

# Does Chapter III of the Constitution protect substantive as well as procedural rights?

by The Hon Justice M.H. McHugh AC High Court of Australia.

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Sir Maurice Hearne Byers was one of the greatest advocates that the Australian Bar has produced. He was admitted to the New South Wales Bar in 1944 and took silk in 1960. He was Solicitor-General of Australia from 1973 to 1983. He was President of this Bar in 1966 and 1967.

Sir Maurice excelled in all fields of advocacy. But his great power of analysis, all round knowledge of the law and conversational style of advocacy combined to make him most effective when arguing points of law in an appellate court. He was an extraordinarily persuasive and lucid advocate. His arguments had a hypnotic effect on his opponents as well as on judges, frequently forcing or inducing his opponents to argue cases within the legal framework that Sir Maurice had impressed on the case. He was my opponent in the first High Court appeal I argued<sup>1</sup>. The subtlety and plausibility of his arguments induced me, as an inexperienced junior of just four years standing, to spend 90 per cent of my time combating his arguments instead of concentrating on my primary argument – which the Court ultimately accepted. It taught me the valuable lesson that, as an advocate, you cannot let your opponent dictate the structure of the argument.

Whatever field of law he was arguing, Maurice Byers mastered it. Those who think of him as primarily a constitutional lawyer should be reminded that, as a junior of five years standing, he had a remarkable win in the High Court in a criminal case. In *Greene v The King*<sup>2</sup>, he persuaded a majority of the Court that it was *not* an offence against the law of false pretences to falsely pretend to the buyer of goods that the accused intended and was in a position to deliver them within a specified period. The majority held that a representation of the existence of a present intention to perform a promise was not a representation of an existing fact. Understandably, the legislature quickly reversed the decision.

But it is as one of the greatest constitutional lawyers in the history of Australia that Sir Maurice will always be remembered. In 1985, when the federal government announced the formation of the Australian Constitutional Commission, he was the natural choice as its chairman. As solicitor-general, Sir Maurice appeared in 44 constitutional cases, winning 37 of them. Among his wins were the *Tasmanian Dams Case*<sup>3</sup> and the *Sea and Submerged Lands Case*<sup>4</sup>. But his success as a constitutional advocate did not cease upon his retirement as solicitor-general. At the private Bar, he successfully argued the *ACTV Case*<sup>5</sup> which established that, by necessary implication, the Constitution protects freedom of communication concerning political and

government matters. In his last constitutional case, he got a majority of the Court to hold that Chapter III of the Constitution prohibits a State legislature from investing its courts with any function or jurisdiction that might impair public confidence in those courts while exercising federal jurisdiction. That was in *Kable v Director of Public Prosecutions (NSW)*<sup>6</sup>.

It seems fitting, therefore, that the subject of this Address should concern Chapter III of the Constitution and the vexed question as to the extent that it protects substantive rights. I should, however, lodge a caveat of the kind that any serving judge should lodge when giving a public lecture about law<sup>7</sup>. The views that I express are the product of my own reading and reflection. For the most part, they have not had the advantage of counsel's argument that, so often, induces a judge to depart from any provisional view that he or she may hold about the law.

## Chapter III: 'The Judicature'

Chapter III of the Constitution contains 10 sections, ss71-80. Among other things, those sections create the federal judiciary, delineate the appellate and original jurisdiction of the federal judiciary, and provide for trial by jury in indictable matters. Of these ten sections, the most fundamental is s71. It declares that the judicial power of the Commonwealth is vested in the High Court 'and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'. The Court has often said that it is practicably impossible to give an exhaustive definition of judicial power<sup>8</sup>. But a 'widely-accepted statement' is that of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*<sup>9</sup> where he said that judicial power means:

the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.

On its face, Chapter III is merely a blue-print for the judicial arm of government. However, interpretation of Chapter III has revealed a number of procedural and substantive due process rights within its provisions<sup>10</sup>. At an early stage of federation, the High Court declared that s71 exhaustively defines the bodies that can exercise the judicial power of the Commonwealth. They must be courts that meet the requirements of ss71 and 72 of the Constitution. By 1918, it had been established that federal judicial power could not be exercised by the comptroller-general of customs<sup>11</sup>, the Inter-State Commission<sup>12</sup> or a court or tribunal created by Federal Parliament whose members were not appointed in accordance with s72 of the Constitution<sup>13</sup>. That view of Chapter III has been maintained. And as Quick and Garran point out, 'the legislature may *overrule* a decision, though it may not *reverse* it'<sup>14</sup>.

## Procedural rights

Few would now doubt that Chapter III protects some procedural rights. The distinction between procedural and



\* The inaugural Sir Maurice Byers Lecture was delivered by Sir Gerard Brennan on 30 November 2000 and published in *Bar News* Summer 2000/2001

substantive rights is not always easy to draw. In discussing procedural rights, I may occasionally be referring to what others regard as substantive rights. Speaking generally, a procedural right is a right of access to a method of enforcing substantive rights and duties<sup>15</sup>. A number of such procedural rights are evident in Chapter III. Thus, s73 of the Constitution provides for a right of appeal against the orders of the supreme courts and courts exercising federal jurisdiction. And as Deane and Gaudron JJ have said<sup>16</sup>, the effect of ss75(iii) and 75(v) of the Constitution is to:

ensure that there is available, to a relevantly affected citizen, a Chapter III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.

Another procedural right in Chapter III is the right to a jury where a person is tried on indictment<sup>17</sup>.

However, apart from the s75(v) right to obtain prerogative relief against Commonwealth officers, these procedural rights may be legislatively restricted without contravening Chapter III. Thus, the Parliament may require serious offences to be tried summarily, thereby avoiding jury trials. Since 1984, most appeals to the Court require a grant of special leave<sup>18</sup>, and there is no absolute right of appeal to the High Court.

#### Gradual acceptance that Chapter III protects due process rights

But there are some procedural rights in Chapter III that cannot be abolished or restricted. In *Re Tracey; Ex parte Ryan*<sup>19</sup>, Deane J said, correctly in my opinion, that s71 is 'the Constitution's only general guarantee of due process'. In *Leeth v The Commonwealth*<sup>20</sup>, Mason CJ, Dawson J and myself also said:

It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.

The procedural rights that are arguably beyond the power of the Parliament to change may be described as those rights which courts have traditionally regarded as fundamental to the effective functioning of judicial power. It is after all a 'short step'<sup>21</sup> from the constitutional requirement that judicial power can only be vested in the courts identified in s71 to the conclusion that Chapter III guarantees the procedural rights necessary for the exercise of that power.

It is only in recent years that it has become accepted that due process rights are guaranteed by the Constitution. In the *Australian Communist Party Case*<sup>22</sup>, Latham CJ<sup>23</sup>, Webb<sup>24</sup> and Fullagar JJ<sup>25</sup> emphatically rejected an argument that legislation dissolving the Communist Party and permitting the governor-general to declare certain persons disqualified from holding office in trade unions usurped the judicial power of the Commonwealth. Fullagar J<sup>26</sup> said that Chapter III only had a very limited role in protecting individual rights. If His Honour's views were accepted, it would seem that the Parliament could make any law invading the judicial function with impunity.

Instead, the weight of judicial opinion, in the last fifteen years, supports the judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*<sup>27</sup>. Their Honours

said that Commonwealth legislative power does not extend 'to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'<sup>28</sup>.

Thus, Gaudron J in *Re Nolan; Ex parte Young*<sup>29</sup>, emphasised that the protection that Chapter III gives to the judicial process includes:

open and public inquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.

But what of such procedural matters as discovery and interrogatories, the obtaining of particulars and the issuing of subpoenas? What of matters that straddle the borders of substance and procedure such as the right to a fair trial, the presumption of innocence, the right of an accused to refuse to give evidence, the onus and standard of proof in civil and criminal cases and the use of deeming provisions and presumptions of fact? Can the Parliament abolish or change these rights and matters? Would legislation purporting to do so be an invalid attempt by Parliament to dictate and control the manner of exercising the judicial power of the Commonwealth? Given statements made in cases decided in the last 15 years, the power of Parliament to affect these procedural and quasi-substantive matters in significant ways is open to serious doubt.

But what is meant by exercising 'judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'<sup>30</sup>? In *Polyukhovich v The Commonwealth*<sup>31</sup>, *Leeth v The Commonwealth*<sup>32</sup> and *Nationwide News Pty Ltd v Wills*<sup>33</sup>, Deane and Toohey JJ provided some answers to this question. They insisted that Chapter III does more than determine what bodies shall exercise the judicial power of the Commonwealth. Their Honours said that Chapter III dictated and controlled the manner of its exercise. The judicial power of the Commonwealth must be exercised in accordance with the 'traditional judicial process'<sup>34</sup>. In *R v Quinn; Ex parte Consolidated Food Corporation*<sup>35</sup>, Jacobs J also saw judicial power as being concerned with the 'basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom'. In *Polyukhovich*<sup>36</sup>, Deane J said that Chapter III was based 'on the assumption of traditional judicial procedures, remedies and methodology' and that the Constitution intended that the judicial power of the Commonwealth 'would be exercised by those courts acting as courts with all that notion essentially requires'.

If these statements are right, the power of Parliament to interfere with traditional procedural rights is narrower than once was assumed to be the case. I think it is likely that the view of Deane J will ultimately gain wide acceptance. Judicial power is vested in courts exercising federal jurisdiction to promote the supremacy of the law over arbitrary power<sup>37</sup>. Any law that might weaken the supremacy of the law in the administration of justice is suspect. For such a law to be valid, it must at least be justified as a reasonably proportionate means of implementing some other legitimate object within the constitutional powers of the Parliament. Professor Zines must be right when he says that: 'At least one test for determining the limits on legislative power

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arising from Chapter III is surely whether the statutory provision impairs the due administration of justice.<sup>38</sup>

As it happens, certain procedural and substantive rights can now be taken as constitutionally protected and judicially recognised.

### Implied right to legal representation

One important example of a due process right recognised as protected by Chapter III is the right to legal representation in certain situations. In *Dietrich v The Queen*<sup>39</sup>, our court reaffirmed that a court has power to stay proceedings in a criminal case where an unfair trial might otherwise result. That power extends to a case where an indigent accused is charged with a serious offence and, through no personal fault, is unable to obtain legal representation. It cannot be doubted that Chapter III protects the right to stay proceedings where the accused is unable to get legal representation to meet a serious criminal charge. That is because the right to a fair trial is entrenched in that Chapter, as Deane and Gaudron JJ, in separate judgments, pointed out in *Dietrich*<sup>40</sup>.

Once it is accepted that the Constitution guarantees the right of a fair trial, it must follow that Chapter III also protects litigants from legislative and other acts that might compromise the fairness of any civil or criminal trial in federal jurisdiction. In that regard, it is important to bear in mind that fairness 'transcends the content of more particularised legal rules and principles'<sup>41</sup>. It 'provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal [and civil] law'<sup>42</sup>.

The constitutional right to a fair trial in federal jurisdiction must also mean that there are constitutionally entrenched rights to an unbiased hearing, to obtain a stay of proceedings of a criminal charge where there has been unfair delay in prosecuting the charge<sup>43</sup> and to obtain a permanent or temporary stay of proceedings where there has been prejudicial publicity<sup>44</sup> or a contempt of court that could affect the jury's verdict. No doubt there are many more constitutional rights that flow from the constitutional right to a fair trial. As Mason CJ and I pointed out in *Dietrich*<sup>45</sup>, '[t]here has been no judicial attempt to list exhaustively the attributes of a fair trial'. We pointed out, however, that 'various international instruments and express declarations of rights ... have attempted to define, albeit broadly, some of the attributes of a fair trial'<sup>46</sup>. The rights recognised in those instruments and declarations may well become, if they are not now, guaranteed by Chapter III's grant of judicial power.

Given the modern view of Chapter III, it is difficult to see how the decision of the High Court in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*<sup>47</sup> can stand. There, a majority of the Court, with Dixon and Evatt JJ dissenting, held that it was not inconsistent with the judicial power of the Commonwealth for the Federal Court in Bankruptcy, if it had reason to believe a bankrupt was guilty of an offence against the Act, to charge the person with the offence and hear the charge summarily. The notion that a court could be both prosecutor and judge seems repugnant to the most basic ideas of judicial power. The facts in *Lowenstein* were far removed from the power of a judge to punish a person for contempt in the face of the court, a power that is

necessary to protect the integrity of the court's business.

### More controversial – whether substantive rights are protected by Chapter III

The foregoing discussion shows that the right to procedural due process is now guaranteed by Chapter III of the Constitution. Are more substantive rights, often enshrined in the constitutions of other countries, similarly entrenched? Professor Winterton has pointed out<sup>48</sup> that such rights could include criminal process rights, such as freedom from unreasonable search and seizure<sup>49</sup>, freedom from detention by police or official questioning and the privilege against self-incrimination. They might even include other civil and political rights, such as freedom of communication<sup>50</sup> and the right to equal treatment by the law<sup>51</sup>.

In the *Builders Labourers Case*<sup>52</sup>, Murphy J asserted that 'many of the great principles of human rights stated in the English constitutional instruments (the *Magna Carta*, the *Declaration of Rights* and the *Bill of Rights* 1688) such as those which require observance of due process, and disfavour cruel and unusual punishment' are embedded in the Constitution.

Our Court has already recognised that Chapter III protects some substantive rights. In its constitutional context, the term 'judicial power' has been interpreted as implying a separation of judicial power from legislative and executive power and as guaranteeing the absolute independence of the judiciary<sup>53</sup>. Chapter III has also been interpreted as creating a public right to have the judicial power of the Commonwealth exercised by judges and courts that do not perform tasks for the executive government that might impair public confidence in the impartiality of those judges and courts<sup>54</sup>. It also provides for protection of substantive rights by ensuring through s75(v) of the Constitution that officers of the Commonwealth are performing their tasks according to law<sup>55</sup>. Section 75(v) prevents the Parliament from declaring that the conduct of a Commonwealth officer is not examinable in the High Court. One of the great questions that remains to be decided is whether s75(v) also prevents the Parliament from declaring that the conduct of a Commonwealth officer in a relevant field is not justiciable in the High Court even though it is contrary to law.

The judgment of Deane and Toohey JJ in *Leeth v The Commonwealth*<sup>56</sup> provides the major premise for the conclusion that Chapter III protects substantive due process rights generally. Their Honours said:

[T]he doctrine of legal equality is, to a significant extent, implicit in the Constitution's separation of judicial power ... [I]n Chapter III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit ... the essential requirements of the curial process, including the obligation to act judicially. At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.

I will consider the arguments for and against three particular substantive rights that have been addressed by the High Court as being potentially enshrined by Chapter III.

#### 1. Protection from 'usurpation of judicial power' and 'legislative judgment'

Arguably, Chapter III guarantees the right of an individual to a judicial process that is free of a legislative 'usurpation of judicial power' or 'legislative judgment' about the facts and issues in the case. In *Liyanage v The Queen*<sup>57</sup>, the Privy Council held

'Our Court has already recognised that Chapter III protects some substantive rights.'

invalid legislation that had been passed specifically in relation to a group of dissidents who had been arrested following an attempted coup against the Ceylon government. This special legislation redefined the relevant offences and penalties applicable to the group, modified the laws of evidence, provided for trial by three judges sitting without a jury and retrospectively validated their arrest without warrant and their detention before trial. In a celebrated decision, the Privy Council held the law was invalid as a usurpation of judicial power that violated the separation of powers in the Ceylon Constitution.

The Privy Council said<sup>58</sup>:

Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings.

There is little doubt that this decision would be followed in Australia. Our Court has long recognised that no Australian legislature can improperly interfere with the federal judicial process<sup>59</sup>. In *Actors and Announcers Equity Association v Fontana Films Pty Ltd*<sup>60</sup>, the Court declared invalid a sub-section of the *Trade Practices Act 1974* (Cth) that deemed a union guilty of tortious conduct. Sub-section 45D(5) provided that, where two or more officers of a union engaged in concerted conduct, the union itself was deemed to engage in that conduct, unless it could show 'that it took all reasonable steps' to prevent the officers doing so. By a five to two majority, this provision was held to be invalid.

Murphy J said<sup>61</sup>:

Unlike a presumption, the purpose and effect of a deeming provision is to prevent any attempt, by either party, to prove the truth. Legislative provision for suppression of the truth in judicial proceedings is inconsistent with the exercise of judicial power and unconstitutional.

However, in *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation*<sup>62</sup>, Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ distinguished *Actors Equity* on the basis that the impugned provision in that case did not fall within the commerce power pursuant to which it was enacted. *Ludeke* suggests that Parliament can enact deeming provisions provided that they are within the head of power pursuant to which they are enacted. But given the statements in later cases concerning the extent of judicial power, the matter cannot be taken as finally settled.

At present, High Court case law also upholds the power of Parliament to change the onus of proof<sup>63</sup> in a criminal case or to declare that a state of facts is presumed to exist<sup>64</sup>. In *The Commonwealth v Melbourne Harbour Trust Commissioners*<sup>65</sup>, Knox CJ, Gavan Duffy and Starke JJ said that a law does not usurp judicial power simply because it regulates 'the method or burden of proving facts'. But the cases that hold that the Parliament can do so were decided before the modern view of Chapter III had gained currency. Whether they would now be regarded as correctly decided must be an open question.

As Dr Fiona Wheeler has pointed out<sup>66</sup>, the report of the Constitutional Commission over which Sir Maurice presided makes clear that the presumption of innocence is an important element in ensuring that an accused is not tried unfairly. She argues that:

[I]t should be accepted that where Parliament has placed upon the defendant the persuasive burden of proof in relation to an element of a federal offence, this is (prima facie) to ask a court exercising federal

jurisdiction to conduct an unfair criminal trial because of the risk that ... a defendant will be convicted despite the existence of a reasonable doubt as to her or his guilt.

If the presumption of innocence is a necessary concomitant of a fair trial, as human rights instruments indicate, it must be debateable whether the Parliament can try a person for a serious criminal offence and put any onus of proof on that person. Similarly, it must be debateable whether the Parliament can provide for a lower standard of proof in a criminal trial than proof beyond reasonable doubt.

However, the privilege against self-incrimination, although seen as a fundamental common law principle, has not so far been seen as beyond federal legislative power to impair or abolish<sup>67</sup>. In *Sorby v Commonwealth*<sup>68</sup> Gibbs CJ said:

The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action.

Nevertheless, the traditional view of the judicial process may invalidate any attempt by the Parliament to compel an accused person to give evidence or, in the course of giving evidence, to answer questions that might incriminate him or her. Nor does it seem consistent with the traditional view of the judicial process



that the Parliament could require a person to incriminate herself or himself in a non-judicial environment and then use the answers so obtained to convict the accused.

#### Bills of attainder and retroactive laws

More recently, the question of Parliament interfering with the judicial process has been brought into the spotlight through the High Court considering bills of attainder and retroactive laws. Acts of Attainder and Acts of Pains and Penalties are laws that punish a person without a judicial determination of guilt. Such laws were common in the 16th, 17th and 18th centuries.

In *Polyukhovich v The Commonwealth*<sup>69</sup>, six judges agreed that the Australian Constitution prevented the Federal Parliament from enacting a bill of attainder because it was inconsistent with the separation of judicial power provided for in Chapter III of the Constitution. It amounted to a declaration of guilt by the Parliament and was, therefore, an improper exercise by Parliament of judicial power. It would leave to a court only the duty of determining whether the person charged was a person (or

a member of the class) specified in the Act. If Parliament could pass such legislation, it could enact a legal rule and simultaneously declare that a particular person or group had broken it.

Given these statements on bills of attainder, the decision in *R v Richards; Ex Parte Fitzpatrick and Browne*<sup>70</sup> is difficult to defend. By resolution of the House of Representatives, Fitzpatrick and Browne were declared 'guilty of a serious breach of privilege' and for the 'offence' were committed to gaol. The offence consisted in publishing articles that the Committee of Privileges found were 'intended to influence and intimidate a member ... in his conduct in this House'. Our Court upheld the imprisonment on the basis that s49 of the Constitution gave each House the privileges of the House of Commons. In an oral judgment, the Court simply said that the separation of powers doctrine was not a sufficient reason for giving s49 a restrictive meaning<sup>71</sup>. But surely reconciling ss49 and 71 required greater analysis than the Court gave to the problem. The resolution was an attainder, adjudging two men to be guilty of an offence and committing them to prison. It was an exercise of judicial power. No attempt was made to justify how or why the general language of s49 should be given ascendancy over s71 of the Constitution. Moreover, since *ACTV*<sup>72</sup> and *Lange*<sup>73</sup>, there is reason to think that the unrestricted right of Parliament to punish persons for criticisms of members of Parliament is inconsistent with the freedom of communication protected by the Constitution.

More controversial is the view that a retroactive criminal law is a breach of the separation of powers and necessarily a usurpation of judicial power. In *Polyukhovich*<sup>74</sup>, the retroactive law in question was the *War Crimes Act 1945* (Cth) which provided that a person was guilty of an indictable offence if that person committed, in Europe, between 1 September 1939 and 8 May 1945, a 'war crime'. A majority of the court held that the Act was not inconsistent with the separation of powers.

Mason CJ, Dawson J and myself pointed out that the Act penalised persons according to a generally applicable rule, rather than, as in the case of a bill of attainder, specifying persons or groups by name or identifiable characteristics<sup>75</sup>. Further, we found that the Act did not make any determination of fact. Instead, the requirement of proof of conduct and the necessary state of mind which constitutes murder was 'too particular' in its nature to amount in these circumstances to a 'disguised description of group membership'<sup>76</sup>. Mason CJ said that<sup>77</sup>:

'There is nothing in the statements which I have quoted to suggest that an exercise of judicial power necessarily involves the application to the facts of a legal principle or standard formulated in advance of the events to which it is sought to be applied.'

Toohy J also held that the Act did not constitute a bill of attainder and did not amount to a legislative judgment as to guilt. However, he did deal with the general international abhorrence of retroactive criminal law, seemingly on the basis that it was relevant to Chapter III. He said retroactive laws would not



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necessarily offend Chapter III, but he would not 'share dicta which may be thought to suggest that an ex post facto law can never offend Chapter III'<sup>78</sup>. He found it unnecessary to pursue that issue because the Act was not 'offensively retroactive' in relation to the plaintiff. Murder was universally condemned and constituted a grave moral transgression<sup>79</sup>.

Deane and Gaudron JJ, on the other hand, held that the Act was incompatible with Chapter III of the Constitution, saying that a retroactive criminal law was a usurpation by Parliament of judicial power and a legislative judgment of guilt<sup>80</sup>. For Deane and Gaudron JJ, there was no relevant difference between a law that declared that persons who had certain characteristics were guilty of an offence and a law that provided that persons who had committed certain acts were guilty of an offence<sup>81</sup>.

Deane and Gaudron JJ's views regarding the validity of retroactive criminal laws are controversial because, unlike the United States Constitution<sup>82</sup>, there is no mention of how retroactive laws should be dealt with in the Australian Constitution.

To sum up, in *Polyukhovich* there was a clear majority holding that a bill of attainder per se will be inconsistent with the reservation of judicial power in Chapter III. On the other hand, an implied constitutional guarantee against retroactive criminal laws, as supported by Deane and Gaudron JJ, has not yet won majority support. The early High Court decision of *R v Kidmar*<sup>83</sup> – which held that the Commonwealth did have power to enact a retroactive criminal law – would seem to remain good law.

#### ***Kable v Director of Public Prosecutions (NSW)***

The issue of legislative judgment and usurpation of judicial power also arose in *Kable v Director of Public Prosecutions (NSW)*<sup>84</sup>. There, the *Community Protection Act 1994* (NSW) empowered the Supreme Court of New South Wales to make preventive detention orders. However, s3 limited the making of detention orders to the case of a man named Gregory Kable. The Act was passed because Kable, while in gaol for the manslaughter of his wife, had written letters allegedly threatening the safety of his children and his deceased wife's sister.

Sir Maurice, who appeared for Kable in the High Court, argued that the Act was invalid because it singled out an individual person for detention in the absence of any conviction. He argued that this amounted to a 'legislative judgment' or a 'legislative usurpation of judicial

power' within the meaning of *Liyana v The Queen*<sup>85</sup>.

But the Constitution Act 1902 (NSW) embodies no 'separation of powers'<sup>86</sup>. Accordingly, in the absence of any 'separation of powers' at the State level, an attack on the *Community Protection Act* based on the concept of 'legislative judgment' without more had to fail. However, a majority of the Court invoked the 'incompatibility doctrine'. We held that the function conferred on the Supreme Court by the *Community Protection Act* was 'incompatible' with the exercise of federal jurisdiction invested in the Supreme Court and would undermine public confidence in that court.

Citing authority<sup>87</sup>, I said that it is implicit in Chapter III that a

State cannot legislate in a way that has the effect of violating 'the principles that underlie Chapter III'<sup>88</sup>. I went on to say that<sup>89</sup>:

At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired. The Act therefore infringed Chapter III of the Constitution and was and is invalid.

Once it was established that aspects of the doctrine of separation of powers, such as protection from usurpation of judicial power, were relevant, the invalidity of the Act was readily apparent.

## 2. Freedom from detention

A second substantive right arguably implicit in Chapter III is the right of the citizen to freedom from detention except pursuant to judgment by a court. In *Chu Kheng Lim v Minister for Immigration*<sup>90</sup> Brennan, Deane and Dawson JJ in a joint judgment recognised this right. Their Honours suggested<sup>91</sup> that there existed 'a constitutional immunity from being imprisoned ... except pursuant to an order by a court' – since, apart from certain 'exceptional cases'<sup>92</sup>:

the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

The exceptions noted by the majority included an accused's custody pending trial, the detention of those who are mentally ill or have an infectious disease, and imprisonment by a military tribunal or for contempt of Parliament<sup>93</sup>. And *Lim* itself decided that the aliens power extended to authorising the detention of an alien for the purpose of deportation or expulsion.

If there is a Chapter III right of freedom from detention, then Commonwealth legislation purporting to authorise detention outside the excepted categories may be invalid as an attempted exercise of the judicial power of the Commonwealth. Arguably, federal legislation authorising the detention of a criminal suspect for interrogation, for example, may be invalid.

Gaudron J's judgment in *Lim* was more cautionary. Her Honour said that she was 'not presently persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Chapter III'<sup>94</sup>. My judgment was also cautionary. I said<sup>95</sup> that a law that authorised the detention of an alien for the purpose of deportation or processing an entry permit might be invalid if it went beyond what was reasonably necessary to effect that purpose. That is to say, detention without a curial order will not usurp judicial power if it is reasonably and appropriately adapted to serving some other legitimate object within the Parliament's powers.

Nevertheless, despite these cautionary statements, *Lim* is a significant decision. It provides a foundation for the conclusion that, except in limited circumstances, the detention of citizens against their will may be constitutionally permissible only when determined by a court and only when the determination conforms to the traditional procedures and safeguards of the judicial process.

'More controversial is the view that a retroactive criminal law is a breach of the separation of powers and necessarily a usurpation of judicial power.'

### *Kruger v The Commonwealth*

If the involuntary detention rule exists, *Kruger v The Commonwealth*<sup>96</sup> shows that the exceptions to it are not closed. The issue in *Kruger* was whether the *Aboriginals Ordinance 1918* (NT) was valid insofar as it authorised the forced removal of Aboriginal children from their families and communities without a court order. Toohey, Gaudron and Gummow JJ rejected the plaintiffs' argument on the ground that the ostensible concern of the ordinance with Aboriginal welfare precluded any finding that the confinement of Aboriginals was 'punitive'. Gummow J<sup>97</sup> said that:

The powers of the Chief Protector to take persons into custody and care under the 1918 Ordinance were, whilst that law was in force, and are now, reasonably capable of being seen as necessary for a legitimate non-punitive purpose (namely the welfare and protection of those persons) rather than the attainment of any punitive objective.

Of more general application, Gummow J also noted that '[t]he categories of non-punitive, involuntary detention are not closed'<sup>98</sup>. Indeed, having regard to the breadth of exceptions acknowledged in *Lim* and in *Kable*, Gaudron J<sup>99</sup> now doubted whether any constitutional requirement that involuntary detention be subject to judicial 'due process' was maintainable at all.

Nevertheless, despite the finding that the ordinance in *Kruger* did not infringe Chapter III, and despite the reservation of Gaudron J, it is still arguable that a limited right against detention without judicial due process exists. Further case law will be needed to define how limited this right is.

### 3. Equality argument

From the separation of judicial power in Chapter III, some judges have inferred a third substantive right in that Chapter. It is the guarantee of the equal application of federal law. If the Constitution requires a court to administer equal justice, then, so the argument runs, the court can only do so if the substantive rules created by the legislature require the 'like treatment of persons in like circumstances' and an appropriately 'different treatment of persons in different circumstances'<sup>100</sup>.

*Leeth v The Commonwealth*<sup>101</sup> is the seminal case. The issue was whether a section of the Commonwealth Prisoners Act 1967 (Cth) was valid. It provided that, where a person was to be sentenced to imprisonment for a federal offence and the local law of the State or Territory required prison sentences to specify a minimum non-parole period, the federal offender was to be sentenced according to that local law. As a result, federal offenders in different States and Territories could receive different minimum non-parole periods. The section was said to be unconstitutional because it breached an alleged implied prohibition against the 'unequal treatment of equals'<sup>102</sup> or because it contravened s71 of the Constitution which 'contemplate[d] that in substantive matters the law to be applied will be the same throughout Australia'<sup>103</sup>.

Only Gaudron J based her decision on the ground that the Act was in breach of s71. She declared that equal justice was fundamental to the judicial process<sup>104</sup>. The Act directed courts to treat convicted persons in different ways according to the place of trial, and thus required them to exercise power otherwise than in accordance with 'the judicial process'. Her Honour said<sup>105</sup>:

All are equal before the law. And the concept of equal justice - a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such - is fundamental to the judicial process ... [The legislation here confers] a



power ... that treats people unequally. As such its exercise is inconsistent with the judicial process.

In comparison, Deane and Toohey JJ evince what Professor Zines<sup>106</sup> calls a more 'general equality' argument. Their Honours said<sup>107</sup>:

[T]he doctrine of legal equality is, to a significant extent, implicit in the Constitution's separation of judicial power ... [It] is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.

The joint majority judgment of Mason CJ, Dawson J and myself rejected both the general equality argument and that based on Chapter III. In relation to the equality ground, we said<sup>108</sup>:

'There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.'

In relation to the s71 argument, we said<sup>109</sup> that the Act was not an attempt to cause the court to act contrary to the judicial process. We said:

[To] speak of judicial power in this context is to speak of the function of a court rather than the law which a court is to apply in the exercise of its function.

Like the other members of the majority, Brennan J found that the legislation was not inconsistent with s71 of the Constitution, although his reasoning was closely tied to the circumstances of the case and did not amount to a rejection of the views of the dissenting justices.

A majority of the court in *Leeth* was therefore of the view that the principle of the separation of powers does not limit the Parliament's power to make substantive rules of law that, in the view of the court, treat people in an unequal or discriminatory manner.

### *Kruger v The Commonwealth*

In *Kruger v The Commonwealth*<sup>110</sup>, the *Aboriginals Ordinance 1918* (NT) was also challenged on equality grounds. Gaudron J reaffirmed<sup>111</sup> her own analysis in *Leeth* and repudiated the broader 'equality' doctrine envisaged by Deane and Toohey JJ in that case. Dawson J<sup>112</sup>, with whom I agreed, and Gummow J<sup>113</sup> also rejected the approach of Deane and Toohey JJ in *Leeth*. Similarly, Brennan CJ held that there was no generalised requirement of 'substantive equality' which could assist the Aboriginal plaintiffs in *Kruger*<sup>114</sup>. Only Toohey J defended<sup>115</sup> the position that he and Deane J had taken in *Leeth*.

### Conclusion

The cumulative effect of the judgments of Dawson, Gaudron

and Gummow JJ and myself in *Kruger* appears to mean that the 'doctrine of legal equality' suggested by Deane and Toohey JJ in *Leeth* has been decisively rejected. This supports Professor Winterton's view that the 'judicial power of the Commonwealth' should not generally be held to include substantive rights<sup>116</sup>. It is notable that the United States Constitution, upon which our separation of judicial power was modelled<sup>117</sup>, does not view the right of legal equality as an essential feature of 'judicial power'. Rather, the United States Constitution contained no guarantee of equality until the adoption in 1868 of the Fourteenth Amendment, guaranteeing 'the equal protection of the laws'. Moreover, the framers of the Australian Constitution considered a provision modelled on the Fourteenth Amendment (at least in relation to the States), and specifically rejected it at the Melbourne Constitutional Convention in 1898<sup>118</sup>.

On the other hand, the more limited Chapter III doctrine proposed by Gaudron J, and at least partially endorsed in *Kruger* by Dawson J and myself, appears to be still open. On that basis, despite the plaintiffs' failure in *Kruger*, the combined effect of the judgments in that case with those in *Leeth* and *Polyukhovich* suggest that implications protective of personal liberty will be drawn from the conception of Chapter III as an 'insulated, self-contained universe of Commonwealth judicial power'<sup>119</sup>. *Kable* is perhaps the most dramatic example of this with its protection against usurpation of judicial power and legislative judgment.

Gaudron J's comments that legislation requiring courts to apply the law to 'facts invented by Parliament' would impose 'a travesty of the judicial process' and thereby contravene s 71 of the Constitution<sup>120</sup> also show that federal courts cannot and should not be unconcerned as to the substantive content of the law they apply. Professor Winterton is a critic of substantive due process. But he agrees<sup>121</sup> that it 'would be contrary to accepted notions of judicial power'<sup>122</sup> to require a court 'to enforce laws inconsistent with civilised standards of humanity and justice'. He gives as an example 'Commonwealth legislation imposing barbarous sentences'.

Inevitably, this issue will raise questions about the tension that exists from the effect of the negative implications, arising from the separation of judicial power from legislative power, on laws that are otherwise literally within a head of constitutional power. This is a debate that has been waged since federation and will inevitably continue in the future.

The constitutional law of Australia will be the poorer for not having the wisdom and views of Sir Maurice Hearne Byers on the questions that are and will be involved in this debate.

- 1 *Scala v Mammolitti* (1965) 114 CLR 153.
- 2 (1949) 79 CLR 353.
- 3 *The Commonwealth v Tasmania* (1983) 158 CLR 1.
- 4 *New South Wales v The Commonwealth* (1975) 135 CLR 337.
- 5 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
- 6 (1996) 189 CLR 51.
- 7 cf the remarks of Sir John Laws, 'Judicial remedies and the Constitution' (1994) 57 *Modern Law Review* 213 at 213.
- 8 *Cominos v Cominos* (1972) 127 CLR 588 at 606; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 67; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257; *Nicholas v The Queen* (1998) 193 CLR 173 at 233 [148].
- 9 (1909) 8 CLR 330 at 357.
- 10 Lumb and Moens, *The Constitution of the Commonwealth of Australia*, 6th ed (2001) at 7.
- 11 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
- 12 *New South Wales v The Commonwealth* (1915) 20 CLR 54.
- 13 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.
- 14 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 722 (emphasis in the original).
- 15 Nygh and Butt (eds), *Butterworths Australian Legal Dictionary* (1997) at 1129.
- 16 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205.
- 17 Section 80.
- 18 Lumb and Moens, *The Constitution of the Commonwealth of Australia*, 6th ed (2001) at 254.
- 19 (1989) 166 CLR 518 at 580.
- 20 (1992) 174 CLR 455 at 470.
- 21 Zines, 'A judicially created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 at 168.
- 22 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
- 23 (1951) 83 CLR 1 at 172-173.
- 24 (1951) 83 CLR 1 at 234-235.
- 25 (1951) 83 CLR 1 at 268-269.
- 26 (1951) 83 CLR 1 at 268-269.
- 27 (1992) 176 CLR 1 at 27.
- 28 cf Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.
- 29 (1991) 172 CLR 460 at 496. Similarly, I have said that '[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power': *Grollo v Palmer* (1995) 184 CLR 348 at 379.
- 30 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.
- 31 (1991) 172 CLR 501 at 607.
- 32 (1992) 174 CLR 455 at 486-487.
- 33 (1992) 177 CLR 1 at 70.
- 34 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70.
- 35 (1977) 138 CLR 1 at 11.
- 36 (1991) 172 CLR 501 at 607.
- 37 cf Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 322.
- 38 Zines, *The High Court and the Constitution*, 4th ed (1997) at 204.
- 39 (1992) 177 CLR 292.
- 40 (1992) 177 CLR 292 at 326, 362.
- 41 *Dietrich v The Queen* (1992) 177 CLR 292 at 326.
- 42 *Dietrich v The Queen* (1992) 177 CLR 292 at 326.
- 43 *Jago v District Court (NSW)* (1989) 168 CLR 23.
- 44 *R v Glennon* (1992) 173 CLR 592.
- 45 (1992) 177 CLR 292 at 300.
- 46 (1992) 177 CLR 292 at 300.
- 47 (1938) 59 CLR 556.
- 48 Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 200-201.
- 49 cf United States Constitution, Fourth Amendment.
- 50 cf United States Constitution, First Amendment; see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
- 51 cf United States Constitution, Fourteenth Amendment.
- 52 *Victoria v Australian Building Construction Employees' and Builders*

'Kable is perhaps the most dramatic example of this with its protection against usurpation of judicial power and legislative judgment.'

- Labourers' Federation* (1982) 152 CLR 25 at 109. His Honour's position varies quite dramatically from that expressed by Latham CJ in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. At 168, Latham CJ poured cold water on the suggestion that notions of due process should be imported into the words 'judicial power':
- The case was argued by some counsel as if the Commonwealth Constitution contained provisions corresponding to those contained in certain other constitutions. In the Constitution of the United States of America there are provisions preventing the enactment of laws impairing the obligation of contracts or depriving persons of life, liberty or property without due process of law. In the Canadian Constitution 'property and civil rights within the province' is a subject as to which the provincial legislatures are declared to have exclusive power ... None of these provisions appear in the Constitution of the Commonwealth, and in my opinion there is no basis whatever for the attempt to create such provisions by arguments based upon the judicial power and s 92 of the Constitution and the natural dislike of suppressive laws.
- 53 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540.
- 54 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- 55 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; see also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 684-685. See also Kennett, 'Individual rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581.
- 56 (1992) 174 CLR 455 at 486-487. See also *Re Nolan*, Ex parte Young (1991) 172 CLR 460 at 497 per Gaudron J.
- 57 [1967] 1 AC 259.
- 58 [1967] 1 AC 259 at 290.
- 59 *Huddart Parker v Moorehead* (1909) 8 CLR 330; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 346; *Hammond v The Commonwealth* (1982) 152 CLR 188; *Sorby v The Commonwealth* (1983) 152 CLR 281; *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.
- 60 (1982) 150 CLR 169.
- 61 (1982) 150 CLR 169 at 214-215. See also His Honour's judgment in *R v Bowen*; Ex parte *Amalgamated Metal Workers & Shipwrights Union* (1980) 144 CLR 462 at 480.
- 62 (1985) 159 CLR 636 at 651-652.
- 63 *Williamson v Ah On* (1926) 39 CLR 95; *Milicevic v Campbell* (1975) 132 CLR 307.
- 64 *R v Hush*; Ex parte *Devanny* (1932) 48 CLR 487.
- 65 (1922) 31 CLR 1 at 12.
- 66 'The doctrine of separation of powers and constitutionally entrenched due process in Australia', (1997) 23 *Monash Law Review* 248 at 272.
- 67 In *Hammond v The Commonwealth* (1982) 152 CLR 188 at 203, Brennan J expressly left open the question whether the Commonwealth Parliament could deprive a person, charged with a Commonwealth offence, of immunity from self-incrimination. However, the High Court has now recognised such power: *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298-299, 308, 314; see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
- 68 (1983) 152 CLR 281 at 298.
- 69 (1991) 172 CLR 501.
- 70 (1955) 92 CLR 157.
- 71 (1995) 92 CLR 157 at 165-166.
- 72 (1992) 177 CLR 106.
- 73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
- 74 (1991) 172 CLR 501.
- 75 (1991) 172 CLR 501 at 535-536, 647-649, 721-722.
- 76 (1991) 172 CLR 501 at 686 per Toohey J.
- 77 (1991) 172 CLR 501 at 533.
- 78 (1991) 172 CLR 501 at 690.
- 79 (1991) 172 CLR 501 at 690.
- 80 (1991) 172 CLR 501 at 612-613, 704-705.
- 81 See Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 at 171.
- 82 See United States Constitution, Art 1, s9, cl3, 'No Bill of Attainder or ex post facto law shall be passed'.
- 83 (1915) 20 CLR 425. In that case the defendants were charged with 'conspiracy to defraud the Commonwealth'. This offence had been added to the *Crimes Act 1914* (Cth) by amendment in 1915, but the amending Act required that it 'be deemed to have been in force' from 29 October 1914.
- Most of the judgments specifically held that the Commonwealth did have power to enact a retroactive criminal law.
- 84 (1996) 189 CLR 51.
- 85 [1967] 1 AC 259. See Byers Q.C. for the appellant (1996) 189 CLR 51 at 53-54.
- 86 *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees' and Builders Labourers' Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.
- 87 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 314-315.
- 88 (1996) 189 CLR 51 at 115; see also at 107 per Gaudron J.
- 89 (1996) 189 CLR 51 at 124. But see the dissenting judgment of Dawson J at 86, where His Honour said that 'the concept of incompatibility is derived from the separation of powers and does not have a life of its own independent of that doctrine ... New South Wales has not adopted that doctrine so that there can be no incompatibility between the exercise of judicial power and the exercise of executive or legislative power by a court of that State.'
- 90 (1992) 176 CLR 1.
- 91 (1992) 176 CLR 1 at 28-29.
- 92 (1992) 176 CLR 1 at 27.
- 93 (1992) 176 CLR 1 at 28.
- 94 (1992) 176 CLR 1 at 55.
- 95 (1992) 176 CLR 1 at 65-66.
- 96 (1997) 190 CLR 1.
- 97 (1997) 190 CLR 1 at 162; see also at 85 per Toohey J.
- 98 (1997) 190 CLR 1 at 162.
- 99 (1997) 190 CLR 1 at 110.
- 100 See Zines, *The High Court and the Constitution*, 4th ed (1997) at 205.
- 101 (1992) 174 CLR 455.
- 102 (1992) 174 CLR 455 at 457 per Jackson Q.C..
- 103 (1992) 174 CLR 455 at 458 per Jackson Q.C..
- 104 (1992) 174 CLR 455 at 502.
- 105 (1992) 174 CLR 455 at 502-503.
- 106 See Zines, *The High Court and the Constitution*, 4th ed (1997) at 205.
- 107 (1992) 174 CLR 455 at 486-487.
- 108 (1992) 174 CLR 455 at 467.
- 109 (1992) 174 CLR 455 at 469.
- 110 (1997) 190 CLR 1.
- 111 (1997) 190 CLR 1 at 113-114.
- 112 (1997) 190 CLR 1 at 63.
- 113 (1997) 190 CLR 1 at 153.
- 114 (1997) 190 CLR 1 at 44-45.
- 115 (1997) 190 CLR 1 at 96-97.
- 116 See Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 207.
- 117 See Dixon, *Jesting Pilate* (1965) at 52.
- 118 See Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future directions in Australian Constitutional Law* (1994) 185 at 205.
- 119 Blackshield and Williams, *Australian constitutional law and theory*, 2nd ed (1998) at 1164.
- 120 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704; see also the comments of Murphy J in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 214.
- 121 Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 207.
- 122 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 689 per Toohey J.