

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

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### I INTRODUCTION

My immediate predecessor in this role was Justice French whose address on the topic of the federal and State courts on constitutional law dealing with the 2002 Term was gloomily entitled ‘Dark Matter in the Constitutional Universe’. By this, his Honour intended to refer to the fact that, to use his Honour’s expression, ‘in the constitutional cosmos it is the jurisprudence of the High Court that illuminates or bedazzles us’ but ‘the constitutional decisions of the Federal and State Courts tend to fall into the category of dark matter or, perhaps at best brown dwarfs’.<sup>1</sup>

I do not share his Honour’s gloom. First, not all federal or State court decisions dealing with the *Constitution* cower under the Damoclean sword of a successful special leave application or a s 40 removal. Many clearly dazzle in their own right (and perhaps light). Secondly, while some such cases do end up in the High Court so that, to that extent, the federal and State court decisions might be seen as ‘unfinished matters’, no-one doubts the utility of the intermediate decisions which, to quote Justice French again, ‘will settle the factual aspects of the case, dispose of lesser issues and sharpen the focus of interpretational choices that have to be made’.<sup>2</sup>

Indeed Justice French shook off his gloom to a certain extent by asking rhetorically: where would we be without such decisions? As he said, ‘most of the

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# Speech delivered at the Gilbert + Tobin Centre of Public Law, University of New South Wales, 2004 Constitutional Law Conference, Sydney, 20 February 2004.

\* Judge, Court of Appeal, Supreme Court of New South Wales. I acknowledge the great assistance of my research assistant, Alison Barnett, in locating many of the cases set out in the Schedules below. I also acknowledge the assistance of the Chief Justices of all jurisdictions to whom I wrote asking that they identify the constitutional cases dealt with in their jurisdictions in 2003 in order to ensure that I did not commit any egregious sins of omission. Ms Barnett also prepared the Schedules to this paper.

1 Justice Robert French, ‘Dark Matter in the Constitutional Universe’ (Speech delivered at the Gilbert + Tobin Centre of Public Law, University of New South Wales, 2003 Constitutional Law Conference, Sydney, 21 February 2003, unpublished) 2.

2 Ibid.

important constitutional law of Australia originates in proceedings in the lower courts'.<sup>3</sup>

This is demonstrated by the range of cases decided by the federal and State courts in the 2003 Term.

## II OVERVIEW OF 2003 CONSTITUTIONAL CASES

In contrast to the meagre pickings available to Justice Sackville from the High Court's 2003 Term,<sup>4</sup> I have a veritable cornucopia from which to choose to regale you with the constitutional antics of the federal and State courts in 2003!

I identified 62 judgments decided by the Federal Court and State Supreme Courts which might be said to involve the *Constitution*. Some involved it less than others. Some involved it in a relatively indirect sense and some touched but very lightly upon constitutional concepts. I do not intend to deal in detail with all of these cases. However, I have annexed to this paper two schedules: one which identifies the cases by court and the other which identifies them by reference to the section of the *Constitution* with which they deal, even if only in passing. There is inevitable duplication in the latter schedule to the extent that some cases involve more than one section of the *Constitution*.

Litigation progressed so rapidly in 2003 that some of the cases determined at the federal and State Supreme Court levels and/or their critical themes have been either argued and reserved or, indeed, already determined by the High Court during 2003. In addition, some of the major cases having been the subject of grants of special leave were argued in the first 10 days or so of 'the 2004 Term'.

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

### A Civil Rights

I start with a general observation. The *Constitution*, of course, 'does not contain a "charter of citizens' rights"'.<sup>5</sup> That does not mean that constitutional cases in Australia are not concerned with citizens' rights.

In his paper Justice Sackville contrasts the United States and Australian constitutional systems by virtue of the fact that the *United States Constitution* incorporates a Bill of Rights whereas the *Australian Constitution* does not. This, in turn, according to his Honour (and I do not doubt the indubitable correctness of his proposition) means that 'constitutional norms in the United States pervade many areas of State and federal law'.<sup>6</sup>

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3 Ibid.

4 Justice Ronald Sackville, 'The Inaccessible Constitution: The 2003 High Court on Constitutional Law' (2004) 27 *University of New South Wales Law Journal* 66.

5 Sir Anthony Mason, 'The *Australian Constitution* in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 7, 9.

6 Justice Sackville, above n 4, 79.

While the penetration of ‘constitutional norms’ may not be as pervasive in Australia, nevertheless, to my observation in the 2003 Term, the constitutional issues which engaged federal courts and State Supreme Courts concerned civil rights as fundamental as those to which Justice Sackville refers in relation to the United States Supreme Court and, in many cases, equally controversial.<sup>7</sup>

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

## B Detention without Adjudication of Guilt

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

At a federal level the Federal Court, both at first instance<sup>8</sup> and in the Full Court,<sup>9</sup> has wrestled with the question whether s 196 of the *Migration Act 1958* (Cth) (*‘Migration Act’*) was invalid as being beyond the legislative power of the Commonwealth if it was able to be construed as justifying mandatory detention of an alien in circumstances where that detention was not reasonably necessary for the purpose of the alien’s removal from Australia.

The issue of mandatory detention also arose in the Family Court in *B (Infants) and B (Intervener) v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>10</sup> (*‘B and B’*) – a case concerning the jurisdiction of that Court to release children held in immigration detention.

At State level, Chapter III issues (judicial power) arose in the context of the constitutional validity of the *Dangerous Prisoners (Sexual Offenders) Act 2000* (Qld) (*‘DPA’*) in *Attorney-General (Qld) v Fardon*<sup>11</sup> (*‘Fardon’*). That case squarely confronted, and distinguished, *Kable v Director of Public Prosecutions (NSW)*<sup>12</sup> (*‘Kable’*).

The question of judicial power arose again, in Queensland, in *Re Criminal Proceeds Confiscation Act 2002 (Qld)*<sup>13</sup> (*‘Re Criminal Proceeds’*), which considered the validity of a statutory provision requiring the Supreme Court hearing an application for an order restraining a person from dealing with property to do so in the absence of any party other than, in effect, the applicant. In that case *Kable* was applied to strike down the legislation.

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7 See generally *ibid.*

8 *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 (Unreported, Emmett J, 20 March 2003).

9 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54. (2003) 199 ALR 604.

11 [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003).

12 (1996) 189 CLR 51.

13 [2004] 1 Qd R 40.

### C Implied Freedom of Speech and Association

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

*Mulholland v Australian Electoral Commission*<sup>14</sup> ('*Mulholland*') concerns the provisions of the *Commonwealth Electoral Act 1918* (Cth) ('*CEA*') dealing with registration of political parties. In that case the Full Court of the Federal Court held that the implied freedom of communication was not infringed by provisions of the *CEA* which required the Democratic Labour Party ('*DLP*') to provide a list of at least 500 of its members for the purposes of the Act (the '500 persons rule')<sup>15</sup> and a provision which provided that none of those 500 persons could be relied upon by another political party for purposes of qualifying for registration as a political party (the 'no overlap rule').<sup>16</sup>

In *Bennett v Human Rights and Equal Opportunity Commission*<sup>17</sup> ('*Bennett*'), Finn J applied the implied freedom of communication to declare a Commonwealth regulation which prevented public servants disclosing information acquired in the course of their duties to be invalid. This was a provision which, according to his Honour, had been a 'threatening presence for Commonwealth public servants for over 100 years'.<sup>18</sup>

### D The Institution of Marriage

*Attorney-General (Cth) v Kevin*<sup>19</sup> considered whether there could be a valid marriage between a woman and a transsexual, born a female but who, by operation, was considered by to be a 'man'. At first instance, Chisholm J decided that the question whether a person was a man or a woman should be determined at the time of marriage, not birth. The Full Court of the Family Court upheld his decision. The Full Court considered the meaning of the word 'marriage' in s 51(xxi) of the *Constitution* and concluded that it would be 'inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901'.<sup>20</sup> Accepting that a valid marriage for the purpose of the *Marriage Act 1961* (Cth) must be between a man and a woman, the Full Court held that the words 'man' and 'woman' as used in the legislation should bear their contemporary meaning and that, adopting that approach, 'man' could include a post-operative transsexual. This decision has had international significance. In *Re Marriage of Kantaras v Kantaras*, it was described as 'one of the most important cases on transsexualism to come on the scene of foreign jurisprudence'.<sup>21</sup> It was quoted by the European Court of Human Rights with approval in holding that the United Kingdom had violated arts 8 and 12 of the European Convention on the

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14 (2003) 128 FCR 523.

15 *Commonwealth Electoral Act 1918* (Cth) s 123(1).

16 *Commonwealth Electoral Act 1918* (Cth) s 126(2A)(a).

17 (2003) 204 ALR 119.

18 *Ibid* 143.

19 (2003) 30 Fam LR 1.

20 *Ibid* 24.

21 No 98-5375CA (Fla 6<sup>th</sup> Cir, 21 February 2003).

Protection of Human Rights and Fundamental Freedoms with regard to transsexual people in the United Kingdom particularly in the areas of marriage, social security, employment and pensions.<sup>22</sup> On 11 February 2004, the House of Lords approved the Gender Recognition Bill 2003 (UK) which allows transsexuals to obtain new birth certificates and marry in their adoptive genders.<sup>23</sup>

### E Just Terms

There was an important decision delivered at the end of 2002 in *Pauls Ltd v Dwyer*<sup>24</sup> which deals with the power to acquire property on just terms<sup>25</sup> in the context of takeover offers and the statutory control of share acquisition. It just slipped under Justice French's gaze in his paper last year. It was followed in 2003 in *Energex Ltd v Elkington*.<sup>26</sup>

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

### III DETENTION WITHOUT ADJUDICATION OF GUILT

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

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>27</sup> ('*Lim*'), the High Court held that a statutory provision conferring power on the executive to detain an alien was valid if it was properly characterised as an incident of the constitutional power to exclude, admit or deport aliens.<sup>28</sup>

Justices Brennan, Deane and Dawson, in their majority joint judgment observed that, with some exceptions, Australian citizens enjoyed in peace time 'a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.<sup>29</sup>

In the view of the majority, the legislative power conferred by s 51(xix) of the *Constitution* 'encompasses the conferral upon the executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation'.<sup>30</sup>

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22 Eithne Mills and James McConville, 'The Right of Transsexual People to Marry in Australia Confirmed' (2003) 77(7) *Law Institute Journal* 58.

23 *Britain Legislates for Transsexuals to Marry* (2004) FindLaw <<http://www.findlaw.com.au/news/default.asp?task=read&id=18583&site=LE>> at 22 October 2004.

24 (2002) 171 FLR 369.

25 *Australian Constitution* s 51(xxxi).

26 (2003) 47 ACSR 442.

27 (1992) 176 CLR 1.

28 *Australian Constitution* s 51(xix).

29 *Lim* (1992) 176 CLR 1, 28–9.

30 *Ibid* 32.

The judgments in *Lim* recognised that there could be exceptional categories of cases in which the involuntary detention of a citizen in custody by the State would not be invalidated. Those cases included arrest and detention in custody of a person accused of a crime awaiting trial and detention of persons suffering mental illness or infectious diseases.<sup>31</sup>

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

A law of the Parliament which purports to direct, in unqualified terms, that no court, including this court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.<sup>32</sup>

Chief Justice Mason and Toohey and McHugh JJ held that s 54R could be read down so that it only prevented a court ordering the release of a person lawfully held in custody.<sup>33</sup>

In *Kable*, the High Court held the *Community Protection Act 1994* (NSW) ('CPA') to be invalid as incompatible with Chapter III of the *Constitution*.

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

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

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31 Ibid 28–9 (Brennan, Deane and Dawson JJ). See also 55 (Gaudron J) and 77 (McHugh J). Justice McHugh referred to imprisonment of a person the subject of a deportation order as not ordinarily being punitive because the purpose of the imprisonment was to ensure the deportee was excluded from the community pending removal from the country. His Honour also referred to the imprisonment of an alien while that person's application for entry was being determined as being similarly non-punitive because the purpose of the imprisonment was to prevent the alien from entering into the community until the determination is made.

32 Ibid 36.

33 Ibid 13–14 (Mason CJ), 51 (Toohey J), 69 (McHugh J).

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

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

Justice Toohey distinguished *Lim* on the basis that under the *CPA* '[p]reventive detention ... is an end in itself'. Further, in his Honour's view, the *CPA* did not 'fall within the "exceptional cases" mentioned in *Lim*, directly or by analogy'.<sup>34</sup>

Justice Gaudron said:

The power purportedly conferred by s 5(1) of the [*CPA*] requires the making of an order, if the conditions specified in s 5(1) are satisfied, depriving an individual of his liberty, not because he has breached any law, whether civil or criminal, but because an opinion is formed, on the basis of material which does not necessarily constitute evidence admissible in legal proceedings, that he 'is more likely than not' [s 5(1)(a)] to breach a law by committing a serious act of violence as defined in s 4 of the Act. That is the antithesis of the judicial process, one of the central purposes of which is ... to protect 'the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained'.<sup>35</sup>

Justice McHugh accepted that the Parliament of New South Wales had the constitutional power to pass legislation providing for the imprisonment of a particular individual whether the machinery for the imprisonment be the legislation itself, the order of a minister, a public servant or a tribunal.<sup>36</sup> He also did not doubt the authority of the State to make general laws for preventative detention when those laws operated in accordance with the ordinary judicial processes of the State courts. What, however, in his Honour's view, the legislature could not do consistently with Chapter III of the *Constitution*, was invoke the authority of the Supreme Court to make orders against Mr Kable by the methods the *CPA* authorised. That was because, in his Honour's view, 'the Act and its procedures compromise[d] the institutional impartiality of the Supreme Court'.<sup>37</sup>

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34 *Kable* (1996) 189 CLR 51, 98.

35 *Ibid* 106 (citation omitted).

36 *Ibid* 121.

37 *Ibid*.

Justice McHugh held that the *CPA* expressly removed the ordinary protections inherent in the judicial process by stating that its object was the preventative detention of Mr Kable, by removing the need to prove guilt beyond reasonable doubt, by providing for proof by materials that may not satisfy the rules of evidence and by declaring the proceedings to be civil proceedings although the Court was not asked to determine the existing rights and liabilities of any party or parties.<sup>38</sup> Thus, his Honour said, ‘it is not going too far to say that proceedings under the Act bear very little resemblance to the ordinary processes and proceedings of the Supreme Court’ so that ‘the Act is ... far removed from the ordinary incidents of the judicial process’.<sup>39</sup> His Honour pointed out:

Instead of a trial where the Crown is required to prove beyond reasonable doubt that the accused is guilty of a crime on evidence admitted in accordance with the rules of evidence, the Supreme Court is asked to speculate whether, on the balance of probabilities, it is more likely or not that the appellant will commit a serious act of violence.<sup>40</sup>

Justice Gummow noted that the fact that the *CPA* was directed to only one individual was not, of itself, ‘a badge of invalidity’.<sup>41</sup> Of greater significance in his Honour’s view was the fact that the penalty that the Act meted out was ‘not inflicted upon, and by reason of, conviction by the Supreme Court of any charge of contravention of the criminal law’.<sup>42</sup>

His Honour regarded as ‘striking features of the legislation’ the fact that there was ‘no determination of guilt solely by application of the law to past events being the facts as found’;<sup>43</sup> ‘whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon an adjudgment by the court of criminal guilt’.<sup>44</sup> In his Honour’s view such an authority could not be conferred on a State court exercising federal jurisdiction as it was ‘repugnant to the judicial process in a fundamental degree’.<sup>45</sup>

### A *Attorney-General (Qld) v Fardon*

The issues raised in both *Lim* and *Kable* came before the Queensland Court of Appeal in *Fardon* which considered whether the enactment of the *DPA* was within the legislative competence of the Queensland Parliament. The appellant, the subject of orders made under the Act, contended that it was not, substantially in reliance on *Kable*.

Section 13(5)(a) of Division 3 of the *DPA* authorised the Supreme Court, if satisfied that a prisoner was a ‘serious danger to the community in the absence of a Division 3 order’, to order either that the prisoner be detained in custody for an

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38 Ibid 122.

39 Ibid.

40 Ibid 122–3.

41 Ibid 125.

42 Ibid.

43 Ibid 131.

44 Ibid 132.

45 Ibid.



indefinite term for control, care or treatment (a ‘continuing detention order’)<sup>46</sup> or that the prisoner be released from custody subject to conditions the Court considered appropriate (a ‘supervision order’).<sup>47</sup>

Like the *CPA* considered in *Kable*, the *DPA* provided that the *Bail Act 1980* (Qld) did not apply to a person the subject of a detention order.

The appellant had been convicted in 1989 of rape, sodomy and assault occasioning bodily harm and sentenced to 14 years’ imprisonment. These offences were committed 20 days after his release on parole after serving eight years of a 13 year sentence for a previous conviction of rape.

The 14 year term expired on 29 June 2003. The *DPA* commenced on 6 June 2003, the date of assent – three weeks before his sentence expired. On 27 June 2003 a judge ordered that the appellant be detained in custody until 4:00pm on 4 August 2003,<sup>48</sup> that he undergo examinations by two nominated psychiatrists,<sup>49</sup> and appointed 31 July 2003 as the date for the hearing of an application for a Division 3 order.<sup>50</sup>

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

In the Court of Appeal the appellant submitted that the *DPA* was invalid because, among other reasons, it sought

‘... to divorce an order of imprisonment from a finding of criminal guilt’ ... and because it amounted to legislative ‘interference with the finality of an exercise of judicial power’, insofar as it effectively [operated] to lengthen, retrospectively, the term of imprisonment imposed following conviction.<sup>51</sup>

The Attorney-General submitted that the Court’s obligation under the *DPA* was to apply what might be characterised as ‘normal judicial process’ and

that to suggest orders made under these provisions retrospectively lengthen the imprisonment originally imposed ignores the reality that following the expiration of that term of imprisonment, the appellant [would] have been newly detained, ‘under protective legislation’.<sup>52</sup>

The Chief Justice of Queensland accepted those submissions.

Chief Justice de Jersey also accepted the Attorney-General’s submission that the ‘imposition of non-punitive, involuntary detention protective of the community [was] not incompatible with the exercise of judicial power’. Further, the Chief Justice accepted the primary judge’s conclusion that the *CPA* and, ergo *Kable*, were distinguishable because the *DPA* was of general application, conferred general discretionary power, was informed by criterion directed to

46 *Dangerous Prisoners (Sexual Offenders) Act 2000* (Qld) s 13(5)(a).

47 *Dangerous Prisoners (Sexual Offenders) Act 2000* (Qld) s 13(5)(b).

48 *Dangerous Prisoners (Sexual Offenders) Act 2000* (Qld) s 8(2)(b).

49 *Dangerous Prisoners (Sexual Offenders) Act 2000* (Qld) s 8(2)(a).

50 *Dangerous Prisoners (Sexual Offenders) Act 2000* (Qld) s 8(1)(a).

51 *Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [18] (de Jersey CJ).

52 *Ibid* [19].

community protection rather than punishment, and because the Court's processes were subject to the rules of evidence.<sup>53</sup>

Chief Justice de Jersey went on to distinguish the Court of Appeal's decision in *Re Criminal Proceeds* in which s 30 of the *Criminal Proceeds Confiscation Act 2002* (Qld) ('CPCA') was held to be invalid as being beyond the power of the Queensland Parliament. I deal with this case later in this paper. His Honour distinguished *Re Criminal Proceeds* on the basis that the provisions of the CPCA which was struck down as invalid, had 'effectively commanded the Court to hear certain applications for orders affecting property rights in the absence of interested parties'.<sup>54</sup>

The appellant's submissions focussed, as one might have expected following *Kable*, on the contention that a court cannot legitimately be required to order detention unless it is consequent upon a finding of guilt of a criminal offence. Chief Justice de Jersey said that that submission gained 'basic support from some of the statements made in *Kable*, for example this statement of Gummow J':<sup>55</sup>

I have referred to the striking features of this legislation. They must be considered together. But the most significant of them is that, whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt. Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.<sup>56</sup>

In this respect, de Jersey CJ said:

In an historical sense, a detention order made under s 8 or s 13 is consequent upon conviction, because it is the earlier conviction for a 'serious sexual offence' which places the particular prisoner into the category of prisoner to which the Act applies. It may also be acknowledged that a prisoner being sentenced for what amounts, under the Act, to a 'serious sexual offence', would have to be taken to appreciate the possible application of the Act come the expiration of the term of imprisonment imposed.<sup>57</sup>

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

In dealing with this argument, de Jersey CJ characterised the purpose of orders made under the *DPA* as being 'plainly not punishment, but community protection'. This was so even though 'this community protection is to be achieved through the denial of personal liberty'.<sup>58</sup> His Honour referred to the

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53 Ibid [21].

54 Ibid [25].

55 Ibid [26].

56 *Kable* (1996) 189 CLR 51, 132.

57 *Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [27] (de Jersey CJ).

58 Ibid [30].

exceptional category of cases *Lim* identified as justifying involuntary detention.<sup>59</sup> He extracted a passage from Justice McHugh's judgment in *Lim* in which his Honour said:

Certainly, Div 4B deprives designated persons of the right to seek their release from custody. But they have been deprived of that right not because the Parliament wishes to punish them but because it wishes to achieve the non-punitive object of ensuring that aliens who have no entry permit or visa are kept under supervision and control until their claims for refugee status or entry are determined.<sup>60</sup>

In Chief Justice de Jersey's view the orders which might be made under the *DPA* could be seen to be within a similar category of exception because the object of a detention order or a supervision order was 'not punishment, but community protection'.<sup>61</sup> In his Honour's view the category of persons who might be the subject of an involuntary detention order was not closed and should be seen to include 'community protection against violent criminals who, although sane, would, if at liberty, constitute a serious danger to the community'.<sup>62</sup>

The Chief Justice referred<sup>63</sup> to *Kruger v Commonwealth* ('*Kruger*'), where Gummow J said:

A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth. The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.<sup>64</sup>

His Honour then summarised his views:

The Act contemplates involuntary detention which should be characterised as non-punitive. The detachment of the making of an order for such detention from the original adjudication of criminal guilt does not warrant the conclusion the relevant legislation is beyond legislative power. That is because the situation contemplated by this legislation falls naturally into the exceptional category recognized in *Lim* and *Kruger*. That category is not closed, and just as it extends to the protection of the community from the mentally ill, there is no reason why, by analogy, it should not also be seen to include community protection against violent criminals who, although sane, would, if at liberty, constitute a serious danger to the community. The process established by the Act sufficiently conforms to normal judicial processes. The legislation should accordingly be regarded as constitutionally valid.<sup>65</sup>

His Honour, Williams JA, agreed with the Chief Justice's reasons for dismissing the appeal but added reasons of his own. In his Honour's view, the *DPA* was 'clearly distinguishable from the [New South Wales] Act ... [as] the

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59 Ibid [35]–[38].

60 *Lim* (1992) 176 CLR 1, 71.

61 *Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [39].

62 Ibid [42].

63 Ibid [40].

64 (1997) 190 CLR 1, 161–2.

65 *Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [42].

New South Wales legislation ... applied only to a named prisoner and effectively directed the court to make an order detaining that person in custody'.<sup>66</sup>

In his view the *DPA*, which provided for non-punitive involuntary detention of persons, where the Court was satisfied that the prisoner would be a serious danger to the community in the absence of a detention order, was designed to protect the community and afford an opportunity to provide further care and treatment to a person found by the Court to be a serious danger to the community if not detained, thus bringing it within the exceptional categories referred to in *Lim* as well as *Kruger*<sup>67</sup> and *Veen v The Queen (No 2)*.<sup>68</sup>

Secondly, in dealing with the submission that the *DPA* was invalid because it authorised the making of a detention order which was not dependent upon the Court determining criminal guilt and therefore that the making of such an order was not an incident of the judicial function of adjudging and punishing criminal guilt, Williams JA was influenced by the fact that there was an historical link between the prisoner's conviction of a serious sexual offence and the making of an order pursuant to the Act.<sup>69</sup> Finally, Williams JA distinguished *Kable* because the *DPA* provided for an unfettered judicial hearing to determine whether the prisoner in question was a serious danger to the community and then whether, in the exercise of a judicial discretion, a continuing detention order or supervision order, or indeed no order, should be made.<sup>70</sup>

Her Honour, President McMurdo, dissented. In her Honour's view, the *DPA* was invalid. She viewed the scheme instituted under the Act as unique in Australia in that it made

a prisoner who has been convicted and sentenced for an offence liable for an order for further detention imposed by a Supreme Court Judge, not because of any further unlawful actions but because of the potential that the prisoner may commit further unlawful actions.<sup>71</sup>

Her Honour observed that the Act required

a Judge of the Supreme Court ... to order the detention of someone convicted and sentenced for a criminal offence, who has satisfied the penalty imposed at sentence, without any further determination of criminal guilt justifying the use of judicial power.<sup>72</sup>

Her Honour recognised that the *DPA* differed in many respects from the legislation considered in *Kable*,<sup>73</sup> but, in her Honour's view, those differences were 'cosmetic changes'. In her opinion the legislative scheme under the Act was 'the antithesis of the judicial process',<sup>74</sup> which is to protect the individual from

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66 Ibid [95].

67 (1997) 190 CLR 1, 161–2 (Gummow J).

68 (1988) 164 CLR 465, 496 (Deane J). See *Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [96]–[101].

69 *Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [102]–[104].

70 Ibid [105]–[107].

71 Ibid [76].

72 Ibid [80].

73 Ibid [83].

74 Ibid [91].

the arbitrary interference with rights other than in consequence of the fair and impartial application of the law to properly ascertain facts. Her Honour held:

Ordinary reasonable members of the public could well reasonably see the Act as making the Supreme Court of Queensland a party to, and responsible for, implementing the political decisions of the Executive Government that unpopular prisoners should be imprisoned beyond the expiry of their sentenced terms of imprisonment without the benefit of the ordinary processes of law. The powers sought to be given to the Supreme Court of Queensland under the Act compromise the integrity of this Court and of the judicial system effected by Ch III of the *Constitution*.<sup>75</sup>

Her Honour therefore concluded that ss 8 and 13 of the *DPA* infringed the requirements of Chapter III of the *Constitution* that the Supreme Court of Queensland only exercise the judicial power of the Commonwealth consistently with the doctrine of the separation of powers.<sup>76</sup>

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

- (1) It might be thought curious that the decision of the majority gave little weight to the proposition which appeared to loom large in *Kable* that to confer a power on a State court to order the imprisonment of a person, although that person had not been adjudged guilty of any criminal offence, was incompatible with Chapter III of the *Constitution*.
- (2) The two Justices who referred to *Lim* in *Kable* did not regard the *Kable* legislation as falling within one of the exceptional categories referred to in that case. Justice Toohey expressly distinguished *Lim* on the basis that, under the *CPA*, '[p]reventive detention ... is an end in itself'.<sup>77</sup> Justice Gummow also referred expressly to *Lim* and clearly did not regard the involuntary detention the Act prescribed 'for community protection' as falling within any category of exceptional involuntary detention referred to in that case. Although neither Gaudron or McHugh JJ referred to *Lim*, both had been members of the Court which decided that case. Neither referred to the class of exceptional detention cases it identified as a possible basis for the validity of the *Kable* legislation. This was not referred to in the majority judgments in *Fardon*.
- (3) The exceptional category that de Jersey CJ crafted, namely protection of the community from violent criminals, was at first blush the same object that the *Kable* legislation sought to achieve, yet this does not appear to have influenced the Chief Justice's conclusion.

It appears that on 6 November 2003, White J made a continuing detention order in respect of Mr Fardon pursuant to which he was detained in custody.<sup>78</sup> Mr Fardon appealed from that order to the Queensland Court of Appeal. In the

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75 Ibid.

76 Ibid [92].

77 *Kable* (1996) 189 CLR 51, 98.

78 Transcript of Proceedings, *Fardon v A-G (Qld)* (High Court of Australia, Gummow and Kirby JJ, 12 December 2003).

meantime on 12 December 2003 the High Court (Gummow and Kirby JJ) granted Mr Fardon leave to appeal.<sup>79</sup>

And now a brief retrospective. In *R v Moffatt*,<sup>80</sup> the Victorian Court of Appeal constituted by Winneke P, Hayne and Charles JJA, expressed doubt about identifying the precise ratio of *Kable*. Of these, clearly the most significant for present purposes was Hayne JA who, after referring to the various views of the majority, said:

But exactly what is the underlying principle is not clear. As I have said, the legislation under consideration in *Kable* was extraordinary: it was directed at one man; it required (or at the least contemplated) the confinement of that man in prison and did so not for what he had done but for what he might do. But by what principle is one to decide whether legislation is incompatible with Ch III? Is its being novel sufficient? Is the perception that reasonable members of the public may have of it relevant? If so, what kind of perception is relevant?<sup>81</sup>

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

## B Mandatory Detention

I turn then to the ‘mandatory detention’ cases, to use a term coined by the Full Court of the Federal Court last year in the principal decision to which I will refer – *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*<sup>82</sup> (*‘Al Masri’*).

In essence, the issue in these cases is whether the aliens power<sup>83</sup> supports provisions in the *Migration Act* permitting the Minister for Immigration and Multicultural and Indigenous Affairs to continue to detain an unlawful non-citizen who has no entitlement to a visa but who has asked to be removed from Australia when there is no real likelihood or prospect of that person’s removal overseas in the reasonably foreseeable future.

I will not dwell too long on this category since the legal issue is almost moot at federal level – what might loosely be called the ‘*Al Masri* principle’ has already been argued in the High Court and judgment is reserved.<sup>84</sup> However, as the subject is clearly within my remit and as the principle involved is of profound significance, let me take you to the critical points raised.

A number of 2003 decisions of the Federal Court have considered the issue of mandatory detention, however, the key 2003 decision was the decision of the Full Federal Court in *Al Masri*.

79 Ibid. The appeal was heard on 2 March 2004 and the Attorneys-General of the Commonwealth, New South Wales, Western Australia, South Australia and Victoria intervened to support the Queensland legislation. The High Court dismissed the appeal on 1 October 2004: *Fardon v A-G (Qld)* (2004) 210 ALR 50.

80 [1998] 2 VR 229.

81 Ibid 251.

82 (2003) 126 FCR 54.

83 *Australian Constitution* s 51(xix).

84 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130; *Al-Kateb v Godwin* (2004) 208 ALR 124; *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 7 October 2004).

Like *Fardon*, *Al Masri* raised squarely the issues considered in *Lim*. The Full Court said the case posed the question ‘whether the Act authorises and requires the indefinite, and possibly even permanent, administrative detention of ... a person’, an unlawful non-citizen under the Act who having been refused refugee status asked to be removed from Australia, when there is no real likelihood or prospect of that person’s removal overseas in the reasonably foreseeable future.<sup>85</sup> The Full Court answered that question with what I suggest can fairly be described as a resounding ‘no’.

Section 196(1) of the *Migration Act* requires and authorises an unlawful non-citizen,<sup>86</sup> first detained under the separate ‘arrest’ provisions of s 189, to be kept in immigration detention until he or she is removed from Australia under s 198 or 199, or deported under s 200 or granted a visa. The only provision of the *Migration Act* which deals with the release of a person from s 196 detention is s 198(1) which requires an officer to remove ‘as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed’.<sup>87</sup>

The Full Court (Black CJ, Sundberg and Weinberg JJ) described the effect of s 196 as being to ‘provide for mandatory detention’, ‘because the legislation contains no provision authorising the release of a person on discretionary grounds’.<sup>88</sup>

The short facts in *Al Masri* were that Mr Al Masri was a Palestinian from the Gaza Strip who arrived in Australia on about 5 June 2001 as an unlawful non-citizen. After his arrival he was detained in Woomera Detention Centre in South Australia. He lodged an application for a protection visa claiming to be a refugee. That application was declined by a delegate of the Minister, a decision which was affirmed by the Refugee Review Tribunal. Mr Al Masri did not seek to challenge the decision of the Tribunal but, rather, signed a written request to the Minister to be returned to the Gaza Strip. Mr Al Masri’s removal from Australia was delayed, apparently because officers of the relevant department could not obtain permission to transit countries on his way back to the Gaza Strip. In May 2002, Mr Al Masri commenced proceedings against the Minister in the Federal Court seeking an order in the nature of habeas corpus for release from immigration detention. Justice Merkel who heard the application ordered Mr Al Masri’s immediate release from detention.<sup>89</sup>

The Minister appealed. By the time the case came on for hearing in the Full Court of the Federal Court of Australia on 2 October 2002 Mr Al Masri had been removed from Australia and, presumably, returned to the Gaza Strip. An argument that the appeal should be dismissed as incompetent on the basis of his removal was refused. The Minister argued that a live controversy was extant in

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85 *Al Masri* (2003) 126 FCR 54, 58.

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

87 *Migration Act 1958* (Cth) s 198(1). ‘Remove’ means remove from Australia: s 5(1).

88 *Al Masri* (2003) 126 FCR 54, 58.

89 *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609.

relation to costs and that, even absent that controversy, the matter should be determined because, according to the Solicitor-General's submission, it 'would be wrong and unfair to the Minister and his officers to allow the order for release to stand if it were ... based on erroneous view of the law'.<sup>90</sup>

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

HREOC also submitted that implied limitations upon the power to detain were supported by principles of statutory construction derived from international law and the common law. With respect to international law it argued that a statute should be interpreted and applied, to the extent that its language allowed, in a manner that was consistent with established international law and with Australia's treaty obligations. Thus, HREOC argued ss 196(1)(a) and 198 should be construed consistently with the rights conferred by the *International Covenant on Civil and Political Rights*.<sup>91</sup> It also submitted that principles of statutory construction dictated that there should be clear words before a statute would be construed as removing a fundamental right or freedom – the relevant right in this instance being the right to personal liberty.<sup>92</sup>

The ultimate decision in *Al Masri* did not turn on a constitutional point. However, the Full Federal Court tentatively concluded that, if s 196 imported no limitation (in particular, no temporal limitation) on the detention of an unlawful non-citizen other than that the detention be bona fide for one of the purposes identified in s 196(1) (being removal from Australia under s 198 or 199, deportation under s 200 or the ground of a visa), then it could not be regarded as reasonably appropriate and adapted to an end sufficiently linked to the aliens power, particularly if considerations of proportionality were taken into account.<sup>93</sup> They reached this tentative conclusion principally upon an analysis of the High Court's decision in *Lim*.

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90 *Al Masri* (2003) 126 FCR 54, 62.

91 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

92 *Al Masri* (2003) 126 FCR 54, 67.

93 *Ibid* 75.



Although the challenge to the critical provisions of the *Migration Act* in *Lim* failed, the Full Court viewed that case as of ‘critical relevance’ because of

the clear preponderance of opinion in the judgments that Ch III of the *Constitution* may operate to impose limits upon the power to detain by reason of its insistence that the judicial power of the Commonwealth is vested exclusively in the courts that Ch III designates.<sup>94</sup>

The Full Court held that while a ‘limited authority to detain an alien in custody can be conferred on the executive without the infringement of Ch III’s exclusive vesting of the judicial power of the Commonwealth in the courts which it designates’, that conferral is limited to the extent that the ‘authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth’.<sup>95</sup>

The Full Federal Court viewed the joint judgment in *Lim* as upholding the validity of the statutory scheme there under consideration because the scheme operated so that, as a practical matter, the detention could be brought to an end.<sup>96</sup> It was the absence of a similar provision from the sections being considered in *Al Masri* (that is, a provision with a practical capacity to bring about release from detention) which, in the Full Court’s view, distinguished *Lim* from the scheme the Court was considering.<sup>97</sup>

In the Full Court’s view, if the power to detain was not read as subject to limitations, it would extend impermissibly to authorise detention which was punitive in nature. This was because if there was no real likelihood or prospect of removal being effected in a reasonably foreseeable future, the connection between the removal of aliens and their detention became so tenuous as to make the detention punitive in nature.<sup>98</sup> In their Honours’ view there was a clear distinction between ‘detention which is directed in a genuine, and realistic sense towards removal, and detention in the hope that, at that some unknown point in the future, removal will be possible’.<sup>99</sup>

Accordingly, in their Honours’ view, constitutional considerations pointed strongly to the need and foundation for a limitation that ss 196(1)(a) and 198 authorised detention only for as long as the removal of the removee from Australia was ‘reasonably practicable’, in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future.<sup>100</sup>

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

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94 Ibid 68.

95 Ibid 69.

96 Ibid 71.

97 Ibid 73.

98 Ibid 73–4.

99 Ibid 75.

100 Ibid. See also *Al Masri v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2002) 192 ALR 609, 618 (Merkel J).

Their Honours referred to the ‘*Hardial Singh* principle’, articulated by Lord Woolf in *R v Governor of Durham Prison; Ex parte Hardial Singh*.<sup>101</sup> In that case his Lordship held that a provision enabling the detention pending removal or departure of a person against whom a deportation order was in force was impliedly limited to a period which was reasonably necessary for that purpose.<sup>102</sup> The Full Court referred to a number of cases in which the *Hardial Singh* principle had been applied including the decision by the Privy Council in *Tan Te Lam v Superintendent of Thai A Chau Detention Centre*<sup>103</sup> and by the House of Lords in *R v Secretary of State for the Home Department; Ex parte Saadi*.<sup>104</sup>

A similar conclusion had been reached by the majority in the Supreme Court of the United States in *Zadvydas v Davis*<sup>105</sup> where the Court considered applications for habeas corpus filed by aliens detained indefinitely. The majority (Breyer, Stevens, O’Connor, Souter and Ginsberg JJ) held that

read in light of the constitutional demands of the due process clause of the Fifth Amendment, the post-removal-period detention statute implicitly limited the detention of an alien to a period reasonably necessary to bring about the alien’s removal from the United States ... [so that it did not] permit indefinite detention.<sup>106</sup>

Applying that principle, therefore, their Honours analysed the relevant provisions of the *Migration Act*. They concluded that an intention to curtail the right of personal liberty had not been clearly manifested. Accordingly, the power to detain a person under the Act was held to be impliedly limited to such time as the removal of the person from Australia was ‘reasonably practicable’ in the sense that there was a real likelihood of removal in the reasonably foreseeable future.<sup>107</sup>

In expressing their conclusion, the Full Court noted that the constitutional validity of ss 196 and 198 of the *Migration Act* had been addressed by Emmett J in *NAGA v Minister for Immigration and Multicultural and Ethnic Affairs*<sup>108</sup> (‘*NAGA*’). His Honour had concluded that no constitutional invalidity ‘arose’ from construing the relevant provisions as authorising continued detention of an unlawful non-citizen at a time when there was no real prospect of removing that person in the foreseeable future. Their Honours pointed out that Justice Emmett’s conclusion was based upon an analysis of *Lim* with which they differed.<sup>109</sup>

Their Honours’ analysis in *Al Masri* of authorities in Australia, the United Kingdom and the United States of America confirmed that the right to personal liberty is one of the most fundamental common law rights as well as among the most fundamental of the universally recognised human rights – a right which extends both to citizens and non-citizens.<sup>110</sup> In so finding, their Honours applied

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101 [1984] 1 WLR 704.

102 Ibid 706.

103 [1997] AC 97.

104 [2002] 4 All ER 785, 793.

105 533 US 678 (2001).

106 Ibid 689, cited in *Al Masri* (2003) 126 FCR 54, 82.

107 *Al Masri* (2003) 126 FCR 54, 88.

108 [2003] FCA 224 (Unreported, Emmett J, 20 March 2003).

109 *Al Masri* (2003) 126 FCR 54, 97.

110 Ibid 76–83.

the principle of statutory interpretation that ‘courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language’.<sup>111</sup>

In *NAGA*, Emmett J accepted that it was beyond the legislative power of the Commonwealth to invest the executive with an arbitrary power to detain persons in custody.<sup>112</sup> This was because detention is normally of a punitive nature and the function of judging and punishing criminal guilt was a judicial one referred to in Chapter III of the *Constitution*. He pointed out that in *Lim* it had been held that detention of an alien for the purposes of expulsion or deportation was not punitive in nature and therefore did not trespass on the judicial power of the Commonwealth.<sup>113</sup> In Justice Emmett’s view there was no constitutional reason why s 196(1) could not be read as conferring unqualified power to keep an unlawful non-citizen in immigration detention until one of the events specified in the section occurred, however uncertain the event may be, as long as ‘the purpose of the detention is removal’.<sup>114</sup>

The High Court refused special leave to appeal from the Full Court’s decision in *Al Masri* on the basis that the special leave application lacked utility in circumstances where Al Masri had been removed from Australia and also when, at the same time, it had made orders removing *Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>115</sup> (*‘Al Khafaji’*) and *SHDB v Godwin; Ex parte Attorney-General (Cth)*<sup>116</sup> (*‘SHDB’*). The latter cases both involve the question whether constitutional considerations compel recognition of temporal limitations on periods of immigration detention pursuant to the *Migration Act*, ss 196 and 198. They were argued in the High Court on 12–13 November 2003 along with *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*.<sup>117</sup> The Solicitor-General, Mr David Bennett QC, acknowledged that the primary purpose of the removals was to challenge the Full Federal Court decision in *Al Masri*.<sup>118</sup>

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111 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

112 [2003] FCA 224 (Unreported, Emmett J, 20 March 2003) [51].

113 *Lim* (1992) 176 CLR 1, 32.

114 *NAGA* [2003] FCA 224 (Unreported, Emmett J, 20 March 2003) [54].

115 [2002] FCA 1369 (Unreported, Mansfield J, 5 November 2002).

116 See Transcript of Proceedings, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (High Court of Australia, Gummow, Kirby and Hayne JJ, 14 August 2003).

117 (2004) 208 ALR 271. This case is an appeal from the South Australian Supreme Court: *Secretary of the Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453. It concerns the question whether conditions in prison can render imprisonment or detention unlawful, thus justifying either an escape or habeas corpus. The High Court delivered its decisions in the three related matters on 6 August 2004, dismissing the appeals in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 and *Al-Kateb v Godwin* (2004) 208 ALR 124, and allowing the appeal in *Al Khafaji* (2004) 208 ALR 201.

118 See Transcript of Proceedings, *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 12 November 2003).

### C Children in Detention

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

In *B and B*, the Full Court of the Family Court (Nicholson CJ, Ellis and O’Ryan JJ) held that the welfare jurisdiction of the Family Court extended to all children of marriages in Australia, including children in immigration detention, where the particular orders sought arose out of or were sufficiently connected to the marriage relationship. Their Honours further held that the Family Court’s welfare jurisdiction derived its constitutional validity from the marriage, divorce and incidental powers contained in ss 51(xxi) and 51(xxii) of the *Constitution* which were to be broadly construed. They also held that in exercising the welfare jurisdiction the Family Court could make orders for the protection of children of marriages directed at third parties where the orders sought were sufficiently connected to the relevant constitutional heads of power and that those orders might be made to protect children of marriages in immigration detention.

Chief Justice Nicholson and O’Ryan J also concluded that, consistently with the decision of the Full Court of the Federal Court in *Al Masri*, if the children in immigration detention were unable to bring their detention to an end, their continued detention was unlawful.<sup>119</sup>

The Minister had submitted that the children’s detention could only be brought to an end by the actions of their parents or the children attaining a sufficient capacity to make a request for repatriation themselves. In their Honours’ view that interpretation raised the ‘very real possibility of [the] children spending their entire childhood in detention’. They considered that if s 196(3) of the *Migration Act* produced that effect then it was unconstitutional.<sup>120</sup> They agreed with the Full Court of the Federal Court in *Al Masri* that there was nothing in the scheme of the *Migration Act* or s 196 itself that suggested that Parliament contemplated such a departure from fundamental freedoms and individual liberty that would produce such a result.<sup>121</sup>

Their Honours also found support for their conclusion in arts 37(b), (c) and (d) of the United Nations *Convention on the Rights of the Child*,<sup>122</sup> requiring that no child should be deprived of his or her liberty unlawfully or arbitrarily and that the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time. In their Honours’ view, the indefinite detention of the children was incompatible with art 37 and constituted a serious breach of Australia’s obligations under the Convention.<sup>123</sup> Accordingly, their Honours concluded that s 196(3) of the *Migration Act* did not

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119 *B and B* (2003) 199 ALR 604, 665.

120 *Ibid* 666.

121 *Ibid*.

122 Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 20 September 1990).

123 *B and B* (2003) 199 ALR 604, 666.

bar the exercise of the Family Court's welfare jurisdiction nor prevent the Court from ordering the release of the children from detention.<sup>124</sup>

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

His Honour disagreed, however, with Nicholson CJ and Justice O'Ryan's conclusion that the continued detention of the children was unlawful as, in his view, it could not be said that there was no real likelihood or prospect in the reasonably foreseeable future of the children being removed and thus released from detention.<sup>125</sup>

The decision in *B and B* was delivered on 19 June 2003. On 8 July 2003, the Family Court granted a certificate pursuant to s 95(b) of the *Family Law Act 1975* (Cth) certifying for the purposes of an appeal to the High Court, that the case involved an important question of law of public interest. The High Court heard the appeal on 30 September – 1 October 2003 and reserved its decision.<sup>126</sup> The Solicitor-General for the Commonwealth, Mr David Bennett QC, informed the High Court that one of the issues the appellant sought to agitate, namely that aspect of the decision of the Family Court that the children's detention was unlawful, had been a matter that the parties had not argued before the Family Court but was nevertheless dealt with in the judgment.<sup>127</sup>

Although Mr Bennett QC submitted that the case could be resolved by issues which did not raise the *Al Masri* principle, he also submitted that if the Court did decide that it had to consider that issue then it should defer giving judgment until it had heard the two removed cases which raised the *Al Masri* principle (*Al Khafaji* and *SHDB*). Both of these cases were argued in the High Court on 12–13 November 2003 together with *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* and judgment was reserved.<sup>128</sup>

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124 Ibid 666–7.

125 Ibid 673.

126 The High Court delivered its decision on 29 April 2004, reversing the decision of the Full Court of the Family Court: *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130.

127 Transcript of Proceedings, *Minister for Immigration and Multicultural and Indigenous Affairs v B* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, and Heydon JJ, 30 September 2003).

128 Transcript of Proceedings, *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 13 November 2003). The High Court delivered its decisions in the three related matters on 6 August 2004, dismissing the appeals in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 and *Al-Kateb v Godwin* (2004) 208 ALR 124, and allowing the appeal in *Al Khafaji* (2004) 208 ALR 201.

#### IV VISA CASES

Justice Sackville has already dealt with the High Court's decision in *Shaw v Minister for Immigration and Multicultural Affairs*<sup>129</sup> ('Shaw'). As his Honour has pointed out, the facts in *Shaw* were almost identical to the facts in *Re Patterson; Ex parte Taylor*.<sup>130</sup> Mr Taylor was born in the United Kingdom and arrived in Australia at the age of nine. In 1994 he had been granted a Permanent Transitional Visa. Subsequently, he pleaded guilty to offences under the *Crimes Act 1900* (NSW) and was sentenced to gaol. As a result of this conviction his visa was cancelled purportedly pursuant to s 501 of the *Migration Act*. He was arrested and detained as an 'unlawful non-citizen'. He was subsequently released after a majority of the High Court held that Mr Taylor had not been an alien when he arrived in Australia and had never become one. Accordingly, he was beyond the reach of the aliens power and thus outside s 501 of the *Migration Act*.

In *Ruddock v Taylor*,<sup>131</sup> the New South Wales Court of Appeal dismissed an appeal by the Minister for Immigration from a District Court judgment awarding damages to Mr Taylor for a wrongful imprisonment. The case is significant not merely because it provides a rare glimpse of the sequelae of a High Court judgment but also because of its emphasis upon the protection of the personal liberty of individuals as well as its emphasis that it was incumbent upon the government to establish that it has lawful authority to imprison a person.<sup>132</sup> This emphasis upon the limited circumstances in which the government can impinge upon the liberty of subjects echoes the strong statements to like effect in *Al Masri*.

#### V JUDICIAL POWER

In *Re Criminal Proceeds* the Queensland Court of Appeal (Williams JA, White and Wilson JJ) considered the validity of s 30 of the *Criminal Proceeds Confiscation Act 2002* (Qld) which required the Supreme Court in hearing an application for an order restraining any person from dealing with property other than in a stated way or in stated circumstances<sup>133</sup> to hear the application in the absence of anybody other than, in effect, the applicant for the order and that party's legal representatives. The appellant submitted that s 30 was so inconsistent with the essential character of the exercise of judicial power that, given the reasoning in *Kable*, it was invalid.<sup>134</sup>

His Honour, Williams JA, (with whom White and Wilson JJ agreed) held that the provision was invalid because the command to the judge hearing the application to proceed in the absence of any party affected by the order to be

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129 (2003) 203 ALR 143. See Justice Sackville, above n 4, 75–9.

130 (2001) 207 CLR 391.

131 (2003) 58 NSWLR 269. Special leave to appeal was granted by the High Court on 8 October 2004.

132 Ibid 272 (Spigelman CJ).

133 *Criminal Proceeds Confiscation Act 2002* (Qld) s 28.

134 *Re Criminal Proceeds* [2004] 1 Qd R 40, 43 (Williams JA).

made was such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. He held that the provision was constitutionally invalid because the Supreme Court of Queensland was part of the integrated Australian judicial system for the exercise of the judicial power of the Commonwealth.<sup>135</sup> Integral to his Honour's conclusion was the proposition that the right of a party likely to be affected by a decision to be duly notified when and where a matter was to be heard, and to be given the full opportunity of stating a case in response, was a universal principle which applied to both civil and criminal proceedings and that the effect of s 30 was to abrogate that principle.<sup>136</sup>

## VI IMPLIED FREEDOM OF SPEECH AND ASSOCIATION

Now let me turn to the cases with election implications.

In *Mulholland*, the appellant, the registered officer of the DLP, a registered political party under the *CEA*, sought to challenge s 123(1) of the *CEA* which required the DLP to provide a list of at least 500 of its members for the purposes of the *CEA* (the '500 persons rule') and s 126(2A)(a) which provided that none of those 500 persons could be relied upon by another political party for purposes of qualifying for registration as a political party (the 'no overlap rule'). The appellant sought to challenge those requirements on a number of bases. First, he challenged the 500 persons rule and the no overlap rule as being invalid as breaching the implied constitutional limitation respecting freedom of political communication. He also claimed that the provisions were invalid for breaching the implied freedom of association and freedom of participation and the right of privacy inherent in the *Constitution*.<sup>137</sup> Justice Marshall dismissed his application at first instance.<sup>138</sup>

As summarised by the Full Federal Court, Marshall J held that there was no relevant political communication but that even if he was wrong, 'such interference as there was with any political communication was reasonably appropriate and adapted to a legitimate object'.<sup>139</sup> While Marshall J apparently accepted that the inclusion of party details on the ballot (which was an advantage of registration as a political party) constituted a communication about a political matter, he also held that it was not a relevant communication for the purpose of the constitutional limitation because the ballot paper was a communication from the executive to the voter and not a communication between voters.<sup>140</sup>

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135 Ibid 55.

136 Ibid 49–50.

137 *Mulholland* (2003) 128 FCR 523, 526.

138 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710.

139 *Mulholland* (2003) 128 FCR 523, 527.

140 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710, 725.

Justice Marshall held, applying the test for the implied freedom of communication set out in *Lange v Australian Broadcasting Corporation*<sup>141</sup> (*'Lange'*), that the 500 persons rule was

reasonably appropriate and adapted to the fulfilment of a legitimate legislative purpose, such purpose being compatible with the constitutionally prescribed system of representative government, namely the maintenance of the integrity of the system of registration of political parties and the setting of qualifications for political parties to achieve before taking the benefit of other provisions of the Act.<sup>142</sup>

It appeared that the choice of the figure of 500 was based on a report published by the Commonwealth Parliament's Joint Select Committee on Electoral Reform. Justice Marshall inferred that the number indicated a party with a 'reasonable measure of public support'.<sup>143</sup> The appellant complained that the 500 persons rule infringed the implied constitutional freedom of communication because non-registered parties were unable to have their endorsed candidates identified by association with their party on the ballot paper. Justice Marshall concluded that this was an incident of the system of registration which was 'reasonably appropriate and adapted to achieve the legislative aim of regulating registered political parties'. That aim, according to Marshall J, was 'to ensure that not every political party with minuscule levels of public support would be entitled to the benefits of registration'. He held that '[a]ny incidental effect upon the freedom of a political party to communicate with the electorate at the ballot box is ... an inhibition "which is commensurate with reasonable regulation in the interests of an ordered society"'.<sup>144</sup>

His Honour also found that the no overlap rule did not infringe the implied freedom of communication against government and political matters because it was intended to 'make the process of registration of political parties more effective by seeking to limit the capacity of individuals to foster a multiplicity of political parties based on an identical or substantially identical membership'. He accepted a submission made by the Attorney-General for the Commonwealth that the policy behind the challenged amendments was

the avoidance of 'entrepreneurial' or cynical use of the same 'block' of members to register multiple parties with no true and discrete membership, the minimising of confusion to voters, the 'tablecloth' ballot paper and the use of 'decoy' or front parties to mislead the voter into indicating a preference for a group ticket which is merely calculated to channel preferences to a another party.<sup>145</sup>

Finally, Marshall J held that there was no constitutionally entrenched freedom to keep political associations private but that, even if such a freedom existed, the challenged provisions 'could not reasonably be viewed as hampering that freedom'.<sup>146</sup> The Full Court of the Federal Court of Australia dismissed the appeal.

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141 (1997) 189 CLR 520, 560.

142 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710, 728.

143 *Ibid.*

144 *Ibid* (citation omitted).

145 *Ibid* 729.

146 *Ibid* 731.



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

Since *McGinty* it has been clear, if it was not clear before, that the *Constitution* gives effect to the institution of ‘single representative government’ only to the extent that the text and structure of the *Constitution* establish it ... under the *Constitution*, the relevant question is not ‘what is required by representative and responsible government?’ It is, ‘what do the terms and structure of the *Constitution* prohibit, authorise or require?’<sup>147</sup>

The Full Court referred to the questions the High Court said, in *Lange*, had to be determined when a law was alleged to infringe the implied freedom of communication. The first was whether the law effectively burdened freedom of communication about government or political matters either in its terms, operation or effect. The second was, if the law did effectively burden that freedom, whether the law was reasonably appropriate and adapted to serve a legitimate end the fulfilment of which was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Secondly, the Full Court pointed out that in *Lange* the High Court had observed that the freedom of communication the *Constitution* protected was not absolute but was limited to ‘what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*’.<sup>148</sup>

The Full Court did not agree with Justice Marshall’s conclusion that the relevant provisions did not burden political communication. In the Full Court’s view, the statutory provisions conferred a limited privilege on registered political parties in relation to their communications with the voters. That privilege was a burden on all those seeking election who did not enjoy it.<sup>149</sup> Nevertheless, the Court also held that the registration of political parties under the *CEA* was a necessary aspect of a valid and legitimate legislative objective.<sup>150</sup>

The appellant had argued that the 500 persons rule was not reasonably appropriate. The appellant submitted that any requirement of more than two members which, the Full Court inferred was presumably ‘the minimum to have a [single] “party”’, was ‘too many’. As the Full Court pointed out, while the number ‘500’ might in one sense be considered to be arbitrary, nothing was put before the Court which suggested it was inappropriate. The Full Court recognised that:

The Parliament must be able to take into account issues such as the extent of public support enjoyed by the party. Maybe it can also take account of the degree of recognition of the party by the voters. The Parliament could hardly be required to arrange the publication on the ballot of party affiliations if the only effect of doing so is to create confusion. It is also likely that Parliament may take into account the

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147 *Lange* (1997) 189 CLR 520, 566–7 (citations omitted).

148 *Mulholland* (2003) 128 FCR 523, 530. See *Lange* (1997) 189 CLR 520, 567–8, 561–2.

149 *Mulholland* (2003) 128 FCR 523, 532.

150 *Ibid* 533–4.

potential farce of the ballot paper being so large that the public lose confidence in the electoral system.<sup>151</sup>

The Full Court also concluded that the no overlap rule was reasonably appropriate and adapted to the requirements of transparency and accountability within the electoral system in the same manner as was the disclosure of funding to political parties.<sup>152</sup>

The Court concluded that it was unnecessary for it to determine whether the system of representative government provided for by the *Constitution* limited the legislative power to interfere with freedom to associate and participate for the purposes of that system because, in its view, whether such limits were seen as additional to or incorporated within the limits based upon political communication, they would not in any event apply to laws which were reasonably adapted and appropriate to that system. As they had concluded that the laws were so relevantly appropriate and adapted the issue did not arise. The Court also agreed with Justice Marshall's conclusion that there was no right to 'political privacy' implicit in the *Constitution*.<sup>153</sup>

The High Court granted special leave in *Mulholland* on 3 October 2003. The appeal was heard on 11–12 February 2004.<sup>154</sup>

## VII OFFICIAL SECRECY

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

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

As his Honour observed, the regulation only limited the information which it covered by the qualifications that it be 'about public business' or that it be 'anything of which the employee has official knowledge'. His Honour characterised it as intended to be a 'catch-all' provision.<sup>155</sup>

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151 Ibid 535–6.

152 Ibid 536–7.

153 Ibid 537.

154 See Transcript of Proceedings, *Mulholland v Australian Electoral Commission* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ, 11–12 February 2004). The High Court dismissed the appeal on 8 September 2004: *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582.

155 *Bennett* (2003) 204 ALR 119, 133.

In seeking to identify whether the regulation infringed the requirement of freedom of communication, Finn J accepted<sup>156</sup> that the implied freedom could be described sufficiently in the words of McHugh J in *Levy v Victoria*:

The freedom protected by the *Constitution* is not, however, a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the *Constitution*. Unlike the Constitution of the United States, our *Constitution* does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law.<sup>157</sup>

Justice Finn analysed extensively opinion, both judicial and otherwise, which emphasised the important purposes served first, by the public communication of information about government and secondly, by open government in a modern democratic society. He considered that those purposes bore directly on the vitality of the system of representative and responsible government provided for by the *Constitution*.<sup>158</sup> While his Honour accepted that ‘official secrecy has a necessary and proper province in our system of government’, in his view ‘a surfeit of secrecy does not’.<sup>159</sup>

Secondly, his Honour concluded that the law was not reasonably appropriate and adapted to serve a legitimate end compatible with the implied freedom of communication principally because of its catch-all operation. He concluded that

the dimensions of the control [the regulation] imposes impedes quite unreasonably the possible flow of information to the community – information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public’s knowledge and understanding of the operation, practices and policies of Executive Government.<sup>160</sup>

His Honour rejected the Commonwealth’s submission that the authorisation exception in the regulation provided an appropriate basis to differentiate the nature of the information which could be disclosed. His Honour’s blunt response was that ‘placing “an unbridled discretion” in the hands of an Agency Head may, or may appear to, “result in censorship”’.<sup>161</sup> He concluded that if the authorisation mechanism was considered as part of the balancing process required by the second *Lange* test, ‘it unreasonably compromises the freedom by transforming the freedom into a dispensation’ and was ‘not an appropriate filtering device to protect the efficient workings of government in a way that is compatible with the freedom’.<sup>162</sup>

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156 Ibid 136.

157 *Levy v Victoria* (1997) 189 CLR 579, 662 (emphasis in original).

158 *Bennett* (2003) 204 ALR 119, 136.

159 Ibid 141.

160 Ibid.

161 Ibid 141–2 (citation omitted).

162 Ibid.

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

Though I am mindful that Reg 7(13) and its predecessors have been a threatening presence for Commonwealth public servants for over 100 years I am satisfied that it is invalid.<sup>163</sup>

The conclusion that reg 7(13) was invalid did not conclude the matter, for his Honour also considered whether the duty of loyalty that both parties accepted the applicant owed to the Commonwealth to serve with good faith and fidelity, or with loyalty and fidelity, coupled with a power to give directions, provided the necessary justification for the direction to Mr Bennett not to make media comment as a Customs Officer or as President of the Customs Officers' Association which involved direct or indirect disclosure of information about public business or anything about which he had official knowledge. His Honour accepted the applicant's contention that if such a duty could be relied upon, the Commonwealth's submission presupposed not only that the duty was being used in a fashion compatible with the implied constitutional freedom but also that appropriate findings had been made by HREOC that the duty could properly have been invoked. As no such findings had been made the matter had to be remitted to HREOC.<sup>164</sup>

## VIII RACIAL DISCRIMINATION

In *Toben v Jones*,<sup>165</sup> a case which might be colloquially referred to as the flipside of the implied right to freedom of communication, the Full Court of the Federal Court of Australia (Carr, Kiefel and Alsopp JJ) held that Part IIA of the *Racial Discrimination Act 1975* (Cth), which deals with prohibiting offensive behaviour based on racial hatred, was constitutionally valid as an exercise of the external affairs power.

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

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

In my opinion it is clearly consistent with the provisions of the [International Convention on the Elimination of All Forms of Racial Discrimination] and the [International Covenant on Civil and Political Rights] that a State party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or

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163 Ibid 143.

164 Ibid 144-5.

165 (2003) 129 FCR 515.

ethnic origin before such acts can go into incitement or promotion of racial hatred or discrimination. The authorities show that, subject to the requisite connection [with the external affairs power], it is for the legislature to choose the means by which it carries into or gives effect to a treaty.<sup>166</sup>

## IX FREEDOM OF INTERSTATE TRADE

Section 92 of the *Constitution* was invoked in *Sportodds Systems Pty Ltd v New South Wales*<sup>167</sup> (*Sportodds*). To the extent the case concerned a ‘free trade’ issue, the question was whether ss 28–33 of the *Racing Administration Act 1998* (NSW) were invalid as imposing an impermissible restraint on trade, commerce and intercourse between the States and/or between the Australian Capital Territory and the States. The Full Court of the Federal Court (Branson, Hely and Selway JJ) was of the view that the material and information before the Court was insufficient to enable it to determine whether or not those sections or any of them were invalid on this basis and concluded that the declaration sought on the basis of this issue could not have been granted.

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

The Court referred to the summary in *Barley Marketing Board for New South Wales v Norman*<sup>168</sup> of the meaning and effect of the requirements of s 92 of the *Constitution* relating to freedom of trade and commerce. In that case the High Court explained that *Cole v Whitfield*<sup>169</sup> decided that the freedom of interstate trade and commerce guaranteed by s 92 is freedom from imposition on that trade and commerce of discriminatory burdens of a protectionist kind and that a law will discriminate in a relevant sense ‘if the law on its face subjects that trade or

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166 Ibid 525.

167 (2003) 202 ALR 98.

168 (1990) 171 CLR 182.

169 (1988) 165 CLR 360.

commerce to a disability or disadvantage or if the factual operation of the law produces such a result'.<sup>170</sup>

The Full Court observed that even if a law is relevantly discriminatory, it would not be in breach of s 92 if it was reasonably appropriate and adapted to some legitimate objective,<sup>171</sup> and that it was necessary to establish as a fact that the burden operates so as to discriminate against interstate trade, unless the discrimination was obvious on the face of the legislation.<sup>172</sup>

It was in the latter respect that, in their Honours' view, the evidence fell short of what was necessary to enable the Court to deal properly with the s 92 issue.<sup>173</sup> Thus neither party had put any material before the Court to enable it to determine whether the requirement that a licensed bookmaker be present at a licensed racecourse discriminated against interstate traders.<sup>174</sup> Equally, no material had been placed before the Court which would enable it to determine whether, if an analysis of the actual operation of the provisions revealed that they discriminated in effect against interstate bookmakers or against interstate communication, the burden imposed was reasonably proportionate to a legitimate object.<sup>175</sup>

Although the Court acknowledged it could enquire for itself into constitutional facts, as explained by Brennan J in *Gerhardy v Brown*,<sup>176</sup> in the Court's view there were obvious dangers in a court informing itself from its own enquiries unless the material relied upon was 'public or authoritative or unless the Court had no other choice'.<sup>177</sup>

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

## X OUTRIDER CASES

Finally let me touch briefly on the 'outrider cases' – a category with an enduring and endearing quality identified by Justice French last year. These cases were defined by his Honour as 'outriders of constitutional jurisprudence' which may be

collected under the generic heading 'fiat justitia' as the philosophy that informed many of them is well summed up in the statement attributed to Ferdinand I – Holy Roman Emperor from 1558 – Fiat Justitia et Pereat Mundus – Let Justice Be Done Though the World Should Perish.<sup>178</sup>

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170 *Barley Marketing Board for New South Wales v Norman* (1990) 171 CLR 182, 199.

171 *Sportodds* (2003) 202 ALR 98, 110.

172 *Ibid* 111.

173 *Ibid*.

174 *Ibid*.

175 *Ibid*.

176 (1985) 159 CLR 70, 141–2.

177 *Sportodds* (2003) 202 ALR 98, 115.

178 Justice French, above n 1, 6–7.

According to Justice French, '[f]or the most part such cases have their own internal logic but are routed in misconception or wishful thinking'.<sup>179</sup>

The most significant case in this category, *Lohe v Gunter*,<sup>180</sup> was an application to have Mr Gunter declared a vexatious litigant. The case was the sad finale of many actions by a gentleman whose brushes with the law involved convictions by the Magistrates Court at Ipswich of driving an unregistered truck, one charge of driving the same truck without a number plate and one charge of failing to drive the truck into a checking site (or weighbridge) and a conviction for being the owner of a dog which was not under effective control in a public place. He sought to challenge one conviction on the basis that the statutory provisions under which he was convicted were ultra vires the *Constitution*. He also argued that Chapter 29 of *Magna Carta*, which includes the clause '[w]e will sell to no man, and we will not deny or defer to any man, either justice or right', prevented the making of any costs order against him, as amounting to the selling of justice. He also argued that the *Vexatious Litigants Act 1981* (Qld) conflicted with *Magna Carta*.

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

## XI CONCLUSION

This review of constitutional cases decided by the federal courts and State Supreme Courts during the 2003 Term demonstrates the wide implications of the constitutional issues decided beyond the shores of Lake Burley Griffin. As *Al Masri* demonstrates, the right to personal liberty is one of the most fundamental common law rights as well as among the most fundamental of the universally recognised human rights – a right which extends both to citizens and non-citizens. The common law and the *Constitution* should be bulwarks against the abrogation of such a fundamental right. Yet echoes of populist law and order campaigns can be seen in the legislation held valid in *Fardon* which would keep a person detained without a finding of criminal guilt. On the other hand, the work

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179 Ibid 7.

180 [2003] QSC 150 (Unreported, Holmes J, 16 April 2003).

the implied freedom of communication can do was seen in its application to ensure there could be reasonable regulation of the registration of political parties but not unreasonable restraints on public servants from disclosing information acquired in the course of their duties. It is vital that the *Constitution* should be interpreted in a contemporary context. It is equally important that that interpretation take place both in the Federal Court and State courts as well as in the High Court to ensure a broad range of judicial views. This review of the 2003 Term illustrates that constitutional jurisprudence flourishes at all levels of the judicial hierarchy.



## SCHEDULE 1: CASES BY COURT

Court	Case	Sections Considered
<b>Federal Court of Australia</b>  Full Court	<i>Petrotimor Companhia de Petroleos SARL v Commonwealth</i> (2003) 126 FCR 354	ss 51(xxix), (xxxi), 61
	<i>Ferdinands v Chief of Army</i> [2003] FCAFC 10 (Unreported, Spender, Ryan, von Doussa, Dowsett and Selway JJ, 11 February 2003)	Ch III, ss 51(vi), 72, 80, 122
	<i>Ayan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 126 FCR 152	ss 51(xix), (xxvii), 75, 76
	<i>Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri</i> (2003) 126 FCR 54	Ch III, s 51(xix), (xxxix)
	<i>Mulholland v Australian Electoral Commission</i> (2003) 128 FCR 523	–
	<i>Toben v Jones</i> (2003) 129 FCR 515	s 51(xxix)
	<i>Bray v F Hoffman-La Roche Ltd</i> (2003) 130 FCR 317	ss 51(xx), 71, 76, 77
	<i>Miller v University of New South Wales</i> (2003) 200 ALR 565	Ch III, s 51(xx), (xxxv)
	<i>Long v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 76 ALD 610	s 51(xix), (xxvii)
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 202 ALR 98	ss 92, 109
	<i>Commonwealth v Lyon</i> (2003) 203 ALR 553	ss 71, 75, 76, 77
Single Judge	<i>O'Meara v Commissioner of Taxation</i> (2003) 128 FCR 376	ss 53, 55
	<i>NAGA v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 224 (Unreported, Emmett J, 20 March 2003)	Ch III, s 51(xix)
	<i>Te v Ruddock</i> [2003] FCA 661 (Unreported, Gray J, 2 July 2003)	s 51(xix)
	<i>Hicks v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 757 (Unreported, French J, 21 July 2003)	Ch III, ss 75(iii), (v), 76(i)
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 201 ALR 706	ss 92, 109, 122
	<i>P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 1029 (Unreported, French J, 26 September 2003)	ss 51(xix), 75(v)
	<i>Thayananthan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 78 ALD 50	s 75(v)
	<i>Mashood v Commonwealth</i> [2003] FCA 1147 (Unreported, Goldberg J, 21 October 2003)	s 51(xix), (xxvii)
	<i>Australian Gas Light Co v Australian Competition and Consumer Commission (No 2)</i> (2003) ATPR ¶41-962	s 77
	<i>New England Biolabs Inc v F Hoffman-La Roche AG</i> (2003) 60 IPR 83	Ch III

	<i>Bennett v Human Rights and Equal Opportunity Commission</i> (2003) 204 ALR 119	–
	<i>Hollis v Minister for Immigration and Multicultural Affairs</i> (2003) 202 ALR 483	s 51(xix), (xxvii)
	<i>South Australia v Slipper MP</i> (2003) 203 ALR 473	ss 51(xxxi), 75(v), 109
<b>Family Court of Australia</b>	<i>AI and AA v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FamCA 943 (Unreported, Chisholm J, September 2003)	–
	<i>Attorney-General (Cth) v Kevin</i> (2003) 30 Fam LR 1	s 51(xxi)
	<i>B (Infants) and B (Intervener) v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 199 ALR 604	–
	<i>HR and DR v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 179 FLR 172	–
	<i>KN v SD</i> (2003) 176 FLR 73	–
<b>Supreme Court of the Australian Capital Territory</b>	–	–
<b>Supreme Court of New South Wales</b>  Court of Appeal/ Court of Criminal Appeal	<i>Julia Farr Services Inc v Hayes</i> (2003) 25 NSW CCR 138	ss 77(iii), 118
	<i>Mitchforce v Industrial Relations Commission</i> (2003) 57 NSWLR 212	ss 71, 73(ii)
	<i>R v O'Meara</i> [2003] NSWCCA 250 (Unreported, Meagher JA, Sully J and Smart AJ, 5 September 2003)	s 80
	<i>Air Link Pty Ltd v Paterson (No 2)</i> (2003) 58 NSWLR 388	s 109
	<i>Ruddock v Taylor</i> (2003) 58 NSWLR 269	s 51(xix)
Supreme Court	<i>Atkinson v State Bank of NSW Ltd</i> (2003) 53 ATR 407	s 51(ii)
	<i>Travel Compensation Fund v Blair</i> [2003] NSWSC 720 (Unreported, Einstein J, 7 August 2003)	s 109
	<i>Tryam Pty Ltd v Grainco Australia Ltd</i> [2003] NSWSC 812 (Unreported, Palmer J, 5 September 2003)	s 73(ii)
	<i>Chief Executive Officer of Customs v Pham</i> (2003) 176 FLR 131	s 80
	<i>A Goninan &amp; Co Ltd v Atlas Steels (Australia) Pty Ltd</i> [2003] NSWSC 956 (Unreported, Austin J, 24 October 2003)	ss 76(ii), 77(iii)
	<i>Hedges v Australasian Conference Association Ltd</i> [2003] NSWSC 1107 (Unreported, Young CJ in Eq, 1 December 2003)	s 117
	<i>Song v Coddington</i> (2003) 59 NSWLR 180	ss 52, 109
<b>Supreme Court of the Northern Territory</b>	–	–
<b>Supreme</b>	<i>Pauls Ltd v Dwyer</i> [2004] 2 Qd R 176	s 51(xxxi), (xxxvii)

<b>Court of Queensland</b> Court of Appeal	<i>Re Criminal Proceeds Confiscation Act 2002</i> (Qld) [2004] 1 Qd R 40	<i>Commonwealth Constitution</i> s 71; <i>Queensland Constitution</i>
	<i>Attorney-General (Qld) v Fardon</i> [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003)	<i>Commonwealth Constitution</i> Ch III; <i>Queensland Constitution</i>
	<i>Energex Ltd v Elkington</i> (2003) 47 ACSR 442	s 51(xxxi), (xxxvii)
	<i>Cannavan v Lettvale Pty Ltd</i> [2003] QCA 528 (Unreported, de Jersey CJ, McPherson JA, McMurdo J, 28 November 2003)	ss 92, 109
Supreme Court	<i>Lohe v Gunter</i> [2003] QSC 150 (Unreported, Holmes J, 16 April 2003)	–
	<i>Attorney-General (Qld) v Fardon</i> [2003] QSC 200 (Unreported, Muir J, 9 July 2003)	–
<b>Supreme Court of South Australia</b> Full Court	<i>South Australian River Fishery Association v South Australia</i> (2003) 84 SASR 507	s 51(xxxi)
	<i>Herald &amp; Weekly Times Ltd v Director of Public Prosecutions</i> (2003) 86 SASR 70	–
	<i>Edwards v Olsen</i> (2003) 228 LSJS 317	–
	<i>Conservation Council of SA Inc v Chapman</i> (2003) 87 SASR 62	–
	<i>Hui v Lane</i> (2003) 231 LSJS 334	s 51(i), (xx), (xxiiiA)
Single Judge	<i>Featherston v Tully</i> (No 2) (2002) 83 SASR 347	–
	<i>Altamura v Director of Fisheries Policy, South Australia</i> (2003) 229 LSJS 208	–
	<i>Tower Trust (SA) Ltd v Pincus</i> (2003) 230 LSJS 323	s 109
<b>Supreme Court of Tasmania</b>	–	–
<b>Supreme Court of Victoria</b> Court of Appeal	<i>PSL Industries Ltd v Simplot Australia Pty Ltd</i> (2003) 7 VR 106	s 109
	<i>Agtrack (NT) Pty Ltd t/as Spring Air v Hatfield</i> (2003) 7 VR 63	s 109
	<i>R v Ng</i> (2002) 5 VR 257	s 80
	<i>Director of Public Prosecutions (Cth) v Hunter</i> (2003) 7 VR 119	s 77(iii)
Supreme Court	<i>Australian Securities and Investments Commission v Plymin (No 1)</i> (2003) 175 FLR 124	s 51(i), (xvii), (xx), (xxxix)
	<i>Hyams v Victorian Electoral Commission</i> [2003] VSC 156 (Unreported, Gillard J, 21 May 2003)	ss 44(iv), 52(ii), 69, 109
<b>Supreme Court of Western Australia</b>	<i>Quigley v Legal Practitioners Complaints Committee</i> [2003] WASCA 228 (Unreported, Malcolm CJ, Anderson and Parker JJ, 25 September 2003)	–
	<i>P v Dunne</i> (2003) 27 WAR 528	Ch III, ss 77(iii), 109

## SCHEDULE 2: CASES BY SECTION

Section	Case
44(iv): Disqualification from Sitting as Member of Parliament	<i>Hyams v Victorian Electoral Commission</i> [2003] VSC 156 (Unreported, Gillard J, 21 May 2003)
51(i): Trade and Commerce	<i>Hui v Lane</i> (2003) 231 LSJS 334
	<i>Australian Securities and Investments Commission v Plymin (No 1)</i> (2003) 175 FLR 124
51(ii): Taxation	<i>Atkinson v State Bank of NSW Ltd</i> (2003) 53 ATR 407
51(vi): Defence	<i>Ferdinands v Chief of Army</i> [2003] FCAFC 10 (Unreported, Spender, Ryan, von Doussa, Dowsett and Selway JJ, 11 February 2003)
51(xvii): Bankruptcy and Insolvency	<i>Australian Securities and Investments Commission v Plymin (No 1)</i> (2003) 175 FLR 124
51(xix): Aliens	<i>Ayan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 126 FCR 152
	<i>Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri</i> (2003) 126 FCR 54
	<i>Long v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 76 ALD 610
	<i>NAGA v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 224 (Unreported, Emmett J, 20 March 2003)
	<i>Te v Ruddock</i> [2003] FCA 661 (Unreported, Gray J, 2 July 2003)
	<i>P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 1029 (Unreported, French J, 26 September 2003)
	<i>Mashood v Commonwealth</i> [2003] FCA 1147 (Unreported, Goldberg J, 21 October 2003)
	<i>Hollis v Minister for Immigration and Multicultural Affairs</i> (2003) 202 ALR 483
51(xx): Corporations	<i>Hui v Lane</i> (2003) 231 LSJS 334
	<i>Bray v F Hoffman-La Roche Ltd</i> (2003) 130 FCR 317
	<i>Miller v University of New South Wales</i> (2003) 200 ALR 565
	<i>Australian Securities and Investments Commission v Plymin (No 1)</i> (2003) 175 FLR 124
51(xxiiiA): Maternity Allowances, Widows' Pensions, Child Endowment etc	<i>Hui v Lane</i> (2003) 231 LSJS 334
51(xxvii): Immigration	<i>Ayan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 126 FCR 152
	<i>Long v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 76 ALD 610
	<i>Mashood v Commonwealth</i> [2003] FCA 1147 (Unreported, Goldberg J, 21 October 2003)
	<i>Hollis v Minister for Immigration and Multicultural Affairs</i> (2003) 202

	ALR 483
51(xxix): External Affairs	<i>Petrotimor Companhia de Petroleos SARL v Commonwealth</i> (2003) 126 FCR 354
	<i>Toben v Jones</i> (2003) 129 FCR 515
51(xxxi): Acquisition of Property on Just Terms	<i>South Australian River Fishery Association v South Australia</i> (2003) 84 SASR 507
	<i>Pauls Ltd v Dwyer</i> (2002) 171 FLR 369
	<i>Energex Ltd v Elkington</i> (2003) 47 ACSR 442
	<i>Petrotimor Companhia de Petroleos SARL v Commonwealth</i> (2003) 126 FCR 354
	<i>South Australia v Slipper MP</i> (2003) 203 ALR 473
51(xxxv): Conciliation and Arbitration	<i>Miller v University of New South Wales</i> (2003) 200 ALR 565
51(xxxvii): Matters Referred by the States	<i>Pauls Ltd v Dwyer</i> (2002) 171 FLR 369
	<i>Energex Ltd v Elkington</i> (2003) 47 ACSR 442
51(xxxix): Incidental Power	<i>Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri</i> (2003) 126 FCR 54
	<i>Australian Securities and Investments Commission v Plymin (No 1)</i> (2003) 175 FLR 124
52: Exclusive Powers of the Parliament	<i>Hyams v Victorian Electoral Commission</i> [2003] VSC 156 (Unreported, Gillard J, 21 May 2003)
	<i>Song v Coddington</i> (2003) 59 NSWLR 180
53: Powers of the Houses in Respect of Legislation	<i>O'Meara v Commissioner of Taxation</i> (2003) 128 FCR 376
55: Tax Bill	<i>O'Meara v Commissioner of Taxation</i> (2003) 128 FCR 376
61: Executive Power	<i>Petrotimor Companhia de Petroleos SARL v Commonwealth</i> (2003) 126 FCR 354
69: Transfer of Certain Departments	<i>Hyams v Victorian Electoral Commission</i> [2003] VSC 156 (Unreported, Gillard J, 21 May 2003)
Chapter III: The Judicature	<i>Attorney-General (Qld) v Fardon</i> [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003)
	<i>Ferdinands v Chief of Army</i> [2003] FCAFC 10 (Unreported, Spender, Ryan, von Doussa, Dowsett and Selway JJ, 11 February 2003)
	<i>Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri</i> (2003) 126 FCR 54
	<i>Miller v University of New South Wales</i> (2003) 200 ALR 565
	<i>NAGA v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 224 (Unreported, Emmett J, 20 March 2003)
	<i>Hicks v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 757 (Unreported, French J, 21 July 2003)
	<i>New England Biolabs Inc v F Hoffman-La Roche AG</i> (2003) 60 IPR 83
	<i>P v Dunne</i> (2003) 27 WAR 528

71: Judicial Power and Courts	<i>Re Criminal Proceeds Confiscation Act 2002</i> (Qld) [2004] 1 Qd R 40
	<i>Bray v F Hoffman-La Roche Ltd</i> (2003) 130 FCR 317
	<i>Commonwealth v Lyon</i> (2003) 203 ALR 553
	<i>Mitchforce v Industrial Relations Commission</i> (2003) 57 NSWLR 212
72: Judges' Appointment, Tenure and Remuneration	<i>Ferdinands v Chief of Army</i> [2003] FCAFC 10 (Unreported, Spender, Ryan, von Doussa, Dowsett and Selway JJ, 11 February 2003)
73: Appellate Jurisdiction of High Court	<i>Mitchforce v Industrial Relations Commission</i> (2003) 57 NSWLR 212
	<i>Tryam Pty Ltd v Grainco Australia Ltd</i> [2003] NSWSC 812 (Unreported, Palmer J, 5 September 2003)
75: Original Jurisdiction of High Court	<i>Ayan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 126 FCR 152
	<i>Commonwealth v Lyon</i> (2003) 203 ALR 553
	<i>Hicks v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 757 (Unreported, French J, 21 July 2003)
	<i>PI/2003 v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 1029 (Unreported, French J, 26 September 2003)
	<i>Thayanathan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 78 ALD 50
	<i>South Australia v Slipper MP</i> (2003) 203 ALR 473
76: Additional Original Jurisdiction	<i>Ayan v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2003) 126 FCR 152
	<i>Bray v F Hoffman-La Roche Ltd</i> (2003) 130 FCR 317
	<i>Commonwealth v Lyon</i> (2003) 203 ALR 553
	<i>Hicks v Minister for Immigration and Multicultural and Indigenous Affairs</i> [2003] FCA 757 (Unreported, French J, 21 July 2003)
	<i>A Goninan &amp; Co Ltd v Atlas Steels (Australia) Pty Ltd</i> [2003] NSWSC 956 (Unreported, Austin J, 24 October 2003)
77: Power to Define Jurisdiction	<i>Bray v F Hoffman-La Roche Ltd</i> (2003) 130 FCR 317
	<i>Commonwealth v Lyon</i> (2003) 203 ALR 553
	<i>Australian Gas Light Co v Australian Competition and Consumer Commission (No 2)</i> (2003) ATPR ¶41-962
	<i>Director of Public Prosecutions (Cth) v Hunter</i> (2003) 7 VR 119
	<i>P v Dunne</i> (2003) 27 WAR 528
	<i>Julia Farr Services Inc v Hayes</i> (2003) 25 NSWCCR 138
	<i>A Goninan &amp; Co Ltd v Atlas Steels (Australia) Pty Ltd</i> [2003] NSWSC 956 (Unreported, Austin J, 24 October 2003)
80: Trial by Jury	<i>Ferdinands v Chief of Army</i> [2003] FCAFC 10 (Unreported, Spender, Ryan, von Doussa, Dowsett and Selway JJ, 11 February 2003)
	<i>R v Ng</i> (2002) 5 VR 257
	<i>R v O'Meara</i> [2003] NSWCCA 250 (Unreported, Meagher JA, Sully J and Smart AJ, 5 September 2003)

	<i>Chief Executive Officer of Customs v Pham</i> (2003) 176 FLR 131
92: Trade within the Commonwealth to be Free	<i>Cannavan v Lettvale Pty Ltd</i> [2003] QCA 528 (Unreported, de Jersey CJ, McPherson JA, McMurdo J, 28 November 2003)
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 202 ALR 98
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 201 ALR 706
109: Inconsistency	<i>Tower Trust (SA) Ltd v Pincus</i> (2003) 230 LSJS 323
	<i>Cannavan v Lettvale Pty Ltd</i> [2003] QCA 528 (Unreported, de Jersey CJ, McPherson JA, McMurdo J, 28 November 2003)
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 202 ALR 98
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 201 ALR 706
	<i>South Australia v Slipper MP</i> (2003) 203 ALR 473
	<i>PSL Industries Ltd v Simplot Australia Pty Ltd</i> (2003) 7 VR 106
	<i>Agtrack (NT) Pty Ltd v/as Spring Air v Hatfield</i> (2003) 7 VR 63
	<i>Hyams v Victorian Electoral Commission</i> [2003] VSC 156 (Unreported, Gillard J, 21 May 2003)
	<i>P v Dunne</i> (2003) 27 WAR 528
	<i>Air Link Pty Ltd v Paterson (No 2)</i> (2003) 58 NSWLR 388
	<i>Travel Compensation Fund v Blair</i> [2003] NSWSC 720 (Unreported, Einstein J, 7 August 2003)
	<i>Song v Coddington</i> (2003) 59 NSWLR 180
117: Rights of Residents in States	<i>Hedges v Australasian Conference Association Ltd</i> [2003] NSWSC 1107 (Unreported, Young CJ in Eq, 1 December 2003)
118: Recognition of Laws etc of States	<i>Julia Farr Services Inc v Hayes</i> (2003) 25 NSWCCR 138
122: Territories	<i>Ferdinands v Chief of Army</i> [2003] FCAFC 10 (Unreported, Spender, Ryan, von Doussa, Dowsett and Selway JJ, 11 February 2003)
	<i>Sportodds Systems Pty Ltd v New South Wales</i> (2003) 201 ALR 706
<i>Queensland Constitution</i>	<i>Re Criminal Proceeds Confiscation Act 2002 (Qld)</i> [2004] 1 Qd R 40
	<i>Attorney-General (Qld) v Fardon</i> [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003)