Introduction - Sir Richard Blackburn

It is a considerable privilege to deliver this lecture in honour of the late distinguished Australian jurist and former Chief Justice of this territory, Sir Richard Blackburn. In so many chapters of his life he achieved personal excellence and made substantial contributions to the community generally. He was a first class honours graduate, a Rhodes Scholar, and an army officer who served in East North Africa and Papua New Guinea. At 32 he became Bonython Professor of Law at Adelaide University, a chair which he held until 1957 when he entered legal practice and became a partner in the Adelaide firm of Finlaysons.

His judicial career, commenced with his appointment to the Supreme Court of the Northern Territory in 1966. While in that office he decided the case of Milirrpum v Nabalco\(^1\). There he held, in accordance with the 1889 Privy Council decision in Cooper v Stuart\(^2\) that the continent of Australia at the time of colonisation was settled or occupied rather than conquered or ceded and that the doctrine of terra nullius applied, that is to say there was no system of pre-existing law cognisable by the common law.

His Honour set out the central proposition that limited his power thus:

"...the question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony."\(^3\)

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1 (1971) 17 FLR 141
2 (1889) 14 App Cas 286
3 Milirrpum at 244
The authority of the Privy Council had elevated an historical fiction into a rule of law which his Honour felt bound to apply. He did not however, lose sight of the reality with which he was dealing when, in an often quoted passage, he observed that what the evidence before him showed was:

"... a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me.”

The tension between the law and practical reality illustrated by that case is a theme of this paper. The proper constitutional definitions of the judicial function may create limits upon what judges and courts can or should do which can be productive of apparent or real injustice or inconvenience. Unexplained and unaddressed those limits and their outcomes may undermine public confidence in the judicial system. So too, on the other hand, in a different way if they are exceeded.

In the Nabalco case, as is the duty of a judge at first instance, he applied the law as it bound him to the case before him. It was no part of his function to repudiate the relevant legal principle. That was a matter for a higher court or for the legislature. In so doing he exemplified the proper discipline of the judicial office.

It is important to place Sir Richard’s decision in proper context by observing that the change to the law when it came was based upon a revised view of history and was constitutional in its character. As Justice Gummow said of the Mabo decision in the Wik case:

“That view differed from assumptions, as to extent of the reception of English land law, upon which basic propositions of Australian land law had been formulated in the colonies before federation. To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at federation.”

4 Milirrpum at 267
5 Wik Peoples v State of Queensland and Others (1996) 187 CLR 1 at 182
The High Court of 1972 was a very different court from that of 1992. It is interesting to speculate on what direction the common law of native title might have taken had Sir Richard’s decision been taken on appeal.

In 1971, Sir Richard Blackburn accepted a commission as a Judge of the Australian Capital Territory. He also became Chairman of the Law Reform Commission of the Territory. In 1976 he became Pro-chancellor of the Australian National University and later its Chancellor and in 1977 was appointed Chief Judge of the Australian Capital Territory and a Justice of the Federal Court. In 1982 he became Chief Justice of the Australian Capital Territory and in 1983 was made a Knight Bachelor recognising many achievements both within the law and in the wider community.

His words to the legal profession at his farewell sitting in the Supreme Court of the Australian Capital Territory in 1985 are important and relevant in contemporary debate about the justice system. He said:

“If we want a society in which order and cohesions are the guardians, and not the enemies, of liberty and moral responsibility, then I assert that the presence of an efficient and devoted legal profession is indispensable. You are indispensable to the Court, you are indispensable to the community.”

One might add to that that the presence of an efficient and devoted judiciary is equally indispensable to a society in which order and cohesion are to be the guardians and not enemies of liberty and moral responsibility.

My remarks about Sir Richard, whom I never had the privilege of meeting, do not do justice to his life and contribution. I hope, nevertheless, that they convey some sense of the significance of his contribution and justify the theme of this lecture.
The Scope of this Lecture

The temporal taxonomy which brings us to the end of one millennium and the beginning of another evokes a psychology in which fundamental questions about institutions seem both timely and reasonable. Is the Australian Head of State into the next millennium to be a foreigner? Will our courts go on as they are into the next millennium? Put this way, propositions for change seem to gain greater weight. Questions about our courts are being asked in a variety of forums, not least through the work of the Australian Law Reform Commission on the adversarial system, the research projects of the Australian Institute of Judicial Administration and various statements of the Commonwealth Attorney-General, most recently about the “culture” of judges and lawyers. They are also being asked in the courts themselves. We live in a time in which no institution can be taken as beyond the reach of fundamental change. In this paper consideration is given to aspects of the present judicial system which can be said to have a constitutional character in the generic sense not limited to what is found in the written constitutions of the Commonwealth and the States. The practical limitations on the outcomes of the system shaped by those constitutional attributes may be little understood and contribute to public disquiet about their social utility.

Areas of concern considered are:

(a) The limits of the judicial function to the extent that it declares rights and obligations without making provision for their practical implementation.
(b) The limits of judicial review of official action which precludes merits review.
(c) The incremental nature of judicial law making.
(d) The limits on the use of judges in non-judicial roles.
(e) The potential fragmentation of federal and state jurisdictions by invalidation of the cross-vesting scheme.

To the extent that these areas of concern reflect fundamental or constitutional principles governing the operation of the judicial system they may be unalterable by the courts. To the extent that they embody important operating rules for the benefit of society at large, they should be explained. To the extent that their perceived adverse impacts can be modified by the courts, the courts should be open to their modification.
The Limits of the Judicial Function

The Australian concept of the judicial function is constitutional in its character, albeit it crosses Federal and State boundaries and is not explicitly written into their constitutions. The enunciation of judicial power by Justices Mason, Murphy, Brennan and Deane in their 1983 judgment in *Fencott v Muller*\(^6\), applies as well to State judicial systems as it does to the exercise of the judicial power of the Commonwealth:

“The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.”

The functions of the courts were there briefly summarised without express reference to their limitations. But it is the latter which have contemporary significance for public understanding of and confidence in the courts.

A fundamental limitation was stated in short form on 4 May 1998 by the retiring Chief Justice of the High Court, Sir Gerard Brennan, in connection with the delivery of that Court’s judgment in *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia*\(^7\). His Honour said:

“The courts do not - indeed they cannot - resolve issues wider than legal rights and obligations. They are confined to the ascertainment and declaration of legal rights and obligations and, when legal rights are in competition, the courts do no more than define what rights take precedence over others.”

The case concerned claims of sacked dock workers, the former employees of companies now under administration, which had provided labour to the Patrick Group of stevedoring companies. Reinstatement orders made on their application at first instance by North J in the Federal Court were varied to recognise that the question whether an employer company resumed trading was a matter for its administrator and not for the Court.

\(^6\) (1983) 152 CLR 570 at 608
\(^7\) [1998] HCA 30 (4 May 1998)
What the Chief Justice said in explaining the variation defined the core business of courts generally - making decisions about legal rights and obligations and where necessary their priorities inter se. The limitation on that business so defined is constitutional in its character - a rule by which courts are distinguished in their functions from executive governments and legislatures and, as in the *Patrick's* case, company administrators. It is however not bounded by bright lines and there are differences about its application. Indeed in the case in point, the sole dissenting Justice, Callinan J, invoked it to support his dissent when he said:

"The role of the courts is the adjudication of cases, not the making, under the guise of supervisory orders, of de facto business decisions."\(^8\)

It must be recognised that the statement published by the Chief Justice in the *Patrick's* case was designed to explain in simple terms to an intensely interested public why the court went as far as it did and no further than it did in the orders it made. It was not intended as an exhaustive exposition of the judicial power. Nevertheless it highlighted the reality, and perhaps responded to a general perception, that the answers which can be provided by the courts to the questions which come before them are often incomplete from the litigant or the public’s point of view. The courts, in accordance with their traditional functions, declare rights and obligations but not how they are to be exercised or discharged in practice. And it can be said that in so doing they leave to litigants, whether the State or the subject, freedom of movement to make detailed arrangements suitable to their particular circumstances.

People other than judges who make decisions within the framework of the law must, in the ordinary course, make those decisions prospectively, not misconceive their rights and obligations and make evaluative and managerial determinations ranging far wider than any guidance which courts offer. This is the task that faces members of the Executive Government, public office holders, directors, managers and administrators of corporations and ordinary men and women in all walks of life every day of their lives.

\(^{8}\) Ibid at para 192
Nevertheless the limits of the courts’ functions and their incapacity or reluctance to deliver complete or practical answers to the controversies before them can be a source of public bafflement, irritation or anger. This is well illustrated by Shakespeare in relation to competing rights and obligations. So Portia in the Merchant of Venice declared to Shylock:

“A pound of that same merchant’s flesh is thine.  
The court awards it and the law doth give it.”

This was met with acclamation:

“Most rightful Judge” said Shylock.

There followed however what we might call in *Patrick v MUA* terms the administrator’s caveat:

“Take then thy bond, take thou thy pound of flesh;  
But, in cutting it, if thou dost shed  
one drop of Christian blood,  
Thy lands and goods are,  
By the laws of Venice,  
Confiscate  
Unto the State of Venice”.

A recent case of competing rights giving rise to unresolved practical question was the decision of the High Court in *Wik Peoples v State of Queensland*.

The issue before the Court was whether the as yet undetermined native title rights of the Wik and Thayorre Peoples had been extinguished by the grant of pastoral leases under Queensland statutes. Holding that there was no necessary extinguishment of such rights by the grant of the pastoral leases, the Court also held that whether there was extinguishment could only be determined by reference to such particular rights and interests as might be asserted and established. Relevantly it said in a postscript to the judgment of Justice Toohey, authorised by the other majority Justices, Gaudron, Gummow and Kirby:

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9 (1996) 187 CLR 1
“If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.”

So far so good, and in public debate much has been said about the co-existence principle enunciated in *Wik*. But if the *Wik* litigation proceeds to judgment in the Federal Court and native title is proven, the content of that judgment will be a determination that native title exists, that it is or is not exclusive, the identity of the holders, the native title rights and interests of importance and the other interests to which it is subject. If the native title is determined to exist under a pastoral lease it will be expressed to be subject to that lease. This is what the *Native Title Act* 1993 specifies as the required content of a determination of native title (s 225). To borrow from Portia, that is what the court awards, that is what the law gives.

There is, however, no obvious mechanism by which the court can embody in its determination rules or directions for the management of the relationship between those co-existing rights. Such rules would have to encompass conditions of access to the pastoral lease covering a variety of mundane and detailed topics. These could include the use of station gates, roads and watering points, shooting, camping, fires, vehicles, no go areas for protection of sacred sites on the Aboriginal side and for the protection of stock and assets at mustering or other times on the pastoral side. Questions of identification of persons entitled to access and the burden of liability for personal injury or damage to property on the lease and importantly, expeditious and economic remedies for breaches of the rules would all have to be addressed. These are matters of fundamental concern to those involved in native title litigation. They extend beyond pastoral leases to the whole array of tenures with which native title can potentially co-exist.

The formulation of such practical arrangements for the exercise of declared rights is not within the normal range of judicial functions and here there is a dilemma. A court may confine itself to what the *Native Title Act* 1993 requires of a determination. Complaint about practical consequences may attract from some purists the famous cry “Fiat justitia et ruant

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10 *Wik Peoples* at 133
coelum” - “Let justice be done though the heavens fall”. But to those affected by the determination it will, if so limited, have failed to answer their most crucial questions. This has been a sub-text of some of the antagonistic rural reaction to the *Wik* decision more or less along the lines of the scriptural rebuke”

“Woe unto you lawyers. You lay impossible burdens upon men but will not lift a finger to lighten them”\(^{11}\)

Murray Island which was the subject of the first common law determination of native title in Australia is illustrative of the problem in another way. The High Court there declared inter alia:

“…That the Meriam People are entitled as against the whole world to possession, occupation, use and enjoyment of the Murray Islands.”\(^{12}\)

The declaration did not advert to the intra-mural rights of individual islanders to plots of land allocated under the customary law which supports the global native title so determined. On Murray Island there have followed very real problems about the provision of community infrastructure including a dam, a community coolroom and a sports centre. On an island where most of the land is allocated to individuals who now see those traditional interests as protected by the common law, the process of acquiring land for public purposes is considerably complicated.

It would be too much to expect a court making a native title determination to prescribe a detailed regime for its management. It would elicit criticism from other quarters that it had overstepped its proper function. It may be, however, that there can be a closer integration between the courts’ determinative role and consensual mechanisms for the resolution of those issues. This requires a recognition by the court of and a sensitivity to the real impact of its decisions upon the public.

\(^{11}\) (Luke 11: 46)

\(^{12}\) *Mabo v State of Queensland* (1992) 175 CLR 1
One approach is suggested by the *Hopevale* native title determination made in December 1997. This was a consent judgment of the Federal Court made after negotiation of a number of ancillary agreements which dealt with the recognition of existing intra-mural rights, protocols for their exercise and protocols for the provision and maintenance of infra-structure and public works by statutory authorities established by the State of Queensland and specifically by the Far North Queensland Electricity Corporation and Telstra. These agreements were made as part of the mediation process which preceded the consent determination and were formally noted by the Court.

Where a determination is to be made after a trial it may be that the court could provide some incentive for immediate consideration of the practical implications of its order by requiring parties to at least present a program and time frame for negotiations or referring them to mediation on those issues before its formal determination. If justification is needed for such a course in terms of the court’s traditional function, it may be that the rights it is to declare and the operation of the non-indigenous laws and entitlements to which they are subject are likely to be undermined if there is no scheme in place for their exercise and enjoyment respectively. Such a course may also be justified by the need to maintain public confidence in the authority of the courts. If courts are impervious to the practical implications of their decisions then it may justly be said that they inhabit a kind of legal virtual reality which has little connection with the real world.

**Judicial Review**

Judicial review of decisions by Ministers and government officials is a particular example of the often misunderstood limitations of judicial functions. In judicial review the courts carry out a limited function. They are limited to consideration of the lawfulness, fairness and, in a narrow sense, the rationality of the decisions and decision making process. This does not authorise their involvement in merits review, that is substituting their own opinion of the right decision. For many parties coming to court to challenge official decisions this limitation is not easy to comprehend. Justice is measured by outcome, not by the purity of the court’s reasoning. And consistently with judicial review there is no doubt that decisions which are or
appear to be harsh or unjust may nevertheless be lawful and rational and made in accordance with fair processes.

At some levels the courts may be seen as acquiescing in official wrong doing. On the other hand there is an official perspective which is ready to charge the courts with overt or covert intrusion upon the functions of the executive by embarking indirectly upon merits review. For example, in 1996 the Chief General Counsel for the Attorney-General’s Department referred to:

“..... the aggressive and activist work, principally of the Federal Court, in curbing the excesses of the executive as they see it, by resort to reliance on the protection of individual rights, by the expansion of procedural safeguards, and by interference at the preliminary or investigative stage of the administrative process. The outcome has been to turn judicial review into a merits review exercise, to find a means, if at all possible, to overturn decisions that a judge does not like.”

Sharp debate or comment on the work of the courts is to be welcomed and I do not wish to respond to the content of that comment. The point to make about it however, is that there is a real tension between the perspectives of litigants who come to the court seeking their concept of justice, which is in the ordinary case to have a wrong decision righted and the perspectives of government which expect the court to confine itself to the process oriented review to which it is limited by law. How is the problem of public confidence to be addressed when a media report may show to all the world an apparently harsh decision being apparently endorsed by the court.

Plainly it is in part a problem of explanation by the court. The judge in such a case should be at pains to make clear the limitations imposed by law upon his or her role. This can be reinforced by a suitably briefed media office. And the availability of merits review through other processes is something which may need to be explained with greater clarity at appropriate times by government. Attacks upon the courts by Ministers or their representatives for allegedly entering upon merits review in such cases will do little to

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enlighten anybody. If the court has exceeded its function, this can be corrected upon appeal. The High Court has shown no reluctance to do that.\textsuperscript{14}

\textbf{Judicial Law Making}

I have referred to the limitation of the judicial function to the declaration of legal rights and obligations. There is a similar issue arising out of the limits of the law making function of the courts and, particularly, the High Court as ultimate appellate body.

The myth that courts merely find and declare the law and that the judges are, to use the words of Blackstone, “living oracles”, is long exploded.\textsuperscript{15} The common law is in essence judge made law and even the statute law is subject to judicial construction which gives it content, sometimes surprising to its originators. There have been complaints from time to time about perceived excesses in the law making function of the courts. Sometimes these complaints are ad hoc responses to developments in the common law which do not meet the approval of the complainant. One of the more colourful process oriented complaints in this regard was essayed by the former Dean of the Law Faculty of Queensland University who told a New Zealand conference in August 1993:

\begin{quote}
"The Mabo case, therefore, except in relation to the Murray Islanders, is nothing more than a monstrous presumptuous obiter dictum. In the mould of Tasmanian Dams it represents yet another usurpation by the court of the constitutional power of the Australian Parliament and people.\textsuperscript{16}"
\end{quote}

Whether or not the courts have in any case over stepped the line between the incremental law making long recognised as their proper role, and intruded into the sphere of the legislature, is a matter for debate. What must be recognised is the difficulty generated in some areas of the law by the inherent limitations of judicial law making.

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\textsuperscript{14} Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others (1995) 185 CLR 259 \\
\textsuperscript{15} Commentaries Vol 1 p 69 \\
\end{flushright}
The growth of the common law can be compared to biological evolution. It proceeds through the myriad of cases which present for decision and in a cumulative way lead to the development of emergent organising principles for future cases. It has been compared to "the sluggish movement of the glacier rather than the catastrophic charge of the avalanche"\textsuperscript{17}. Lord Devlin once described the creation of a new tort as a process akin to the canonisation of a saint:

"The cause is first of all fostered by academic well wishers and then promoted in the lower courts. Eventually if things prosper, the cause will be beatified by the Court of Appeal and then, probably after a very long interval, it will achieve full sainthood in the House of Lords."\textsuperscript{18}

The trouble with this process is that it is in some cases neither speedy enough nor comprehensive enough for modern conditions. The evolutionary time scale of the common law will not necessarily meet an urgent need for predictable and intelligible rules for resolving specific particular classes of commercial or social conflict in the area of law concerned. The problem becomes acute where parliament cannot or does not legislate to deal with the issue. The paradigm case of this problem in Australia today lies in the common law of native title. There are many pressing and unanswered questions about its content and application. Can native title be recognised in the sea? What are its interactions with the varieties of tenures granted since colonial times, pastoral leases, mining tenements, parks, reserves, commons and, indeed, Aboriginal trust lands? Is the continuing physical connection of traditional owners with land a necessary condition of the recognition of their native title on it? Despite the apparent discontinuity between the common law enunciated in the \textit{Mabo} decision and that which had preceded it, the ongoing development of that common law is likely to be in accordance with traditional processes. As Justice Lee of the Federal Court has said:

"Exegesis of the operation of the common law in respect of native title will take place in the judgments of Australian courts which consider and apply \textit{Mabo (No. 2)}. There will be an incremental development of the law according to the

\textsuperscript{17} W.H.V. Rogers, \textit{Winfield and Jolowicz on Tort} 14th Edition Sweet & Maxwell Ltd, London, 1994, p 17

\textsuperscript{18} The Listener 12 December 1968
particular facts of each case as those cases are brought to the courts for
decision.”

And in the *Wik* case itself, Justice Gummow pointed to the limitations of the outcome of
specific common law cases which might be based upon imperfect or incomplete evidence:

“From such a foundation, the further elucidation of common law principles of
native title, by extrapolation to an assumed generality of Australian conditions and
history from the particular circumstances of the instant case, is pregnant with the
possibility of injustice to the many, varied and complex interests involved across
Australia as a whole. The better guide must be “the time honoured methodology
of the common law” whereby principle is developed from the issues in one case to
those which arise in the next.”

The proper, and it can be said constitutional, function of the courts in their law making role
is necessarily limited and to that extent involves what, viewed in isolation, may be a
deficiency in process. But in a democratic society that deficiency can only be supplied by
legislative action if the proper demarcation between courts and legislatures is to be
maintained. Criticism of the courts for delivering allegedly “unworkable” decisions may be
based upon a misperception of the proper limits of their function or deliberate exploitation of
community ignorance about it. Properly limited that function should leave to legislatures,
executive governments and citizens their proper powers and freedoms in the laws,
administrative practices and personal arrangements they may respectively make.

**Separation of Powers**

An important constitutional limitation on the things courts and judges can do derives from
the doctrine of the separation of powers. Its rationale as applied to judges is perhaps best
expressed in the work of Baron Montesquieu who asserted that there is no liberty if the
power of judging is not separated from legislative and executive powers:

“Where it joins with the legislative, the life and liberty of the subject would be
exposed to arbitrary control; for the judge would be then the legislator. Were it

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19 *North Ganalanja Aboriginal Corporation v State of Queensland* (1995) 132 ALR 565 at 592 per Lee J (dissenting). The decision of the majority of the Court was reversed by the High Court in *North Ganalanja Aboriginal Corporation v State of Queensland* (1996) 70 ALJR 344

20 *Wik Peoples* at 184
Some expressions of popular culture do not accept the doctrine and its rationale. American films about police and criminals sometimes evince impatience and frustration with the constraints on process that the doctrine imposes. In one film a judge, dissatisfied with the acquittal of criminals on the basis of legal rulings he is bound to make, sets up an after hours Star Chamber and summarily executes those he thinks to be guilty. Another film, Judge Dredd, paints a futuristic and entirely approving picture of Sylvester Stallone as a combination of policeman, judge and executioner whose motto is “I am the law”.

Popular attitudes to the doctrine and pragmatic disregard for some of its finer points are translated into the political sphere and sometimes into ministerial decision making about the things judges should be asked to do.

It is as important to communicate clearly to government as it is to communicate clearly to the wider public the reasons for which the courts, and in particular the High Court, set bounds upon the things that judges can do.

A particular application of separation of powers agitated in recent times before the High Court has been the extent to which Federal Judges may be appointed to carry out non-judicial tasks. The Court has held that the separation of powers difficulty may be overcome if two conditions are satisfied:

1. No non-judicial function that is not incidental to a judicial function can be conferred without a judge’s consent - the persona designata condition.

2. No function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power - the compatibility condition.

The conditions appear from the joint judgment of Chief Justice Brennan and Justices Deane, Dawson and Toohey in *Grollo v Palmer* \(^22\), which concerned the validity of provisions of the *Telecommunications (Interception) Act 1979* authorising consenting federal judges, to issue telephonic interception warrants.

Incompatibility is said to arise where the non-judicial function:

1. involves so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable; or
2. is of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised; or
3. is of such a nature that public confidence in the integrity of the judiciary as an institution is diminished. \(^23\)

In considering the validity of the Act the joint judgment expressed clear reservations about the involvement of judges in the issuing of interception warrants:

> "The decision to issue a warrant is, for all practical purposes, an unreviewable in camera exercise of executive power to authorise a future clandestine gathering of information. Understandably a view might be taken that this is no business for a judge to be involved in, much less the large majority of the judges of the Federal Court." \(^24\)

Nevertheless it was held not to be incompatible with the judicial function as the judge would decide independently of the applicant agency whether the warrant should issue. It was the recognition of that independent role that, in the view of the majority judges, "*preserves public confidence in the judiciary as an institution*".

*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* \(^25\) concerned the appointment of a Federal Court Judge to report on the Hindmarsh Island Bridge development to the Minister for Aboriginal Affairs under the *Aboriginal and Torres Strait Islander*

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\(^22\) (1995) 184 CLR 348  
\(^23\) *Grollo v Palmer* at 365  
\(^24\) *Grollo v Palmer* at 367  
\(^25\) (1996) 189 CLR 1
Heritage Protection Act 1984. Holding the appointment to be invalid, the High Court expanded upon the “public confidence” criterion. The overarching principle was that public confidence in the independence of the judiciary is achieved by a separation of the judges from the persons exercising the political functions of government. Therefore no functions could be conferred on a Chapter III judge that would breach that separation. Questions to be answered in determining whether the non-judicial function was incompatible with the judicial role under the third condition of incompatibility were:

1. Whether the function is an integral part of or is closely connected with the functions of the legislature or the Executive government.

2. If no to 1, whether the function is required to be performed independently of any instruction, advice or wish of the legislature or the Executive government, other than a law or an instrument made under a law.

3. If no to 2, whether any discretion purportedly possessed by the judge to be exercised on political grounds - that is on grounds not confined by factors expressly or impliedly prescribed by law.

These questions may involve inquiry into a constellation of factors affecting the appointment to which public confidence or lack thereof may be attributed to the satisfaction of the judicial mind. That attribution may in many, if not in most instances, be intuitive or even a metaphor for judicial confidence. There are of course cases in which substantial public disquiet is evidenced whether through media or otherwise. But this will not necessarily be based upon a tidy application of incompatibility criteria. A theoretically unexceptionable appointment may engender great controversy because it is seen as “political”. A recent example, albeit it involved a retired judge, was the Marks Royal Commission established by the Government of Western Australia to inquire into various events including the conduct of a former Premier of the State, then a serving minister in the Federal Labor Government. The compatibility criteria might well have been answered in favour of the appointment. Its politically controversial character which engendered fierce political criticism of the commissioner was eminently predictable. That is not to say that the commissioner warranted any criticism at all. On the other hand, there may be cases in which the compatibility criteria would preclude an
appointment to non-judicial work that would be of little or no concern to the public as a matter of fact.

The debate which surrounded the appointment some years ago of Justice Stewart of the New South Wales Supreme Court to head the National Crime Authority was contentious but seems largely to have been conducted between judges, leaders of the legal profession and the then Attorney-General, Senator Evans. It will be recalled that Justice Stewart ultimately resigned from the New South Wales Supreme Court but was given by statute the courtesy title of “Mr Justice” and the pension entitlements of a judge under the Commonwealth Judges Pensions Act 1968. Incidentally, Sir Richard Blackburn said of this arrangement in a statement in the Supreme Court of the Australian Capital Territory:

“First, Mr Justice Stewart will not be a judge of this Court. Secondly he will not be a judge of any court. In short, he will not be a judge.”

Denunciations of the appointment were widespread among judges and leaders of the profession although it was defended by Justice Enderby and the New South Wales Society of Labor Lawyers. Mr Murray Gleeson QC, then President of the New South Wales Bar Association, was quoted in the Daily Telegraph of 13 July 1984 as saying that the appointment was “very likely” to involve a judge in public controversy or even court dispute over the extent of his powers and that:

“These factors may well lead to a loss of public confidence in the independence and impartiality of the judiciary.”

In 1990, Mr Justice Phillips of the Supreme Court of Victoria resigned from that Court to accept appointment as Chairman of the National Crime Authority. He was commissioned concurrently as a judge of the Federal Court. There was barely a public ripple. In 1991, and following his retirement as Chairman of the NCA he became Chief Justice of Victoria.

What the saga of the NCA appointments may illustrate is that the concerns of the judges and the legal profession about maintaining separation of powers and their view of public confidence in the judiciary are not necessarily the concerns of politicians or the wider public.
Moreover, applications of the incompatibility test to invalidate appointments will inevitably be attended by some degree of inconvenience and waste of public resources. These may be difficult to explain in a way that is comprehensible to the intelligent layman. That is not to say that the principle should be compromised. But its explanation should be persuasive.

To return for a moment to the Stewart controversy, the words of the Vice President of the New South Wales Bar Association, Mr Roger Gyles QC, seemed to strike the right tone:

“...it is wrong for a judge to head an authority investigating crimes and bringing people to court. The role of a judge is not to hunt criminals but to impartially decide on the guilt or innocence of persons brought to trial.”

The application of compatibility criteria in relation to public confidence will necessarily involve a recognition that this is an area in which opinions may differ and that the courts should keep a weather eye on real world perspectives.

Integration of the Judicial System

Australia has both Federal and State judicial systems. Their efficient interaction has been the subject of much debate and various proposals for reform. It was in the context of incompatibility between judicial and non-judicial functions in State courts that the issue of integration recently arose in the High Court. In *Kable v The Director of Public Prosecutions for the State of New South Wales* the High Court held by a 4-2 majority that the Community Protection Act 1994 (NSW) was invalid. The Act effectively required the New South Wales Supreme Court to make orders for the detention of a particular individual on the ground of his dangerousness and not on the ground of any offence for which he had been convicted. Justices Gaudron, McHugh and Gummow held the exercise of jurisdiction under the Act to be incompatible with the integrity, independence and impartiality of the Supreme Court of New South Wales as a court in which federal jurisdiction had also been invested under Chapter III of the Commonwealth Constitution. Justice Toohey held that the incompatibility arose

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26 A full account of the Stewart debate can be found in the publication of the Australian Institute of Judicial Administration entitled *Judges As Royal Commissioners and Chairman of Non-judicial Tribunals*, 31 August 1985

27 (1996) 189 CLR 51
because the Supreme Court, having been seized of federal constitutional points, was exercising federal jurisdiction conferred by s 39 of the *Judiciary Act* 1903.

Justices Gaudron, McHugh and Gummow found the incompatibility requirement to apply because the State Courts or at least the Supreme Courts of the States are part of an integrated national system for the exercise of the judicial power of the Commonwealth.\(^\text{28}\) Justice McHugh put it thus:

> "Under the Constitution, therefore, the State Courts have a status and role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power."\(^\text{29}\)

To a nation which may still harbour residual memories of the difficulties in bringing about a standard gauge railway and with a contemporary awareness of the costs and absurdities of legislative and jurisdictional disjunctions, talk of integrated court systems should be good news indeed.

And so it was when the reciprocal cross-vesting legislation was introduced some years ago under which State Courts could exercise a wide range of Federal Court jurisdictions and the Federal Court could exercise jurisdiction conferred by State laws. All this on the understanding, which seems to have been honoured, that the object of the scheme was not to promote judicial empire building but to avoid useless and costly jurisdictional arguments in areas of overlap. But the scheme is now under a cloud.

The constitutional validity of legislation vesting State jurisdiction in the Federal Court under the *Corporations Act* was recently considered by the High Court in *Gould v Brown*\(^\text{30}\). Although the validity of that legislation was upheld, the 3-3 split decision has left a serious question over the future of the cross-vesting system. That question was raised by the same

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\(^{28}\) Ibid at 102-103 per Gaudron J, 114-115 per McHugh J, 142-143 per Gummow J

\(^{29}\) *Kable* at 114-115

\(^{30}\) (1998) 151 ALR 395
three judges who expounded the federally integrated system of courts in *Kable*. They would have found the cross-vesting of State jurisdiction in Federal Courts to be invalid.

Space does not permit detailed analysis of the basis upon which that conclusion was reached. But whatever its future as a matter of constitutional principle, there can be little doubt that the outcome of a successful challenge to the cross-vesting legislation will be inconvenience and cost to the public and, for a time at least, a return to the days of jurisdictional guerilla war of no benefit to anyone other than those seeking to avoid their day in court. It will be difficult to explain to the public and, in particular, to the business community why such a result is mandated by the Constitution. In the event, persuasive explanation comprehensible to the intelligent non-lawyer or journalist should accompany, if not form part of, any decision which has that outcome.

**Conclusion**

The functions of courts under the written Constitutions and as defined by constitutional principles raise issues about their interaction with the wider community. They raise issues of communication, explanation and public confidence. They may require consideration of what is fundamental and what is not. In the discharge of those functions, the courts of this country have much to be proud of but no room for complacency. Public confidence is not to be taken for granted. As the Commonwealth Government’s Civics Expert Group found four years ago, a majority of persons whom it surveyed had never seen the Constitution and did not know what it covered. Some did not know that Australia has a Constitution. Twenty eight per cent knew of the concept of judicial independence and 23% were aware that the government appoints judges. There is no reason to suppose that these figures have shifted significantly since then.

On important constitutional principles affecting the core functions of the court, there should be no compromise. There should however be a harsh modesty about their significance to the people at large and a recognition that the courts will be judged by the outcomes they deliver and the ways in which they explain them.