The Federal and State Courts on Constitutional Law – The 2011 Term

Justice Alan Robertson, Federal Court of Australia

17 February 2012

My task is to review the decisions of the Federal and State Courts in the field of federal constitutional law for the 2011 term and to identify some of the prevalent issues. I have included the Family Court of Australia and the Territory Supreme Courts.

I have taken an old-fashioned view as to what constitutes federal constitutional law so I have not included all the cases that refer to State Constitutions. But I have counted the more substantial of the decisions applying *Kable*/*Kirk*.

You have in your materials a list or an index of the cases I have found. The selection of cases is not limited to reported cases but involved a judgment about the relevance of each case for today's purposes.

You also will have access to what I have called a synopsis of each of the cases I have selected and that synopsis will be available on the conference website.

There are only some 20 or so cases I have found in the Federal and State courts for 2011 worthy of comment. As will be seen most of them concerned Chapter III in its *Kable*/*Kirk* institutional integrity aspect.

Why are there so few? In part it must be because constitutional points in cases below the High Court often have a reactive rather than a proactive aspect - that the party raising the constitutional point often does so by way of defence to, for example, a prosecution.

Where a constitutional case starts below the High Court it is of course very difficult for a non-Attorney-General to have the case removed. A recent statement of practice was made in *Monis v R* [2011] HCATrans 097. Similarly, Attorneys-General appear reluctant to seek to remove constitutional cases as of right.

The point here is that the number of judgments is an accurate reflection of the cases in the courts below the High Court in which constitutional issues were pursued to judgment.

Finally I note that until 1976 this aspect of the annual conference would not have been possible in light of the then automatic removal into the High Court of inter se constitutional questions in any cause pending in the Supreme Court of a State: s 40A of the *Judiciary Act 1903.*

With that preamble I shall refer to the categories of cases. I do not refer to patterns since by definition no court other than the High Court chooses the cases it hears. I will later seek to identify some issues.

To practitioners who wish to run such a case the clear moral is first wait until the constitutional point is ripe. Construe the statute. If there is a discretion yet to be exercised then proceed cautiously. Then construe the statute again. It is quite possible that the constitutional point does not arise.

.....

There was one **section 92** case or at least a Northern Territory s 92 case so it could perhaps count as a s 109 case: *Sportsbet Pty Ltd v State of Victoria* (2011) 282 ALR 423 (see page 6 of the synopsis). It would not be fruitful to say more about that decision as an appeal to the Full Court is listed for hearing next Monday, 20 February 2012. Also of course the High Court is reserved in *Betfair* and *Sportsbet* which were argued in August and September 2011.

Next I refer to two **section 116** cases. One of these *Cheedy* (page 5 of the synopsis) was a native title case chiefly interesting because the appellants' case proceeded on

the unchallenged basis that their use of ochre and sacred stones called *gandi* were religious practices. The argument was that if the ochre and *gandi* sites were dug up in the process of mining iron ore, the appellants would be prevented from continuing to access them and thus to observe those religious practices. The case went off on the basis that s 116 did not operate to invalidate Commonwealth laws which had only an indirect effect of prohibiting the free exercise of religion.

The second s 116 case is *Hoxton Park* which came up to the New South Wales Court of Appeal on appeal from a summary judgment decision (synopsis page 27). Both Commonwealth and State legislation were challenged. The argument bears a strong resemblance to *Spencer v The Commonwealth* (2010) 241 CLR 118 except this was a s 116 case rather than a s 51(xxxi) case. The applicants alleged that funding for the construction and operation of an Islamic school was obtained from the Commonwealth by way of a grant made under the *Schools Assistance Act 2008* (Cth). The Court of Appeal held that the appeal from the summary judgment should be allowed in respect of the constitutional challenge to the Commonwealth legislation but rejected in relation to the challenge to State legislation.

And of course the High Court is reserved in *Williams v Commonwealth* from August 2011 although the decision may turn out to be more about executive power than s 116. You will be hearing about *Williams* later this morning.

I then come to **s 109**. I have listed only two cases and both of them were in the Full Court of the Federal Court. Why were there only two? I had expected more, particularly if one thought that *Dickson v The Queen* (2010) 241 CLR 491 heralded a new approach. But *Momcilovic* perhaps showed that the heralds were premature or that *Dickson* should be limited to conspiracy provisions where Commonwealth law left so called "areas of liberty". You will be hearing more about *Momcilovic* later this morning.

In any event one, s 109 case concerned civil aviation: *Heli-Aust* (page 4 of the synopsis) where State law was held to be inconsistent. The other, *Birdon*, (page 8 of the synopsis) concerned payment for the hire of a dredge where the alleged inconsistency was between the Commonwealth *Admiralty Act* and the *Australian*

Consumer Law on the one hand and the New South Wales *Building and Construction Industry Security of Payment Act 1999* which provided for a party to seek progress payments. The majority held that was no inconsistency.

I should next refer to the **s 51(xxxi)** cases. There were three of these.

One of them, *John Holland Group*, was in the Court of Appeal of the Supreme Court of Victoria: (see synopsis at page 22). It concerned the effect of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). The Court of Appeal held that the relevant part of the legislation had that purpose of adjusting the relations of employers and employees by providing for the phasing in of the new industrial relations regime created by the *Fair Work Act* and that, applying *Georgiadis*, the purpose of the provision was not to acquire the property constituted by John Holland's contractual right against the unions consisting of the relevant unions contractual obligation not to engage in "protected industrial action".

A similar approach and similar result appears from the judgment of the Family Court of Australia in *Wallace & Stelzer* (synopsis page 1). The legislation here was the *Federal Justice Systems Amendment (Efficiency Measures) Act (No 1) 2009*.

The third case, *Dickfoss*, was a decision of the Northern Territory Court of Appeal so strictly this was a s 50 of the *Northern Territory (Self-Government) Act 1978* (Cth) case. But the ground was the *Criminal Property Forfeiture Act 2002* (NT) and Riley CJ for the Court relied on *Burton v Honan* and *Ex parte Lawler* to reject the challenge to the validity of the legislation.

By this time next year we will have the benefit of the High Court judgments in *Phonographic Performance Company of Australia Limited & Ors v Commonwealth of Australia & Ors* [2011] HCATrans 117 (10 May 2011) and plain packaging *Philip Morris Limited v The Commonwealth of Australia*. Will there be more or less s 51(xxxi) litigation in the coming 12 months? Will the section have its *Cole v Whitfield* moment? Much is possible but I would be surprised to see s 51(xxxi) covering amendments or adjustments to entirely legislative workplace relations schemes or the

requirements for binding financial agreements under laws made under the *Family Law Act* or indeed criminal property forfeiture.

I come then to two interesting **implied freedom of political communication cases**. *Corneloup* was a decision of the South Australian Full Court of the Supreme Court in relation to a body called Street Church (synopsis page 16). An application for special leave to appeal has been filed.

A by-law was struck down. It was one which provided that no person shall without permission on any road preach, canvass, harangue or distribute to any bystander or passerby any printed matter. I understand the by-law now to have been amended so as to prohibit any person, without permission, on any road preaching, canvassing, haranguing or otherwise soliciting *for religious purposes*. It will be a nice question where the line may be drawn between religious and political communication.

The other decision was *Monis v R* (synopsis page 29). The charges related to letters allegedly sent by Mr Monis to the wives and relatives of Australian military personnel killed while serving in Afghanistan. Copies of the letters were sent on occasions to various politicians. At one level the letters were critical of the involvement of the Australian Military in Afghanistan. The letters also referred to the deceased soldiers in a denigrating and derogatory fashion. The relevant question arose under s 471.12 of the *Criminal Code 1995* (Cth): did the accused use a postal service in a way that reasonable persons would regard as being, in all circumstances, offensive. The Court made a close and nuanced analysis of the legislation. First the Court construed the word "offensive" as meaning calculated or likely to arouse significant anger, significant resentment or other extreme reactions in the mind of a reasonable person. It was insufficient if the use of a postal service would only hurt or wound the feelings of the recipient. Second, it was nonetheless held that the law did effectively burden freedom of communication about governmental and political matters and so the question became, third, whether the law was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution. The key factor in finding that the section was valid was the personalised nature of communication by post. There is an application for special leave to appeal filed in that case is well.

Perhaps what links the users of roads in Adelaide and the recipients of mail is an (implicit) desire to be free **from** political communication or at least certain forms of it. Perhaps that should be the focus of the rulemakers.

I come next to the 12 Chapter III cases. I assume there are so many because the concepts still developing.

First there are three **section 80** cases.

The first one, *Huston*, (synopsis page 21) I only refer to in passing because it deals with the place of trial, part of s 80 which, no doubt as all the criminal lawyers know, is reflected in s 70A of the *Judiciary Act*. The overt acts of the particular conspiracy charged were alleged to have been performed in more than one State and extraterritorially and thus the offence charged was "not committed within any state" within s 80 of the *Constitution*. Thus the trial was properly held in Queensland.

The other two s 80 cases were also decisions of the Queensland Court of Appeal. In *Hart v Commonwealth Director of Public Prosecutions* (page 20 of the synopsis) the s 80 argument was part of a more general Chapter III argument. Part 2-4 of the *Proceeds of Crime Act 2002* (Cth) permitted a court to impose a penalty in respect of serious crimes without any conviction for those crimes after a trial by jury on indictment. The Court of Appeal held that the determination of an application for a pecuniary penalty order did not contravene s 80: the proceedings under Part 2-4 were civil proceedings not criminal and were not a trial on indictment. An application for special leave to appeal has been filed.

In *R v CAZ* (page 18) the s 80 argument also was related to a more general Chapter III point. The problem arose under the *Queensland Criminal Code Act 1899*, in particular s 229B(4). That provision referred to unlawful sexual acts involved in an unlawful sexual relationship. The prosecution was not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence and the jury was not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence and all the members of the jury were not required to be satisfied about the same unlawful sexual acts.

Because it was a State offence the Court of Appeal said that the Constitution did not require a jury in trials in State courts of offences against State law. In any event, it was held that s 229B did not purport to dispense with trial by jury.

There does not appear to have been an application for special leave to appeal.

You might want to consider how s 229B(4) would fare if it were a provision in the Commonwealth Criminal Code. If the provision were construed as delineating the substantive offence rather than the mode of trial then perhaps it would pass muster.

Next I mention the **traditional (non-*Kable*) separation of federal powers** cases.

Here I refer first to a decision of the Full Court of the Family Court (page 2 of the synopsis) *Babbit v Babbit* which involved an application of *Luton v Lessels*.

Next there was what I call a traditional *R v Humby; ex parte Rooney* case. *Australian Education Union v Lee* (synopsis page 3) is outside the timeframe of 2011 but was not referred to this time last year and was argued in the High Court on 31 January 2012. Lest it slip through the cracks, I refer to it here. The question was whether s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) undid the quashing by order of the Federal Court of the registration of the Australian Principals' Federation and, if so, whether that involved an interference with or a usurpation of the judicial power of the Commonwealth.

The other case in that vein but concerning a different aspect of *R v Humby; ex parte Rooney* was really an institutional integrity case. In *Wallace & Stelzer* (synopsis page 1) the Family Court had no difficulty holding that the Amending Act, in amending the statutory criteria for the validity of a financial agreement, did not interfere with the Court's ability to determine the proceedings that were before it but rather conferred a broad discretion and therefore did not tell the Court how to deal with a particular matter and how to deal with particular parties.

Seddon, synopsis page 14, concerned that part of *Kirk*, [100], where the High Court said that the distinction between jurisdictional and non-jurisdictional error marked the relevant limit on State legislative power. This dictum was referred to by the Western Australia Supreme Court as supporting the limited construction of s 145(9) of the *Workers' Compensation and Injuries Management Act 1981* (WA) that a decision of a

medical assessment panel or anything done under the Act in the process of coming to a decision of a medical assessment panel was not amenable to judicial review. Edelman J held that the words “not amenable to judicial review" should exclude only judicial review for non-jurisdictional error. The court, as I have noted in the synopsis, said that the question of the obiter dictum in *Kirk* was to be the subject of further consideration by the High Court in *Public Service Association of South Australia Inc v Industrial Relations Commission*. That case was argued before the High Court on 29 November 2011 in relation to s 206 of the *Fair Work Act* 1994 (SA).

Next are cases concerning: whether the court has a *discretion* (as a subclass of institutional integrity). The line of country is described by Spigelman CJ in *BUSB* which I refer to later, as including:

- Legislation that "constituted a marked interference with a judicial process and circumscribed the judicial functions and discretions incidental to it". (*R v Humby; Ex Parte Rooney* (1973) 129 CLR 231 at [14] per Mason J.)

- A law which requires or authorises a court to "exercise judicial power in the manner which is inconsistent with the essential character of a court or with the nature of judicial power". (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at [21].)

- "Interference with the governance of the trial and distortion of its predominant characteristics." (*Nicholas v The Queen* (1998) 193 CLR 173 at [145].)

- Requiring the court "to depart to a significant degree from the methods and standards which have characterised judicial activities". (*Thomas v Mowbray* (2007) 233 CLR 307 at [111], [600] and [651] and see *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [52].)

In *Chevalley v Industrial Court of New South Wales* (synopsis page 33), special leave to appeal was refused by the High Court on the 10 February 2012.

You will be familiar with the scheme of the *Occupational Health and Safety Act 2000* (NSW) from *Kirk*. In short the question was whether the scope of the defences to liability of directors and managers (s 26) were or were not illusory so as to render the exercise of jurisdiction by the State court a charade where judicial procedure was used as a mask for a legislative decree. The five judges of the Court of Appeal held as a matter of construction that matters of substance *were* left to the determination by the Court should the defendant choose to put them in issue.

The case is also of interest by virtue of the reservation or warning given by Basten JA that although it was often convenient to consider whether the state law would have been valid had it been a law of the Commonwealth conferring jurisdiction on a court created by Parliament under s 71 of the Constitution there were risks in adopting the approach.

Dickfoss is the Northern Territory case I have referred to already in the context of s 51(xxxi) (synopsis page 36). Section 96 of the *Criminal Property Forfeiture Act* (NT) and related provisions provided that the Court, in hearing an application for forfeiture, *must order* that the property be forfeited to the Territory if the Court was satisfied that it was more likely than not that the property was crime-used. It was submitted that the operative decision to order forfeiture was made by the executive and not by the courts. This argument was rejected as a matter of construction of the provision. The failure to interpose a judicial discretion or a judicial decision between the establishment of the criteria and the making of the order was held not to be problematic. The Court of Appeal referred to the judgment of Doyle CJ in *DPP v George* in 2008 and to the judgment of McHugh J in *Fardon* in 2004.

Birdon, (synopsis page 8) I have already referred to in the context of s 109. It concerned the provision of the *Building and Construction Industry Security of Payment Act 1999* (NSW) in so far as it provided in s 25 for the filing of an adjudication certificate which "may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly". However this section had to be read with s 32 of the same Act so that the assessment might be enforced as if it were a judgment of a court of competent jurisdiction but only insofar as a court had not determined, or did not determine, otherwise. It followed that the State Act did not purport to instruct the courts to do the work of the legislative or executive branches of government of the State of New South Wales. Keane CJ said there was nothing about the enforcement of the adjudication certificate as if it were a judgment of the court which was at odds with the fundamentals of the judicial process. An application for special leave was discontinued to December 2011.

This leaves five more general Chapter III cases.

CAZ (synopsis page 18) I have already referred to as the decision of the Court of Appeal of the Supreme Court of Queensland in relation to s 80. You will remember

subsection (4) of s 229B of the *Criminal Code Act 1899* (Qld) (above). The Court of Appeal accepted that State legislation, which denied to a State court in which Federal jurisdiction was vested the power to order the prosecution to supply to the defendant particulars of an offence charged against State legislation which were necessary to fulfil the requirements of procedural fairness for trial in that court, would be constitutionally invalid as it would be repugnant to the judicial process in a fundamental degree and would distort the institutional integrity of the court. However the Court held that the section did not preclude the ability of the courts to ensure a fair trial for the defendant: s 229B did not work such a serious diminution upon the necessary extent of particularisation of the offence, the usual requirements for jury unanimity or majority verdicts or other procedures designed to ensure a fair trial. This was a matter of construction.

Kamal (synopsis page 12) may be seen as related to *Dickfoss* in that it concerned a *Proceeds of Crime Act*, this time the Commonwealth Act. At first instance it had been declared that s 26(4) of the Act was invalid. It provided "the court must consider the application [for a restraining order over the respondent's property] without notice having been given if the DPP requests the court to do so". Martin CJ and Buss JA allowed the appeal on the basis that s 26(4) was not to be construed as requiring a court to determine an application for a restraining order in respect of property without notice to the owner of the property because s 26(5) permitted the court, at any time before finally determining the application, to direct the DPP to give such notice. McLure P also upheld the appeal but on the ground that the Act provided for a restraining order to be revoked on the application of the owner of the property following a contested hearing.

Seiffert (synopsis page 13) concerned s 115 of the *Sentence Administration Act 2003* (WA). The section provided that the rules of natural justice did not apply to or in relation to the doing or omission of any act, matter or thing under Parts 2 to 6 of the Act by, relevantly, the Board. The section was construed not as a privative clause but as a permissible exclusion of the rules of natural justice. The court held that s 115 was a provision which created or defined the scope of the duties or powers conferred on the Board and others and because the section did not *in terms* preclude judicial review nor did it *operate* to exclude judicial review the *Kirk* principle was not enlivened.

Slieman (synopsis page 24) concerned the construction of the provision of the State Act, the *Security Industry Act*. The key provisions created a non-disclosure regime for criminal intelligence reports or other criminal information relied upon by the Commissioner of Police in his decision to refuse or to revoke a licence under that State Act. The next leg of the argument related to the provision that such material should not be disclosed by Administrative Decisions Tribunal without the approval of Commissioner. Thus, it was contended, the reasons of the Tribunal would be misleading because the true reasons would not be disclosed and the true reasons might reveal jurisdictional error. It followed that the subsection could operate to prevent the Supreme Court exercising its supervisory jurisdiction to review jurisdictional error by the Tribunal.

The Court of Appeal recognised that there could be substantial difficulties facing an applicant wishing to invoke the supervisory jurisdiction of the Supreme Court but held that those provisions did not deny the Supreme Court power to provide relief in respect of jurisdictional error and did not substantially impair the exercise of that power. In each case the court may draw such inferences as to the decision-makers' reasons as were appropriate on the material before it. It could not be assumed that the Supreme Court would allow procedural requirements to frustrate the exercise of its jurisdiction to review for jurisdictional error.

Finally I refer to *BUSB* (synopsis page 26). It concerned screening orders in respect of some ASIO witnesses. The applicant relied upon the strength of the principle that an accused had a right to confront the witness against him. The constitutional issue was held not to arise since the District Court only had the implied power to make a screening order where it was necessary for the administration of Justice. If such an implied power had the effect of the kind summarised in the cognate formulations of the constitutional principle so as to undermine the institutional integrity of the Court then the implied power to make a screening order would be held not to exist.

What then are the larger themes and issues? One sees, as would be expected, that these decisions do not involve novel points of construction of the *Constitution*. But one also sees that litigants in these courts tend to be distracted by the glitter of a constitutional point where the answer more frequently lies in the statutory construction of the Commonwealth or State Act in issue. Where there is a statutory

discretion vested in a court which may or may not be exercised in a particular way is unlikely that the statutory power itself would be held to be unconstitutional.

In the Chapter III context discretion is essential, using the word discretion in a number of senses. At the minimum, as appears from *Dickfoss*, the Parliaments may not by the terms of the statute tell the courts what the facts are. Also the Parliaments must not by deeming provisions or otherwise detract from a fair trial whether by way of unexaminable certificates (*Birdon*) or by way of a trial which is argued to be not "fair". One can see the Courts applying this (procedural) value in *Kamal*, *CAZ* and *BUSB*: has the defendant had the opportunity to oppose the order, to be told what the particular charge is, and to confront his accusers…? The judges have to be allowed to judge and to do so as a matter of substance.

In the judgments, none of this is for the sake of the courts themselves but so that the courts can perform the task in public law cases, including criminal cases in this context, of applying the law according to law - sometimes referred to as standing between the government and the individual. One can see in these Federal and State court decisions that the power to make findings of fact, to exercise real discretions and the fairness of the judicial process are part of the irreducible minimum. They are defining characteristics of the courts and of the judicial process.

One sees the implied freedom of political communication requiring the courts to construe statutes in a way which accommodates that freedom. Similarly these courts have been construing statutes to preserve the (newly found) requirement for the institutional integrity of the Supreme Courts. The Courts will look, as they have been, with new eyes at the functions, powers and discretions conferred on them. So will the legislatures in conferring jurisdiction on the courts rather than on other bodies.

Why is all this Chapter III learning important for non-lawyers? Because a trial in a court independent of and from the other branches of government and attended by an irreducible minimum of the characteristics of the judicial process is part of the rule of law and of our freedoms.