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The Hon Justice Wheeler

Introduction

In this paper I endeavour to do three things. I look at the reality of constitutional argument in the majority of the cases before State and Federal Courts. I survey the cases in those Courts in which judicial power/Chapter III topics are raised, in part to illustrate that reality and in part because the sheer number of such cases raises an interesting question. I also touch on some other cases too interesting to leave out.

In his paper on this topic in 2003, Justice French made two observations. They were:

> "The process of first instance and intermediate appeal decision-making on [constitutional] matters if properly carried out will settle factual aspects of the case, dispose of lesser issues, and sharpen the focus of the interpretation choices that must be made."

And:

> "The Australian Law Reform Commission observed, in its Report [No 92 October 2001], that if Australia

> were to move to a centralised model the High Court would be burdened with many constitutional cases of no great significance and without the filtering effects of the lower courts."

It is interesting to consider for a moment the extent to which these two observations reflect the reality of constitutional decision-making in State Courts and the Federal Court. The theory certainly is that constitutional arguments will be raised only if fairly arguable (particularly since they will involve the burden of complying with s 78B of the *Judiciary Act 1903* (Cth)), that any facts bearing on those constitutional issues will be identified so that findings may be made; and that the constitutional argument will function as something of a dress rehearsal of what might ultimately be run in the High Court, so that some real refinement will take place at the earlier stage. There are cases like that. There seem to have been a couple of cases like that in the 50 or so to which I will shortly refer.

The majority of constitutional issues arising at the State level are, however, as the Australian Law Reform Commission observed (with considerable understatement), of "no great significance". The Judge at that level is often, for example, faced with the task of explaining to a litigant in person that you can still be prosecuted under State misuse of drugs legislation, even if you are caught with the offending substance at the airport. Where constitutional issues are raised by counsel, they are more often than not raised in one of two ways. In the first category of cases, they are raised as a kind of fall-back position; little attention is given to them in argument, but counsel feels that there might be a point in there somewhere and that if all else is lost in the State Court of Appeal, then the way will be left open to brief someone who knows something about the issue to make

a special leave application. Alternatively, the point is a *Kable* one (*Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51), not infrequently raised by counsel whose experience lies in the field of criminal rather than constitutional law, and who is not able to pinpoint why the impugned legislation offends fundamental principles other than perhaps because the legislation is relatively novel and that its effects upon the particular appellant were not favourable.

2004 Overview

A survey of the 2004 cases suggests that the year has seen the usual mix of the meritorious and serious on the one hand, and the half-baked on the other, with the half-baked perhaps predominating. I am indebted to my associate, Ms Alana McCarthy, for identifying approximately 100 cases in which constitutional issues were mentioned in the catchwords, and for narrowing that field to about 50 in which a constitutional issue was squarely raised, however briefly. A list of the latter cases is attached to this paper. I am also grateful for the assistance provided by each of the relevant Chief Justices, for their assistance in checking the list for significant omissions, and to the High Court Registry for advising which are the subject of special leave applications.

When one looks at the issues raised, there are identifiable trends. Chapter III continues to loom large with very large numbers of *Kable* issues raised cases about privative clauses, and about the meaning of "matter". There do not seem to have been so many freedom of speech cases this year, although that issue continues to be raised. Although there were relatively few cases in this category, I would nominate "interstate" issues as one which continues to be of

interest. Questions revolving around ss 117 and 118 have been around for some time now, but much about the scope and implications of these sections remains to be worked out. Although basic principles surrounding s 109 inconsistency are certainly well settled, there are differences of emphasis in some cases which may be of interest when considered against changing fashions in drafting of legislation. On the other hand, perhaps surprisingly, the question of Commonwealth power pursuant to s 51 is not often raised, and when raised it is rarely a central issue.

Chapter III

Harking back to ancient history, I recall as if it were yesterday being involved in a case - I cannot recall its name - in which it was rumoured that the High Court would seize the opportunity (for which it was rumoured the majority of the Court had been seeking) to overturn or at least restrict the *Boilermakers'* doctrine (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254). Strict separation of powers was said not to be part of the Australian system; *Boilermakers'* had gone too far. It is a matter of history that no such revision ever occurred.

The Kable cases

R v Granger (2004) 88 SASR 453; (2004) 146 A Crim R 344; [2004] SASC 156. Mr Granger was found with 17 kilos of cannabis. He was not happy with s 32 of the *Controlled Substances Act 1984* (SA), which created a statutory presumption that, in the absence of proof to the contrary, a person having more than 100 grams of cannabis had it for the purpose of sale or supply.

So far as one can tell, the arguments were not characterised by any great precision. It was argued that the provision in question conferred on the District Court a function of a non-judicial character; or that the presumption was incompatible with the exercise of the judicial power of the Commonwealth; or that it required the District Court to act "in a manner incompatible with the manner in which a Court exercising the judicial power of the Commonwealth must act" (whatever that means); or that it required the District Court to act in a manner requiring an unfair trial. The leading judgment was that of Doyle CJ. His Honour set out a number of relevant passages from *Kable*, which might be said not to speak with one voice. He drew from them at least a principle that the Supreme Courts (and probably other State Courts in which Federal jurisdiction may be invested) may not be given functions which are "… incompatible with the integrity, independence and impartiality required of a court which exercises invested federal jurisdiction". This is similar to the enunciation in *Silbert v Director of Public Prosecutions for Western Australia* (2002) 25 WAR 330 and in *Attorney-General for the State of Queensland v Fardon* [2003] QCA 416 in the Queensland Court of Appeal.

His Honour took the view, in my respectful opinion correctly, that authority much closer to the point in issue was that of *Nicholas v The Queen* (1998) 193 CLR 173. In relation to the argument that the provision required the Court to ignore the presumption of innocence in a manner inconsistent with traditional concepts associated with the administration of the criminal law, he made the very important point (at [53]) that "… one must be careful not to entrench unthinkingly the common law, or the current state of the law (both common law and

statutory), or to prevent a change in the law". This is a theme which arises in a number of the cases.

Perry J, while substantially agreeing with Doyle CJ, made two other observations. At [95] his Honour suggested that it might be that *Kable* would at some time require reconsideration of the question of whether Parliament can provide for any presumption, even a rebuttable one, in order to prove an element of an offence. The refusal of special leave in *Granger*, and the brief reasons given at that time, endorsing *Nicholas*, suggest that no such reconsideration is likely in the foreseeable future.

Perry J also made the observation, however, at [97] that it has long been recognised that international instruments, particularly those dealing with human rights, may legitimately influence the development of the common law in Australia. He went on to discuss briefly the status of the presumption of innocence in such instruments. There is, perhaps, a question there as to whether those instruments may have some part to play in determining what is the minimum content of the concept of a fair trial, departure from which (on one view of *Kable*) so affects the integrity of the Court as to render legislation authorising the departure invalid. Some reference was made to such instruments by the High Court in *Fardon v Attorney-General for the State of Queensland* (2004) 210 ALR 50; [2004] HCA 46. While perhaps helping to counter a natural tendency unthinkingly to entrench the familiar, against which Doyle CJ cautioned, such instruments do raise the sometimes difficult issues discussed by Professor Charlesworth, in her paper to this conference.

R v England (2004) 89 SASR 316; [2004] SASC 254 was another South Australian *Kable* case. In some ways, this was quite

close to *Fardon*, revolving around an order declaring that a defendant was incapable of controlling his sexual instincts and directing that he be detained in custody until further order. It differed from *Fardon* in that the declaration was made at an earlier stage, at the time of sentencing; although in that respect, of course, it was closer to the more traditional indefinite sentence available in some States. At [43], Doyle CJ made essentially the point he had made in *Granger* that "… the sentencing process, and the judicial function in connection with the sentencing of offenders, are not fixed beyond change in their present form. Changing circumstances may warrant or call for changed approaches to sentencing. So may changing community attitudes and social values. These are largely matters for Parliament".

Hadba v R (2004) 182 FLR 472; (2004) 146 A Crim R 291; [2004] ACTSC 62 was another case, as so many *Kable* cases are, involving a strikingly unmeritorious criminal defence. The appellant suggested he may have removed his own and the complainant's underwear due to an "erotic dream reflex" resulting from consumption of alcohol, medication and marijuana. Although no issue was raised on the appeal as to the validity of s 339 of the *Crimes Act 1900* (ACT), to the effect that evidence of self-induced intoxication cannot be considered in determining whether an act or omission was voluntary, Higgins CJ and Crispin J did suggest in passing that *Kable* might render invalid legislation purporting to require a Territory Court to ignore potentially exculpatory evidence. In the context of alcohol use, that is an interesting observation. If it is correct, someone will have to decide whether intoxication is or is not exculpatory, a question in relation to which the law has fluctuated over time (see, eg, Archbold, "Criminal Pleading Evidence & Practice" 39th ed

par 1448a). There is in areas such as this a particular danger of seeing the current state of the law as an absolute standard.

R v MSK and MAK [2004] NSWCCA 308 involved yet another factually unmeritorious *Kable* challenge. The appellants had been convicted of aggravated sexual assault in company on two girls. They had access to legal representation, but declined to make use of it. The alleged contravention of the principles of *Kable* was that s 294A of the *Criminal Procedure Act 1986* (NSW) prohibited cross-examination of a complainant in a sexual assault case by an accused personally, providing that, in such a case, there might instead be a court-appointed examiner. The appellants had declined the offer of having a barrister as the court-appointed questioner at no cost to them. As the Court of Appeal of New South Wales noted, the case against the appellants had, in any event, been extremely strong. However, a number of observations were made during the course of the decision which echo those made in other *Kable* cases. Mason P said at [47] that: "What is fair in the trial process is not set in concrete". His Honour also adopted certain observations of Spigelman CJ from *R v Whyte* (2002) 55 NSWLR 252 to the effect that no "single principle" can be derived from the judgments in *Kable*, although the common theme is a test of incompatibility.

At [59] there is a passing reference to one of the difficulties of applying at least one strand of the reasoning in *Kable*. Mason P observed that: "Some of the reasoning … in *Kable* proceeds on the basis that the legislation there in question was seen … as bringing the Supreme Court of New South Wales into public disrepute. I am unaware of authoritative guidance as to how a court gathers information as to the potential application of such an open-ended

constitutional criterion". In connection with that observation, it is interesting to note the divergence of view which appears to have existed in relation to the legislation there in issue, its desirability, and its fairness. The trial Judge apparently was not impressed with s 294A. Wood CJ at common law was firmly of the view that it was an appropriate response to the risk of re-victimisation which can accompany the giving of evidence by a complainant, and Barr J agreed with those additional remarks, Mason P expressing no opinion. At an interlocutory application, Kirby J's first impression was that the *Kable* point was arguable. However, special leave was refused. During the course of the special leave application, it should be noted that McHugh J said that: "The procedures of courts are not set in concrete".

Director of Public Prosecutions for Western Australia v Hafner (2004) 28 WAR 486; [2004] WASC 32 concerned s 32A of the *Misuse of Drugs Act 1981* (WA) which provided that on application by the DPP a Court shall declare a person convicted of certain drug offences to be a drug trafficker. Section 8 of the *Criminal Property Confiscation Act 2000* (WA) then provided for consequences in relation to the property of such a person. The report again reveals the scattergun approach taken by counsel, which is common in such cases. That approach, no doubt, stems in part from the difficulty of finding a clear single principle in *Kable*, but also, perhaps, stems from the range of views which may legitimately exist about what the "core concepts" of a fair trial may be. Pullin J, not very sympathetically, expressed the opinion that the submission really boiled down to a complaint that it was too easy for the DPP to establish a fact, the relevant fact being a matter of court record. However, merely because

the fact was easy to establish did not mean that the Court in declaring it to be established became a rubber stamp.

His Honour also, not surprisingly, disposed of a submission that the legislation did not provide for equality of treatment under the law since it treated first time and recidivist drug traffickers alike. His Honour pointed out that the relevant distinction was between people who were drug traffickers and people who were not. The case also raises some more interesting interstate issues, which I turn to shortly.

Finally, a case in which one Judge was seriously attracted to a *Kable* argument. That is ***Re Grinter; Ex parte Hall*** (2004) 28 WAR 427; (2004) 180 FLR 433; [2004] WASCA 79. This case concerned s 102 of the *Justices Act 1902* (WA). In that State, there is now no committal in the traditional sense. Rather, there is a procedure for disclosure of evidence and for the taking of a plea from an accused person without a discretion in the Magistrate as to whether to commit for trial. Because there is now no general preliminary hearing in which witnesses can be compelled to give evidence, s102 provides that, at any time before the hearing (which is still referred to as the "committal mention"), a person may be summoned to attend before Justices, without notice to the defendant, for the purpose of being examined by or on behalf of the prosecution. The defendant is not party to such an examination. The procedure provides in written form the substance of the evidence of persons whom the prosecution considers may be relevant witnesses, but who do not wish to give statements in the usual way. A question arose as to the applicability of this provision in relation to Commonwealth offences.

While the majority of the Court held that s 102 was not picked up by any provision of the *Judiciary Act 1903* (Cth) and for that reason was inapplicable in the case at hand, Malcolm CJ went on to deal with the submission raised on behalf of the applicant that s 102 was, in any event, invalid. His Honour's view was that *Kable* determined that State Courts could not be given non-judicial powers that would undermine the role of those Courts as Courts exercising Federal judicial power.

In this case, the Chief Justice accepted a submission made by counsel that some guidance could be gleaned from the "*persona designata*" cases. Applying those cases by analogy, his Honour reached the view that the function conferred was one which was repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. While it is fairly clear why he considered the power not to be judicial power, gleaning the reason for the incompatibility from his Honour's reasons is more difficult, perhaps illustrating the elusiveness of the concept.

Matter/Federal Judicial Power

I deal very briefly with this issue, mainly because I have never personally found it very interesting. However, it is worth noting the continuing significance of the principle that Federal Courts are vested with jurisdiction in "matters", and the continuing importance of ascertaining what falls outside the concept of judicial power. In the Federal Court, there were the following cases.

Australian Institute of Private Detectives Ltd v Privacy Commissioner (2004) FCA 1440 (Sackville J). His Honour dismissed a proceeding brought by the plaintiff which had sought a determination from the Privacy Commissioner that the disclosure by

an organisation of personal information to members of the plaintiff for certain purposes did not constitute a breach of privacy within the Commonwealth *Privacy Act 1988.* The Commissioner had declined to make such a determination. The pleading did not allege that the Institute, or any member, had sought specific information from any organisation for any particular purpose, or that it had been denied that information by reason of the *Privacy Act*, omissions which were fatal to the claim.

Civil Aviation Safety Authority v Boatman [2004] FCAFC 165: this concerned the validity of sections of the *Civil Aviation Act 1988* (Cth). That Act provided that if the plaintiff had reason to believe that the holder of a civil aviation authorisation had engaged in certain dangerous conduct, it could suspend the authorisation by written notice, but only for five days. Thereafter, the CASA could apply to the Federal Court and if the Federal Court was satisfied there were reasonable grounds to believe that the particular conduct had been, or was likely to be, engaged in, the Court was required to make an order which extended the suspension for a further and longer period. The CASA also had power to give the holder of an authorisation a "show cause" notice and if at the end of a specified period the CASA was satisfied that a serious and imminent risk to air safety would exist if it did not vary, suspend or cancel, it had authority to vary, suspend or cancel the authorisation.

It was alleged that the power conferred on the Court was one which was not a judicial power and did not assign jurisdiction to the Court in a "matter". Two of the Justices of the Federal Court were of the view that the task imposed on the Court involved the application of a standard to facts found by it resulting in a final determination of a

dispute between parties (notwithstanding that the resulting order might have a limited lifespan). Selway J dissented, undertaking the exercise of looking at existing categories of functions which have been judicially or historically accepted as judicial or non-judicial and reasoning by analogy to the case at hand. In his Honour's view, there were significant similarities between the power conferred under the *Civil Aviation Act* and the power to issue search warrants. His Honour also noted that the "ultimate process" was not judicial, in the sense that the Court had no ultimate role in determining whether there had been a breach of the Act.

In the New South Wales Supreme Court in ***Cauvin v Philip Morris Ltd*** [2004] NSWSC 644, it was argued that s 72 of the *Fair Trading Act 1987* of New South Wales authorised the Court to make compensatory orders in favour of non-parties in proceedings which were not representative proceedings. That, it was submitted, would involve the Court in the exercise of non-judicial power. Bell J accepted that if the first proposition was true, then so was the second. That is, she inclined to the view that the award of compensation to persons who are not parties would involve the exercise of non-judicial power. However, the construction contended for was in error, her Honour finding that s 72 did not have that effect.

A somewhat different proposition from that usually raised, being an argument that legislation invalidly conferred judicial power on the Executive was raised in ***Olbers v Commonwealth of Australia (No 4)*** (2004) 205 ALR 432; [2004] FCA 229, and on appeal [2004] FCAFC 262. This case, which is the subject of a special leave application, revolved around the detailed and rather draconian forfeiture provisions of s 106A of the *Fisheries Management Act 1991*

(Cth). Both French J and the Full Court considered that the mere fact that the relevant provisions contained a number of deeming provisions which related, for example, to the failure of owners to take various steps within specified time limits, did not constitute any exercise by the Parliament itself or by the Executive of a power of determination of guilt. Rather, they merely regulated the exercise by a person of the capacity to seek to have the question whether there had been a forfeiture dealt with by a Chapter III Court.

Finally, in the judicial power area, I note that in ***Hoffman v Chief of Army*** [2004] FCAFC 148, the tension between Chapter III and the defence power, in relation to military disciplinary offences and tribunals, once more presented issues for determination.

Privative Clauses

There is obviously a lurking feeling that somehow s 75(v), or some principle underpinning Chapter III, means that there is a limit to the Parliament's power to preclude or restrict judicial review, and that the present limit is either not fixed with clarity, or requires re-examination in the light of *Kable*. I mention three relevant cases.

Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd (2004) 88 SASR 311; (2004) 233 LSJS 300; [2004] SASC 124 is currently the subject of a special leave application. The contention was that the provision in the *Workers' Rehabilitation and Compensation Act 1986* (SA) limiting review of decisions of the Workers' Compensation Tribunal was invalid as inconsistent with Chapter III. That contention relied upon observations of McHugh J in *Kable* (at [114]) that "… although it is not necessary to decide the point in the present case, a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State

court … would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages" (Gummow J at 139 - 141 and certain observations in *Gould v Brown* (1998) 193 CLR 346 were also relied upon). However, the Court found that the relevant provision did not completely bar any avenue of appeal or review, but was a provision falling within what have been described as the "*Hickman*" principles. The Court also noted that the argument run in that case appeared not to be consistent with either *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181 at 204 or *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 634 per Gaudron and Gummow JJ.

In ***Deputy Commissioner of Taxation v Warrick (No 2)*** (2004) ATC 4779; (2004) 56 ATR 371; [2004] FCA 918, French J considered an argument that the decision of the High Court in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 required a reconsideration of the line of authority relating to ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth), which provisions significantly limited judicial review. However, his Honour considered that, as a single Judge, it was necessary for him to follow *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, which had considered those clauses to be valid.

Tying together the cases earlier discussed relating to the scope of judicial power, and the privative clause cases, is an interesting analysis in ***Craig v Workers' Compensation Tribunal*** [2004] SASC 410. This was another argument revolving around the meaning and effect of s 88I of the *Workers' Rehabilitation and Compensation Act 1986* of South Australia. Doyle CJ at [55] through to [61]

analysed authority relating to a denial of procedural fairness. His Honour's view at [59] was that recent High Court authority indicated that a denial of procedural fairness by a decision-maker acting under statute, who is required to decide issues of fact and law and to make a finding that directly affects the rights or interests of individuals, will ordinarily mean that the decision is made in excess of or with want of jurisdiction in the sense necessary to attract the remedies under s 75(v) of the Constitution. However, where a decision-maker was a Court, his Honour's view (at [61]) was that the decision in *Craig v State of South Australia* (1995) 184 CLR 163 established that the ambit of jurisdictional error was narrower. The effective reach of privative clauses then may depend upon the nature of the decision-maker.

Why so many Chapter III cases?

At the State and Federal Court level, there have been in 2004, as in most recent years, a considerable number of cases dealing with Chapter III and with implications arising from it. There have been, as I have noted, few cases raising the limits of Commonwealth legislative power pursuant to s 51. The statistics presented at this conference by Professor Williams suggest that the High Court, too, has not often been asked to consider issues of the latter kind.

It is interesting, in the light of the relative frequency of Chapter III cases and infrequency of s 51 cases, to look back for a moment at the explanation given in the *Boilermakers'* case for taking a strict approach to separation of powers and to Chapter III. At pages 267 - 268, Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

> "A federal constitution must be rigid. The government it establishes must be one of defined

> powers … The concept of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature. The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth." [(1956) 94 CLR]

At this point in the history of Federal/State relations, parts of the reasoning in *Boilermakers'* may seem a little thin. I am not sure that any convincing alternative has been articulated, and I wonder if that may, in part, explain the imprecision in the definition of some Chapter III issues, at least at the State and Federal Court level. It is always easier to ascertain what one should be doing, if one is clear about why one is doing it.

***Inter se* issues**

Some issues of legislative power have arisen. For the most part, they have concerned issues of significance as between States, although some Commonwealth/State issues have arisen.

In ***Dalton v New South Wales Crime Commission*** [2004] NSWCA 454, the New South Wales Court of Appeal was called upon to consider whether "process" in s 51(xxiv) extended to encompass a subpoena requiring attendance at a statutory authority investigating criminal activity. The majority considered that it did, the words "criminal process" being capable of extending to encompass such powers. Mason P dissented, considering that the word "process" was confined in that context to proceedings which were directly connected

with the determination of legal rights or enforcement of the law. This is a case of potential importance considering the almost universal establishment of such commissions.

In ***R v Workman*** (2004) 60 NSWLR 471; [2004] NSWCCA 213, the appellant was convicted of various sexual offences relating to the daughter of a woman with whom he had had a *de facto* relationship. A significant exhibit at trial was a tape-recording of a conversation between him and the complainant. She had reported the offences in Queensland and he, at all relevant times, was in New South Wales, where the offences had taken place. There is in Queensland an investigative procedure, pursuant to which the complainant telephoned the appellant and her conversation with him was broadcast on a speaker and recorded by a mechanism adjacent to, but not touching, the speaker. The appellant argued that if the recording been made in New South Wales, it would have been illegal because of the *Listening Devices Act 1984* (NSW) and it therefore should be excluded pursuant to s 138 of the *Evidence Act 1995* (NSW). There was a passing observation by Grove J to the effect that, although it was not necessary to draw upon s 118 of the Constitution for the conclusion, it was in harmony with the spirit of that provision to conclude that evidence expressly declared to be lawful in Queensland could not be held to have been produced improperly in a New South Wales Court.

In ***Director of Public Prosecutions for Western Australia v Hafner*** (2004) 28 WAR 486; [2004] WASC 32, referred to above, the attack on the confiscation orders related to the legislative competence of Western Australia, it being said that the Parliament had no competence to confiscate property situated outside the State. Pullin J

apparently accepted that there was sufficient connection between the subject matter of the legislation and the State to lead to the conclusion that such confiscation was for the peace, order or good government of the State. The question of whether a Court in another State would give effect to a declaration that property had been confiscated was another issue, in relation to which his Honour expressed no opinion. A mutual recognition regime in this area makes it unlikely that question will ever need to be faced at the level of constitutional principle: eg, *Criminal Property Confiscation Act 2000* (WA) (Part 10).

Transport Accident Commission v Sweedman (2004) 210 ALR 140; (2004) 41 MVR 310; [2004] VSCA 162 was one of those complicated interstate element motor vehicle accidents. It is the subject of a special leave application [subsequently granted]. Mrs Sweedman collided in New South Wales with Mr and Mrs Sutton's motor vehicle, injuring them. The Transport Accident Commission made payments pursuant to the *Transport Accident Act 1986* of Victoria to the Suttons. That was because at the time of the accident Mr Sutton was driving a motor vehicle which was registered in Victoria. Both the Suttons were Victorian residents. Mrs Sweedman was a resident of New South Wales and her vehicle was registered there.

The scheme of the Victorian *Transport Accident Act* was broadly as follows. A person injured as a result of a transport accident was entitled to compensation if either: (a) the accident occurred in Victoria; or (b) the accident occurred in another State or Territory <u>and</u> either the person injured was a resident of Victoria, or was driving or a

passenger in a registered motor vehicle. Vehicles had to be registered in Victoria if normally garaged there.

The Commission was liable to indemnify the owner or driver of a registered motor vehicle in respect of any liability arising out of the use of the motor vehicle either in Victoria or another State or Territory. Section 104 provided that if any injury in respect of which the Commission had made payments arose under circumstances which would have created a legal liability in a person to pay damages, the Commission was entitled to be indemnified by that person, to the extent of that person's negligence. However, excluded from the reach of s 104 were persons entitled to be indemnified under s 94; that is, owners or drivers of vehicles registered in Victoria.

In the end, the only live point was the s 117 one. Callaway JA considered that, the payments to the Suttons having depleted the fund available for the compensation of victims of motor accidents, it was not surprising that the Commission should have recourse against the tortfeasor in relation to that depletion. However, since in the case of the owner or driver of a registered motor vehicle, the person was entitled to be indemnified by reason of s94, the exclusion of those persons from the group to whom the "clawback" would apply was no more than a correlative of the entitlement to indemnity.

Nettle JA, with whom Winneke P agreed, analysed the statute in detail. He adverted to, but found it unnecessary to resolve, an interesting side issue as to whether it would be within the competence of the Victorian Parliament to amend the common law choice of law rule laid down in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, or whether that rule was so inextricably linked with the

Constitution that it lay beyond the competence of a State legislature to do so.

In relation to the s 117 argument, his Honour accepted that, since *Street v Queensland Bar Association* (1989) 168 CLR 461, it was clear that a provision which on its face applied to residents and non-residents alike could still, as a practical matter, operate so as to engage s 117. His Honour posed the question whether, were the non-resident person a resident of the legislating State, that different circumstance would of itself either effectively remove the disability or discrimination or for practical purposes in all circumstances mitigate its effect to the point where it would be rendered illusory.

Mrs Sweedman argued that if one applied that hypothetical comparison, if she had been resident in Victoria and her car garaged at her home, it would have been registered in Victoria or required to be so registered, so that the Commission would be required to indemnify her and s 104 would not permit a recovery from her. His Honour accepted that contention "up to a point" (at [82]). He accepted that there was a degree of discrimination in s 104 in that it protected owners and drivers of Victorian registered cars from liability to the Commission, but did not protect owners and drivers of cars registered in other States. His Honour considered it was self-evident that most people would garage their cars at or near their homes, so that the registration requirement as a practical matter operated upon residence.

However, his Honour observed that not every disability or discrimination based upon residence is of a kind which falls within the proscription in s 117 (citing *Street* at 490). He noted that Mason CJ in that case (at 491) suggested that the exclusion of out of State residents from the enjoyment of rights naturally and exclusively associated with

residence of a State must be recognised as standing outside the operation of s 117. State welfare benefits were an example. He cited also Deane J at 528-9, Dawson J at 546 and Gaudron J at 572, to broadly similar effect. Brennan and Toohey JJ, in his Honour's view, also considered that disability or discrimination did not fall within s 117 if the difference was a natural consequence of legislation aimed at protecting the legitimate interests of the State community.

His Honour then went on to consider *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463. That case, of course, dealt with a provision of the Queensland *Motor Vehicles Insurance Act 1936* which provided that the amount of damages recoverable by an out-of-State resident in Queensland could not exceed the damages that might have been recovered in that person's State of residence. Notwithstanding an argument in that case that different treatment was justified because the insurance premiums which provided the relevant funds for the insurers came from residents of Queensland and not from residents of other States, the Court considered that s 117 precluded the differential treatment. His Honour's conclusion was that " … most of the Court in Street spoke in terms which suggest that the disability or discrimination in s 104 would not fall within the proscription and I see little in Goryl v Greyhound that suggests a change of mind" [92]. His Honour considered the object of the exclusion in s 104 was not to discriminate against non-residents, but to ensure that the scope of cover afforded to residents by the indemnity provision (s 94) was not rendered nugatory, a conclusion broadly similar to that of Callaway JA.

One can see the logic in the judgments, but it may, with respect, appear to be a somewhat narrow view of the various

provisions, since the plain fact was that the Commission proposed to recover payments which it made from residents of other States, but not from Victorians.

The conclusion is of some importance, given the pressures on such statutory schemes, and the natural desire of States to protect them (although one cannot help feeling that some sort of interstate "knock-for-knock" agreement might be cheapest in the long run).

Inconsistency

Two contrasting approaches perhaps are worth mentioning, in the light of the increased tendency of Parliaments throughout Australia to enact very wide objects clauses in legislation. These clauses have a tendency, one sometimes thinks, to verge on political manifestos in which the legislature expresses its desire to do wonderful things and to make everybody very happy. There is an issue as to the way objects clauses, or other indications of broad legislative purpose, should be used, if at all, in approaching inconsistency questions.

In ***BGC Contracting Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers*** (2004) 132 IR 220; [2004] FCA 981 (French J), there was a question of potential inconsistency between the *Workplace Relations Act 1996* of the Commonwealth and the *Industrial Relations Act 1979* of Western Australia. The principal object of the Commonwealth Act was said by s 3 to be "… to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia". A variety of means by which this object was to be achieved were also set out in s 3, including that of ensuring that the primary responsibility for determining matters affecting the relationship between employers and

employees rests "… at the workplace or enterprise level". French J, in my respectful opinion correctly, appears not to have any regard to the breadth of those Commonwealth objects in determining whether there was any inconsistency in the relevant sense between the two pieces of legislation.

By contrast, at first instance, in *"P" v Dunne* (2003) 27 WAR 528, EM Heenan J referred frequently, during the course of his reasoning, to the general principle arising from the *Family Law Act 1975* (Cth), that it is beneficial for a child to grow up enjoying the company of both its parents. His Honour referred to " … the wider objects and principles which are expressly identified by s 60B of the Family Law Act" in resolving complex questions of inconsistency arising out of the interrelationship of a number of Family Court contact orders, violence restraining orders, and a condition of bail imposed under the *Bail Act 1982* of Western Australia. The approach of the Full Court on appeal appears to have avoided reference to such considerations, instead analysing more closely the orders and the particular sections of each Act said to give rise to the inconsistency (***Dunne v "P"*** [2004] WASCA 239).

<u>The year's prize case</u>

Reflecting on many of the cases from 2004, I began to wonder if there should perhaps be an annual prize; something along the lines of "most optimistic use of constitutional argument in the past year". If there were, I would nominate this freedom of speech case. In ***Inder-Smith v Tudor-Stack*** [2004] NTSC 48, Angel J was confronted by the argument that the constitutional freedom of speech and access to government (which, it must be remembered, derives from the constitutional provisions relating to representative government and is

for the protection of that institution) extended so far as to protect the appellants. They had disrupted the process of representative government by entering the Northern Territory Legislative Assembly, and conducting themselves in a way which caused its business to be suspended.

Cases by Court

Federal Court of Australia

Full Court

Civil Aviation Safety Authority v Boatman [2004] FCAFC 165 [s 49, s 76, s 77, s 122]

Hoffman v Chief of Army [2004] FCAFC 148 [s 51(vi)]

Minister for Immigration and Multicultural and Indigenous Affairs v Cisinski [2004] FCAFC 302

Olbers Co Ltd v Commonwealth of Australia (2004) 212 ALR 325; [2004] FCAFC 262 [s 51(i), s 51(x), s 51(xxxi), s 51(xxxix)]

Single Judge

Applicant s76 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1107 [s 75(v)]

Australian Institute of Private Detectives Ltd v Privacy Commissioner [2004] FCA 1440 [s 75, s 76, s 77]

Barnes v Boulton [2004] FCA 1219 [s 51, s 106, s 122]

BGC Contracting Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers (2004) 132 IR 220; [2004] FCA 981 [s 76, s 109]

Cisinski v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 507 [s 71, s 75, s 76, s 77]

Deputy Commissioner of Taxation v Warrick (No 2) [2004] ATC 4779; (2004) 56 ATR 371; [2004] FCA 918 [s 51(ii), s 55, s 75(v)]

Olbers v Commonwealth of Australia (No 4) (2004) 205 ALR 432; [2004] FCA 229 [s 51(x), s 51(xxix), s 51(xxxi), Ch III]

Supreme Court of the Australian Capital Territory

Full Court

Hadba v R (2004) 182 FLR 472; (2004) 146 A Crim R 291; [2004] ACTSC 62 [Ch III]

Supreme Court of New South Wales

Full Court

R v MSK and MAK [2004] NSWCCA 308

R v Workman (2004) 60 NSWLR 471; [2004] NSWCCA 213 [s 118]

Single Judge

Cauvin v Philip Morris Ltd [2004] NSWSC 644 [s 71, Ch III]

Dalton v NSW Crime Commission [2004] NSWCA 454 [s 51(xxiv)]

O'Shane v John Fairfax Publications Pty Ltd (2004) Aust Torts Rep 81-733; [2004] NSWSC 140

Supreme Court of the Northern Territory

Single Judge

Inder-Smith v Tudor-Stack [2004] NTSC 48

Supreme Court of South Australia

Full Court

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276 [s 51(xxix), s 51(xxxvii), s 51(xxxviii), s 106, s 107, s 108, s 109]

Craig v Workers' Compensation Tribunal [2004] SASC 410 [s 75(v)]

Gee v Magistrates Court of South Australia (2004) 89 SASR 534; [2004] SASC 315

R v England (2004) 89 SASR 316; [2004] SASC 254 [Ch III, s 71]

R v Granger (2004) 88 SASR 453; (2004) 146 A Crim R 344; [2004] SASC 156 [Ch III]

Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd (2004) 88 SASR 311; (2004) 233 LSJS 300; [2004] SASC 124 [Ch III]

Single Judge

Amarantos Shipping Co Ltd v State of South Australia (2004) 87 SASR 528; (2004) 205 ALR 459; (2004) 232 LSJS 261; [2004] SASC 57 [s 51(i), s 51(xxxviii), s 98, s 109]

Supreme Court of Victoria

Full Court

Transport Accident Commission v Sweedman (2004) 210 ALR 140; (2004) 41 MVR 310; [2004] VSCA 162 [s 75, s 106, s 117, s 118]

Single Judge

Ali v Commonwealth of Australia [2004] VSC 6 [Ch III]

Victorian Workcover Authority v Commonwealth of Australia [2004] VSC 474

Supreme Court of Western Australia

Full Court

Dunne v "P" (2004) 212 ALR 413; [2004] WASCA 239 [s 51(xxi), s 51(xxii), s 76(i), s 77(iii), s 109]

Re Grinter; Ex parte Hall (2004) 28 WAR 427; (2004) 180 FLR 433; [2004] WASCA 79 [s 75, s 76, s 77, s 80]

Single Judge

Director of Public Prosecutions for Western Australia v Hafner (2004) 28 WAR 486; [2004] WASC 32 [Ch III]

Cases by Section

Note: Only cases referring to particular sections are listed here.

Section 49: Privileges etc. of Houses

Civil Aviation Safety Authority v Boatman [2004] FCAFC 165

Section 51: Legislative powers of the Parliament

Barnes v Boulton [2004] FCA 1219

Section 51(i): Trade and Commerce

Amarantos Shipping Co Ltd v State of South Australia (2004) 87 SASR 528; (2004) 205 ALR 459; (2004) 232 LSJS 261; [2004] SASC 57

Olbers Co Ltd v Commonwealth of Australia (2004) 212 ALR 325; [2004] FCAFC 262

Section 51(ii): Taxation

Deputy Commissioner of Taxation v Warrick (No 2) [2004] ATC 4779; (2004) 56 ATR 371; [2004] FCA 918

Section 51(vi): Defence

Hoffman v Chief of Army [2004] FCAFC 148 [s 51(vi)]

Section 51(x): Fisheries

Olbers Co Ltd v Commonwealth of Australia (2004) 212 ALR 325; [2004] FCAFC 262

Olbers v Commonwealth of Australia (No 4) (2004) 205 ALR 432; [2004] FCA 229

Section 51(xxi): Marriage

Dunne v "P" (2004) 212 ALR 413; [2004] WASCA 239

Section 51(xxii): Divorce and Matrimonial Causes

Dunne v "P" (2004) 212 ALR 413; [2004] WASCA 239

Section 51(xxiv): Service and Execution

Dalton v NSW Crime Commission [2004] NSWCA 454

Section 51(xxix): External Affairs

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

Olbers v Commonwealth of Australia (No 4) (2004) 205 ALR 432; [2004] FCA 229

Section 51(xxxi): Acquisition of property on just terms

Olbers v Commonwealth of Australia (No 4) (2004) 205 ALR 432; [2004] FCA 229

Olbers Co Ltd v Commonwealth of Australia (2004) 212 ALR 325; [2004] FCAFC 262

Section 51(xxxvii): Matters referred by the States

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

Section 51(xxxviii): Exercise of any power which can be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

Amarantos Shipping Co Ltd v State of South Australia (2004) 87 SASR 528; (2004) 205 ALR 459; (2004) 232 LSJS 261; [2004] SASC 57

Section 51(xxxix): Incidental powers

Olbers Co Ltd v Commonwealth of Australia (2004) 212 ALR 325; [2004] FCAFC 262

Section 55: Tax Bill

Deputy Commissioner of Taxation v Warrick (No 2) [2004] ATC 4779; (2004) 56 ATR 371; [2004] FCA 918

Chapter III: The Judicature

Ali v Commonwealth of Australia [2004] VSC 6

Cauvin v Philip Morris Ltd [2004] NSWSC 644

Director of Public Prosecutions for Western Australia v Hafner (2004) 28 WAR 486; [2004] WASC 32

Hadba v R (2004) 182 FLR 472; (2004) 146 A Crim R 291; [2004] ACTSC 62

Olbers v Commonwealth of Australia (No 4) (2004) 205 ALR 432; [2004] FCA 229

R v England (2004) 89 SASR 316; [2004] SASC 254

R v Granger (2004) 88 SASR 453; (2004) 146 A Crim R 344; [2004] SASC 156

Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd (2004) 88 SASR 311; (2004) 233 LSJS 300; [2004] SASC 124

Section 71: Judicial power and the Courts

Cauvin v Philip Morris Ltd [2004] NSWSC 644

Cisinski v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 507

R v England (2004) 89 SASR 316; [2004] SASC 254

Section 75: Original jurisdiction of the High Court

Australian Institute of Private Detectives Ltd v Privacy Commissioner [2004] FCA 1440

Cisinski v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 507

Re Grinter; Ex parte Hall (2004) 28 WAR 427; (2004) 180 FLR 433; [2004] WASCA 79

Transport Accident Commission v Sweedman (2004) 210 ALR 140; (2004) 41 MVR 310; [2004] VSCA 162

Section 75(v): Original jurisdiction in which a writ of Mandamus, etc. is sought

Applicant s76 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) FCA 1107

Craig v Workers Compensation Tribunal [2004] SASC 410

Deputy Commissioner of Taxation v Warrick (No 2) [2004] ATC 4779; (2004) 56 ATR 371; [2004] FCA 918

Section 76: Additional original jurisdiction

Australian Institute of Private Detectives Ltd v Privacy Commissioner [2004] FCA 1440

Cisinski v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 507

Civil Aviation Safety Authority v Boatman [2004] FCAFC 165

BGC Contracting Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers (2004) 132 IR 220; [2004] FCA 981

Re Grinter; Ex parte Hall (2004) 28 WAR 427; (2004) 180 FLR 433; [2004] WASCA 79

Section 76(i): Additional original jurisdiction arising under this Constitution, or involving its interpretation

Dunne v "P" (2004) 212 ALR 413; [2004] WASCA 239

Section 77: Power to define jurisdiction

Australian Institute of Private Detectives Ltd v Privacy Commissioner [2004] FCA 1440

Cisinski v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 507

Civil Aviation Safety Authority v Boatman [2004] FCAFC 165

Re Grinter; Ex parte Hall (2004) 28 WAR 427; (2004) 180 FLR 433; [2004] WASCA 79

Section 77(iii): Power to define jurisdiction investing any court of a State with federal jurisdiction

Dunne v "P" (2004) 212 ALR 413; [2004] WASCA 239

Section 80: Trial by jury

Re Grinter; Ex parte Hall (2004) 28 WAR 427; (2004) 180 FLR 433; [2004] WASCA 79

Section 98: Trade and commerce includes navigation and State railways

Amarantos Shipping Co Ltd v State of South Australia (2004) 87 SASR 528; (2004) 205 ALR 459; (2004) 232 LSJS 261; [2004] SASC 57

Section 106: Saving of Constitutions

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

Barnes v Boulton [2004] FCA 1219

Transport Accident Commission v Sweedman (2004) 210 ALR 140; (2004) 41 MVR 310; [2004] VSCA 162

Section 107: Saving of power of State Parliaments

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

Section 108: Saving of State laws

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

Section 109: Inconsistency

Amarantos Shipping Co Ltd v State of South Australia (2004) 87 SASR 528; (2004) 205 ALR 459; (2004) 232 LSJS 261; [2004] SASC 57

Amarantos Shipping Co Ltd v State of South Australia (2004) 89 SASR 438; (2004) 183 FLR 98; [2004] SASC 276

BGC Contracting Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers (2004) 132 IR 220; [2004] FCA 981

Dunne v "P" (2004) 212 ALR 413; [2004] WASCA 239

Section 117: Rights of residents in States

Transport Accident Commission v Sweedman (2004) 210 ALR 140; (2004) 41 MVR 310; [2004] VSCA 162

Section 118: Recognition of laws etc. of States

R v Workman (2004) 60 NSWLR 471; [2004] NSWCCA 213

Transport Accident Commission v Sweedman (2004) 210 ALR 140; (2004) 41 MVR 310; [2004] VSCA 162

Section 122: Government of territories

Barnes v Boulton [2004] FCA 1219

Civil Aviation Safety Authority v Boatman [2004] FCAFC 165