AUSTRALIAN JUDICIAL FEDERALISM: THE RELATIVE VALUE OF FEDERALISM AND INDIVIDUAL RIGHTS

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SUMMARY: I. *Introduction*. II. *Australia's Federal System*. III. *Federalism and the Australian Federal Judicature*. IV. *Conclusion*.

I. INTRODUCTION

In this paper I give a brief, general account of Australia's federal system, and then explore a number of recent cases that raise difficult questions relating to the relative weight that should be given to federal principles and the individual rights that flow from the separation of judicial power. I suggest that while the great battles of Australian constitutional federalism in the regulation of trade and commerce, taxation and the like are now over, significant new questions have emerged in the application of federal principles to the judicial branches of the Commonwealth and regional governments. In particular, to what extent should federal principles be invoked to militate against federal co-operation in the sphere of the judicature? More importantly, to what extent should federal principles operate to militate against the recognition of individual and human rights?

II. AUSTRALIA'S FEDERAL SYSTEM

Australia is an "indissoluble federal Commonwealth" comprising a national, or Commonwealth Parliament, six States and two self-governing territories subject to ultimate Commonwealth control.[1] The Common-

[1] See ie. *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 274.

wealth of Australia recently celebrated its centenary of Federation (1 January 2001). After 100 years, the general principles of Australian federal jurisprudence are now relatively well-settled. The High Court has opted for an expansive approach to the construction of federal powers held concurrently with the States,[2] and will not construe the Commonwealth's powers by reference to any implied State reserved powers or implied intergovernmental immunity (Australia has no equivalent to the Tenth Amendment to the US Constitution).[3] This does not mean that the Commonwealth can regulate the States out of existence: the many references to the States in the Commonwealth Constitution give rise to the implication that the Commonwealth may not pass valid laws that impair the autonomy and integrity of the States.[4] However beyond this general exception to the rule, which has been applied on relatively few occasions,[5] the High Court has emphasized that the language of the Constitution should be given a strict,

[2] As to the principle of concurrent and enumerated powers, see *Attorney-General (Cth) v Colonial Sugar Co. Ltd.* (1913) 17 CLR 644 at 653-654.

[3] As to the general principle of construction, since confirmed on any occasions, see *Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd & Ors* ("the *Engineers* case") (1920) 28 CLR 129. The High Court had, until the decision in *Engineers*, developed and applied two doctrines which had a restrictive effect on the scope of Federal constitutional powers. The first, the doctrine of implied intergovernmental immunities, was based on a proposition, said to be a necessary implication from the federal nature of Australian Government, that the Commonwealth and the States were sovereign in the separate areas described by their respective Constitutions, and were therefore able to exercise their legislative power immune from the operation of the legislation of the other: *D'Emden v Pedder* (1904) 1 CLR 91 at 109-111; *Deakin v Webb* (1904) 1 CLR 585 at 606; and *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (the *Railway Servants* case) (1906) 4 CLR 488. A second and related doctrine was the doctrine of State reserved powers. Also said to be an implication necessarily drawn from the Constitution, the doctrine of State reserved powers was that the Commonwealth could not exercise its legislative power in a way that interfered with the residual or 'reserved' powers of the States falling outside the list of enumerated powers: *R v Barger* (1908) 6 CLR 41 at 69; *Attorney-General (NSW); Ex rel Tooth & Co v Brewery Employés Union of New South Wales* (the *Union Label* case) (1908) 6 CLR 469 at 503; *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 352.

[4] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 55, 60, 66, 74 and 79.

[5] *Queensland Electricity Commission & Ors v The Commonwealth* (1985) 159 CLR 192; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 498; *Austin v The Commonwealth* [2003] HCA 2.

"legalist" construction in federal disputes.[6] To that end, unless there is an express exception to, or qualification of, federal power with respect to some topic regulated by the States, the High Court will not assume that the federal power is so qualified.[7] Correlatively, unless the Federal Parliament has a clear power to deal with some subject matter, then such a power will not be assumed.[8]

I will momentarily return to consider the way in which conflicts of law between the Commonwealth and the States are resolved when the Commonwealth exercises one of its concurrently-held legislative powers. For the sake of completeness, I should also note at this point that in addition to those powers that are expressly exclusive to the Commonwealth (as to which, consider sections 52 and 90),[9] the language of some of the Commonwealth's notionally concurrent legislative powers (in s 51) indicates that the power over the given topic is, for all intents and purposes, exclusive. A number of powers might fall into this category, including ss 51(iv) ('Borrowing money on the public credit of the Commonwealth'); (xix) ('Naturalization and aliens'); (xxx) ('The relations of the Commonwealth with the islands of the Pacific'); (xxxi) ('The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'); (xxxvi) ('Matters in respect of which this Constitution makes provision until the Parliament otherwise provides') and (xxxix) ('Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth'). None of these powers could be exercised without the active involvement of the Commonwealth as a political, legislating entity.

6 This expression is typically associated with comments made by former Chief Justice Sir Owen Dixon, who remarked, at his swearing-in, that: "close adherence to legal reasoning is the only way to maintain confidence of all parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safe guide to judicial decisions in great conflicts than a strict and complete legalism".

7 See for example *Commonwealth v Tasmania* (the *Tasmanian Dam case*) (1983) 158 CLR 1.

8 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, the subject of further analysis later in this paper.

9 See *Allders International Pty Ltd v Commissioner of State Revenue* (1996) 186 CLR 630 (as to the scope of s 52) and *Ha v New South Wales* (1997) 189 CLR 465 (as to the proper construction of s 90).

Further, a number of federal powers containing express or implied restrictions that enable the State to exercise a certain measure of exclusive power with respect to some topics. So, for example, s 51(i), the trade and commerce power, refers to trade and commerce 'with other countries and among the States'. The sub-section does not confer a general power to regulate trade and commerce. This does not mean that the Commonwealth may not use some other power, such as s 51(xx), to the same end.[10] So the Commonwealth could regulate the purely intra-State trading activities of a s 51(xx) corporation, but would not have power to regulate the intra-State trading activities of an individual, partnership or other non-corporate entity unless those activities touched and concerned a s 51(xx) corporation.[11] Sections 51(iii), 90 and 91 condition the Commonwealth's power to grant bounties. Section 51(x) appears to limit the geographical scope of the Commonwealth's power with respect to regulating fisheries. Sections 51(xiii) and (xiv) limit the Commonwealth's power with respect to State banking and State insurance.[12] It seems that s 51(xx) limits the Commonwealth's power to incorporate trading or financial corporations, as s 51(xx) refers to 'formed' corporations, that is, corporations *already formed* within the Commonwealth[13] (although that construction seems, to this writer at least, unduly narrow, when compared with the expansive construction of Commonwealth power typically favoured by the Court). The Commonwealth's power to prevent and settle industrial disputes by way of conciliation and arbitration in s 51(xxxv) is limited to disputes extending beyond the limits of any one State, giving rise to an implication that the Commonwealth has no direct power to regulate purely intrastate industrial disputes.[14]

In addition, a number of State powers are subject to Commonwealth veto and the States have power to reserve consent to Commonwealth regulation of certain topics. So, a State shall not raise or maintain a naval or military force without the consent of the Commonwealth: s 114. The States may levy charges on imports and exports necessary for the execution of State inspection laws, but the revenue derived from these charges is for

10 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
11 As to which, see further *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
12 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.
13 *New South Wales v The Commonwealth* (the *Incorporation Case*) (1990) 169 CLR 482.
14 *R v Commonwealth Court of Conciliation and Arbitration and Builders' Labourers' Federation; Ex parte G P Jones and W Cooper and Sons (the Builders' Labourers' case)* (1914) 18 CLR 224 at 243, 255.

the use of the Commonwealth and the Commonwealth may annul these inspection laws: s 112. In other areas, the States have power to reserve consent to Commonwealth regulation. Not surprisingly, the States have power to consent (or withhold consent) to the increase, diminution or alteration of the limits of the State (s 123) and the States retain the power to consent to the formation of a new State formed from the territory of that State: s 124. The States also retain the power to consent to Commonwealth acquisition of railways and the construction of railways: ss 51(xxxiii) and (xxxiv), respectively.

Finally, a number of Australian constitutional provisions contemplate that the Commonwealth and the States might assist each other or co-operate, or required a measure of equality of treatment among the polities. The States shall make provision for custody of offenders against Commonwealth laws: s 120. In addition, the Commonwealth must assist the States by protecting them against invasion and domestic violence (fortunately this has never occurred): see s 119, coupled with s 51(vi). A number of constitutional provisions contemplate that the State will co-operate in respect to certain matters or ensure equality of treatment of the residents of the States. So, the States may not discriminate against the subjects of other States on the basis of residence: s 117.[15] The States must also give full faith and credit to the public Acts, records and judicial proceedings of every State: s 118.[16]

The provisions outlined in the last three paragraphs help provide the general backdrop of Australian constitutional principles of federalism. However in the main, federal disputes over constitutional power are resolved by the inconsistency provision,[17] which gives the Commonwealth laws primacy over State laws. Cases involving the resolution of inconsistency of laws between the Commonwealth and the States still form a significant portion of the overall number of constitutional cases heard by the High Court. However the tests developed by the High Court have become so well-established that the law in that area holds little surprises beyond its application to novel fact situations: ie. there is no new law in the area, only new fact situations to which the old law is applied.[18]

15 *Street v Queensland Bar Association* (1989) 168 CLR 461.

16 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36.

17 Section 109 of the Constitution reads: "Inconsistency of laws 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

18 See ie. *Telstra v Worthing* (1997) 197 CLR 61 at 76-77.

So how much of Australian constitutional law today involves federal disputes? Federal disputes over matters relating to finance and trade have all but been resolved.[19] While the Commonwealth and the States have concurrent power over taxation the Commonwealth has enjoyed the balance of real power in the area of income tax since WW II.[20] Recently Commonwealth supremacy in revenue-raising was underscored when the High Court confirmed the Commonwealth's exclusive power to levy excise duties.[21] The net result of these decisions is that the Commonwealth generates the majority of the revenue but the States have the majority of the outlays. The *realpolitik* of Australian federalism is governed by section 96 of the Constitution, which gives the Commonwealth the power to grant financial assistance to the States on such terms and conditions as it thinks fit. The real business of federalism then takes place at the "Premiers Conference", a meeting that is held periodically between the Premiers (equivalent to US State Governors) and the Federal Treasurer, where the money is distributed. This typically rather unedifying spectacle involves all of the predictable politics associated with government disputes over money, though with the occasional co-operative initiative advancing efficiency in some area or a common interest or aim among the polities.

[19] There have been few cases on section 92 (freedom of inter-State trade, commerce and intercourse) since *Cole v Whitfield* (1998) 165 CLR 360 and none since 1992; there have been no major cases on Australia's commerce clause since 1977 (see *Minister for Justice (WA); Ex rel Ansett Trasnport Industries (Operations) Pty Ltd* (1976) 138 CLR 492.

[20] See *South Australia v Commonwealth* ("the *First Uniform Tax case*") (1942) 65 CLR 373 The *Uniform Tax* case involved a Federal legislative scheme with the object of securing to the Commonwealth the exclusive power to levy income taxation. One law in the scheme imposed a rate of income tax that made it politically impossible for the States to levy a concurrent income tax. Another law authorised by s 96, made grants to the States on the condition that they do not levy income tax. The laws were challenged on a number of grounds, including that the laws 'form a single legislative scheme the object, substance and effect of which is to prevent the States of the Commonwealth from exercising their respective constitutional rights and powers to levy and collect income tax and to make it impossible for such States to levy and collect income tax'. The High Court upheld the laws by majority. A post-*Melbourne Corporation* challenge to the *Uniform Tax* scheme failed (*Victoria v Commonwealth* (the *Second Uniform Tax case*) (1957) 99 CLR 575), in spite of the clearly negative impact the *Uniform Tax* scheme had on the revenue of the States and the absence of support for the scheme under the defence power, a compelling argument in 1942 when the First Uniform Tax case was decided.

[21] *Ha v New South Wales* (1997) 189 CLR 465.

One interesting recent development is the Prime Minister's proposed review of the role of the Senate, which was originally contemplated to be the States House of the Federal Parliament.[22] The Commonwealth is a 'bicameral' system, with legislative power being held by two houses of Parliament, the House of Representatives and the Senate. The House of Representatives is based on a national franchise pursuant to s 24 of the Constitution, and each of the States elect an equal number of Senators (currently 12) pursuant to s 24 of the Constitution. Section 53 indicates that apart from the power to initiate bills that appropriate money (a power reserved to the House), 'the Senate shall have equal power with the House of Representatives in respect of all proposed laws'. Section 57 is designed to resolve deadlocks between the House and Senate. It provides for the Governor-General to call a double dissolution election for both Houses of Parliament if the Senate twice blocks a bill passed by the House of Representatives. If after the election the impasse still remains, a joint sitting of both houses can be held to vote on the legislation.[23]

The power of the Senate to withhold the supply of money is clearly a highly significant power in Australian constitutional politics. Its invocation in 1975 by a Senate controlled by one side of Australian politics brought down a Government and caused a constitutional crisis. It is quite true to observe that the Senate has rarely realised the intention of the people who drafted the Constitution that it be a States' House protecting the interests of the States. Party politics have generally overridden State concerns. In the last several decades the balance of power has been held by minor parties and this has enhanced the power of the Opposition, in conjunction with minor parties, to use Senate committees to place pressure on the Government.

To stem the influence of the minor parties, the Government has sought review of the power of the Senate to block legislation. I will not dwell on this proposal since it is so recently developed, and only now the subject of national consultation. Complaints about the power of the Senate to block the legislative program of the House of Representatives are not new, but the satisfaction of Australian voters with a system that results in the balance of power in the Senate being held by a minor party or combination of minor

22 As to which see further Commonwealth of Australia, *Resolving Deadlocks: A Discussion Paper on Section 57 of the Constitution*.

23 See *Resolving Deadlocks: A Discussion Paper on Section 57 of the Constitution,* 15.

parties or individuals can now scarcely be in doubt, since this has pertained since 1977. Without condescending into a fuller discussion of the merits of this proposal at this stage it seems to me that it will be unlikely to be supported by a majority of the voters in a majority of the States.

III. Federalism and the Australian Federal Judicature

In this paper I propose instead to focus on the most interesting cases raising federal issues in the last ten years, those cases that have concerned the judicial branch of government. Three questions have occupied the High Court's time in this area. First, to what extent can the Commonwealth Parliament vest jurisdiction in State courts, and also allow federal courts to accept State jurisdiction? Second, bearing in mind the Commonwealth's capacity to vest jurisdiction in State courts, to what extent if any do implications arising from the separation of judicial power apply within the States to State courts exercising, or capable of exercising, federal jurisdiction? Third, if State courts can exercise federal judicial power, does this affect matters relating to judicial independence in any way – that is, can State courts have less independence than federal courts, even in circumstances in which they exercise federal judicial power? In dealing with these latter questions I will focus on the anomalous position of the self-governing territories which, while not part of Federation, are affected by (and ultimately subject to) the laws of the Federal Parliament. Finally, I reflect on the purposes and functions of federalism, and consider whether the recent cases on the federal judicature discussed in this paper in fact demonstrate that the real defect of Australia's constitutional jurisprudence is not the absence of a coherent jurisprudence of federalism, but rather the absence of constitutional protection of individual rights.

1. *The Birth and Death of Cross-Vesting*

Informed by the experience of the Americans, the Australian Founding Fathers developed an "autochthonous expedient", giving the Commonwealth Parliament express power to vest jurisdiction in State courts. It is now established that State courts form part of the federal judicature, and are subject to any implied limitations arising from the separation of judi-

cial power.[24] In this first part of my paper I examine the birth and death of the cross-vesting" experiment. At the conclusion of this part I analyse the approach the High Court of Australia has taken to the resolution of federal questions, and what more general lessons might emerge for constitutional lawyers from the experiment.

In 1985 the Commonwealth, States and Territories passed complementary legislation allowing the courts of each polity to exercise the jurisdiction of the other. The "cross-vesting" scheme removed the need to pursue State and Federal claims in separate State and Federal courts. It removed inconvenience, lessened costs and reduced delays in the management of mixed claims. The scheme allowed State courts to hear Federal matters, Federal courts to hear State matters, Territory courts to hear State matters, State courts to hear Territory matters, Federal courts to hear Territory matters and Territory courts to hear Federal matters. Thousands of cases proceeded on the assumption that the cross-vesting scheme was constitutionally valid.

After the split decision in *Gould v Brown* (the *First Cross-Vesting case*)[25] upholding the constitutional validity of the scheme, the decision of the High Court in the *Second Cross-vesting case* was anxiously awaited by the legal profession. In the *Second Cross-vesting case, Re Wakim; Ex parte McNally*,[26] the High Court decided that Chapter III of the Constitution forbids the States from vesting jurisdiction in Federal courts. So much of the cross-vesting scheme that enabled Federal courts to hear State matters was found invalid. The Federal and State governments developed a legislative scheme to address the defects of the cross-vesting system and in this section of the paper I will describe and analyze the several recent decisions of the High Court that consider some of the dimensions of this scheme.

It is helpful at the start to enumerate those features of the scheme that are not in doubt. First, there is no doubt that a federal action could be validly transferred to a State court. Section 77(iii) combined with sections 75 and 76 of the Constitution support federal-to-State cross-vesting arrangements. Second, s 76, in conjunction with s 122, support Territory-to-State cross-vesting.[27] Third, the Commonwealth can invest any jurisdiction in a Territorial court including jurisdiction identical to that exercised by a Fed-

24 (1996) 189 CLR 51.
25 (1998) 193 CLR 346.
26 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
27 *Northern Territory v GPAO* (1999) 73 ALJR 470; 161 ALR 318.

eral court.[28] Fourth, Territory-to-Federal cross-vesting is constitutionally valid. Section 76(ii), in conjunction with s 77(i) of the Constitution, permits the conferral of jurisdiction on federal courts in matters arising under laws made under s 122 of the Constitution.[29] That leaves State-to-Federal cross-vesting and State-to-Territory cross-vesting. State-to-Territory cross-vesting was not considered in the First Cross-Vesting case or the Second Cross-vesting case. In the Second Cross-vesting case the Court has confirmed that State-to-Federal cross-vesting is constitutionally invalid.

A. *The invalidity of State-to-Federal cross-vesting*

From the commencement of the cross-vesting scheme in 1988 there were questions raised regarding the validity of State-to-Federal cross-vesting of jurisdiction.[30] The first and most obvious reason that cross-vesting was found invalid is that the Constitution does not, in its terms, authorise State-to-Federal cross-vesting.[31] That part of the cross-vesting scheme simply fails for want of legislative power. The requirement of such a power is axiomatic.[32] Every Justice of the Court in the *Second Cross-vesting case*, including the dissenting Justice, Kirby J, agreed that there was no express power authorising the scheme. The phrase "Federal jurisdiction" as used in ss 71, 73 and 77 of the Constitution means jurisdiction derived from the Fed-

28 So long as there is a sufficient nexus between the law and the government of the territory: *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607; but see *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 440 and *Capital TV and Applicances Pty Ltd v Falconer* (1971) 125 CLR 591 at 604.9, cf 600.4, 602.5, 609.9, 614.2.

29 *Northern Territory v GPAO* (1999) 73 ALJR 470 at 486; 161 ALR 318 at 340 per Gleeson CJ and Gummow J (with whom Hayne J agreed). This statement was affirmed by Callinan J in the *Second Cross-vesting case* at [312].

30 At paragraph [1], footnote 1 of his judgment, Gleeson CJ said: "The Commonwealth legislation is the Jurisdiction of Courts (Cross-vesting) Act. After the Bill had passed through the Houses of Parliament, but before it had been assented to, the Advisory Committee on the Australian Judicial System, in its Report to the Constitutional Commission (1987, at 3.113-3.115), expressed doubts as to the validity of the legislation and drafted a constitutional amendment to support the proposal for cross-vesting. In 1988, in its Final Report (vol 1, pars 6.29-6.38), the Constitutional Commission recommended that the Constitution be amended to permit cross-vesting. However, the legislation was enacted without the support of any constitutional amendment.

31 See ie. Callinan J at [256].

32 See for example *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 168.3.

eral Commonwealth.[33] The "Parliament" referred to in ss 76 and 77 is the Federal Parliament. The Constitution contemplates Federal-to-State vesting of jurisdiction. But it has nothing to say about State-to-Federal vesting of jurisdiction.[34]

Second, it is now well-established that Chapter III is an exhaustive delimitation of the jurisdiction that may be conferred on federal courts.[35] This proposition was emphatically confirmed by the majority in the *Second Cross-vesting case*.[36] It is therefore not constitutionally permissible for a Federal court to "consent" to the vesting of State jurisdiction.[37] The majority rejected the contention that it was elevating the maxim of statutory construction *expressio unius est exclusio alterius* beyond its true status.[38] In the absence of an express grant of power one ought not be inferred.[39] After

[33] *Lorenzo v Carey* (1921) 29 CLR 243 at 252.1.

[34] However, some commentators have argued that the negative implication drawn from the lack of a specific provision authorising state-to-federal cross-vesting should be "limited to what is necessary to preserve the constitutional structure" in the same sense that positive implications (ie in relation to freedom of political speech) are limited (Hill, G., "The Demise of Cross-vesting", 27 *Federal Law Review* (law.anu.edu.au/publications/flr/Vol27no3/hill.htm) at p 19-20). See also *Abebe v Commonwealth* (1999) 162 ALR 1, Lovric "*Re Wakim: an overview of the fallout*" (2000) 19 *Australian Bar Review* 237 at 240 and Lam, "*Case Note:Wakim*" (2000) 22 *Sydney Law Review* 13.

[35] *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 62; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Attorney-General (Commonwealth) v The Queen (the Boilermakers' Case)* (1956) 94 CLR 254 at 270 (HC); (1956) 95 CLR 529 (PC); *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 534-5, 541; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612; see also Marbury v Madison 5 US 137 at 174 (1803); Johnson, H.A., "Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction" (1993) 19 *MULR* 45, 58 fn 69; cf. *Spratt v Hermes* (1965) 114 CLR 226; *Re Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 57 ALJR 649; Judicature Sub-Committee, *Report*, Appendix A (the Zines opinion).

[36] Gleeson CJ at [22], Gaudron J at [26] (agreeing with Gummow and Hayne JJ, McHugh J at [52] & [56] to [61].

[37] See for example, Gummow and Hayne J at [105], [116] to [117].

[38] At [123]. But cf Kirby J at [199].

[39] *Le Mesurier v Connor* (1929) 42 CLR 481 at 512.8-513.2. Note also the presence in the Constitution of ss 91 and 114; ss 51(xxxiii), (xxxiv) and 123. The position of the "implied incidental power" is not in doubt. The implied incidental power attaches to any express grant of power: *D'Emden v Pedder* (1904) 1 CLR 91 at 111. However, the notion of an "implied nationhood power" must be in doubt (and if it is not it should be). For further discussion of Wakim and the making of constitutional implications see also Hill, G., "The Demise of Cross-Vesting" (1999) 27 *Federal Law Review* 547 at 573-575.

all, the Constitution is one of *enumerated* powers.[40] The Constitution, by erecting a scheme of federal jurisdiction that contemplates the vesting of Federal jurisdiction in State courts, gives rise to a "negative implication" that the States many not vest jurisdiction in a Federal court.[41] State-to-federal cross vesting provisions would conflict with the scheme constructed by ss 73(ii), 76(ii)[42] and 77. It would be, to say the least, curious if the Commonwealth could, by consenting to State legislation, enable federal courts to exercise non-judicial State powers.[43]

Third, State-to-Federal cross-vesting would conflict with the historical understanding of the reason for inclusion of s 77(iii) in the federal Constitution. The so-called "autochthonous expedient" was developed to overcome the difficulty that had arisen under the US Constitution, where cross-vesting of federal jurisdiction to the States was held not to be incidental to general federal legislative powers dealing with federal jurisdiction. The express inclusion of a power to invest State courts with federal jurisdiction was considered necessary on the basis that without such power the Commonwealth would have no power to conscript State courts to exercise federal jurisdiction.[44]

Fourth, there is no "incidental power" available to allow the Federal Parliament to authorise Federal courts to consent to the exercise of jurisdiction offered to them by State Parliaments.[45] The express incidental power (s 51(xxxix)) is not wide enough, as it only gives the Federal Parliament power to pass laws incidental to the exercise of an express power.

40 *Attorney-General (Cth) v Colonial Sugar Co Ltd* (1913) 17 CLR 644 at 653-654.

41 Perhaps the most persuasive dissenting comment from Kirby J was his comment at [191] that a "negative implication will only arise when it is manifest from the language used in the provisions within Ch III or is logically or practically necessary for the preservation of the integrity and structure of the Judicature envisaged by that Chapter".

42 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154.3 ("Paragraph (ii) is limited to matters arising under Federal statutes, and does not extend to matters involving the interpretation of such statutes if they do not arise thereunder").

43 Mason, K. and Crawford, J., "The Cross-Vesting Scheme" (1988) 62 *Australian Law Journal* 328, 334; Gummow and Hayne JJ at [116] and [119].

44 *Le Mesurier v Connor* (1929) 42 CLR 481; *Queen Victoria Memorial Hospital v Thorton* (1953) 87 CLR 144, 152; O'Brien, B., "The Constitutional Validity of the Cross-Vesting Legislation" (1989) 17 *MULR* 307, 310.

45 At [118], [122]. But cf Kirby J at [220].

Fifth, courts are only bound by their own legislatures.[46] This principle is essential to the construction of a federal Constitution.[47] In the *Second Cross-vesting case*, Gummow and Hayne JJ, with whom Gleeson CJ, Gaudron, McHugh and Callinan J agreed, said:

> What gives courts the authority to decide a matter is the law of the polity of the courts concerned, not some attempted conferral of jurisdiction on those courts by the legislature of another polity. That is becuse of the very nature of judicial power as 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property'.[48] The authority to decide comes from the sovereign authority concerned, not from some other source.

The authorities clearly contemplate the existence of separate State and federal jurisdiction.[49] Section 118 of the Constitution (or perhaps s 51(xxv)) does not remedy the deficiency of State power in this respect. There is no authority in Australian or US constitutional law that ascribes such an operation to that provision or its US equivalent.[50]

46 *Ex parte Goldring* (1903) 3 SR (NSW) 260 at 262.5-6, 264.5; *Le Mesurier v Connor* (1929) 42 CLR 481 at 495.8-496.5. See also *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452.5-8, 464.3-5, 471.4; O'Brien, B., "The Constitutional Validity of the Cross-Vesting Legislation" (1989)17 *Melbourne University Law Review* 307, 309.5ff. Cf. *The Commonwealth v Queensland* (1975) 134 CLR 298 at 309.6-313 and references cited therein but cf Jacobs J at 323.6ff - however this case may be distinguished on the facts and no longer operates as an exception to the general rule as a consequence of s 11 of the *Australia Act* 1986 (Cth). That is, the principle in that case may be limited to colonial legislatures enlarging a right of appeal to the Judicial Committee: see especially at 311.7. The principle that "courts are only bound by their own legislatures" is a fundamental rule of private international law which is modified within Australia only to the extent contemplated by s 118 of the Constitution: *cf McKain v R W Miller Pty Ltd* (1991) 174 CLR 1 at 36.2. The common law, including the principles of private international law applied within Australia, form the fabric of principle upon which our Constitution rests: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

47 *Collins v Charles Marshall Pty Ltd* (1954) 92 CLR 529 at 543.7.

48 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 257 per Griffith CJ.

49 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; *Lorenzo v Carey* (1921) 29 CLR 243 at 252; *The Commonwealth v Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69 at 87; *Pirrie v McFarlane* (1925) 36 CLR 170 at 177.

50 O'Brien, 310.

Sixth and finally, if neither the Commonwealth nor the States have constitutional power to confer State jurisdiction on a federal court it is submitted that end cannot be achieved through co-operative action.[51] The authorities which deal with cross-vesting of jurisdiction of administrative tribunals[52] may be distinguished on the basis that they concern *executive* power, not *judicial* power.[53] In addition, there is an express provision in the Constitution authorising co-operative executive action: the Parliaments of the States may refer matters to the Commonwealth.[54] This power could not be used to authorise the State-to-Federal cross-vesting, because to construe the power in this way would be inconsistent with the scheme of federal jurisdiction erected by Chapter III of the Constitution.

As a result, so much of the cross-vesting scheme that contemplates vesting of State jurisdiction is constitutionally invalid.[55]

B. *Conclusion*

Analysis of the result and the reasoning in the cross-vesting decisions yields a number of general indicia of the High Court's federal jurisprudence.

First, the High Court has taken a technical approach to questions of federalism in Australia. This has been described by former Chief Justice Dixon as a "strict and complete legalism" and can produce difficult results, as the *Sec-*

51 The Australian Judicial System Advisory Committee of the Constitutional Commission formed the view that "to enable cross-vesting proposals to proceed, the conferral by the States of jurisdiction on federal courts needs to be accomplished (in order to put cross-vesting legislation beyond doubt as to validity) either by reference of powers under s 51(xxxvii) of the Constitution, or by constitutional amendment", *Report* (1987), par. 3.114. See also O'Brien, 310.9-311.6, esp 311.5.

52 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552-553, 563.4, 579.6-580.4, 589, 591; *Re Cram; Ex parte New South Wales Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 131.4. See also *Le Mesurier v Connor* (1929) 42 CLR 481 at 509.2-509.9.

53 The Judicature Sub-Committee to the Standing Committee on an Integrated System of Courts of the Australian Constitutional Convention of 1984 relied on an opinion supporting the scheme on the basis of these authorities, see esp 27-36 (1984).

54 Section 51(xxxvii).

55 The *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), s 9 those sections of the relevant State Acts equivalent to s 4 of the relevant NSW Act. Sections 51 and 56 of the *Corporations Act* 1989 (Cth) also enabled cross-vesting of State matters to Federal courts.

ond Cross-Vesting Case indicates. The Court is not interested in whether a policy informing a co-operative scheme is worthwhile, only whether it may clearly be supported by an express constitutional power.

Second, and correlatively, the 'implied nationhood power' seems to have receded in importance. The notion of a 'nationhood power', so useful to the federal government in Canadian jurisprudence, is not available to enable the Australian national government to engage in national tasks.

Third, the Court will insist on formal steps being taken by each of the partners in the Australian federation when co-operative schemes are developed and implemented, and the several polities are disentitled to assume that if one lacks the relevant power, the other automatically has it (the whole is not equal to the sum of its parts).

The *Second Cross-Vesting Case* indicates that Australia's federal jurisprudence has become technical, de-politicised, characterised by orthodox methods of construction ("legalism"). The High Court has taken this approach in disregard of the policies implemented by the several polities in co-operative schemes and insisted on strict compliance with the federal constitutional text in such schemes. The result in the *Second Cross-Vesting Case* was manifestly inconvenient and inefficient, and has been roundly criticised by Australian practitioners. Nevertheless the reinforcement of orthodox methods of construction and interpretation after a long period of flux and controversy in the High Court's jurisprudence may also be seen by some to be a welcome development.

2. *The Kable Principle, Chapter III and the States*

While the *Second Cross-Vesting Case* had a significant practical impact, the problems were later fixed by corrective legislation by the States validating the decisions of the federal courts that had been unconstitutionally vested with State judicial power.[56] A much more significant decision in the long term in regards to the power of the federal judicature, and particularly the power of the federal High Court over the States and their courts (and perhaps Territory courts), is *Kable v Director of Public Prosecutions (NSW)*.[57]

[56] See further Keyzer, P. and Bollen, R., "The Current Status of Cross-Vesting", (2001) 39(6) *new South Wales Law Society Journal* 60.

[57] (1996) 189 CLR 51.

Kable stabbed his wife to death and was imprisoned for manslaughter on the basis that, at the time of the stabbing, he could only be held to a standard of 'diminished responsibility' due to steroid abuse.[58] While he was in prison, Kable sent threatening letters to a number of people, including relatives of his deceased wife. In December 1994, the New South Wales Parliament passed the *Community Protection Act*, which conferred jurisdiction on the Supreme Court of New South Wales to make 'preventive detention orders' to keep a person in prison for a specified period of time to undergo psychiatric evaluation in the event the Court was satisfied that the person was more likely than not to commit an act of serious violence and that it is appropriate for the protection of the community that such a person continue to be held in custody. The object of the Act was 'to protect the community by providing for the preventive detention…of Gregory Wayne Kable'.

Kable challenged the constitutional validity of the State law on a number of grounds: that the legislation could not be said to be a law for the 'peace, order and good government' of New South Wales; that it infringed common law rights that were so fundamental that they could not be overturned by any legislature; on the basis that it was inconsistent with the separation of powers embodied in the New South Wales Constitution; and, finally (and successfully), on the basis that the law was inconsistent with the requirements of Chapter III of the Commonwealth Constitution. The High Court held that the law was a Bill of Attainder as its clear purpose was to continue Kable's incarceration.

The decision was remarkable because it had long been recognised that there is no separation of powers within any of the States of the Commonwealth. But the High Court applied the separation of judicial power in the *Commonwealth* Constitution to the *States*. The majority (4:2) held that Chapter III of the Commonwealth Constitution postulates an integrated Australian court system for the exercise of the judicial power of the Commonwealth, with the High Court at its apex as a court exercising appellate jurisdiction for the nation. This system does not permit different grades or qualities of justice to operate as between State and federal courts.[59] Neither the Commonwealth nor the States could legislate to undermine the scheme set up by Ch III of the Constitution:

58 Description taken from Keyzer, P., *Constitutional Law*, Butterworths, 1998, Ch 3.
59 Gaudron J at 101, 103.

> Because the State courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power… neither… parliament… can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power. Neither… can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power.[60]

And, furthermore it was held that,

> One of the basic principles which underlie Ch III and to which it gives effect is that the judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government. Given the central role and the status that Ch III gives to State courts invested with federal jurisdiction, it necessarily follows that those courts must also be, and be perceived to be, independent of the legislature or the executive government.

The majority concluded that the legislation removed the ordinary protections inherent in the judicial process by stating that its object was the preventive detention of the appellant, by removing the need to prove guilt beyond reasonable doubt, and by enabling the legislature to employ the Supreme Court to execute the legislature's determination that the appellant be deprived of his liberty.[61]

Kable v DPP (NSW) confirmed the existence of a significant new limitation on State power.

Scholars of Australian federalism have remained deeply divided about Kable. Some regard it as a travesty, a significant incursion on State's rights by an activist High Court. Others regard it as a salutary development, providing what is in effect a U.S.-style Fourteenth Amendment or due process clause that can be used to attack State (or perhaps event Territory) laws that abuse judicial process.

Two cases that are currently working their way through the court system illustrate the potential of the Kable decision to affect State and Territory

60 McHugh J at 115.
61 107 (Gaudron J), 122 (McHugh J), 131 (Gummow J).

legislative and executive power, and could alter Australia's federal jurisprudence.

The first matter that may indicate the width of the *Kable* principle is a case called *Fardon v Attorney-General (Queensland)*. At the time of writing the High Court had recently granted special leave to appeal in this case and the hearing before the Full High Court is set down for 2 March 2004. The second is *North Australian Aboriginal Legal Aid Service v Bradley*, which I consider later in this paper.

Fardon v Attorney-General (Queensland)

Robert Fardon is a sex offender who is currently imprisoned in Townsville Correctional Centre in northern Queensland. In June 2003 the Queensland Parliament enacted legislation called the *Dangerous Prisoners (Srexual Offenders) Act* which, like the legislation in *Kable*, gives a State Attorney-General power to make an application to a State Supreme Court for an order that a person be detained on the basis that if the prisoner were released he could constitute a serious danger to the community. The difference here, according to the Queensland Supreme Court and Court of Appeal, is that because the legislation does not single out a prisoner, Kable's case may be distinguished.[62] This somehow makes the law less pernicious, though I must admit I fail to see the merit in this point. The fact that this is the first legislation in Australia that extends a term of imprisonment without a predicate determination of criminal guilt (or even a crime occasioning a charge!) seems to have been lost on the Queensland courts. With the reatest of respect to those Courts, I do not think that this point will be lost on the High Court.

The significance of this test case for Australian federal jurisprudence lies in the scope it provides for an extension of the *Kable* principle to provide a substantive guarantee of due process within the States. Since *Kable* was decided there has been much academic speculation about whether it would provide a springboard for the development of an implied Bill of Rights in the Australian Constitution – which contains no Bill of Rights.[63] *Fardon v Attorney-General (Queensland)* provides the vehicle

62 [2003] QSC 200; QCA 416.

63 See Wheeler, F., "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia" (1997) 23 *Monash University Law Review* 248 and

for the recognition of the substantive rights that necessarily form part of any recognition that a Bill of Attainder is unlawful. It provides an opportunity for the judges of the High Court to expand on what they decided and meant in *Kable* - to explain what *grundnorm* informs the recognition that a Bill of Attainder is unlawful in a constitutional system that contains no Bill of Rights.

Kable is a relatively young decision and its progeny are *in utero*. Nobody knows how far and to what extent the principles of the separation of judicial power applicable to the Commonwealth (and now the States and possibly even the Territories) will go. The effect of all of this on the States is potentially huge. This area of Australian federal jurisprudence stands in marked contrast to the High Court's well-established, stable jurisprudence on the economic dimensions of federalism.

3. *The "Federal Compact" and The Territories (and Chapter III)*

The third case I would like to consider involves the question whether the *Kable* principle extends to Australia's territories, and whether it provides any substantive guarantee of judicial independence in those areas. The fundamental principles of judicial independence are well-known and need no elaboration: they are guaranteed by Article 10 of the *Universal Declaration of Human Rights* (which enshrines the principle of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law); the *International Covenant on Economic, Social and Cultural Rights* and *the International Covenant on Civil and Political Rights* (Art 14(1)); and in our region, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* prescribes minimum standards for judicial independence (Articles 4 and 31).

North Australian Aboriginal Legal Aid Service v Bradley is a case that has been progressing through the legal system for over three years and, at the time of writing, had only recently been heard by the High Court of Australia (8 October 2003). The case is fairly complicated but some background is necessary to set the scene. It concerned the constitutional validity of the appointment of the Chief Magistrate of the Northern Territory, Mr Hugh Bradley. Mr Bradley was appointed under provisions of the NT

Keyzer, P., "*Pfeiffer*, *Lange*, The Common Law of the Constitution and the Constitutional Right to Natural Justice" (2000) 20 *Australian Bar Review* 87.

Magistrates Act that authorized the Administrator of the NT to set remuneration for magistrates "from time to time". The North Australian Aboriginal Legal Aid Service, or "NAALAS", sought a declaration in the Supreme Court that the appointment was invalid because Mr Bradley, while appointed to age 65, was only guaranteed remuneration for the first two years of his tenure. Ordinarily judges are appointed under what is called an "open determination" —an independent remuneration tribunal that sets a particular amount— and then judges are paid that amount from a particular point in time. The determination is "open" because the remuneration amount is not expressed to terminate at any particular time. Rather, the amount is reset from time to time after hearings of the independent tribunal take place to take into account broader economic factors such as the rate of inflation, the cost of living, and the like.

According to NAALAS the two-year limited remuneration package that was paid to Mr Bradley breached principles of judicial independence because at the conclusion of the pay period he would be placed in a position in which he would have to go cap-in-hand to the government to ensure continued payment of his salary, and failing that, might even have to sue the Administrator to ensure payment. The dependence on the government that would necessarily be created by such an arrangement gave rise to a reasonable apprehension that decisions made by the Chief Magistrate might be tailored to suit the government (it was not and has never been suggested that this had occurred, or would occur, only that a person appearing in the Magistrate's Court may have this reasonable apprehension given the arrangement developed by the NT, the second respondent to the proceedings). Since NAALAS represented hundreds of people in the NT Magistrates Court it had an interest in the validity of the appointment.

NAALAS have argued that the *Kable* principle applies in the Territories, and that *Kable* guarantees that any court capable of exercising federal jurisdiction, including Territory courts (and, relevantly, the Chief Magistrate), be independent of the executive government. On that footing, the appointment mechanism adopted by the NT government outlined above is invalid because it infringes principles of judicial independence.

Questions relating to the constitutional differences between the States and the territories and the position of the territories within the Commonwealth have been a source of constitutional angst for the High Court since the earli-

est days of Federation.[64] In a number of early decisions of the Court, some judges formed the view that the territories were *not* part of the Commonwealth, and should be treated differently for that reason.[65] But there was no basis for this implication.[66] If the territories weren't part of the Commonwealth then as Evatt J once asked rhetorically, where *were* they?[67] While it was correct to say that the territories are not part of the federal system —*they were not there when it happened*— there is, thankfully, less support today for the proposition that the territories are not to be regarded as "part of the Commonwealth".

At a fundamental level the Commonwealth's territories ought to be treated as being closer to the Commonwealth than the States – for precisely that reason. They are ultimately subject to the Commonwealth, whereas the States are protected by the federal principles outlined in the opening part of this paper. In NAALAS v Bradley it has been argued that the territories are subject to Chapter III. The argument includes the following integers:

1. It may be true to say that, as a general rule,[68] the territories are not subject to all of the requirements of Chapter III of the Constitution.
2. For example, it was recently confirmed that judicial appointments to territory courts do not need to be made in accordance with s 72 of the Constitution.[69]
3. But it would be incorrect to say that Chapter III is wholly inapplicable to s 122.[70]

64 See further Keyzer, P., "The 'Federal Compact' and the Territories (and Chapter III)", (2001) 75 *Australian Law Journal* 124.

65 For example, *Buchanan v The Commonwealth* (1913) 16 CLR 315; *R v Bernasconi* (1915) 19 CLR 629; *Porter v The King; Ex parte Yee* (1926) 37 CLR 432; *Mitchell v Barker* (1918) 24 CLR 365; *Ffrost v Stevenson* (1937) 58 CLR 528; *Waters v The Commonwealth* (1951) 82 CLR 188.

66 See for example Evatt J in *Ffrost v Stevenson* (1937) 58 CLR 528 at 592.

67 Compare Evatt's extra-curial remarks in the ALJ: Evatt, The Hon Dr Justice H.V., "The Jury System in Australia" (1936), 10 *Australian Law Journal* (Supplement) 49-76, 64.

68 *Northern Territory v GPAO* (1999) 73 ALJR at [170] per McHugh and Callinan JJ. For what it is worth, this is not my preferred view.

69 It has been held that requirements of federal judicial appointments under s 72 of the Constitution do not apply in territory courts (*Spratt v Hermes* (1965) 114 CLR 226; *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* [1999] HCA 44).

70 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 439 per Knox CJ and Gavan Duffy J; *Spratt v Hermes* (1965) 144 CLR 226 at 243; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605-606 per Menzies J; *Gould v Brown* (1998) 72 ALJR

4. The judicial power of the Commonwealth described in s 71 and the separation of judicial power of the Commonwealth applies in the territories.
5. The steps taken to create the Northern Territory were taken pursuant to s 111 of the Constitution.[71]
6. Territories surrendered by a State and accepted by the Commonwealth pursuant to s 111 are "subject to the exclusive jurisdiction of the Commonwealth".[72]
7. Full sovereignty over the Northern Territory, including judicial power, was thereby vested in the Commonwealth.[73]
8. Covering clause 5 of the Constitution renders the Constitution and the laws authorised by the Constitution "binding on the courts, judges, and people of every State and of every part of the Commonwealth".[74]
9. The phrase "every part of the Commonwealth" in cl 5 includes the territories.[75]

375 at 412 per McHugh J; *Northern Territory v GPAO* (1999) 73 ALJR at [120], [127] per Gaudron J; *Eastman* [1999] HCA 44 at [9] per Gleeson CJ, McHugh and Callinan JJ, at [70] per Gummow and Hayne JJ.

71 *Paterson v O'Brien* (1978) 138 CLR 276; *Svikart v Stewart* (1994) 181 CLR 548 at 566 per Brennan CJ; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 49-50 per Dawson J, at 164 per Gummow J; *Northern Territory v GPAO* (1999) 73 ALJR at [40] per Gleeson CJ and Gummow J, with whom Hayne J agreed at [254] to [258].

72 Constitution, s 111. See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 49-50 per Dawson J; *Northern Territory v GPAO* (1999) 73 ALJR at 477-478 per Gleeson CJ and Gummow J, with whom Hayne J agreed.

73 *R v Phillips* (1970) 125 CLR 93 at 126; *Worthing v Rowell & Muston Pty Ltd* (1970) 123 CLR 89 at 126; *Svikart v Stewart* (1994) 181 CLR 548 at 566; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 165 per Gummow J; *Sue v Hill* (1999) 73 ALJR 1016 at 1032-1033; Eastman at [50] per Gleeson CJ and Gummow J, with whom Hayne J agreed. See also the *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898, vol 4, p 259.

74 See *Lamshed v Lake* (1958) 99 CLR 132 at 148 per Dixon CJ with whom Webb and Taylor JJ agreed; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102 per Gaudron J, at 126 per Gummow J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 per curiam.

75 Semble *Ffrost v Stevenson* (1937) 58 CLR 528 at 562-563 per Rich J; *Lamshed v Lake* (1958) 99 CLR 132 at 142 per Dixon CJ, with whom Webb and Taylor JJ agreed (see also Kitto J at 153-154); *Spratt v Hermes* (1965) 114 CLR 226 at 270; *Newcrest Mining (WA) Ltd v The Commonwealth* (197) 190 CLR 513 at 601 per Gummow J; *Northern Territory v GPAO* (1999) 73 ALJR 470 at [176] per McHugh and Callinan JJ.

10. The Northern Territory is therefore subject to the exclusive jurisdiction of the Commonwealth, which is in turn exclusively governed by its Constitution. Neither the Commonwealth Parliament nor the Northern Territory Legislative Assembly has the power to remove itself from the operation of the Commonwealth Constitution.
11. Section 122 of the Constitution has been described as a power "unlimited and unqualified in point of subject matter"[76] and "as large and universal a power of legislation as can be granted".[77]
12. But s 122 does not provide the Commonwealth with unlimited power to regulate its territories. For a law to be a valid exercise of s 122, it must be characterised as a law sufficiently connected to the subject matter of that section.
13. For example, the Court has recently held that laws made under s 122 of the Constitution can provide the basis for the exercise of federal jurisdiction pursuant to s 76(ii) of the Constitution.[78]
14. That holding flowed from the well-established proposition that a law made by the Commonwealth Parliament in the exercise of the power conferred by s 122 is a "law of the Commonwealth".[79]
15. Every law of the Commonwealth, including laws support or authorized[80] by s 122 of the Constitution, are subject to the judicial power of the Commonwealth.[81]

[76] *Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 570; *Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 6.

[77] *Spratt v Hermes* (1965) 114 CLR 226 at 242; *Capital Duplicators Pty Ltd v The Australian Capital Territory* (1992) 177 CLR 248 at 272.

[78] *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605 per Menzies J; *Northern Territory v GPAO* (1999) 73 ALJR 470.

[79] *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605 per Menzies J; *Northern Territory v GPAO* (1999) 73 ALJR 470.

[80] *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585-586; *Lamshed v Lake* (1958) 99 CLR 132 at 142; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605 per Menzies J; *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 727-728, 740-741; *Northern Territory v GPAO* (1999) 73 ALJR 470 at 485 per Gleeson CJ and Gummow J, with whom Hayne J agreed at [254] to [258], at 494 per Gaudron J; *Eastman* at [33] and [38] per Gaudron J, at [147] per Kirby J.

[81] *Kruger v The Commonwealth* (1997) 190 CLR 1 at 84 per Toohey J, at 162 et seq per Gummow J.

16. The presence of the words "subject to" in s 51[82] and s 52,[83] and their absence in s 122, does not direct a conclusion that territorial matters that can be regulated under s 122 are not "subject to" the judicial power of the Commonwealth.
17. Section 111 reverses this conclusion by clearly providing that a s 111 territory is "subject to" the exclusive jurisdiction of the Commonwealth.

In my opinion, that means that *Kable v Director of Public Prosecutions (NSW)* applies in the territories.[84] And if it does, then guarantees of judicial independence flow from this fact because Territory courts, capable of exercising federal jurisdiction, cannot be less independent than Federal courts. To repeat what Justice McHugh said in *Kable* in the extract above:

One of the basic principles which underlie Ch III and to which it gives effect is that the judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government. Given the central role and the status that Ch III gives to State courts invested with federal jurisdiction, it necessarily follows that those courts must also be, and be perceived to be, independent of the legislature or the executive government.

Adapting this statement in *Kable* to the Territories may merely seem to be a clever way to circumvent the High Court's decisions that s 72, which guarantees judicial tenure for federal judges, does not apply in the Territories. Perhaps that is true. But it seems to me that the *need* for judicial independence in a system that purports to be governed by the rule of law is paramount, and clearly *ought to* outweigh any (historical) need for separate territory administration.

IV. CONCLUSION

As I said before, the *Second Cross-Vesting Case* indicates that Australia's federal jurisprudence has become technical, de-politicised, and char-

82 As to which, see *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 per McHugh J.

83 As to which, see *Svikart v Stewart* (1994) 181 CLR 548 at 561 per Mason CJ, Deane, Dawson and McHugh JJ.

84 (1996) 70 ALJR 814.

acterised by "legalism". The reinforcement of orthodox methods of construction and interpretation in that decision may be seen by some to be a welcome development.

However to ensure adequate protection of individual rights —protection of Australians in every State and Territory— from pernicious laws such as Bills of Attainder (*Kable*) and Bills of Penalties (*Fardon*) and from pernicious judicial appointment practices that leech the independence of regional judges (*NAALAS v Bradley*), it is clearly necessary for our High Court judges to imagine a system of justice that *is not expressly provided* in the Commonwealth Constitution. In the absence of constitutional amendment these protections will only arise by implication from the separation of judicial power.

After 100 years of peaceful federalism in Australia the real defect of Australia's constitutional jurisprudence, then, is not the absence of a coherent jurisprudence, but the absence of constitutional protection of individual rights in that federal context. To remedy this, and emphasise the point, the judges of the High Court will need to reconcile an approach to federal questions characterised by a focus on the *express* language of the Constitution with an approach to individual rights characterised by the recognition of *implied* rights arising from the separation of judicial power.

Four of the seven judges of the current High Court were appointed since its landmark decision in *Kable*. One has been critical of *Kable*,[85] and two others have been critical of the style of law-making that characterised that decision (ie. the recognition of implied rights in the Constitution).[86] No one can say for certain what impact these changes in the composition of the bench will have on the cases before the Court considered in this paper. Whether the Court will emphasise the need for State autonomy from federal judicial power, and a technical approach to the construction of the Constitution, and roll back *Kable* is a question that will be tested in the *Fardon* case. As the ancient Chinese curse reads: "may you live in interesting times".

[85] Before he was appointed to the High Court, Justice Hayne was a judge of the Victorian Court of Appeal and he was critical of *Kable* in *R v Moffatt* [1998] 2 VR 229.

[86] See Justice Callinan's remarks at [338] - [348] in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 and Justice Heydon's remarks in "Judicial Activism and the Death of the Rule of Law" (2003) *Quadrant* 9 (January-February).