

## **THE VICTORIAN GOVERNMENT AND THE JURISDICTION OF THE SUPREME COURT**

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### **I. INTRODUCTION**

Recent events have directed attention to the place of the Supreme Court of Victoria in the State constitutional structure, as argument has emerged in the press and elsewhere about legislation reducing the Court's jurisdiction. This article considers the legislation which has led to this controversy, the significance of Victoria's distinctive constitutional entrenchment of Supreme Court jurisdiction, and other aspects of the constitutional position of the Supreme Court.

### **II. THE PLACE OF THE SUPREME COURT**

The judges of the Supreme Court of Victoria have included some pointed comments in their recent annual reports to the State Governor. Some of these have to do with finance, such as the judges' misgivings about the Court's budget, a

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concern they share with their counterparts in New South Wales.<sup>1</sup> Others have to do with the theme of this article, the Court's jurisdiction:

The existence and nature of the body politic of the State depend upon the capacity of the Supreme Court to exercise its function as the State's court of general jurisdiction. It must follow that any whittling down of the Court's jurisdiction tends to impair that capacity.<sup>2</sup>

The judges have made comments of this sort under both the current Liberal-National Party Government and its Labor predecessor.<sup>3</sup>

This particular concern of the judges, about jurisdiction, is part of a more general concern they have expressed about the position of the Court. As the judges put it in their report for 1993:

...some of the difficulties encountered by the Court during the year and referred to above appear to be indicative of an increasing tendency in some quarters of the Public Service to regard this Court as simply another administrative unit within the Department of Justice.<sup>4</sup>

Two ghosts would have stirred if they read those words. An early dispute between one of the Supreme Court judges and the Victorian Government concerned the need for the judge, Sir Redmond Barry, to get the permission of the Government before he went on leave. As the dispute continued, it also took in the power of the Government to suspend or remove judges by an order of the Governor in Council, without the usual resolution in both Houses of Parliament, and the right of the judges to communicate directly with the Governor without going through the Attorney-General. The Attorney-General was George Higinbotham, a future Chief Justice of the Supreme Court, and his notorious reference to the judge as an "officer in his Department" shows how old some of these issues are:

...the Attorney-General cannot permit any officer in his Department - no matter how eminent the position of the officer may be, or however independent the law may have made him in the exercise of his official functions - to place himself outside the limits of the system of responsible government, and communicate with the Attorney-General on an official subject by means of letters addressed to the Governor in person.<sup>5</sup>

The Government won the immediate argument, although they may have wished their relations with the judges were better the following year, when the dispute was still dragging on and the Supreme Court became involved in a separate crisis over the blocking of supply.

This episode was one in a series of disputes over the tenure of colonial judges in Australia and other British Colonies. As well as this, like other controversies over the years between the Government and the Supreme Court, it illustrates a more persistent issue: the place of the Supreme Court in the structure of government.<sup>6</sup>

1 Supreme Court of Victoria, *Annual Report*, 1993 at 2-5; Supreme Court of New South Wales, *Annual Review*, 1994 at 51-4.

2 Supreme Court of Victoria, *Annual Report* 1988 at 19.

3 *Ibid* at 16-27; Supreme Court of Victoria, note 1 *supra* at 16-17.

4 Supreme Court of Victoria (1993), *ibid* at 19.

5 Higinbotham to Governor, 16 April 1864, Victoria, Parliament, Legislative Assembly, *Votes and Proceedings*, 1864-5, vol 2, paper no C2 at 6-7.

6 See Z Cowen and DP Derham, "The Constitutional Position of the Judges" (1956) 29 *ALJ* 705.

Barry's attempt to communicate directly with the Governor, and the Attorney-General's resistance, symbolised disagreement over the status of the Court. Was it an equal and co-ordinate institution of government, level with the Ministry and the Parliament, or was it under the umbrella of the Attorney-General's Department, as Higinbotham implied?

There are features in the *Constitution Act* 1975 (Vic) (the *Constitution Act*) that go to support the judges when they describe the Court as "the third and independent arm of Government in this State",<sup>7</sup> but these are qualified by the powers of the State Parliament and the State Government. The Court is established by the *Constitution Act*. The provisions setting it up and governing its judges and jurisdiction have a part of the Act to themselves, as do the Crown, the Parliament, and the Executive. These provisions deal with the Court's jurisdiction. They also deal with the tenure of Supreme Court judges, although surprising obscurity still surrounds some of the powers of the government and the Parliament in this regard.

### III. DISMISSAL OF JUDGES

Under s 77(1) of the *Constitution Act*, a judge of the Supreme Court can be removed by the Governor on an address from both Houses of Parliament. Unlike s 72(ii) of the Commonwealth Constitution, the Victorian provision does nothing to describe or limit the grounds on which Parliament may ask for a judge's removal. It follows that Parliament can remove a judge for any reason it chooses, not for misbehaviour or incapacity alone. The Queensland Parliament used a corresponding power to remove Justice Angelo Vasta of the Queensland Supreme Court in 1989, highlighting, in the process, some of the problems of the grounds and procedures involved.<sup>8</sup> In the 19th century, the Victorian Government also asserted an independent power of suspension of judges, since removed by legislative amendments.<sup>9</sup>

The wording of s 77(1) leaves open the independent possibility that the government might try to terminate a judge's commission for misbehaviour, without votes in the two Houses of Parliament. Under the opening words of the subsection, the judges' commissions "continue and remain in full force during their good behaviour", subject to compulsory retirement and the power of the Governor to act on an address from Parliament. It could be argued that misbehaviour therefore terminates judges' commissions without the need for any action by Parliament.<sup>10</sup> Concerning a power of this sort, Edward Jenks wrote in the 1890s that "under present circumstances it could hardly be exercised without raising great constitutional difficulties", and the difficulties would be even greater today.<sup>11</sup>

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7 Note 2 *supra* at 16.

8 A Woodward, "Queensland: Removal of a Supreme Court Judge" (1990) 71 *Parliamentarian* 212.

9 *Constitution Act* 1975 (Vic), s 77; Z Cowen, "A Historical Survey of the Victorian Constitution, 1856 to 1956" (1957) 1 *MULR* 9 at 46.

10 Compare with Law Book Company, *The Laws of Australia*, title 19.4, para 31.

11 E Jenks, *The Government of Victoria (Australia)*, George Robertson (new issue, 1897) p 318.

Any government would doubtless come under strong pressure not to avoid taking such a question to Parliament, whatever legal possibilities might be open to it.

There are, however, other possibilities for the dismissal of Supreme Court judges, which may affect the position of the Court. These require consideration in some detail. A piece of received English legislation, the *Colonial Leave of Absence Act 1782*,<sup>12</sup> known as *Burke's Act*, gave an additional power to the Governor in Council to remove, or "amove", judges on grounds of absence, neglect or misbehaviour, without any action by Parliament. The first resident judge of the New South Wales Supreme Court in Melbourne was removed using this procedure in 1841, as were two other Australian judges, and it seems that this power of the Governor in Council survived the changes in the tenure of Supreme Court judges, made on the introduction of local self-government in the 1850s.<sup>13</sup> Certainly the English Law Officers of the Crown believed the power was still available in Victoria in 1866, and that the enactment of the first Victorian *Constitution Act*,<sup>14</sup> which contained a provision matching s 77(1) of the *Constitution Act 1975*, had not excluded it.<sup>15</sup>

If still in force in Victoria, *Burke's Act* would provide a dismissal procedure additional to those allowed under s 77 of the *Constitution Act*. As an Act of paramount force, applying to the colonies by express words, *Burke's Act* was not included in the general repeal of received English legislation by the *Imperial Acts Application Act 1980* (Vic),<sup>16</sup> and indeed it could not be repealed by Victorian legislation until s 3 of the *Australia Act*<sup>17</sup> ended the application of the *Colonial Laws Validity Act 1865* (UK) to laws passed by State Parliaments.

However, *Burke's Act* was repealed by British legislation in 1964, at least so far as it was part of the law in force in Britain, and it is possible that this repeal extends to the Australian States.<sup>18</sup> No Australian request or consent was legally necessary for the 1964 Act to have this effect, because of the exclusion of matters of purely State legislative power from the request and consent rule in s 4 of the *Statute of Westminster 1931* (UK). The 1964 Act, though, did not refer specifically to the operation outside Britain of the Acts it repealed, and, in the light of *Bistrice v Rokov*<sup>19</sup> and *Ukley v Ukley*,<sup>20</sup> it remains unclear whether the general repeal carried out by the 1964 Act would show sufficient intention to affect the operation of *Burke's Act* in the former colonies to which it originally applied. If anything, *Bistrice* and *Ukley* suggest that the repeal does not operate in Victoria, and that a more specific indication of intention would be required for it to do so. If so, then, curious though it seems, *Burke's Act* is still in force in Victoria, subject to

12 22 Geo 3 c 75 (UK).

13 AC Castles, *An Australian Legal History*, Law Book Company (1982) pp 340-2.

14 18 & 19 Vic c 55 (UK, 1855).

15 Cardwell to Darling, 25 Jan 1866 (and enclosures), Victoria, Parliament, Legislative Assembly, *Votes and Proceedings*, 2nd sess 1866, paper no C8 at 13-14; *Constitution Act 1855* (Vic), s 38.

16 See *Imperial Acts Application Act 1980* (Vic), s 4.

17 *Australia Act 1986* (Cth); *Australia Act 1986* (UK).

18 Compare with C Wheeler, "The Removal of Judges from Office in Western Australia", (1979-82) 14 *UWALR* 305 at 316-17.

19 (1976) 135 CLR 552.

20 [1977] VR 121.

the possibility of implied repeal by the provisions on judicial tenure in the *Constitution Act*.

If the alternative procedure under *Burke's Act* were inconsistent with s 77 of the *Constitution Act* to any extent, then, putting aside one possibility discussed below, *Burke's Act* would prevail as an Act extending to Victoria under ss 1 and 2 of the *Colonial Laws Validity Act* 1865 (UK) at the time of the enactment of the *Constitution Act* in 1975 (before the *Australia Act* removed these restrictions on State legislative power). An inconsistency of this sort would arise if s 77 were now held to imply that the procedures it set out were the only ones for the removal of Supreme Court judges. This would, however, be different from the English Law Officers' opinion on the predecessor of s 77 in the original *Constitution Act* of 1855.

The possibility which may produce a different result, is that s 77 of the *Constitution Act* may be read as prevailing over *Burke's Act* by virtue of s 58 of the *Interpretation of Legislation Act* 1984 (Vic). Section 58 was added to the *Interpretation of Legislation Act* by the *Constitution (Amendment) Act* 1994 (Vic). The section purports to give each provision of Victorian legislation enacted before the commencement of the *Australia Act* the effect it would have had if the *Australia Act* had been in operation at the time of its enactment. If the *Australia Act* had been in force when s 77 was enacted, the Victorian provision would have prevailed over any inconsistent British legislation of paramount force, other than the *Commonwealth of Australia Constitution Act* 1900 (UK), the Commonwealth Constitution, the *Statute of Westminster* 1931 (UK), and the *Australia Act* itself. This would have been the result of the operation of ss 3 and 5 of the *Australia Act*, which ended the restrictions imposed on State Parliaments by the *Colonial Laws Validity Act* 1865 (UK) and the rule set out there that colonial laws repugnant to British laws of paramount force were invalid. Section 77 would then have prevailed over *Burke's Act* to the extent of any inconsistency. Whether s 58 of the *Interpretation of Legislation Act* 1984 (Vic) is capable of having this effect is a question that goes beyond the scope of this paper.

The upshot of these various possibilities is that an address from both Houses of Parliament to the Governor is the most likely, and surely the most constitutionally proper, means of removing a Supreme Court judge. However, the law is not as clear as it could be that this is the only valid way in which a judge could be removed.

#### IV. APPOINTMENTS AND ADMINISTRATION

Appointments to the Supreme Court are made by the Governor with the advice of the Executive Council, and hence by the government, under s 75(5) of the *Constitution Act*. The government also has effective control of the Court's budget. Only the judges' salaries and pensions are set under the *Constitution Act* itself. The rest of the Court's operating expenses come from ordinary government budget allocations. By contrast, the Victorian Parliament now has a separate annual appropriation Act of its own, a change introduced in 1992 with the intention of

giving the parliamentary machinery a greater degree of independence from the Government and the budget process.<sup>21</sup>

The Victorian Attorney-General has announced plans to establish new arrangements that will give State courts more autonomy in administrative affairs, following the example of Federal courts and some courts in other States. However, she envisages that the Department of Justice will still have responsibility for “matters of key administrative policy”, and the funding for court administration will still come from an appropriation within the Department’s budget.<sup>22</sup> The Government will retain its ultimate responsibility for court administration:

Although in their *judicial* capacity the courts are accountable solely through the processes of judicial review, the exercise of their *administrative and managerial* capacities will be accounted for, so far as is consistent with their constitutional status, through the executive, to Parliament.

In making a claim on the moneys provided by the public the administration of the judicial arm<sup>23</sup> will be in a similar position to other administrative organs of government.

A greater power remains in the background in these routine relations between the Supreme Court and the Victorian Government. A government with absolute majorities in both Houses of Parliament can change any feature of the State constitutional structure, putting aside the constraints imposed by the Commonwealth Constitution, Commonwealth legislation and the *Australia Act*. This freedom covers the courts, the Governor, and the structure and composition of the Parliament itself. The main limit on this freedom over the long history of the Supreme Court has not been legal, but traditional. Governments have been constrained by ideas of what it was proper or desirable to do with the Supreme Court, keeping them well within the outer boundaries of the powers they could exercise when backed up by absolute majorities in the Parliament.

## V. ENTRENCHMENT OF JURISDICTION

The general jurisdiction of the Supreme Court is conferred by s 85(1) of the *Constitution Act*:

Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

Section 85(3) then adds:

The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the *Supreme Court Act* 1986.

21 Victoria, Legislative Assembly 1992, *Debates*, vol 406, p 71. See also vol 408, p 90.

22 J Wade, “The Law, the Lawyers and the Courts” (1994) *Victorian Bar News* (no 90) 14 at 24; Queensland Electoral and Administrative Review Commission, *Report on Consolidation and Review of the Queensland Constitution*, 1993 at 120-5.

23 J Wade, *ibid* at 24 (italics in original).

In the words of Phillips JA, this second sub-section "confirms, and authorises the exercise of the Court's jurisdiction, powers and authorities".<sup>24</sup> Some powers and authorities may be distinct from jurisdiction properly so-called, although all three will comprehensively be referred to as 'jurisdiction'.<sup>25</sup> The Court's jurisdiction comes from other sources as well, such as cross-vesting legislation, grants of Federal jurisdiction, and the sections of the *Constitution Act Amendment Act 1958* (Vic) which give the Court the power to hear election cases as a court of disputed returns.<sup>26</sup> The Court's power to award *habeas corpus* is confirmed by s 86 of the *Constitution Act*.

Section 85 of the *Constitution Act* is entrenched, in that any provision by which it may be repealed, altered or varied is void under s 18(2A) if it is not passed with the support of an absolute majority of the members of each House of Parliament. This, however, is not the only special requirement for laws altering s 85. With some exceptions, a provision is not to be taken to repeal, alter or vary s 85 unless it satisfies procedural conditions set out in s 85(5). The Act in question must expressly refer to s 85 "in, or in relation to," the provision, the Act must expressly state an intention to repeal, alter or vary s 85, and the Member introducing the Bill for the Act (or the Member's delegate) must make a statement to the relevant House of Parliament of the reasons for repealing, altering or varying s 85. Section 85(5)(c) prescribes the time at which the statement must be made during the Bill's passage through the House concerned. The Court will not inquire into the sufficiency of the reasons given.<sup>27</sup> If the steps set out in s 85(5) are not taken, the provision in question will be merely ineffective to vary the Court's jurisdiction under s 85, and the rest of its operation, if any, will continue. But if absolute majorities are not obtained under s 18(2A), the provision repealing, altering or varying s 85 is void.<sup>28</sup>

Provisions which directly repeal or directly amend s 85 are not required to satisfy these conditions, thanks to an exception in the opening words of s 85(5). The difference between direct and indirect amendments for this purpose is not entirely clear, but a change in the text of s 85 would doubtless count as a direct amendment, while a change in the effect of the section through enactment of subsequent inconsistent legislation, without amendment of the text, would count as an indirect amendment.<sup>29</sup> Nor does the Act affect the power of Parliament to give

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24 *The Broken Hill Proprietary Company Ltd v Rex Dagi and ors* (the *BHP* case) (unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Brooking, Tadgell, Phillips and Hayne JJA, 15 December 1995) at 46, per Phillips JA.

25 *Ibid* at 35, per Winneke P; at 35, per Hayne JA; at 3-5, per Tadgell JA; at 32, per Brooking JA.

26 *Constitution Act Amendment Act 1958* (Vic), ss 280, 300.

27 The *BHP* case, note 24 *supra* at 36-7, per Hayne JA; at 52, per Phillips JA (at 40-1, per Winneke P concurring and at 32, per Brooking JA concurring).

28 *Ibid* at 45, per Phillips JA.

29 In the *BHP* case, note 24 *supra*, Brooking JA took the view that "directly" for this purpose meant expressly, not (only) textually: at 28. This would imply that a provision counts as a direct amendment if it expressly alters the effect of s 85 while making no change in the text. But, if this is the case, Acts that state their intention to repeal, alter or vary s 85 under s 85(5) may amount to direct amendments, so taking them outside the requirements of s 85(5) and defeating its requirement for statements of reasons. It may be possible to avoid this conclusion by holding that a direct amendment (excluded from s 85(5) by the opening words of the sub-section) is different from an express alteration or variation (which is within the sub-section

the Court additional jurisdiction or powers, dealt with specifically by s 85(4). The creation of a summary offence is deemed not, in itself, to vary s 85, but privative clauses excluding or restricting judicial review, and grants of any parts of the Supreme Court's jurisdiction to other courts, have no effect to limit the Court's powers unless s 85(5) is satisfied.<sup>30</sup>

It is possible that jurisdiction given to the Court by other Acts of Parliament does not have this protection, and could be removed without following special procedures. The jurisdiction of other Victorian courts can also be changed by ordinary legislation.

The effect of these provisions is that all reductions in the jurisdiction of the Supreme Court under s 85, and all other amendments of s 85, must be passed with absolute majorities in both Houses of Parliament. Where the reduction in the Court's jurisdiction is made by an indirect repeal or amendment of s 85, the Act in question must include specific reference to s 85, and the reasons for the reduction must be explained in Parliament. In this way, Parliament's attention will be drawn to reductions in the Supreme Court's jurisdiction, and to other changes in the words or effect of s 85, either because the Bill in question repeals or amends the section directly, or because it refers expressly to s 85 and satisfies the other requirements of s 85(5). Attracting attention is part of the purpose of the entrenchment mechanism, as the Victorian Attorney-General has pointed out.<sup>31</sup> Other indirect amendments of s 85 which do not reduce the Court's jurisdiction, such as indirect amendments of s 85(5), must also satisfy the special requirements of the sub-section.<sup>32</sup>

## VI. THE CONTEXT OF ENTRENCHMENT

Victoria is the only Australian State which has entrenched the jurisdiction of its Supreme Court, and this part of its *Constitution Act* represents something of an experiment. In 1975, provisions concerning the Supreme Court, including the section giving the Court its basic jurisdiction, became one of the parts of the new *Constitution Act* which could be amended only with absolute majorities in both Houses of Parliament. The 1975 Act was introduced as a consolidation which made only minimal substantive changes to the law, and the purposes and effects of this new entrenchment were not debated in Parliament at the time.<sup>33</sup>

Results of the entrenchment of the Supreme Court's jurisdiction became a problem in the 1980s, when it was found that some Acts reducing the Court's jurisdiction had been passed without absolute majorities, throwing their validity into doubt. Some Acts, for example, gave other tribunals exclusive power over

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under s85(5)(a)). The need for this subtlety could be removed by treating only changes in the text of s 85 as direct repeals or amendments.

30 *Constitution Act* 1975 (Vic), s 85(6)-(8).

31 J Wade, "Attorney-General's Column" (1994) *Victorian Bar News* (no 90) 9 at 12-13.

32 *The BHP case*, note 24 *supra* at 41-2, per Phillips JA.

33 Victoria, Legislative Assembly 1975, *Debates*, vol 321, pp 4962-8, vol 322, p 5819-35; Legislative Assembly 1975, *Debates*, vol 322, pp 5865-76, 6206-20.



particular kinds of disputes, by implication taking away the power of the Supreme Court in those cases. This would have been an implied reduction of the Court's s 85 jurisdiction, and, without absolute majorities, the whole of the new Act, of which the exclusive jurisdiction provision might be only a small part, would have been invalid under the *Constitution Act* as it stood at the time.

Validating legislation and an investigation by the Parliament's Legal and Constitutional Committee followed, leading to amendments to the *Constitution Act* in 1991.<sup>34</sup> These amendments created the new requirement that indirect variation of s 85 must follow the special procedure set out in s 85(5) in order to be effective. As well as making other changes to s 85 itself, these amendments altered s 18 of the *Constitution Act* with the effect that failure to obtain absolute majorities for any changes to s 85 (whether the amendments are direct or indirect) now invalidates only the provisions varying s 85, not the whole of the amending Act as in the past.

In most of the States, the only constitutional provisions dealing with the courts have to do with judicial tenure, and not with jurisdiction. These provisions commonly lay down the procedure for dismissal of Supreme Court judges.<sup>35</sup> The New South Wales provisions go further, and cover judges of other courts, and the reappointment of the holders of any judicial offices which are abolished.<sup>36</sup> These provisions of the New South Wales *Constitution Act* were entrenched as a result of one of the referendums held at the same time as the 1995 State election, and any changes to them must now be approved by referendum.<sup>37</sup> In Tasmania, judges' tenure is controlled by separate legislation, outside the *Constitution Act* 1934 (Tas).<sup>38</sup>

The original jurisdiction of the High Court under s 75 of the Commonwealth Constitution can be removed only by referendum. This includes jurisdiction to review many decisions of Commonwealth government officers, which therefore cannot be taken away by legislation, although legislation can limit review in some ways.<sup>39</sup> This power of the High Court stands as a safeguard, while the corresponding jurisdiction of the Federal Court is used far more often in practice. That Federal Court jurisdiction is not entrenched by the Constitution, and can be changed by ordinary legislation; other High Court jurisdiction not given directly by the Constitution itself is in the same position. Where Commonwealth legislation removes rights of action, the guarantee of just terms for acquisition of property arising under s 51(31) of the Commonwealth Constitution also becomes relevant. A statute barring rights of action can act as an acquisition of property under these provisions.<sup>40</sup> Analogous provisions have been treated in Victoria as

34 *Constitution (Supreme Court) Act* 1989 (Vic); Victoria, Parliament, Legal and Constitutional Committee, *Report to Parliament upon the Constitution Act* 1975, March 1990; *Constitution (Jurisdiction of Supreme Court) Act* 1991 (Vic).

35 *Constitution Act* 1867 (Qld), ss 15-16; *Constitution Act* 1934 (SA), ss 74-5; *Constitution Act* 1889 (WA), ss 54-5.

36 *Constitution Act* 1902 (NSW), ss 52-6.

37 *Constitution (Entrenchment) Amendment Act* 1992 (NSW).

38 *Supreme Court (Judges' Independence) Act* 1857 (Tas).

39 See for example, *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232.

40 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

variations of court jurisdiction to award damages; the breadth of the Victorian concept of provisions varying jurisdiction is discussed below.

Because of the Victorian Supreme Court's wide jurisdiction under s 85 of the *Constitution Act*, its basic power is to hear whatever actions the law recognises in Victorian cases, putting aside complications arising from Federal jurisdiction, cross-vesting and the creation of special tribunals. If there is an action known to the general law, the basic jurisdiction gives the Court power to hear it. The width of this jurisdiction, and its entrenchment, strengthen the opportunity to go to court to get a remedy for a breach of the law, and reduce the problems of showing that any particular court has jurisdiction to hear the case.

The tradition of the common law countries is that it is wrong to exclude certain cases or certain people from the ordinary courts of law, although there have been exceptions, including the operation of military law or, further back, ecclesiastical law. The rule of law is the most familiar principle bound up in this. A V Dicey described one of the meanings of the rule of law in this way:

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals...

As well as this, scope of jurisdiction is an element of the Court's independence. The Victorian Parliament's Legal and Constitutional Committee has noted this:

The Chief Justice argued that without the entrenchment of the actual jurisdiction of the Court, the entrenchment in the *Constitution Act* of other provisions guarding the independence of the Court would be 'hollow' (Written Submission, pp 4-5). With this comment, the Committee agrees: what is the point of guaranteeing a court independence, without guaranteeing it a jurisdiction within which that independence is to be exercised?<sup>41</sup>

The principles at stake show the significance of the ways in which that jurisdiction can be changed.

## VII. RECENT LEGISLATION

The number of provisions arguably affecting the Victorian Supreme Court's jurisdiction has been high under the present State Government and its predecessor. The judges of the Court have commented on this:

In what has become a regrettably familiar feature of the *Annual Report*, we note once more the erosion of the jurisdiction of the Supreme Court by legislation of the Victorian Parliament.<sup>42</sup>

In 1994, the Victorian Bar Council and the Law Institute of Victoria stated their opposition to the prevalence in such Acts of privative clauses ousting judicial review.<sup>43</sup>

41 AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan (4th ed, 1893) p 192.

42 Victoria, Parliament, Legal and Constitutional Committee, note 34 *supra* at 16.

43 Supreme Court of Victoria, *Annual Report*, 1994 at 13.

Since 1991, these Acts have typically included one or more substantive provisions which affect rights, avenues of appeal or other aspects of Supreme Court proceedings, followed somewhere in the Act by a so-called 's 85 clause'. The s 85 clause is designed to protect the operation of the substantive provisions of the Act by declaring an intention to repeal, alter or vary s 85 of the *Constitution Act*, as required by s 85(5). It would also be possible, and perhaps preferable, to include this statement of intention in the substantive provisions that affect the Court's jurisdiction, but the general practice has been to put the statement of intention and the substantive provisions in separate sections.<sup>45</sup> Without this and the other steps required by s 85(5), the relevant substantive provisions will not be taken to vary the jurisdiction of the Court, and any attempt in them to limit or exclude that jurisdiction will be ineffective.

Exact figures for the number of Acts affecting the Court's jurisdiction are difficult to calculate for the period from the first entrenchment of the jurisdiction in 1975 to 1991, when the special procedure introduced for Bills of this sort made them easier to identify. This difficulty is compounded by disagreement about the kinds of provision that should be counted as reductions in jurisdiction. Nevertheless, the present Attorney-General has listed 120 Acts passed during the term of the previous ALP Government, from 1982 to October 1992, which varied the Supreme Court's jurisdiction in ways that would have required the use of a s 85 clause under the interpretation of s 85 followed from 1991 to 1995.<sup>46</sup> The list includes some Acts dealing with reservations of Crown land that would not now attract the use of a s 85 clause, following the change in drafting practice noted by the Scrutiny of Acts and Regulations Committee in November 1995.<sup>47</sup> In short, from 1982 to 1992 the Parliament passed 120 Acts that would probably have been counted as reductions in Supreme Court jurisdiction (hence requiring s 85 clauses) had they all been introduced after the special procedure for enactment of such provisions became law in 1991. This makes it fair to compare the figure of 120 Acts with the figures for the number of Acts with s 85 clauses passed since 1992.

During the term of the present Kennett Liberal-National Party Government, from 1992 to the end of 1995, the Parliament has passed 78 Acts containing declarations of intention to vary the jurisdiction of the Supreme Court under s 85(5). Details are found in Appendix One below. In effect, this figure represents the number of Acts that have been taken by the drafters to reduce the jurisdiction of the Court in this period.

The variety and complexity of the Acts passed in both periods makes it difficult to summarise their provisions briefly. However, the great majority of the Acts affecting the Court's jurisdiction contain provisions excluding or limiting liability, while a much smaller number contain traditional privative clauses excluding or limiting judicial review of administrative decisions.

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44 Law Institute of Victoria, "Lawyers fight back: Ousting judicial review from the courts" (1994) 68 *LJ* 632.

45 See the *BHP* case, note 24 *supra*, per Hayne JA at 36.

46 Victoria, Parliament, Scrutiny of Acts and Regulations Committee, *Discussion Paper No 1: Section 85 of the Constitution Act 1975*, May 1995 at 155-62.

47 *Id.*, *Alert Digest No 13* of 1995 at 7.

The entrenchment mechanism in the *Constitution Act* makes provisions affecting the Victorian Supreme Court's jurisdiction much more noticeable than comparable provisions in other States. This makes it difficult to compare the recent Victorian legislation with the position elsewhere, where Parliament can make indirect reductions in Supreme Court jurisdiction without drawing any particular attention to what is done or identifying the changes in any special way. One reason, although not the only one, for the recent attention to this subject in Victoria is that every reduction in the Court's jurisdiction must be noted in Parliament. Even provisions which few, if any, would previously have linked with the Supreme Court have now been categorised as indirect reductions in the Court's jurisdiction and passed with absolute majorities.

Searching for the key words that recur in privative clauses and no-compensation clauses does nevertheless show that they are common in New South Wales legislation, to take just one other State for comparison. Appendix Two below lists provisions in 68 New South Wales Acts introduced from 1982 to 1995 and still in force which exclude or limit judicial review or exclude or limit liability. Some of these Acts contain both privative and no-compensation clauses. The list is by no means exhaustive, and it does not include provisions of some other kinds (such as miscellaneous restrictions on rights of action) which have sometimes been taken in the Victorian context as variations of the jurisdiction of the Supreme Court. The figures from the two States can be compared only with caution, for these reasons. Nevertheless, the New South Wales figure is still much lower than the total of 198 Acts passed by the Victorian Parliament from 1982 to 1995 containing provisions that have been taken to vary the jurisdiction of the Supreme Court (other than grants of new jurisdiction).

### VIII. LEGISLATIVE POLICY

One question raised by the recent Victorian legislation is whether, as a question of legislative policy, Parliament should attempt to extinguish rights of action or close avenues of review at all in such Acts. That is, putting aside all questions of Supreme Court jurisdiction, is it desirable for the substantive provisions of the Acts to exclude liability or judicial review? This question is independent of the entrenchment of the Court's jurisdiction, although it is because of that entrenchment that it has been highlighted recently. The question can arise in different ways.

In some cases, the likelihood that an Act will give rise to claims for compensation or other legal action is low. For example, some provisions facilitate the changes Parliament makes from time to time in the use and classification of miscellaneous pieces of Crown land. Provisions excluding rights to compensation have long been used in this sort of Act, and they are little more than a precaution so long as any changes affecting the land have been properly prepared and do not extinguish private interests.

Provisions in this class generally have little effect, if any, on jurisdiction or rights to compensation, but this has led the Parliament's Scrutiny of Acts and

Regulations Committee, on the one hand, and drafters and responsible Ministers, on the other, to take quite different views of their desirability.<sup>48</sup> To the Committee, if the Bill has little or no effect on existing rights, there is correspondingly little or no need for an exclusion of compensation. The Government's response has been to insist on no-compensation provisions in order to be sure of preventing any legal actions which may still be possible in spite of assessments that they are not likely.<sup>49</sup> A related question, discussed below, is whether no-compensation provisions in this class need to be accompanied by a s 85 clause; the Government and the Committee debated this in conjunction with the question of whether compensation should be excluded by these Bills.

Other reductions in the Court's jurisdiction have been motivated by problems with court procedure and the desire to provide alternative remedies outside the courts. This was the case, for example, with two of the Acts at the centre of the difficulties with unnoticed indirect amendments to the s 85 jurisdiction in the 1980s. These gave exclusive jurisdiction to the Retail Tenancies Tribunal and the Administrative Appeals Tribunal, creating special avenues for particular kinds of proceedings arising under the Acts.<sup>50</sup> Legislation of this sort generally preserves a supervisory role for the courts by allowing appeals against tribunal decisions on points of law.

A third category of legislation taking away rights of action raises rather different questions. Sometimes, court action on the subject-matter of the Act is quite likely. In these cases, Parliament is not excluding liability or review merely out of an abundance of caution. Nor is it establishing a comprehensive scheme as an alternative to litigation. Instead, it is limiting or excluding court action for the sake of other policies or objectives which it deems to be more important.

Many provisions of this last sort remove causes of action or limit remedies without providing a substitute. The Scrutiny of Acts and Regulations Committee noted that most of the clauses it examined in 1993 were of this kind.<sup>51</sup> These provisions have a long history, and they have been used in Victoria since at least 1854.<sup>52</sup> Among other issues, they raise questions of compensation for extinguishment or compulsory acquisition of property rights. There is no constitutional guarantee of such compensation under Victorian law, apart from whatever operation s 85 itself has in such cases. The statutory provisions for compensation under the *Land Acquisition and Compensation Act 1986* (Vic) can be modified or excluded by later legislation.

The Australian Grand Prix Bill 1994 (Vic) contained what are perhaps the best-known examples of this type of clause. Among other things, this Bill gave the Australian Grand Prix Corporation immunity from liability for compensation in relation to its management and control during the race period of the race area designated for the running of the Australian Formula One Grand Prix in

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48 Note 46 *supra* at 125-35.

49 Victoria, Parliament, Scrutiny of Acts and Regulations Committee, *Alert Digest No 3 of 1995*, at 2-5, 20-2; *Alert Digest No 5 of 1995*, at 19-21.

50 *Retail Tenancies Act 1986* (Vic); *Planning and Environment Act 1987* (Vic).

51 Victoria, Parliament, Scrutiny of Acts and Regulations Committee, *First Annual Report*, 1994 at 31.

52 *Postage Act 1854* (Vic), s 59.

Melbourne. More ambiguously, the Act also appeared to give the Corporation immunity in relation to its construction and other works in the race area. The Bill included a s 85 clause to give effect to these immunities.<sup>53</sup>

The Scrutiny of Acts and Regulations Committee, in which the Government has a majority, found that some of the immunities given by the Australian Grand Prix Bill may have trespassed unduly on rights and freedoms. Examples included the clauses covering construction works in the race area and the suspension of any other rights and interests in the race area during the race period were cited as examples.<sup>54</sup> The Bill also gave the Grand Prix Corporation other protections, including an exemption from freedom of information laws for the contract giving Victoria the race, and exemption from planning and environment protection legislation. The Committee found some of the remaining immunities and exemptions given by the Bill desirable and appropriate, and was unable to reach a decision on others.<sup>55</sup> The Government amended the Bill as a result of the Committee's report, removing some, but not all, of the Committee's grounds for concern.<sup>56</sup>

Occupants of houses near the new Grand Prix race track subsequently claimed that construction works caused cracking and other damage. The Government paid compensation to many home owners, but, to the extent that the Act succeeds in excluding liability, any payments made in this way depend on the Government's good will, and could not be ordered by the courts.<sup>57</sup>

The justification for privative and no-compensation clauses in this third category commonly depends on the greater good which is supposed to follow from removing the delays, costs and liability for compensation which may arise from court action. For example, when discussing the Melbourne Sports and Aquatic Centre Bill 1994 (Vic), which established the Centre as part of the redevelopment of Albert Park for the Australian Formula One Grand Prix, the responsible Minister said:

Any claims for compensation based on the former use of the land could delay or prevent a change in the use or status of Crown land that is for the benefit of the community as a whole. It is in the public interest for the rights on the site to be clarified to allow this major development to be built. This facility will significantly enhance the amenity of the area to park users, local residents and Melburnians generally.<sup>58</sup>

A characteristic of recent legislation in this category has been the appearance of a small group of Bills giving immunity from review to particular decisions made in the course of wide-ranging programs restructuring the operations of State and local

53 Australian Grand Prix Bill 1994 (Vic), clauses 28, 30, 42, 50. The no-compensation clause, clause 42, applied to things done under or arising out of clause 28, requiring the Corporation not to undertake works without a licence, but not to things done under or arising out of clause 31, giving the Corporation power to enter Albert Park and carry out works there. Hence the ambiguity about immunity for construction work.

54 See clauses 28, 30 and 42.

55 Victoria, Parliament, Scrutiny of Acts and Regulations Committee, *Reports to Parliament: Alert Digest Nos 8-14 of 1994* at 38, 40-50.

56 See *Australian Grand Prix Act 1994* (Vic), ss 42, 50.

57 D Saunders and E Longo, "Residents to get GP damages" *The Age*, 28 April 1995, p 4; L Gettler, "Grand Prix compensation is closed, residents told" *The Age*, 27 June 1995, p 8.

58 Note 55 *supra* at 156.

government. The Kennett Government has used provisions of this sort in implementing some of its best-known policies, on education, restructuring of local government, amalgamation of metropolitan hospitals, the Grand Prix, and the Melbourne casino, for example.<sup>59</sup> They make it easier for government to implement policies which court action might impede, but they also reduce the chance to challenge or test the lawfulness of government actions in the courts, or to get compensation for any harm they might cause. The widest of the provisions show a determination to keep government bodies and officers out of the courts when they are carrying out major policies. The usual justification offered by the government is that the benefit of the policies outweighs any harm which might be done by preventing litigation, but the political process which produces those policies is, by its nature, a much weaker protection than the courts for people whose rights under general law are infringed by what is done. Legislation of this sort represents a choice to restrict or exclude legal remedies for people in this position.

### IX. WHEN IS A s 85 CLAUSE NEEDED?

Another question raised by these Acts is whether an extinguishment of rights or exclusion of compensation, if included in legislation, needs to be protected with a s 85 clause, or whether it is not properly seen as a reduction of jurisdiction at all. This concerns the steps which are necessary to make an Act's substantive clauses effective in the light of s 85. Since problems arose with the entrenchment of Supreme Court jurisdiction in the late 1980s, drafters and others have come to act on the belief that a very wide class of legislative provisions might be seen as indirect amendments of the general jurisdiction of the Supreme Court, but there is little authoritative interpretation of s 85 to provide guidance.

Under different circumstances, privative or ouster clauses might have raised this question. A provision excluding judicial review of an administrative decision can operate under general law as a statutory expansion of the powers of government officials, rather than a removal of jurisdiction, within whatever limits the Commonwealth Constitution applies to the relevant legislative powers.<sup>60</sup> This reasoning, however, does not apply to Victorian provisions which exclude or restrict judicial review by the Supreme Court. Under s 85(6) of the *Constitution Act*, provisions of this sort will be treated as variations of the Court's jurisdiction

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59 *Education (Amendment) Act* 1993 (Vic), s 15 (excludes court action in relation to school closures and other matters arising under the *Education Act*); *Local Government (General Amendment) Act* 1993 (Vic), s 3 (new ss 220N-O of the *Local Government Act* 1989 (Vic) exclude judicial review of local government reviews under that Act); *Health Services (Metropolitan Hospitals) Act* 1995 (Vic), s 10 (new s 65O of the *Health Services Act* 1988 (Vic) excludes rights of action in relation to hospital aggregation); *Australian Grand Prix Act* 1994 (Vic) ss 42, 50 (described above); *Casino Control (Amendment) Act* 1993 (Vic), s 4 (new ss 128N and 128S of the *Casino Control Act* 1991 (Vic) limit judicial review of planning decisions concerning the casino development, and exclude compensation for closure of roads and revocation of Crown land reservations).

60 *O'Toole v Charles David Pty Limited* (1990) 171 CLR 232; *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 per Dixon J.

even if the general law may have interpreted them as expansions of statutory power rather than reductions in jurisdiction.

In a different and much more specialised case, the Supreme Court itself has rejected an argument that legislation affecting rights and determining the outcome of litigation amounted to an alteration or variation of the grant of jurisdiction in s 85. This was the decision on one branch of the argument in *City of Collingwood v State of Victoria and anor (No 2)*.<sup>61</sup> There, new legislation had given binding force to certain agreements whose legal effect was in dispute in pending litigation. Justice Brooking (Southwell and Teague JJ concurring) briefly rejected the argument that this altered or varied the relevant provisions of s 85.<sup>62</sup> His Honour reached this conclusion on the ground that the provisions did not invalidly interfere with the judicial process of the Supreme Court, and he did not investigate any further the kinds of legislation which might amount to reductions of the Court's general jurisdiction under s 85. He disagreed with the reasoning that led Harper J, at an earlier stage of the litigation, to reach a different conclusion about similar legislation.<sup>63</sup>

Whether other provisions affect the Court's jurisdiction is less clear.<sup>64</sup> Statutes limiting or excluding some form of liability might be taken either to reduce jurisdiction, or to vary the law applied by the courts within their jurisdiction without taking jurisdiction away. Many of the Victorian Acts discussed above were clearly framed on the conscious or unconscious assumption that it was the second alternative which applied, and that the relevant provisions involved no effects on jurisdiction and no need for absolute majorities. The vast majority of the Acts in the Attorney-General's lists for the period from 1982 to 1989 were indeed passed without absolute majorities, although the doubts this eventually cast on their effect led to the validating legislation of 1989.<sup>65</sup> Since this period, though, drafting policy has moved to the opposite extreme, and s 85 clauses are being included out of an abundance of caution even when it is only a possibility that the Bill in question really affects jurisdiction, as distinct from making a change in the substantive law.<sup>66</sup> This was a concern of the Scrutiny of Acts and Regulations Committee in its increasingly critical comments on Bills introduced in 1993-5.<sup>67</sup>

The Chief Parliamentary Counsel is understandably cautious in omitting s 85 clauses in any legislation which might indirectly affect the Court's jurisdiction.<sup>68</sup> Without the protection of such a clause, the relevant substantive provisions of the Bill may be ineffective. This, though, increases the number of Bills explicitly removing jurisdiction from the Court. In November 1995, the Scrutiny of Acts and

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61 [1994] 1 VR 652.

62 *Ibid* at 668-9.

63 *Ibid* at 667-8. Justice Harper's decision is reported in *City of Collingwood v State of Victoria and Anor* [1993] 2 VR 66.

64 See generally, Legal and Constitutional Committee, note 34 *supra* at 19-25.

65 *Ibid* at 66-9, listing Bills passed with absolute majorities from 1976 to 1989.

66 See the *BHP* case, note 24 *supra* at 24, 26-7, per Hayne JA; Scrutiny of Acts and Regulations Committee, note 51 *supra* at 33.

67 Scrutiny of Acts and Regulations Committee, note 46 *supra* at 65-117.

68 Letter from Rowena Armstrong QC, Chief Parliamentary Counsel, to Scrutiny of Acts and Regulations Committee, 6 April 1995, *ibid* at 123-4. See also *ibid* at 137.



Regulations Committee noted a change in drafting practice which may see s 85 clauses omitted in future from one class of Bills that previously contained them for reasons of caution: Bills revoking reservations of Crown land.<sup>69</sup> Doubt about the need for such clauses in these and other bills will persist despite this change.

Uncertainty about the kinds of provision which really require the protection of a s 85 clause complicates and obscures the issues raised by the substantive provisions affecting avenues of review or other rights in recent legislation. It is clear from the reports of the Scrutiny of Acts and Regulations Committee that this uncertainty has caused some friction between the Committee and the framers of legislation. Clarification of the meaning of jurisdiction for the purposes of s 85 would prevent the list of Bills affecting the section from being swelled by provisions which are not properly seen as reductions of jurisdiction. A court decision on this question may make it clearer whether so many of the recent Acts needed to include a specific reduction in the s 85 jurisdiction, whatever their other merits. This could occur through an action to test the validity of a provision which may have reduced the Court's jurisdiction but was allowed to pass without complying with the amendment requirements in s 85.

It would also be possible to reduce the uncertainty by changing the extent of jurisdiction which is entrenched, so that only a list of particular matters are protected in this way. Section 75 of the Commonwealth Constitution could be a model for such a provision, putting aside the matters listed there which are peculiar to the High Court. This would have the effect of entrenching the jurisdiction to deal with at least two kinds of action in which it is particularly important to keep open an avenue of litigation: actions against the government itself, typically for compensation for legal wrongs, and actions for judicial review of government decisions.

Entrenchment of some specific elements of the Court's jurisdiction, along the lines of s 75 of the Commonwealth Constitution, was considered briefly by the Victorian Parliament's Legal and Constitutional Committee in its 1990 report, but rejected because it would leave other parts of the Court's jurisdiction unprotected by entrenchment.<sup>70</sup> This is true of the High Court's jurisdiction, some of which is entrenched by ss 73 and 75, and the rest of which, including original jurisdiction in matters arising under the Constitution or involving its interpretation, and in matters arising under laws made by the Commonwealth Parliament, is not entrenched by the Constitution, but may be conferred by legislation under s 76. However, the unentrenched original jurisdiction of the High Court at present may be less significant than the unentrenched jurisdiction of the Supreme Court would be if s 85 included only the applicable heads from s 75. Those heads would not include the Court's original jurisdiction in private civil litigation, for example. An entrenched appellate jurisdiction corresponding to s 73 of the Commonwealth Constitution could, of course, be added to an amended s 85 in the Victorian Act.

Assuming the entrenched provision could be amended with absolute majorities in both Houses, it would still be possible to reduce the newly defined jurisdiction

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69 Scrutiny of Acts and Regulations Committee, note 47 *supra*.

70 Legal and Constitutional Committee, note 34 *supra* at 20.

just as recent legislation has done. Unless there were a change in legislative or drafting policy, the number of Bills with s 85 clauses might remain much the same even if jurisdiction only in specific matters were entrenched. It is likely, under current practice, that many of the recent Bills would be counted by drafters as reductions even of jurisdiction specified along the lines of s 75 of the Commonwealth Constitution.

Another possibility is political rather than legal. This is for the Government to include fewer restrictions on rights of action in its legislation, and to adopt a policy of accepting the consequences of decisions which give rise to rights of legal redress, whether in the form of compensation for legal wrongs or judicial review of invalid decisions, rather than prohibiting the litigation. Where government decisions of this sort could not be avoided, or were not avoided, such an approach would mean that the Government would simply have to face the consequences in court.

## X. THE MERITS OF ENTRENCHMENT

The present Victorian Attorney-General has supported entrenchment of the Court's jurisdiction, and has even linked it with the general policy of the Kennett Government:

Unlike the philosophy of the former administration, liberalism recognises the individual as a person in his or her own right, not merely as a component in the production of the collective good. The position of liberals that individual freedom should be maximised, and government interference kept to the minimum level required by good administration, is entirely supportive of the existence of the review jurisdiction of the Supreme Court. Such jurisdiction secures the right of the individual to challenge unlawful administrative interference... By maintaining tight control over proposals to limit such jurisdiction, the government is ensuring that individual liberty to exercise such right [sic] is not unnecessarily compromised.

Some would prefer to keep the Court's jurisdiction out of the entrenched parts of the *Constitution Act*, and leave Parliament to vary it without any special restrictions.<sup>72</sup> After all, one might say, the law can be enforced by other courts or other bodies, those bodies are not necessarily any less independent or expert in their particular fields, and at the end of the day Parliament should be able to change the law or the role of any particular tribunal, or to prevent review altogether, if it sees fit.

The problem with the removal of entrenchment under the current constitutional structure is that it would leave the Parliament alone, unfettered by any procedural restraints or substantive guarantees, to decide what jurisdiction will exist to review the actions of the State Government, or others, in the courts. In one way, this would be democratic, and allow the current majority in the two elected Houses to allocate functions to courts and other tribunals as they see fit. Seen more generally, though, it would give a government with control of both Houses an even

71 Note 31 *supra* at 11-12.

72 C Foley, "Section 85 Victorian Constitution Act 1975: Constitutionally Entrenched Right...or Wrong?" (1994) 20 *Mon U L Rev* 110 at 147-50.

greater freedom to restrict judicial review in ways that may threaten scrutiny and control of the actions of the government itself, or those the government may favour with special legal protection. The law is one of the resorts of an abused minority or wronged individuals, if what they have suffered comes within notions of legal wrongs, and judicial review deserves to be guarded at least with the caution about erosion that the current entrenchment encourages.

Criticisms of the current scheme of entrenchment include its partial character (covering only the general jurisdiction of one court) and its limited effectiveness, since it imposes only procedural restrictions. The force of these criticisms is reduced by the value of the general Supreme Court jurisdiction as a safeguard standing behind other procedures in much more common use, procedures which are not themselves covered by entrenchment. The entrenched original jurisdiction of the High Court is also exercised in only a fraction of the cases which it could cover, but it stands in the background to other Federal courts and tribunals as a partial constitutional guarantee of review. These other bodies hear most of the cases, but they operate under legislation which Commonwealth Parliament can amend at will. If Commonwealth legislation closed that system to particular applicants or a particular class of case, there would still be an opportunity for review in the High Court, within the limits of the Court's entrenched jurisdiction.

As for the fact that contentious subtractions are made from the Supreme Court's jurisdiction in spite of entrenchment, if this is an objection to the current scheme, it implies that protection of the Court's jurisdiction should be stronger, not weaker. Certainly, requiring only a special procedure within Parliament is a weaker guarantee than the Commonwealth entrenchment, based on the referendum provisions of the Commonwealth Constitution. It does allow more freedom to the Parliament to judge when the jurisdiction needs to be qualified in some way, a freedom which would be restricted to an unworkable degree by requiring a referendum for every alteration of the Court's general jurisdiction, for example.

It follows from the flexibility of the entrenchment mechanism that it is a guarantee only of a certain degree of scrutiny of reductions in jurisdiction. The judges of the Supreme Court have commented adversely on the Scrutiny of Acts and Regulations Committee's reviews of Bills reducing the Supreme Court's jurisdiction, and on the statements Ministers make in Parliament giving reasons for the reductions:

A reader of the Committee Reports and Hansard will struggle to find any discussion of the impact, specifically and generally, of the proposed changes on the rule of law and rarely find any discussion of the questions:

- (a) whether the perceived dangers relied upon by the relevant Minister to justify the provision exist; and
- (b) whether<sup>73</sup> there are alternative ways of addressing the reasons given for the change.

An entrenchment mechanism such as that found in the *Constitution Act* generally heightens scrutiny of reductions in jurisdiction. By its nature, it cannot guarantee the depth or quality of that scrutiny, and it will allow legislative policy

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73 Supreme Court of Victoria, *Annual Report*, 1994 at 19.

supported by the necessary majorities to prevail, as long as the required procedure is followed.

Entrenchment of jurisdiction itself has its limits as a protection of rights of review or compensation, and as a guarantee of due process it is partial at best. The intimate connection between legal substance and legal procedure sometimes makes it hard to distinguish a change in the substantive law on rights of action from a change in jurisdiction. To the extent that the concept of jurisdiction is uncertain, the value and effect of its entrenchment is diminished, or at least unclear. Even if this uncertainty is resolved, changes to substantive rights which are not properly seen as reductions of jurisdiction will be beyond the power of the entrenchment mechanism to control.

## XI. CONCLUSION

The present scheme of entrenchment, requiring more than an ordinary Act but less than a referendum, works by attracting attention and sometimes odium to reductions in the Supreme Court's basic jurisdiction. It makes conspicuous something other State Parliaments can do more quietly. Its operation, and the task of the Scrutiny of Acts and Regulations Committee in reporting on Bills affecting the Court's jurisdiction, are clouded by the lack of a clear guide to the identification of provisions which reduce the jurisdiction of the Court, and so require the protection of a s 85 clause. Removing this difficulty would allow attention to be concentrated on the most important issue: the scope of the immunities given by legislation of this sort.

As for the position of the Supreme Court, while the tenure of its judges and the protection of its jurisdiction, to say nothing of the tradition of its independence, make the Court much more than merely a part of the Justice Department, the Government's various controls on it qualify the judges' claim to be "the third and independent arm of Government in this State".<sup>74</sup> The nature of the Victorian Constitution is that the elected Parliament is at the top of the constitutional structure, and that no other State institution is completely independent of it. Parliament itself, and not the court system, is to be the final safeguard of good government. If Parliament is not serving that purpose, there are two legal solutions, each with its own problems: the introduction of other constitutional guarantees which limit the Parliament's legislative power, and reform of the legislature itself.

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74 *Ibid*, 1988 at 16.

## POSTSCRIPT

Since this article was written, the High Court has delivered its judgment in *Kable v Director of Public Prosecutions for New South Wales*.<sup>75</sup> Justices Toohey, Gaudron, McHugh and Gummow held that a State Parliament could not validly give a State Supreme Court functions which were incompatible with the judicial function of the Court under Chapter III of the Commonwealth Constitution. This imposes a limit on the powers of the State Parliaments to give powers or functions to the Supreme Courts, although it does not directly affect the reductions in jurisdiction discussed above.

Justices Gaudron, McHugh and Gummow also went further, and held that the Commonwealth Constitution required the continued existence of the State Supreme Courts. A State could not validly abolish its Supreme Court, on this reasoning, without replacing it with a comparable court. It should follow that it would also be invalid for a State to remove all jurisdiction from its Supreme Court and so interfere with the function which (on this interpretation) Chapter III of the Commonwealth Constitution gives to the Court.

If accepted by a majority of the High Court, this reasoning would limit the power of the State Parliaments to remove the jurisdiction of the Supreme Courts. It would also emphasise that the Supreme Courts are not merely State institutions but are part of a national court system. But it is unlikely that even the most significant variations in jurisdiction mentioned in this article would be sufficiently extreme to be declared invalid on this ground.

## APPENDIX 1

Acts passed by the Victorian Parliament in 1995 containing express variations in the jurisdiction of the Supreme Court in accordance with *Constitution Act 1975* (Vic), s 85(5):

*Australian Food Science Industry Centre Act*  
*Business Franchise (Tobacco) (Amendment) Act*  
*Competition Policy Reform (Victoria) Act*  
*Courts (General Amendment) Act*  
*Domestic Building Contracts and Tribunal Act*  
*Equal Opportunity Act*  
*Fisheries Act*  
*Health Services (Metropolitan Hospitals) Act*

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<sup>75</sup> Unreported, High Ct, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 12 September 1996.

*Heritage Act*  
*Infertility Treatment Act*  
*Land (Miscellaneous) Act*  
*Land (Revocation of Reservations) Act*  
*Legal Aid Commission (Amendment) Act*  
*Melbourne City Link Act*  
*National Parks (Yarra Ranges and Other Amendments) Act*  
*Public Sector Management (Amendment) Act*  
*Public Transport Competition Act*  
*Retail Tenancies (Amendment) Act*

Details of the relevant provisions in these 18 Acts can be found in the *Alert Digests* of the Victorian Parliament's Scrutiny of Acts and Regulations Committee for 1995.

Lists of relevant Acts passed from 1982 to October 1992, and of Bills introduced in 1993 and 1994, are found in Victoria, Parliament, Scrutiny of Acts and Regulations Committee, *Discussion Paper No 1: Section 85 of the Constitution Act 1975*, May 1995, at 155–166. All Bills listed there for 1993 were enacted in that year, with the exception of the Land Titles Validation Bill and the Road Safety (Amendment) Bill (both enacted in 1994). The Electricity Industry Bill 1993, also in the list, contained no s 85 clause, and was therefore ineffective to derogate from the Court's jurisdiction even if, as the Scrutiny of Acts and Regulations Committee thought, it contained provisions that may have purported to have this effect. It has been omitted from the total of 78 Acts given in the text above. All Bills listed for 1994 were enacted in that year, with the exception of the Courts (General Amendment) Bill (enacted in 1995), the Public Sector Management (Amendment) Bill (enacted in 1995), and the City of Greater Bendigo Bill (not enacted). The provisions affecting the Court's jurisdiction were removed from another listed bill, the Crown Lands Acts (Amendment) Bill 1994, before enactment, and it has likewise been omitted from the total.

## APPENDIX 2

Examples of provisions passed by the New South Wales Parliament from 1982 to 1995 limiting or excluding compensation or judicial review:

*Aboriginal Land Rights Act* 1983, s 37  
*Apiaries Act* 1985, s 32  
*Blue Mountains Land Development (Special Provisions) Act* 1985, ss 3, 5  
*Building Services Corporation Act* 1989, ss 23, 144, sched. 2A cl 9  
*Casino Control Act* 1992, ss 40, 155, 156  
*Children (Care and Protection) Act* 1987, ss 22, 23  
*Children (Community Service Orders) Act* 1987, s 5A  
*Children (Criminal Proceedings) Act* 1987, ss 21, 47

*Community Service Orders Act* 1979, s 26A (added 1987)  
*Compensation Court Act* 1984, s 17  
*Consumer Claims Tribunals Act* 1987, ss 12, 34  
*Crown Lands Act* 1989, ss 109, 174  
*Darling Harbour Authority Act* 1984, s 12B  
*Dividing Fences Act* 1991, s 13  
*Education (Ancillary Staff) Act* 1987, s 26  
*Electricity Transmission Authority Act* 1994, s 38  
*Essential Services Act* 1988, s 21  
*Exhibited Animals Protection Act* 1986, s 41  
*Exotic Diseases of Animals Act* 1991, s 60  
*Fair Trading Act* 1987, s 10  
*Financial Institutions Commission Act* 1992, s 22  
*Food Act* 1989, s 89  
*General Government Debt Elimination Act* 1995, s 27  
*Gore Hill Memorial Cemetery Act* 1986, s 13  
*Guardianship Act* 1987, s 30  
*Heritage Act* 1977, s 146C (added 1987)  
*Human Tissue Act* 1983, s 35  
*Independent Commission Against Corruption Act* 1988, s 109  
*Industrial Arbitration (Special Provisions) Act* 1984, s 3  
*Industrial Relations Act* 1991, ss 301, 366, 391, 454, 697J  
*Legal Profession Act* 1987, ss 208K, 211  
*Liquor Act* 1982, s 148, 150A  
*Local Government Act* 1993, ss 74, 106, 246, 340  
*Lotto Act* 1979, s 17B (added 1988)  
*Luna Park Site Act* 1990, ss 11, 14, 15  
*Marine (Boating Safety - Alcohol and Drugs) Act* 1991, s 20  
*Marine Pollution Act* 1987, s 60  
*Medical Practice Act* 1992, ss 10, 35  
*Mining Act* 1992, s 337  
*National Parks and Wildlife Act* 1974, sched. 9A cl 20 (added 1983)  
*Necropolis Act* 1901, s 8C, sched. 3 cl 10 (added 1986)  
*Parliamentary Remuneration Act* 1989, s 18  
*Periodic Detention of Prisoners Act* 1981, s 5C (added 1994)  
*Petroleum (Onshore) Act* 1991, ss 6, 22  
*Police Department (Transit Police) Act* 1989, s 24  
*Police Service Act* 1990, s 44, 89  
*Protected Estates Act* 1983, s 67  
*Public Sector Management Act* 1988, s 27, 42J, 55, 77A  
*Rail Safety Act* 1993, ss 26, 95, sched. 2 cl 16  
*Registered Clubs Act* 1976, s 42B (added 1982), 106P (added 1988)  
*Residential Tenancies Act* 1987, ss 111, 119D  
*Retail Leases Act* 1994, ss 36, 77  
*Retirement Villages Act* 1989, s 12  
*Roads Act* 1993, ss 16, 21, 63, 190, 260

*Royal Commission (Police Service) Act 1994*, s 40  
*Rural Lands Protection Act 1989*, s 84  
*Sentencing Act 1989*, s 23  
*Special Commissions of Enquiry Act 1983*, s 36  
*Statutory and Other Offices Remuneration Act 1975*, s 24J (added 1989)  
*Stock (Artificial Breeding) Act 1985*, ss 32, 35  
*Summary Offences Act 1988*, s 27  
*Sydney Harbour Tunnel (Private Joint Venture) Act 1987*, s 17  
*Technical and Further Education Commission Act 1990*, s 19  
*Traffic Act 1909*, ss 4F (added 1982), 5AC (added 1987), 17A (added 1983)  
*Transport Administration Act 1988*, s 98  
*Victims Compensation Act 1987*, s 68  
*Vocational Education and Training Accreditation Act 1990*, s 28  
*Water Administration Act 1986*, s 19

This list contains 68 Acts identified by searching for words typically found in such provisions. It does not include Acts that were later repealed, or regulations, and it is not intended as a complete list of privative or no-compensation clauses passed during the period.