

THE LIMITATION OF STATE LEGISLATIVE POWER

It has become fashionable in recent years, when referring to State Parliaments, to stress the liberating effects of the *Australia Acts*. For example, Mahoney P of the NSW Court of Appeal, in *Egan v Willis* observed that the effect of the *Australia Act 1986* (Cth) was to 'alter the grundnorm of the Australian legal system'. He concluded:

If they were not so before, the parliaments of the Australian States became (subject to what I say) the legislatures of independent political entities in a Federal system and had the plenary powers appropriate to such legislative bodies.... The State Parliaments are, in the relevant sense, legislatures with plenary powers which derive not from grant but from their characters as organs representative of the democratic societies which they represent.¹

Justice Kirby, on appeal in *Egan v Willis* to the High Court, attributed to the expansion of the powers of the NSW Parliament to both the Commonwealth Constitution and the enactment of the *Australia Acts*. He stated that:

The status of the New South Wales Parliament, and its constituent chambers, was immeasurably enhanced by the coming of the Commonwealth and the provision for the States in the Australian Constitution. This may not have been fully understood at the time.²

Indeed, it is hard to understand it today, given that federation did not remove the colonial status of New South Wales and the Imperial fetters upon its legislative power. More importantly, the Commonwealth Constitution expressly cut down State legislative power. State Parliaments no longer had the power to enact excises³ or laws which protect the State's trade⁴ or discriminate against residents of other States.⁵ State laws which are inconsistent with Commonwealth laws are also rendered invalid to the extent of the inconsistency.⁶

Justice Kirby, in *Egan v Willis*, went on to note that the State Parliament must be regarded as an independent legislative body which enjoys, under the Commonwealth Constitution, plenary legislative powers, now that it is released from earlier historical limitations by the *Australia Act 1986* (Cth).⁷

Is it true then to say that since 1901, or at least since 1986, the legislative power of the States has significantly expanded? Overall, the answer must be no. While the *Australia Acts* did remove limitations upon the legislative power of the States, the practical effect

¹ *Egan v Willis* (1996) 40 NSWLR 650 per Mahoney P at 685-6. See also Gleeson CJ at 659 and Priestley JA at 692.

² *Egan v Willis* (1998) 195 CLR 424 per Kirby J at 496.

³ Commonwealth Constitution: s. 90.

⁴ Commonwealth Constitution: s. 92.

⁵ Commonwealth Constitution: s. 117.

⁶ Commonwealth Constitution: s. 109.

⁷ *Egan v Willis* (1998) 195 CLR 424 per Kirby J at 496.

of these amendments was not significant. It is debateable whether the power granted to the States to legislate extra-territorially⁸ extended to the States any greater power than they were already recognized as validly exercising. Further, the release from the application of the *Colonial Laws Validity Act*,⁹ while symbolically important, did not have a great practical effect as little Imperial legislation remained binding on the States.¹⁰

Of far greater significance to the States today is the use by the courts of expansive interpretations of implications drawn from the Commonwealth Constitution to limit the legislative powers of the States. Contrary to Justice Kirby's view in *Egan v Willis*, the Commonwealth Constitution, far from enhancing the status of the New South Wales Parliament, is now being used to reduce its powers and subordinate its position in the federation.

Laws, which if enacted by a colonial Parliament, or a State Parliament prior to the enactment of the *Australia Acts*, would never have raised a constitutional eyebrow are now being struck down as constitutionally invalid. Today I shall discuss a few very recent cases.

***Fairfax v Attorney-General (NSW)* [2000] NSWCA 198**

The first example is a law which concerns the holding of certain court hearings in camera. Where a defendant is found not to have committed contempt of court, the Attorney-General may submit a question of law to the Court of Appeal for its determination. The Court's determination does not affect the original finding in the contempt proceedings. In order to protect the defendant from the undermining of the original finding, the hearing of the proceeding on the question of law, under former s. 101A of the *Supreme Court Act* 1970 (NSW), was required to be in camera. The publication of a report of any submissions made upon the question of law by the Attorney-General, and a report of the proceedings which identifies the alleged contemnor, is punishable as contempt of court. The judgment, however, may be reported in the usual way.

These provisions were challenged on two constitutional grounds in *Fairfax v Attorney-General (NSW)*. Both grounds were based upon implications or principles derived from the Commonwealth Constitution.

The first ground was based on the *Kable* case.¹¹ It was argued that the obligation to sit in camera with respect to this category of proceedings was incompatible with the role of the Supreme Court as a court which exercises federal jurisdiction. The NSW Court of Appeal held, by majority (per Spigelman CJ and Meagher JA), that the provisions were not invalid upon this ground. However, the judgments are still notable for *Kable*-creep.

⁸ *Australia Acts* 1986: s. 2(1).

⁹ *Australia Acts* 1986: s. 3(1).

¹⁰ See also *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 re the power of the Commonwealth Parliament to repeal Imperial legislation applicable to the States.

¹¹ *Kable v DPP (NSW)* (1996) 189 CLR 51.

Spigelman CJ accepted that *Kable* not only prevents a State Parliament from legislating to confer on State courts functions which are incompatible with the exercise of federal jurisdiction, but that it may also have the effect of invalidating State laws which set out procedures for State courts to follow in exercising their judicial power.¹² A requirement to close a court is, he found, such a procedure.

However, in the particular circumstances, the Chief Justice did not hold the provision to be invalid upon this ground. He noted that it implements a policy that an individual has a right not to have an acquittal of a criminal charge called into question, and that the public is likely to appreciate that this is a limited and justifiable exception to the general principle of open justice.¹³ Accordingly, the provision does not impinge upon the integrity of the Court or the confidence of the public in the Court.

Priestley JA, in contrast, concluded that the provisions were invalid because it is ‘wholly inappropriate that [contempt] cases be heard in camera, or that the arguments in them should not be allowed to be published.’¹⁴ He considered that such restrictions were incompatible with the exercise of judicial power by the court when exercising federal jurisdiction. This is because ‘the public can have little confidence in a system which compels a court of appeal to hear in secret arguments put on behalf of the government aimed at restricting freedom of speech’.¹⁵

In my view this conclusion is just a little too melodramatic. The judgment in the case will be public and may, of course, be reported. Although the actual submissions of the Attorney-General may not be reported, the types of arguments raised before the court will undoubtedly be addressed in that judgment and may consequently be discussed. There is no limitation upon discussion of that judgment, the motives of the government in bringing the appeal, the conduct of the Attorney-General, the oppression of freedom of speech, or any other alleged evil perpetrated by the government. S. 101A(8)(b) did not prohibit a report of the proceedings generally. It only prohibited a report that would disclose the name or identity of the alleged contemnor. As Meagher JA concluded, ‘nothing of any importance is withheld from the public’.¹⁶

Given that the contempt trial itself is held in open court, it ought to appear reasonably obvious that the purpose of this provision is not to hide government attempts to suppress freedom of speech, but rather to protect an acquitted person from having his or her acquittal undermined through further publicity.

The case also raised the question which was not satisfactorily answered in *Kable*, as to whether the court is only precluded from exercising the incompatible function or procedure while actually exercising federal jurisdiction. In *Kable*, of the majority of four

¹² *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [34].

¹³ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [74].

¹⁴ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [153].

¹⁵ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [161].

¹⁶ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [164].

Justices, Toohey J took the view that the incompatibility issue arises where the Supreme Court is exercising Commonwealth judicial power,¹⁷ while Gaudron, McHugh and Gummow JJ¹⁸ considered that applied to the Supreme Court because it is a repository of Commonwealth judicial power, even though it is not exercising that power in a particular case. The absence of a clear majority on this point has made the application of *Kable* difficult for lower courts. This is reflected in the comments of Meagher JA in *Fairfax*, where he said of *Kable*: ‘What, if anything that case decided by way of *ratio* I do not know. Nor do others’.¹⁹

In *Fairfax*, Spigelman CJ managed to avoid the issue, concluding that it was unnecessary to decide.²⁰ Priestley JA concluded, however, that in deciding the question of law on appeal in a contempt proceeding, the Supreme Court ‘will be exercising federal jurisdiction’ because ‘Fairfax intends to argue questions concerning the interpretation of the Commonwealth Constitution’.²¹ This approach is based upon Justice Toohey’s judgment in *Kable*. However, if this were the criteria upon which the constitutionality of State laws turned, then it would lead to the ludicrous result that the State Parliaments have no power to legislate to impose a function or procedure on a Supreme Court in purely State matters where a party challenges the validity of the law under the Commonwealth Constitution, but that such legislation is perfectly valid and effective where no such challenge is made (because federal jurisdiction is not being exercised). This result is simply absurd and points to the difficulties which arise in interpreting *Kable*.

The other point raised in *Fairfax*, which was successful in striking down most of the provision, was the freedom of political communication. Well might you ask what on earth was the political communication involved? The Court appears to have been influenced by the fact that the original articles giving rise to the contempt case, concerned drug dealers and government action in dealing with them, which would conceivably fall within the definition of political communication.²² However, this was not a challenge to the validity of laws concerning contempt of court and whether they are contrary to freedom of political communication. S. 101A of the Supreme Court did not itself suppress the discussion of the drug trade or the government’s response to it. It merely provided that a question of law, arising after an acquittal, could be argued in camera before a court, and that neither the submissions of the Attorney-General nor the name of the alleged contemnor could be published. Again, it should be noted that the outcome of the case and its effect upon the media could be discussed, as could the drug trade in Sydney. So how do these minor restrictions on discussion of a point of law result in a breach of freedom of political communication? Spigelman CJ, with whom Priestley JA agreed on this point, concluded that ‘the questions of law sought to be agitated in the s. 101A application will be of significance for the ability of the media to publish other

¹⁷ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 per Toohey J at 95-6 and 99.

¹⁸ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 per Gaudron J at 102-3; per McHugh J at 116; and per Gummow J at 143.

¹⁹ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [169], referring to *R v Moffat* [1998] 2 VR 229.

²⁰ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [13]

²¹ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [146]

²² *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [99]

articles of the same character'.²³ So the political communication here, is not about the drug trade and the government's response. It is the discussion in a court about the legal principles which set the boundaries upon freedom of political communication. This, in itself is peculiar, not least because the Chief Justice rejected earlier in his judgment the argument that the conduct of courts and judges falls within the implication of freedom of political communication.²⁴

Meagher JA, dissenting in his inimitable style, dismissed this argument as follows:

Let it be conceded that the issues relating to the importation and distribution of drugs were of public significance, although accumulated ennui makes such a concession difficult to utter. There is nothing in the legislation which prevents those issues being discussed, and endlessly. Every aspect of the criminal trial can be discussed. Every aspect of the contempt case can be discussed. The only thing which, according to the legislation, cannot be discussed is in effect, the legal argument between Bar and Bench on some question of law which arises out of the acquittal, and even that can be discussed once the appeal has been heard. In these circumstances, the possibility of s. 101A being contrary to the doctrine in *Lange's Case* is non-existent.²⁵

This was a case crying out for special leave to the High Court. Special leave was granted without any argument on the matter even being heard. However, when the case came on for hearing, the High Court became afflicted with Meagher JA's ennui and instead of addressing, and perhaps even resolving, these important points set aside the declarations of the Court of Appeal and sent it back to it because the legislation had since been amended.²⁶ Where does this leave the law? Do we accept the *Kable*-creep? Do we accept that the implied freedom of political communication extends to arguments in court about the extent of constitutional principles?

Wong v The Queen

The next case I want to mention is that of *Wong v The Queen*.²⁷ Here the High Court held that the NSW Court of Criminal Appeal did not have the power to make guideline judgments of its own volition. The Court had been making guideline judgments since the case of *R v Jurisic*²⁸ in 1998, relying on its general statutory power to determine controversies, as set out in ss. 5D and 12 of the *Criminal Appeal Act 1912* (NSW). Part 8 of the *Criminal Procedure Act 1986* (NSW) was then enacted, setting up a separate procedure under which the Attorney-General can apply to the Court of Criminal Appeal

²³ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [99]

²⁴ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [83]

²⁵ *Fairfax v A-G (NSW)* [2000] NSWCA 198 at [173]

²⁶ S. 101A of the *Supreme Court Act* now provides that the hearing must be in camera unless the court otherwise orders and that the name of the alleged contemnor must not be published unless he or she consents. The ban on the publication of submissions remains, leaving a live question for the High Court to resolve if it had chosen to do so.

²⁷ *Wong v The Queen* (2001) 76 ALJR 79.

²⁸ (1998) 45 NSWLR 209.

to give a guideline judgment.²⁹ In *Wong*, this separate legislative procedure was not used. The court relied on its general power to make a guideline judgment of its own volition. It issued as part of its judgment a table setting out the range of appropriate penalties for low-level drug importation, based upon the amount of the drugs involved. Two critical points were that the guideline judgment: (1) concerned federal offences; and (2) did not cover the situation of the actual parties to the case, who were involved in higher level activities.

The High Court criticized the guidelines on the grounds that they direct sentencing results, rather than set out the principles to be applied by the sentencing judge. The Court also concluded that the Court of Criminal Appeal had no statutory or common law power to issue such a guideline judgment and that they conflicted with Commonwealth legislation directing the matters to be considered in sentencing a person for a federal offence.

As an aside, it is interesting to note the observation of Gaudron, Gummow and Hayne JJ that the 'guideline judgment' was not part of an order or declaration of the court below and is not directly subject to appellate review.³⁰ Only the actual sentences of Wong and Leung could be appealed. It is somewhat ironic, therefore, that the Justices of the High Court spend most of their judgments criticizing the Court of Appeal for issuing guidelines on sentences which were not relevant to the appeal and making findings on its power to do so, when this itself could not have been the subject of the appeal to the High Court either.

The main constitutional argument was that the Court of Criminal Appeal was exercising a legislative function in promulgating these guidelines and that this was inconsistent with the exercise of federal jurisdiction. The High Court held that the general legislation which confers functions on the Court of Appeal was confined to the power to decide the particular cases before it, and did not include the power to give guideline judgments which govern future cases. Accordingly, there was no inconsistency between the ss. 5D and 12 of the *Criminal Appeal Act 1912* (NSW) and Ch. III of the Commonwealth Constitution.³¹

However, comments made by some of the Justices suggest that there may indeed be Commonwealth constitutional constraints upon the ability of a State Parliament to legislate to permit its Supreme Court to issue guideline judgment on sentencing. Justices Gaudron, Gummow and Hayne noted that the fixing of penalty tables in a prescriptive manner by a court passes 'from being a decision settling a question which is raised by the matter, to a decision creating a new charter by reference to which further questions are to be decided. It at least begins to pass from the judicial to the legislative'.³² Their Honours stressed that the distinction must be made between a court articulating principles which underpin the determination of a particular sentence, and the publication of the

²⁹ This procedure is now re-enacted in Pt 3, Div 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

³⁰ *Wong v The Queen* (2001) 76 ALJR 79 at 87, para [39].

³¹ *Wong v The Queen* (2001) 76 ALJR 79 at 88-89, and 96, paras [49] and [84].

³² *Wong v The Queen* (2001) 76 ALJR 79 at 95, para [80]

expected or intended results of future cases. The latter ‘is not within the jurisdiction or the powers of the court’.³³

It appears clear from the judgments that a federal court could not exercise such a power. If the power were characterized as legislative, it would be a clear breach of the separation of powers. However, can such a legislative function be conferred upon a State Court? More particularly, can it be conferred upon a State Court when exercising State judicial power, or when exercising Commonwealth judicial power? The High Court did not need to decide this question, as it held that the general legislation relied upon did not purport to confer such jurisdiction on the NSW Court of Criminal Appeal. (Although strictly, this issue itself was irrelevant to the appeal).

At para [88] Gaudron, Gummow and Hayne JJ, however, observed in relation to Part 8 of the *Criminal Procedure Act* 1986, which does set out a legislative basis for guideline judgments, that it would seem very likely that there would be a disconformity between it and the Constitution in relation to federal offences. Their Honours also noted earlier at para [38] that questions arise about the difference between legislative and judicial functions in the issue of guideline judgments ‘because the Court of Criminal Appeal was exercising federal jurisdiction’.³⁴

After *Wong* was handed down by the High Court, the NSW Parliament enacted the *Criminal Legislation Amendment Act* 2001 (NSW) which amends the *Crimes (Sentencing Procedure) Act* 1999 (NSW) by giving express power to the Court of Criminal Appeal to give a guideline judgment of its own motion in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings’.³⁵ Given the comments made in *Wong*, there is a significant likelihood that both this provision and the separate legislative procedure under which the Attorney-General applies for a guideline judgment, will be read down so as not to apply to the sentencing of federal offences.

The final, and most controversial question, reverts back to what is meant by *Kable*. Is the function of giving guideline judgments so incompatible with a Supreme Court exercising federal judicial power, that the Supreme Court may not even issue guideline judgments solely in relation to State offences? This again leads back to the argument that federal jurisdiction is attracted whenever an objection is raised under the Commonwealth Constitution, so that if on any occasion that a State Court proposes to issue a guideline judgment about sentencing for a State offence, a Commonwealth constitutional objection is raised, federal jurisdiction is attracted and the court’s power to issue the guideline judgment no longer exists.

Callinan J, while speaking positively about State legislative power, also implied limitations upon it. He said:

³³ *Wong v The Queen* (2001) 76 ALJR 79 at 96, para [83]. See also Kirby J at 108, para [144].

³⁴ See also Kirby J at 109, para [147] where he notes that ‘at least in federal jurisdiction, there is a constitutional boundary; and it must not be passed’.

³⁵ *Crimes (Sentencing Procedure) Act* 1999 (NSW): s. 37A.

It is difficult to see, however, why a State legislature might not, as these States [of NSW and WA] have, legislate for the promulgation of guidelines in relation to State offences, so long as it is understood that they are guidelines only, that is, at most, merely indicative starting points, not to be rigidly or mechanistically applied and that the trial judge still has a real, judicial sentencing discretion to exercise...³⁶

This would appear to suggest that if a State conferred upon its courts the power to make guideline judgments that were prescriptive in nature in relation to sentencing for State offences, it may be invalid under the Constitution.

The High Court has now set up the grounds for a further challenge to guideline judgments. This time it will be based upon the argument that the legislation supporting the making of such judgments is constitutionally invalid because it purports to confer on the Supreme Court a function which is incompatible with its continuing exercise of federal judicial power. If the Court were to hold such legislation invalid, the likely result will be that the Parliament itself takes up this role. Instead of courts being subject to ‘guidelines’ prepared by senior members of the judiciary, their discretion would most likely be dramatically reduced and ‘grid-sentencing’ or a similar prescriptive sentencing system will be imposed upon courts by legislation. This would be an unfortunate development brought by the courts upon themselves.

Mobil Oil Australia Pty Ltd v Victoria

The third case I wish to mention is *Mobil Oil Australia Pty Ltd v Victoria*, which was heard in the High Court last week. Judgment is currently reserved. The case concerns a class action commenced in Victoria by small aircraft operators in the wake of the contamination of aviation fuel in November and December 1999 which kept many hundreds of light aircraft grounded. The challenge is to the Victorian class action provisions which mirror those which apply in the Federal Court. Initially those provisions were applied by way of Order 18A of the *Supreme Court Rules*.³⁷ After the Order was challenged, the Victorian Parliament replaced it with Part 4A of the *Supreme Court Act*, with retrospective effect from 1 January 2000.

The validity of the legislation is challenged on the grounds of extra-territoriality and inconsistency with the exercise of federal judicial power.

Both issues hinge on the fact that it is an ‘opt-out’ scheme, rather than an ‘opt-in’ scheme. It therefore purports to bind all members of the affected class unless they expressly opt-out of the proceedings. The number and identity of the parties to the proceedings may not be known.

³⁶ *Wong v The Queen* (2001) 76 ALJR 79 at 112, para [168].

³⁷ See the challenge to Order 18A in: *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* [2000] VSCA 103.

The first ground of challenge is that Part 4A purports to bind members of a group who are not resident in the State and whose claims arise from transactions which occurred outside the State. It is argued that the State Parliament does not have the power to impose a binding judgment upon persons who have no relevant connection with the State. Such a result would be a significant limitation on the legislative power of the States. The States have long been considered to have the power to legislate extra-territorially as long as there is a relevant connexion between the State and the subject-matter of the legislation. That connexion need be no more than 'remote and general'.³⁸ The *Australia Acts* also expressly grant the States the capacity to legislate extra-territorially. To argue that a State cannot give its court jurisdiction to decide matters which bind parties interstate is to propose a serious limitation on the legislative and judicial capacities of a State.

Related to this ground is the assertion that the common law rules about choice of law are constitutionally entrenched and cannot be amended by the States. This issue was left open by the High Court in *John Pfeiffer Pty Ltd v Rogerson*³⁹ Again, it would be a serious limitation on the legislative powers of the Commonwealth and the States if they were unable, separately or collectively, to alter common law choice of law rules in appropriate cases.

The third ground in the written submissions was that Part 4A requires the Supreme Court to act in a manner which is inconsistent with the proper exercise of judicial power in the determination of a controversy. This is because: (a) group members are denied procedural rights because they have no opportunity to participate in the case on an individual basis; (b) the Supreme Court's judgment will go beyond the determination of a genuine justiciable controversy because it binds parties who have no knowledge of the case and are not involved in it; (c) the provisions contemplate the giving of a judgment which merely sets out the way the law will apply if particular facts are later found, and therefore does not quell a controversy; and (d) the Supreme Court, in assessing aggregate damages rather than assessing damages for each group member, is involved in an arbitral rather than a judicial process.

While the primary argument is about whether these assertions are correct and if so, whether they require the Supreme Court to act in a manner which is inconsistent with the proper exercise of judicial power, the controversial *Kable* issues arise again. If the Supreme Court is dealing with class actions relating to State jurisdiction only, is there a constitutional problem if the functions it performs are inconsistent with the exercise of federal jurisdiction? When the same issues were argued in the Victorian Court of Appeal, Ormiston JA dismissed them, noting that they had an 'air of unreality about them'.⁴⁰ Perhaps not surprisingly, this point was not developed in argument before the High Court. Nevertheless, the uncertainty surrounding the application of *Kable*, and the willingness of the High Court to use implications derived from the *Commonwealth Constitution* to limit the legislative powers of the States, makes it extremely difficult for States to legislate with confidence as to the validity of their statutes.

³⁸ *Union Steamship* (1988) 166 CLR 1 at 14; *Pearce v Florenca* (1976) 135 CLR 507.

³⁹ (2000) 203 CLR 503 per Gleeson CJ Gaudron, McHugh, Gummow and Hayne JJ at 535 [para 70]

⁴⁰ *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* [2000] VSCA 103 at [46]

Local Government Association of Queensland (Inc) v Queensland

This final case I wish to discuss is *Local Government Association of Queensland (Inc) v Queensland* [2001] QCA 517. The case was removed to the High Court and then remitted back to the Supreme Court of Queensland, which handed down its judgment on 15 November 2001.

The case concerned Queensland legislation, s. 224A(b) of the *Local Government Act* 1993 (Qld), which provides that a local councillor ceases to be a councillor if he or she becomes a candidate for election to the State Parliament or the Commonwealth Parliament. It should be stressed that it in no way prevented a local councillor from nominating to become a Member of Parliament. It merely provided that the person ceases to be a councillor once he or she nominates to run for Parliament. Presumably the reason is a concern about the incompatibility between fulfilling a role as a local councillor and campaigning for office for the Parliament.

The Queensland Supreme Court held that the law was invalid on either of two grounds. First, because the Queensland Parliament did not have the legislative power to enact such a law, and secondly because it is inconsistent with Commonwealth legislation.

How, you may ask, could this be the case? Why can't the State Parliament legislate for the qualification and disqualification of its local councillors? How could a provision concerning the disqualification from office of a local councillor be inconsistent with a Commonwealth law?

McMurdo P simply concluded that the Queensland Parliament had imposed a disincentive or sanction for a local government councillor who nominates for election to the Commonwealth Parliament and that this disincentive undermines the exclusive Commonwealth legislative scheme under the *Commonwealth Electoral Act*.⁴¹ Accordingly, she found that there was no legislative power to enact the law. She saw the State legislation as adding to the *Commonwealth Electoral Act* an extra category of persons not entitled to be nominated as a Senator or Member of the House of Representatives.⁴²

Williams J also concluded that the power to make laws regulating the conduct of Federal elections is exclusive to the Commonwealth.⁴³ He considered that the Queensland law 'places a burden on particular candidates to stand for Federal election'. Again, he noted that s. 164 of the *Commonwealth Electoral Act* 1918 details who is not entitled to nominate as a candidate for a Federal election and that the Queensland legislation effectively adds an additional category to that list.⁴⁴

⁴¹ [2001] QCA 517 per McMurdo P at [12]

⁴² [2001] QCA 517 per McMurdo P at [14]

⁴³ [2001] QCA 517 per Williams JA at [72]

⁴⁴ [2001] QCA 517 per Williams JA at [75]

In addition, all three Justices held that an inconsistency arose under s. 109 of the Constitution, because Commonwealth legislation about elections covers the field and the State legislation trespassed into that field because its indirect effect is to hinder councillors from taking the risk of nominating for election to the Commonwealth Parliament.⁴⁵

It is hard to see how this is so. The Queensland legislation does not in any way prevent or hinder local councillors from nominating for election to the Federal Parliament. There is no additional category of disqualification from the right to nominate. All the legislation does is require the councillor to vacate his or her position. This is completely understandable. It is a general principle, frequently applied, that people who hold high statutory or elective office must resign from that office before running for a different elective office. This prevents people from using the mantle of one office, unfairly, to get elected to another office. It also avoids any conflict of interest, where a person's campaign may conflict with his or her duties of office.

Section 164 of the *Commonwealth Electoral Act* 1918 is a case in point. It provides that a person is not capable of being nominated to be elected to the Commonwealth Parliament if he or she is a member of the Parliament of a State.

New South Wales examples include:

- s. 79(7) of the *Parliamentary Electorates and Elections Act* which provides that a Member of the Commonwealth Parliament shall be incapable of being nominated as a candidate for the NSW Legislative Assembly; and
- s. 275 of the *Local Government Act* 1993 (NSW) which provides that a person is disqualified from holding office as a local government councillor while a judge of any court of the State or the Commonwealth.

I would characterize neither provision as being one with respect to Members of the Commonwealth Parliament or the Commonwealth judiciary. Both, in my view, fall within the legislative power of the State to control the qualification and disqualification of members of State Parliament and local councils. However, if the above judgment were to prevail, both provisions would become questionable. The consequence, in its narrowest form, would be that a State Parliament would not have the power to legislate to say that any of its officers, such as judges, must vacate their office if they nominate for the Federal Parliament. In its broader form, the principle would prevent the State from validly enacting laws which provide a disincentive to do something under exclusive Commonwealth legislation.

⁴⁵ [2001] QCA 517 per McMurdo P at [2]; Davies JA at [59] – [60]; and Williams JA at [80]

Conclusion

These four cases are indicative of a constitutional trend by which the Commonwealth Constitution and the implications drawn from it are being used by the courts to limit the plenary legislative powers of the States.

The uncertainty involved in the application of these implications makes it extremely difficult for State Governments and Parliaments to be confident in enacting legislation that it will be held to be valid. Moreover, there is the increasing problem of dealing with the consequences of invalid laws. Remedial legislation appears to be more commonly required today to address court judgments,⁴⁶ and the constitutional ability of the States to fix the problems arising from invalid legislation is itself often doubtful and subject to even more litigation.⁴⁷

Perhaps it is time for the courts to show their oft-mentioned respect for the plenary legislative power of the States by looking to the electorate as the judge of legislation through the democratic process, rather than searching between the lines of the Commonwealth Constitution to find ever broader and fuzzier implications to shackle the State Parliaments.

⁴⁶ See, for example, *Federal Courts (State Jurisdiction) Act 1999* (NSW); and *Crimes Legislation Amendment Act 2001*: Sched 5 [13].

⁴⁷ See, for example, *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629; and *Re Macks; Ex parte Saint* (2000) 75 ALJR 203.