State and the NT, relying instead on a similar provision in section 10 of the *Northern Territory (Administration) Act 1910*[813]. But having reached that conclusion, the High Court held that the Commonwealth legislation over-road inconsistent South Australian legislation under section 109 of the Constitution,[814] applying a more integrationist approach.

Unless the High Court might seek in the future to extend the meaning of "*State*" in section 92 to include a territory by judicial determination, such that the operation of the section was extended to trade, commerce or inter course between a State and a territory, or between two territories, this current position will stand. In my view it is most unlikely the High Court would so act.

6. Inconsistency between State and Commonwealth laws in Section 109

Section 109 of the Constitution provides:

> *109 Inconsistency of laws*
> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

As discussed under the previous heading, this provision has been applied by the High Court only between laws of the Commonwealth and laws of a "*State*", but extending to situations where the State law has a geographical operation that lawfully involves a territory in some way.

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811 *Lamshed v Lake*, supra, at page 143.

812 (1957) 99 CLR 132.

813 See now section 49 of the *Northern Territory (Self-Government) Act 1978*.

814 See also *AG (WA) v Australian National Airlines* (1975) 138 CLR 492; *NT v GPAO* (1999) 196 CLR 553. See the discussion under the next heading.

The High Court has worked out its own superiority provision between conflicting Commonwealth legislation and territory laws without reliance on section 109[815]. I take a similar view to this section as I do to section 92; that is, unless the High Court might seek in the future to extend the meaning of "*State*" in section 109 to include laws of a territory by judicial determination, this position will stand. In my view it is most unlikely the High Court would so act.

7. Taxation on State Property in Section 114

The relevant part of Section 114 of the Constitution reads as follows:

> *114 States may not raise forces. Taxation of property of Commonwealth or State*
> *A State shall not, without the consent of the Parliament of the Commonwealth … impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.*

This section raises some interesting questions: which legal entity owns the government property in or on a Commonwealth territory? Prior to any grant of self-government to a territory I would have thought the Commonwealth as a separate body politic under the Crown was the owner. But I would argue this is not the case upon a grant of self-government, where a separate body politic under the Crown is created for that territory with the capacity to own property. That property would not in my view belong to the Commonwealth in terms of this section. Hence the prohibition on State taxation on that property would not be within the protections of that section. Nor, it would seem, would self-governing territory property be protected by the section from Commonwealth taxation, that is, unless the High Court might seek in the future to extend the meaning of "*State*" in section 114 to include a territory by judicial determination. This is in my view most unlikely.

I would think the reference to the "*Commonwealth*" in this section is to the Commonwealth as the national body politic and hence does not include a self-governing territory body politic and its property.

815 *Re Kearney; Ex pt Japanangka* (1984) 158 CLR 395, in particular Brennan J at 418-419, and other cases.

8. Freedom of religion in Section 116

Section 116 of the Constitution provides:

> *116 Commonwealth not to legislate in respect of religion*
> *The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

This is expressed in the form of a prohibition on Commonwealth legislation affecting religion in any of four different ways. These include a prohibition on any religious test *"for any office or public trust under the Commonwealth"*. This latter reference seems to be a reference to the Commonwealth as a separate body politic under the Crown.

In *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority*[816], Mossop M stated at paragraph 310:

> *Firstly, the decision in Wurridjal v Commonwealth [2009] HCA 2; (2009) 237 CLR 309 did not decide that the guarantee in s 116 applied to laws made under s 122. Reference was made to some of the dicta in relation to the application of s 116 in the territories at [49], [54] and [62] but no more than that. On the issue in dispute in that case, namely, the application of s 51(xxxi), a majority found that it did qualify the power in s 122 of the Constitution: see [2009] HCA 2; (2009) 237 CLR 309 at, [189], [287]. It is therefore consistent with the integrationist trend in recent High Court authority on s 122 but does not determine the s 116 issue. Secondly, it is established that the Territory Assembly is not merely a delegate of the Commonwealth as the submission of the plaintiff asserts. Rather, it is a separate legislative body armed with general legislative authority as large and of the same nature as those of Parliament itself and laws of the Assembly do not involve an exercise of the legislative power of the Commonwealth: Capital Duplicators Pty Ltd v Australian Capital Territory [1992] HCA 51; (1992) 177 CLR 248 at 283, 284.*
>
> *311. The authorities are divided upon whether or not s 116 qualifies the power to make laws for the government of a territory under s 122 of the Constitution.*

At least since *Wurridjal,* and perhaps even before, this section seems a prime candidate for the High Court holding that it applies in and to territories. There is no indication in the wording of the section that it is intended to only apply in the States.

816 [2014] ACTSC 165.

However there are some High Court dicta to the effect that section 116 does not apply in territories, applying the disparate view[817]. A contrary judicial view has also been expressed[818]. As Mossop M stated, the matter remains to be settled. I am inclined to the view that should the matter squarely arise for decision in the High Court in the future, then applying a more integrationist approach, the section would be extended to territories.

However I am also of the view that the prohibition on the legislation of the Commonwealth Parliament in the section does not extend to laws made by the legislature of a self-governing territory body politic under the Crown. This view is confirmed by the comments of Gaudron J in *Kruger*, as follows:

> *…s116 is directed to laws made by the Commonwealth, not laws enacted by the legislature of a self-governing territory.*[819]

For similar reasons I am of the view that the reference in the section to "*an office or public trust under the Commonwealth"* does not include a reference to such an office or public trust under a self-governing territory body politic under the Crown.

9. The "Kable" doctrine

The decision in *Kable v DPP (NSW)*[820] establishes the principle that because the Constitution establishes an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State supreme courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.[821]

In *Emmerson*, the High Court confirmed the view already expressed in a line of cases that the principle in *Kable* applies to the supreme courts of territories and to all State and territory courts as Chapter III courts[822].

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817 *AG (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559, per Gibbs J at 593. Some other Justices in that case expressed the obiter view that the section did apply in territories.

818 For example, *Lamshed v Lake* (1957) 99 CLR 132 per Dixon CJ at 143; *Kruger v Commonwealth* (1997) 190 CLR 1 per Toohey, Gaudron and Gummow JJ, Dawson and McHugh JJ disagreeing.

819 (1997) 190 CLR 1 at .

820 (1996) 189 CLR 51.

821 Adapted from *AG (NT) v Emmerson* [2014] HCA 13 per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at paragraph 40.

822 At paragraph 42 and footnotes [70] and [71].

10. The implied Freedom of Communication Doctrine

This implied freedom, as first identified by the High Court in 1992 in *Australian Capital Television Pty Ltd v Commonwealth*[823] and *Nationwide News Pty Ltd v Wills*[824], was derived from the Constitution on the basis it was necessary to support the system of representative government established by the Constitution. The Court held the relevant sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.

From the beginning of the judicial enunciation of this doctrine, the High Court extended it to territories and to territory legislation. This in my view remains the current position.

I do not discuss in this lecture the Separation of Powers doctrine arising from Chapter III of the Constitution, applicable at the Commonwealth level between the Commonwealth Judiciary and the other branches of the Commonwealth Government, but not at the State judicial level, and whether it applies at the self-governing territory judicial level.

823 (1992) 177 CLR 106.

824 (1992) 177 CLR 1.

High Court Dicta that may Favour Some Parallel Extension of the Meaning of the Constitution where it refers to a "*State*"

The case of *Breavington v Godleman*[825] concerned the application in the NT of section 118 of the Constitution. That section provides:

> *118 Recognition of laws etc. of States*
> *Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.*

It can be seen that this constitutional recognition mandate is expressed to only apply to certain official matters of every "*State*". It confers no equivalent recognition of the same matters of a territory, including a self-governing territory[826]. But on the other hand, to the extent that recognition is conferred by section 118, this operates "*throughout the Commonwealth*", including in territories[827]. The reference to the "*Commonwealth*" here would seem to be either to the whole geographic area of the Commonwealth of Australia, or to the national entity by the same name, and not to the Commonwealth body politic, and hence will include Commonwealth territories in either event.

In that case the Justices agreed section 118 did not apply to confer constitutional recognition on certain official matters of a territory. Wilson and Gaudron JJ in that case pointed out the limitation of section 18 of the *State and Territorial Laws and Records Recognition Act 1901* of the Commonwealth[828], which applied to territories, compared to that of section 118 of the Constitution. Those two Justices perceived a need for uniformity in so far as section 118 prescribed there only be one body of State law determining the legal consequences attaching to a set of facts occurring in a State only. For purposes of uniformity they concluded that the same rule as in section 118 should now be adopted as a common law rule in relation to the relevant official matters in a territory[829].

Thus in cases where the Court perceived a deficiency in the Constitution in its application in and to territories, the Court might possibly be prepared to invent an equivalent common law rule to remedy the deficiency.

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825 (1988) 169 CLR 41.

826 See the parallel head of Commonwealth legislative power in Section 51(xxv) of the Constitution.

827 *Breavington v Godleman*, infra, per Wilson and Gaudron JJ at 95, 99, Toohey J at 163.

828 Repealed by the *Evidence (Transitional Provisions and Consequential Amendments) Act 1995* No. 3 of 1995, -section 3. See now the *Evidence Act 1995* of the Commonwealth, section 185, as follows:

185 Faith and credit to be given to documents properly authenticated

All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

829 At page 98. None of the other Justices took the same view.

There is also the possibility of some judicial presumption being made to the effect that the Constitution is to be interpreted in such a manner as to maximise its application to territories, a matter already spoken of above[830]. For my part, I cannot see how this approach can overcome the clear words of the Constitution limiting certain provisions thereof to a "*State*" or "*States*" only. It would amount to a partial re-writing of the Constitution. The High Court would need to invent some parallel implied constitutional provision applicable to territories, and generally speaking the High Court has shown a reluctance to do this unless such an implication is a necessary or essential extension of the existing provisions of the Constitution[831].

The question is whether these approaches might appeal to the High Court in future cases in its application to other provisions of the Constitution. Looking at the examples of constitutional guarantees already considered in this lecture, I would hazard an opinion that the Court would be most unlikely to do so in relation to the right to vote in section 41, nor to do so in relation to the discrimination and preference provisions considered above, nor to the State banking and State insurance provisions discussed above, nor to the freedom of trade, commerce and intercourse in section 92, nor to the inconsistency provision in section 109, nor to the tax on property provision in section 114. I have already indicated a view on trial by jury in section 80 which would make the issue irrelevant. I have expressed a similar view on the freedom of religion provisions in section 116. And the implied doctrines in *Kable* and with implied freedom of communication already apply in and to territories.

Hence there seems very little scope for applying this common law approach to any perceived deficiencies in the Constitution in their application in and to territories, at least for the provisions considered in this lecture. Of course any such deficiencies can normally be remedied by Commonwealth legislation under the Territories power in section 122 of the Constitution, and in some cases this has been done. But neither methodology equates to a constitutional guarantee. I have already discounted the availability of an implied parallel constitutional provision, especially where the constitutional provision in question is expressly limited to a "*State*" or "*States*".

830 See discussion above of dicta of Gaudron J in *Capital Duplicators v ACT* (1992) 177 CLR 248 at 288.

831 Such as in essence it did in *Capital Duplicators*, holding that section 90 of the Constitution applied to give the Commonwealth Parliament powers as to customs and excise and bounties exclusive not only of the State legislatures but also of self-governing territory legislatures. Section 90 in that case did not expressly limit its operation to States only.

The Constitutional Position of the NT Judiciary and Federal Jurisdiction in the NT 2015

Note: this lecture does not take into account the High Court decision in North Australian Aboriginal Justice Agency Limited v Northern Territory [2015] HCA 41

This lecture picks up some of a previous lecture entitled "The NT Judiciary and the Transition of the NT to Statehood - Chapter III of the Constitution, The Judicature". That lecture was primarily concerned with the possible future transition to Statehood for the NT and the implications of that for the judiciary. This lecture has quite a different focus; it concentrates on the constitutional position of the NT Judiciary at it is at present whilst the NT remains a self-governing territory and identifies some real constitutional issues yet to be resolved. It also brings my relevant earlier comments up to date. It includes a consideration of the extent to which federal jurisdiction is exercised in the NT as distinct from territory jurisdiction by territory courts, and the potential constitutional difficulties in this regard.

Description in Brief of the Present NT Judiciary

The self-governing NT body politic under the Crown and its Ministers of the Territory[832] have, since the grant of Self-government by *Commonwealth Act in 1978*[833] and the making of the relevant Commonwealth Regulations in 1979[834], a grant of executive authority in respect of "*Courts (including the procedures of the courts and the remuneration of the judiciary)*…." This grant is complemented in a legislative sense by the plenary and wide grant of legislative power to the NT Legislative Assembly concerning the peace, order and good government of the Territory under the same Commonwealth Act[835].

832 That is, Ministers of the NT Government chosen from the members of the Government party in the NT Legislative Assembly.

833 *Northern Territory (Self-Government) Act 1978 (Cth)*.

834 *Northern Territory (Self-Government) Regulations* as amended by No 205 of 1979, Regulation 4 (a). Note also the matters of executive authority as to the "*legal profession*", "*Legal aid*", "*Maintenance of law and order and the administration of justice*".

835 *Northern Territory (Self-Government) Act 1978*, section 6.

These two grants apparently enable the self-governing NT to deal with all legislative and executive matters concerning NT courts and the NT judiciary or as incidental thereto, including the establishment of Territory courts, their jurisdiction[836] and the appointment and terms of condition of Territory Supreme Court judges and Territory magistrates, but subject always to the overriding control of the national Constitution and to the superior force of any Commonwealth legislation applying in the NT, including any enacted under the very wide Territories power in section 122 of that Constitution, relevant to NT courts and judiciary.

Pursuant to these grants of self-governing power, NT legislation has established the Supreme Court of the NT, a superior Court with extremely wide civil and criminal jurisdiction in respect of the Territory[837], not limited to specific matters or causes of action. This grant is also not limited to matters of federal jurisdiction as contained in Chapter III of the Constitution[838]. It includes matters arising under the common law and equity, as well as matters arising under Territory legislation enacted both before and after the grant of Self-government and also Commonwealth legislation in force in the Territory[839]. Further, this jurisdiction includes a statutory appellate jurisdiction from certain inferior Territory courts[840]. Appeals from a single judge of the Supreme Court lie to the Appellate Courts of that same Court in both civil[841] and criminal matters[842]. From there, appeals lie to the High Court by special leave of that Court[843]. Territory Supreme Court judges can also exercise jurisdiction in certain tribunals such as the Motor Accidents (Compensation) Appeal Tribunal established under Territory legislation[844].

The Northern Territory has basically a two tier system of Territory courts, that is, the Supreme Court and what may be generally described as the inferior or magistrate's courts. There is no intermediate system of district courts as there are in the states. Thus, for example, there is the Local Court[845],

836 *Supreme Court Act (NT)* Part II Division 2. Some particular matters of jurisdiction are still dealt with by Commonwealth legislation – eg: *Judiciary Act 1903 (Cth)* sections 67B and 67C.

837 *Supreme Court Act (NT)*. This is a continuation of the Territory Supreme Court as in existence before the grant of Self-government and the 1979 amendments to the *Northern Territory (Self-Government) Regulations*, that Supreme Court having been previously established by Commonwealth legislation, the *Northern Territory Supreme Court Act 1961 (Cth)*, now repealed. Originally the Supreme Court was set up by early Territory ordinance.

838 Discussed further below as to whether territory courts always exercise federal jurisdiction. But it does include matters of federal jurisdiction, or matters by analogy with federal jurisdiction, by reference to that jurisdiction in the Supreme Court of South Australia, by virtue now of section 67C of the *Judiciary Act 1903 (Cth)*, previously section 15(2) of the *Northern Territory Supreme Court Act 1961 (Cth)*, now repealed.

839 Although such Commonwealth legislation would seem to give rise to federal jurisdiction under section 76(ii) of the Constitution. It includes normal Australia-wide Commonwealth legislation, unless there is any contrary intention expressed in Commonwealth legislation in a particular case. See *Spratt v Hermes* (1965) 114 CLR 226.

840 *Local Court Act (NT)* section 19, *Justices Act (NT)*, Part VI.

841 *Supreme Court Act (NT)* Part III.

842 *Criminal Code (NT)* Part X, Division 2.

843 *Judiciary Act 1903 (Cth)* section 35AA. The existing High Court authorities support the validity of this conferral of appellate jurisdiction on the High Court, see below.

844 *Motor Accidents (Compensation) Act (NT)*.

845 *Local Court Act (NT)*; also *Small Claims Act (NT)*; *Care and Protection of Children Act (NT)*.

the Court of Summary Jurisdiction[846], the Work Health Court[847], the Youth Justice Court[848], the Smart Court[849] which is now the Alcohol Mandatory Treatment Tribunal [850], and the Northern Territory Civil and Administrative Tribunal [851], all established by Territory legislation. There are also some other Territory statutory tribunals which appear to exercise judicial power (in part at least), those tribunals also being established under Territory legislation[852]. None of the members of these Territory courts and tribunals meet the security of tenure provisions of section 72 of the Constitution[853]. Nor may they meet the separation of powers doctrine developed from Chapter III of the Constitution in relation to the federal judicature[854].

The Supreme Court of the NT is integrated into the nation-wide cross-vesting of jurisdiction scheme with state supreme courts and the Federal Court of Australia and the Family Court of Australia under complimentary Commonwealth and Territory legislation[855], the validity of which in relation to the Territory has been upheld by the High Court.

The Constitution, Chapter III

The relevant provisions are set out in the schedule to this lecture for your assistance.

Federal Jurisdiction in the NT

It is now clear the Federal Court and Family Court are federal courts established by the Commonwealth Parliament and can exercise federal jurisdiction under section 76(ii) of the Constitution in the Territory under particular Commonwealth legislation operating in the Territory[856]. The question for consideration is whether federal jurisdiction is exercised by any other courts in the NT, or whether this is territory jurisdiction under section 122 of the Constitution.

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846 *Justices Act (NT)*, Part IV Division 1.

847 *Work Health Administration Act (NT)*, and see the *Workers Rehabilitation and Compensation Act (NT)*.

848 *Youth Justice Act (NT)*.

849 Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court Act 2011(NT).

850 *Alcohol Mandatory Treatment Act (NT)*.

851 *Northern Territory Civil and Administrative Tribunal Act 2014 (NT)*.

852 Eg: Lands, Planning and Mining Tribunal established by section 4 of the *Lands, Planning and Mining Tribunal Act (NT)*, although this seems to have been recently abolished; the Northern Territory Licensing Commission established under the *Northern Territory Licensing Commission Act (NT)*, although this also seems to have been recently abolished, and see now the *Liquor Act (NT)*; the Agents Licensing Board established under the *Agents Licensing Act (NT)*.

853 But the position under existing High Court authorities is that section 72 does not apply to territory courts, see below.

854 But that doctrine, I would argue, does not apply in and to territories and territory courts, but see discussion below.

855 *Jurisdiction of Courts (Cross-vesting) Act (Cth)* and *Jurisdiction of Courts (Cross-Vesting) Act (NT)*.

856 *Northern Territory v GPAO* (1999) 196 CLR 553, *Re Wakim; Ex pt McNally* (1999) 198 CLR 511; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at page 605.

The Scope of the Debate

There is an increasing legal debate about the extent to which Chapter III of the Commonwealth Constitution applies to territory courts and judicial system, including self-governing territories such as the NT. This has major implications for those courts and that system, as will be discussed below. While the original High Court view was that Chapter III had no such application at all, the dualist view, it is clear this is no longer the current view. The first territory courts were established by legislation on the basis that Chapter III had no application to them or their jurisdiction, and this has largely continued to be the practice and understanding to this day. But as times have changed, so have the approaches of some of the High Court Justices. The continuing principle which has plagued the debate results from the judicial view taken fairly early in federation that Chapter III is exhaustive in its description of the jurisdiction of the Commonwealth federal Judiciary, and in particular exhaustive of the original and appellate jurisdiction of the High Court, and as territories are within the exclusive jurisdiction of the Commonwealth, then why should they be excepted from Chapter III. In these circumstances there has been some judicial questioning as to why the literal wording of some sections of Chapter III should not be applied to territory courts and their jurisdiction. The views range from those High Court Justices who would take a modified position depending on the language of each section of Chapter III while still recognising that Chapter III was designed for federal courts and jurisdiction in the historical sense of Commonwealth and States and not for territory courts and territory jurisdiction, and those Justices who would seek to go further and fully integrate territory courts as federal courts exercising only federal jurisdiction within Chapter III.

It was Kirby J who took the view that territory jurisdiction was federal in nature. For example, in *Gould v Brown*[857], he stated:

> *Contrary to the opinion of the Privy Council … territory jurisdiction is not "non-federal".*

In *Northern Territory v GPAO*[858], Gaudron J surveyed the existing authorities on Chapter III and territories and concluded they had not resulted in a coherent body of doctrine[859]. Her Honour added:

> *Given the terms of ss 71, 72 and 76(ii) of the Constitution, I adhere to my statement in Gould v Brown that "the better view is that courts created pursuant to s 122 are 'courts created by the Parliament' for the purposes of s 72". However there is some basis for concluding otherwise.*

She went on, however, to accept that the past decisions of the High Court on the dualist nature of the relationship between section 122 and Chapter III should stand.

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857 (1998) 193 CLR 346.

858 (1999) 196 CLR 553.

859 Drawing upon the same words of Menzies J in *Spratt v Hermes* (1965) 114 CLR 226 at page 265.

In *Re Governor, Goulburn Correctional Centre; Ex pt East*man[860], Kirby J in dissent held that territory courts, in that case the ACT Supreme Court under Self-government, were "*courts created by the Parliament*" within section 72 of the Constitution, thereby in his view overruling the past dualist authorities of the Court[861]. But this extremely wide view has not been adopted by any other Justices of the Court. As will be seen, this is just as well, particularly in the light of the grant of Self-government to the NT.

It is to be noted that McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ stated in their joint judgment in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[862] that *Eastman's case* had established section 72 had no application to the Supreme Court of the ACT – it was not a court "*created by the Parliament*", and this point should be taken as settled. It would seem that Kirby J concurred in this on the basis of established precedent.

I will be strongly arguing that in interpreting Chapter III of the Constitution in relation to self-governing territories such as the NT, whilst some provisions of Chapter III may have application to courts operating and exercising jurisdiction in a territory, in the main territory courts and the judicial system accompanying them still remain largely outside of the application of Chapter III. They are territory courts that exercise mainly territory jurisdiction. This is the thrust of existing authority. Any alternate view has in my view the potential to lead to serious constitutional difficulties, particularly in the case of self-governing territories having responsibility for their own courts and tribunals[863]. I am aware there may be some judges and other legal experts who would not agree with this and would argue for the full application of Chapter III, perhaps in the manner indicated by Kirby J, so far as the words thereof will allow. My argument is advanced for several reasons, as will be indicated below. These reasons include, but are not limited to, the need to maintain maximum flexibility under the Territories power in section 122 of the Constitution, the disastrous effect on any grant of territory self-government if the very wide integrationist view was to be adopted, and my argument that the provisions of Chapter III should be interpreted, in relation to the judiciary of a territory, in a way which would facilitate a smooth transition to eventual Statehood and to the constitutional position of a new State judiciary. To apply Chapter III fully to territory courts and judicial system prior to a grant of Statehood may well lead to difficulties of transition and in my view it would be better to treat them on a par with State courts and judicial systems prior to the grant as far as possible.

But first let's have a brief look at the course of High Court decisions on this subject.

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860 (1999) 200 CLR 322.

861 And see Kirby J in *Ruhani v Director of Police* (2005) 222 CLR 489 at paragraph 194.

862 (2004) 218 CLR 146.

863 Although note that Kirby J did not find this fact a persuasive argument in *Eastman* to adopt the traditional dualist approach.

The Dualist Approach to Territory Courts and Chapter III and its Modification

The early High Court took a strict view of the non-application to territories of the whole of Chapter III of the Constitution – "*The Judicature*". It drew a clear distinction between states of the Commonwealth within the federal system on the one hand and territories on the other – the disparate view. Applied to Chapter III, it read that Chapter as having no application in and to territories[864]. It is a principle which in my view still commands some support, although with the evolution of the idea that there is only one Commonwealth under the Constitution, applicable to Australia as a whole according to its terms, including to territories, it is an idea that to a considerable degree has influenced the High Court to retreat in more recent times. A more integrated approach was recently demonstrated in the *Wurridjal* decision, although not in relation to Chapter III. In relation to "*The Judicature*", despite recent judicial recognition that Australia has one integrated court system, this retreat has not so far been taken to the maximum degree, and, in my opinion, there are very good reasons why it should not do so. The strongest recent support for the more disparate approach in the context of Chapter III might be said to have been McHugh J in *Gould v Brown*[865] and *Northern Territory v GPAO*[866], as well as strong evidence for this approach disclosed in cases such as *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*[867] and *Capital TV and Appliances v Falconer* [868].

In addition to this disparate approach, it was established in *Re Judiciary and Navigation Acts*[869] that the Commonwealth could not legislatively confer federal judicial power and jurisdiction, original or appellate, beyond the heads in Chapter III of the Constitution. In *R v Kirby; Ex parte Boilermakers' Society of Australia* it was established that only courts properly established by the Commonwealth Parliament could exercise the judicial power of the Commonwealth within Chapter III of the Constitution, and it was not possible to look beyond that Chapter to confer jurisdiction on other bodies. The court flirted with the idea that Chapter III might have some wider application in territories, but noted the authorities to the contrary. Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

> *26. To this interpretation of Chap. III an objection is made which rests upon the decisions given under s. 122 with respect to the appeal to this Court that has been given from the courts of Territories. It has been decided that the courts of the Territories falling under s. 122 are not governed by the judicature provisions. A trial on indictment for an offence against a law of a Territory need not be by jury: for s. 80 has no application. A law of the Territory is not a law of the Commonwealth within that section.*

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864 Eg: in *R v Bernasconi* (1915) 19 CLR 629, with reference to the non-application of section 80 of the Constitution, trial by jury, to territories. This decision, although since judicially questioned, has survived to the present day, but see *Fittock v R* [2003] HCA 19; 217 CLR 508. See also The King: Ex pt Yee (1926) 37 CLR 432 per Viscount Simonds.

865 (1998) 193 CLR 346.

866 Discussed below.

867 (1999) 200 CLR 322.

868 (1971) 125 CLR 591

869 (1921) 29 CLR 257.

> *It was so held in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629. Nevertheless by an exercise of legislative power derived from s. 122 an appeal may be given to this Court from a court of a Territory. That was decided in Porter v. The King; Ex parte Yee [1926] HCA 9; [1926] HCA 9; (1926) 37 CLR 432 by Isaacs, Higgins, Rich and Starke JJ., Knox C.J. and Gavan Duffy J. dissenting. This seems at first sight to be inconsistent with the decision in Re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257 which was that the jurisdiction of the High Court, as of other federal courts when created, arises wholly under Chap. III of the Constitution. The reconciliation depends upon the view which the majority adopted that the exclusive or exhaustive character of the provisions of that chapter describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part. Isaacs J. expressed this view as follows: "I accordingly accept the latter case (scil. In Re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257) as authoritatively determining that 'the judicial power of the Commonwealth', within the meaning of Chapter III., and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629, that of the Commonwealth proper, which means the area included within States. Beyond that the decision in the later case does not apply. It follows that, if there be appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts" (1926) 37 CLR, at p 441. It would have been simple enough to follow the words of s. 122 and of ss. 71, 73 and 76 (ii.) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. As s. 80 has been interpreted there is no difficulty in avoiding trial by jury where it does apply and otherwise it would only be necessary to confer upon judges of courts of Territories the tenure required by s. 72.*

But the High Court did not go down the path of a more integrated approach to territory courts within Chapter III. This exhaustive view of Chapter III as to the scope of federal jurisdiction and Commonwealth judicial power has been followed in the main ever since, but leaving territory courts largely outside of it. Thus in *Ruhani v Director of Police*[870], the view was affirmed by a majority that Chapter III of the Constitution was exhaustive of the original and appellate jurisdiction of the High Court (itself a federal court). Only Kirby J disagreed. The existing majority view remains that the jurisdiction of territory courts arises by under and by virtue of legislation made under section 122 of the Constitution and is not confined by sections 73, 75 and 76 and hence is not federal in nature[871]. This is in my opinion a necessary view given territory jurisdiction must be capable of covering the whole panoply of matters capable of arising in the territory and requiring judicial resolution, without being so confined.

870 (2005) 222 CLR 489.

871 Although as I have already noted, jurisdiction conferred on a federal court by Commonwealth legislation within sections 75 or 76 of the Constitution, and operating in a territory, is now accepted as being federal jurisdiction.

There is a view that in so far as original jurisdiction is conferred on a territory court within the matters listed in sections 75 and 76 of the Constitution[872], it may also be federal jurisdiction, but such jurisdiction in my view only covers a small part of the total jurisdiction of territory courts. Any other matter must be territory jurisdiction.

It also followed from this view that territory appeals to the High Court lay outside of section 73 of the Constitution and were hence not constitutionally guaranteed. However, such appeals could be granted by legislation enacted under section 122 of that Constitution. The first case dealing with this is *R v Bernasconi*[873]. This came to the High Court by way of a case stated from the Territory of Papua, but was dealt with as an appeal under the *Papua Act*. No objection was taken to this mechanism as the general approach of the Court was that territory judicial matters were outside Chapter III[874].

In *Porter v The King; Ex pt Yee*[875], Isaacs J held that a NT Ordinance could confer validly a right of appeal from a Territory court, it not being a federal court, to the High Court, and that this was an exercise of the power in section 122 of the Constitution. Higgins, Rich and Starke JJ concurred in separate judgments. Knox CJ and Gavan Duffy J dissented on the basis that section 73 was exhaustive of appeals to the High Court, and NT courts were not federal courts.

This majority view that territory appeals lay outside section 73 became the established view[876] and various appeals were brought to the High Court (by leave) under it over some decades[877]. But this view, according to some Justices, continued to sit uncomfortably with the view in *Re Judiciary and Navigation Acts*[878] that Chapter III of the Constitution was exhaustive of the original and appellate jurisdiction of the High Court and of federal jurisdiction, and that no jurisdiction could be conferred by the Commonwealth outside of it, even for territories. This was analysed in the *Boilermakers' case*[879] per Dixon CJ, McTiernan, Fullagar and Kitto JJ, noting a choice had to be made between this exhaustive view, in which case territory courts would be federal courts, and the view that territory courts were section 122 courts and outside of Chapter III, that Chapter being only concerned with the federal system proper.

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872 See below.

873 (1915) 19 CLR 629. See also *Mitchell v Barker* (1918) 24 CLR 365.

874 A different result was reached in *Mainka v Custodian of Expropriated Property* (1924) 34 CLR 297, where Isaacs J found that the Central Court of the Territory of New Guinea was a federal court, and thus an appeal lay to the High Court under section 73. However in *Porter v The King; Ex pt Yee*, Isaacs J was able to distinguish that earlier decision on the basis that the constitutional head of power in *Mainka* depended upon New Guinea being under an international mandate to the Commonwealth and hence was a federal court. It was not a case of a tribunal simply erected under section 122 of the Constitution.

875 (1926) 37 CLR 432.

876 *Chow Hung Ching v R* (1948) 77 CLR 449.

877 See *Spratt v Hermes* (1965) 114 CLR 226 per Barwick CJ at page 239.

878 (1921) 29 CLR 257.

879 *R v Kirby, Ex pt Boilermakers' Society of Australia* (1955-56) 94 CLR 254, and on appeal to the Privy Council (1957) 95 CLR 529, discussed further below.

They noted the prior decisions supporting the latter view. The disparate view was later endorsed by, and perhaps even taken further by, the Privy Council on appeal[880], which described the legislative power with respect to territories as a "*disparate and non-federal matter*"[881].

The position on appeals to the High Court outside of section 73 was confirmed in *Capital TV and Appliances v Falconer*[882], a case involving an appeal to the ACT Supreme Court and a further appeal to the High Court. It was held that there was no constitutional right of appeal, only a statutory right of appeal (if one exists), and that territory courts were not federal courts. Arguably this settled the matter of appeals[883]. The High Court continued to hear appeals from territory courts under the relevant statutory right of appeal[884].

Isolated judicial comments continued to be made on this matter seeking a more integrated approach. Thus in *NT v GPAO*[885], it was held by a majority that the Family Court exercising original jurisdiction in the NT was exercising federal original jurisdiction under Chapter III of the Constitution. Gaudron J cast doubt on the view that appeals to the High Court from territories lay outside section 73, although in the light of authority she was prepared to let the current decisions stand.

As against this, the decision in *Re Governor, Goulburn Correctional Centre; Ex pt Eastman*[886] confirmed once and hopefully for all that territory courts were section 122 courts and not federal courts. This was not an appeal but an application to the High Court for habeas corpus.

Appeals have continued to be brought from the courts of the NT to the High Court, for example *Attorney-General of NT v Chaffey*[887]. Such appeals continue to be brought under the *Judiciary Act (Cth)*[888]. I discuss section 73 further below.

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880 (1957) 95 CLR 529.

881 At page 549.

882 (1971) 125 CLR 591.

883 The status of appeals to the High Court from territory courts was considered in passing in *Gould v Brown,* (1998) 193 CLR 346. It was not a satisfactory decision as the Court split 3:3 over the validity of the cross-vesting legislation. The majority was made up of Brennan CJ, Toohey and KirbyJJ. The first two of them expressly stated that section 73 of the Constitution did not prevent the vesting in the Court of appellate jurisdiction under section 122, following existing authority.

884 Despite some judicial disquiet, eg: Gaudron and Gummow JJ in *Kruger v Commonwealth* (1997) 190 CLR 1. In relation to appeals from territories, Gummow J saw two difficulties with the view that territory appeals stand outside Chapter III. First was the exhaustive nature of Chapter III. Second was the integrated nature of Australian law and single system of jurisprudence, with the High Court constitutionally at the apex, suggesting that Parliament should not have the right to grant or deny appeal to the High Court from territories. But these views are not reflected in the current authorities of the High Court on the place of territories in Chapter III of the Constitution.

885 (1999) 196 CLR 553.

886 (1999) 200 CLR 322.

887 [2007] HCA 34.

888 Section 35AA.

It is fair to say the attack of some members of the High Court on the disparate approach to the Constitution and territories generally has been going on for some time, based on the assertion there was only one Commonwealth, States and territories included. The lack of symmetry and uniformity in the application of the Constitution throughout Australia, including to territories and to territory courts, has troubled these Justices, although in my view unnecessarily so in relation to Chapter III. The first strong and authoritative support for this more integrated view was in *Lamshed v Lake*[889] - however this was not a Chapter III case. The judgment of Dixon CJ was content to rely on *Bernasconi* as to the non-applicability of Chapter III to territories, but not in relation to various other sections in the Constitution. In relation to the status of Commonwealth laws made for territories under section 122 of the Constitution, Dixon CJ took the view that they were laws of the national Parliament, having effect throughout the Commonwealth, and not just local laws for a territory[890].

In *Spratt v Hermes*[891], the applicability of Chapter III to territories directly arose, although the facts involved judicial review of an ACT magistrate in relation to a charge under a Commonwealth Act. The primary question decided in the affirmative was that section 76(i) of the Constitution was capable of applying in territories, using a more integrationist approach to the place of territories within the Constitution. But the case also provides support for the view that territory courts were not federal courts and hence were not subject to section 72 of the Constitution. The Justice most supportive of the old disparate approach was Kitto J.

In *Capital TV & Appliances v Falconer*[892], the Barwick Court had to deal with the status of the Supreme Court of the ACT, holding it to be a territory court, not a federal court. This confirmed the view that section 72 of the Constitution had no application in and to territories and their courts, and in doing so established there were dangers in taking the more integrated view too far in relation to Chapter III. As a result, territory courts were not subject to Commonwealth control in the appointment and removal of their members and their security of tenure. By inference they were not also courts within section 71 of the Constitution. But leaving that aside, a more integrationist approach was still evident to some degree in the approaches of some of the Justices in that case. There was much discussion about the operation of section 76(ii) of the Constitution in territories, the Court holding it was capable of applying to Commonwealth laws made under the Territories power in section 122 of the Constitution[893]. What was missing, in my opinion, was some kind of rational theory and basis as to why some of the provisions of Chapter III were capable of applying in and to territories and territory courts and why some were not.

889 (1957) 99 CLR 132, per Dixon CJ.

890 I have no quarrel with this view.

891 (1965) 114 CLR 226.

892 (1971) 125 CLR 591.

893 At pages 605-6.

The 1997 decision in *Kruger v Commonwealth*[894] dealt in large part with the *Aboriginals Ordinance 1918 (NT)*. In an interesting passage on territories and Commonwealth judicial power, Gummow J summarised the territory cases, thereby indicating the quandary that the Court was in. He stated:

> *The judicial power and the Territories*
> *Chapter III operates to achieve the independence of the judiciary for two related ends:*
>
> *(i) the institutional separation of the judicial power so that the courts might operate as a check, according to law, on the other arms of government; and (ii) protection of the independence of the judiciary to ensure the determination of controversies free from domination or improper influence by other branches of government and in accordance with judicial process [486]. Chapter III gives effect to the doctrines of the separation of the judicial power from other functions of government and of judicial review which are essential integers of the federal structure of government [487]. It also serves the personal interests of litigants (individual, corporate and government) in having their controversies resolved by an independent judiciary [488].*

Certain decisions of this Court have sought, explicitly or otherwise, to explain the content and nature of that part of "the exclusive jurisdiction of the Commonwealth", within the meaning of Section 111 of the Constitution, as pertains to the judicial power. Provision as to the legislative aspect of the "exclusive jurisdiction of the Commonwealth" in relation to the Territory is made by Section 122 and, in some respects, by Section 51 of the Constitution[489]. Section 61 embraces the executive power in relation to such a Territory. An answer both simple and close to the text would have been given by a decision that, conformably with Section 61 as to the executive power of the Commonwealth, provision was made by Section 71 as to the judicial power of the Commonwealth in relation to the Territories.

In R v Kirby; Ex parte Boilermakers' Society of Australia [490], Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

> *"It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament."*

894 (1997) 190 CLR 1.

Later, after referring to R v Bernasconi [491] and Buchanan v The Commonwealth [492], Windeyer J said [493]:

> *"Nevertheless and although, because of the eminence of those who gave the judgments and of their close knowledge of the genesis of phrases of the Constitution, it may seem boldly unbecoming to say so, I do not think that the conclusion that Chap III, as a whole, can be put on one side as inapplicable to matters arising in the territories is warranted by its actual language."*

In my view, there is much to be said for the proposition that the text of the Constitution, which must be controlling, places the territorial courts within the scheme and structure of Chapter III. However, as will appear, at least two subsequent decisions of this Court stand in the way of acceptance of that proposition.

It is true that controversies arising in the territories might involve wholly or exclusively disputes as to rights and liabilities conferred or imposed pursuant to the general law rather than federal statute law. But Section 7(1) of the Northern Territory Acceptance Act 1910 (Cth) provided:

> *All laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth.*

Such a provision excluded the possibilities of a legal vacuum and of the surrender and acceptance of the Territory being equivalent to the cession of territory by one power to another by treaty, so the ceded territory became part of the nation to which it was annexed [494]. Further, in the Province of South Australia, it had been regarded as axiomatic that from the beginning of European occupation the common law and English and Imperial legislation would apply under the common law principles on the reception of law in settled colonies [495]. Finally, there may be a "matter [a]rising under" a law made by the Parliament, within the meaning of Section 76(ii) of the Constitution, although its interpretation is not involved; it is sufficient that the right or duty in question in the matter owes its existence to federal law or depends upon it for its enforcement [496][895].

Hence, the force in the statement, with reference to the position in the Australian Capital Territory, made by Dixon J in Federal Capital Commission v Laristan Building and Investment Co Pty Ltd [497]:

> *It may well be that all claims of right arising under the law in force in the Territory come within this description [ie, within s 76(ii)], because they arise indirectly as the result of the Seat of Government Acceptance Act 1909 (see s 6), and the Seat of Government (Administration) Act 1910 (see ss 4 to 7 and 12).*

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895 Citing *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, a case involving subordinate Commonwealth legislation operating in a State.

However, on the appeal in Attorney-General of the Commonwealth of Australia v The Queen [498], the Privy Council for the time being foreclosed any development to implement these views by a dogmatic statement that Chapter III was to be regarded as "exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part". This obliged Dixon CJ, in Lamshed v Lake [499], to accept that Chapter III "may be treated as inapplicable so that laws made mediately or immediately under s 122 are primarily not within the operation of the Chapter" (emphasis added).

Then, in Spratt v Hermes [500], although many aspects of the subject were discussed, two points were decided: the first was that the Commonwealth legislation supported by Section 122 may create or authorise the creation of courts with jurisdiction with respect to occurrences in or concerning a territory without observance of the requirements of Section 72 of the Constitution, so that the stipendiary magistrate hearing the charge in question under the Post and Telegraph Act 1901 (Cth) was validly appointed. Second, a court of a territory having the appropriate local jurisdiction may enforce in relation to acts occurring within the territory a law made by the Parliament upon a subject-matter falling within Section 51 of the Constitution and, as was the case with the 1901 statute, intended to operate throughout the Commonwealth. This is so, even though the territory court is not one in which the judicial power of the Commonwealth is vested within the meaning of Section 71 of the Constitution [501].

Capital TV and Appliances Pty Ltd v Falconer [502] is authority for the proposition that the Supreme Court of the Australian Capital Territory, created and constituted by the Australian Capital Territory Supreme Court Act 1933 (Cth), was not a federal court nor a court exercising federal jurisdiction within the meaning of Section 73 of the Constitution [503]. The consequence was that no appeal lay by force of Section 73 of the Constitution. A law passed under Section 122 of the Constitution might confer a right of appeal to the High Court from territorial courts, whether or not the matter in issue otherwise was one of federal jurisdiction. However, no such law applied to the instant case and the appeal was dismissed as incompetent. Nor was there any legislation conferring jurisdiction to grant special leave [504].

As it presently appears to me, and contrary to the submissions for the plaintiffs, it would be necessary at least to reopen these decisions if Chapter III were to be given that operation in relation to the territories described in Boilermakers by Dixon CJ, McTiernan, Fullagar and Kitto JJ [505]. This operation would follow from the "simple" reading of Chapter III such that the courts and laws in force in a territory were federal courts and laws made by the Parliament or made pursuant to such laws.

The treatment in some of the earlier decisions of the constitutional footing for the exercise of judicial power in the territories appears to have been blighted in several respects. First, there is the proposition that controversies which arise under some laws made by the Parliament will involve the exercise of federal jurisdiction whilst others will involve the exercise of jurisdiction which is "territorial" and "non-federal".

This does not sit well with the established doctrine that the Constitution is to be read as one coherent instrument, so that Section 122 should not be treated as "disjoined" from the rest of the Constitution [506].

Second, to treat the scope of Chapter III as reflecting the division of legislative power between the Parliament and the legislatures of the states gives insufficient weight to the heading of Chapter III. This is simply "THE JUDICATURE" It also gives the term "federal" in the phrase "federal courts" as it appears in Section 71 and in succeeding provisions too narrow a meaning. Many heads of federal jurisdiction embrace justiciable controversies of a nature and character unknown in the anterior body of general jurisprudence in the Australian colonies. Griffith CJ pointed to this early in the history of this court, with reference to the then disputed border between South Australia and Victoria [507]. In addition to actions between states, the controversies include those arising under the Constitution or involving the interpretation of its provisions (including Section 122 itself), and those where an injunction, prohibition or mandamus is sought against a Commonwealth officer[508]. This renders inapt any analogy to the division of legislative power affected by Section 51.

Third, the absence, save in covering Clause 5, in the Constitution of reference specifically to territorial courts and, in particular, the absence of specific identification thereof in Chapter III have encouraged the belief that the creation and composition of territorial courts and the exercise of jurisdiction by them is a matter entirely for the legislature; yet, as was pointed out by Dixon CJ, McTiernan, Fullagar and Kitto JJ in Boilermakers (in the passage set out before in these reasons), the terms of Section 122 and sections 71, 73 and 76(ii) are consistent with a contrary view.

Fourth, there has been, at least before the amendments made in 1977 to Section 72 of the Constitution, some apprehension lest the life tenure previously provided for in Section 72 be requisite in all courts exercising jurisdiction in relation to the territories.

At a time when the external territories included or were expected to include populations then regarded as being in a backward state of development, there was an evident apprehension as to what would be involved in the extension there of the Australian legal system in all its incidents, including trial by jury. Further, both in this country [509] and the United States [510], it has become clear that delegation of some part of the jurisdiction, powers and functions of a federal court to its officers is, upon certain conditions, permissible and consistent with the federal judicature provisions made by the respective Constitutions.

The first consideration is nowhere more evident than in the judgment of Isaacs J in R v Bernasconi. The Court there decided, on a case reserved by the Central Court of Papua, that the accused's deemed request for a jury had been rightly refused and that Section 80 of the Constitution was inapplicable. Isaacs J said [511]:

> *[Section 122] implies that a 'territory' is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers. It is in a state of dependency or tutelage, and the special regulations proper for its government until,*

> *if ever, it shall be admitted as a member of the family of States, are left to the discretion of the Commonwealth Parliament. If, for instance, any of the recently conquered territories were attached to Australia by act of the King and acceptance by the Commonwealth, the population there, whether German or Polynesian, would come within s 122, and not within s 80. Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system.*

The difficulties of applying Chapter III of the Constitution to territories became more evident in the split decision of the cross vesting case *Gould v Brown*[896]. As already noted, Gaudron J commented in her judgment that it was impossible to reconcile the different views on Chapter III in this regard[897]. With regard to section 76(ii) of the Constitution, Her Honour thought it could apply to laws made under section 122[898], but she may well have only been talking about laws of the Commonwealth Parliament, not laws of a territory legislature. McHugh J took the view that sections 75 and 76 of the Constitution were an exhaustive description of federal original jurisdiction and that territories stand outside the federal system[899].

In *Northern Territory v GPAO*[900], the High Court held that section 76(ii) of the Constitution read with section 77 thereof permitted the conferral by the Commonwealth Parliament of jurisdiction on federal courts in matters arising under laws made for territories under section 122 of the Constitution, applying *Capital TV and Appliances v Falconer*. In *GPAO*, the Court was considering an inconsistency issue between the *Family Law Act* (Cth) and the *Evidence Act (Cth)* operating in the NT on the one hand, and the *Community Welfare Act (NT)* on the other, so the issue raised a matter arising under a law of the Commonwealth Parliament operating in the Territory. But the Justices considering the phrase "*Arising under any laws made by the Parliament*" in section 76(ii) of the Constitution only did so in the context of laws of the Commonwealth Parliament, not a law of a territory legislature. There was a territory law involved, but it was sufficient that a matter arose under a law of the Commonwealth Parliament to invoke that jurisdiction. McHugh J with Callinan J took the conservative view that territories stood outside Chapter III. As to section 76(ii), they said:

> *Indeed the only powerful argument in support of applying Ch III to s 122 is that s 76(ii) refers to the conferral of jurisdiction "arising under any laws made by the Parliament". But given the many considerations which point in the opposite direction, this seems too weak a foundation for applying Ch III as a whole to the territories …However, the terms of s 76(ii) and 77(i) seem wide enough to confer original jurisdiction on this Court and original and appellate jurisdiction on a federal court in respect of matters arising under a s 122 law.*

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896 (1998) 193 CLR 346 .

897 See comments of Kirby J also.

898 At paragraph 65.

899 Kirby J disagreed with this view.

900 (1999) 196 CLR 553.

Re Governor, Goulburn Correctional Centre; Ex pt Eastman[901] firmly upheld the view that courts established under section 122 of the Constitution, in that case the ACT Supreme Court as originally established by the Commonwealth Parliament, were territory courts, not federal courts. This decision was handed down after the action in 1992 whereby the ACT was granted Self-government, and the *ACT Supreme Court (Transfer) Act (Cth)* provided that the *Supreme Court Act (Cth)* was to become an "*enactment*" which the ACT legislature could amend or repeal[902]. In the judgment of Gummow and Hayne JJ, they cited the passage of Brennan, Deane and Toohey JJ in *Capital Duplicators*[903] to the effect that the territory legislature was erected to exercise its own powers and not the (Commonwealth) Parliament's powers – it was not a mere delegate of the Commonwealth but exercised its own plenary and independent legislative powers as part of the territory's grant of Self-government.

In *North Australian Legal Aid v Bradley*[904], McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ stated:

> *…Re Governor, Goulburn Correctional Centre; Ex parte Eastman established that s72 of the Constitution had no application to the Supreme Court of the Australian Capital Territory because that Court was not a court "created by the Parliament" within the meaning of s72 of the Constitution. It followed that there was no objection based upon the tenure requirement of s72 to the appointment of an acting judge in that Court. Although in Eastman and in earlier cases other views have been stated on this subject, for these proceedings the point should be taken as settled.*

As a result a similar approach was taken by the High Court in that case to Northern Territory magistrates.

The end result is that, in my opinion, notwithstanding various expressions of judicial disquiet over the continuance in part of the disparate or dualist approach to territories and Chapter III of the Constitution, particularly in the light of a trend towards a more integrated approach to other provisions of the Constitution and territories, on the existing High Court authorities, territory courts are not fully incorporated into the federal judicial system under that Chapter, and in my view for good reasons. Territory courts remain courts of the territory established under section 122 of the Constitution and are not federal courts within Chapter III and are not subject to section 72 of the Constitution. This applies in particular to territory courts established by the legislatures of self-governing territories.

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901 (1999) 200 CLR 322.

902 Kirby J saw this as a fiction and that the Supreme Court was still a court established by the Parliament.

903 (1993) 178 CLR 561. See also Mason CJ, Dawson and McHugh JJ at pages 265- 266 in the same case. Further, see *R v Toohey*: *Ex pt Northern Land Council* (1981) 151 CLR 170; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Fittock v R* [2003] HCA 19; 217 CLR 508, although note the integrationist view of Kirby J; *NT Power Generation v Power and Water Authority* [2004] HCA 48; *Burgundy Royale Investments v Westpac Banking Corporation* (1987) 18 FCR 212; *Attorney-General v Minister for Aboriginal Affairs* (1989) 25 FCR 345.

904 (2004) 218 CLR 146.

In so far as those territory courts exercise their jurisdiction, as conferred by territory legislation enacted under section 122 of the Constitution, or as inherently conferred as superior courts of general jurisdiction, it is in my view territory jurisdiction, not federal jurisdiction. The exception to this may be where original jurisdiction is conferred on a territory court by the Commonwealth Parliament in a matter within those matters listed in sections 75 and 76 of the Constitution. Several High Court judgments clearly envisage this position[905]. Those territory courts may have original jurisdiction conferred on them by Commonwealth legislation[906] in federal matters within sections 75 and 76, those matters being exhaustive of original federal jurisdiction. This can be by analogy with the federal jurisdiction of a State court, such as in section 67(c) of the *Judiciary Act (Cth)* by reference back to section 15(2) of the now repealed *Northern Territory Supreme Court Act 1961*. This cannot be a conferral within section 77 of the Constitution, which only applies to federal and State courts, so presumably it is a conferral pursuant to section 122[907]. There is no warrant in my view for using the provisions of Chapter III of the Constitution to read down or qualify the virtually unlimited, plenary nature of the grant of legislative power over territories in section 122 thereof, extending as it must do to the establishment of territory courts exercising wide general territory jurisdiction not limited to that in Chapter III, particularly as part of a new self-governing entity separate from the Commonwealth.

Commonwealth or territory legislation may also confer appellate jurisdiction on a federal court (including on the High Court) from territory court decisions, but on current authority this appellate jurisdiction is not constitutionally within section 73 of the Constitution.

The Relevant Sections of Chapter III of the Constitution

Section 71

> *71. Judicial power and Courts*
> *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.

On the view I have taken, federal courts are only courts directly created by legislation of the Commonwealth Parliament, being courts which have a federal characteristic and jurisdiction.

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905 For example, *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (1999) 200 CLR 322 per Gaudron, Gummow and Hayne JJ; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gaudron J at page 363; cited in *North Australian Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ at paragraph 27.

906 Query also by territory legislation, and whether this is a possible 'matter' under section 76(ii) of the Constitution, but see my comments below.

907 In which case is it federal jurisdiction?

On existing authority, this does not include territory courts, and in particular courts established by territory legislation under territory self-government. Such territory courts do not have a federal characteristic in that their jurisdiction is of necessity limited to territory matters in reliance on section 122. Since NT Self-Government, they are not part of the "*judicial power of the Commonwealth*" but are part of the judicial power of the self-governing NT since the NT became a new body politic under the Crown separate from the Commonwealth[908]. The territory courts are not courts created by the Commonwealth Parliament but by legislation of a territory legislature, which legislature, since the grant of Self-government, is the legislature of a new body politic under the Crown[909].

The reference to courts invested with federal jurisdiction is necessary to give effect to courts of a State invested with federal jurisdiction by the Commonwealth Parliament under section 77(iii) of the Constitution. Note that section 77 makes no provision for investing a territory court with federal jurisdiction. There is a question, however, whether the reference to "*other courts*" can include courts of a territory where conferred with jurisdiction in federal matters, and hence being federal jurisdiction[910]. On one view, where that jurisdiction is conferred by the Commonwealth Parliament within sections 75 or 76 of the Constitution, it may well be regarded as being federal jurisdiction.

Section 72

72. Judges' appointment, tenure, and remuneration
The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;
(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age. The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

908 This is now an established constitutional principle. See in particular *Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248. I have addressed this in other CPD lectures.

909 Note that since 1979, the matter of territory "*courts*" is a transferred matter within the list of matter s for which that new NT body politic and its Ministers of the Territory have responsibility. This matter is discussed further below under the heading of separation of powers.

910 An issue discussed in *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (1999) 200 CLR 322.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.[911]

Thus if a court is created by the Commonwealth Parliament in terms of this section, the requirements of this section automatically apply and cannot be avoided by any means. The question is whether territory courts, including the courts of self-governing territories, are *"courts created by the* [Commonwealth] *Parliament"*. If they are, then such courts have to be established in accordance with this section.

In my view the section does not apply to territory courts, if just for the reason that this is the firm state of the authorities. Such courts are not in my view courts created by the Commonwealth Parliament, particularly if established by territory legislation and not Commonwealth legislation, for reasons given above. If territory courts created by legislation of a self-governing territory were to be treated as having been created by the Commonwealth Parliament, it would in effect nullify any transfer of authority with respect to those courts upon the grant of Self-government[912]. It would mean it would be constitutionally impossible to establish Self-government in a territory in all three traditional arms of government, including the judiciary. In my view these courts are no longer the courts created by Commonwealth legislation but by the legislature of a separate self-governing territory. If it was otherwise, the members of those courts would have to be appointed by the Governor-General on the advice of the federal Ministers, could only be removed by the Governor-General upon an address in the Commonwealth Parliament praying for removal, would have to retire at 70[913] and

911 See also section 79.

912 Such as has already occurred in the NT.

913 Compare sections 32(2) and 38 of the *Supreme Court Act (NT)*.

could only receive the remuneration fixed by the Commonwealth Parliament[914].

As all NT courts are now established by NT legislation and the members thereof are appointed by (and can be removed by) the NT under that legislation, then if constitutionally section 72 applies to them it must mean all members and officers thereof have not and do not validly hold office. This presumably means their actions and judgments are and have been of no legal effect[915]. This would be a disastrous result, with no means of retrospectively legitimising past actions and judgments[916]. Leaving aside the remote possibility of the High Court using a method of prospective overruling of past authority in extending section 72 to territory courts, this disastrous result would seem to be unavoidable. Even with prospective overruling, it would take time to change the legislation to reflect the requirements of section 72, thus significantly reducing the scope of Self-government and also leaving a temporary hiatus in the territory judicial system. This still seems unacceptable. It all points to the sanity of the existing dualist position, the views of Kirby J dismissing the relevance of such a disastrous effect notwithstanding.

Section 73

> *73. Appellate jurisdiction of High Court*
> *The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:*
>
> *(i) of any Justice or Justices exercising the original jurisdiction of the High Court;*
> *(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;*
> *(iii) of the Inter-State Commission, but as to questions of law only; and the judgment of the High Court in all such cases shall be final and conclusive.*
>
> *But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.*
>
> *Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.*

914 Compare section 40 of the *Supreme Court Act (NT)*.

915 Quaere the application of the de facto officers doctrine.

916 Leaving aside a successful national referendum to change the Constitution.

As already discussed, the established constitutional principle is that courts of a territory, not being federal courts nor courts exercising federal jurisdiction, and based on the dualist approach to Chapter III, are not within the section 73 constitutional guarantee of appeals to the High Court, and that it is open for the Commonwealth Parliament or a territory legislature to legislate (or otherwise) for an appeal from a territory court to the High Court under the plenary power in section 122 of the Constitution. Pursuant to this position, appeals have been granted from the courts of some territories to the High Court and the right so conferred has been exercised from time to time, including on appeal from NT courts (notably the NT Supreme Court[917]). It is therefore not a constitutionally guaranteed right of appeal.

But as we have already seen, this current position has not enjoyed unanimous support on the High Court. For example, in *Porter v The King; Ex pt Yee*[918], there were those Justices in dissent. But the existing position was confirmed in *Capital TV and Appliances v Falconer*[919], although some Justices have since expressed doubts about this position. These doubts are compounded by the issue that even if territory courts are not federal courts, some might argue they always exercise federal jurisdiction under section 76(ii) of the Constitution, an issue addressed under the next heading. Alternatively it is clearly arguable that if territory courts exercise jurisdiction under any head of original jurisdiction in sections 75 or 76, then they are exercising federal jurisdiction in that case. If they do, then to that extent any appeal from such a territory court to the High Court must be within section 73.

As stated above, I conclude that on the present state of authority, appeals from territory courts to the High Court stand outside of section 73 of the Constitution, on the basis that territory courts are neither federal courts nor do they exercise federal jurisdiction, but that such appeals from territory courts are capable of being supported by legislation enacted under section 122 of the Constitution. Those appeals continue to be brought under the *Judiciary Act*. I qualify this by noting it is arguable that in some matters territory courts may be exercising federal jurisdiction if within any of the heads in sections 75 or 76.

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917 The Judiciary Act 1903 (Cth) currently provides this in section 35AA:

"Appeals from Supreme Court of a Territory

1. *Subject to subsections (2) and (3), the High Court has jurisdiction to hear and determine appeals from judgments of the Supreme Court of a Territory.*
2. *An appeal shall not be brought from a judgment, whether final or interlocutory, referred to in subsection (1) unless the High Court gives special leave to appeal."*

918 (1926) 37 CLR 432. That case involved an NT ordinance conferring of a right of appeal from the NT Supreme Court to the High Court.

919 (1971) 125 CLR 591. That case involved an appeal sought from the ACT Supreme Court, that Court being established by Commonwealth legislation, to the High Court where no such statutory right of appeal existed.

I think my view in this regard can be supported by reference to the particular nature and purpose of section 122. It was designed to cater for a complete range of Commonwealth territories, from those totally dependent on the Commonwealth with no or very few residents, to those in an advanced state of development and population sufficient to justify a comprehensive grant of self-government. The key is flexibility, a point noted by the High Court on a number of occasions. It may be quite appropriate to statutorily grant a right of appeal from the courts of the more developed territories to the High Court, but not necessarily from the courts of the less developed.

Sections 75 and 76

'75. Original jurisdiction of High Court
In all matters:

(i) arising under any treaty;
(ii) affecting consuls or other representatives of other countries;
(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
(iv) between States, or between residents of different States, or between a State and a resident of another State;
(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
the High Court shall have original jurisdiction.

76. Additional original jurisdiction
The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject-matter claimed under the laws of different States.

Section 75 describes the automatic original jurisdiction of the High Court. Section 76 provides for the conferral by legislation of the Commonwealth Parliament of additional original jurisdiction on the High Court. These sections are said to exhaustively define the original federal jurisdiction of the High Court[920].

920 It has long been held that sections 75 and 76 are exhaustive of the original jurisdiction of the High Court. See, for example, *Ah Yick v Lehmert* (1905) 2 CLR 593 per Griffith CJ at page 603. But it has also been held that the High Court can be given jurisdiction in judicial matters by legislation outside of Chapter III – *Capital TV and Appliances v Falconer* (1971) 125 CLR 591 per Menzies J at page 604. The term "*federal jurisdiction*" embraces both the original jurisdiction under those two sections and the appellate jurisdiction of the High Court – Ah *Yik v Lehmert*, above. The High Court has, despite doubts expressed, by a clear majority continued to regard this federal jurisdiction as exhaustive, but still excluding jurisdiction conferred under section 122 on territory courts.

This in turn permits the conferral by the [Commonwealth] Parliament of that jurisdiction on any federal court or any court of a State under section 77.

It is section 76(ii) which is of most interest in this context, although it is of course possible that a matter may arise in a territory under some other head of sections 75 or 76. But I concentrate my comments on section 76(ii). . The two questions are, whether the Commonwealth Parliament can confer original jurisdiction on the High Court in any matter whatsoever where that matter arises "*under any laws made by the Parliament*", including in a territory, and whether this latter phrase extends to legislation of a territory legislature, including the legislature of a self-governing territory. If the answer is in the affirmative in both cases, then it may well be "*federal jurisdiction*" to which sections 71 and 73 apply. It also supplies additional arguments for treating territory courts as federal courts for the purposes of sections 71, 73 and 77, as well as being "*courts created by the Parliament"* for the purposes of section 72. If it is "*federal jurisdiction*", it also means the Commonwealth Parliament can prescribe the number of judges which may exercise that jurisdiction under section 79[921].

It is to be noted that for section 76(ii) to apply in these circumstances, two actions by the Commonwealth Parliament are required, two limbs if you like, although they could be consolidated into one item of legislation. Under the first limb, the Parliament has to legislate to specifically confer jurisdiction on the High Court in any matter, although this may in turn be conferred on a federal court under section 77(i). And second, that matter must arise under any laws made by the same Parliament.

Arguably the first limb of these two requirements relates to legislative action of the Commonwealth Parliament itself, and not of some subordinate legislature. The introductory words to section 76 seem to contemplate legislative action by the Commonwealth Parliament alone. It may be thought unlikely that the provision would be interpreted to allow a territory legislature, including the legislature of a separate self-governing body politic, acting unilaterally on behalf of the Commonwealth Parliament, to confer original federal jurisdiction on the High Court or a federal court in any matter whatsoever arising under its territory legislation[922].

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921 Of course such a provision is not necessary for a territory court because of the wide nature of section 122.

922 Although this is in effect what the High Court decided that could be done by territory ordinance in relation to appellate jurisdiction of the High Court in *Porter v The King*; *Ex pt Yee*, see above. Can the appellate jurisdiction be distinguished? The appellate jurisdiction conferred in that case was treated as territory jurisdiction outside of section 73 of the Constitution. Here we are talking about federal jurisdiction within section 76(ii), based on the use of the term "*The Parliament*" at the beginning of section 76. This means the Commonwealth Parliament, but is it capable of including the legislation of a subordinate territory legislature, including that of a self-governing territory? This may be doubted, particularly since a grant of territory Self-government, but this gap can be filled, for example in the cross vesting scheme, by territory legislation under section 122 of the Constitution conferring jurisdiction on the Federal Court, supported by reciprocal Commonwealth legislation, as held in by NT Supreme Court in *Bateman Project Engineering Pty Ltd v Pegasus Gold Australia Pty Ltd* [2000] NTSC 34. In the case of a grant of territory Self-government, the legislatures of two distinct bodies politic are involved, and in my view it does not mean that a matter arising under the legislation of the legislature of a self-governing territory can come within section76(ii) of the Constitution. It is different if only legislation of the Commonwealth Parliament is involved, including in its operation in a territory.

And as to the second limb, the question is whether it extends to matters arising under laws made by some subordinate territory legislature, including that of a self-governing territory. That is, would the matters flowing from those territory laws be capable of being described as arising under any laws made by the [Commonwealth] Parliament. If it would, then it may be that the conferral of jurisdiction on the High Court is federal jurisdiction, with all the consequences which flow from that[923]. This second question largely arises because of the use of the words "*Arising under*" in section 76(ii). In this case, the wording of the paragraph picks up "*laws made by the Parliament*" rather than *"laws of the Commonwealth*". The former would seem to be narrower than the latter.

As to the correct interpretation, it is the *'matter'* which must arise under the laws made by the [Commonwealth] Parliament. It is not the same as saying a matter arising under laws made by or under the Parliament. You have to identify that the law was made by the [Commonwealth] Parliament, the question being whether this law can made be indirectly as well as directly by that Parliament. There have been some suggestions that perhaps the words "*directly or indirectly*" can be implied into section 76(ii) between "*Arising*" and "*under any laws made by the Parliament*", but I wish to argue against such a view, particularly in relation to the legislation of a self-governing territory.

In relation to territorial legislatures, including those of a self-governing territory, the question is therefore whether a matter arising under the laws of such a territorial legislature could also be said to arise under laws made by the [Commonwealth] Parliament.

In *R v Commonwealth Court of Conciliation and Arbitration; Ex pt Barrett*[924], Latham CJ stated:

> *A matter is one "arising under" a federal law if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law.*

We know from *Spratt v Hermes*[925] that section 76(i) can extend to matters in territories, but in that case the matter arose under a Commonwealth Act, the *Post and Telegraphs Act*. And the case was not decided on an application of section 76(ii). But this case put an end to the view that the whole of Chapter III had no application to territories. It was a matter of interpreting each section thereof according to the language used. Dicta in the judgments indicated a view that section 76(ii) was capable of operating in territories according to its terms.

923 This leaves aside the question whether legislation under section 122 of the Constitution can confer original jurisdiction on the High Court outside of sections 75 and 76.

924 (1945) 70 CLR 141.

925 (1965) 114 CLR 227.

This dicta was confirmed by further dicta in *Capital TV and Appliances Pty Ltd v Falconer*[926], where Menzies J expressed the view that section 76(ii) applies to any laws made by the Commonwealth Parliament, including laws made by that Parliament by virtue of section 122 for territories[927]. This view was confirmed in *Northern Territory v GPAO* [928]. A somewhat similar view was taken by Finn J in *O'Neill v Mann*[929].

The NT Legislative Assembly is established by legislation of the Commonwealth Parliament – the *Northern Territory (Self-Government) Act 1978*. Thus on one view a law made by that Legislative Assembly might be said to be indirectly a law made by the Commonwealth Parliament[930]. But it seems to me this overlooks the fundamental constitutional change introduced by the grant of Self-government. Such an NT law is the law of a separate plenary legislature of another body politic, legally separate from the Commonwealth Parliament and body politic, over which the Commonwealth Parliament has very limited control. It can no longer properly be described as a law made by the Commonwealth Parliament, even though the power to make that law is to be found in Commonwealth legislation. It is not really much different to a law made by the Commonwealth Parliament viz-a-viz the Imperial Parliament and the *Commonwealth of Australia Constitution Act 1900* before the *Australia Act 1986*. The only significant means by which the Commonwealth Parliament can now deal with such an NT law it disagrees with is by passing an overriding Commonwealth law[931]. And likewise the Commonwealth Government has very little control over such an NT law, particularly since the power of disallowance in section 9 of the last mentioned Act was repealed recently[932].

There is clear authority for the proposition that upon a grant of Self-government to a territory, the establishment of a territory legislature as part of that grant creates a new legislative power separate and distinct from that of the Commonwealth Parliament. Unlike the making of Commonwealth regulations under a Commonwealth Act, it is not a mere delegation of Commonwealth legislative power, but an independent plenary legislative grant in its own right to the legislature of a new body politic under the Crown separate from the Commonwealth.

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926 (1971) 125 CLR 591.

927 At page 605.

928 (1999) 196 CLR 553

929 (2000) 101 FCR 160

930 Given that that Commonwealth Act establishes the NT Legislative Assembly as the legislative arm of the self-governing NT and grants it plenary powers to enact laws for the NT. It also provides in section 57 for the continuance of existing NT laws.

931 Such as occurred in the case of Euthanasia legislation.

932 *Commonwealth Act No 166 of 1911.*

Thus in *Capital Duplicators Pty Ltd v ACT*[933], Mason CJ, Dawson and McHugh JJ stated[934]

> *But when it comes to s. 122 of the Constitution, there can be no doubt that the section confers power to endow a territory with the institutions appropriate to self-government. Hence the Legislative Assembly for the Australian Capital Territory, as established and constituted by the Self-Government Act, is a "new legislative power" authorized by s. 122 within the contemplation of the statements made in Re The Initiative and Referendum Act and Victorian Stevedoring. We repeat what Mason J. said in Berwick Ltd. v Gray (64):*
>
> *"The power conferred by s. 122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions or a separate fiscus; yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus."*

Barwick C.J., McTiernan J. and Murphy J. agreed with that judgment.

In the same case, Brennan, Deane and Toohey JJ stated[935]:

> *By contrast with the regulations whose validity was upheld in Victorian Stevedoring, enactments of the Legislative Assembly under s. 22 of the Self-Government Act do not lack "independent and unqualified authority". Enactments are made under a power to make laws "for the peace, order* and good government" of the Australian Capital Territory. Such a power has been recognized as a plenary power, as this Court pointed out in Union Steamship Co. of Australia Pty. Ltd. v. King (14), "even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies". The terms in which s. 22 confers power on the Legislative Assembly show - to adapt the language of Powell v. Apollo Candle Co (15) - that the Parliament did not intend the Legislative Assembly to exercise its powers "in any sense [as] an agent or delegate of the ... Parliament, but ... intended [the Legislative Assembly] to have plenary powers of legislation as large, and of the same nature,

933 (1992) 177 CLR 248.

934 At pages 265-6.

935 At pages 282-3.

as those of Parliament itself" (emphasis added). In Reg. v. Toohey; Ex parte Northern Land Council (16) Wilson J. said of s. 6 of the Northern Territory (Self-Government) Act 1978 (Cth), a provision corresponding with s. 22 of the Self-Government Act:

"Section 6 invests the Legislative Assembly with power to make laws for the peace, order and good government of the Territory, a power which in my opinion, subject to the limits provided by the act, is a plenary power of the same quality as, for example, that enjoyed by the legislatures of the States. The constitution of the Territory as a self-governing community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial statute."

The Legislative Assembly of the Australian Capital Territory has been erected to exercise not the Parliament's powers but its own, being powers of the same nature as those vested in the Parliament. The Governor-General's power to disallow an enactment under s. 35 of the Self-Government Act does not alter the independent character of the legislative power which s. 22 purports to confer on the Legislative Assembly. A similar power of disallowance was vested in the Queen in Council to disallow laws made by *the Indian Legislature under the Indian Councils Act (s. 21) yet the Privy Council in Burah (17), in the first of the historic cases defining the independent character of colonial legislatures, held that the Indian Legislature's powers were, within their prescribed limits, "as large, and of the same nature, as those of Parliament itself"*.

So my first argument is that a matter arising under a law made by the legislature of a self-governing territory does not arise under a law made by the Commonwealth Parliament for the purposes of section 76(ii) of the Constitution. It arises under a law made by the legislature of a self-governing body politic quite separate from the Commonwealth. In this regard it is quite different from legislation like a Commonwealth regulation. This, in my view, may well extend to laws made by a territory legislature before a grant of Self-government, but now part of the laws of that self-governing entity, as those laws only have continuing effect by virtue of the grant of Self-government. They have become part of the laws of the self-governing territory.

A very similar approach was taken recently by Refshauge ACJ in *Lewis v Chief Executive of the Dept of Justice and Community Safety*[936] in relation to the separation of powers doctrine in its non-application to the self-governing ACT[937]. However see the discussion below as to the decision in *O'Neill v Mann*.

936 [2013] ACTSC 198.

937 See below.

But I would extend this argument to the laws made by any territory legislature, whether self-governing or otherwise. On my view, laws made by such a legislature are not laws made by the Commonwealth Parliament for the purposes of section 76(ii) of the Constitution. In my view it would be a strange argument to assert that part of the intention of section 76(ii) was to extend its effect to enable a conferral of jurisdiction on High Court in any matter arising under any law of the legislature of a Commonwealth territory whatsoever, and that the jurisdiction could then be assumed by some other court including a court of a territory even though no provision is made for that conferral in section 77[938]. The conferral of that jurisdiction on a territory court would presumably need the constitutional support of section 122. And yet the argument is that it is federal jurisdiction because it comes within section 76(ii). I find it hard to accept although I note judicial comments in support of it. And in so far as jurisdiction is conferred on a federal court in matters arising under territory legislation, it seems to me this can quite adequately be achieved under the plenary legislative powers in section 122 without needing the aid of section 76(ii) read with section 77(i). However I have to accept the High Court dicta in more recent cases, supported by the fact that the current High Court took a more integrationist approach to the place of territories in the Constitution in *Wurridjal*, puts some pressure against me on this issue.

In this regard, in *Anderson v Eric Anderson Radio and TV*[939], Taylor J expressed doubt as to whether a right given to a plaintiff under an ACT ordinance answered the description of a matter arising under a law made by the Parliament. But then see *Kruger v Commonwealth* [940]where Gummow J summarised as follows:

> *Hence, the force in the statement, with reference to the position in the Australian Capital Territory, made by Dixon J in Federal Capital Commission v Laristan Building and Investment Co Pty Ltd [497]:*
>
> > *It may well be that all claims of right arising under the law in force in the Territory come within this description [ie, within s 76(ii)], because they arise indirectly as the result of the Seat of Government Acceptance Act 1909 (see s 6), and the Seat of Government (Administration) Act 1910 (see ss 4 to 7 and 12).*
>
> *However, on the appeal in Attorney-General of the Commonwealth of Australia v The Queen [498], the Privy Council for the time being foreclosed any development to implement these views by a dogmatic statement that Ch III was to be regarded as "exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part". That obliged Dixon CJ, in Lamshed v Lake [499], to accept that Ch III "may be treated as inapplicable so that laws made mediately or immediately under s 122 are primarily not within the operation of the Chapter" (emphasis added).*

938 See discussion of section 77 below.

939 (1965) 114 CLR 20 at page 44.

940 (1997) 190 CLR 1.

But then see the different view in *Capital TV and Appliances v Falconer* [941] per Menzies J at 605-6 that section 76(ii) does extend to section 122 laws. With this view Gleeson CJ and Gummow J (Hayne J concurring) agreed in *NT v GPAO*[942]. Gaudron J tended to the same view in that case. McHugh and Callinan JJ also tended to the same view in the latter case but stated it did not follow that the court, when acting under a section 122 law, was exercising federal jurisdiction or the judicial power of the Commonwealth. Gummow and Hayne JJ repeated their views in *Re Wakim; Ex pt McNally*[943]. Gleeson CJ and Callinan J in that case seem to have accepted these views. Kirby J in *Ruhani v Director of Police* [944] also takes the view that section 76(ii) applies to law made directly or indirectly under a law of the Commonwealth Parliament, citing *Federal Capital Commission v Laristan Building & Investment Co Pty Ltd*[945]. The argument has yet to be clearly settled that section 76(ii) does extend to laws made by a territorial legislature, unaided by Commonwealth legislation, particularly where there has been a grant of Self-government.

But this is not the end of the matter. The constitutional scope and application of section 76(ii) is one question; there is still the need for actual legislation conferring that original jurisdiction on the High Court or on some other court. There is in fact no such conferral at present on the High Court. But jurisdiction in the same matters can be conferred on any federal court under section 77 of the Constitution[946]. There is a conferral in the *Judiciary Act 1903* of the Commonwealth of original jurisdiction on the Federal Court in the following terms:

> *39B Scope of original jurisdiction*
>
> …
>
> *(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:*
>
> *(a) in which the Commonwealth is seeking an injunction or a declaration; or*
> *(b) arising under the Constitution, or involving its interpretation; or*
> *(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.*

941 (1971) 125 CLR 591.

942 (1999) 196 CLR 553.

943 (1999) 198 CLR 511. Note the Commonwealth cross-vesting legislation in that case expressly provided for a conferring of jurisdiction on the Federal Court in civil matters arising under the Corporations law of the ACT.

944 (2005) 222 CLR 498, paragraph 215.

945 (1929) 42 CLR 582.

946 See next heading.

Thus by the use of the same language in section 39B (1A) (c) as in section 76(ii) of the Constitution, that is, *'arising under any law made by the Parliament'*, the same question arises; namely, whether this includes laws made by a territory legislature, including that of a self-governing territory. So one comes back to the same constitutional question in relation the Federal Court as for the High Court.

My conclusion is that the Federal Court does not have original jurisdiction under section 39B in matters arising under laws made by a territory legislature. But if I am wrong in this regard, then I still assert that the Court has no original jurisdiction in matters arising under the laws made by a self-governing territory legislature such as the NT.

Section 77

> *77. Power to define jurisdiction*
> *With respect to any of the matters mentioned in the last two sections the Parliament may make laws:*
>
> *(i) defining the jurisdiction of any federal court other than the High Court;*
> *(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;*
> *(iii) investing any court of a State with federal jurisdiction.*

This section, read with section 71, allows any of the original jurisdictions of the High Court under sections 75 and 76 to be conferred on a "*federal court*" or a "*court of a State*".

But in my view a territory court is not a federal court, for reasons already explained. And clearly a territory court is not a "*court of a State*"[947]. So in my view this section has no application to courts of territories. This supports my view that federal jurisdiction is not conferred on such territory courts. Rather it must be territory jurisdiction under section 122, which of necessity is not limited to matters within the federal jurisdiction of the High Court. Territory courts, being courts geographically designated for each territory in terms of their jurisdiction, must have the full range of jurisdiction to deal with all manner of disputes capable of adjudication, not limited to the matters in sections 75 and 76. This includes matters arising under the common law and equity and not just under legislation. There has been no legislative conferral on NT courts by the Commonwealth Parliament of jurisdiction with respect to all matters within sections 75 or 76[948]. Instead, NT courts are established by NT legislation and their conferral of jurisdiction in that legislation is by and large expressed in general terms.

947 See definition of "*The States*" in section 6 of the *Commonwealth of Australia Constitution Act1900*. The NT is no longer the northern territory of South Australia but a separate territory of the Commonwealth. It is no longer a part of the State of South Australia.

948 Apart perhaps for the very limited conferral in section 76C of the *Judiciary Act 1903*.

Section 79

> *79. Number of judges*
> *The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.*

See discussion of this section above.

Section 80

> *80. Trial by jury*
> *The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

I discussed this issue in my 2012 lecture in light of the High Court decision in *Wurridjal*. In the lecture I said:

> *The relevant issue for present purposes is whether this constitutional requirement of trial by jury applies to trials of offences against any law of the Commonwealth committed in a territory, or whether it is limited to such trials against a law of the Commonwealth either in a State or beyond the limits of any State and external to Australia as a whole. Note that the second part of the section is limited expressly to a State where that type of offence was committed in a State, but the second part extends to such offences not committed within any State. This would seem to cover any extra territorial offences committed in the seas beyond Australia. But would it include such an offence committed in a territory?*
>
> *R v Bernasconi*[949] *is still authority for the proposition that Section 80 has no application in territories. But it is a very early case, reflecting the then disparate approach of the early High Court. In that case a Papua Ordinance provided for the trial of certain indictable offences should be without jury. The High Court unanimously held that the guarantee of trial by jury in Section 80 had no application to a Commonwealth territory. Griffith CJ thought that Chapter III of the Constitution had no application to territories and Isaacs J expressed a similar view. Gavan Duffy and Rich JJ agreed with the Chief Justice.*
>
> *But of course it is no longer possible to say that, apart from Section 80, Chapter III is incapable of any application to territories. While territory courts are not federal*

949 Cited above.

courts[950], and appeals to the High Court can be granted from territory courts outside of Chapter III of the Constitution[951], it is clear that courts exercising jurisdiction in a territory can be invested with federal jurisdiction under Section 76 of the Constitution[952]. The question of the extent to which Chapter III is capable of application to territories and territory courts has yet to be finally resolved and is beyond the scope of this paper. But it is no longer possible to assert that Chapter III has no such application at all, a position that, to some extent at least, undermines the decision in Bernasconi. Nor would it seem open any longer to argue that a criminal law statute enacted by the Commonwealth Parliament, operating in a territory, is not a "law of the Commonwealth" for the purposes of Section 80 of the Constitution[953]. The continuing correctness of Bernasconi has been questioned, but the point has yet to be judicially decided. Having regard to the decision in Wurridjal, it is difficult to conclude, merely from the references to a "State" in the second part of Section 80, that the section has no application to territories.

As to the meaning of "any law of the Commonwealth" in Section 80[954], arguably this does not include a law of a self-governing territory legislature. Whether a territory law, including under a grant of territory self-government, is such a law of the Commonwealth for the purposes of Section 80 was a matter considered in Fittock v R[955] but not decided[956]. It clearly does now include every law made by the Commonwealth Parliament whatever the constitutional power under or by reference to which that law is made or supported, including the Territories Power in Section 122[957]. I would argue that a law passed by the legislature of a self-governing territory, that territory being a body politic under the Crown separate and apart from the Commonwealth body politic under the Crown, is not capable of being a law of the Commonwealth for this purpose.

950 *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV & Appliances v Falconer* (1971) 126 CLR 591; *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (1999) 200 CLR 322.

951 *Porter v R; Ex pt Yee* (1926) 37 CLR 432.

952 *NT v GPAO* (1999) 196 CLR 553; *Re Governor, Goulburn Correctional Centre; Ex pt Eastman* (1999) 200 CLR 322 and other cases.

953 *Lamshed v Lake* (1958) 99 CLR 132; *Spratt v Hermes* (1965) 114 CLR 226 and other cases.

954 And as that term is used elsewhere in the Constitution.

955 [2003] HCA 19.

956 I would argue that with a grant of Self-government to a territory, creating an arm of the Crown separate from that of the Commonwealth, and with its own territory legislature, that the laws made by such a legislature are not laws of the Commonwealth for this purpose.

957 *Spratt v Hermes* (1965) 114 CLR226 per Barwick CJ at page 247.

> *I incline to the view that should the issue of the correctness of Bernasconi be raised squarely again in a court, involving a Commonwealth criminal statute operating in a territory and conferring no jury trial for an indictable offence, and an application be made to the High Court to overrule Bernasconi, it is likely that it would succeed and Bernasconi would be overruled.*

But I am also firmly of the view that an indictable criminal offence established under legislation of a self-governing territory is not within the phrase a "*law of the Commonwealth*" for the purposes of section 80. It is the legislation of the legislature of a separate self-governing territory, not of the Commonwealth.

Separation of Powers Doctrine

I am of the view that the federal separation of powers doctrine, which arises by implication from the provisions of Chapter III of the Constitution in relation to the federal judicature, has no application in and to territories and territory courts and tribunals, particularly in cases of self-governing territories, although there is no defining High Court decision specifically to that effect[958]. But this result does, in my view, follow from the fact that territory courts have been held not to be federal courts and do not normally exercise federal jurisdiction under Chapter III[959]. Territory judicial power is non-federal, being more analogous to State judicial power. The doctrine is directed to the Commonwealth and federal courts, not to territories and territory courts, and in particular not to self-governing territories. It has no application to States and State courts.

The federal separation of powers doctrine is to the effect that Chapter III sets up the federal Judiciary, and it is not constitutionally open for the Parliament to bestow judicial power on bodies which is not an exercise of federal jurisdiction by courts under Chapter III, nor can such courts exercise non judicial powers which are not ancillary or incidental to a judicial exercise of power. There has to be a clear separation, at the federal level, between judicial power on the one hand and legislative and executive power on the other.

The doctrine in relation to territories has been referred to in dicta. Kearney J in Jones v North Australian Aboriginal Legal Aid Service Inc and Norman[960]stated it was open to doubt whether the Boilermakers case establishing this doctrine applied to the exercise of the judicial power of the Commonwealth by the Conciliation and Arbitration Commission in a territory. The decision he was referring to was R v Kirby; Ex parte Boilermakers' Society of Australia[961] and seems to lend support for this view in placing territories outside of the federation proper. In Kruger v Commonwealth[962], it was argued that certain

958 Although I accept the principle in Kable, previously referred to, does apply in territories to territory courts.

959 Except perhaps where the jurisdiction falls squarely within sections 75 or 76 of the Constitution.

960 17 March 1986, NT Supreme Court No 719 of 1985.

961 (1956) 94 CLR 254.

962 (1997) 190 CLR 1.

orders made under the Aboriginals Ordinance of the NT represented an exercise of judicial power otherwise than by a court and hence contrary to the Constitution. This argument failed, mainly on the basis that the action was not an exercise of judicial power. But at least three of the Justices took a somewhat dualist approach to territories and the Constitution, agreeing that section 122 stood outside of Chapter III. And Dawson J specifically found the separation of powers doctrine had no application in territories.

In *Lewis v Chief Executive of the Dept of Justice and Community Safety*[963], followed in *Jacka v ACT and Chief Executive Dept of Justice and Community Safety*[964], Refshauge ACJ stated the ACT, as a polity, was not subject to the doctrine such as has been held to bind the Commonwealth. In *Lewis*, the Judge gave a lengthy analysis of the cases. The basis of His Honour's view was ACT courts did not, since Self-government, exercise the judicial power of the Commonwealth, but rather that of the new self-governing entity. He expressed a similar view for the self-governing NT. *Lewis* was approved by the same judge on this point in *Merrilees v R*[965].

But it would appear the decision in *Lewis* was obiter, given the finding that no judicial power was exercised in any event. And the decision has been criticised as being inconsistent with the decision of Finn J in *O'Neill v Mann* [966] on this point. Leeming J has written in his article "The Federal and State Courts on Constitutional Law: The 2013 term"[967] , which, after outlining the facts in *Lewis*, stated as follows:

> *Nevertheless, the reasons [of Refshauge J] elaborately ask and answer a much more general and important question (at [292]-[354]), namely, may judicial power be given to the Board? His Honour found the even had the powers of the Board to cancel periodic detention been the exercise of judicial power, then the ACT Legislative Assembly had power to invest the Board with that jurisdiction. That amounted to what may be regarded as a surprising conclusion:*
>
> > *Having given the matter anxious and careful thought and not without some hesitation, I am of the view that the current state of authority is that there is no applicable doctrine of the separation of powers flowing from the Australian Constitution that applies in the ACT as an independent self-governing territory, and that, while the ACT courts may be invested with federal jurisdiction, as are the State courts, the judicial power of the ACT is not the judicial power of the Commonwealth.*

963 [2013] ACTSC 198.

964 [2013] ACTSC 199.

965 [2014] ACTCA 10.

966 (2000) 101 FCR 160.

967 [2014] NSWJSchol, 5.

If by that paragraph his Honour was saying the Territory courts invariably exercise the judicial power of the ACT and not the judicial power of the Commonwealth, then that proposition is incorrect.27[968] *Indeed, his Honour was exercising a panoply of constitutional submissions which amounted to a s76(i) matter.*

However, in my opinion the better view is that Territory courts invariably exercise the judicial power of the Commonwealth. That had been held by Finn J in O'Neill v Mann (2000) 101 FCR 160 at [26]-[30]. For careful reasons, which accorded with what had been said by Dixon J in Laristan, Gummow in Kruger, and advocated by Professor Cowan and Zines. It aligns with the "integrating" decisions which have been seen in the last decade.28

The only authority squarely on point is O'Neill v Mann, where Finn J held unequivocally that because the source of all enforceable laws in the Territory (including the common law action in defamation before him) arose indirectly under the Seat of Government Acceptance Act 1909 and ss 3 and 4 of the Seat of Government (Administration) Act 1910; there was a s76(ii) matter. That reasoning was, and was expressed to be, essential to Finn J's conclusion that (sitting as the Federal Court) he was validly exercising cross-vesting jurisdiction. His Honour did not refer to (and may not have been taken to) Finn J's reasons. That suggests that the decision may be regarded as having been made per incuriam.

The general question is of considerable importance to all three self-governing Territories[969]*. There were other, narrower ways, argued by the parties, by which the same result could have been reached. In short, there are in my respectful opinion a number of criticisms which may be made of Lewis, which stands alone as an atypical example of a non-incremental constitutional law decision made in 2013 by courts below the High Court.*

Of course the decision in *O'Neill v Mann* was of a single Federal Court Judge. As stated, the matter has not yet reached the High Court. It remains open to either distinguish the decision in that case or to challenge the correctness of the judicial reasoning in that case in this respect.

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968 Footnote 27 reads:
"It is contrary to what was held in Northern Territory v GPAO (1999) 196 CLR 553 and Spinks v Prentice (1999) 198 CLR 511, as well as the unanimous decision in North Australia Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146 at [28] ("a court of a territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament")."

969 There are now only two self-governing territories with the demise of Norfolk Island with that status.

It seems to me the ratio in *O'Neill v Mann* is quite confined. It was not a separation of powers case. The matter in that case arose under the common law of defamation as affected by NSW legislation carried forward into the Act by legislation of the Commonwealth Parliament establishing the ACT and providing for its administration. No legislation of the ACT was involved. The challenge to the jurisdiction of the Federal Court arose because it was cross-vested into that Court from the ACT Supreme Court under Commonwealth cross-vesting legislation. The Judge held that both the common law[970] and the relevant NSW legislation were given effect in the ACT by legislation of the Commonwealth Parliament, being both the founding ACT legislation and the cross-vesting legislation[971]. Given the view that matters arising under Commonwealth legislation operating in a territory have been held to be federal jurisdiction, it followed in his view that the matter in issue arose under laws made by the Commonwealth Parliament under section 76(ii) of the Constitution, and hence it must be within the jurisdiction of the Federal Court.

Even Leeming J accepts in his article that there is some doubt as to whether section 76(ii) picks up matters arising only under laws of a territory, as distinct from under a law enacted by the Commonwealth Parliament. He cites some dicta either way on this point, as to which see my earlier comments. The dicta is inconclusive. But he then sweeps aside this doubt on the basis of a decision of a single judge in *O'Neill v Mann*, which on its ratio does not extend to this point. He does not even consider in depth the relevant effect of a grant of self-government on a territory in the terms I have already discussed. It seems to follow from his sweeping approach that every matter arising in a territory, self-governing or otherwise, and whether under Commonwealth or territory legislation or the common law, and whether dealt with by the Federal Court or some territory court, can be said to arise under laws made by the Commonwealth Parliament within section 76(ii). If this is correct, and I do not accept it is, then all matters of any kind arising in a territory are matters of federal jurisdiction regardless of which court exercises them. The Federal Court would have original jurisdiction in every such matter. There would be no need for the NT cross-vesting legislation between NT courts and the Federal Court. It would also follow that all such jurisdictions would be within the judicial power of the Commonwealth under section 71 of the Constitution, and there would be a constitutionally guaranteed right of appeal to the High Court under section 73 of the Constitution (contrary to existing authority).

970 Quaere, is the common law statutorily based in a territory under Commonwealth legislation? That common law would have continued to apply of its own force whatever legislative arrangements were made for a territory. In *Eastman v The Queen*, McHugh J identified the jurisdiction of the Federal Court in relation to matters arising under the common law in a territory as raising *'difficult questions'*. There are also comments in the *Western Australia v Commonwealth (The Native Title Act Case)* that cast doubt on the capacity of Parliament to convert the common law into a law of the Commonwealth. Perhaps the NT legislature could now repeal and re-enact all the common law in force in the NT to give it continuing force under self-governing NT legislation.

971 In the NT see the equivalent provisions to that for the ACT in section 7 of the *Northern Territory Acceptance Act 1910* of the Commonwealth, and as to NT Self-government see section 57 of the *Northern Territory (Self-Government) Act 1978* of the Commonwealth.

From this point, it may be possible to argue that the separation of powers doctrine under Chapter III of the Constitution applies in territories[972]. *Lewis* and the other cases decided by Refshauge J and cited above would be wrong on this point, as Leeming J suggests. It is also a step leading to the argument that territory courts are courts created (indirectly) by the Commonwealth Parliament for the purposes of section 72 of the Constitution (contrary to existing authority) and hence subject to all the restrictions of that section. If a matter arising under territory legislation can be said to arise indirectly under laws made by the Commonwealth Parliament, then arguably why can't territory courts be said to be courts created indirectly by the Commonwealth Parliament. Once this point is reached, the judicial aspect of any grant of any territory Self-government has been totally destroyed, for reasons already discussed.

In relation to the grant of Self-government to the NT[973], it seems to me with respect that Leeming J has failed to undertake a proper consideration of the nature and purpose of section 122 of the Constitution in coming to his conclusions. The purpose of leaving the grant of legislative power in that section in its extremely wide terms, virtually unlimited as to subject matter and largely unfettered by the restraints on Commonwealth judicial power in the states, was to maintain as much flexibility as possible. The judicial observation has often made that the section was designed to accommodate a wide range of territories in different stages of development, both within and beyond Australian shores, ranging from those with virtually no development and small or primitive populations to much more settled and developed communities, perhaps leading up to a grant of statehood. To maximise flexibility, the Commonwealth Parliament must be free to make whatever arrangements it wishes in respect of a territory judiciary, including by way of either at one end of maintaining control of that judiciary or at the other end of transferring its control and administration fully to a separate territory politic, with judicial members appointed (and removed) from within that body politic under its own legislation. Sections 71, 72, 73, 79 and perhaps section 80 just don't fit comfortably into this. Nor does the separation of powers doctrine. If the Commonwealth decides to prepare a territory for Statehood by granting it substantial Self-government in all three traditional arms of government, then it will want the maximum flexibility to do this. This does not mean it cannot reserve to itself a degree of federal jurisdiction in its own courts in specific matters under laws made by the Commonwealth Parliament. But it does not follow that the Commonwealth should be constitutionally required to retain responsibility for all judicial matters in the territory, to the limitation of Self-government and to the disadvantage of the progression to Statehood.

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972 Although this may also depend upon whether section 72 applies to territory courts as federal courts.

973 And the ACT. If territory courts are not federal courts I would still argue that the separation of powers doctrine has no application.

The separation of powers doctrine would cause a serious problem for territory courts and tribunals if it was to be judicially extended to territory courts and tribunals on the basis that territory courts were federal courts, or they were exercising the judicial power of the Commonwealth and federal jurisdiction. In the NT there have been occasions when territory judicial officers have exercised non judicial powers perhaps going beyond the *persona designata* rule[974]. Even more serious is the fact that judicial powers have been and are exercised by non-judicial officers in various Territory statutory tribunals[975], as you might well expect in a small jurisdiction serving a small population. In either case the officers have not been appointed in accordance with section 72 of the Constitution, discussed above. To now apply the doctrine to a territory, given the view taken in the past that the doctrine did not apply in territories, may well result in the invalidity of certain office holders as well as of the past decisions they made. It would be most inconsistent to apply the doctrine while the territory was only self-governing given that it almost certainly will not apply once it became a new state.

In my view, there is nothing in the *Northern Territory (Self-Government) Act 1978* to suggest some rigid separation between the judicial power of the self-governing NT and the legislative and executive powers of that entity. There is only a brief reference to the NT Supreme Court in the third Preamble to that Act as then established under Commonwealth legislation[976] prior to the transfer of executive authority with respect to NT courts to the new body politic in 1979, and the concurrent repeal of that Commonwealth legislation and the enactment of the new *Supreme Court Act* of the NT. NT courts are now established entirely by ordinary NT legislation.

In my opinion, the separation of powers doctrine does not apply to territory courts and tribunals, particularly where they are part of a self-governing territory.

974 The rule that it is permissible to add non-judicial functions to a judicial officer providing the appointment or assignment is addressed to the individual person.

975 See discussion above as to various Territory tribunals currently operating.

976 *Northern Territory Supreme Court Act 1961*.

Schedule
Constitution

Chapter III—The Judicature

71 Judicial power and Courts

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.

72 Judges' appointment, tenure, and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council [see Note 12]
No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court
In all matters:

- *(i) arising under any treaty;*
- *(ii) affecting consuls or other representatives of other countries;*
- *(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;*
- *(iv) between States, or between residents of different States, or between a State and a resident of another State;*
- *(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*

the High Court shall have original jurisdiction.

76 Additional original jurisdiction
The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- *(i) arising under this Constitution, or involving its interpretation;*
- *(ii) arising under any laws made by the Parliament;*
- *(iii) of Admiralty and maritime jurisdiction;*
- *(iv) relating to the same subject-matter claimed under the laws of different States.*

77 Power to define jurisdiction
With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;
(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
(iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State
The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges
The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury
The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Some Personal Thoughts on the Recognition of Australia's Indigenous Peoples in the Australian Constitution

(A paper prepared for a NT Law Society function in 2015 but not yet delivered)

Do we want constitutional recognition of Australia's indigenous peoples? Views differ on this, both within the indigenous community and outside of it. That is the first issue. All views should be respected. If the answer to this by a preponderance of opinion is in the affirmative, then the second question is what form of words should be inserted in Australia's Constitution to achieve this goal? This is the primary subject of this lecture. There is also a third question. That is, will constitutional change have the desired beneficial effect, both on our indigenous peoples and on the Australian community at large? This question is complex and difficult to answer, and I don't propose to go into it in any detail, particularly as we don't yet have the proposed text.

Sufficient to note that in my own personal view, some constitutional change by way of recognition is justified. I discuss this below. But the form of words used should be such that it has some prospects of success at a national referendum based on the double majority requirements of section 128 of that Constitution. And in my view it should be so framed to encourage and facilitate a harmonious, tolerant and unified Australian community applicable to all, including with respect to its indigenous peoples. If the proposed changes are not likely to succeed at such a referendum then it would all be a waste of time and perhaps to some extent divisive.

And as to the likely beneficial effect of any change, rightly worded, it would in my opinion have some beneficial effect by defining a more inclusive society as our national aspiration and in guiding the legal processes. This to me is enough to warrant it. But as to whether it would remedy all the injustices and disunity with respect to our indigenous community, the answer is clearly in the negative. This is an ongoing task, not to be solved just by words, even in the most important legal document of the country. There are various suggestions around, such as proposals for a treaty, which seek to remedy the faults of the past – but I would go even further. In my view an effective and lasting remedy involves moral and spiritual issues as much as anything else, beginning within each and every member of that Australian community. We must deal with peoples' hearts as well as their minds. Legal remedies are never enough by themselves.

Existing Constitutional Provisions

In order to discuss the possible constitutional recognition of Australia's indigenous peoples in the Australian Constitution, it helps to know first what there is of relevance already in that Constitution.

There is nothing in the Preambles to the *Commonwealth of Australia Constitution Act*[977], the British Act that set up our Constitution[978], about Australia's indigenous people, nor in the first eight covering clauses of that Act. The first Preamble refers to the indissoluble federation of the peoples of the British colonies under the UK Crown, as if the land was vacant and unclaimed at the time of colonisation, an outlook common at the time of federation. There is no doubt that the constitutional framers had little regard to the position of the indigenous peoples of Australia in carrying out their task.

Thus one indigenous comment as to the manner of making the Constitution and its deficiencies is:

> *One hundred and ten years ago years ago, Queen Victoria gave Royal Assent to the Australian Constitution, the founding document of our nation and pre-eminent source of law in the country.*
>
> *Aboriginal and Torres Strait Islander peoples were noticeably absent from its drafting.*
>
> *We were excluded from the discussions concerning the creation of a new nation to be situated on our ancestral lands and territories.*
>
> *We were expressly discriminated against in the text of the Constitution, with provisions that prevented us from being counted as among the numbers of the new nation, and which prevented the new Australian Government from making laws that were specifically directed towards us.*
>
> *As a consequence, the Constitution did not – and still does not – make adequate provision for us. It has completely failed to protect our inherent rights as the first peoples of this country.*
>
> *Former Chief Justice of the High Court of Australia, Sir Anthony Mason, has referred to this as a 'glaring omission'.[4]*[979]

Footnote 4 to the above quotation notes:

> *4] Sir A Mason, 'The Australian Constitution in retrospect and prospect' in G Lindell (ed), The Sir Anthony Mason Papers (2007) 144, p 148.*

977 Hereafter called the *Constitution Act*.

978 Which is set out in section 9 of the *Constitution Act* and is hereafter referred to as the Constitution proper.

979 Social Justice Report 2010, Australian Human Rights Commission, Chapter 2: Constitutional reform: Creating a nation for all of us.

There is very little in the Constitution proper about our indigenous peoples, nor about people of a particular race. In this regard, note the following:

> **Section 25**
> *25 Provision as to races disqualified from voting*
> *For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted. (Section 25 is still in the Constitution)*
>
> **Section 51 (xxvi)**
> *– power for the Commonwealth Parliament to make laws with respect to*
> *(xxvi) the people of any race, [other than the aboriginal race in any State,] for whom it is deemed necessary to make special laws;. (words in brackets deleted in 1967)*
>
> **Section 127**
> *127 Aborigines not to be counted in reckoning population*
> *In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted. (Entire section deleted in 1967)*

Thus, if indigenous people could not vote at a State level, they were not counted in determining the quota for the members of each State in the Commonwealth House of Representatives. But if those people could vote at a State level they could also vote at the federal level (section 41). Several colonies apparently did give them the vote at 1901, but very few of them were then on the roll; they all now have the vote. But section 25 seems to assume a State could still take away that vote.

And as the Constitution stood up until 1967, the Commonwealth Parliament could not legislate for people of the Aboriginal race, a matter for the States, but could legislate for any other people of a particular race. This exclusionary provision as to Aboriginals was deleted by national referendum in 1967, and as a result, various items of Commonwealth legislation were enacted for Aboriginal and TI people for the first time. That legislation can, it seems, discriminate for or against such people (*Hindmarsh Island case*[980]).

And Aboriginal natives could not be included for any purpose (including a census) in reckoning the numbers of people in the Commonwealth or any part thereof, until section 127 was repealed in 1967.

Otherwise our supreme national law, the Australian Constitution, is strangely silent on this issue.

980 *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.

In an article "A racist constitution for a nation; a nation of racists?" (2000) 25(5) Alt L J 211, I argued that the Constitution was racially discriminatory, both in its preparation and as subsequently adopted even after the 1967 referendum. Indigenous peoples took no part in its framing, there was no recognition of or reference to their prior ownership, occupation and use of the land, of their customs and practices, law, languages, religion, etc., and only provisions of an exclusionary nature were included in the Constitution's terms by reference to them. The article reads:

> ***A racist constitution for a nation: a nation of racists?***
> *The Constitution should be amended to remove racist principles.*
> *The title to this article is deliberately provocative. It asserts that the Commonwealth Constitution is based on racially discriminatory principles, both as originally devised and adopted in 1901, and as interpreted in more contemporary times. It questions whether this necessarily implies that Australians support a domestic legal and social system based on racism, given that the supreme legal document of that system, the Constitution, is based on these racist principles. It draws attention to the contradictions inherent in Australia's international legal position in this regard, and raises the possibility of a constitutional change.*
>
> ***The constitution and racism***
> *The first assertion involves not only the proposition that the Constitution does not prohibit racial discrimination in Australia, but that it is not even racially neutral. On the contrary, the view is taken that the Constitution promotes a race-based legal and social system in Australia. To support this assertion, it is necessary to refer briefly to the period leading up to the adoption of the Constitution in 1901, and then to some relevant events thereafter.*
> *The Australian continent was settled and occupied in the 18th and 19th centuries by people of predominantly white-skinned Anglo-Irish extraction, being mainly English speaking and British subjects of the Crown. This is illustrated in the census of 1901. Of a total Australian population of 3,788,204 at that time, only some 29,907 were Chinese, with 9327 being Pacific Islanders in Queensland, otherwise called 'Kanakas', plus smaller numbers of other coloured minorities. The vast majority of the remainder were of this Anglo-Irish stock, apart from people of Aboriginal descent the numbers of whom had dramatically declined since European settlement.[1]*
>
> *Notwithstanding the relatively small numbers of people of Asian and Pacific origins in Australia, the immigration to Australia of such people in the 19th century due to the gold rushes and other factors gave rise to considerable resentment among people of European descent. The colonial legislatures, under their recently acquired powers of self-government, reflected this concern by introducing laws to restrict Chinese immigration to their respective colonies. Some of this legislation met some opposition from the British Colonial Office,*

in the light of relevant international commitments by Great Britain. But the Australian colonies persisted. This led to litigation in Victoria, the outcome of which was a Privy Council ruling to the effect that no alien had an enforceable legal right, apart from legislation, to enter a British territory.[2] A number of the Australian colonies then legislated in 1895 to extend their restrictive immigration legislation to foreigners from all parts of Asia, but this legislation was reserved and not assented to. Instead, it was suggested to the colonies that the model of the Natal Act be adopted, which included a requirement of a written European language test for would-be new migrants. A number of the Australian colonies then legislated to adopt this model.[3]

The Colony of Queensland had the additional experience in the second half of the 19th century of the immigration to that Colony of a number of Pacific Islanders, often by way of forced abduction from their home islands. They met the intensive labour needs of the developing sugar industry. But considerable objection was taken to this practice by workers of European extraction and their new unions. As a result, reliance on Pacific Islander labour had begun to decrease as the turn of the century approached. The sugar industry had largely resigned itself to the fact that if Queensland joined the new Commonwealth of Australia, trade in Pacific Islander labour would have to come to an end.[4] Onetime Queensland Premier and Chief Justice and a leading delegate to the Constitutional Conventions of the 1890s and one of the draftsmen of the new Constitution, Sir Samuel Griffiths, supported an end to this trade, as did other leading politicians such as Sir Littleton Groom.

There were also pressures within the Australian colonies to legislate to restrict the rights and opportunities of people of non-European descent who had already migrated to those colonies. At least one of the colonies, Western Australia, had taken the step before 1901 of legislating in such a racially discriminatory way to prohibit people of Asian or African origin already in that Colony from obtaining certain mining tenements.

The relatively small numbers of non-European immigrants to the colonies in the 19th century has already been noted. But despite this, it is clear that fears of coloured labour were to some extent a factor in the lead up to federation in 1901. It is said that between 1880 and 1900, the fear of such labour degenerated into hysteria in the eastern colonies. This extended to an obsession with the perceived evils of miscegenation and with the problem of permitting Chinese, Japanese, Pacific Islanders or Indians to live in Australia where they were believed not to share in the political tradition of bourgeois or liberal democracy.[5] There was considerable racist sentiment in the colonies at that time, a factor that undoubtedly had an effect on the drafting of the new Constitution, although care needs to be taken not to grossly exaggerate the effect of this sentiment in the causal factors resulting in federation.[6]

Out of this colonial scenario was borne the concept of 'White Australia', the belief that Australia should be preserved for only the white skinned European races, primarily of Anglo-Irish stock. This was a conceptual term already in use before federation. It very quickly became the unchallenged national policy of the new federal government and Parliament after 1901. There is no doubt that the delegates to the Constitutional Conventions of the 1890s had this concept in mind and saw a need for a national approach to the issue. The fact that they did not excessively dwell on this concept in their debates does not indicate the strength of their sentiments in this regard. It was simply accepted that the proposal for federation was one of bringing together the English-speaking British subjects residing in the participating colonies in a new constitutional arrangement under the Crown within the British Empire, in a manner that left no room for aliens of coloured skin. That the new Constitution was to be drafted to meet these expectations did not need to be spelt out and debated by the delegates at length.

The Constitution – the first draft

Consequently, the first draft of the new Constitution included a concurrent but very wide legislative power for the proposed Commonwealth Parliament to control immigration to Australia, as well as a similar power with respect to aliens already in Australia, capable in their terms of extending to members of coloured races, including the Pacific Islanders.[7] The new Commonwealth Parliament proceeded at an early date to enact the Immigration Restriction Act 1901 to restrict immigration to Australia, using the Natal Act model. It also legislated to provide for the deportation of Pacific Islander labourers from Australia, legislation that was unsuccessfully challenged in the High Court.[8]

The first draft of the Constitution also included an exclusive Commonwealth legislative power with respect to the affairs of people of any race for whom it was deemed necessary to make special laws, a power that was intended to deal with members of any coloured race already in Australia, including those who were British subjects.[9] By these means, full Commonwealth legislative power to deal with the matter of race was assured. However, this latter power expressly excluded the 'aboriginal native race in Australia and the Maori race in New Zealand', an exclusion designed to ensure that legislative power over the indigenous peoples remained with the component States in the new federation, and thereby ensuring that the States had wide legislative powers over them, unimpeded by any constitutional limitations. In addition, that first draft provided that the 'aboriginal natives of Australia' were not to be counted in any Commonwealth census.[10] The reference to the Maori race was of course deleted in later drafts when New Zealand indicated its unwillingness to enter the federation, but the exclusion of the Aboriginal race in the 'race' power remained. That 'race' power eventually became a concurrent Commonwealth

legislative power in a later draft. Thus the indigenous people of this country were relegated by federation to the ignominious position of having only two express references to them in the Constitution, both in lower case letters, and both by way of exclusion. There were of course no Aboriginal delegates to the Constitutional Conventions of the 1890s, although a very few Aboriginal people on the roll may have voted for or against the draft Constitution in those colonies that permitted them the vote at that time.

Reflecting the limited nature of the right of Aboriginal people to vote in the 1890s, the first draft of the new Constitution contained a racially discriminatory provision, requiring in effect that people of any race not entitled to vote in State elections for the lower house of State Parliament were not to be taken into account for purpose of the population quota for the new House of Representatives.[11] This provision in slightly different terms still survives in s.25 of the Constitution, and provides clear support for the intention to facilitate racially discriminatory measures under the Constitution. That section may not have any current practical effect due to current State voting laws, but it continues as a discriminatory constitutional provision of potential future application.

Discrimination on the basis of race

In other respects, it is clear that the Constitution as drafted was designed to facilitate the enactment of Commonwealth legislation that had a racially discriminatory effect. This necessarily followed from the premise that a primary role envisaged for the new Commonwealth Parliament was to ensure the implementation of the 'White Australia' policy on a uniform national basis. Delegates accepted that this could never have been effectively achieved on a separate colony by colony basis.

Further, the Commonwealth Parliament's power to enact special laws with respect to a particular race, as the relevant clause finally emerged from the Convention debates, was clearly intended to facilitate Commonwealth legislation that could either advantage or disadvantage people of any race. So much was accepted without contrary argument recently in the High Court, [12] a view that must be taken to have been endorsed by the majority of the Justices in that case.[13] There was some resistance by some of the delegates to the Constitutional Conventions of the 1890s to the idea that either the Commonwealth or the State Parliaments should have any power to legislate in a discriminatory manner on the basis of the race of people already lawfully in Australia,[14] and the first draft of the Constitution had contained a clause 17 in an earlier Chapter V, preventing the States from denying to any person within the jurisdiction the equal protection of the laws. But in later Convention debates, the expressed desire to preserve State legislative capacity as far as possible, including by way of State laws as to particular races, prevailed.

The 'race' power was removed from the list of Commonwealth exclusive legislative powers to the concurrent list, and the equal protection clause was deleted, to be replaced by the present and much more limited provisions of s.117 of the Constitution.[15]

In summary, the Constitution as finally adopted contained a clear power for the Commonwealth Parliament to legislate in a manner that discriminated on the basis of race, both as to immigrants coming into Australia, as well as to people (whether British subjects or otherwise) of a particular race already in Australia. There was an expectation that the new Commonwealth would use these wide powers to implement the 'White Australia' policy, which it proceeded to do. That Constitution contained, and still contains, a direct constitutional requirement to discriminate on the basis of race in certain voting matters. There was no contrary constitutional limitation in the nature of an equal protection clause or a non-discrimination clause on the basis of race or the like, either at the Commonwealth or the State level. And the Constitution left Aboriginal people entirely under the control of the States and their Parliaments, with freedom to enact State laws that discriminated against them or otherwise. A number of discriminatory laws on the basis of Aboriginal race were thereafter enacted by the States, followed later, when the Northern Territory became a territory of the Commonwealth in 1911, by similar Territory laws. Such a summary must, it is submitted, lead to the conclusion that the Constitution was designed to promote a race-based legal and social system in Australia.

Post 1901

This position under the Constitution at 1901 has not since altered in any material degree. As a matter of national approach, the 'White Australia' policy has been dropped from the main party platforms, and at least at that policy level the Australian government proclaims that it no longer discriminates in its immigration programs on the basis of race. But this does not reflect any constitutional change. The only relevant constitutional change was the 1967 amendment by national referendum to delete all references to members of the Aboriginal race from the Constitution, and in the process giving the Commonwealth Parliament concurrent legislative power under s.51 (xxvi) to make special laws for people of that race. An endeavour to use that constitutional amendment and the accompanying referendum material to reinterpret s.51(xxvi) to only permit Commonwealth laws that were beneficial to people of the Aboriginal race, and not to their disadvantage, clearly failed by a majority in Kartinyeri v the Commonwealth (Kirby J dissenting). It is submitted that on a correct reading of the majority High Court judgments in that case, and in the light of the racially discriminatory nature of the Commonwealth legislative amendment under consideration in that case, that the 'race' power continues to be one which can be used to discriminate for or against people of a particular race,

subject only to a possible exception at the margins under the 'manifest abuse' test referred to by Gaudron, Gummow and Hayne JJ in that case. It is to be noted that Brennan CJ and McHugh J in that same case postulated that their view of s.51 (xxvi) was subject to any prohibitions or limitations contained in the Constitution, but they discerned no such prohibition or limitation of relevance on the facts before them.

And of course, there continues to be no constitutional impediment to Commonwealth legislation of a racially discriminatory nature enacted other than in reliance on the 'race' power. Attempts by some members of the High Court to construct an implied constitutional doctrine of equal treatment under the law, [16] stalled in Kruger v Commonwealth.[17] In so far as there is a doctrine of equality under the law in Australia, [18] it is only operative at the common law level, and only applies to the law as recognised by the dominant legal system in Australia. At least in relation to Aboriginal people and Torres Strait Islanders, the common law has now extended legal recognition to surviving native customary title to land and seas and to matters incidental thereto, [19] subject to any relevant legislation such as the Native Title Act 1993 (Cth). But it is clear that this does not extend up to the present time to recognition of Aboriginal and Torres Strait Islander customary rights and entitlements generally.

From a State perspective, the enactment of the Racial Discrimination Act 1975 (Cth), making discrimination on the basis of race and related characteristics unlawful in Australia, has now limited the scope of State legislative power in this matter by virtue of the effect of s.109 of the Constitution. But from a Commonwealth perspective, this latter act is simply ordinary legislation, capable of being overridden by later ordinary Commonwealth legislation, expressly or by necessary implication.

Arguably, there have already been some examples of later Commonwealth legislation that has contradicted the provisions of the Racial Discrimination Act. One example may well be the Hindmarsh Island Bridge Act 1997 (Cth), qualifying the operation of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) in a manner that clearly disadvantaged particular Aboriginal people, as considered in Kartinyeri v Commonwealth. Another example may well be the 1998 amendments to the Native Title Act 1993 (Cth). The provisions of this act, as originally enacted, were accepted by the Committee on the Elimination of Racial Discrimination as not being racially discriminatory, and the Act's validity was subsequently upheld by the High Court.[20] However, the subsequent amendments made by the Native Title Amendment Act 1998 were found by that same Committee to be racially discriminatory in four respects in its decision handed down on 18 March 1999. [21] The Australian Government in turn has refuted the findings of that Committee,

although it is to be noted that the 1998 amendments to s.7 of the Native Title Act now give the provisions of the Racial Discrimination Act a much more limited application to the Native Title Act than that applicable prior to those amendments. So while there may be a legal argument as to which view was correct in this regard — the Committee or the Australian government, the fact that the argument even exists points to the concern as to the legal potential for the valid enactment of Commonwealth domestic legislation with a racially discriminatory effect.

International perspective

At an international law level, the events during World War Two, and in particular those of the Nazi holocaust, threw new light on the topic of racial discrimination and provoked a sense of international outrage, with demands for a new emphasis on international human rights, including in relation to racial discrimination. This was reflected in the Charter of the United Nations, calling for respect for human rights and for fundamental freedoms for all people without distinction as to race and other factors.

The new emphasis was carried over into the Universal Declaration of Human Rights, and into the International Covenant on Civil and Political Rights. In 1965, the International Convention on the Elimination of all forms of Racial Discrimination was opened for signature, and entered into force in 1969. Australia became a party to that Convention, and thereby assumed the international legal obligations under it to pursue by all appropriate means and without delay in eliminating racial discrimination and in promoting understanding among all races, so as to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law in all fields of Australian public life.

Subsequently the Commonwealth Parliament legislated to implement in part this Convention in the Racial Discrimination Act 1975, supplemented later by the Racial Hatred Act 1995 (Cth), thereby rendering all forms of racial discrimination and racial hatred unlawful in Australian domestic law, applicable to all levels of government in Australia, although without creating new civil and criminal causes of action in respect of any breach. In this manner, the Australian government, as representing the nation in the international arena, has proclaimed its acceptance of the international community's abhorrence of racial discrimination and has followed up this position with domestic legislation. It has also made discrimination on the basis of race one of the grounds for complaint under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), with the potential for a complainant to take the matter further in a federal court if the matter cannot be resolved before the Human Rights and Equal Opportunity Commission.

At international law, the illegality of all forms of racial discrimination is now firmly established. It seems inconceivable that this aspect of international law could be reversed at any time in the future. The fact that there have been a number of repeated cases of serious, widespread and systematic breaches of the Racial Discrimination Convention in recent decades, in many cases amounting to crimes against humanity, has only highlighted the international community's abhorrence of this form of breach of fundamental human rights, and has lead to attempts to improve the international legal regime for dealing with such breaches. It is certainly not a reasonable argument in defence of Australia's Constitution to assert that some other countries have a worse record than Australia in this regard. Arguably, the prohibition on racial discrimination is already part of customary international law even without the Racial Discrimination Convention, and has probably now reached the stage of a peremptory norm of international law, from which no derogation is legally possible in any circumstances by any member of the international community.[22]

But it continues to be the case that international agreements to which Australia is a party have no direct effect on Australian domestic law until implemented by Australian legislation. It appears that a similar legal principle also applies to the application of international customary law in Australian domestic law. It follows from this dualist position that although it is no longer legally possible at international law for any country (including Australia) to act in a racially discriminatory manner, domestically Australia is only legally bound by such prohibition in so far as the Commonwealth Parliament chooses from time to time to be bound by it. A Bill passed by a simple majority in both Houses of the Commonwealth Parliament will suffice for this purpose to alter the legal position in Australia. There is no significant constitutional limitation on any future Commonwealth legislation which permits racially discriminatory acts within Australian domestic law, even though in clear breach of international law and Australia's international obligations.[23] The rebuttable presumption against domestic legislation contradicting fundamental human rights offers no guarantees. We are left with the future vagueries of political majorities in both Houses of the Commonwealth Parliament to determine the Australian legal position from time to time in this regard. It is a sad reflection on the state of Australian domestic law, and in particular the Constitution, that it has been unable to keep pace with contemporary international law developments in permanently and completely outlawing the very worst breaches of fundamental human rights, being those breaches of peremptory norms that are so outrageous that they should never be tolerated in any circumstances at any future time by any fair minded person or government.

Conclusion

In such a situation, it has to be asked how Australia as a nation can countenance a situation in the 21st century where its supreme domestic legal document, the Constitution, is designed to promote a system of racial discrimination, a position that constitutionally remains basically unchanged in Australia to this day, when Australia as a nation has voluntarily assumed international law obligations of a binding and permanent nature as to the prohibition on racial discrimination. Does this not necessarily imply that Australians still continue to support a form of legal racism in Australia, notwithstanding the contemporary international position of the Australian government and the fact that the Commonwealth Parliament has enacted ordinary legislation to make racial discrimination unlawful? Should not international law and Australian domestic law be fully consistent on such a fundamental issue? To be consistent with the present international position, a binding and permanent domestic legal ban on all forms of racial discrimination, of a non-derogable nature, would be required, capable of being judicially enforced by Australian courts in accordance with the rule of law. But on the present state of the domestic law as applied by Australian domestic courts, such a legal ban does not exist. Australians, it appears, are free to espouse and adopt the contradictory approach of an international legal position which does not at the same time necessarily accord with their domestic legal position. On any reasonable test, such a contradictory approach, in an increasingly interdependent world in which all people have certain inalienable minimum legal standards of human rights, is not tenable. Racial discrimination in all its forms is unjust and grossly offensive, is destructive of human solidarity, and is a major impediment to domestic and international peace and security. Its practice perpetrates too outrageous a violation of the dignity of human beings to be countenanced under any pretext.[24] If Australian courts are going to continue to insist on a strict dualist approach between international law and domestic law, even in the case of peremptory norms of international human rights law, then it is time that a prohibition on all forms of racial discrimination in Australian law was put beyond the reach of any politician in this country by an express constitutional amendment.

References

[1] *The Aboriginal population was estimated to have shrunk in numbers by 1901 to between 66,950 — see Rowley, C.D., Outcasts in White Australia, ANU Press, Canberra, 1971, pp.41-6 — and 94,564 — see Russell, Rosyln, and Chubb, Philip, One Destiny, Penguin, 1998, p.117.*

[2] *Chung Teong Toy v Musgrove (1891) App Cas 272.*

[3] *Quick, Sir J. and Garran, R., The Annotated Constitution of the Australian Commonwealth, Legal Books, 1976, pp.623-7.*

[4] *Souter, Gavin, Lion and Kangaroo, Fontana, 1976, p.85.*

[5] *Clark, Manning, A Short History of Australia, MacMillan, 1982, p.163.*

[6] *Yarwood, A.T. and Knowling, M.J., Race Relations in Australia: A History, Methuen, 1982, pp.227-8.*

[7] *Original draft Constitution, ch.1, cl.52 (19) and (24), now to be found in s.51 (27) and (19).*

[8] *Robtelmes v Brenan [1906] HCA 58; (1906) 4 CLR 395.*

[9] *Original draft Constitution, ch.1, cl.53 (1), now to be found in s.51 (xxvi). For the origins of this clause, see La Nauze, J.A., The Making of the Australian Constitution, Melbourne University Press, 1974, p.51.*

[10 *Original draft Constitution, ch.VII, cl.3, later to be found in s.127 until deleted in the 1967 national referendum.*

[11] *Original draft Constitution, ch. 1, cl.26.*

[12] *Kartinyeri v Commonwealth [1998] HCA 22; (1998) 195 CLR 337.*

[13] *In Kartinyeri's case, the main point was whether the 1967 referendum result amending s.51 (xxvi) of the Constitution had changed the position in this regard, and not whether that head of power in its original form allowed racially discriminatory Commonwealth legislation. This case is discussed later in this article.*

[14] *Constitutional Convention Debates, Melbourne, 1898, Kingston, CC, pp.246-8, Symon, J.H., pp.248-50.*

[15] *117. Rights of residents in States*
A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

[16] *Leeth v Commonwealth [1992] HCA 29; (1992) 174 CLR 455.*

[17] *Kruger v Commonwealth [1997] HCA 27; (1998) 190 CLR 1.*

[18 *Walker v NSW [1994] HCA 64; (1994) 182 CLR 45, Mason CJ.*

[19] *Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1.*

[20] *Western Australia v Commonwealth [1995] HCA 47; (1995) 183 CLR 373, which decision also struck down the Land (Titles and Traditional Usage) Act 1993 (WA) as being inconsistent with the Racial Discrimination Act 1975 (Cth). The High Court held in that case the Native Title Act did not repeal the Racial Discrimination Act either retrospectively or prospectively — Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at pp.483-4. They added that the Native Title Act could be regarded either as a special measure under the Racial Discrimination Act, or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the Racial Discrimination Convention. They further added that even if there was inconsistency between the Racial Discrimination Act and the Native Title Act, the general provision of the former act must yield to the specific provisions of the latter act.*

[21] *Hoffman, Shane, 'United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its Early Warning Measures and Urgent Action Procedures', (2000) Aust J Human Rights 13.*

[22] *As to non-derogable peremptory norms generally, see Art 53 of the Vienna Convention on the Law of Treaties. As to the prohibition on racial discrimination being a peremptory norm of international law, see Koowarta v Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168, Stephen J at 220, Nulyarimma v Thompson [1999] FCA 1192, Wilcox J at paras 18 and 21, Merkel J at para 78, and see Lineham, J, 'The Law of Treaties', ch.4 of Blay, Piotrowicz and Tsamenyi (eds), Public International Law: An Australian Perspective, Oxford University Press, 1997, p.107. There is widespread support for this view outside Australia.*

[23 *That Commonwealth legislation, within constitutional power, can validly operate domestically even though in breach of international law, has been clear since Polites v Commonwealth [1945] HCA 3; (1945) 70 CLR 60. This principle, as presently enunciated by the Australian courts, apparently applies as much to peremptory norms of international law as to any other rule of international law.*

[24] *Universal House of Justice, The Promise of World Peace, CPN Publications, Canberra, 1986, p.15.*

This article was criticised and the views therein rejected in some quarters. But I stand by those views. It seems to me it is somewhat amazing the foundational and supreme legal document of the Australian nation should make no reference to its indigenous inhabitants other than in an exclusionary way. This is unlike the constitutions of a number of countries, including Canada, Norway, Sweden, South Africa and India. The Australian Constitution simply assumes the British settlers had a right to settle and take Australia and set up their own society and their inherited British law through the British colonies which then became the States in the new federation, virtually without any reference to the indigenous peoples of the land. This reflected the view at the time of drafting that Australia was terra nullius, virtually unoccupied, a view since rejected by the High Court in *Mabo No 2*[981]. These British actions have been held by the High Court to beyond judicial challenge in the domestic courts. Australia was, it seems, to be for whites, as reflected in the White Australia Policy. The indigenous peoples were largely ignored and sidelined, perhaps to gradually die out or to be assimilated. This was not only an error of perception but an injustice.

But the White Australia Policy has now gone. We now generally accept that Australian people are very diverse and multicultural, comprised of migrants from many different places, and that the indigenous peoples of this country were its first inhabitants, going back many thousands of years. Racial discrimination is now unlawful under Commonwealth-wide legislation[982], reflecting basic international law human rights standards. So the question arises – is it not now time to reflect this in our supreme national law, the Constitution? Should the Constitution reflect who the Australian people are? Should the first Australians simply be ignored constitutionally? Should not that Constitution prohibit racial discrimination[983]?

I am not arguing here for or against the view there was any element of indigenous sovereignty prior to British settlement capable of being recognised by Australian law. That is another issue, on which views will differ. In strict legal terms the High Court has already ruled on it[984]. Nor am I suggesting there should or should not now be a treaty of some kind between the Australian Government and its indigenous peoples. These are separate matters, upon which I do not comment in this lecture. It seems to me these two matters and other proposals can be matters of ongoing discussion,

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981 *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.

982 At international law it seems that such a prohibition on racial discrimination, as contained in various international human rights instruments to which Australia is a party, is in the category of jus cogens, from which no derogation is permissible in any circumstances.

983 The Expert Panel Report advocated a new Constitutional provision as follows:

"Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group."

984 *Coe v Commonwealth* [1979] HCA 68; (1979) 53 ALJR 403; (1979) 24 ALR 118 ; *Coe v Commonwealth* [1993] HCA 42; (1993) 68 ALJR 110; (1993) 118 ALR 193

whether or not there is express constitutional change. All I am raising for discussion at this time is my view that it is very surprising there is no reference to those indigenous peoples in the Constitution. They were occupying and using the Australian Continent[985] in considerable numbers at the time of British settlement, the land was not terra nullius, those people had certain rights and obligations according to their own legal, social, linguistic and religious systems, and these systems largely continued after settlement. We know British settlement was not always peaceful and there was a degree of confrontation between the indigenous peoples and the encroaching settlers, the extent of that confrontation being a matter of debate. But our indigenous peoples and their systems did survive. One would expect some constitutional recognition of the prior existence of the indigenous peoples and their occupation and use of the land as its first peoples. It was not just a matter of the white settlers setting up British colonies in an uninhabited land.

For my part, I believe such recognition should even go beyond this. Australia's indigenous peoples are a part of a much greater diversity of peoples who now call Australia home. That diversity has increased exponentially since World War II. Most people would now agree that diversity is a good thing which has contributed much to Australian society. They would all now agree it is critical to preserve harmony, tolerance and unity among those diverse peoples. Hence I would suggest any constitutional recognition of the indigenous peoples of Australia should include reference, at least in a preamble, to them being a part of this great diversity, and we should seek to preserve and enhance national harmony, tolerance and unity. To this end, in the context of proposals for Northern Territory Statehood, the Report of the NT Legislative Sessional Committee on Constitutional Development, November 1996[986] on a Final Draft Constitution for the NT, included a preamble to the effect that:

> a. *Since time immemorial all or most of the geographical area of Australia now constituting the NT was occupied by various groups of Aboriginal people under an orderly and mutually recognised system of governance and laws by which they lived and defined their relationships with each other, with the land and with their natural and spiritual environment987; and*
> b. *the people of the NT are concerned to preserve a harmonious, tolerant and united multicultural society, and it went on to specify certain associated language, customs/traditions and religious rights*[988].

That draft NT Constitution went on to include specific provisions on Aboriginal issues in its body, most of which were deleted by the subsequent NT Constitutional Convention. Words to that effect above in the draft Preamble, somewhat modified, survived the subsequent NT Constitutional

985 And Tasmania.

986 For which I was the legal adviser.

987 Preamble 1.

988 Preamble 17.

Convention in the draft Constitution as adopted by that body[989]. Of course the subsequent NT referendum on Statehood failed, in large part because it did not have Aboriginal support, but that referendum question did not refer to that specific draft Constitution.

I also note various other past proposals for a new preamble to the Australian Constitution. These would of course require a successful national referendum to be adopted. In noting past proposals I am not suggesting only references in a new Preamble to the Australian Constitution are required for full recognition. Most proposals for recognition advocate new provisions in the actual sections of the Constitution as well. But on one view, some new preamble provisions are at least required[990], and in my view they should apply to all of the Constitution, and not to just a particular provision in it.

Just for background I note the Report of the Expert Panel set up in 2012 on constitutional recognition recommended the existing power for the Commonwealth Parliament to make laws as to peoples of a particular race[991] be repealed, and in its place a new section 51A be inserted in the Constitution proper with a number of preambles as follows:

> ***Section 51A Recognition of Aboriginal and Torres Strait Islander peoples***
> ***Recognising*** *that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;*
> ***Acknowledging*** *the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;*
> ***Respecting*** *the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;*
> ***Acknowledging*** *the need to secure the advancement of Aboriginal and Torres Strait Islander Peoples;*
> *the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.*

In addition it recommended there also be a new provision in the Constitution recognising Aboriginal languages[992]. No recommendation was included in the Report advocating new provisions for

989 Preamble 1 and in the introductory words following Preamble 3.

990 I note the preambles recommended in the Expert Panel Report set up in 2012 for constitutional recognition were to go at the beginning of the new section conferring legislative power of the national Parliament rather than at the beginning of the Constitution. That Report did not favour preambles to the whole Constitution.

991 Section 51(xxvi). This power has been, since the 1967 amendment, wide enough to include our indigenous peoples even though not expressly named.

992 *Section 127A Recognition of languages*
(1) The national language of the Commonwealth of Australia is English.
(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

promoting harmony, tolerance and unity within the wider community, perhaps because this was outside their brief. No new preamble to the *Constitution Act* was proposed, nor at the beginning of the Constitution proper.

Prior proposals for a new Preamble.
In 1987, the Committee advising the Constitutional Commission on individual and democratic rights recommended a new Preamble to the Australian Constitution. It went as follows:

> *Whereas the People are drawn from a rich diversity of cultures yet are one in their devotion to the Australian traditions of equality, the freedom of the person and the dignity of the individual;*
>
> *Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership; etc.*

The Constitutional Convention met in Canberra in February 1998 to consider whether Australia should become a republic and what the implications would be for the Constitution. It considered the question of a new preamble for a republican Constitution, and decided as follows:

- The Constitution should have a Preamble.
- The Preamble should begin with the words "We the people of Australia".
- The Preamble also should refer to, inter alia:
  - the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders;
  - Australia's cultural diversity;

- Other matters to be considered for inclusion in the Preamble were:
  - affirmation of the equality of all people before the law;
  - recognition of gender equality;
  - recognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia's indigenous peoples.

- The Preamble should not be used to interpret the Constitution:
  - it should be drafted in a way that does not have implications for the interpretation of the Constitution;
  - Chapter III of the Constitution should prohibit use of the Preamble for purposes of interpretation.

The Preamble to the *Commonwealth of Australia Constitution Act* should be kept.

During 1999, a new preamble was drafted by the Commonwealth Government for insertion at the beginning of the Constitution proper and was put to Australians for their consideration in a national referendum. It read as follows:

> *With hope in God, the Commonwealth of Australia is constituted as a democracy with federal system of government to serve the common good.*
> *We the Australian people commit ourselves to this Constitution:*
> *proud that our national unity has been forged by Australians from many ancestries;*
> *never forgetting the sacrifices of all who defended our country and our liberty in time of war;*
> *upholding freedom, tolerance, individual dignity and the rule of law;*
> *honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;*
> *recognising the nation-building contribution of generations of immigrants;*
> *mindful of our responsibility to protect our unique natural environment;*
> *supportive of achievement as well as equality of opportunity for all;*
> *and valuing independence as dearly as the national spirit which bind us together in both adversity and success.*

This Preamble was rejected at the referendum held on 6 November 1999.

For any new preamble to succeed, it would have to obtain the double majorities of votes at a national referendum required under section 128 of the Constitution. There is a constitutional question as to whether the existing Preambles in the *Constitution Act*, being an Imperial Act, can be validly amended or supplemented by new provisions as a result of a national referendum under the Constitution, although the view I prefer is that they can. Alternatively, and perhaps safer, the new preamble could be added at the very beginning of the Constitution proper, or, like the recommendations in the Expert Panel Report, it could go in a new section of the Constitution proper. Whichever option is chosen, given the difficulties of obtaining a successful vote in a national referendum, it seems advisable the wording of the referendum proposal should be as brief and clear as possible. Although I do not wish to be tied to a particular form of words, it could, for example, recite brief words to the effect that before British occupation, the land was occupied and used by our indigenous peoples in accordance with their laws and customs as the first Australians, and also there is a desire to preserve and enhance a harmonious, tolerant and united Australian society which includes the indigenous peoples.

The question is then whether the proposed amendments should go further with new, substantive clauses in the Constitution.

Disadvantages of Constitutional Recognition

These are conveniently discussed in the text by Davis and Williams, *Everything You Need to Know About The Referendum To Recognise Indigenous Australians*[993]. They are summarised as follows with my comments:

1. *There are more important issues to address. Rather than changing the Constitution, Australia's politicians should focus on ending Indigenous disadvantage by way of health and education reforms.*

My comment: Firstly, I cannot see why both activities should not be pursued at the same time. They are not mutually exclusive and both are important in my view. It might perhaps extend to issues other than just the provision of public services. The pressing issues concerning our indigenous peoples are not just matters of health and education; they are much deeper and much more complex and are rooted in the tragic history. In the north, and possibly elsewhere, they go to the very viability of indigenous societies, self-management/self-determination and other matters. These are matters which can be dealt with without any constitutional change.

2. *Changing the Constitution is expensive. There are better things to spend tens of millions of dollars on.*

My comment: True, there is some expense involved. This can be greatly reduced if the referendum is held in conjunction with a federal election. In any event, the cost in comparison to the total federal budget is very small. The real question is whether the issue is important enough to warrant the expense. In my view it definitely is, it is of particular importance in working towards reconciliation and an inclusive form of community harmony in this country, a matter most people would agree is of great importance. The significance of a clear constitutional statement cannot be overemphasised. The voters of Australia should be given the choice to vote on the issue.

3. *The Constitution has worked well enough for more than a century. It should not be changed or tinkered with unless there is a compelling reason. If it ain't broke, don't fix it.*

My comment: It is true the Australian Constitution has survived the test of time and is one of the more stable constitutions in the world. But that doesn't mean it is perfect. It was generally the product of white, conservative, male, Anglo-leaning Empire loyalists of the 19th Century, whereas the views of most Australians have moved on. The position and interests of our indigenous peoples received no consideration in this foundational process other than in an exclusionary way. But times have changed. Indigenous people and their concerns have become much more prominent in our society. The injustices of the past are now much better recognised. Our constitutional history remains incomplete.

993 2015, New South Books, vii.

Constitutions are essentially dynamic in nature and must reflect the prevailing circumstances and requirements of the times. If they don't then pressures mount and something is bound to give. The Australian Constitution is no exception and contains its own referendum mechanism for express change[994]. This mechanism has succeeded in achieving change some eight times, including on the subject of Aboriginal peoples in 1967. Clearly that latter change was very conservative and although remarkable in itself, in my view it did not go far enough; in particular it did not give our indigenous peoples any constitutional recognition whatsoever. In my view it is time for further change.

4. *The High Court would be left to make sense of what the changes mean, and judges could bring about unintended consequences.*

My comment: Of course the High Court of Australia is the final arbiter in matters of constitutional interpretation in this country. This is its existing function and jurisdiction. But the Court only applies the rule of law, not some arbitrary judicial or political discretion. The decisions of the justices have to be openly justified in reasoned legal arguments and written judgments after a fair hearing of the relevant parties. The Justices have to have recourse to the legislative intention as disclosed in association with any constitutional changes, including in parliamentary speeches and in associated materials, as well as the plain meaning of the words used. Only where the wording is vague or ambiguous is there much room for judicial variations in approach. And it is up to the drafting of the proposed change, the exact words used, to disclose a clear intention and to avoid any vagueness or ambiguity.

Some may view this as a reason for the use of preambles preliminary to the Constitution proper to achieve constitutional recognition**.** As a general rule such preambles have much less influence on constitutional interpretation than do clauses inserted in the actual constitutional text. Preambles are not directly enforceable in a court of law. However the Expert Panel Report did not endorse preambles of this kind, noting the legal doubt as to whether a national referendum could validly alter or add to the Preambles in the *Constitution Act*[995], and referring to the cumbersome nature of adding new preambles to the beginning of the Constitution proper in addition to those already in the *Constitution Act*, and the possible difficulties of resolving the relationship between the two different preambles. Rather, they recommended a number of preambles to the new clause conferring legislative power of the national Parliament specifically with respect to Aboriginal and Torres Strait Islander peoples.

I personally would prefer new, brief preambles at the beginning of the Constitution proper, of the kind already indicated, namely, that before British occupation, the land was occupied and used by our indigenous peoples in accordance with their laws and customs as the first Australians, and also that there is a desire to preserve and enhance a harmonious, tolerant and united Australian society that includes the indigenous peoples. I am not convinced by the reasoning of the Expert Panel in rejecting this approach and instead attaching preambles to a new single clause on Commonwealth legislative power.

994 Section 128.

995 An Imperial Act.

The approach I have suggested, it seems to me, if it passed the referendum tests, would offer little scope for radical constitutional interpretation by Justices of the High Court. Of course, if the constitutional proposals extend to the making of new, substantial changes to the text of the Constitution proper, then the scope if passed for such constitutional interpretation and the possibility of new, legally enforceable rights arising may increase accordingly.

5. *There is no agreement about how the Constitution should be changed. Even Aboriginal and Torres Strait Islander peoples have different views. Until there is unanimity, no referendum should be held.*

My comments: Well of course there will be differences of views on the nature and content of any changes to the Constitution concerning recognition. This is natural. Unanimity of views among all Australian voters would in my view be impossible to achieve. There will be some Australian voters opposed to any change at all at one end of the spectrum. At the other end, there will be some people advocating radical changes, perhaps extending to enforceable rights of self-determination, a treaty and indigenous sovereignty, which I would think would have little prospects of success at a national referendum. It has to be borne in mind that the double majority requirements for express constitutional change in this country have proved to be difficult to successfully achieve in the past. If there is to be such a referendum, and the federal Government has indicated there will be, then it is a matter of coming up with concrete proposals which have a reasonable chance of success. The Expert Panel Report has come up with one set of proposals, fairly wide-ranging in content. These can be a basis for discussion but cannot automatically be treated as necessarily the best set of proposals or the most likely to succeed.

In this regard, the initiative in this country for express constitutional change by national referendum has in practice got to come from the Australian Government. It requires a proposed law for the constitutional change be submitted to both Houses of the Australian Parliament, to be passed by an absolute majority of both Houses, before it can be submitted to a vote of Australian electors in each State and also in each territory with representation in the House of Representatives[996]. The proposal then must obtain the specified double majorities in voting. Practice also suggests that the best chance of success is if both major political parties in the Australian Parliament support the proposed change. There is no provision for electors generally, or any group of electors, to require a referendum to be held. So it is the Australian Government which must take the lead in drafting the actual text of the proposed change, preferably supported by consultations with the other major political party. Thus it can be safely assumed that no radical proposals for change, with wide potential for creating new, legally enforceable rights, will see the light of day for submission to the Australian Parliament and then to the electorate. No government will be likely to proceed with proposed constitutional change unless it thinks it has some reasonable prospects of success.

996 Section 128 of the Constitution.

But this is not a reason for not proceeding at all with any constitutional change. In my view it is possible to achieve constitutional recognition of our indigenous peoples, and that alone seems to me to justify and be important enough for pursuing constitutional change. All the better if it extends to the goal of a harmonious, tolerant and united Australian community, including our indigenous peoples. The more radical proposals can still be pursued by their advocates without the need for constitutional change.

My Suggestions

Bearing all this in mind, I again feel any proposal for change should be as brief and clear as possible. It should not go beyond that which can reasonably be expected to obtain the necessary double majorities at a national referendum.

In my view it should at least include some preambles, perhaps along the lines I have suggested at the beginning of the Constitution proper. I feel these should be worded to protect our diverse pluralistic society in the manner I have indicated under the principle of unity in diversity.

I also consider it should include the deletion of section 25 of the Constitution, above.

I am of the view it should include a new clause prohibiting any discrimination on the basis of race or related grounds[997], not limited to our indigenous people, although they may be the most likely section of the Australian community to suffer from this form of discrimination[998]. In my opinion it is abhorrent to allow the possibility of such discrimination domestically against any race when it is absolutely prohibited at international law. There is an existing prohibition at international law which seems to have a peremptory status and which cannot be avoided on any grounds[999]. And yet in Australian domestic law it is not yet similarly guaranteed. The High Court of Australia has already demonstrated a capacity to decide issues such as 'race'[1000] and discrimination in a legal and impartial manner, without regard to politics, and is quite capable of fairly applying any new constitutional prohibition on race discrimination in the same way as it has done with the existing legislative prohibition[1001]. That existing prohibition in Australian law[1002] has the same effect as a constitutional guarantee would have, except the former is not constitutionally entrenched and can be overridden by later ordinary legislation.

997 Colour, descent, or national or ethnic origin –see section 9 of the *Racial Discrimination Act 1975* and Article 1 of the scheduled Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is a party.

998 I refer in this regard to the Commonwealth legislation on the Intervention in the NT.

999 See my article above.

1000 Eg: in *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168.

1001 Eg: in *Maloney v The Queen* [2013] HCA 28; *Western Australia v Commonwealth* [1995] HCA 47; (1995) 183 CLR 373

1002 *Racial Discrimination Act 1975* of the Commonwealth, applying the Convention on the Elimination of All Forms of Racial Discrimination to which Australia is a party.

My only concern with such a proposal as that quoted below is with the concept of '*special measures'* in terms of Article 1.4[1003] of the Convention on the Elimination of All Forms of Racial Discrimination[1004]. These are affirmative action measures in favour of some disadvantaged race and which are permissible under the Convention, and are not to be continued after the objectives for which they were taken have been achieved. This concept of special measures has already been considered and applied by the High Court in the context of the *Racial Discrimination Act* of the Commonwealth[1005]. I note the Expert Panel Report advocated a prohibition on racial discrimination in a proposed new clause in the Constitution, as follows:

> ***Section 116A Prohibition of racial discrimination***
> *(1The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.*
> *(2Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.*

This kind of provision in the Constitution has, in my view, considerable merit. It would apply across the board to include our indigenous people, but would not be limited to them. It is a prohibition which could not be avoided once in the Constitution. In my opinion, racism in any form is objectionable and should never be tolerated. Racism, one of the most baneful and persistent evils, is a major barrier to a peaceful society, particularly in our multicultural society. Its practice perpetrates too outrageous a violation of the dignity of human beings to be countenanced under any pretext. Racism retards the unfoldment of the boundless potentialities of its victims, corrupts its perpetrators and blights human progress. The outlawing of racism by appropriate legal guarantees is not only justified but in my view is necessary. As stated, it is a prohibition which at international law seems to have a peremptory status and cannot be avoided on any grounds[1006]. My only reservation to the above proposal is there is no provision in it for revoking any positive discrimination measures in favour of the disadvantaged once the objective of those measures has been achieved.

1003 *"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." Such special measures are an exception to the prohibition on racial discrimination in the Racial Discrimination Act 1975 – see section 8(1).*

1004 As scheduled to the *Racial Discrimination Act 1975 (Cth)*.

1005 EG: in *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70; *Maloney v The Queen* [2013] HCA 28; *Wurridjal v The Commonwealth of Australia* [2009] HCA 2. The prohibitions in that Act are of course just normal statutory prohibitions and can be overridden by a later Act of the same status.

1006 See my article above.

As to whether the proposals for change to the Constitution should go any further with respect to our indigenous peoples than those I have already supported, I am in two minds. It is clear there is already power for the Commonwealth Parliament to pass laws as to our indigenous peoples. Is it essential to rewrite this power to limit it to indigenous peoples? Is this not complicating the issue to be put to national referendum and prejudicing its prospects of success? And is it critical to have provision in the Constitution on language rights? Again a complication that may tip the balance in achieving success at a national referendum. I best leave these matters to others.

LECTURES ON NORTHERN TERRITORY PUBLIC LAW
Graham Nicholson

This book is comprised of a number of lectures on aspects of Northern Territory public law delivered by Graham Nicholson. No person is or has been better equipped to deliver these lectures. His credentials are clearly set out in the Forward written by the Solicitor-General of the Northern Territory, Michael Grant QC. As there stated, he is Australia's leading expert on the constitutional structure and history of the self-governing Northern Territory.

As pointed out by the author at the commencement of the first chapter, since the grant of self-government to the Northern Territory, the Territory has occupied a unique constitutional position in Australian law. That and the following chapters take the reader on a journey through that constitutional landscape and highlight the matters that have achieved particular prominence, including the relationship between territories and constitutional guarantees, the constitutional position of the Northern Territory judiciary, and the revival of proposals for a grant of statehood.

The issues raised are important and of ongoing significance and the author provides a comprehensive account of and informed insights into the topics covered. Each of the lectures has been carefully researched and they are presented in a lucid and readable style.

This book will be of great interest to law professionals and law students, and to anyone who has an interest in Australia's constitutional development and, in particular, the constitutional development of the Northern Territory.

Professor Ned Aughterson
Head of School – Law, Charles Darwin University