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The Federal and State Courts on Constitutional Law: The 2009 Term

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Introduction

Statistics

A survey of all decisions of Federal, State and Territory Courts in 2009 reveals 20 cases “of interest” – so far as we constitutional lawyers are concerned. Excluded from this selection are those cases which raised s 109 inconsistency, since none appears to involve issues of principle. Also excluded are those cases which were spurious challenges; these keep the Supreme Courts of particularly Queensland and Western Australia on their toes!

A short profile of the 20 cases “of interest” reveals the following statistics:

1. Just over half occurred in the Federal Courts (11 cases) with the remainder in State Courts (9 cases: NSW (3); SA (2); Tas (1); Vic (1); WA (2)).
2. There was an even split between those cases concerned with the exercise of federal power (including one involving an exercise of territory power) and those concerned with the exercise of State power.
3. In so far as these cases involved challenges to the exercise of federal or state power, only one and a half cases were successful, compared with 15 clearly unsuccessful.
4. Just over half of the cases invoked a constitutional guarantee arising under Ch III, s 90, the implied freedom of political communication, an implied constitutional freedom of movement, or fair compensation for compulsory acquisition of property.
5. Special leave to appeal to the High Court has been granted so far in 2 cases.

General themes

Significant political issues continue to find their way into the courts in the hope of achieving a judicial resolution. As the brief survey above indicates, the success rate is very low. Whether other strategic advantages are won, despite a failure in the courts, is unclear. Prominent issues in 2009 to reach the courts in these 20 cases include: the alleged links between organised crime and bikie gangs; water conservation measures; the alcopops tax; the dismissal of the NSW Minister for Small Business, Tony Stewart; the Habib case; commercial insolvency; the enforceability of government promises; the betting industry; the Tasmanian pulp industry; and child support.
Given the political controversy surrounding each of these issues, it is not surprising that most cases focus on the Executive branch. In all but a few cases, the complaint which initiated the legal proceedings was in respect of some action or inaction on the part of the Executive. The cases of 2009 were generally instigated in an endeavour to have the Government held accountable via the judicial branch. While the vast majority failed in this endeavour, the judgments often indicate, in obiter, more serious circumstances where judicial relief may be granted. To this extent they usefully warn the Executive Governments of the federation of the limits of their power.

In undertaking such a survey of cases, the dream is to discover the birth of a new constitutional star – like the principle of interpretation advocated so meekly by Robert Menzies at the directions hearing in the *Engineers* case, or the Ch III principle of institutional integrity, advocated much less meekly, by Sir Maurice Byers in *Kable*.

Yet the High Court does not have a monopoly on embryonic constitutional thought – yes, State and other federal courts can be fertile grounds for such cross-fertilisation. I won’t dwell on the comparative fertility of the Bar, law firms, law schools ...

Alas, on this occasion, I regret to inform you that in 2009, as far as I can see, no bright constitutional star was born in any Federal or State Court .... but I can report that those Courts performed their role well in maintaining the equilibrium of the constitutional orbit, and that a number of promising ideas did emerge.

Let me take you through a few of the 2009 cases in search of those ideas. I have categorised them into three themes all of which focus on the Executive Government – federal or State:

A. The dangers involved in the Executive Government trying to avoid constitutional and legal restrictions in innovative ways – at times trying to put form over substance.

B. The need for the Executive Government to observe human rights and procedural fairness.

C. Recognition of the rights of the Executive in relation to:
   - Gold; and
   - Legal professional privilege

**A. The dangers involved in the Executive Government trying to avoid constitutional and legal restrictions in innovative ways – at times trying to put form over substance.**

I refer to 5 cases here, as well as one where the Executive may be innocent of this criticism.

**Totani v South Australia**

There is always the temptation on the part of the Executive to use the judicial branch to outlaw socially unacceptable behaviour, and to direct, so far as it can, the outcome it wants to achieve.

At the State level, such attempts are now subject to invalidity under the Kable Principle which protects the institutional integrity of State courts vested with federal jurisdiction.
The difficulty with the Kable principle is that it involves a spectrum of interference in courts, from what is clearly invalid to what may be valid.

Three cases occurred along this spectrum in 2009 – all concerned with State not federal courts - but only one, *Totani v South Australia* [2009] SASC 301; SAFC; 259 ALR 673 breached the principle, according to the Full Court of the Supreme Court of South Australia. The High Court granted special leave to appeal last week.

The issue in that case is how narrowly can the jurisdiction of a State court vested with federal jurisdiction be confined and made to depend on facts determined by a non-judicial authority, before this undermines the institutional independence and integrity of that court – particularly when the court is exercising a power which directly takes away a fundamental human right.

This issue arose in relation to Parts 2 and 3 of the *Serious and Organised Crime (Control) Act* 2008 which was enacted to address perceived problems with bikie gangs in South Australia. Under Part 2, s10(1) empowers the Attorney-General on the application of the Commissioner of Police to make a declaration in respect of an organisation if the AG is satisfied that (a) the members of the organisation associate for the purpose or organising, planning, facilitating, supporting or engaging in serious criminal activity; and (b) the organisation represents a risk to public safety and order in this State.” Section 10(3) permits the AG to have regard to a range of matters including inter alia any information “suggesting” (a) a link exists between the organisation and serious criminal activity. The Commissioner of police may also provide the AG with “criminal intelligence” which is never to be released to anyone else.

After five months of investigation and consultation, the SA Attorney-General declared the *Finks Motorcycle Club* to be a declared organisation for the purposes of the Act. An application was then made by the Police Commissioner to the Magistrates Court under Part 3 s 14(1) to make a control order against a person alleged to be a member of the Finks. Under s 14(1): “The Court must, on application by the Commissioner, make a control order against a person if the Court is satisfied that the defendant is a member of a declared organisation.” (emphasis added)

This contrasts with s 14(2) where the Court may, on application by the Commissioner, make a control order against a person if the Court is satisfied that the defendant has been a member of a declared organisation (or engages, or has engaged, in serious criminal activity, and regularly associates with members of a declared organisation; … and that the making of the order is appropriate in the circumstances. (emphasis added)

When making a control order under both subsections, the Court does have under subs (5) a discretion as to the terms of the order itself. A declaration made in respect of an organisation under s 10 is not reviewable by a court. But a control order is reviewable.

A majority (Bleby J with whom Kelly J agreed) viewed the combination of Parts 2 and 3 as violating the Kable principle. Bleby J considered that in acting under s 14(1) the Court is in “a very real sense … required to [act] as an instrument of the Executive” [156]. All that the Court must decide is whether or not the person concerned is a member of the organisation. It cannot go behind the AG’s declaration. His Honour therefore concluded at [157]:
It is the unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government which destroys the Court’s integrity as a repository of Federal jurisdiction.

His Honour emphasised the fact that it had taken the AG 5 months to process the application for a declaration in respect of the Finks, but only taken one day for the Magistrate to issue a control order against one of the plaintiffs.

White J dissented at this point, holding that the Court retains a “considerable discretion” - “the Court must be satisfied that the defendant’s membership of a declared organisation has been proved and that the particular terms of the control order are appropriate. ... in considering these matters, the Magistrates Court is to exercise its own independent adjudicative role.” [274]

It is difficult to accept this dissenting view given that the Attorney-General’s decision to declare an organisation stops short only one step from imposing the control order on its members. On the spectrum, this case lies between the extreme of a bill of attainder on one hand and a regime of mandatory sentencing on the other. It is a question of degree and judicial impression. The High Court in granting special leave will now determine the issue. Interestingly, the challenge did not rely on a violation of an implied freedom of association, despite this being the primary concern of the plaintiffs. This was no doubt due to the challenge being stronger under Ch III.

The two unsuccessful challenges under the Kable principle were:

The Kable principle was also relied upon, although this time unsuccessfully, in R v Ironside [2009] SASC 151 to challenge the provision made under s 32A(3) of the Criminal Law (Sentencing) Act 1988 (SA) which permitted a plea of guilty to be taken into account in deciding whether special reasons existed for the Court to shorten the mandatory minimum non-parole period prescribed by that Act. The South Australian Court of Criminal Appeal (Doyle CJ, Gray and Kourakis JJ) rejected the argument that this discrimination against those who are convicted after pleading not guilty, was incompatible or repugnant to the exercise of judicial power. To the extent that a person is treated differently in this instance, it is based on “a material and appropriate distinction” [86]. Doyle CJ (with whom Kourakis J agreed) did accept “that there is a common law principle that an offender should not be penalised for pleading not guilty.”[95] but he went on to raise the issue without deciding it whether “the Parliament of a State could ... validly legislate to provide, for example, that an offender who pleads not guilty shall, if convicted, receive a heavier sentence than an offender who, in like circumstances in all respects, has pleaded guilty.” [96]

Gray J at [147] was prepared to accept the argument that a law which gave a lesser non-parole period to an offender who pleaded guilty than to one who did not would be invalid. But in this case this was not the statutory position – rather a lesser period could be imposed depending on the level of co-operation the offender had provided [155].

Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council [2009] NSWCA 59 concerned an issue as to whether it was incompatible with the exercise of federal judicial power for a State court to hear proceedings for indemnification by a putative tortfeasor to an employer in respect of injuries incurred on an employee under workers compensation, if the putative tortfeasor was unable to insist on its own medical assessment of the employee.
Port of Portland Pty Ltd v Victoria

Port of Portland Pty Ltd v Victoria [2009] VSCA 282 involved an unlawful executive dispensation of statute – a practice outlawed since at least the Bill of Rights 1689. The Victorian Court of Appeal invalidated a clause in an agreement for the sale of land previously used as a port facility between the State of Victoria and the appellant purchaser whereby the State promised to repay any additional land tax which the appellant had to pay if proposed statutory amendments to reduce land tax on the property were not passed. Those amendments were not effected. The Court rejected the distinction argued by the appellant between:

- unlawfully exempting a person from an obligation to pay tax; and
- validly promising to repay to a taxpayer the amount paid in tax.

Buchanan JA [43] regarded this as putting form over substance. Maxwell Pat [2] and Nettle JA at [89] agreed. The Court followed Dixon J in Thomson’s Case (Perpetual Executors and Trustees Association of Australia Ltd v FCT (1948) 77 CLR 1) at 28:

> The imposition of a tax necessarily involves an intention that when levied it shall not become repayable. Any liability *ex contractu* to repay it *in substance*, whether as damages, indemnity or recoupment, must be dissolved by force of the statute.

The Court of Appeal also considered that an undertaking by the State to effect changes to the land tax legislation to exclude the value of certain port structures was unenforceable.

Tipperary Developments Pty Ltd v Western Australia

The Executive power to enter into a contract came under scrutiny in the judgment of Wheeler JA in obiter at [5], [10], [18-19] in Tipperary Developments Pty Ltd v Western Australia [2009] WASCA 126. In applying the NSW v Bardolph doctrine [as no party disputed that doctrine], her Honour distinguished between:

- a contract entered into for the purpose of providing financial assistance to a threatened financial institution whose failure would have serious consequences for the State’s economy – this would be within or incidental to the ordinary and well recognised functions of government; and
- a contract of that nature which was intended to serve the interest of a particular ministry rather than the public interest – as a narrow political agreement, this would not fall within the scope of ordinary and well recognised functions of government.

Suntory (Aust) Pty Ltd v Commissioner of Taxation

Continued approval was given to the Commonwealth Executive - to avoid the fundamental principle requiring parliamentary authorisation for imposing taxation by the backdoor method - in Suntory (Aust) Pty Ltd v Commissioner of Taxation [2009] FCAFC 80 “the alcopops tax case”.

This case involved the issue of provisional collection of excise duties by the Commonwealth before parliamentary approval occurs – a practice which was well established by the first half of the 19th century in order to protect the revenue.
The distinguishing feature in this case is the fact that Suntory had applied for permission under s 61C of the *Excise Act* 1901 (Cth) to deliver the goods for home consumption and had accepted a condition that it would pay any provisional rate of excise duty proposed under s 160B of the Act.

Accordingly, Suntory became liable to pay the higher rate of excise when this was proposed by the Commissioner of Taxation under s 160B on 26 April 2008, effective the following day. The Bill to ratify this increase passed the House of Representatives on 25 February 2009 but was rejected by the Senate on 18 March 2009.

Suntory challenged the increased excise as the imposition of a tax without parliamentary authority in breach of the fundamental principle established in *Bowles v Bank of England* (1913) 1 Ch 57, affirmed by the House of Lords in *Attorney-General v Wilts United Dairies* (1922) 91 LJ KB 897 and accepted by the High Court in the *Wooltops* case (*Commonwealth v Colonial Combing, Spinning and Weaving Company Limited* (1922) 31 CLR 421).

The challenge failed in the Full Federal Court (Finn, Emmett and Stone JJ) on the ground that the condition imposed pursuant to s 61C(3) lacked the “compulsory element” essential for a tax [27] – that condition had been accepted by the taxpayer in choosing to use the s 61C procedure rather than following the usual procedure under s 58. The relevant provisions were supported by the incidental scope of the tax power as they were protective of the revenue [35]. The Court at [31] distinguished the *Wooltops* case which involved an exercise of executive power, whereas this case concerned the exercise of statutory power, supported by the incidental scope of the tax power. However, the Court accepted at [32] that the issue of consent had to be determined as a matter of substance, and noted that “on the evidence presented” it could not be seen to be “colourable”.

In permitting this, the Courts are assisting the Executive to side-step the fundamental requirement of parliamentary approval for taxation. They are allowing the Executive to achieve indirectly what they cannot do directly.

**Spencer v Commonwealth**

The Full Federal Court in *Spencer v Commonwealth* [2009] FCAFC 38 continued approval for Commonwealth Executive avoidance of a fundamental right of fair compensation for compulsory acquisition of property under s 51(xxxi). The case was not distinguishable from *Pye v Renshaw* (1951) 84 CLR 58 in that an intergovernmental agreement, which may contemplate the State acquiring property on other than just terms, is not a law with respect to the compulsory acquisition of property. This approach was affirmed by the High Court in 2009 in *ICM Agriculture v Commonwealth* [2009] HCA 51. In *Spencer*, the Full Federal Court rejected a challenge to the validity of the National *Resources Management (Financial Assistance) Act* 1992 (Cth) and the *Natural Heritage Trust of Australia Act* 1997 (Cth) on the basis that neither Act authorised nor required any particular agreement between the Commonwealth and a State which required the State to acquire property to attract the constitutional guarantee of fair compensation under s 51(xxxi).

**Compare –**

In *Queanbeyan City Council v ACTEW Corporation Limited* [2009] FCA 943 (now on appeal to Full Federal Court), the ACT Government does not appear to have tried to avoid a constitutional
restriction – in this case s 90 excise duties. Indeed, one wonders whether the Government thought of it at all. But it defended its actions on the basis that it was promoting water conservation.

In this case, two ACT imposts, a water abstraction charge (WAC) and a utilities (network facilities) tax (UNFT), were challenged by the Queanbeyan City Council (QCC) as invalid excise duties. Both fees were imposed on ACTEW which passed them onto the QCC to which it supplied water.

In a well considered judgment, Buchanan J held the WAC to be valid as a fee for the acquisition or use of property, and the UNFT to be invalid as an excise duty.

The WAC, which had increased from 10 to 55 cents per kilolitre of water abstracted, was held not to be a tax, but was a fee for the right to take the water, being a fee which had a discernible relationship with the value of what is acquired.

ACTEW and the ACT argued that no discernible relationship had to be shown if the fee was for the acquisition or use of property. They relied on the joint judgment of Mason CJ, Deane and Gaudron JJ at 325 and that of Brennan J at 335 in Harper v Minister for Sea Fisheries (1989) 168 CLR 314, neither judgment of which referred specifically to any need for a discernible relationship in that case between the abalone licence fee and the value of the privilege so conferred in concluding that it was not a tax.

On the other hand, the QCC relied on the joint judgment of Dawson, Toohey and McHugh JJ which specifically emphasised the importance of the fact that such a discernible relationship existed in that case. This argument was accepted by Buchanan J at [83] who considered that the joint judgment of Mason CJ, Deane and Gaudron JJ was not inconsistent with that view. But in applying this principle, his Honour emphasised at [106] that a “discernible relationship” must be considered in a process of characterisation, not justification, and concluded at [124] that the WAC, even at 55c/kL, was a fee for the acquisition of the right to supply water. QCC had argued it became a tax when it was increased above 25c/kL.

On the other hand, the UNFT, charged upon various networks distributing water, electricity, gas, sewerage and telecommunications, was invalid as an excise – at least in relation to the water networks of ACTEW. The tax was calculated on the length of the network route. The Court rejected the argument that it was a charge for the use or occupation of land rather than a tax, as well as the next argument that it was not a tax on goods but a levy imposed on persons. The substance test from Hematite was applied to hold that it was a tax on a step in the production, sale and distribution of goods, which operated as an indirect tax on consumers. Water was held to be a commodity. The Court expressly made no finding in respect of the other networks.

B. The need for the Executive Government to observe human rights and procedural fairness.

Stewart v Ronalds

The decision of the NSW Court of Appeal in Stewart v Ronalds [2009] NSWCA 277; 259 ALR 86 demonstrates the risk of Executive innovation when exercising the power of ministerial dismissal.
The plaintiff, Tony Stewart, a member of the Legislative Assembly of NSW and a former minister and member of the Executive Council, commenced proceedings in the Supreme Court of NSW alleging that he was denied procedural fairness in the process which led to the advice of the Premier to the Lieutenant-Governor to withdraw his commissions and claiming both a declaration that this withdrawal of his commissions was void and damages against the first defendant for her role.

Ms Ronalds SC, a senior counsel at the private bar, had been retained by the Premier to investigate allegations of misconduct against the plaintiff and to provide a report for tabling in Parliament. Her tabled report found the allegations justified.

Predictably, the NSW Court of Appeal (Allsop P, Hodgson JA and Handley AJA) held the actions of the Premier and Lieutenant-Governor were not subject to judicial review, nor did they owe a duty of procedural fairness. The dismissal raised “quintessentially political questions”.

Most interestingly, the case against the first defendant was stood over because “a question arises as to the relationship between the exercise of public and private power, in this case public power and individual capacity and the application of the principles of procedural fairness” [74] per Allsop P.

On the issue of parliamentary privilege, the Court was not convinced that the report by the first defendant was protected by parliamentary privilege. The uncertainty arose because the report was not directed by Parliament or one of its committees for tabling. In this case the report was commissioned by the Executive, for report to the Executive and only later tabled in Parliament. Allsop P at [76] thought there was significant force in the views of Hodgson JA but left the issue open. So did Handley AJA at [129].

In my view, if the Premier engages an independent third party to report on the behaviour of any minister for the purpose of determining whether to advise the Governor to dismiss that minister, and then makes the report public, procedural fairness should be accorded any person adversely commented on in that report. If the report is not released, such a requirement would not seem to be required.

**Habib v Commonwealth (No 2)**

**Habib v Commonwealth (No 2)** [2009] FCA 228 raised the issue whether the Commonwealth Executive has a legally enforceable obligation to protect Australian citizens in relation to the actions of foreign states – it required the Federal Court to demarcate its judicial role in reviewing the actions of the Executive in international affairs. Perram J struck out the pleadings of Mr Habib in proceedings which he commenced in the High Court which then remitted to the Federal Court. In these proceedings the Commonwealth applied pursuant to s 31A of the Federal Court of Australia Act 1976 (Cth) for judgment in relation to all but one part of Mr Habib’s case on the basis that the proceedings have no reasonable prospect of success. His Honour concluded at [14-15] that the legal wrongs pleaded against the Commonwealth Government were: harassment and intimidation; breach of fiduciary duty; breach of a duty of assistance; negligence in failing to assist; and defamation; to which were added by his counsel Mr Barker QC negligent failure to consider whether to intervene with Pakistan, Egypt or the US; misfeasance in a public office; and failure to act in accordance with Mr Habib’s legitimate expectation that the Commonwealth would assist him.
The claim of a breach of fiduciary duty on the part of the Commonwealth was struck out for three reasons: the courts do not intervene in foreign relations if this takes them into the exclusive domain of the political branches; equity would not impose a fiduciary duty which fetters foreign policy - “the Chancellor’s foot [does not] tread the boards of the world stage” [54]; and conceptual deficiencies in the claim based on a conflict of interest.

No significant cases occurred in 2009 in reliance on the Implied freedom of political communication:

The principle from Mulholland v Australian Electoral Commission (2004) 220 CLR 181 was invoked by Siopis J in Keo v Minister for Immigration & Citizenship [2009] FCA 676 to reject an argument that the implied freedom of political communication could be invoked to override a statutory time limit on the right to seek merits review by the Migration Review Tribunal.

In Gunns Limited v Alishah [2009] TASSC 45, Porter J held that a plea of immunity from being held liable for aggravated and exemplary damages based on the implied freedom of political communication was arguable relying on the principle that “the common law rule must yield to the constitutional norm”: see Roberts v Bass (2002) 212 CLR 1 at 27 [66] per Gaudron, McHugh and Gummow JJ. The implied freedom could not however be pleaded as a defence to a claim for damages for trespass.

An implied freedom of international movement?

An implied freedom of movement into and out of Australia was raised in the Federal Magistrates Court in Williams v Child Support Registrar [2009] FMCA 481 in a challenge to a departure prohibition order (DPO) issued by the Registrar under s 72D of the Child Support (Registration and Collection) Act 1988 (Cth) in circumstances where the person has an unpaid child support liability. Reliance was placed on the recognition given to forms of this freedom by Gaudron J and McHugh J in Kruger v Commonwealth (1997) 190 CLR 1 at 121 and 141. McHugh J referred only to a freedom to travel “inside and outside Australia for the purposes of the constitutionally prescribed system of government and referendum procedure” (at 141).

While the right of Australian citizens to return to Australia was recognised in Air Caledonie v Commonwealth (1988) 165 CLR 462 at 469, the right to leave Australia has not been clearly recognised yet judicially. Kirby J did so in obiter in DJL v Central Authority (2000) 201 CLR 226 at 279 [138], referring to the “ordinary entitlement [of citizenship] to reside in, depart from and return to Australia” in reliance upon Art 12 of the International Covenant on Civil and Political Rights. In any event, DPOs were seen as reasonably and appropriate to serve the legitimate object of ensuring the due payment of child support.

C. Recognition of the rights of the Executive

Two cases worth mentioning here concern the rights of the Executive in relation to:

- Gold; and
- Legal professional privilege

Crown ownership of Gold and Imperial law
In New South Wales v Cadia Holdings Pty Ltd [2009] NSWCA 174 the NSW Court of Appeal held 2-1 (Basten JA and Handley AJA; Spigelman CJ contra) that the NSW Crown retained rights to the mixed ore of gold and copper at a mine at Cadia Hill. The mixture was such that neither mineral could be mined on its own. According to the majority, such a mixture prevented it from being a “copper mine” within the terms of s 4 of the Royal Mines Act 1688 (Imp) – it was more appropriately characterised as a “gold-copper mine”. Had it been a “copper mine”, then it would be a privately owned mineral within the terms of the Mining Act 1992 (NSW) for which the owners would be entitled to seven-eighths of all royalties.

Not being a copper mine, it remained a gold mine within the prerogative, entitling the Crown to both the gold and the copper (as per the Case of Mines – The Queen v The Earl of Northumberland (1568) 1 Plowden 310; 75 ER 472 which had held that the Crown owns the entire ore in which a royal metal is mixed). To remove from the prerogative a gold-copper mine, as well as a copper mine, required express words or a necessary implication in accordance with Barton v Commonwealth (1974) 131 CLR 477.

The 1688 Imperial Act was accepted as still in force in New South Wales pursuant to the Imperial Acts Application Act 1969 (NSW), having been inherited under the Australian Courts Act 1828 (Imp) [despite the requirement in s 2 to deliver the gold to the Tower of London!]. A later Imperial Act of 1693 was not in force but was still relied on to assist with the interpretation of the 1688 Act [36].

In a strong dissent, Spigelman CJ interpreted s 4 of the Royal Mines Act 1688 more liberally, as legislation of constitutional significance, to exclude from the prerogative even “gold-copper mines” since the legislative purpose at the time was to encourage the development of the mining industry in England and to redress a constitutional imbalance between the King and his subjects. His Honour at [76] relied on the accepted view that the Case of Mines principle applied to vest the entire ore in the Crown, where the Royal metal is mixed with other metal, only if the value of the royal metal exceeded the cost of separating it. He concluded at [91] that if the mine contains a substantial quantity of copper it constitutes a copper mine.

In granting special leave to appeal, the High Court transcript indicates the Court is interested in the present NSW statutory position, the application of the 1688 Act, and the extent to which the prerogative has survived.

Role of Parliamentary Counsel in advising the Executive – legal professional privilege

The aftermath of the successful s 92 challenge in Betfair Pty Limited v Western Australia [2008] HCA 11 continues in the Federal Court.

In New South Wales v Betfair Pty Ltd [2009] FCAFC 160, a claim of legal professional privilege by the NSW Executive was upheld in relation to proceedings commenced by Betfair Pty Ltd which challenged under s 92 certain conditions imposed on approvals to use field information granted to it by two NSW statutory bodies, Racing NSW and Harness Racing NSW, pursuant to amendments to the Racing Administration Act 1998 (NSW). The Court of Appeal (Kenny, Stone and Middleton JJ) upheld the claim of legal professional privilege in respect of the following categories of documents: drafting instructions by the NSW Office of Liquor, Gaming and Racing to Parliamentary Counsel; draft regulations and draft bills; and emailed communications for the purpose of formulating instructions
to Parliamentary Counsel. The judgment concluded, after drawing an analogy with the drafting of a will, at [22]:

...Parliamentary Counsel, in drafting the legislation and presenting the draft to the government agency, is in effect advising that the draft legislation is in accordance with the instructions given and gives legal effect to those instructions. The draft itself is not the legal advice, but the communication in providing the draft legislation contains implicitly the advice of Parliamentary Counsel endorsing the draft legislation as being effective and valid.

In *Sportsbet Pty Limited v New South Wales (No 3)* [2009] FCA 1283 Jagot J rejected a claim of parliamentary privilege in respect of documents constituting or recording communications with Parliamentary Counsel for the purpose of preparing a draft bill and documents relating to the preparation of a draft bill. His Honour observed at [21]:

I do not accept the State’s proposition that every document concerning the preparation of draft legislation is protected by parliamentary privilege because of the fact that, ultimately, parliament makes legislation. The proposition depends on a connection with the business of Parliament far more distant and tenuous than that accepted as founding the privilege in *Rowley v O’Chee*.

One document created for the purpose of a minister conducting business in Parliament was protected.

**Conclusion**

I have tried to condense/distill the 20 cases “of interest” into three categories which focus on the Executive:

- The dangers involved in the Executive Government trying to avoid constitutional and legal restrictions in innovative ways – at times trying to put form over substance.
- The need for the Executive Government to observe human rights and procedural fairness.
- Recognition of the rights of the Executive in relation to: Gold; and Legal professional privilege

What emerges from this survey?

- Beware of putting form over substance in constitutional analysis.

- The States and Territories need to be more aware of the constitutional restraints emanating from the Constitution, especially from Ch III and the implied freedom of political communication.

- Executive Governments need to be reminded of their constitutional role, when engaging and competing in the world of commerce and industry.

- Avoid the temptation of pleading a constitutional principle when it just doesn’t fit!
Appendix

This appendix provides an outline of the other cases of constitutional interest from 2009 not referred to during the delivery of the above paper at the conference on 19 February.

Chapter III – “matter”

In Australian Securities & Investments Commission v Axis International Management Pty Ltd [2009] FCA 852, ASIC sought a declaration under s 1337B of the Corporations Act 2001 (Cth) that a company (third defendant) had breached s 727(1) of that Act by not lodging a certain prospectus with ASIC and orders that the company both send a letter to all the shareholders concerned advising them of that and publish an advertisement to that effect. The third defendant challenged these proceedings as not revealing a “matter” within the Court’s jurisdiction. Gilmour J rejected this argument at [42-43]:

[42] I am satisfied that these proceedings constitute relevantly a “matter” which enlivens the Court’s jurisdiction. The plaintiff, as the public regulatory agency charged with enforcing the Act, has a real interest in raising the questions to be litigated in the current proceedings. It is not a hypothetical case but involves real questions of fact and law between the corporate regulator and Owston as the appropriate contradictor. The courts have for a considerable period consistently concluded that it is appropriate for ASIC to take civil proceedings for declaratory relief in respect of past events, even if there is no risk of repetition, where the outcome may establish that the conduct complained of was wrongful and thereby mark the court’s and the community’s disapproval of it and may deter other wrongdoers. … this is so, on the authorities, whether or not there is a cause of action against the defendant, and whether or not other relief is sought. Further, s 21 of the Federal Court Act provides, as I observed earlier, that a ‘suit is not open to objection on the ground that a declaratory order only is sought’.

[43] It also informs those affected, for example investors, as to what occurred as a matter of law….

Chapter III – s 73 appellate jurisdiction

In Smith v Australian Electoral Commission [2009] FCAFC 43, the appellant filed a petition in the High Court as the Court of Disputed Returns disputing the validity of the return of senators for NSW and Queensland in the November 2007 general election. Gummow J referred the trial of the petition to a single justice of the Federal Court in Sydney. Following the trial, Bennett J dismissed the petition. The appellant filed a notice of appeal in the Federal Court but s 368 of the Commonwealth Electoral Act 1918 (Cth) denies a right of appeal from a single justice of the Federal Court exercising power as a Court of Disputed Returns. The Full Federal Court upheld the validity of s 368. It did not offend s 73 of the Commonwealth Constitution as it prescribed a valid exception to appeals to the High Court. Exceptions to the High Court’s appellate jurisdiction may be prescribed by the Commonwealth Parliament under s 73 subject to the principle in Cockle v Isaksen (1957) 99 CLR 155 at 165 per Dixon CJ, McTiernan and Kitto JJ that they cannot be used “so as to destroy the general rule, in relation to any court or tribunal or class of courts or tribunals comprised within s 73, that an appeal shall lie from its judgments decrees orders or sentences.” While Gaudron J in Sue v Hill (1999) 199 CLR 462 at [151] accepted that s 368 was a valid exception to s 73, Gleeson CJ, Gummow and Hayne JJ relied on the amelioration provided by s 18 of the Judiciary Act 1903 (Cth) which permits a single justice of the High Court to refer a case or question to the Full Court – especially on constitutional issues.
The Full Federal Court (Gray, Siopis and Buchanan JJ) in Smith v AEC concluded s 368 operates as a valid exception because of the amelioration provided by, first, the fact that a single justice hears the petition on the referral of the High Court, and secondly, the capacity for the matter to be removed back to the High Court under s 40 of the Judiciary Act. Reference was also made to the need for certainty in election results.

**Chapter III – exercise of judicial power by non-judicial officer**

In Davis v Insolvency & Trustee Service Australia (No 1) [2009] FCA 562, Foster J rejected at [55-56] the argument that the issue of a s 72A notice by the Child Support Registrar under the Child Support (Registration and Collection) Act 1988 (Cth) was an exercise of federal judicial power by a non-judicial official. Such a notice is given to a debtor of a child support debt requiring payment of the moneys owing direct to the Registrar. Reliance was placed on the determination in Luton v Lessels (2002) 210 CLR 333 (espec Gleeson CJ at 346) that the Registrar’s powers to collect child support debts, including the registration of a child support liability, did not constitute an exercise of judicial power.

**Commonwealth compulsory acquisition of property s 51(xxxi)**

A further exception to s 51(xxxi) was recognised by Finkelstein J in In the matter of Opes Prime Stockbroking Limited [2009] FCA 813; 258 ALR 362 in so far as s 411 of the Corporations Act 2001 (Cth) authorises the court to convene meetings of creditors to consider proposed schemes of arrangement which have the effect of acquiring property. His Honour acknowledged at [61] that members or creditors of financially troubled companies “often have to give up some right in order to keep the company going or to remedy some deficiency in its structure. If under such an arrangement “property” is acquired, that acquisition is merely an incident of the regulation of conduct that is in the common interest. Neither the schemes nor the statute which gives them effect, can be characterised as dealing with, or with respect to, the acquisition of property for purposes of s 51(xxxi)”.

**Manner & Form – Australia Acts**

In Glew v The Governor of WA [2009] WASC 14, a further challenge occurred in Western Australia to the Acts Amendment & Repeal (Courts and Legal Practice) Act 2003 (WA) which replaces in various statutes, including the Constitution Act 1889 (WA), references to Her Majesty and the Crown with references to the State or the Governor. Hasluck J, following the ruling of the Court of Appeal in Glew v Shire of Grenough [2006] WASC 260, held there was no need to comply with the manner and form requirements (which required referendum approval) of s 73(2)(g) of the Constitution Act 1889 (WA) since these statutory changes did not in any substantive manner alter the constitutional structure of the State.