

**2008 CONSTITUTIONAL LAW CONFERENCE  
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***THE FEDERAL AND STATE COURTS ON  
CONSTITUTIONAL LAW: THE 2007 TERM***

**Hon Justice C E Holmes  
Queensland Court of Appeal**

I should, at the outset, make the confession that in my own jurisdiction, Queensland, constitutional argument in the past year was rare indeed, and sensible constitutional argument non-existent. Fortunately, the 2007 term in other jurisdictions has left me with no shortage of cases to discuss. As in previous years, the State and Federal Courts heard a mixed bag of constitutional cases of varying merit, a large part of that workload being borne by first instance judges in the Federal Court. I note Kiefel J's comment, when she delivered this paper in 2006, that there seemed relatively few appeals from first instance decisions on constitutional issues. My survey of the cases suggests that is still largely true for decisions of Federal Court judges, whose resolution of constitutional issues seems in many cases to conclude the matter, but decisions by State judges are much more likely to go on appeal. I do not know whether that indicates that the issues raised in the Federal Court at first instance are more often frivolous or just that Federal Court judges sound more convincing.

It has become the convention for the deliverer of this paper to annex a schedule of cases identified as involving constitutional questions in the Federal and State Supreme Courts, and I have conformed with it. But I propose to limit my discussion to those which I, at any rate, found of more pressing interest.

Over the term there were two interesting cases on executive power, some unremarkable s 51 cases and some s 109 cases, which were at least factually colourful. But Chapter III cases predominated in number and importance. The question of what amounts to judicial power was re-visited in *Australian Pipeline Ltd v Alinta Ltd & Ors* (2007) 159 FC 301 and there were some cases of importance in considering the essential characteristics of a fair hearing and the limits of the *Kable* principle; in particular, two concerning the extent to which State legislation may

require a court to act on material withheld from one of the parties: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 208 FLR 403 and *K-Generation Pty Ltd & Anor v Liquor Licensing Court & Anor* [2007] SASC 319. I will return to those at more length later in the paper.

## **Chapter I – The Parliament**

It seems logical to begin with Chapter I and the Parliament. 2007 was, of course, an election year. *Horn v Australian Electoral Commission* [2007] FCA 1827 arose in that context. The *Commonwealth Electoral Act 1918* provides for separate voting compartments in polling booths in which the voter is supposed to be able to “retire alone”, screened from observation as she or he marks the ballot paper. Mr Horn was concerned that the cardboard arrangements we are all familiar with did not meet those requirements and sought declarations to that effect. The constitutional question arose in this way: he argued that the relevant provisions must be read in such a way as to be compatible with the requirement in ss 7 and 24 that the members of the Senate and the House of Representatives be “directly chosen by the people”. Fundamental to the right to vote was the right to freedom from observation while doing so.

McKerracher J, in the Federal Court, hearing the application on the day before the election, had first to deal with a Chapter III issue. He held that it was at least arguable that there was a justiciable matter, since Mr Horn would expose himself to a penalty if he were unable to vote. On the Chapter I question, while ss 7 and 24 of the Constitution entrenched the right to vote, he doubted that it also entrenched a secret ballot; or at any rate the relevant secrecy was limited to how the voter had actually voted. The fundamental right to vote was not curtailed by the fact that a voter was observable by others.

The freedom of political communication implied from ss 7 and 24 also required consideration, in a case of interest, not so much for the application of principle, which was unexceptionable, as for its highly topical context. In *New South Wales Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, the Classification Review Board had refused classification to two publications which, it said, called on Muslims to become involved in fighting and acts of terrorism.

The applicants mounted an argument as to the construction of the part of the National Classification Code dealing with publications promoting or inciting crime or violence, and in the alternative argued that it was invalid on the *Lange*<sup>1</sup> and *Coleman v Power*<sup>2</sup> test, as a burden on freedom of communication about government or political matters not reasonably appropriate and adapted to serve a legitimate end compatibly with the constitutional system of government. Edmonds J in the Federal Court found against the applicants on both limbs of the test.

There was a relatively small number of s 51 cases, the majority of which arose in connection with the aliens, migration and external affairs powers. In *Plaintiff 1/2003 v Ruddock* [2007] 157 FCR 518, the plaintiff sought leave to amend a statement of claim so as to challenge s 198A of the *Migration Act* 1958 which allowed Immigration to remove an asylum seeker to another country where there was a declaration that that country provided appropriate protection. Nicholson J accepted a number of the plaintiff's proposed arguments as tenable: that any law passed under s 51(xix), the naturalisation and aliens power, required, in order to be valid, a sufficient connection to both naturalisation and aliens, and the *Migration Act* related only to the latter; that in any event the effect of s 198A was so disproportionate as to be beyond power; that the provision was beyond the immigration and migration power conferred by s 51(xxviii) as contrary to accepted considerations of international comity; and that in any event the provision again was disproportionate in effect so as to be beyond that power. But he upheld the objection to amendment on the basis that the section was, beyond argument, supported by the external affairs power, applying the *Polyukhovich*<sup>3</sup> principle: that law operating on conduct geographically external to Australia was a law with respect to external affairs within s 51(xxix) of the Constitution.

The *Polyukhovich* principle was applied again in *Wight v Pearce* [2007] 157 FCR 485. A provision of the *Foreign Acquisitions and Takeovers Act* 1975 allowed the Treasurer to make a divestiture order to a foreign person who had acquired an interest in Australian property. The legislation contained an expanded definition of

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1. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

2. (2004) 220 CLR 1.

3. *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

“foreign person” which included a natural person not ordinarily resident in Australia. The applicant argued that the two sections constituted a law with respect to the acquisition of property in Australia rather than relating to external matters. Besanko J concluded that because the provisions related to persons not ordinarily resident in Australia, a class geographically external to the country, the relevant provisions were a valid exercise of the external affairs power. Even if that were not so, the definition section could be read down so as to apply only to non-citizens, and to that extent the provisions would constitute a valid exercise of the aliens power.

In *R v Wei Tang* [2007] VSCA 134, it was the Court itself which identified a constitutional question, in that case as to the constitutionality of slavery provisions in the *Criminal Code Act 1995* (Cth). The Victorian Court of Appeal held that the provisions were a valid exercise of the external affairs power in s 51(xxix), as giving effect to Australia’s obligations under the *International Convention to Suppress the Slave Trade and Slavery 1926*.

## **Chapter II – The Executive Government**

There were two cases dealing with Chapter II executive power which involved applicants of considerable notoriety. *Mokbel v Attorney-General for the Commonwealth of Australia* [2007] FCA 1536 concerned s 40 of the *Extradition Act 1988*, which provided for a request for extradition to be made by, or with the authority of, the Attorney-General. The request in respect of Mr Mokbel had been signed by the Minister for Justice, not the Attorney-General. Gordon J reasoned that the request was an exercise of executive power under Chapter II, s 40 being merely a machinery provision. Executive power under the Constitution was exercisable by the Governor-General on the advice of the Federal Executive Council, which included the Justice Minister and the Attorney-General. Both had been appointed under s 64 to administer the Attorney-General’s Department, the legislation administered by which, in turn, included the *Extradition Act*. The ultimate conclusion was that it was open to the Justice Minister to sign a request for extradition. That reasoning met with approval on appeal.<sup>4</sup> An application for special leave was dismissed in December 2007.<sup>5</sup>

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4. Which was rapidly brought on: *Mokbel v Attorney General (Cth)* (2007) 162 FCR 296; [2007] FCAFC 161.

5. [2007] HCATrans 813.

In *Hicks v Ruddock & Ors* [2007] 156 FCR 574, Mr Hicks had sought judicial review of the Commonwealth Government's decision not to seek his release from Guantanamo Bay and the respondents had applied to Tamberlin J for summary judgment. They maintained that by virtue of the Act of State doctrine the court should abstain from hearing proceedings in which it might have to pass judgment on the legality of a foreign sovereign government's acts; and that since it concerned foreign relations, the matter was non-justiciable. Tamberlin J, adopting an earlier analysis by Gummow J in *Re Ditfort*<sup>6</sup>, concluded that the nature and extent of the powers of the executive government in relation to the conduct of international relations could give rise to a matter involving the interpretation of s 61 of the Constitution, which vests the executive power of the Commonwealth in the Crown. The fact that a decision might have implications for foreign policy did not, *per se*, preclude review. He also accepted that a further argument was not foreclosed: that the government had gone beyond the limits of s 61 executive power by participating in the imposition of punishment by a body other than a Chapter III court. The stage was set for some interesting litigation, but history, of course, intervened.

### **Chapter III – The Judicature**

#### **Justiciable matters**

*Hicks v Ruddock & Ors* was one of a number of cases which considered the parameters of justiciable matters under ss 75 and 76 in respect of which State and Federal Courts may be given jurisdiction. Where *Hicks* focussed on what was justiciable, in *Commonwealth of Australia v BIS Cleanaway Limited* [2007] NSWSC 1075, Brereton J was concerned with what constituted a “matter”, in the context of an application for declarations. Applying the “no foreseeable consequences” formula, which, he observed, extended to practical as well as legal consequences, in a case in which the Commonwealth sought declarations about the status of and obligations under a licence to deposit waste, he concluded that there was a justiciable controversy.

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6. *Re Ditfort: Ex Parte Deputy Commission of Taxation* (1988) 19 FCR 347.

The issue before Sackville J in *Commonwealth of Australia v Westwood* [2007] FCA 1282, was different again: whether the Commonwealth was a party, for the purposes of s 75(iii), to an application for declaratory relief. The declaration sought was that a decision, made in the course of a court martial, to exclude a record of interview was wrong. The particular question, answered in the affirmative, was whether the Director of Military Prosecutions was the Commonwealth.

### **Separation of powers**

The question of what constitutes an exercise of judicial power continued to vex. *Australian Pipeline Ltd v Alinta Ltd and Ors* (2007) 159 FCR 301 concerned the constitutionality of powers conferred on the Takeovers Panel to declare the existence of “unacceptable circumstances” in relation to a company's affairs if, *inter alia*, they constituted, or gave rise to, a contravention of certain provisions of the *Corporations Act* 2001. Once that declaration was made, the Panel could make consequential orders including remedial orders and costs orders, which it was then an offence of strict liability to contravene. The persons who could apply for such declarations and orders included ASIC and any person whose interests were affected by the relevant circumstances. In the event of contravention, or apprehended contravention of the Panel's orders, application could be made to the court for orders necessary to secure compliance.

A majority of the Full Federal Court distinguished the High Court's decision in *Precision Data Holdings Ltd v Wills*,<sup>7</sup> that an earlier version of the legislation did not confer judicial power on the relevant panel. In contrast, the majority in *Alinta* identified a number of features suggestive of the Panel's powers being judicial: it had to adhere to the rules of procedural fairness, had to give written published reasons, could dismiss proceedings as frivolous, had rule-making powers and was immune from suit. Crucially, they characterised the powers conferred on the Panel as enabling it, during the bid period, to resolve disputes between private parties by application of the law to past events and conduct, to the exclusion of the courts and with remedies of a kind which a court might order. Enforceability by the Panel itself of its orders was not, the majority observed, an essential indicium of judicial power. Although there

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7. (1991) 173 CLR 167.

was provision for the court to make orders to secure compliance with the Panel's orders, the court could not enquire into the correctness of the Panel's decision that there was a contravention. Their conclusion: the provision which enabled the Panel to make the declaration of unacceptable circumstances on the basis of a contravention was invalid as purporting, in contravention of Chapter III, to confer exclusive Commonwealth judicial power on the Panel.

Finkelstein J dissented. He pointed out that it was not the Panel's function to go through a process of determining whether there had been a contravention of the *Corporations Act*, then making a declaration and, in turn, an order. Whether it found such a contravention was merely one element in deciding whether unacceptable circumstances existed, and it did not follow that a contravention would result in a declaration. A declaration of unacceptable circumstances did not resolve any dispute about existing legal rights; when the Panel made an order it was creating future rights. Secondly, its decision did not entail applying the law to found facts, but was based on subjective evaluation and value judgment, characteristic of administrative decision making. Thirdly, there was no enforcement mechanism: the Court's intervention, entailing an independent exercise of judicial power, was required to give effect to the Panel's orders.

On 13 December 2007, the High Court allowed an appeal and substituted a declaration that the provision was not invalid as conferring the judicial power of the Commonwealth on the Takeovers Panel. Reasons were published on 31 January. They are not within the purview of this paper; it suffices to say that the reasoning of Finkelstein J seems to have prevailed.

The converse situation, of non-judicial power being conferred on a Chapter III court, was the subject of contention in *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501. There the argument was that s 596A of the *Corporations Act* 2001, which gave the Federal Court power to issue summonses for examination, was invalid if it extended to corporations not under external administration. French J held that on its proper construction the provision did not apply to the examinable affairs of a corporation not in external administration. But, he said, if that had not been so, he would have held that the provision exceeded the legislative power of the

Commonwealth; in isolation from a judicial proceeding, the examination power was administrative, not judicial.

The question of legislative interference with the exercise of federal judicial power was raised in *Faheem Khalid Lodhi v Regina* [2007] NSW CCA 360. At issue in the New South Wales Court of Criminal Appeal was whether certain provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) impeded the exercise of the judicial power of the Commonwealth. Lodhi was charged with terrorism-related offences. The *NSI Act* contained provisions enabling the Attorney-General to issue certificates prohibiting disclosure of certain information. Where a certificate was issued, the court had to decide, having regard to it, whether there would be a risk of prejudice to national security if the information were disclosed or the relevant witness were called, and also whether any order would have a substantial adverse effect on the defendant's right to receive a fair hearing. The provision required the court to give "greatest weight" to the risk of prejudice to the national security factor. It was argued for Lodhi that the certificate would in effect be conclusive, since a judge could hardly form an independent view about the level of threat; and there was a risk that the public would perceive the courts to be acting in accordance with the wishes of the executive rather than in an unimpeded exercise of judicial power. In particular, the requirement that the court give greatest weight to the national security risk required the exercise of judicial power in a manner inconsistent with the essential character of a court or purported to direct the court as to the manner of its exercise of jurisdiction.

The court held that the subsection was not constitutionally invalid. It indicated that greater weight was to be given to a particular factor, but did not require that the balance fall in a particular way so as to usurp judicial power. Tilting the balance in the formulation of a judgment might affect the outcome of the process by which the judgment was formed, but it did not impinge on its integrity. An application for special leave was filed in *Lodhi* in mid- January.

In another New South Wales decision, *Pioneer Park Pty Ltd (In Liq) & Ors v Australia & New Zealand Banking Group Limited* [2007] NSWCA 344, the Court of

Appeal determined that the *Harris v Caladine*<sup>8</sup> principle (that the delegation of federal judicial power to a non-judicial officer of a Chapter III court required, in order to be valid, that his or her decision be subject to supervision by a judge of the court) had no application to a registrar of a State court. The power to invest jurisdiction in a State court under s 77(iii) did not extend to altering the structure or organisation of the State court itself.

### **The *Kable* cases**

The 2007 term saw two cases concerned with the limits of the *Kable*<sup>9</sup> principle, which, as elucidated by *Fardon*<sup>10</sup>, is that State parliaments may not legislate to confer powers on State courts which so compromise their institutional integrity as to be incompatible with their status as repositories of the judicial power of the Commonwealth. The concept is replete with value judgments, and although one can say with confidence after *Fardon* that those judgments are unlikely to be made in favour of an applicant, the two cases, *Gypsy Jokers* and *K-Generation*, demonstrate how fine minds may differ as to *Kable*'s application. Both cases involved legislative requirements for the withholding of information provided to a court from parties affected by it. In each case, the provision in question was held by a majority to be constitutionally valid; but in each there was a powerful dissenting judgment. Both involved property interests, not personal liberty, but both, nonetheless, raised issues of considerable significance in relation to judicial independence and due process.

Both *Gypsy Jokers* and *K-Generation* entailed some consideration of the incompatibility principle developed in the *persona designata* cases, *Grollo*<sup>11</sup> and *Wilson*<sup>12</sup>; that is, the principle that non-judicial power can be conferred on a judge as *persona designata* provided its exercise is not incompatible with, and does not threaten the integrity of, the performance by the individual, or the court to which he or she belongs, of its judicial functions. In *Grollo*, one example given of such incompatibility was “the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution, or in the capacity

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8. (1991) 172 CLR 84.

9. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1.

10. *Fardon v A-G (Qld)* (2004) 223 CLR 607.

11. *Grollo v Palmer* (1995) 184 CLR 348.

12. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

of the individual judge to perform his or her judicial functions with integrity, is diminished".<sup>13</sup> In *Wilson*, three questions were identified for determining whether constitutional incompatibility existed: whether the function was essentially one of the legislature or the executive government; whether the function was or was not to be performed independent of instruction, advice or wish of the legislature or executive government; and thirdly, whether any discretion was to be exercised on political grounds.<sup>14</sup>

I should also mention a third case which attracted some attention in *Gypsy Jokers* and *K-Generation* as a unique example of the application of the *Kable* principle to facts with some similarity to those cases, in that it entailed exclusion from the judicial process of persons affected by it. *Re Criminal Proceeds Confiscation Act 2002*<sup>15</sup> concerned, unsurprisingly, a provision of the *Criminal Proceeds Confiscation Act (Qld)*. It required the Supreme Court to hear an application for a restraining order in the absence of and without informing the person whose property was the subject of the application or, for that matter, anyone else affected. Williams JA in the Court of Appeal characterised the provision as depriving the court of its capacity to act impartially, by effectively ensuring an outcome adverse to the affected citizen. That amounted to such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. The case was decided before *Fardon*; if it had post-dated it, the terminology used, although probably not the result, might have been different.

*Gypsy Jokers* was a decision of the Court of Appeal of Western Australia. The *Corruption & Crime Commission Act 2003* contained some provisions aimed at forcing the removal of fortifications around premises; particularly, of course, motorcycle clubhouses. The Commissioner of Police could issue a fortification removal notice if he believed the premises were (a) fortified and (b) habitually used by people involved in organised crime; and in the absence of compliance he could remove the fortifications and sell anything he could salvage. Section 76 of the Act provided for Supreme Court review of the fortification removal notice on application

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13. At 364.

14. At 17.

15. [2004] 1 Qd R 40.

by the owner of the premises or an interested person. In deciding whether the Commissioner could reasonably have held the necessary beliefs in issuing the notice, the court was to have regard to any submissions made to the Commissioner and any other information he took into consideration. Importantly, sub-s 76(2) allowed the Commissioner to identify any information provided to the court for the review as confidential if its disclosure might prejudice his operations. In that event, the identified information could be used only by the court and could not be disclosed to anyone else, including the parties.

That confidentiality arrangement had some distinctive aspects. The court was required to act on the confidential information: it was not the sort of provision where a conclusive certificate is given with the result that the protected evidence does not come into play at all. Significantly, at least as the legislation's effect was argued in the Supreme Court, it was not the court which made the decision as to what should be disclosed; nor was there any ameliorating mechanism such as the appointment of special counsel to test the evidence.

The Commissioner presented an affidavit identifying confidential information in the *Gypsy Jokers* case. On the hearing of the application for review of the decision to issue a fortification notice, the argument was made that s 76(2) was constitutionally invalid. The question was referred to the Court of Appeal, where two bases of argument emerged: that s 76(2) was invalid because it compromised the institutional integrity of the court by detracting from its independence and impartiality; and that it was invalid because it was antithetical to the judicial process.

Steytler P wrote the leading majority judgment. He did not think that the incompatibility doctrine, as it had evolved through *Grollo* and *Wilson* in the *persona designata* context, had much to do with the *Kable* assessment of whether a court as an institution was a fit repository for Commonwealth jurisdiction. But in considering whether a Supreme Court's institutional integrity was impaired, its independence of the legislative and executive government in the exercise of its federal jurisdiction was relevant, as was whether the legislative power conferred was antithetical to the judicial process.

Some aspects of s 76(2) were thus antithetical: the fact that one party had the power to prevent evidence being disclosed to the other was one. The sub-section had the potential to cause a serious denial of natural justice, a situation made worse by the court's inability to give adequate reasons when its decision turned on the confidential information, and by the denial of any right of appeal. But he did not think that the applicant's reliance on *Re Criminal Proceeds Confiscation Act 2002* was well-placed, since the wrong question, as to whether the provision interfered with the essential character of the exercise of judicial power, had been asked there. It was significant that, in determining whether the Commissioner could reasonably have had the required belief, the court could undertake a genuine evaluative review on all the material before the Commissioner. It was not acting as a mere instrument of government policy or the executive, nor did anything in the legislation impinge on its institutional impartiality. The fact that the legislation gave one party an advantage did not mean that the court was no longer impartial or had that appearance. Those aspects of the review process which he had identified as antithetical to the ordinary judicial process were not such as to render the court as an institution unfit to be a repository of the judicial power of the Commonwealth.

Martin CJ agreed with Steytler P's reasons and conclusions. The legislature had struck a balance between the interests of the applicant and the public interest in the investigation of organised crime and use of the power to issue fortification notices. To the argument that allowing one party to an adversarial process to determine the extent to which the case to be met could be disclosed to the other was antithetical to the judicial process, he responded that the content of the requirements of procedural fairness was not fixed. The tension between the desire to make available judicial review and the need to protect the confidentiality of the material relied on arose in many contexts, including those where there was tension between protection of national security interests and the judicial process.

Undertaking a review of the cases in which courts in Europe, New Zealand, Canada and the United States had approached resolution of that question, Martin CJ concluded that neither in Australia nor in those other jurisdictions did authority support the proposition that the right of unrestricted access to all the information upon which the court was to rely was an indispensable component of a fair trial. In some

circumstances the requirements of procedural fairness had to yield to the countervailing public interest in the protection of confidentiality of evidentiary material. Section 76 did not place the process of judicial review so far outside the nature and scope of judicial proceedings as to compromise the institutional integrity of the Supreme Court so as to make it an inappropriate repository of federal jurisdiction.

Wheeler JA dissented. The applicant in its submissions had focussed on the effect of the legislation in limiting the applicant's ability to make submissions and in restricting on the power of the court to provide proper reasons. But, Wheeler JA said, there were other, more important, features of the legislation: one was the role of the executive, another was the fact that s 76 permitted one party in adversarial proceedings to determine what evidence the other would see, and the third that the applicant was litigating against the State in circumstances where the legislation conferred what could be a significant advantage upon the latter.

The *Grollo* emphasis on preservation of the institutional integrity of the judiciary recurs in the later line of cases commencing with *Kable*; that similarity of focus meant that both *Grollo* and *Wilson* were of assistance in determining the question of incompatibility. Turning to the *Wilson* questions, Wheeler JA answered the first, whether the review function under s 76 was closely connected with the exercise of executive power, in the affirmative. It was a step in a process involving the exercise of executive power: if the court did not make a determination that the Commissioner could not reasonably have had the belief the notice continued in effect and the various consequences attaching to compliance or non-compliance would follow. As to the next question, the function conferred by s 76 was not independent of instruction. The Commissioner of Police could identify the information which he or she could require the court not to disclose. The remaining question, whether the discretion was to be exercised on political grounds, was answered in the negative. Applying those tests, Wheeler JA said, the fact that the court had to determine the validity of executive action in circumstances in which its procedure was dictated by a decision made by an officer of the Executive was fatal to the validity of s 76(2).

Returning to the applicant's argument, Wheeler JA considered that there were a number of aspects of the procedure which, in combination, rendered s 76 antithetical and invalid. They were, that the Commissioner, an officer of the executive government, decided conclusively what information the court could disclose, both to the other party and in its reasons; that the court had to make a determination affecting the property rights of a party where that party may have had no opportunity to consider the material adverse to it; and that the court's ability to provide interpretable reasons or perform its functions in the public fashion which was the hallmark of justice was impaired. Collectively, those features amounted to such a departure from the requirements of independence of the executive and the impartiality which was the hallmark of the judicial process as to render the legislation invalid.

Similar questions were dealt with by the Full Court of the Supreme Court of South Australia in *K-Generation*, except that the *persona designata* cases were relevant there directly, not merely by analogy. The background was that under the South Australian *Liquor Licensing Act 1997* the Licensing Commissioner was the primary decision-maker on licence applications, with review available from the Licensing Court, consisting of a designated District Court Judge, and appeal from that court to the Supreme Court. Section 28A of the Act set up a mechanism very similar to that in the *Gypsy Jokers* case. The Commissioner of Police could classify information provided to the Liquor Commissioner as "criminal intelligence", which, as defined, was information in relation to actual or suspected criminal activity the disclosure of which could reasonably be expected to prejudice criminal investigations or reveal the existence or identity of a confidential source. If the licensing authority refused the licence application on the basis of that intelligence, it was not required to provide any reasons for its decision, other than saying that granting the application would be contrary to the public interest. The Liquor Commissioner, the Licensing Court and the Supreme Court were all required, on the Commissioner's application, to take steps to maintain the confidentiality of the information classified as criminal intelligence, including the receipt of evidence and the hearing of argument in the absence of the parties and their representatives.

The plaintiff, which had been refused an entertainment venue licence by a decision of the Licensing Commissioner affirmed on review by the Licensing Court,

sought a declaration that s 28A was constitutionally invalid. Duggan J, with whom Vanstone J agreed, proceeded on the basis that the *Kable* principle applied to the Licensing Court, and the *Grollo* and *Wilson* principles applied to the District Court judge designated to exercise the Licensing Court jurisdiction. Accepting that the legislature could modify aspects of procedural fairness such as the right of access to all the material relied upon by the courts, and that it could prevent the court from giving all the reasons for its decision, those factors did not of themselves impose a role on the courts which was constitutionally incompatible; a proposition for which he relied on the *Gypsy Jokers* case.

Duggan J distinguished *Re Criminal Proceedings Confiscation Act 2002*, observing that the impugned legislation there left almost no room for the application to be determined in the course of an appropriate exercise of judicial power; a feature absent in his view, from the present case. The licensing authority was in a position to evaluate the evidence objectively, independent of any connection with or direction by the legislature or the executive government. The departures from the rules of procedural fairness were of concern, but the procedure provided for by the section was not constitutionally incompatible with the court's status as a proper repository of federal jurisdiction. The function to be performed by the District Judge designated as the Licensing Court was judicial; even if it were not, it was not of such a nature as to be constitutionally incompatible with his or her role as a judge. Similar reasoning applied to the Supreme Court's consideration of an appeal from the Licensing Court judge's decision.

The dissenting judgement was delivered by Gray J. On the Chapter III arguments, he observed that while the separation of judicial power did not flow through into the State constitutions, the power of a State legislature to legislate in respect of the way in which a State court exercised judicial power was not unfettered. It did not extend to imposing on a State court invested with federal jurisdiction the requirement that it be involved in a fundamental denial of natural justice such as the *Liquor Licensing Act* entailed. He regarded the case as analogous to *Re Criminal Proceedings Confiscation Act 2002*, saying that a party's right to appear and make submissions was meaningless if it did not know the allegations made against it.

Gray J quoted passages from Wheeler JA's dissenting judgment in *Gypsy Jokers* in concluding that the legislation made both the District Court judge acting as the Licensing Court and the Supreme Court on review, instruments of the executive government, removing the "ordinary protections inherent in the judicial process". In addition, s 28A required the District Court judge in his role as *persona designata* constituting the Licensing Court, to perform functions incompatible with his office and functions as a Chapter III judge because he had been reduced to being a servant of the executive.

On 7 February, 2008 the High Court decided the *Gypsy Jokers* appeal.<sup>16</sup> Again, that decision falls with the parameters of another paper in another year. I need only say that the High Court construed s 76(2) so as to avoid constitutional invalidity. The majority's view was that the Supreme Courts did retain some power of review of the Commissioner's decision to classify evidence as confidential; it was able to determine whether, on the evidence, disclosure could in fact prejudice his operations. That removed the case from the stark position where an officer of the Executive was the final arbiter of what the Court could disclose. Kirby J, however, did not think that interpretation of s 76(2) was supportable. Agreeing with Wheeler JA's dissent, he considered that the provision did attract the *Kable* principle. It seems probable that a similar exercise in construction would now be regarded as appropriate for the *K-Generation* legislation.

I should mention a third *Kable* decision. *Burnett and Ors v Director of Public Prosecutions* [2007] NTCA 7 was a more clear-cut case for rejecting the application of the principle. It concerned provisions of the *Criminal Property Forfeiture Act 2002* which enabled the making of a restraining order on a finding of reasonable grounds for suspicion of various kinds. The application could be made *ex parte*, the court could be closed and orders made ensuring the confidentiality of the proceedings. There was no express power to provide for the affected person's legal expenses. The plaintiffs argued that those features combined to amount to a conferral of power compromising the institutional integrity of the court. The Northern Territory Court of Appeal rejected that argument. In particular, Martin CJ pointed out that any

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16. [2008] HCA 4.

restraining order was of an interlocutory kind, not involving any determination of guilt or the ultimate issues; the court had unfettered discretion whether to make confidentiality orders and as to the determination of the application; there was no question of the court's function being merely a step in the exercise of executive power; nothing in the provisions undermined the independence and impartiality real or apparent of the court; and the inherent power to prevent unfairness could be used to overcome the effect of restraining orders in preventing the affected person from being able to fund legal representation.

### **Section 80 – trial by jury**

The New South Wales Court of Criminal Appeal produced two interesting decisions on the essential characteristics of trial by jury under s 80. In *R v JS* [2007] NSWCCA 272, the Crown in right of the Commonwealth appealed against a directed acquittal, as it was entitled to do under an amendment passed in 2006. That raised the question of whether the finality of the verdict of acquittal was an essential characteristic of trial by jury within the meaning of s 80. The question had been decided in the negative by the Court of Criminal Appeal in Tasmania, where the Criminal Code allowed appeals from an acquittal; there the court had taken the view that while s 80 precluded legislative provision enabling the Court of Appeal to substitute a verdict of guilty for an acquittal, it did not preclude the conferring of a power to review an acquittal and order a new trial<sup>17</sup>. In *JS*, the bench of five, not being persuaded of plain error in that interpretation, followed it. Mason P expanded a little on that conclusion by characterising the question of finality as an issue of double jeopardy, not of the rights entrenched by s 80.

The more celebrated decision was *Cesan v Director of Public Prosecutions* [2007] NSWCCA 273 which produced the interesting result that while Basten JA concluded that the constitutional guarantee included a conscious judge, the two trial judges sitting with him did not. On Basten JA's view, since there was a contravention of a constitutional requirement, a substantial miscarriage of justice had, *ipso facto*, occurred. Grove J, with whom Howie J agreed, reviewed the authorities and concluded that the minimum requirement of trial by jury was the judge's physical

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17. *R v Sung Bo Kim* (1993) 65 A Crim R 278.

presence, but not his unremitting attentativeness; and absent a demonstrated miscarriage of justice resulting from inattentativeness, the appellant had not been deprived of his s 80 right of trial by jury. An application for special leave has been filed.

#### **Chapter IV – Finance and Trade**

It was a quiet year for s 92. It raised its head in *Sampson & Harnett (No. 10)* [2007] FamCA 1365. The Full Family Court, having reviewed earlier authorities from that court and the High Court, concluded that there was nothing in them to deny the existence of a power to directly restrain a parent from relocation interstate or to require relocation.

#### **Chapter V – The States**

There was a number of s 109 cases during the 2007 term. Three, *Compass Group (Australia) Pty Ltd v Bartram* (2007) 239 ALR 262, *Tristar Steering and Suspension Limited v Industrial Relations Commissioner of New South Wales* (2007) 158 FCR 104 and *Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union* [2007] FCA FC 177 concerned inconsistency between State legislation and the *Workplace Relations Act 1996*; in each case that inconsistency was found. More factually interesting were *Re Inaya (Special Medical Procedure)* [2007] FamCA 658 and *AB v Registrar of Births, Deaths and Marriages* [2007] FCA FC 140. In the first, the question was of inconsistency between the *Family Law Act 1975* and the *Human Tissue Act 1982* (Vic), the underlying question being whether the Family Court exercising its welfare jurisdiction could authorise a child to give a bone marrow transplant for the benefit of her infant cousin when the *Human Tissue Act* prohibited transfer or implantation of tissue from a child except for a member of the child's immediate family. Cronin J in the Family Court found an inconsistency and made the orders necessary to authorise the transplant.

In *AB v Registrar of Births, Deaths and Marriages*, Victorian legislation prevented a married person from seeking any alteration to the gender noted in his or her birth registration. The applicant, who had undergone gender change surgery, argued that the provision was inconsistent with s 22 of the *Sex Discrimination Act* which made it unlawful to discriminate on the ground of marital status. Two of the

members of the Full Court of the Federal Court who heard her appeal held that there was no inconsistency. The prohibition against discrimination on the ground of marital status in the *Sex Discrimination Act* was enacted to give effect to the *Convention on the Elimination of all Forms of Discrimination against Women*, and its operation was confined to discrimination against women. The Victorian provision discriminated against all married persons regardless of sex; no conflict arose. Black CJ dissented on the basis that the provision nonetheless discriminated against women on the basis of their marital status even if at the same time it also discriminated against men.

*DPP v Loo & Ors* [2007] VSC 343 was concerned with whether there was an inconsistency between a provision allowing the making of restraining orders under the Victorian *Confiscation Act 1997* and the liquidator's duty under the *Corporations Act* to apply the property of a company being wound up to satisfy its liabilities. The argument was that the *Confiscation Act* provision by allowing the freezing of the company's assets prevented the liquidator from carrying out that duty. Osborn J held that there was no inconsistency. All the restraining order provision did was enable the creditors to assert rights which were not inconsistent with those they could assert under the *Corporations Act*; the section did not effect any change in priority of debt.

*Gibbons v Pozzan* (2007) 209 FLR 233, a decision of the South Australian Full Court, concerned what was said to be an inconsistency between s 41 of the *Law of Property Act* (South Australia) and s 127 of the *Corporations Act*. The former deemed a deed which had been defectively executed valid if there was evidence that the party intended to be bound; the *Corporations Act* provision set out the requirements for execution of documents by a company including deeds. The South Australian Full Court held that there was no inconsistency: s 127 proscription of a method of execution did not preclude a remedy in the circumstances referred to in s 41. The High Court refused special leave to appeal in that case.

I should mention, in relation to State issues, that in *Zentai v Republic of Hungary* (2007) 157 FCR 585 the Full Federal Court found it unnecessary to decide an argument that s 19 of the *Extradition Act 1988* (Cth), which provides for a State or Territory Magistrate to conduct extradition proceedings, is invalid as an attempt by the Commonwealth Parliament to impose an administrative duty on a State officer

without State legislative approval. But special leave to appeal on the point was granted.<sup>18</sup>

There were the usual outliers, or ‘outriders’, as French J described them in 2002. In the only constitutional case I was able to find from my own court, *Permanent Custodians Ltd v Wheeley* [2007] QCA 110, the appellant appealed against a first instance decision to give the respondent lender summary judgment for possession of land under a mortgage, on the basis that he was a member of the Independent Sovereign State of Australia and its church, headed by a gentleman named Don Cameron (as it happens, a declared vexatious litigant). So attempts to make him pay back the loan were inconsistent with freedom of religion under s 116, amounted to discrimination against a resident of the State contrary to s 117, and contravened the s 118 requirement that full faith and credit be given to the laws of every State. His appeal was dismissed.

In the *plus ça change* department, Mr Alan Skyring sought in *Skyring v Commissioner of Taxation* [2007] FCA 1526 to reopen an earlier appeal from a judgment of McPherson J in the trial division of the Queensland Supreme Court in 1983. (It was so long ago that it was in the days when a tax objection went to the Supreme Court and an appeal to the Full Federal Court.). He contended that when the Full Federal Court dismissed his appeal it had not properly resolved his argument; which was that he could not pay his taxes in Australian currency because the *Currency Act* was not a valid law of the Commonwealth by reason of s 115 of the Constitution. It says that States shall not coin money nor make anything but gold and silver coin legal tender, so paper money, on Mr Skyring’s long-held and regularly argued thesis, is impermissible. The courts which have dealt with the question have taken the less imaginative view that it just means States can’t issue currency. Greenwood J declined to reopen the appeal court’s orders.

### **CASES BY SECTION OR TOPIC**

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18. *Zentai v Republic of Hungary & Ors; O’Donoghue v Ireland & Anor* [2007] HCATrans 491.

## **A. Chapter I: The Parliament**

### **Part II: The Senate**

- **Section 7- Composition of the Senate**

- *Horn v Australian Electoral Commission* [2007] FCA 1827
- *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108; [2007] FCA 896

### **Part III: The House of Representatives**

- **Section 24- Composition of the House of Representatives**

- *Horn v Australian Electoral Commission* [2007] FCA 1827
- *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108; [2007] FCA 896

- **Section 25 – Provision as to Races Disqualified from Voting**

- *Vorhauer v R* [2007] NSWCCA 125

### **Part IV: Both Houses of the Parliament**

- **Section 49- Powers, Privileges and Immunities of Both Houses of Parliament**

- *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000

### **Part V: Powers of the Parliament**

- **Section 51(iv)- Postal, Telegraphic, Telephonic and Other Like Services**

- *McFarlane v National Australia Bank Ltd* [2007] VSCA 275

- **Section 51(vi)- Defence Power:**

- *Commonwealth of Australia v Westwood* [2007] FCA 1282

- **Section 51(xix)- Naturalisation and Aliens**

- *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; [2007] FCA 65
- *Pull v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 20
- *Wight v Pearce* (2007) 157 FCR 485; [2007] FCA 26

- **Section 51(xx)- Corporations Power**

- *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000
- *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
- **Section 51(xxiv)- Service and Execution of Civil and Criminal Processes, and Judgments of Courts of the States**
  - *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
- **Section 51(xxvii)- Immigration and Emigration**
  - *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; [2007] FCA 65
- **Section 51(xxix)- External Affairs Power**
  - *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000
  - *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; [2007] FCA 65
  - *Pull v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 20
  - *R v Wei Tang* [2007] VSCA 134
  - *Wight v Pearce* (2007) 157 FCR 485; [2007] FCA 26
- **Section 51(xxxi)- Acquisition of Property on Just Terms**
  - *Australian Prudential Regulation Authority v Siminton (No. 6)* [2007] FCA 1608
  - *Copyright Agency Ltd v New South Wales* [2007] FCAFC 80
  - *Spencer v Australian Capital Territory* (2007) 13 BPR 24,307; [2007] NSWSC 303
- **Section 51(xxxvii)- Matters Referred by the Parliaments of the States**
  - *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
- **Section 51(xxxix)- Matters Incidental to the Execution of Other Powers**
  - *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13

## **B. Chapter II: The Executive Government**

- **Section 61- Executive Power of the Queen & Governor-General**
  - *Hicks v Ruddock, Attorney-General* (2007) 156 FCR 574; (2007) 239 ALR 344; (2007) 96 ALD 321; [2007] FCA 299
  - *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 278; [2007] FCA 1536
    - **[Affirmed]** on appeal: *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 296; [2007] FCAFC 161 ]
- **Section 62- Federal Executive Council**
  - *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 278; [2007] FCA 1536
    - **[Affirmed]** on appeal: *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 296; [2007] FCAFC 161 ]
- **Section 64- Appointment of Ministers**
  - *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 278; [2007] FCA 1536
    - **[Affirmed]** on appeal: *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 296; [2007] FCAFC 161 ]
  - *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108; [2007] FCA 896
  - *Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 3)* [2007] FCA 1567
- **Section 65- Ministers of State**
  - *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 278; [2007] FCA 1536
    - **[Affirmed]** on appeal: *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 296; [2007] FCAFC 161 ]

### **C. Chapter III: The Judicature**

- *Australian Pipeline Ltd v Alinta Ltd* [2007] FCAFC 55; (2007) 159 FCR 301; (2007) 240 ALR 294; (2007) 62 ACSR 196; (2007) 25 ACLC 602
  - **[Special Leave Granted:** *Attorney-General (Cth) v Alinta Ltd* [2007] HCATrans 308, 15 June 2007; **Appeal allowed:** *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2]
- *Commonwealth of Australia v BIS Cleanaway Ltd* [2007] NSWSC 1075
- *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245; (2007) 208 FLR 403; [2007] WASCA 49
  - **[Special Leave Granted:** *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] HCATrans 297, 15 June 2007]

- *Lodhi v The Queen* [2007] NSWCCA 360
- *Pioneer Park Pty Ltd (in liq) v Australia and New Zealand Banking Group Ltd* [2007] NSWCA 344
- *Valceski v Valceski* (2007) 210 FLR 387; (2007) 36 Fam LR 620; (2007) FLC 93-312; [2007] NSWSC 440
  
- **Section 71- Creation of the High Court and Federal Courts**
  - *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000
  - *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
  - *K-Generation Pty Ltd v Liquor Licensing Court* [2007] SASC 319
  - *Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 3)* [2007] FCA 1567
  
- **Section 72- Appointment of Justices of the High Court and Other Courts Created by Parliament**
  - *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
  
- **Section 75- Original Jurisdiction of High Court**
  - *Commonwealth of Australia v Westwood* [2007] FCA 1282
  - *Horn v Australian Electoral Commission* [2007] FCA 1827
  - *K-Generation Pty Ltd v Liquor Licensing Court* [2007] SASC 319
  
- **Section 75(v)- Original Jurisdiction of High Court in Relation to Writs**
  - *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2007] FCAFC 32; (2007) 157 FCR 260; (2007) 239 ALR 466; (2007) 162 IR 36
  - *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40; (2007) 96 ALD 368; [2007] FCA 1273
    - **[Affirmed - Minister for Immigration and Citizenship v Haneef** [2007] FCAFC 203 ]
  - *Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 3)* [2007] FCA 1567
  - *Tristar Steering & Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* [2007] FCAFC 95; (2007) 159 FCR 274; (2007) 164 IR 318

- **Section 76- Additional Original Jurisdiction**
  - *Commonwealth of Australia v Westwood* [2007] FCA 1282
  - *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40; (2007) 96 ALD 368; [2007] FCA 1273
    - **[Affirmed - Minister for Immigration and Citizenship v Haneef** [2007] FCAFC 203 ]
  - *Horn v Australian Electoral Commission* [2007] FCA 1827
- **Section 76(ii)- Arising Under Any Laws Made by the Parliament**
  - *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000
- **Section 77- Parliament's Power to Make Laws in Respect of ss 75, 76**
  - *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000
  - *Horn v Australian Electoral Commission* [2007] FCA 1827
  - *K-Generation Pty Ltd v Liquor Licensing Court* [2007] SASC 319
  - *Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 3)* [2007] FCA 1567
- **Section 77(i)- Parliament's powers over jurisdiction of federal courts**
  - *Commonwealth of Australia v Westwood* [2007] FCA 1282
- **Section 77(iii)- Parliament's powers in relation to federal jurisdiction in state courts**
  - *Commonwealth of Australia v Westwood* [2007] FCA 1282
- **Section 80- Trial by Jury**
  - *Australian Prudential Regulation Authority v Siminton (No. 6)* [2007] FCA 1608
  - *Cesan v Director of Public Prosecutions (Cth); Rivadavia v DPP (Cth)* [2007] NSWCCA 273
  - *McFarlane v National Australia Bank Ltd* [2007] VSCA 275
  - *Ngaronoa v Minister for Immigration and Citizenship* [2007] FCA 1565
  - *Re Pattison (Trustee); Bell v Bell* [2007] FCA 137
  - *R v JS* [2007] NSWCCA 272
  - *Vorhauer v R* [2007] NSWCCA 125

## **D. Chapter IV: Finance and Trade**

- **Section 92- Duties and Customs**
  - *Sampson & Hartnett (No. 10)* [2007] FamCA 1365

## **E. Chapter V: The States**

- **Section 106- Saving of State Constitutions**
  - *Vorhauer v R* [2007] NSWCCA 125
- **Section 108- Saving of State Laws**
  - *Vorhauer v R* [2007] NSWCCA 125
- **Section 109- Inconsistency of Laws:**
  - *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140; (2007) 162 FCR 528; (2007) 240 ALR 399; (2007) 97 ALD 548
  - *Compass Group (Australia) Pty Ltd v Bartram* [2007] FCAFC 26; (2007) 239 ALR 262; (2007) 161 IR 307
  - *Development Assessment Commission v 3GIS Pty Ltd* (2007) 154 LGERA 72; (2007) 249 LSJS 204; [2007] SASC 216
  - *Director of Public Prosecutions (Vic) v Tat Sang Loo* (2007) 25 ACLC 1403; [2007] VSC 343
  - *Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union* [2007] FCAFC 177
  - *Gibbons v Pozzan* (2007) 209 FLR 233; (2007) 247 LSJS 424; [2007] SASC 99.
    - **[Special Leave Refused: *Gibbons v Pozzan* [2007] HCATrans 422 8 August 2007]**
  - *Re Inaya (Special Medical Procedure)* [2007] FamCA 658
  - *Saadat-Talab v Australian Federal Police* [2007] NSWSC 1353
  - *Tristar Steering & Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* [2007] FCAFC 95; (2007) 159 FCR 274; (2007) 164 IR 318
- **Section 114- Restrictions on State and Commonwealth Taxes**
  - *Trevorrow v State of South Australia (No. 5)* (2007) 98 SASR 136; [2007] SASC 285
  - *Vorhauer v R* [2007] NSWCCA 125

- **Section 115- Restrictions on States in Relation to Money and Legal Tender**
  - *Skyring v Commissioner of Taxation* [2007] FCA 1526
- **Section 116- Religion**
  - *Australian Prudential Regulation Authority v Cameron* [2007] FCA 628
  - *Daniels v Deputy Commissioner of Taxation* [2007] SASC 114
    - **[Appeal dismissed: Daniels v Deputy Commissioner of Taxation** [2007] SASC 431]
  - *Permanent Custodians Ltd v Wheeley* [2007] QCA 110
- **Sections 117, 118- Non-discrimination Between States' Residents; Recognition of all States' Laws and Proceedings**
  - *Permanent Custodians Ltd v Wheeley* [2007] QCA 110
- **Sections 120- Custody of Offenders of Laws Against the Commonwealth**
  - *Vorhauer v R* [2007] NSWCCA 125

#### **F. Chapter VI: New States**

- **Section 122- Parliament's Authority Over Territories Placed Under Commonwealth Control**
  - *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
- **Section 123- Alteration of the Limits and Territory of the States**
  - *Australian Prudential Regulation Authority v Cameron* [2007] FCA 628

#### **G. Chapter VIII: Alteration of the Constitution**

- **Section 128- Alteration of the Constitution**
  - *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108; [2007] FCA 896

## CASES BY COURT

### A. Federal Court of Australia

- **Full Court**

- *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140; (2007) 162 FCR 528; (2007) 240 ALR 399; (2007) 97 ALD 548
- *Australian Pipeline Ltd v Alinta Ltd* [2007] FCAFC 55; (2007) 159 FCR 301; (2007) 240 ALR 294; (2007) 62 ACSR 196; (2007) 25 ACLC 602
  - **[Special Leave Granted:** *Attorney-General (Cth) v Alinta Ltd* [2007] HCATrans 308, 15 June 2007;  
**Appeal allowed:** *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2]
- *Compass Group (Australia) Pty Ltd v Bartram* [2007] FCAFC 26; (2007) 239 ALR 262; (2007) 161 IR 307
- *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2007] FCAFC 32; (2007) 157 FCR 260; (2007) 239 ALR 466; (2007) 162 IR 36
- *Copyright Agency Ltd v New South Wales* [2007] FCAFC 80
- *Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union* [2007] FCAFC 177
- *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203
- *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 296; [2007] FCAFC 161

- **Single Judge**

- *Australian Prudential Regulation Authority v Cameron* [2007] FCA 628
- *Australian Prudential Regulation Authority v Siminton (No. 6)* [2007] FCA 1608
- *Commonwealth of Australia v Westwood* [2007] FCA 1282
- *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518; [2007] FCA 1000
- *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40; (2007) 96 ALD 368; [2007] FCA 1273
- *Hicks v Ruddock, Attorney-General* (2007) 156 FCR 574; (2007) 239 ALR 344; (2007) 96 ALD 321; [2007] FCA 299

- *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; (2007) 237 ALR 753; (2007) 25 ACLC 69; [2007] FCA 13
- *Horn v Australian Electoral Commission* [2007] FCA 1827
- *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 278; [2007] FCA 1536
- *Ngaronoa v Minister for Immigration and Citizenship* [2007] FCA 1565
- *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)*(2007) 159 FCR 108; [2007] FCA 896
- *Re Pattison (Trustee); Bell v Bell* [2007] FCA 137
- *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; [2007] FCA 65
- *Pull v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 20
- *Skyring v Commissioner of Taxation* [2007] FCA 1526
- *Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 3)* [2007] FCA 1567
- *Tristar Steering & Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* [2007] FCAFC 95; (2007) 159 FCR 274; (2007) 164 IR 318
- *Wight v Pearce* (2007) 157 FCR 485; [2007] FCA 26

## **B. Family Court of Australia**

- **Full Court**
  - *Sampson & Hartnett (No. 10)* [2007] FamCA 1365
- **Single judge**
  - *Re Inaya (Special Medical Procedure)* [2007] FamCA 658

## **C. Supreme Court of New South Wales**

- **Court of Appeal**
  - *Pioneer Park Pty Ltd (in liq) v Australia and New Zealand Banking Group Ltd* [2007] NSWCA 344
- **Court of Criminal Appeal**
  - *Cesan v Director of Public Prosecutions (Cth); Rivadavia v DPP (Cth)* [2007] NSWCCA 273
  - *Lodhi v The Queen* [2007] NSWCCA 360
  - *R v JS* [2007] NSWCCA 272

- *Vorhauer v R* [2007] NSWCCA 125

- **Supreme Court**

- *Commonwealth of Australia v BIS Cleanaway Ltd* [2007] NSWSC 1075
- *Saadat-Talab v Australian Federal Police* [2007] NSWSC 1353
- *Spencer v Australian Capital Territory* (2007) 13 BPR 24,307; [2007] NSWSC 303
- *Valceski v Valceski* (2007) 210 FLR 387; (2007) 36 Fam LR 620; (2007) FLC 93-312; [2007] NSWSC 440

#### **D. Supreme Court of Queensland**

- **Court of Appeal**

- *Permanent Custodians Ltd v Wheeley* [2007] QCA 110

#### **E. Supreme Court of South Australia**

- **Full Court**

- *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431
- *Development Assessment Commission v 3GIS Pty Ltd* (2007) 154 LGERA 72; (2007) 249 LSJS 204; [2007] SASC 216
- *Gibbons v Pozzan* (2007) 209 FLR 233; (2007) 247 LSJS 424; [2007] SASC 99
  - **[Special Leave Refused: *Gibbons v Pozzan* [2007] HCATrans 422]**
- *K-Generation Pty Ltd v Liquor Licensing Court* [2007] SASC 319

- **Single Judge**

- *Daniels v Deputy Commissioner of Taxation* [2007] SASC 114
- *Trevorrow v State of South Australia (No. 5)* (2007) 98 SASR 136; [2007] SASC 285

#### **F. Supreme Court of Victoria**

- **Court of Appeal**

- *McFarlane v National Australia Bank Ltd* [2007] VSCA 275
- *R v Wei Tang* [2007] VSCA 134

- **Supreme Court**

- *Director of Public Prosecutions (Vic) v Tat Sang Loo* (2007) 25 ACLC 1403; [2007] VSC 343

## **G. Western Australia**

- **Court of Appeal**

- *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245; (2007) 208 FLR 403; [2007] WASCA 49
- [Special Leave Granted: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] HCATrans 297, 15 June 2007]