

## Unfinished Matters: The Federal And State Supreme Courts On Constitutional Law: The 2003 Term

### UNFINISHED MATTERS: THE FEDERAL AND STATE SUPREME COURTS ON CONSTITUTIONAL LAW: THE 2003 TERM

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My immediate predecessor in this role was Justice French whose address on the topic of the Federal and State Courts on Constitutional Law dealing with the 2002 Term was gloomily entitled "Dark Matter in the Constitutional Universe". By this, his Honour intended to refer to the fact that, to use his Honour's expression, "in the constitutional cosmos it is the jurisprudence of the High Court that illuminates or bedazzles us" but "the constitutional decisions of the Federal and State Courts tend to fall into the category of dark matter or, perhaps at best brown dwarfs".

I do not share his Honour's gloom. First, not all Federal or State Court decisions dealing with the Constitution cover under the damoclean sword of a successful special leave application or a s 40 removal. Many clearly dazzle in their own right (and perhaps light). Secondly, while some such cases do end up in the High Court so that, to that extent, the Federal and State Court decisions might be seen as "unfinished matters", no-one doubts the utility of the intermediate decisions which, to quote Justice French again, "will settle the factual aspects of the case, dispose of lesser issues and sharpen the focus of interpretational choices that have to be made."

Indeed French J shook off his gloom to a certain extent by asking rhetorically "where would we be without" such decisions. As he said, "most of the important constitutional law of Australia originates in proceedings in the lower courts."

This is demonstrated by the range of cases decided by the Federal and State courts in the 2003 term.

#### Overview of 2003 Constitutional Cases

In contrast to the meagre pickings Sackville J has identified from the High Court's 2003 Term, I have a veritable cornucopia from which to choose to regale you with the constitutional antics of the Federal and State courts in 2003!

I identified sixty-two judgments decided by the Federal Court and State Supreme Courts which might be said to involve the Constitution. Some involved it less than others. Some involved it in a relatively indirect sense and some touched but very lightly upon constitutional concepts. I do not intend to deal in detail with all of these cases. However, I have annexed to this paper two schedules: one which identifies the cases by Court and the other which identifies them by reference to the section of the Constitution with which they deal, even if only in passing. There is inevitable duplication in the latter schedule to the extent that some cases involve more than one section of the Constitution.[1]

Litigation progressed so rapidly in 2003 that some of the cases determined at the Federal and State Supreme Court levels and/or their critical themes have been either argued and reserved or, indeed, already determined by the High Court during 2003. In addition, some of the major cases having been the subject of grants of special leave were argued in the first ten days or so of what, I suppose, Professor Williams would call the 2004 Term.

The analysis of the 2003 cases reveals that decisions touching upon the Constitution were delivered in all jurisdictions save for the Supreme Courts of the Australian Capital Territory, the Northern

Territory and Tasmania.

## Civil Rights

I start with a general observation. The Constitution, of course, "does not contain a "charter of citizens' rights." [2] That does not mean that constitutional cases in Australia are not concerned with citizens' rights.

In his paper Justice Sackville contrasts the United States and Australian Constitutional systems by virtue of the fact that the United States Constitution incorporates a Bill of Rights whereas the Australian Constitution does not. This, in turn, according to his Honour (and I do not doubt the indubitable correctness of his proposition) means that "constitutional norms in the United States pervade many areas of State and federal law."

While the penetration of "constitutional norms" may not be as pervasive in Australia, nevertheless, to my observation in the 2003 Term, the constitutional issues which engaged Federal and State Supreme Courts concerned civil rights as fundamental as those to which Justice Sackville has referred this morning in relation to the United States Supreme Court and, in many cases equally as controversial.

A brief outline of the key issues dealt with in 2003 in constitutional cases demonstrates the significance of these cases for all members of the community. I will briefly identify the core issues dealt with then attempt in the time available to consider several of the decisions more closely.

### Detention without adjudication of guilt

A major issue in 2003 has been the validity of both Commonwealth and State legislation purporting to detain or imprison people without the adjudication of guilt of a crime.

At a Federal level the Federal Court both at first instance (*NAGA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 224) and in the Full Court (*Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70, 197 ALR 241) has wrestled with the question whether s 196 of the Migration Act 1958 (Cth) was invalid as being beyond the legislative power of the Commonwealth if it was able to be construed as justifying mandatory detention of an alien in circumstances where that detention was not reasonably necessary for the purpose of the alien's removal from Australia.

The issue of mandatory detention also arose in the Family Court in *B and B and Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451; (2003) 199 ALR 604 - a case concerning the jurisdiction of that Court to release children held in immigration detention.

At State level Chapter III issues (judicial power) arose in the context of the constitutional validity of the Dangerous Prisoners (Sexual Offenders) Act 2000 (Queensland) in *A-G(Qld) v Fardon* [2003] QCA 416. That case squarely confronted, and distinguished, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

The question of judicial power arose again, in Queensland, in *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2003] QCA 249; [2004] 1 Qd R 40 which considered the validity of a statutory provision requiring the Supreme Court hearing an application for an order restraining a person from dealing with property to do so in the absence of any party other than, in effect, the applicant. In that case *Kable* was applied to strike down the legislation.

### Implied Freedom of Speech and Association

The implied freedom of speech and association has been considered in two decisions which could assume great significance in an election year.

*Mulholland v Australian Electoral Commission* [2003] FCAFC 91; (2003) 198 ALR 278 concerns the provisions of the Commonwealth Electoral Act dealing with registration of political parties. In that case the Full Court of the Federal Court held that the implied freedom of communication was not infringed by provisions of the Commonwealth Electoral Act 1918 (Cth) which required the Democratic Labour Party to provide a list of at least 500 of its members for the purposes of the Act (s 123(1), the "500 persons rule") and a provision (s 126(2A)(a)) which provided that none of those 500 persons could be relied upon by another political party for purposes of qualifying for registration as a political party (the

"no overlap rule").

In *Bennett v Human Rights & Equal Opportunity Commission* [2003] FCA 1343 Finn J applied the implied freedom of communication to declare a Commonwealth regulation which prevented public servants disclosing information acquired in the course of their duties to be invalid. This was a provision which, according to his Honour had been a "threatening presence for Commonwealth Public Servants for over 100 years".

The institution of marriage

The Attorney-General for the Commonwealth and "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission [2003] FamCA 94; (2003) 172 FLR 300; (2003) 30 Fam LR 1; (2003) EOC 93-265; (2003) FLC 93-127 considered whether there could be a valid marriage between a woman and a transsexual, born a female but who, by operation, was considered by to be a "man". At first instance, Chisholm J decided that the question whether a person was a man or a woman should be determined at the time of marriage not birth. The Full Court of the Family Court upheld his decision. The Full Court considered the meaning of the word "marriage" in s 51(xxi) of the Constitution and concluded that it would be "inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth Power to place marriage in a special category, frozen in time to 1901". Accepting that a valid marriage for the purpose of the Marriage Act 1961 must be between a man and a woman, the Full Court held that the words "man" and "woman" as used in the Marriage Act should bear their contemporary meaning and that, adopting that approach, "man" could include a post-operative transsexual. This decision has had international significance. In *Re Marriage and Michael J Kantaras v Linda Kantaras* in the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, it was described as "one of the most important cases on transsexualism to come on the scene of foreign jurisprudence." It was quoted by the European Court of Human Rights with approval in holding that the United Kingdom had violated articles 8 and 12 of the European Convention on the Protection of Human Rights and Fundamental Freedoms with regard to transsexual people in the United Kingdom particularly in the areas of marriage, social security, employment and pensions.[3] Just over a week ago, on 11 February 2004, the House of Lords approved the Gender Recognition Bill which allows transsexuals to obtain new birth certificates and marry in their adoptive genders.[4]

Just terms

There was an important decision delivered at the end of 2002 in *Pauls Limited v Dwyer* [2002] QCA 545; (2002) 33 ASCR 413 which deals with the power to acquire property on just terms (Constitution s 5 (xxxi)) in the context of takeover offers and the statutory control of share acquisition. It just slipped under French J's gaze in his paper last year. It was followed in 2003 in *Energex Ltd v Elkington & Ors* [2003] QCA 430; (2003) 47 ACSR 442.

I turn then to a more detailed consideration of some of the major decisions.

Detention without adjudication of guilt

Let me place the detention cases in context by briefly recapitulating on two earlier High Court decisions touching upon similar, some might say identical, issues.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] 176 CLR 1 ("Lim") the High Court held that a statutory provision conferring power on the Executive to detain an alien was valid if it was properly characterised as an incident of the constitutional power to exclude, admit or deport aliens (s 51 (xix)).

Brennan, Deane and Dawson JJ, in their joint judgment observed that, with some exceptions, Australian citizens enjoyed in peace time "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a Court in the exercise of the judicial power of the Commonwealth".[5]

In the view of the majority in *Lim* (Brennan, Deane and Dawson JJ)[6] the legislative power conferred by s 51(xix) of the Constitution "encompasses the conferral upon the Executive of authority to detain or to direct the detention of, an alien in custody for the purposes of expulsion or deportation." The judgments in *Lim* recognised that there could be exceptional categories of cases in which the involuntary detention of a citizen in custody by the State would not be invalidated. Those cases included arrest and detention in custody of a person accused of a crime awaiting trial, detention of

persons suffering mental illness or infectious diseases.[7]

Brennan, Deane and Dawson JJ (with whom Gaudron J agreed on this point) also held that s 54R of the Migration Act 1958, which declared that a Court was not to order the release from custody of a designated person, was invalid. In their Honours' view the section purported to prevent a Court from ordering the release from custody of a person who was being held unlawfully. After referring to s 75(iii) of the Constitution (which gives the High Court original jurisdiction in all matters in which the Commonwealth, or a person being sued on behalf of the Commonwealth, is a party) and to s 75(vi) (which gives the High Court jurisdiction in all matters in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth) their Honours said:

"A law of the Parliament which purports to direct, in unqualified terms, that no Court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid." [8]

Mason CJ, Toohey and McHugh JJ held that s 54R could be read down so that it only prevented a Court ordering the release of a person lawfully held in custody.[9]

In *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 the High Court held the New South Wales Community Protection Act (NSW) 1994 to be invalid as incompatible with Chapter III of the Constitution.

The Community Protection Act was assented to shortly before Mr Kable was to be released from prison. The Act made no bones about its purpose. Section 3(1) provided that its object was "to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable ...".

Section 5(1) provided that on an application made in accordance with the Act the Supreme Court of New South Wales may order that a specified person be detained in prison for a specified period if satisfied on reasonable grounds that the person was more likely than not to commit a serious act of violence and that it was appropriate for the protection of a particular person or persons or the community generally that the person be held in custody. Section 5(2) specified that the maximum period for a detention order was six months.

The High Court (Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting) in individual judgments held that the Act was invalid in essence because the exercise of jurisdiction under the Act was incompatible with the integrity, independence and impartiality of the Supreme Court as a court invested with Federal jurisdiction under Chapter III.

It was critical to the majority's conclusion that the Act enabled the Supreme Court to order the imprisonment of a person although that person had not been adjudged guilty of any criminal offence. This was seen as conferring non-judicial functions on a state, albeit, a Chapter III court. Secondly, the majority was of the view that State Parliaments could not confer non-judicial functions on State courts which would undermine public confidence in the independence and impartiality of those courts. The majority viewed the Act as having this effect for a variety of reasons which largely turned on the fact that the Act applied to only one person and the view that the procedures for making detention orders paid lip service to ordinary judicial process.

Toohey J distinguished *Lim* on the basis that under the Community Protection Act "preventative detention ... is an end in itself". Further, in his Honour's view, the Community Protection Act did not "fall within the 'exceptional cases' mentioned in *Lim*, directly or by analogy."

Gaudron J said:

"The power purportedly conferred by s 5(1) of the (Community Protection Act) requires the making of an order, if the conditions specified in s 5(1) are satisfied, depriving an individual of his liberty, not because he has breached any law, whether civil or criminal, but because an opinion is formed, on the basis of material which does not necessarily constitute evidence admissible in legal proceedings, that 'he is more likely than not' (s 5(1)(a)) to breach a law by committing a serious act of violence as defined in s 4 of the Act. That is the antithesis of the judicial process, one of the central purposes of which is ... to protect 'the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence

of the fair and impartial application of the relevant law to facts which have been properly ascertained'. "[10]

McHugh J accepted that the Parliament of New South Wales had the constitutional power to pass legislation providing for the imprisonment of a particular individual whether the machinery for the imprisonment be the legislation itself, the order of a Minister, a public servant or a Tribunal.[11] He also did not doubt the authority of the State to make general laws for preventative detention when those laws operated in accordance with the ordinary judicial processes of the State Courts. What, however, in his Honour's view, the legislature could not do consistently with Chapter III of the Constitution, was invoke the authority of the Supreme Court to make orders against Mr Kable by the methods the Act authorised. That was because, in his Honour's view, "the Act and its procedures compromised the institutional impartiality of the Supreme Court."

McHugh J held that the Act expressly removed the ordinary protections inherent in the judicial process by stating that its object was the preventative detention of Mr Kable, by removing the need to prove guilt beyond reasonable doubt, by providing for proof by materials that may not satisfy the rules of evidence and by declaring the proceedings to be civil proceedings although the Court was not asked to determine the existing rights and liabilities of any party or parties.[12] Thus, his Honour said, "it is not going too far to say that proceedings under the Act bear very little resemblance to the ordinary processes and proceedings of the Supreme Court" so that "the Act is ... far removed from the ordinary incidents of the judicial process." [13] He pointed out:

"Instead of a trial where the Crown is required to prove beyond reasonable doubt that the accused is guilty of a crime on evidence admitted in accordance with the rules of evidence, the Supreme Court is asked to speculate on the balance of probabilities, it is more likely or not that the appellant will commit a serious act of violence." [14]

Gummow J pointed out that the fact that the Act was directed to only one individual was not, of itself, "a badge of invalidity". [15] Of greater significance in his Honour's view was the fact that the penalty that the Act meted out was "not inflicted upon, and by reason of, conviction by the Supreme Court of any charge of contravention of the criminal law."

His Honour regarded as "striking features of the legislation" the fact that there was "no determination of guilt solely by application of the law to past events being the facts as found" [16]; "whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon an adjudgment by the Court of criminal guilt." [17] In his Honour's view such an authority could not be conferred on a State Court exercising Federal jurisdiction as it was "repugnant to the judicial process in a fundamental degree."

Attorney General (Queensland) v Fardon [2003] QCA 416

The issues raised in both *Lim* and *Kable* came before the Queensland Court of Appeal in *Attorney-General (Queensland) v Fardon* [2003] QCA 416 which considered whether the enactment of the *Dangerous Prisoners (Sexual Offenders) Act 2000 (Qld)* was within the legislative competence of the Queensland Parliament. The appellant, the subject of orders made under the Act, contended that it was not, substantially in reliance on *Kable*.

Section 13(5)(a) of Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* authorised the Supreme Court if satisfied that a prisoner was a "serious danger to the community in the absence of a Division 3 order", to order either that a prisoner be detained in custody for an indefinite term for control, care or treatment (a "continuing detention order", s 13(5)(a)) or that the prisoner be released from custody subject to conditions the Court considered appropriate (a "supervision order", s 13(5)(b)).

Like the Act considered in *Kable*, the Queensland Act provided that the Bail Act did not apply to a person the subject of a detention order.

The appellant had been convicted in 1989 of rape, sodomy and assault occasioning bodily harm and sentenced to fourteen years imprisonment. These offences were committed 20 days after his release on parole after serving 8 years of a 13 year sentence for a previous conviction of rape.

That fourteen year term expired on 29 June 2003. The Act commenced on 6 June 2003, the date of assent - 3 weeks before his sentence expired. On 27 June 2003 a Judge ordered that the appellant be detained in custody until 4.00 pm on 4 August 2003 (s 8(2)(b)), that he undergo examinations by two

nominated psychiatrists (s 8(2)(a)) and appointed 31 July 2003 as the date for the hearing of an application for a Division 3 Order (s 8(1)(a)).

Mr Fardon's challenge to the validity of the Act failed at first instance because the trial judge held that the legislation was distinguishable from that considered in *Kable*, partly because it was of general rather than particular application. He also failed in the Court of Appeal with Chief Justice de Jersey and Williams JA upholding the trial judge's conclusion and the President of the Court, Justice McMurdo, dissenting.

In the Court of Appeal the appellant submitted that the Act was invalid because among other reasons it sought "to divorce an order of imprisonment from a finding of criminal guilt and because it amounted to legislative 'interference with the finality of an exercise of judicial power', insofar as it effectively [operated] to lengthen, retrospectively, the term of imprisonment imposed following conviction." [18]

The Attorney-General submitted that the Court's obligation under the Act was to apply what might be characterised as "normal judicial process" and "that to suggest orders made under these provisions retrospectively lengthen the imprisonment originally imposed ignores the reality that following the expiration of that term of imprisonment, the appellant [would] have been newly detained, 'under protective legislation'." The Chief Justice of Queensland accepted those submissions. [19]

De Jersey CJ also accepted the Attorney-General's submission that the "imposition of non-punitive, involuntary detention protective of the community [was] not incompatible with the exercise of judicial power".[20] He held that the court's obligation under these provisions was "to apply what might be characterised as 'normal judicial process' ". In his Honour's view, to suggest orders made under these provisions retrospectively lengthened the imprisonment originally imposed, ignored the reality that "following the expiration of that term of imprisonment, the appellant will have been newly detained, 'under protective legislation' ".

De Jersey CJ also accepted the primary judge's conclusion that the New South Wales legislation and, ergo *Kable*, were distinguishable because the Queensland Act was of general application, conferred general discretionary power, was informed by criterion directed to community protection rather than punishment, and because the court's processes were subject to the rules of evidence. [21]

De Jersey CJ also distinguished the Court of Appeal's decision in *Re Criminal Proceeds Confiscation Act 2002 (Queensland)* [2003] QCA 249 in which s 30 of the Criminal Proceeds Confiscation Act 2002 was held to be invalid as being beyond the power of the Queensland Parliament. I deal with this case later in this paper. His Honour distinguished *Re Criminal Proceeds Confiscation Act 2002 (Queensland)* on the basis that the provisions of the Criminal Proceeds Confiscation Act 2002 which was struck down as invalid had "effectively commanded the Court to hear certain applications for orders affecting property rights in the absence of interested parties." [22]

The appellant's submissions focussed, as one might have expected following *Kable*, on the contention that a court cannot legitimately be required to order detention unless it is consequent upon a finding of guilt of a criminal offence. De Jersey CJ said that that submission gained "basic support from some of the statements made in *Kable*, for example this statement of Gummow J":

"I have referred to the striking features of this legislation. They must be considered together. But the most significant of them is that, whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt. Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree." [23]

In this respect, de Jersey CJ said:

"[27] In an historical sense, a detention order made under s 8 or s 13 is consequent upon conviction, because it is the earlier conviction for a "serious sexual offence" which places the particular prisoner into the category of prisoner to which the Act applies. It may also be acknowledged that a prisoner being sentenced for what amounts, under the Act, to a "serious sexual offence", would have to be taken to appreciate the possible application of the Act come the expiration of the term of imprisonment imposed." [24]

The Attorney-General had not sought to support the Act by endeavouring to link the orders made to the finding of guilt involved in the conviction. Rather he sought to place the legislation into the category of an exceptional case in which the court might order detention other than in direct immediate consequence of a finding of guilt.

In dealing with this argument, De Jersey CJ characterised the purpose of orders made under the Act as being "plainly not punishment, but community protection." [25] This was so even though "this community protection is to be achieved through the denial of personal liberty". His Honour referred to

the exceptional category of cases Lim identified as justifying involuntary detention.[26] He extracted a passage in McHugh J's judgment in Lim in which his Honour said:

"Certainly, Div. 4B deprives designated persons of the right to seek their release from custody. But they have been deprived of that right not because the Parliament wishes to punish them but because it wishes to achieve the non-punitive object of ensuring that aliens who have no entry permit or visa are kept under supervision and control until their claims for refugee status or entry are determined." [27]

In de Jersey CJ's view the orders which might be made under the Act could be seen as within a similar category of exception because the object of a detention order or a supervision order was "not punishment, but community protection." [28] In his Honour's view the category of persons who might be the subject of an involuntary detention order was not closed and should be seen to include "community protection against violent criminals who, although sane, would, if at liberty, constitute a serious danger to the community." [29]

Having referred [30] to *Kruger v Commonwealth* (1996-7) 190 CLR 1, where Gummow J said : "A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth. The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed." [31]

De Jersey CJ summarised his views:

"The Act contemplates involuntary detention which should be characterised as non-punitive. The detachment of the making of an order for such detention from the original adjudication of criminal guilt does not warrant the conclusion the relevant legislation is beyond legislative power. That is because the situation contemplated by this legislation falls naturally into the exceptional category recognized in Lim and Kruger. That category is not closed, and just as it extends to the protection of the community from the mentally ill, there is no reason why, by analogy, it should not also be seen to include community protection against violent criminals who, although sane, would, if at liberty, constitute a serious danger to the community. The process established by the Act sufficiently conforms to normal judicial processes. The legislation should accordingly be regarded as constitutionally valid." [32]

Williams JA agreed with the Chief Justice's reasons for dismissing the appeal but added reasons of his own. In his Honour's view the Queensland Act was "clearly distinguishable from the Act; [as] the New South Wales legislation ...applied only to a named prisoner and effectively directed the court to make an order detaining that person in custody." [33]

In his view the Queensland Act provided for non-punitive involuntary detention of persons where the Court was satisfied that the prisoner would be a serious danger to the community in the absence of a detention order, was designed to protect the community and afford an opportunity to provide further care and treatment to a person found by the Court to be a serious danger to the community if not detained thus bringing it within the exceptional categories referred to in Lim as well as *Kruger v The Commonwealth* (1997) 190 CLR 1 at 161 - 162 per Gummow J and *Veen v The Queen* [No 2] (1998) 164 CLR 465 at 496 per Deane J. [34]

Secondly, in dealing with the submission that the Act was invalid because it authorised the making of a detention order which was not dependent upon the court determining criminal guilt and therefore the making of such an order was not an incident of the judicial function of adjudging and punishing criminal guilt, Williams JA was influenced by the fact that there was an historical link between the prisoner's conviction of a serious sexual offence and the making of an order pursuant to the Act. [35] Finally, Williams JA distinguished *Kable* because the Queensland Act provided for an unfettered judicial hearing to determine whether the prisoner in question was a serious danger to the community and then whether, in the exercise of a judicial discretion, a continuing detention order or supervision order or indeed no order should be made. [36]

McMurdo P dissented. In her Honour's view the Act was invalid. She viewed the scheme instituted under the Act as unique in Australia in that it made "a prisoner who has been convicted and sentenced for an offence liable for an order for further detention imposed by a Supreme Court Judge, not because of any further unlawful actions but because of the potential that the prisoner may commit further unlawful actions." [37] Her Honour observed that the Act required "a Judge of the Supreme Court ... to order the detention of someone convicted and sentenced for a criminal offence, who has satisfied the penalty imposed at sentence, without any further determination of criminal guilty justifying the use of judicial power". [38]

Her Honour recognised that the Queensland Act differed in many respects from the legislation considered in *Kable* [39] but, in her Honour's view, those differences were "cosmetic changes". [40] In her view the legislative scheme under the Act was 'the antithesis of the judicial process', which is to protect the individual from the arbitrary interference with rights other than in consequence of the fair

and impartial application of the law to properly ascertain facts." She held:

"Ordinary reasonable members of the public could well reasonably see the Act as making the Supreme Court of Queensland a party to, and responsible for, implementing the political decisions of the Executive Government that unpopular prisoners should be imprisoned beyond the expiry of their sentenced terms of imprisonment without the benefit of the ordinary processes of law. The powers sought to be given to the Supreme Court of Queensland under the Act compromise the integrity of this Court and of the judicial system effected by Ch III of the Constitution." [41]

Her Honour therefore concluded that sections 8 and 13 of the Act infringed the requirements of Chapter III of the Constitution that the Supreme Court of Queensland only exercise the judicial power of the Commonwealth consistently with the doctrine of the separation of powers.[42]

There are some features of the decision in *Fardon* which attract passing comment.

1. First, it might be thought curious that the decision of the majority gave little weight to the proposition which appeared to loom large in *Kable* that to confer a power on a State court to order the imprisonment of a person although that person had not been adjudged guilty of any criminal offence was incompatible with Chapter III of the Constitution.
2. Secondly, the two justices who referred to *Lim* in *Kable* did not regard the *Kable* legislation as falling within one of the exceptional categories referred to in that case. Toohey J expressly distinguished *Lim* on the basis that under the Community Protection Act "preventative detention ... is an end in itself". Gummow J also referred expressly to *Lim* and clearly did not regard the involuntary detention the Act prescribed "for community protection" as falling within any category of exceptional involuntary detention referred to in that case. Although neither Gaudron or McHugh JJ referred to *Lim*, both had been members of the Court which decided that case. Neither referred to the class of exceptional detention cases it identified as a possible basis for the validity of the *Kable* legislation. This was not referred to in the majority judgments in *Fardon*.
3. Finally, the exceptional category de Jersey CJ crafted, namely protection of the community from violent criminals, was at first blush the same object the *Kable* legislation sought to achieve, yet this does not appear to have influenced the Chief Justice's conclusion.

It appears that on 6 November 2003 Justice White made a continuing detention order in respect of Mr *Fardon* pursuant to which he was detained in custody.[43] Mr *Fardon* appealed from that order to the Queensland Court of Appeal. In the meantime on 12 December 2003 the High Court (Gummow and Kirby JJ) granted Mr *Fardon* leave to appeal.[44]

And now a brief retrospective. In *R v Moffatt* [1998] 2 VR 229, the Victorian Court of Appeal constituted by Winneke, Hayne and Charles JJ, expressed doubt about identifying the precise ratio of *Kable*. Of these, clearly the most significant for present purposes was Hayne JA (as he then was) who after referring to the various views of the majority said:

"But exactly what is the underlying principle is not clear. As I have said, the legislation under consideration in *Kable* was extraordinary: it was directed at one man; it required (or at the least contemplated) the confinement of that man in prison and did so not for what he had done but for what he might do. But by what principle is one to decide whether legislation is incompatible with Ch. III? Is its being novel sufficient? Is the perception that reasonable members of the public may have of it relevant? If so, what kind of perception is relevant?"[45]

Now his Honour will have the opportunity to answer those questions.

#### Mandatory detention

I turn then to the "mandatory detention" cases - to use a term coined by the Full Court of the Federal Court last year in the principal decision to which I will refer - *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70, 197 ALR 241.

In essence the issue in these cases is whether the aliens power (s 51 (xix)) supports provisions in the Migration Act 1958 permitting the Minister for Immigration and Multicultural and Indigenous Affairs to continue to detain an unlawful non-citizen who has no entitlement to a visa but who has asked to be removed from Australia when there is no real likelihood or prospect of that person's removal overseas in the reasonably foreseeable future.

I will not dwell too long on this category for two reasons: first, the legal issue is almost moot at Federal level - what might loosely be called the *Al Masri* principle has already been argued in the High Court



and judgment is reserved. Secondly, you will be hearing much about refugee issues later today in the session on "Detention and the Constitution" by speakers far more qualified than I to do full justice to this important topic.

However as the subject is clearly within my remit and as the principle involved is of profound significance, let me take you to the critical points raised.

A number of 2003 decisions of the Federal Court have considered the issue of mandatory detention however the key 2003 decision was the decision of the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241.

Like *Fardon*, *Al Masri* raised squarely the issues considered in *Lim*. The Full Court said the case posed the question "whether the Act authorises and requires the indefinite, and possibly even permanent administrative detention of ...a person", an unlawful non-citizen under the Act who having been refused refugee status asked to be removed from Australia, when there is no real likelihood or prospect of that person's removal overseas in the reasonably foreseeable future.[46] The Full Court answered that question with what I suggest can fairly be described as a resounding "no".

Section 196(1) of the Migration Act 1958 (Cth) requires and authorises an unlawful non-citizen[47] first detained under the separate "arrest" provisions of s 189 to be kept in immigration detention until he or she is removed from Australia under ss 198 or 199, or deported under s 200 or granted a visa. The only provision of the Migration Act which deals with the release of a person from s 196 detention is s 198(1) which requires an officer to remove "as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed": s 198(1); "remove" means remove from Australia: s 5(1) Migration Act 1958 (Cth).

The Full Court (Black CJ, Sundberg and Weinberg JJ) described the effect of s 196 as being to "provide for mandatory detention", "because the legislation contains no provision authorising the release of a person on discretionary grounds".[48]

The short facts in *Al Masri* were that Mr Al Masri was a Palestinian from the Gaza Strip who arrived in Australia on about 5 June 2001 as an unlawful non-citizen. After his arrival he was detained in Woomera Detention Centre in South Australia. He lodged an application for a protection visa claiming to be a refugee. That application was declined by a delegate of the Minister, a decision which was affirmed by the Refugee Review Tribunal. Mr Al Masri did not seek to challenge the decision of the Tribunal but, rather, signed a written request to the Minister to be returned to Gaza Strip. Mr Al Masri's removal from Australia was delayed, apparently because officers of the relevant department could not obtain permission to transit countries on his way back to the Gaza Strip. In May 2002 Mr Al Masri commenced proceedings against the Minister in the Federal Court seeking an order in the nature of habeas corpus for release from immigration detention. Merkel J who heard the application ordered Mr Al Masri's immediate release from detention.[49]

The Minister appealed. By the time the case came on for hearing in the Full Court of the Federal Court of Australia on 2 October 2002 Mr Al Masri had been removed from Australia, and, presumably, returned to the Gaza Strip. An argument that the appeal should be dismissed as incompetent on the basis of his removal was refused. The Minister argued that a live controversy was extant in relation to costs and that, even absent that controversy, the matter should be determined because, according to the Solicitor General's submission, it "would be wrong and unfair to the Minister and his officers to allow the order for release to stand if it were ... based on erroneous view of the law."[50]

In the Full Federal Court Mr Al Masri submitted that if s 196 was construed to permit detention indefinitely or for an unreasonable period it would be invalid on four separate grounds: that it would be contrary to the exclusive vesting of the judicial power of the Commonwealth in Chapter III Courts, that it would not be supported by a head of power in s 51 of the Constitution, that it would be an impermissible ouster clause purporting to prevent the Court from reviewing detention and that it would be in breach of s 75(v) of the Constitution as a limitation on the power of the Court to grant orders in the nature of habeas corpus. The Human Rights and Equal Opportunity Commission (HREOC) intervened by leave. It, too, submitted that the power to detain conferred by s 196 should be read down by reference to constitutional limitations flowing from s 51(xix) and Chapter III's vesting of judicial power in designated courts. It submitted that the Executive or administrative powers conferred by the Migration Act to detain a non-citizen would be constitutionally valid only as long as they were limited to what was reasonably capable of being seen as necessary to effect the exclusion or deportation or to consider the admission of the person.

HREOC also submitted that implied limitations upon the power to detain were supported by principles of statutory construction derived from international law and the common law. With respect to

international law it argued that a statute should be interpreted and applied, to the extent that its language allowed, in a manner that was consistent with established international law and with Australia's treaty obligations. Thus, HREOC argued ss 196(1)(a) and 198 should be construed consistently with the rights conferred by the International Covenant on Civil and Political Rights. It also submitted that principles of statutory construction dictated that there should be clear words before a statute would be construed as removing a fundamental right or freedom - the relevant right in this instance being the right to personal liberty.[51]

The ultimate decision in *Al Masri* did not turn on a constitutional point. However the Full Federal Court tentatively concluded that if s 196 imported no limitation (in particular, no temporal limitation) on the detention of an unlawful non-citizen other than that the detention be bona fide for one of the purposes identified in s 196(1) (being removal from Australia under ss 198 or 199, deportation under s 200 or the ground of a visa) then it could not be regarded as reasonably appropriate and adapted to an end sufficiently linked to the aliens power, particularly if considerations of proportionality were taken into account.[52] They reached this tentative conclusion principally upon an analysis of the High Court's decision in *Lim*.

Although the challenge to the critical provisions of the Migration Act in *Lim* failed, the Full Court viewed that case as of "critical relevance" because of "the clear preponderance of opinion in the judgments that Chapter III of the Constitution may operate to impose limits upon the power to detain by reason of its insistence that the judicial power of the Commonwealth is vested exclusively in the Courts Chapter III designates".[53]

The Full Court held that while "a limited authority to detain an alien in custody can be conferred on the Executive without the infringement of Chapter III's exclusive vesting of the judicial power of the Commonwealth in the Courts which it designates", that conferral is limited to the extent that the "authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth." [54]

The Full Federal Court viewed the joint judgment in *Lim* as upholding the validity of the statutory scheme there under consideration because the scheme operated so that, as a practical matter, the detention could be brought to an end.[55] It was the absence of a similar provision from the sections being considered in *Al Masri* (ie a section with a practical capacity to bring about release from detention) which, in the Full Court's view, distinguished *Lim* from the scheme the Court was considering.[56]

In the Full Court's view, if the power to detain was not read as subject to limitations, it would extend impermissibly to authorise detention which was punitive in nature. This was because if there was no real likelihood or prospect of removal being effected in a reasonably foreseeable future, the connection between the removal of aliens and their detention became so tenuous as to make the detention punitive in nature.[57] In their Honours' view there was a clear distinction between "detention which is directed in a genuine, and realistic sense towards removal, and detention in the hope that, at that some unknown point in the future, removal will be possible." [58]

Accordingly, in their Honours' view, constitutional considerations pointed strongly to the need and foundation for a limitation that ss 196(1)(a) and 198 authorised detention only for as long as the removal of the removee from Australia was "reasonably practicable", in the sense there must be a real likelihood or prospect of removal in the reasonably foreseeable future.[59]

Ultimately, as I have said, their Honours found it unnecessary to decide the case on the constitutional point because, in their Honours' view, as a matter of statutory construction s 196 should not be interpreted to curtail Mr *Al Masri*'s fundamental right to liberty.

Their Honours referred to the *Hardial Singh* principle, articulated by Lord Woolf in *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704. In that case his Lordship held that a provision enabling the detention pending removal or departure of a person against whom a deportation order was in force was impliedly limited to a period which was reasonably necessary for that purpose.[60] The Full Court referred to a number of cases in which the *Hardial Singh* principle had been applied including by the Privy Council in *Tan Te Lam v Superintendent of Thai A Chau Detention Centre* [1997] AC 97 and by the House of Lords in *R v Secretary of State for the Home Department; ex parte Saadi* [2002] 4 All ER 785 at 793.

A similar conclusion had been reached by the majority in the Supreme Court of the United States in *Zadvydas v Davis* 533 US 676 (2001) where the Court considered applications for habeas corpus filed by aliens detained indefinitely. The majority (Breyer, Stevens, O'Connor, Souter and Ginsberg JJ) held

that "read in light of the constitutional demands of the due process clause of the Fifth Amendment the post-removal-detention-period statute implicitly limited the detention of an alien to a period reasonably necessary to bring about the alien's removal from the United States so that it did not permit indefinite detention." [61]

Applying that principle, therefore, their Honours analysed the relevant provisions of the Migration Act. They concluded that an intention to curtail the right of personal liberty had not been clearly manifested. Accordingly, the power to detain a person under the Act was held to be impliedly limited to such time as the removal of the person from Australia was "reasonably practicable" in the sense that there was a real likelihood of removal in the reasonably foreseeable future. [62]

In expressing their conclusion the Full Court noted that the constitutional validity of ss 196 and 198 of the Migration Act had been addressed by Emmett J in *NAGA v Minister for Immigration and Multicultural and Ethnic Affairs* [2003] FCA 224. His Honour had concluded that no constitutional invalidity "arose" from construing the relevant provisions as authorising continued detention of an unlawful non-citizen at a time when there was no real prospect of removing that person in the foreseeable future. Their Honours pointed out that Emmett J's conclusion was based upon an analysis of *Lim* with which they differed. [63]

Time does not permit me to consider the remainder of their Honours' judgment in detail. I commend to you, however, a close reading of their Honours' analysis of authorities both in Australia, the United Kingdom and the United States of America which confirmed that the right to personal liberty is one of the most fundamental common law rights as well as among the most fundamental of the universally recognised human rights - a right which extends both to citizens and non-citizens. [64] In so finding, their Honours applied the principle of statutory interpretation that "courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language." [65]

In *NAGA*, Emmett J accepted that it was beyond the legislative power of the Commonwealth to invest the Executive with an arbitrary power to detain persons in custody. [66] This was because detention is normally of a punitive nature and the function of judging and punishing criminal guilt was a judicial one referred to in Chapter III of the Constitution. He pointed out that in *Lim* it had been held that detention of an alien for the purposes of expulsion or deportation was not punitive in nature and therefore did not trespass on the judicial power of the Commonwealth. [67] In Emmett J's view there was no constitutional reason why s 196(1) could not be read as conferring unqualified power to keep an unlawful non-citizen in immigration detention until one of the events specified in the section occurred, however uncertain the event may be, as long as "the purpose of the detention is removal". [68]

The High Court refused special leave to appeal from the Full Court's decision in *Al Masri* on the basis that the special leave application lacked utility in circumstances where *Al Masri* had been removed from Australia and also when, at the same time, it had made orders removing *Al Khafaji v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1369 and *SHDB v Godwin & Ors*; *Ex Parte The Attorney-General for the Commonwealth of Australia*. [69] The latter cases both involve the question whether constitutional considerations compel recognition of temporal limitations on periods of immigration detention pursuant to the Migration Act, ss 196 and 198. They were argued in the High Court on 12-13 November 2003 along with *Behrooz & Ors v Secretary DIMIA & Ors*. [70] The Solicitor-General, David Bennett QC, acknowledged that the primary purpose of the removals was to challenge the full Federal Court decision in *Al Masri*. [71]

#### Children in detention

The issue of mandatory detention arose again in the Family Court in a number of decisions concerning the question whether the Family Court, in the exercise of its welfare jurisdiction and injunction powers, could order the release of children held in immigration detention.

In *B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 451 the Full Court of the Family Court (Nicholson CJ, Ellis and O'Ryan JJ) held that the welfare jurisdiction of the Family Court extended to all children of marriages in Australia, including children in immigration detention, where the particular orders sought arose out of or were sufficiently connected to the marriage relationship. Their Honours further held that the Family Court's welfare jurisdiction derived its constitutional validity from the marriage, divorce and incidental powers contained in ss 51(xxi) and (xxii) of the Constitution which were to be broadly construed. They further held that in exercising the welfare jurisdiction the Family Court could make orders for the protection of children of marriages directed at third parties where the orders sought were sufficiently connected to

the relevant constitutional heads of power and that those orders might be made to protect children of marriages in immigration detention.

Nicholson CJ and O'Ryan J also concluded that, consistently with the decision of the Full Court of the Federal Court in *Al Masri*, if the children or any of them in immigration detention were unable to bring their detention to an end, their continued detention was unlawful.[72]

The Minister had submitted that the children's detention could only be brought to an end by the actions of their parents or the children attaining a sufficient capacity to make a request for repatriation themselves. In their Honours' view that interpretation raised the "very real possibility of [the] children spending their entire childhood in detention." They considered that if s 196(3) of the Migration Act produced that effect then it was unconstitutional.[73] They agreed with the Full Court of the Federal Court in *Al Masri* that there was nothing in the scheme of the Migration Act or s 196 itself that suggested that Parliament contemplated such a departure from fundamental freedoms and individual liberty that would produce such a result.[74]

Their Honours also found support for their conclusion in Article 37 (b), (c) and (d) of the United Nations Convention on the Rights of Children ("UNCROC") requiring that no child should be deprived of his or her liberty unlawfully or arbitrarily and that the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time. In their Honours' view the indefinite detention of the children was incompatible with Article 37 and constituted a serious breach of Australia's obligations under the Convention.[75] Accordingly, their Honours concluded that s 196(3) of the Migration Act did not bar the exercise of the Family Court's welfare jurisdiction nor prevent the Court from ordering the release of the children from detention.[76]

Ellis J agreed with the analysis of Nicholson CJ and O'Ryan J as to the limits of s 196(3) of the Migration Act and with the observations in *Al Masri* that s 196 should be read as subject to an implied limitation that a period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention.

His Honour disagreed, however, with Nicholson CJ and O'Ryan J's conclusion that the continued detention of the children was unlawful as, in his view, it could not be said that there was no real likelihood or prospect in the reasonably foreseeable future of the children being removed and thus released from detention.[77]

The decision in *B & B* was delivered on 19 June 2003. On 8 July 2003 the Family Court granted a certificate pursuant to s 95(b) of the Family Law Act 1975 certifying for the purposes of an appeal to the High Court, that the case involved an important question of law of public interest. The High Court heard the appeal on 30 September - 1 October 2003 and reserved its decision. The Solicitor General for the Commonwealth, Mr David Bennett QC, informed the High Court that one of the issues the appellant sought to agitate, namely that aspect of the decision of the Family Court that the children's detention was unlawful, had been a matter that the parties had not argued before the Family Court but was nevertheless dealt with in the judgment.[78]

Although Mr Bennett QC submitted that the case could be resolved by issues which did not raise the *Al Masri* principle he also submitted that if the Court did decide that it had to consider that issue then it should defer giving judgment until it had heard the two removed cases which raise the *Al Masri* principle. (*Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369 and *SHDB v Godwin & Ors; ex parte the Attorney General for the Commonwealth of Australia*). Both of these cases were argued in the High Court on 12 - 13 November 2003 together with *Behrooz v The Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* and judgment was reserved: [2003] HCA Trans 458.

#### Visa Cases

Justice Sackville has already dealt with the High Court's decision in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 143. As his Honour has pointed out, the facts in *Shaw* were almost identical to the facts in *Re Patterson; ex parte Taylor* (2001) 207 CLR 391. Mr Taylor was born in the United Kingdom and arrived in Australia at the age of nine. In 1994 he had been granted a Permanent Transitional Visa. Subsequently, he pleaded guilty to offences under the Crimes Act 1900 (NSW) and was sentenced to jail. As a result of this conviction his visa was cancelled purportedly pursuant to s 501 of the Migration Act. He was arrested and detained as an "unlawful non-citizen". He

was subsequently released after a majority of the High Court held that Mr Taylor had not been an alien when he arrived in Australia and had never become one. Accordingly, he was beyond the reach of the aliens power and thus outside s 501 of the Migration Act.

In *Ruddock v Taylor* [2003] NSWCA 262 the New South Wales Court of Appeal dismissed an appeal by the Minister for Immigration from a District Court judgment awarding damages to Mr Taylor for a wrongful imprisonment. The case is significant not merely because it provides a rare glimpse of the sequelae of a High Court judgment but also because of its emphasis upon the protection of the personal liberty of individuals as well as its emphasis that it was incumbent upon government to establish that it has lawful authority to imprison a person.[79] This emphasis upon the limited circumstances in which government can impinge upon the liberty of subjects echoes the strong statements to like effect in *Al Masri*.

#### Judicial power

In *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2003] QCA 249; [2004] 1 Qd R 40, the Queensland Court of Appeal (Williams JA, White and Wilson JJ) considered the validity of s 30 of the Criminal Proceeds Confiscation Act 2002 which required the Supreme Court in hearing an application for an order restraining any person from dealing with property other than in a stated way or in stated circumstances (s 28) to hear the application in the absence of anybody other than, in effect, the applicant for the order and that party's legal representatives. The appellant submitted that s 30 was so inconsistent with the essential character of the exercise of judicial power that, given the reasoning in *Kable v The Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, it was invalid.[80]

Williams JA (with whom White and Wilson JJ agreed) held that the provision was invalid because the command to the judge hearing the application to proceed in the absence of any party affected by the order to be made was such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. He held that the provision was constitutionally invalid because the Supreme Court of Queensland was part of the integrated Australian judicial system for the exercise of the judicial power of the Commonwealth.[81] Integral to his Honour's conclusion was the proposition that the right of a party likely to be affected by a decision to be duly notified when and where a matter was to be heard and given the full opportunity of stating a case in response was a universal principle which applies to both civil and criminal proceedings and that the effect of s 30 was to abrogate that principle.[82]

#### Implied Freedom of Speech and Association

Now let me turn to the cases with election implications.

In *Mulholland v Australian Electoral Commission* [2003] FCAFC 91; (2003) 198 ALR 278 the appellant, M, the registered officer of the Democratic Labor Party (DLP), a registered political party under the Commonwealth Electoral Act 1918 (Cth) sought to challenge provisions of the Act which required the DLP to provide a list of at least 500 of its members for the purposes of the Act (s 123(1), the "500 persons rule") and s 126(2A)(a) which provided that none of those 500 persons could be relied upon by another political party for purposes of qualifying for registration as a political party (the "no overlap rule"). M sought to challenge those requirements on a number of bases. First, he challenged the 500 persons rule and the no overlap rule as being invalid as breaching the implied constitutional limitation respecting freedom of political communication. He also claimed the provisions were invalid as breaching the implied freedom of association and freedom of participation and the right of privacy inherent in the Constitution.[83] Marshall J dismissed his application at first instance.[84]

As summarised by the Full Federal Court, Marshall J held that there was no relevant political communication but that even if he was wrong, "such interference as there was with any political communication was reasonably appropriate and adapted to a legitimate object." While Marshall J apparently accepted that the inclusion of party details on the ballot (which was an advantage of registration as a political party) constituted a communication about a political matter, he also held that it was not a relevant communication for the purpose of the constitutional limitation because the ballot paper was a communication from the Executive to the voter and not a communication between voters. [85]

Marshall J held, applying the test for the implied freedom of communication set out in *Lange v The Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, that the 500 persons rule was "reasonably appropriate and adapted to the fulfilment of a legitimate legislative purpose, such purpose

being compatible with the constitutionally prescribed system of representative government, namely the maintenance of the integrity of the system of registration of political parties and the setting of qualifications for political parties to achieve before taking the benefit of other provisions of the Act".[86]

It appeared that the choice of the figure of 500 was based on a report published by the JSCEC. Marshall J inferred that the number indicated a party with a "reasonable measure of public support". [87] M complained that the 500 persons rule infringed the implied constitutional freedom of communication because non-registered parties were unable to have their endorsed candidates identified by association with their party on the ballot paper. Marshall J concluded that this was an incident of the system of registration which was "reasonably appropriate and adapted to achieve the legislative aim of regulating registered political parties". That aim, according to Marshall J, was "to ensure that not every political party with minuscule levels of public support would be entitled to the benefits of registration." He held that "any incidental effect upon the freedom of a political party to communicate with the electorate at the ballot box is ... an inhibition 'which is commensurate with reasonable regulation in the interests of an ordered society'".[88]

His Honour also found that the no overlap rule did not infringe the implied freedom of communication against government and political matters because it was intended to "make the process of registration of political parties more effective by seeking to limit the capacity of individuals to foster a multiplicity of political parties based on an identical or substantially identical membership." He accepted a submission made by the Attorney General for the Commonwealth that the policy behind the challenged amendments was "the avoidance of 'entrepreneurial' or cynical use of the same 'block' of members to register multiple parties with no true and discrete membership, the minimising of confusion to voters, the 'tablecloth' ballot paper and the use of 'decoy' or front parties to mislead the voter into indicating a preference for a group ticket which is merely calculated to channel preferences to a another party."[89]

Finally, Marshall J held that there was no constitutionally entrenched freedom to keep political associations private but that, even if such a freedom existed, the challenged provisions "could not reasonably be viewed as hampering that freedom." [90] The Full Court of the Federal Court of Australia dismissed M's appeal.

In the Full Federal Court's judgment, the Court first considered the circumstances in which it was appropriate to draw implications from the Constitution. They referred to *Lange* where the High Court in its joint judgment said:

"Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of 'single representative government' only to the extent that the text and structure of the Constitution establish it ... under the Constitution, the relevant question is not "what is required by representative and responsible government?" It is, "what do the terms and structure of the Constitution prohibit, authorise or require?" [91]

The Full Court referred to the questions the High Court said, in *Lange*, had to be determined when a law was alleged to infringe the implied freedom of communication. The first was whether the law effectively burdened freedom of communication about government or political matters either in its terms, operation or effect. The second was if the law did effectively burden that freedom, whether the law was reasonably appropriate and adapted to serve a legitimate end the fulfilment of which was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Secondly, the Full Court pointed out that in *Lange* the High Court had observed that the freedom of communication the Constitution protected was not absolute but was limited to "what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution".[92]

The Full Court did not agree with Marshall J's conclusion that the relevant provisions did not burden political communication. In the Full Court's view the statutory provisions conferred a limited privilege on registered political parties in relation to their communications with the voters. That privilege was a burden on all those seeking election who did not enjoy it.[93] Nevertheless, the Court also held that the registration of political parties under the Act was a necessary aspect of a valid and legitimate legislative objective.[94]

The appellant had argued that the 500 persons rule was not reasonably appropriate. The appellant submitted that any requirement of more than 2 members which, the Full Court inferred was presumably "the minimum to have a 'single party'", was "too many". As the Full Court pointed out, while the number "500" might in one sense be considered to be arbitrary, nothing was put before the

Court which suggested it was inappropriate. The Full Court recognised that:

"The Parliament must be able to take into account issues such as the extent of public support enjoyed by the party. Maybe it can also take account of the degree of recognition of the party by the voters. The Parliament could hardly be required to arrange the publication on the ballot of party affiliations if the only effect of doing so is to create confusion. It is also likely that Parliament may take into account the potential farce of the ballot paper being so large that the public lose confidence in the electoral system." [95]

The Full Court also concluded that the no overlap rule was reasonably appropriate and adapted to the requirements of transparency and accountability within the electoral system in the same manner as was the disclosure of funding to political parties. [96]

The Court concluded that it was unnecessary for it to determine whether the system of representative government provided for by the Constitution limited the legislative power to interfere with freedom to associate and participate for the purposes of that system because, in its view, whether such limits were seen as additional to or incorporated within the limits based upon political communication they would not in any event apply to laws which were reasonably adapted and appropriate to that system. As they had concluded that the laws were so relevantly appropriate and adapted the issue did not arise. The Court also agreed with Marshall J's conclusion that there was no right to "political privacy" implicit in the Constitution. [97]

The High Court granted special leave in Mulholland on 3 October 2003. The appeal was heard on 11-12 February 2004. [98]

Official secrecy

The next decision already has some journalists salivating at the prospects of a steady flow of information from the Australian Public Service.

In a decision which has significant implications generally, but in particular in the period leading up to a Federal election, Finn J in *Bennett v Human Rights & Equal Opportunity Commission* [2003] FCA 1343 held that regulation 7(13) made under the Public Service Act 1922 (Cth) was invalid as infringing the implied freedom of political communication and could not be read down so as to avoid that consequence. Regulation 7(13) provided that an Australian Public Service Employee "must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly any information about public business or anything of which the employee has official knowledge".

As his Honour observed, the regulation only limited the information which it covered by the qualifications that it be "about public business" or that it be "anything of which the employee has official knowledge". His Honour characterised it as intended to be a "catch-all" provision. [99]

In seeking to identify whether the regulation infringed the requirement of freedom of communication, Finn J accepted that the implied freedom could be described sufficiently in the words of McHugh J in *Levy v Victoria* (1997) 189 CLR 579 at 662:

"The freedom protected by the Constitution is not, however, a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But as *Lange* shows, that right or privilege must exist under the general law".

Finn J analysed extensively opinion, both judicial and otherwise, which emphasised the important purposes served first, by the public communication of information about government and secondly, by open government in a modern democratic society. He considered that those purposes bore directly on the vitality of the system of representative and responsible government provided for by the Constitution. [100] While his Honour accepted that "official secrecy has a necessary and proper province in our system of government", in his view "a surfeit of secrecy does not". [101]

Secondly, his Honour concluded that the law was not reasonably appropriate and adapted to serve a

legitimate end compatible with the implied freedom of communication principally because of its catch-all operation. He concluded that "the dimensions of the control [the regulation] imposes impedes quite unreasonably the possible flow of information to the community - information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of Executive Government".[102]

His Honour rejected the Commonwealth's submission that the authorisation exception in the regulation provided an appropriate basis to differentiate the nature of the information which could be disclosed. His Honour's blunt response was that "placing 'an unbridled discretion' in the hands of an Agency Head may, or may appear to, 'result in censorship'". He concluded that if the authorisation mechanism was considered as part of the balancing process required by the second Lange test, "it unreasonably compromises the freedom by transforming the freedom into a dispensation" and was "not an appropriate filtering device to protect the efficient workings of government in a way that is compatible with the freedom".[103]

His Honour's conclusion succinctly captures the mood of his judgment:

"Though I am mindful that regulation 7(13) and its predecessors have been a threatening presence for Commonwealth Public Servants for over 100 years I am satisfied that it is invalid".[104]

The conclusion that regulation 7(13) was invalid did not conclude the matter, for his Honour also considered whether the duty of loyalty both parties accepted the applicant owed to the Commonwealth to serve with good faith and fidelity or with loyalty and fidelity, coupled with a power to give directions, provided the necessary justification for the direction to Mr Bennett not to make media comment as a Customs Officer or as President of the Customs Officers' Association which involved directly or indirectly disclosure of information about public business or anything about which he had official knowledge. His Honour accepted the applicant's contention that if such a duty could be relied upon, the Commonwealth's submission presupposed not only that the duty was being used in a fashion compatible with the implied constitutional freedom but also that appropriate findings had been made by HREOC that the duty could properly have been invoked. As no such findings had been made the matter had to be remitted to HREOC.[105]

Racial Discrimination

In *Toben v Jones* (2003) 199 ALR 1, a case which might be colloquially referred to as the flipside of the implied right to freedom of communication, the Full Court of the Federal Court of Australia (Carr, Kiefel and Alsopp JJ) held that Part IIA of the Racial Discrimination Act 1975 (Cth) which deals with prohibiting offensive behaviour based on racial hatred was constitutionally valid as an exercise of the external affairs power.

The appellant had published on the Internet a document containing information about the activities of the Adelaide Institute which professed scepticism about claims that the German State systematically exterminated 6 million Jews in concentration camps before and during World War 2. The document also claimed that the principal agents of mass murders ordered by Lenin and Stalin were Jewish. The appellant conceded that the material was reasonably likely to offend Australian Jews.

Although the Court delivered separate judgments, the conclusion that Part IIA of the Act was constitutionally valid is usefully encapsulated in Carr J's judgment (with whom Kiefel J agreed on this point):

"In my opinion it is clearly consistent with the provisions of the [International Convention on the Elimination of all forms of Racial Discrimination] and the ICCPR that a State party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can go into incitement or promotion of racial hatred or discrimination. The authorities show that, subject to the requisite connection [with the external affairs power], it is for the legislature to choose the means by which it carries into or gives effect to a treaty".[106]

Freedom of interstate trade

Section 92 of the Constitution was invoked in *Sportodds Systems Pty Limited v State of New South Wales* [2003] FCAFC 237; (2003) 202 ALR 98. To the extent the case concerned a "free trade" issue, the question was whether ss 28 - 33 of the Racing Administration Act 1998 (NSW) were invalid as imposing an impermissible restraint on trade, commerce and intercourse between the States and/or



between the Australian Capital Territory and the States. The Full Court of the Federal Court (Branson, Hely and Selway JJ) were of the view that the material and information before the Court was insufficient to enable it to determine whether or not those sections or any of them were invalid on this basis and concluded that the declaration sought on the basis of this issue could not have been granted.

It is worth touching, albeit briefly, upon the gist of the argument. The appellant was authorised by the laws of the ACT and of Western Australia to carry out Internet betting. It had premises in both the Territory and Western Australia from which it conducted its Internet betting business. It had no licence or other authority issued pursuant to the laws of New South Wales. It had some employees in New South Wales and apparently some access to a licensed racecourse in that State but had no authority or permission to conduct any betting business at a licensed racecourse in the State. It wished and intended to take bets over the Internet on various sporting events forming part of the Rugby World Cup. The effect of various New South Wales statutory provisions dealing with gambling was that it could not take those bets unless it had a physical presence on a racecourse in New South Wales. The appellant argued that the requirement that it had that physical presence discriminated against interstate trade (including, for that purpose, traders from the ACT) and against communication across the relevant borders.

The Court referred to the summary in *Barley Marketing Board for New South Wales v Norman* (1990) 171 CLR 182 of the meaning and effect of the requirements of s 92 of the Constitution relating to freedom of trade and commerce. In that case the High Court explained that *Cole v Whitfield* decided that the freedom of interstate trade and commerce guaranteed by s 92 is freedom from imposition on that trade and commerce of discriminatory burdens of a protectionist kind and that a law will discriminate in a relevant sense "if the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces such a result." [107]

The Full Court observed that even if a law is relevantly discriminatory, it would not be in breach of s 92 if it was reasonably appropriate and adapted to some legitimate objective, [108] and that it was necessary to establish as a fact that the burden operates so as to discriminate against interstate trade, unless the discrimination was obvious on the face of the legislation. [109]

It was in the latter respect that, in their Honours' view, the evidence fell short of what was necessary to enable the Court to deal properly with the s 92 issue. [110] Thus neither party had put any material before the Court to enable it to determine whether the requirement that a licensed bookmaker be present at a licensed racecourse discriminated against interstate traders. [111] Equally no material had been placed before the Court which would enable it to determine whether, if an analysis of the actual operation of the provisions revealed that they discriminated in effect against interstate bookmakers or against interstate communication, the burden imposed was reasonably proportionate to a legitimate object. [112]

Although the Court acknowledged it could enquire for itself into constitutional facts as explained by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 at 141 - 142, in the Court's view there were obvious dangers in a court informing itself from its own enquiries unless the material relied upon was "public or authoritative or unless the Court had no other choice". [113]

Ultimately, in the circumstances, the greatest utility of *Sportodds* may be in its emphasis on the requirement that parties who wish to challenge a legislative scheme as contravening s 92 of the Constitution should ensure that there is an appropriate evidentiary basis before the Court.

#### Outrider cases

Finally let me touch briefly on the "Outrider cases" - a category with an enduring and endearing quality identified by French J last year. These cases were defined by his Honour as "outriders of constitutional jurisprudence" which may be "collected under the generic heading 'fiat justitia' as the philosophy that informed many of them is well summed up in the statement attributed to Ferdinand I - Holy Roman Emperor from 1558 BC - fiat justitia et pereat mundus - let justice be done though the world should perish." According to French J "for the most part such cases have their own internal logic but are routed in misconception or wishful thinking."

The most significant case in this category, *Lohe v Gunter* [2003] QSC 150, was an application to have Mr Gunter declared a vexatious litigant. The case was the sad finale of many actions by a gentleman whose brushes with the law involved convictions by the Magistrates Court at Ipswich of driving an

unregistered truck, one charge of driving the same truck without a number plate and one charge of failing to drive the truck into a checking site (or weighbridge) and a conviction for being the owner of a dog which was not under effective control in a public place. He sought to challenge one conviction on the basis that the statutory provisions under which he was convicted were ultra vires the Constitution. He also argued that chapter 29 of Magna Carta which includes this clause:

"We will sell to no man, and we will not deny or defer to any man, either justice or right".

prevented the making of any costs order against him, as amounting to the selling of justice. He also argued that the Vexatious Litigants Act conflicted with Magna Carta.

In addition he argued that there was no means by which he might lawfully pay fines or costs because of the failure of the Crown to provide currency as prescribed by s 16 of the Currency Act 1965 which provides for coinage as legal tender. There was, he said, no legal sanction for the issue of paper money; and there was a lack of correspondence between the face value of coins and the price at which they may be bought using paper money. (He referred to a particular example of a set of gold coins being bought for an amount far in excess of its face value.) These arguments had been variously raised over the years in the course of his attempts to challenge the original convictions and/or fines/costs orders imposed upon him as had many others including a challenge to the validity of the 2001 Federal election, the details of which I shall not recount.

In a meticulous and patient judgment, Holmes J examined his arguments, but rejected them and declared him a vexatious litigant.

oOo

The Hon Justice Ruth McColl AO  
Judge, Court of Appeal  
Supreme Court of New South Wales

20 February 2004

Cases by Court

1. Supreme Court of South Australia

Full Court

South Australian River Fishery Association & Warrick v State of South Australia [2003] SASC 174, (2003) 227 LSJS 222 [s 51(xxxi)]

Herald and Weekly Times Ltd v Director of Public Prosecutions and Vlassakis [2003] SASC 234

Edwards & Anor v Olsen & Ors; Murphy v Stevens & State of SA [2003] SASC 238

Conservation Council of SA Inc v Chapman [2003] SASC 401

Hui v Lane [2003] SASC 401 [s 51(i), s 51(xx), s 51(xxiiiA)]

Single Judge

Featherston v Tully (No 2) [2002] SASC 338, (2002) 222 LSJS 507

Altamura v The Director of Fisheries Policy South Australia and the Minister of Agriculture Food and Fisheries South Australia [2003] SASC 277

Tower Trust (SA) Ltd v Pincus [2003] SASC 355 [s 109]

2. Supreme Court of ACT

3. Supreme Court of Northern Territory

4. Supreme Court of Tasmania

5. Supreme Court of Queensland

CA

Pauls Ltd v Dwyer [2002] QCA 545, (2002) 43 ACSR 413 [s 51(xxxi), s 51(xxxvii)]

Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249 [s 71 Cth Constitution, Qld Constitution]

A-G(Qld) v Fardon [2003] QCA 416 [Cth Constitution Ch III, Qld Constitution]

Energex Ltd v Elkington & Ors [2003] QCA 430 [s 51(xxxi), s 51(xxxvii)]

Cannavan v Lettvale Pty Ltd [2003] QCA 528 [s 109, s 92]  
SC

Lohe v Gunter [2003] QSC 150

A-G v Fardon [2003] QSC 200

6. Family Court of Australia

AI and AA and The Minister for Immigration & Multicultural & Indigenous Affairs [2003] FamCA 943

The Attorney-General for the Commonwealth and "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission [2003] FamCA 94

B and B and Minister for Immigration & Multicultural & Indigenous Affairs [2003] FamCA 451

HR and DR and The Minister for Immigration & Multicultural & Indigenous Affairs [2003] FamCA 616

KN and SD and Secretary, Department of Immigration & Indigenous & Multicultural Affairs [2003] FamCA 610

7. Federal Court of Australia

Full Court

Petrotimor Companhia de Petroleos SARL v Commonwealth [2003] FCAFC 3 [s 51(xxix), s 51(xxxi), s 61]

Ferdinands v Chief of Army [2003] FCAFC 10 [Ch III, s 122, s 51(vi), s 72, s 80]

Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7, (2003) 196 ALR 332 [s 51(xix), s 51(xxvii), s 75, s 76]

Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70, 197 ALR 241 [Ch III, s 51(xix), s 51(xxxix)]

Mulholland v Australian Electoral Commission [2003] FCAFC 91

Toben v Jones [2003] FCAFC 137, (2003) 199 ALR 1 [s 51(xxix)]

Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153, (2003) 200 ALR 607 [s 51(xx), s 71, s 76, s 77]

Miller v University of New South Wales [2003] FCAFC 180, (2003) 200 ALR 565 [Ch III, s 51(xx), s 51 (xxxv)]

Long & Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 218 [s 51(xix), s 51 (xxvii)]

Sportsodds Systems Pty Limited v State of New South Wales [2003] FCAFC 237 [s 92, s 109]

Commonwealth of Australia v Lyon [2003] FCAFC 284 [s 71, s 75, s 76, s 77]

Single Judge

O'Meara v Cmr of Taxation [2003] FCA 217 [s 53, s 55]

NAGA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 224 [Ch III, s 51(xix)]

Te v Ruddock [2003] FCA 661 [s 51(xix)]

Hicks v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 757 [Ch III, s 75(iii), s 75(v), s 76(i)]

Sportsodds Systems Pty Ltd v State of New South Wales [2003] FCA 992 [s 92, s 109, s 122]

P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1029 [s 51(xix), s 75(v)]

Thayanathan v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1054 [s 75 (v)]

Mashood v Commonwealth of Australia [2003] FCA 1147 [s 51(xix), s 51(xxvii)]

Australian Gas Light Co v Australian Competition & Consumer Commission (No 2) [2003] FCA 1229 [s 77]

New England Biolabs Inc v F Hoffman-La Roche AG [2003] FCA 1460 [Ch III]

Bennett v Human Rights and Equal Opportunity Commission [2003] FCA 1433

Hollis v Minister for Immigration and Multicultural Affairs [2003] FCA 1329, (2003) 202 ALR 483 [s 51 (xix), s 51(xxvii)]

State of South Australia v Slipper MP [2003] FCA 1414 [s 109, s 51(xxxi), s 75(v)]

8.  
Supreme Court of Victoria

CA

PSL Industries Ltd v Simplot Australia Pty Ltd (2003) 174 FLR 111, [2003] VSCA 7 [s 109]

Agtrack (NT) Pty Ltd t/as Spring Air v Hatfield (2003) 174 FLR 395, [2003] VSCA 6 [s 109]

R v Ng (2002) 5 VR 257, [2002] VSCA 108 [s 80]

Director of Public Prosecutions (Cth) v Hunter [2003] VSCA 219 [s 77(iii)]

SC

Australian Securities and Investments Commission v Plymin (No 1) (2003) 46 ACSR 126, (2003) ACLC 700, [2003] VSC 123 [s 51(i), s 51(xvii), s 51(xx), s 51(XXXIX)]

Hyams v Victorian Electoral Commission [2003] VSC 156 [s 109, s 44(iv), s 52(ii), s 69]

9. Supreme Court of Western Australia

Quigley v Legal Practitioners Complaints Committee [2003] WASCA 228

Paynter v Dunne [2003] WASCA 201, (2003) FLC 93-153 [Ch III, s 109, s 77(iii)]

10. Supreme Court of New South Wales

CA/CCA

Julia Farr Services Inc v Hayes (2003) 25 NSWCCR 138, [2003] NSWCA 37 [s 118, s 77(iii)]

Mitchforce v Industrial Relations Commission (2003) 124 IR 79, [2003] NSWCA 151 [s 71, s 73(ii)]

R v O'Meara [2003] NSWCCA 250 [s 80]

Air Link Pty Ltd v Paterson (No 2) [2003] NSWCA 251 [s 109]

Ruddock v Taylor [2003] NSWCA 262 [s 51(xix)]

SC

Atkinson v State Bank of NSW Ltd (2003) 53 ATR 407, [2003] NSWSC 675 [s 51(ii)]

Travel Compensation Fund v Blair [2003] NSWSC 720 [s 109]

Tryam Pty Ltd v Grainco Australia Ltd [2003] NSWSC 812 [s 73(ii)]

Chief Executive Officer of Customs v Pham [2003] NSWSC 971 [s 80]

A Goninan & Co Ltd v Atlas Steels (Australia) Pty Ltd [2003] NSWSC 956 [s 76(ii), s 77(iii)]

Hedges v Australasian Conference Association Ltd [2003] NSWSC 1107 [s 117]

Song v Coddington [2003] NSWSC 1196 [s 109, s 52]

Cases by Section

Note: Not all cases are listed here, only those referring to particular sections.

44(iv): Disqualification from sitting as Member of Parliament

Hyams v Victorian Electoral Commission [2003] VSC 156

51(i): Trade and Commerce

Hui v Lane [2003] SASC 401

Australian Securities and Investments Commission v Plymin (No 1) (2003) 46 ACSR 126, (2003)

ACL 700, [2003] VSC 123

51(ii): Taxation

Atkinson v State Bank of NSW Ltd (2003) 53 ATR 407, [2003] NSWSC 675

51(vi): Defence

Ferdinands v Chief of Army [2003] FCAFC 10

51(xvii): Bankruptcy and Insolvency

Australian Securities and Investments Commission v Plymin (No 1) (2003) 46 ACSR 126, (2003) ACLC 700, [2003] VSC 123

51(xix): Aliens

Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7, (2003) 196 ALR 332

Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70, 197 ALR 241

Long & Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 218

NAGA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 224

Te v Ruddock [2003] FCA 661

P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1029

Mashood v Commonwealth of Australia [2003] FCA 1147

Hollis v Minister for Immigration and Multicultural Affairs [2003] FCA 1329, (2003) 202 ALR 483

Ruddock v Taylor [2003] NSWCA 262

51(xx): Corporations

Hui v Lane [2003] SASC 401

Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153, (2003) 200 ALR 607

Miller v University of New South Wales [2003] FCAFC 180, (2003) 200 ALR 565

Australian Securities and Investments Commission v Plymin (No 1) (2003) 46 ACSR 126, (2003) ACLC 700, [2003] VSC 123

51(xxiiiA): Maternity allowances, widows' pensions, child endowment etc.

Hui v Lane [2003] SASC 401

51(xxvii): Immigration

Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7, (2003) 196 ALR 332

Long & Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 218

Mashood v Commonwealth of Australia [2003] FCA 1147

Hollis v Minister for Immigration and Multicultural Affairs [2003] FCA 1329, (2003) 202 ALR 483

51(xxix): External Affairs

Petrotimor Companhia de Petroleos SARL v Commonwealth [2003] FCAFC 3

Toben v Jones [2003] FCAFC 137, (2003) 199 ALR 1

51(xxxi): Acquisition of property on just terms

South Australian River Fishery Association & Warrick v State of South Australia [2003] SASC 174, (2003) 227 LSJS 222

Pauls Ltd v Dwyer [2002] QCA 545, (2002) 43 ACSR 413

Energex Ltd v Elkington & Ors [2003] QCA 430

Petrotimor Companhia de Petroleos SARL v Commonwealth [2003] FCAFC 3

State of South Australia v Slipper MP [2003] FCA 1414

51(xxxv): Conciliation and arbitration

Miller v University of New South Wales [2003] FCAFC 180, (2003) 200 ALR 565

51(xxxvii): Matters referred by the States

Pauls Ltd v Dwyer [2002] QCA 545, (2002) 43 ACSR 413

Energex Ltd v Elkington & Ors [2003] QCA 430

51(xxxix): Incidental power

Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70, 197 ALR 241

Australian Securities and Investments Commission v Plymin (No 1) (2003) 46 ACSR 126, (2003) ACLC 700, [2003] VSC 123

52: Exclusive powers of the Parliament

Hyams v Victorian Electoral Commission [2003] VSC 156

Song v Coddington [2003] NSWSC 1196

53: Powers of the Houses in respect of legislation  
O'Meara v Cmr of Taxation [2003] FCA 217

55: Tax Bill  
O'Meara v Cmr of Taxation [2003] FCA 217

61: Executive power  
Petrotimor Companhia de Petroleos SARL v Commonwealth [2003] FCAFC 3

69: Transfer of certain departments  
Hyams v Victorian Electoral Commission [2003] VSC 156

Ch III: The Judicature  
A-G(Qld) v Fardon [2003] QCA 416  
Ferdinands v Chief of Army [2003] FCAFC 10  
Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70, 197 ALR 241  
Miller v University of New South Wales [2003] FCAFC 180, (2003) 200 ALR 565  
NAGA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 224  
Hicks v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 757  
New England Biolabs Inc v F Hoffman-La Roche AG [2003] FCA 1460  
Paynter v Dunne [2003] WASCA 201, (2003) FLC 93-153

71: Judicial power and Courts  
Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249  
Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153, (2003) 200 ALR 607  
Commonwealth of Australia v Lyon [2003] FCAFC 284  
Mitchforce v Industrial Relations Commission (2003) 124 IR 79, [2003] NSWCA 151

72: Judges' appointment, tenure and remuneration  
Ferdinands v Chief of Army [2003] FCAFC 10

73: Appellate jurisdiction of High Court  
Mitchforce v Industrial Relations Commission (2003) 124 IR 79, [2003] NSWCA 151  
Tryam Pty Ltd v Grainco Australia Ltd [2003] NSWSC 812

75: Original jurisdiction of High Court  
Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7, (2003) 196 ALR 332  
Commonwealth of Australia v Lyon [2003] FCAFC 284  
Hicks v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 757  
P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1029  
Thayanathan v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1054  
State of South Australia v Slipper MP [2003] FCA 1414

76: Additional original jurisdiction  
Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7, (2003) 196 ALR 332  
Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153, (2003) 200 ALR 607  
Commonwealth of Australia v Lyon [2003] FCAFC 284  
Hicks v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 757  
A Goninan & Co Ltd v Atlas Steels (Australia) Pty Ltd [2003] NSWSC 956

77: Power to define jurisdiction  
Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153, (2003) 200 ALR 607  
Commonwealth of Australia v Lyon [2003] FCAFC 284  
Australian Gas Light Co v Australian Competition & Consumer Commission (No 2) [2003] FCA 1229  
Director of Public Prosecutions (Cth) v Hunter [2003] VSCA 219  
Paynter v Dunne [2003] WASCA 201, (2003) FLC 93-153  
Julia Farr Services Inc v Hayes (2003) 25 NSWCCR 138, [2003] NSWCA 37  
A Goninan & Co Ltd v Atlas Steels (Australia) Pty Ltd [2003] NSWSC 956

80: Trial by jury

Ferdinands v Chief of Army [2003] FCAFC 10  
R v Ng (2002) 5 VR 257, [2002] VSCA 108  
R v O'Meara [2003] NSWCCA 250  
Chief Executive Officer of Customs v Pham [2003] NSWSC 971

92: Trade within the Commonwealth to be free

Cannavan v Lettvale Pty Ltd [2003] QCA 528  
Sportsodds Systems Pty Limited v State of New South Wales [2003] FCAFC 237  
Sportsodds Systems Pty Ltd v State of New South Wales [2003] FCA 992

109: Inconsistency

Tower Trust (SA) Ltd v Pincus [2003] SASC 355  
Cannavan v Lettvale Pty Ltd [2003] QCA 528  
Sportsodds Systems Pty Limited v State of New South Wales [2003] FCAFC 237  
Sportsodds Systems Pty Ltd v State of New South Wales [2003] FCA 992  
State of South Australia v Slipper MP [2003] FCA 1414  
PSL Industries Ltd v Simplot Australia Pty Ltd (2003) 174 FLR 111, [2003] VSCA 7  
Agrtrack (NT) Pty Ltd t/as Spring Air v Hatfield (2003) 174 FLR 395, [2003] VSCA 6  
Hyams v Victorian Electoral Commission [2003] VSC 156  
Paynter v Dunne [2003] WASCA 201, (2003) FLC 93-153  
Air Link Pty Ltd v Paterson (No 2) [2003] NSWCA 251  
Travel Compensation Fund v Blair [2003] NSWSC 720  
Song v Coddington [2003] NSWSC 1196

117: Rights of residents in States

Hedges v Australasian Conference Association Ltd [2003] NSWSC 1107

118: Recognition of laws etc of States

Julia Farr Services Inc v Hayes (2003) 25 NSWCCR 138, [2003] NSWCA 37

122: Territories

Ferdinands v Chief of Army [2003] FCAFC 10  
Sportsodds Systems Pty Ltd v State of New South Wales [2003] FCA 992

Queensland Constitution

Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249  
A-G(Qld) v Fardon [2003] QCA 416

1 I acknowledge the great assistance of my research assistant, Alison Barnett, in locating many of the cases set out in these schedules. I also acknowledge the assistance of the Chief Justices of all jurisdictions to whom I wrote asking that they identify the constitutional cases dealt within their jurisdictions in 2003 in order to ensure that I did not commit any egregious sins of omission. Ms Barnett also prepared the schedules to this paper.

2 Per The Hon Sir Anthony Mason AC KBE, "The Australian Constitution in Retrospect and Prospect", Reflections on the Australian Constitution, The Federation Press, 2003 at 9.

3 "The Right of Transsexual People to marry in Australia confirmed." Eithne Mills and James McConvill, (2003) 77(7) Law Institute Journal 58.

4 "Britain legislates for Transsexuals to Marry", FindLaw, www.findlaw.com.au/news, 11 February 2004.

5 Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 28-29 per Brennan, Deane and Dawson JJ.

6 Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 32.

7 Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 28 - 29 per Brennan, Deane and Dawson JJ; see also Gaudron J at 55 and McHugh J at 77. McHugh J referred to imprisonment of a person the subject of a deportation order as not ordinarily being punitive because the purpose of the imprisonment was to ensure the deportee was excluded from the community pending removal from the country and also to the lawful imprisonment of an alien while that person's application for entry was being determined because the purpose of the imprisonment was to prevent the alien from entering into the community until the determination is



made.

8 Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 36.

9 Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 per Mason CJ at 13 - 14, McHugh at 69.

10 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 per Gaudron J at 106.

11 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 per McHugh J at 121.

12 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 122.

13 Ibid.

14 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 122-123.

15 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 per Gummow J at 125.

16 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 131.

17 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 132.

18 Attorney General (Queensland) v Fardon [2003] QCA 416 at [18] per de Jersey CJ.

19 Attorney General (Queensland) v Fardon [2003] QCA 416 at [19].

20 Ibid.

21 Attorney General (Queensland) v Fardon [2003] QCA 416 at [21].

22 Attorney General (Queensland) v Fardon [2003] QCA 416 at [25].

23 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 132 cited by de Jersey CJ in Attorney General (Queensland) v Fardon [2003] QCA 416 at [26].

24 Attorney General (Queensland) v Fardon [2003] QCA 416 per de Jersey CJ at [27].

25 Attorney General (Queensland) v Fardon [2003] QCA 416 at [30].

26 Attorney General (Queensland) v Fardon [2003] QCA 416 at [35] - [38].

27 Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 71.

28 Attorney General (Queensland) v Fardon [2003] QCA 416 at [39].

29 Attorney General (Queensland) v Fardon [2003] QCA 416 at [42].

30 Attorney General (Queensland) v Fardon [2003] QCA 416 at [40].

31 Kruger v Commonwealth (1996-7) 190 CLR 1 at 161-2.

32 Attorney General (Queensland) v Fardon [2003] QCA 416 at [42].

33 Attorney General (Queensland) v Fardon [2003] QCA 416 per Williams JA at [95].

34 Attorney General (Queensland) v Fardon [2003] QCA 416 at [96] - [101].

35 Attorney General (Queensland) v Fardon [2003] QCA 416 at [102] - [104].

36 Attorney General (Queensland) v Fardon [2003] QCA 416 at [105] - [107].

37 Attorney General (Queensland) v Fardon [2003] QCA 416 at [76].

38 Attorney General (Queensland) v Fardon [2003] QCA 416 at [80].

39 Attorney General (Queensland) v Fardon [2003] QCA 416 at [83].

40 Attorney General (Queensland) v Fardon [2003] QCA 416 at [91].

41 Attorney General (Queensland) v Fardon [2003] QCA 416 at [91].

42 Attorney General (Queensland) v Fardon [2003] QCA 416 at [92].

43 Fardon v Attorney General for State of Queensland [2003] HCATrans 533 (12 December 2003).

44 Fardon v Attorney-General for the State of Queensland [2003] HCATrans 533. The appeal was heard on 2 March 2004 and judgment reserved. The Attorneys-General of the Commonwealth, New South Wales, Western Australia, South Australia and Victoria intervened to support the Queensland legislation.

45 R v Moffatt [1998] 2 VR 229 per Hayne J at 251.

46 Al Masri at [2].

47 An "unlawful non-citizen" is a "non-citizen in the migration zone who is not a lawful non-citizen": s 14(1) Migration Act 1958 (Cth). A "lawful non-citizen" is a "non-citizen in the migration zone who holds a visa" and an "allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities": s 13 of the Migration Act 1958 (Cth). Section 5 defines a "non-citizen" as a person who is not an Australian citizen.

48 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [1].

49 Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1009; (2002) 192 ALR 609.

50 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [20].

51 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [47] - [48].

52 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [80].

53 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [50].

54 See Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR

- 241 at [53].
- 55 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [63].
- 56 See Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [72].
- 57 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [74].
- 58 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [79].
- 59 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [81]; Al Masri v Minister for Immigration and Multicultural Affairs and Indigenous Affairs [2002] FCA 1009 at [38] per Merkel J.
- 60 Hardial Singh at 706.
- 61 See Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [109] - [110].
- 62 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [136].
- 63 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [173].
- 64 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 at [86] - [114].
- 65 Plaintiff S157/2002 v Commonwealth (2003) 195 ALR 24 at [30] per Gleeson CJ.
- 66 NAGA per Emmett J at [51].
- 67 Lim at 32.
- 68 NAGA at [54].
- 69 See MIMIA v Al Masri; MIMIA v Al Khafaji; HDB v Godwin & Ors [2003] HCATrans 305.
- 70 Behrooz is an appeal from the South Australian Supreme Court (2003) 172 FLR 9 which concerns the question whether conditions in prison can render imprisonment or detention unlawful, thus justifying either an escape or habeas corpus.
- 71 See Behrooz & Ors v Secretary DIMIA & Ors; SHDB v. Godwin & Ors; MIMIA V Al Khafaji [2003] HCATrans 456.
- 72 B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 per Nicholson CJ and O'Ryan J at [381].
- 73 B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 at [384].
- 74 B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 at [385].
- 75 B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 at [388].
- 76 B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 at [389].
- 77 B (Infant) and B (Intervenor) and the Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 per Ellis J at [426].
- 78 MIMA v B & Ors [2003] HCA Trans 380.
- 79 See Spigelman CJ at [3].
- 80 Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249; [2004] 1 Qd R 40 Williams JA at [1].
- 81 Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249; [2004] 1 Qd R 40 per Williams JA at [58].
- 82 Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249; [2004] 1 Qd R 40 per Williams JA at [32] - [36], [39].
- 83 Mulholland v Australian Electoral Commission, above, at [7].
- 84 Mulholland v Australian Electoral Commission (2002) 193 ALR 710.
- 85 Mulholland v Australian Electoral Commission (2002) 193 ALR 710 at 725 [61] - [62].
- 86 Mulholland v Australian Electoral Commission (2002) 193 ALR 710 at 728 [82].
- 87 Ibid.
- 88 Mulholland v Australian Electoral Commission (2002) 193 ALR 710 at 728 [83].
- 89 Mulholland v Australian Electoral Commission (2002) 193 ALR 710 at 729 [87] - [88].
- 90 Mulholland v Australian Electoral Commission (2002) 193 ALR 710 at 731 [96].
- 91 Lange at CLR 566 - 567.
- 92 Mulholland v Australian Electoral Commission [2003] FCAFC 91 at [17]; Lange (1997) 189 CLR 520 at 567 - 568, 561 - 562.
- 93 [2003] FCAFC 91 at [22].
- 94 Mulholland v Australian Electoral Commission [2003] FCAFC 91 at [30].
- 95 Mulholland v Australian Electoral Commission [2003] FCAFC 91 at [36].

- 96 Mulholland v Australian Electoral Commission [2003] FCAFC 91 at [39].
- 97 Mulholland v Australian Electoral Commission [2003] FCAFC 91 at [41] - [42].
- 98 See [2004] HCA Trans 007 and [2004] HCA Trans 008.
- 99 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 per Finn J at [63].
- 100 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 at [79].
- 101 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 at [98].
- 102 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 at [99].
- 103 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 at [103].
- 104 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 at [108].
- 105 Bennett v Human Rights & Equal Opportunity Commission [2003] FCA 1343 at [120] - [122].
- 106 Toben v Jones (2003) 199 ALR 1 per Carr J at [20].
- 107 Barley Marketing Board for New South Wales v Norman (1990) 171 CLR 182 at [199].
- 108 Sportodds at [29].
- 109 Sportodds at [34].
- 110 Sportodds at [34].
- 111 Sportodds at [35].
- 112 Sportodds at [36].
- 113 Sportodds at [47] - [49].