

The Federal and State Courts on Constitutional Law: The 2013 term

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Mark Leeming^{*}

Federal and State courts below the High Court tend not to create radically new law, and especially not radically new *constitutional* law. That is a consequence of the recognition of those courts' proper role in the Australian legal system, and of the High Court's original jurisdiction, commonly invoked if there are no contested facts if an important or novel question of constitutional law arises, or if a litigant wishes to revisit a decision of the High Court.

Constitutional law cases determined in the Federal and State courts in 2013 have, on the whole, applied existing doctrines to particular facts. There is thereby created a body of law, hopefully one that is coherent, fleshing out and giving content to doctrines identified by the High Court. But just because there is almost nothing which is *radically* new does not mean that the decisions lack novelty or interest; to the contrary.

The 2013 decisions are of interest, especially at a conference such as this one, because the nature of constitutional law is that principles tend to be expressed in open textured language at a relatively high level of abstraction. It is difficult to assess the true impact of a novel High Court decision, or (if one is academically inclined) to criticise its merits, until a body of law has been developed applying it. This year's crop of decisions based on *Lange*, *Kable* and the reformulation of *Melbourne Corporation* in *Austin* illustrate the process. It is surely no accident that these are three areas which are recent, based on implications, and have themselves all been reformulated by the High Court within the last decade.

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Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. I wish to acknowledge the considerable assistance given by Ms Amy Knox in the preparation of this paper, and the constructive suggestions from the Honourable Justice Holmes, Mr Stephen McDonald, Mr Stephen McLeish SC SG and Ms Kris Walker during and after the conference. All remaining errors are mine.

The 33 decisions mentioned in this paper come from all States and mainland Territories, and are summarised by subject matter in the following table, together with some information about the present status of the litigation:

| Name | Cite [2013] | Date | Topic | Status of any appeal |
|--|--------------------|-------------|----------------------|--|
| <i>Albrecht v DCT</i> | FCA 1248 | 22 Nov | Melb Corp | FCAFC to hear in August |
| <i>Parliamentary Super. Fund v DCT</i> | FCAFC 127 | 14 Nov | Melb Corp | None |
| <i>CFMEU v Vic</i> | FCA 445 | 17 May | Melb Corp | Appeal allowed |
| <i>Vic v CFMEU</i> | FCAFC 160 | 19 Dec | Melb Corp | ??? |
| <i>O’Flaherty v Sydney</i> | FCA 344 | 15 Apr | Lange | FCAFC reserved 7 Nov |
| <i>Muldoon v Melbourne</i> | FCA 994 | 1 Oct | Lange | NoA filed 22 Oct |
| <i>O’Shane v Harbour Radio</i> | NSWCA 315 | 24 Sep | Lange | None |
| <i>The Age v Liu</i> | NSWCA 26 | 21 Feb | Lange | SL refused 6 Sep |
| <i>Marshall v Megna</i> | NSWCA 30 | 25 Feb | Lange | SL refused 11 Oct |
| <i>Van Lieshout v City of Fremantle</i> | WASC 176 | 23 May | Lange | Interlocutory |
| <i>Alcock v Cth</i> | FCAFC 36 | 8 Apr | Just terms | SL discontinued 26 Jul |
| <i>Esposito v Cth</i> | FCA 546 | 31 May | Just terms | Interlocutory |
| <i>Thiess v Customs</i> | QCA 54 | 22 Mar | Just terms | SL granted (non-const) |
| <i>Emmerson v DPP</i> | NTCA 4 | 28 Mar | Just terms; Kable | HCA heard 4 and 5 Feb |
| <i>Today FM v ACMA</i> | FCA 1157 | 7 Nov | Kable | FCAFC to hear 5 Mar |
| <i>A-G (Qld) v Lawrence</i> | QCA 364 | 6 Dec | Kable | None |
| <i>NAR v PPCI</i> | NSWCCA 25 | 15 Feb | Kable | None |
| <i>Patsalis v A-G (NSW)</i> | NSWCA 343 | 16 Oct | State judges | SL app filed 11 Nov |
| <i>Lodhi v A-G (NSW)</i> | NSWCA 433 | 18 Dec | State judges | ??? |
| <i>Petroulias v Justice McClellan</i> | NSWCA 434 | 18 Dec | State judges | ??? |
| <i>Amelia v Dallas</i> | SASC 160 | 25 Oct | HCA orders | None |
| <i>Telstra v Qld</i> | FCA 1296 | 3 Dec | s 109 | None |
| <i>BCBC Singapore v PT Bayan Resources</i> | WASC 239 | 26 Jun | s 109; Ch III | None |
| <i>Nair-Smith v Perisher Blue</i> | NSWSC 1463 | 4 Oct | s 109 | Notice of intent to appeal lodged 19 Dec |
| <i>Gedeon v R</i> | NSWCCA 257 | 12 Nov | s 109 | None |
| <i>AA v BB</i> | VSC 120 | 20 Mar | s 109; Lange | None |
| <i>NZA v Immigration</i> | FCA 140 | 28 Feb | Misc (NZ) | None |
| <i>Caporale v DCT</i> | FCA 427 | 9 May | Misc (s 55ZG) | None |
| <i>Billington v FaHCSIA</i> | FCA 480 | 22 May | Misc | None |
| <i>Walker v SA (No 2)</i> | FCA 700 | 19 July | Misc (SA) | None |
| <i>State Revenue v Oz Min</i> | WASCA 239 | 17 Oct | Misc (e-t) | None |
| <i>DPP (Cth) v Fattal</i> | VSCA 276 | 2 Oct | Misc (s 116) | None |
| <i>Lewis v DoJ</i> | ACTSC 198 | 1 Oct | Misc | ??? |

I have confined attention to the decisions of the superior courts of the Commonwealth, States and Territories, and I have omitted *Karim v R* [2013] NSWCCA 23; 83 NSWLR 268, in light of the High Court dismissing an appeal from it in *Magaming v The Queen* [2013] HCA 40.¹

One trivial thing illustrated by the table is the aptness of the February timing of this conference. The four decisions I regard of greatest interest (*Victoria v CFMEU*, *Lawrence, Lodhi* and *Petroulias*) were delivered in December 2013 (which is also the *shortest* month of the courts' calendar). Almost half of the decisions (16 out of 33) were delivered in the last three months of 2013. I doubt that is explained by chance;² I suspect there is scope for a more extended analysis of the phenomenon.

Substantively, the 2013 decisions reflect three important themes. The first is perhaps underappreciated, and relates to the maturity of the Australian legal system. None of the decisions concerns a challenge to federal legislative power,³ which was the mainstay of the constitutional law course Professor Crawford taught me 26 years ago. Instead, the overwhelming majority of the litigation concerns implied limitations on federal and state legislative power (three *Melbourne Corporation* cases, half a dozen *Kable* cases and a slew of *Lange* cases) or the interaction between federal and state laws and the exercise of judicial power. This may have consequences for how we think about, and teach, constitutional law. I suspect there is no one in this room more enthusiastic than me for the teaching of so-called “dead” languages at school and university. Although reading and teaching the decisions on the trade and commerce power, or the industrial relations power, is an excellent introduction to the social and economic history of 20th century Australia, it is far removed from the practice of constitutional law as it now occurs, in a relatively mature constitutional setting in the 21st century. If we want to explain or teach constitutional law as a living, useful and relevant subject, there is a deal to be said for shifting its focus towards the areas which continue to yield new learning and reducing the focus on areas where principles are settled and well understood.⁴

It may be constructive to step back and re-evaluate what we understand “constitutional law” to mean. Coincidentally, what precisely amounts to “constitutional law” is presently the subject of lively debate in the United Kingdom, although in a very different context.⁵ More particularly, the question what is “State constitutional law” continues to arise.⁶ For the

¹ The addendum to this paper refers to four decisions which were brought to my attention after the conference.

² It is consistent with the output of appellate courts throughout the common law world. For example, the New South Wales Court of Appeal tends to deliver six or seven substantive decisions a week throughout March until November, and double that number in December: the monthly number of “principal judgments” (ie excluding interlocutory judgments and supplementary judgments on orders or costs) delivered in 2013, according to NSW CaseLaw, was: January 0, February 23, March 18, April 19, May 25, June 34, July 29, August 31, September 28, October 29, November 28 and December 56.

³ Nor was there substantial litigation on federal legislative power in the High Court, although power was in issue in *Commonwealth v Australian Capital Territory* [2013] HCA 55, and (depending on the view one takes to the qualifying words in s 51(ii)), in *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34.

⁴ This may be seen in the shrinking of material on s 51(i) to 13 pages (less than 1%), and the deletion of material on s 51(xxxv) (a head of power slain by *WorkChoices*), in the latest edition of G Williams, S Brennan and A Lynch, *Blackshield & Williams Australian Constitutional Law & Theory* (6th ed 2014), and the expansion of chapters on executive and judicial power.

⁵ See for example the articles by Professor Feldman and Dr Khaitan in (2013) 129 *LQR* 343 and 589.

⁶ Two examples are when French CJ repeated in *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at [19] that “no law of the Commonwealth could impair or affect the *Constitution* of a State” (original emphasis), and in relation to the meaning and operation of s 6 of the *Australia Acts 1986* (see *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [72]-[80]).

purposes of this paper, I have taken the view that there are seven constitutions in this federation and that State constitutional law decisions ought to be mentioned, as well as decisions on the interaction of federal and state laws and courts. That accords with Professor Lewis' definition: "the constitutional lawyer sets about the task of charting the institutions and processes of actual public power."⁷

Secondly, the most numerous cases were those based on the implied freedom of political communication. In light of *Monis*, it seems likely that that trend will continue. These cases illustrated two fairly obvious truths. On the one hand, it is relatively easy to establish a burdening of political communication, either indirectly, or directly and substantially – in every case, this was either conceded, or the submission that there was no burden was rejected.⁸ On the other hand, given that "reasonably appropriate and adapted" is far less stringent than "essential or unavoidable", most commonly the statute has withstood challenge, and here the negative formulation in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] has been influential.⁹ As it has been put in *Blackshield and Williams*, "the freedom will rarely avail the litigant who seeks to rely on it".¹⁰

Thirdly, many constitutional questions were raised by unrepresented litigants in 2013. There is no difficulty in finding that s 80 did not require a jury in the Local Court's summary jurisdiction for a driving offence: *Baker v Attorney-General for New South Wales* [2013] NSWCA 329, nor in concluding that the failure to mention local government in the Constitution did not deny power to a council to impose a fine: *Stewart v City of Belmont* [2013] WASC 366. There are very many more decisions which are similar. Indeed, I am sure that most of the constitutional litigation, *by volume*, takes place in lower courts dealing with what might be called "Swan Hill tramp" arguments, as Owen Dixon KC put it in 1927.¹¹ I have consciously omitted decisions where unrepresented parties advance arguments which are doomed to fail. That said, occasionally the creativity of unrepresented litigants has obliged courts to deal with questions of considerable importance and difficulty, continuing the tradition of Mrs Inglis;¹² indeed, one of the most interesting cases of all (*Billington*) was brought by an unrepresented litigant.

⁷ See "Public Law and Legal Theory", in W Twining (ed), *Legal Theory and Common Law*, (Basil Blackwell 1986), 99 at 111.

⁸ No differently from previous years, as has been noted in *Wotton v Queensland* [2012] HCA 2 at [41] (Heydon J) and *Sunol v Collier (No 2)* [2012] NSWCA 44 at [81] (Basten JA).

⁹ "What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end [in a manner which is] consistent or compatible with observance of the relevant constitutional restraint upon legislative power" (I have applied the reformulation from *Coleman v Power* (2004) 220 CLR 1 at [50] adopted by all members of the Court in *Hogan v Hinch* (2011) 243 CLR 506 at [47] and [97].)

¹⁰ G Williams, S Brennan and A Lynch, *Blackshield & Williams Australian Constitutional Law & Theory* (6th ed 2014), preface, p v.

¹¹ "[I]f a tramp about to cross the bridge at Swan Hill is arrested for vagrancy and is intelligent enough to object that he is engaged in interstate commerce and cannot be obstructed, a matter arises under the Constitution. His objection may be constitutional nonsense, but his case is at once one of Federal jurisdiction": Royal Commission on the Constitution of the Commonwealth, Minutes of Evidence, 13 December 1927, p 788. See M Leeming, *Authority to Decide* (Federation Press 2012), pp 34-35.

¹² Notably, in *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 Mrs Inglis personally persuaded a majority of the High Court that Menzies J at first instance had been wrong to dismiss her writ for want of jurisdiction, and produced what remains as a leading case on s 75(iii).

The remainder of this paper summarises the decisions delivered in 2013 by subject matter, starting with decisions where the implications in *Melbourne Corporation*, *Lange* and *Kable* have been invoked.

I. *Melbourne Corporation*

There were two further challenges to the superannuation contributions tax, following the taxpayers' successes in *Austin v Commonwealth* (2003) 215 CLR 185 and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272. They may usefully be contrasted with one another.

Albrecht

First, in *Albrecht v Commissioner of Taxation* [2013] FCA 1248, nine senior Western Australian police officers, who were members of constitutionally protected superannuation funds, challenged the application of the federal legislation to those funds. They were supported by the State Solicitor General. All save one failed. Siopis J accepted the submission of the Commissioner of Taxation applying the *Melbourne Corporation* principle in the *AEU Case* (1995) 184 CLR 188 at 232:

In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of department and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons, and possibly others as well.

The challengers' primary idea was that policing was a sufficiently core and essential function of government to engage this principle, which, after all, extended to "ministerial assistants and advisers". However, to the extent it was put that policing was *per se* a subject matter which attracted protection, the submission was rejected because it had in substance been determined by the High Court in the *AEU* case itself: at [107]. The fallback argument was that some or all of the senior officers fell within the description of "high level statutory office holders", but Siopis J held that only the Commissioner of Police (who was one of the applicants) fell within the scope of the implied limitation. Insofar as the principle applied to the executive government, it only applied to the remuneration of "those persons who are directly responsible to Parliament, or directly associated with, and responsible, to those persons": at [110].

An appeal to the Full Federal Court was filed 12 December 2013, and is to be listed in the August 2014 sittings.

Victorian Parliamentary Trustee

On the other hand, in *Parliamentary Trustee of the Parliamentary Contribution Superannuation Fund v Commissioner of Taxation* [2013] FCAFC 127, the Commissioner of Taxation was completely successful in defending the validity of the tax in respect of a defined benefits scheme (which has been closed since 2006) for the benefit of members of the Victorian Parliament.

There was no doubt that remuneration of members of the State Legislature was protected by the reformulated *Melbourne Corporation* doctrine; they are legislators and potential Ministers: *Clarke* at [69]. But there was a critical difference in the nature of the legislation, for there was no “constitutionally protected fund”.¹³ The impact of the tax did not, directly, impose any obligation upon members of the Victorian Parliament who were members of the fund; it merely increased (significantly) the liabilities of the trustee. In consequence, the Victorian Parliament enacted legislation which created a “surcharge debt account” for each member which was debited each time the trustee paid that member’s surcharge.

Although it might be thought that the economic effect was similar, that was insufficient to contravene the implied constitutional limitation on power.¹⁴ As the joint judgment of Kenny, Perram and Robertson JJ said at [57]:

The State of Victoria has had imposed upon it a tax of general application: unlike the legislation considered in *Austin* and in *Clarke* there is no special legislation singling out high office-holders of the State. The State of Victoria has chosen to pass that tax on to the members of the Fund. It did not have to do that. ... The State of Victoria chose to respond legislatively not to head off an interference with the terms of the engagement of its members of Parliament but instead to relieve itself of an unwanted pressure on the Consolidated Fund.

On ordinary principles (the authority of the *Payroll Tax case*), such legislation, being a tax of general application, was not invalid.

CFMEU

The remaining *Melbourne Corporation* challenge was an innovative response to an innovative claim by the union that the State’s assessment that Lend Lease had entered into an enterprise agreement with its employees contrary to the State’s tendering guidelines amounted to the taking of adverse action contrary to Part 3-1 of the *Fair Work Act 2009* (Cth). Importantly, the “Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry” were *not* formulated to inform statutory discretion, and did not of themselves create legal rights or obligations. Nevertheless, the litigation proceeded on the basis that a consortium including Lend Lease might be unable to win a tender to build a regional hospital; as it turns out, shortly after the primary judge reserved judgment on liability, the consortium which included Lend Lease was awarded the tender. (The foregoing simplifies the factual background very significantly.)

The primary judge found that there had been a breach: *CFMEU v Victoria* [2013] FCA 445; 302 ALR 1 and imposed a penalty of \$25,000 [2013] FCA 1034. By way of defence, the State advanced an argument that if the federal law had the operation for which the union claimed, it was an impairment of the State’s functions contrary to *Melbourne Corporation*. The primary judge heard, but did not find it necessary to determine, full argument on the submission that the Victorian referral of industrial and employment subject matters on which ss 340-342 of the federal Act are based was a complete answer to the contention (at [276];

¹³ It will be recalled that separate legislation imposes superannuation surcharge tax directly upon the members of a defined benefits scheme where the trustee may not itself be taxed because of s 114 of the Constitution; the Court noted at [10] that the trustee expressly declined to argue that s 114 applied.

¹⁴ Another instance of the High Court distinguishing economic realities from constitutional consequences was the statement by Barwick CJ in *AAP* concerning s 96 grants (“although in point of economic fact, a State on occasions may have little option ...”), cited by (for example) Gummow, Hayne, Crennan and Bell JJ in *Williams v Commonwealth of Australia* (2012) 248 CLR 156 at [148], [248] and [501].

that very interesting proposition is, perhaps, an unanticipated consequence of a referral of power by a State).

The State's appeal was heard over three days in November and judgment was delivered very promptly on 19 December: *State of Victoria v CFMEU* [2013] FCAFC 160. The appeal was allowed on the merits (and is with respect an important judgment on industrial law and, more generally, statutory construction); I merely address the aspects which involve constitutional law.

The main constitutional point arose on a cross-appeal by the union, which contended that the adoption and announcement of executive government policy contrary to federal law was "invalid and of no effect", relying on *Williams v Commonwealth of Australia* (2012) 248 CLR 156. It had not been necessary for the primary judge to address this argument. The union's submission was soundly rejected.

All members of the Court held that the mere adoption of government policy, which did not of itself authorise anything or affect anyone's rights or impose obligations, did not support declaratory relief: Kenny J at [15]-[19]; Buchanan and Griffiths JJ at [145]. In accordance with well-settled principles, there is no Chapter III matter.¹⁵

Further, all members of the Court emphasised that *Williams* dealt with limitations on the authority of the *Commonwealth* executive, rather than limits on the authority of the *State* executive: see Kenny J at [23]-[24] and Buchanan and Griffiths JJ at [148]-[149]:

[T]he cross-appeal seeks to argue for a general limitation on the power of the executive government of a State not to undermine or interfere with the operation of Federal statute law.

The first thing that may be said is that no restriction of this kind arises, in terms, from the Constitution and none is necessary for the reasons expressed by Heydon J [viz, s 109 supplied ample protection to the Commonwealth]. Secondly, we see nothing in *Williams*, with respect, which states such a proposition, even obliquely. If anything, the contrary is the case.

It is clear that principles in *Williams* cannot be indiscriminately translated to the executive government of the States. What remains for determination in future cases is the extent to which aspects of those principles apply, whether directly or by analogy. Buchanan and Griffiths JJ said that "we do not suggest that *Williams* has no implications for State executive power": at [146]. Kenny J said at [27] that *Williams* strongly indicated that:

... there are important synergies between the constitutional considerations that affect the contract-making power of the Commonwealth executive and that which affect the contract-making power of the State.

Her Honour added that although some State constitutional principles might not be expressly stated in State constitutions that did not mean that they did not exist and could be safely disregarded, referring with approval to the responsibility of the executive to parliament which Allsop P regarded as "an essential attribute of the system of responsible government introduced [in NSW] in 1855": *Stewart v Ronalds* [2009] NSWCA 277 at [36]. Plainly

¹⁵ There must be "some immediate right, duty or liability to be established by determination of the Court": see for example *Abebe v Commonwealth* (1999) 197 CLR 510 at [25], referring to *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

enough, there is a deal of work to be done on a case-by-case basis in the future working out the consequences of *Williams* at the State level.

Two supplementary observations may be made. The Full Court briefly rejected the State's submission that it could not be liable for a civil penalty under the federal statute (at [155]-[176], Kenny J agreeing at [29]). This was put as a matter of statutory construction (and the conclusion may or may not translate to different statutory contexts): the State, being a body politic, was not a "body corporate" within the meaning of this particular federal statute. The reasoning records a result which a lawyer in the United States, versed in the decisions on the 11th amendment, would find astonishing; that is yet another example of the foreignness of that country's federal system from our own.

Finally, the nuanced approach adopted by all members of the Court to translating these principles to the State sphere may be contrasted with the pattern of decisions over the last 15 years on the implied freedom recognised in *Lange*, culminating in the *Political Donations* case last year. Those cases disclose little attention being given (principally, it must be said, by the parties) to the different constitutional underpinnings of the Commonwealth and the States.¹⁶ I turn to those decisions next.

II. *Lange*

O'Flaherty

Two decisions arose out of the "Occupy" movement. In *O'Flaherty v City of Sydney Council* [2013] FCA 344; 210 FCR 484, Katzmann J determined a challenge arising out of the "Occupy Sydney" protest in Martin Place. The question was whether signs prohibiting staying overnight in Martin Place, purportedly authorised by s 362 of the *Local Government Act 1993* (NSW), infringed the implied freedom of political communication. The reasons, in my respectful opinion, are very useful illustration of the approach to be taken.

- First, her Honour rejected a submission that the act of staying overnight did not of itself constitute political communication, and in so doing reviewed and relied upon decisions relating to non-verbal protest in many jurisdictions including Europe and North America, whilst being conscious that those decisions did not automatically translate into the Australian context.
- Secondly, her Honour found that the operation and effect (although not the terms) of the State law meaningfully burdened the freedom, and that is sufficient.
- Thirdly, her Honour noted that there was no dispute that the freedom extended to State legislative power. Once again, the difficulties surrounding the translation of a limitation on legislative power to the largely unentrenched State constitutions were elided over, although it must be acknowledged that the concession was borne out by what has most recently been said in *Unions NSW v New South Wales* [2013] HCA 58 at [25].

¹⁶ See A Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws" (2012) 35 *UNSW Law Journal* 625 esp at 638-647.

- Fourthly, her Honour identified the legitimate ends of the prohibition (maintaining public health, safety and amenity in a high use public area), and gave a careful analysis of why it was reasonably appropriate and adapted to serve that legitimate end, including reliance on the facts that (a) the law was not directed to political communication, (b) it was connected with conduct not words, (c) it was limited in area and time and (d) there were no obvious alternatives by which those legitimate ends could be effectuated.

An appeal was heard (by Edmonds, Tracey and Flick JJ) on 7 November 2013 and is reserved.

Muldoon

O’Flaherty is to be contrasted with *Muldoon v Melbourne City Council* [2013] FCA 994. In New South Wales in *O’Flaherty*, Katzmann J heard from six counsel over two days and produced a judgment of 96 paragraphs. In Victoria, where the facts were essentially the same, but where the *Charter of Human Rights and Responsibilities Act 2006* (Vic) intervened, and the proceeding was framed as a class action, North J heard from eleven counsel over eight days and produced a judgment of 468 paragraphs. The constitutional component of the reasons resembled those of Katzmann J, and is, if I may respectfully say so, likewise helpful and useful (see at [351]-[416]). The constitutional outcome was the same.

It is often said by their critics that Bills of Rights are a boon for lawyers. These two parallel challenges within the same Court and involving essentially the same facts are an excellent real life Australian example of the additional time and cost of litigation introduced by a Bill of Rights.

Of course, it would have been open to Messrs O’Flaherty and Muldoon to commence in the Supreme Court.¹⁷ Indeed, the choice to commence in the Federal Court involved Mr Muldoon running the gauntlet of a novel jurisdictional challenge. For it was said that there was no challenge to the validity of the statutes pursuant to which regulations were made; the question, so it was said, was whether there was a valid exercise of the statutory power to make delegated legislation. The point of the submission was to deny “arising under” jurisdiction to the Federal Court under s 39B(1A)(b) of the *Judiciary Act*. This was rejected, North J following and applying the reasoning in *Levy*, and distinguishing *Wotton*, which was a challenge to an administrative decision, rather than the exercise of power to make delegated legislation: at [120]-[134].

More generally, it might be interesting to investigate the cases where a litigant had a forensic choice between challenging a State or Federal law in a State or Federal Court.¹⁸ My expectation is that there is little difference in outcome, and that a lawyer in the United States (where choice of venue is considered to be so vital) would be amazed at that fact.¹⁹

¹⁷ Prior to 1997, they would not have been able to sue in the Federal Court. Since 1997, s 39B(1A)(b) of the *Judiciary Act* conferred civil jurisdiction in respect of s 76(i) matters (matters arising under the Constitution) on the Federal Court.

¹⁸ See for two examples in criminal contexts *Karim v R* [2013] NSWCCA 23; 83 NSWLR 268 and *Heli-Aust Pty Limited v Cahill* [2011] FCAFC 62; 194 FCR 502.

¹⁹ Some of the United States literature on the importance of choice of venue in United States law, especially in relation to class actions (where certification and approval of attorney fees loom large), referring to what are known as “magnet jurisdictions”, may be found in M Leeming, *Authority to Decide* (Federation Press 2012), pp 218-220.

Finally, in both *O'Flaherty* and *Muldoon*, it was conceded that the implied constitutional freedom of association (to the extent that one exists) complemented, and could not be used to out-flank, *Lange*: see at [85]-[87] and [284]. That concession was properly made on the state of existing High Court authority (including *Wainohu v New South Wales* (2011) 243 CLR 181 at [112]).

O'Shane

There was at least one, and on one view two, *Lange* issues determined by a divided New South Wales Court of Appeal in *O'Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315. Ms O'Shane, a serving magistrate, brought a defamation action following pejorative statements on air by Mr Alan Jones of Ms O'Shane's performance as a magistrate. The defendants pleaded a defence of truth, and identified nine decisions, seven of which had been overturned on appeal, supporting that plea. Ms O'Shane said, inter alia, that her judicial immunity prevented the defendants from an inquiry into those decisions.

One *Lange* question arose from the submission by the defendants that if judicial immunity prevented an inquiry into the decisions supporting the defence of truth, then it burdened the implied freedom of political communication and was not reasonably appropriate and adapted to serve a legitimate end. That question did not arise, on any of the approaches of the five-member court to whom the issues were referred. All members of the Court concluded that her Honour having commenced the action, judicial immunity could not be used as a sword to prevent a statutory defence of truth.

The larger question was whether the magistrate was able to maintain a cause of action in defamation at all, in circumstances where the imputations related to the conduct, competence and capacity of the performance of her functions as a judicial officer. The majority of the Court (Beazley P, McColl JA and Tobias AJA) held that judges, no differently from other members of the community, could sue in defamation at least where, as here, the decisions (save for one) had been made many years previously and it was a "virtual certainty" that contempt proceedings could not be brought. Dissenting, broadly in accordance with a passage in the reasons of McHugh J in *Mann v O'Neill* (1997) 191 CLR 204 at 235, Basten JA, with whom McCallum J agreed, considered that she could not. In a sense (perhaps an extenuated sense) that may be seen as an aspect of the common law of defamation conforming with the Constitution; cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 (although this was not how it was decided nor argued); it is also a decision which in the United Kingdom would be regarded as "constitutional".

Liu

There were another three more conventional *Lange* challenges. In *The Age Company Ltd v Liu* [2013] NSWCA 26; 82 NSWLR 286 (special leave refused, 6 September 2013) the New South Wales Court of Appeal dismissed a challenge to the validity of r 5.2 of the Uniform Civil Procedure Rules 2005 (NSW), which authorises preliminary discovery of documents to discover the identity of a prospective defendant. Ms Liu alleged that The Age newspaper had published imputations of corrupt conduct by her in connection with dealings with a federal Labor politician, and sought preliminary discovery of the sources from the publisher and three journalists. Part of the defence was a challenge to the validity of the rule.

Bathurst CJ (with whom Beazley and McColl JJA agreed) confirmed that in a challenge based upon the implied freedom of political communications, the starting point is to construe the rule: at [85]. Preliminary discovery was only available where there was a genuinely held

and objectively based desire to commence proceedings, which could not be commenced notwithstanding the applicant having made reasonable inquiries, and which in any event remained discretionary. Bathurst CJ found it unnecessary to answer whether the implied freedom directly required that general discretion only validly to be exercised in accordance with constitutional requirements and limitations: cf *Miller v TCN Channel 9 Pty Ltd* (1986) 161 CLR 556 at 613-614, approved in *Wotton v Queensland* (2012) 246 CLR 1 at [10], [21]-[22], [31]. Bathurst CJ rejected the Attorney-General's submission that the first *Lange* question (whether the law effectively burdens freedom of communication about government or political matters) should be answered negatively, although the burden was indirect, applying what had been said by McHugh J in *Coleman v Power* (2004) 220 CLR 1 at [91] that it was sufficient for the law "directly and not remotely" to restrict or limit communications (whilst noting that the more stringent test favoured by Callinan and Heydon JJ would lead to a different answer). However, Bathurst CJ found that the rule was appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of a constitutionally prescribed system of government, by protecting persons from false and defamatory statements from unnamed sources, having regard to the defence of qualified privilege available to those defendants.

This is another example of the phenomenon that almost all of the work done in *Lange* cases occurs in connection with the second limb of the test.

Marshall

In *Marshall v Megna* [2013] NSWCA 30 (special leave refused, 11 October 2013) the New South Wales Court of Appeal (Beazley JA, Allsop P and Hoeben JA agreeing) rejected a submission that there was an independent category of case within the *Lange* implied freedom of political communications which did not fall within the traditional category of qualified privilege and which was unconfined by the requirement of reasonableness. That rejection was decisive, because the defamatory conduct complained of, the publication of a circular of a non-existent organisation, the "Drummoyne Council Ratepayers' Association" was never contended to be reasonable.

Van Lieshout

Liu and *Marshall* were determined six and two days respectively before *Monis* was delivered. In *Van Lieshout v City of Fremantle (No 2)* [2013] WASC 176 a *Lange* challenge was made to clauses in a planning scheme regulating the placing of advertising signs supporting the "West Australian Party" (of which Hall J said at [3] "if this is a political party it is not a well-known one"). Making the assumption that the signs had a political purpose, Hall J found, irrespective of whether the test was that applied by French CJ and Hayne J in *Monis*, or that by Crennan, Kiefel and Bell JJ, the laws were reasonably appropriate and adapted to achieve a legitimate end, or alternatively, were clearly proportionate to the objective that they seek to achieve, and there were no less drastic means that were clearly more obvious and compelling as a means of achieving those purposes.

The need to apply the somewhat divergent strands emerging from *Monis* is likely to be a theme of future litigation invoking the implied freedom; as this decision illustrates, unless it is necessary to do so, it is appropriate for courts below the High Court to avoid making decisions which turn on one strand rather than the other.

III. Just terms

This is an area where the principles are well settled, and yet litigation continues, although as will be seen, the points taken have been weak. Although McHugh J once described s 109 as the “running down constitutional jurisdiction”, s 51(xxxi) is arguably a stronger candidate for that unenviable title. The plaintiff most commonly fails because the Australian guarantee is much narrower than “takings” which are forbidden by the 5th Amendment.

Alcock

In *Alcock v Commonwealth* [2013] FCAFC 36 the Full Court (Rares, Buchanan and Foster JJ) dismissed a challenge to variation of rights under an abalone fishing licence pursuant to Victorian law. The Full Court confirmed, if confirmation be necessary, that the private statutory rights given by the licence were freely amenable to abrogation or regulation by a competent legislature, that there was no immediately apparent fetter upon the power of the Victorian parliament to extinguish or modify the licence, and because no person had “acquired” the interest which the appellant claimed he had lost when access to marine parks and sanctuaries had been denied, there was no requisite acquisition by another. More fundamentally, none of the consequences for the appellant occurred as the result of a law of the Commonwealth. Hence the s 51(xxxi) challenge was rejected.

Submissions that fisheries law outside State limits fell within exclusive Commonwealth power were robustly rejected. So too was an argument based on s 109, seemingly based on Commonwealth sovereignty and the regime established under the *Seas and Submerged Lands Act 1973* (Cth).

Esposito

A similar challenge, in part based on s 51(xxxi), was rejected at the interlocutory injunction stage in the careful and comprehensive (notwithstanding *ex tempore*) reasons of Griffiths J in *Esposito v Commonwealth* [2013] FCA 546. Ultimately this was a challenge to a decision by a Commonwealth minister to refuse a proposed rezoning of land near Jervis Bay under the *Environmental Protection and Biodiversity Conservation Act 2004* (Cth). An interlocutory injunction was sought by the landowners of a “paper” subdivision, based in part upon a claim that compensation was required under s 519 of the Act because otherwise s 51(xxxi) would be contravened. Making all factual allowances appropriate at the interlocutory stage, where it was sufficient to establish a serious question to be tried, Griffiths J referred to the requirement that there be an “acquisition”, confirmed in *JT International SA v Commonwealth* (2012) 86 ALJR 1297. There was no acquisition here; the landowners remained free to sell and use their land, subject to relevant land use restrictions, no differently from other land subject to zoning by local council.

Thiess

In *Thiess v Collector of Customs* [2013] QCA 54 it was contended that s 167(4) of the *Customs Act*, which states that “no action shall lie for the recovery of any sum paid to the Customs ... unless the payment is made under protest ... and the action is commenced within [6 months]” contravened s 51(xxxi) of the Constitution. Once again, the point seems to have been very weak, first, because of familiar authority dealing with federal limitation laws including *Smith v ANL Ltd* (2000) 204 CLR 493, and also because the *Customs Act* includes (no differently from much federal legislation) a provision to the effect that if any provision would result in an acquisition of property, then the Commonwealth must pay a reasonable amount of compensation as agreed or determined by a court of comparable jurisdiction.

Accordingly, although special leave to appeal was granted on 11 October 2013, the appeal was confined to the non-constitutional aspects of the decision: [2013] HCATrans 239.

Emmerson

Finally, in *Emmerson v Director of Public Prosecutions* [2013] NTCA 04, all members of the Court of Appeal of the Northern Territory rejected a submission that Territory legislation authorising the confiscation of proceeds of crime contravened the prohibition on acquisition of property without just terms in s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) (which is modelled on s 51(xxxi)); that reflects a line of cases including *Burton v Honan* (1952) 86 CLR 169 and *Re Director of Public Prosecutions; ex parte Lawler* (1994) 179 CLR 270. However, a *Kable* challenge succeeded by majority, which is the topic to which I shall immediately turn. Special leave was granted and an appeal was heard on 4 and 5 February, and by notice of contention there seems to have been complete re-argument on the acquisition of property issue. It is likely therefore that before many months, there will be another High Court decision on acquisition of property.

IV. *Kable*

Emmerson

In *Emmerson*, a majority of the Northern Territory Court of Appeal (Kelly and Barr JJ, Riley CJ dissenting) found that Territory confiscation of proceeds of crime legislation was not distinguishable from that considered in *South Australia v Totani* (2010) 242 CLR 1. There seems to have been no attention paid to the question whether some more stringent principle obtained.²⁰ As noted above, this appeal has been heard and is therefore likely soon to be decided.

Today FM

The telephone call by two radio presenters posing as Queen Elizabeth II and Prince Charles gave rise to a constitutional challenge to the investigative and regulatory powers of the Australian Communications and Media Authority in *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* [2013] FCA 1157. The Authority produced a preliminary report in which it expressed the view that the broadcaster had contravened s 11 of the *Surveillance Devices Act 2007* (NSW), which would amount to a contravention of a licence condition (which in turn would give rise to other disciplinary powers). The broadcaster sought declaratory relief that the Authority was not authorised to make findings that it had committed a criminal offence, or, if it was, that the authorising provisions were invalid as being contrary to Ch III or should be restrained as interfering, or carrying a real risk of interfering, with the administration of justice in a criminal proceeding.

Edmonds J rejected the challenge on conventional grounds. His Honour emphasised that neither the preliminary finding, nor the final finding of the Authority would itself amount to a determination of guilt or innocence notwithstanding that they might be a stepping stone to some further action. It followed not only that the investigation was authorised, but was not an exercise of judicial power and so not contrary to Ch III.

An appeal is set down for hearing on 5 March 2014 before Allsop CJ, Robertson and Griffiths JJ.

²⁰ It is suggested that the better view is that Territory courts invariably exercise federal jurisdiction; see further the analysis of *Lewis* at the end of this paper.

Lawrence

Attorney-General for the State of Queensland v Lawrence [2013] QCA 364²¹ was a *Kable* challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) on the “essential notion” confirmed in *Pompano* at [123] of “repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system”. The validity of that very Act had been affirmed in *Fardon*, and so attention focussed upon the amendments made in some haste²² by the *Criminal Law (Public Interest Declarations) Amendment Act 2013* (Qld), which empowered the Governor, on the recommendation of the Minister, by gazettal to declare that a “relevant person” must be detained if satisfied that his or her detention is in the public interest. The Minister was likewise empowered to recommend if satisfied that detention was in the public interest. A “relevant person” was a person subject to a continuing detention order under the Act. A widely drafted privative clause protected decisions of both the Minister to recommend and the Governor to make a public interest declaration.

Applications for continuing detention were made by the Attorney-General, and a case was stated to the Court of Appeal. The joint judgment of the Court of Appeal (Holmes, Muir and Fraser JJA) held that the exercise of the power would undermine the authority of the orders of the Supreme Court. For “the substantial effect of such a declaration is equivalent to a reversal of the Court’s order”. More importantly, even in the absence of a declaration, the Act undermined the authority of the Supreme Court because of its *potential* for exercise: “all such orders [*viz* continuing detention orders] now must be regarded as provisional.” Accordingly, it struck down the critical provisions in the 2013 amending Act, noting that doing so did not invalidate the original Act. There are also useful statements as to standing and discretion (at [38]-[41]): Mr Lawrence had an interest in the court order presently being sought by the Attorney against him to be final, rather than subject to the exercise of power under the 2013 Act).

NAR

In *NAR v PPCI* [2013] NSWCCA 25 the Court of Criminal Appeal rejected Ch III challenges to State provisions protecting sexual assault communications privilege, which provide a relatively stringent test to be satisfied before production of privileged material be made available. The Court applied what had been held in *KS v Veitch (No 2)* [2012] NSWCCA 266.

²¹ *Attorney-General for the State of Queensland v Fardon* [2013] QCA 365 was heard and determined simultaneously, and with the same outcome, but the reasoning relevant to this conference is contained in *Lawrence*.

²² Page 3522 of Queensland Hansard for 17 October 2013 records the following motion put by the Leader of the House at 11.59pm:

“the Criminal Law Amendment (Public Interest Declarations) Amendment Bill having already been declared an urgent bill, the following time limits apply to enable the bill to be passed through its remaining stages at this day’s sitting:

- (a) second reading by 1.30 am;
- (b) consideration in detail to be completed by 1.58 am;
- (c) third reading by 1.59 am; and
- (d) long title agreed by 2 am.

If the stage has not been completed by the time specified, Madam Speaker shall put all remaining questions necessary to pass the bill, including clauses en bloc, without further amendment or debate.”

The motion was carried, and in accordance with it, debate ceased and the bill passed through the chamber shortly after 2am.

V. Interaction between State and Federal laws

State judges

A trio of cases about the administrative functions of State judges, including the interaction with the exercise of federal jurisdiction, are in my view some of the most interesting constitutional law decisions in 2013.

Patsalis

In *Patsalis v Attorney-General for New South Wales* [2013] NSWCA 343 there was purportedly an appeal from the refusal of a Supreme Court judge to inquire into a conviction under s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW). The judge provided reasons for his refusal: see [2012] NSWSC 1597. The Court of Appeal dismissed the purported appeal as incompetent; the judge had been acting administratively, rather than exercising judicial power, so that no appeal lay.

However, the Court of Appeal treated the application as one for judicial review pursuant to s 69 of the *Supreme Court Act*. That raised a constitutional question, whether the principles discussed in *Kirk* required the Court's supervisory jurisdiction to extend to the review of an administrative decision of a single judge of the Court, noting that from time to time it has been said that prerogative writs "went only to an inferior court" (see for example *Craig v State of South Australia* (1995) 184 CLR 163 at 174). Basten JA concluded that the unavailability of review for non-jurisdictional legal error was inapplicable when a judge was not acting in his or her judicial capacity. The Court did not finally determine the metes and bounds of the jurisdiction, it being plain on examination that there were no errors of law in the judge's determination.

A special leave application was filed on 11 November 2013.

Although self-evidently important, that analysis is relatively straightforward. It may be contrasted with the complexity introduced when a State judge is involved in an inquiry under State law into a conviction in a State court against a law of the Commonwealth.

Lodhi and Petroulias

When a State Act requires a State judge to authorise the Sheriff to investigate into the conviction by a s 80 jury of an offence against a law of the Commonwealth, there is apt to be a multitude of questions which, on the view I take, are fairly described as "constitutional". The decisions of the Court of Appeal in *Lodhi v Attorney-General of New South Wales* [2013] NSWCA 433 and *Petroulias v The Hon Justice McClellan* [2013] NSWCA 434 remind their reader of the constitutional complexities underlying what is only seemingly a seamless amalgam when State courts determine prosecutions under federal law. In each case, the question was shortly stated, but complicated to analyse.

In each case the applicant had been found guilty by the verdict of a jury of a serious offence under Commonwealth law ("terrorist acts" under s 101 in Pt 5.3 of the Criminal Code (Cth) in the case of Mr Lodhi, and offences under the *Crimes Act 1914* (Cth) in the case of Mr Petroulias). In each case, after conviction, there were concerns about one of the jurors. (In the case of Mr Lodhi, there was hearsay evidence that one juror had been diagnosed with schizophrenia and suffered from paranoid delusions, including "delusions of persecution by terrorists". In the case of Mr Petroulias, an internet blog extending over some 30 pages

contained material purporting to reflect a discussion of the merits of the convictions, some purporting to be views of members of the jury.)

Section 73A of the *Jury Act 1977* (NSW) authorises the sheriff to conduct an investigation if there is reason to suspect that a jury's verdict may have been affected because of improper conduct, but only "with the consent of or at the request of the Supreme Court or District Court". In each case, the Chief Judge at Common Law was asked to request an investigation by the sheriff, and declined to do so. In each case, the applicant commenced proceedings seeking to review that refusal, and the matter was heard by the Court of Appeal constituted by Bathurst CJ, Beazley P and Basten JA. The constitutional issues have nothing to do with s 80; they are much more interesting.

Only by first analysing (a) whether the Chief Judge was exercising an administrative or a judicial power and (b) whether the Court of Appeal reviewing that exercise of power was exercising federal jurisdiction, could one even begin to address the ultimate questions, namely, did the rules of evidence apply, was there an obligation to give reasons, what bases were available (if any) to review the refusal, and could the application for review be treated as a further request to the Court under the *Jury Act*.

In *Lodhi*, the Court concluded that the Chief Judge was exercising an administrative power, from which no appeal lay (in accordance with *Patsalis*). The Court of Appeal was not exercising federal jurisdiction in conducting the review under s 69 of the *Supreme Court Act 1970* (NSW), because its outcome would not affect rights or obligations determined in the exercise of federal jurisdiction. That in turn led to the conclusion that nothing in *Wainohu v State of New South Wales* (2011) 243 CLR 181 or principles analogous to it required the Chief Judge to give reasons in the exercise of an administrative function.

However, the same analysis meant that the application for judicial review might itself be treated as an application under the Act for the Court to request the sheriff to conduct an investigation. That request, in the case of Mr Lodhi, was ultimately granted. In reaching that conclusion, Basten JA (with whom the other members of the Court agreed) had regard to the operation of s 68 of the *Judiciary Act 1903* (Cth) and concluded that because what was in issue was at one remove from a direct challenge to the conviction for a federal offence, it did not involve an exercise of judicial power, and therefore did not require the operation of s 68 of the *Judiciary Act*. Instead, State law applied of its own force with respect to the powers of the sheriff and the executive power conferred on the Supreme Court: at [63].

Although Mr Lodhi had exhausted all appeals, Mr Petroulias still had (and still has) undetermined appeal proceedings in the Court of Criminal Appeal. In his case, there was a further question as to whether, indeed, the Court should have been constituted as the Court of Criminal Appeal. No question was raised as to any *Momcilovic* incompatibility, and the Court was able to turn to the request on its merits and conclude that the proposed investigation was without merit. Although the threshold jurisdictional and constitutional questions were novel and complex and more difficult than the ultimate question on the merits, the Court (in my respectful view, entirely properly) first identified the existence and nature of its jurisdiction.²³

²³ Cf a debate in the pages of the Australian Law Journal: (2012) 86 ALJ 616, (2013) 87 ALJ 680 and 685.

Amelia

In *Amelia v Dallas* [2013] SASC 160, Gray J addressed unusual arguments arising out of a custody and property dispute between a deceased man's widow and mother. A statement of claim was filed in the High Court alleging that Ms Amelia was a resident of South Australia and Ms Dallas was a resident of New South Wales. The High Court, seemingly on its own motion, remitted the proceeding to the Supreme Court of South Australia. The respondent contended that the High Court's order was made without jurisdiction, with the consequence that the Supreme Court of South Australia lacked jurisdiction. That was the occasion for Gray J reasoning, with respect surely correctly, that

- it being the “first duty” of any court to satisfy itself that it has jurisdiction, the High Court's order impliedly determined that the parties were residents of different Australian states and therefore within the High Court's diversity jurisdiction under s 75(iv);
- the High Court being a superior court of record, its order was valid until set aside and could not be the subject of collateral challenge, and
- the Supreme Court's jurisdiction was sourced in s 44 of the *Judiciary Act*, which was enlivened by the remittal order.

V.2 Section 109 inconsistency

Telstra

An interesting sequela to the *Bayside* litigation (see (2004) 216 CLR 595) was *Telstra Corporation Ltd v State of Queensland* [2013] FCA 1296. Once again there was challenge to State laws imposing a tax on telecommunications carriers on the basis that, so it was said, the law discriminated against carriers and users of carriage services contrary to cl 44 of Sch 3 of the *Telecommunications Act 1997* (Cth). The challenge was to the *Land Act 1994* (Q) and Land Regulation 2009 (Q), which imposes a higher rent on land leased from the state to a carrier pursuant to a “communications lease” than would be the case if it were a “business or government lease”. However, the decision is not about the ultimate question of inconsistency.

Faced with slowly moving proceedings, and Telstra's attitude that it was not required to pay rent at the prescribed rates, leading to what the State claimed to be a debt of \$12.5 million and steadily increasing, the State sought the following declaration:

A declaration that, pending determination of this proceeding, [Telstra] is lawfully obliged to pay the [State] rent on leases it holds under the *Land Act 1994* (Qld) at the rates and in the amounts prescribed by the Land Regulation 2009 (Qld).

That is an unusual application (many landlords would crystallise a dispute by exercising powers under the lease for default, or seeking an interlocutory injunction, or levying execution for debt or identifying a separate question for early decision). There was, to my mind a little surprisingly, extensive debate about whether the declaration in the form sought was interlocutory or final, and whether there was an “irrebuttable presumption” that delegated legislation is valid unless and until declared invalid. Rangiah J had little difficulty

holding that there was no such presumption, that the declaration sought by the State was interlocutory, and accordingly, on conventional grounds, could not be granted.

BCBC

In *BCBC Singapore Pte Ltd v PT Bayan Resources Tbk* [2013] WASC 239, Le Miere J rejected a challenge to the making of freezing orders in aid of proceedings on a cause of action being tried in a foreign court. He rejected the submission that the Court's rules regulating freezing were s 109 inconsistent with the *Foreign Judgments Act 1991* (Cth); it was sufficient to observe that the federal Act was not an exclusive and exhaustive code with respect to the enforcement of foreign judgments, but in any event, as his Honour held, the making of a freezing order does not impair, negate or detract from the operation of the federal Act. Rather, it supports the ability of the Court to prevent the Court's processes from being frustrated.

Nor was there any incompatibility, contrary to Ch III of the Constitution, in the conferral of the function of making freezing orders upon the State court. The submission was that "it is antithetical to the judicial process to make predictions about how matters may turn out in foreign proceedings without the Australian court actually being empowered, or called upon, to make the decision for itself applying foreign law": at [69]. The short answer to the submission was that the Supreme Court has an inherent jurisdiction to make a freezing order, which therefore cannot be contrary to Ch III. That is a useful proposition to bear in mind; it accords with long-standing statements, especially by McHugh J, as to the importance of historical antecedents to laws and practices said to engage *Kable*.²⁴

Nair-Smith

In *Nair-Smith v Perisher Blue Pty Ltd (No 2)* [2013] NSWSC 1463, there was discussion of the important question whether Pts 1A and 2 of the *Civil Liability Act 2002* (NSW) reduce the damages for a claim for breach of the term implied by (former) s 74(1) of the *Trade Practices Act 1974* (Cth). Without resort to s 79 of the *Judiciary Act*, Beech-Jones J regarded the reasoning in *Wallace v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 as dispositive, especially the reasoning that "the warranty created by s 74 carries with it full contractual liability for breach". If Pt 1A applied, then there would be a direct inconsistency, which would "alter, impair or detract from" s 74.

Gedeon

In *Gedeon v R* [2013] NSWCCA 257, the appellant, who had succeeded in (2008) 236 CLR 120 in persuading the High Court to find that evidence of cocaine found in his possession was the result of an unlawful "controlled operation", had nevertheless failed at trial to exclude that evidence. His appeal against conviction contended that s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW) was inconsistent with s 233B of the *Customs Act 1901* (Cth). Ultimately the submission seems to have been that in not providing for the defence of reasonable excuse under State law, the State Act took away a right or privilege available under the *Customs Act*, namely, possession of an imported drug with reasonable excuse.

Bathurst CJ rejected the submission, emphasising (1) that the federal legislation dealt with importation, while the state legislation dealt with possession; (2) the reversal of onus in cases where the Crown establishes beyond reasonable doubt that the accused had possession of not

²⁴ See for example the references to the "traditional judicial process" in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [41] and [42].

less than a traffickable quantity of the prohibited drug did not take away any right or liberty left open by the *Customs Act*, nor did it alter, impair or detract from it; (3) the contrast with *Dickson* was marked, given that there the two laws covered the same area, namely conspiracy to steal Commonwealth property.

The other four members of the Court concurred. The decision illustrates once again the need, emphasised in *Momcilovic* at [245], [261] and [637], first to analyse both laws in question to determine their proper construction.

AA

Finally, there is a careful analysis in *AA v BB* [2013] VSC 120 (Bell J) of the interaction between orders permitting contact made under the *Family Law Act 1975* (Cth) and orders made by a magistrate under the *Family Violence Protection Act 2008* (Vic), as to the latter there was no dispute that they had been contravened. On appeal, elaborate arguments were advanced that they were invalid by reason of the s 109 inconsistencies, as well as the implied freedom of political communication. Those challenges were dismissed.

VI. Miscellaneous

NZA and Walker

Perhaps the most creative constitutional law submission of 2013 was that rejected in *NZA v Minister for Immigration and Citizenship* [2013] FCA 140, which was a review of an AAT visa cancellation decision under s 501 of the *Migration Act 1958* (Cth) following the applicant's conviction in the Supreme Court of Queensland. Relying on covering clause 6, the applicant (a New Zealand citizen) submitted that "there was no constitutional power to cancel his visa under s 501 of the *Migration Act*, because New Zealand was constitutionally part of Australia".

Covering clause 6 defined the States to "mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth..."; the words "as for the time being" were fatal to the submission.

The litigant in *NZA* might have benefited from reading *Walker v State of South Australia (No 2)* [2013] FCA 700. There Mansfield J, in the course of rejecting a submission that the Commonwealth did not have sovereignty over land comprising Kangaroo Island and a substantial part of the Fleurieu Peninsula, gave a careful and detailed legal history of the establishment of the colony of South Australia and the constitutional foundations of the Province and later State.²⁵

²⁵ That might have indicated another argument, more closely connecting New Zealand with Australia. For New Zealand was a formal dependency of New South Wales for a few months in 1840 (see 3 & 4 Vic 62 c 62 (1840) and letters patent of 16 November 1840). Beforehand, it had been treated as an "adjacent Pacific island" thereby falling within the letters patent commissioning Governor Phillip: see *Wacando v The Commonwealth* (1981) 148 CLR 1 at 8. However subsequently the history of the colony of New South Wales was one of steady shrinkage: losing Norfolk Island in 1843, Victoria in 1851, Queensland in 1859, "no-man's land" to South Australia in 1861, the Australian Capital Territory in 1909 and Jervis Bay in 1915. See A Twomey, *The Constitution of New South Wales* (Federation Press 2004) p 38.

Caporale

In *Caporale v Deputy Commissioner of Taxation* [2013] FCA 427; 212 FCR 220, Robertson J dealt on the merits with a challenge to the validity of s 55ZG of the Judiciary Act. That is the provision which requires various bodies (including legal practitioners acting for many Commonwealth departments, organisations and authorities) to comply with certain Legal Services Directions but adds that they are non enforceable, and non-compliance may not be raised in any proceedings except by the Commonwealth.

Robertson J confirmed that it was open for the Commonwealth Executive to create or impose obligations owed only to the Commonwealth, and that this had occurred in the Legal Services Directions: “I accept that the Parliament may in the first instance shape and limit such obligations and rights which the Parliament itself creates”: at [39]. His Honour then construed s 55ZG(3), concluding that it did not operate as a privative clause, taking away the jurisdiction from any court, but was reflective of the limited scope and nature of the obligations created by the Commonwealth: at [50]. On those bases, the section was valid.

Fattal

In *DPP (Cth) v Fattal* [2013] VSCA 276, Buchanan AP, Nettle and Tate JJA crisply rejected a submission that a constitutional right to freedom of religion under s 116 entitled Mr El-Sayed to conspire to attack the Australian Army base at Holsworthy for the purpose of advancing Islam. The Court stated that the constitutional question was whether the provision of the Criminal Code was a law for the prohibition of the free exercise of a religion. As Starke J had observed in *Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 155, s 116 did not confer an unlimited licence to propagate or disseminate subversive doctrines. It was easily held that it did nothing to immunise a law punishing inflicting violence.

Billington

A large constitutional question arose out of very human facts in *Billington v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2013] FCA 480. Ms Billington and her partner were domiciled in Queensland. She gave birth to a son on 30 March 2011 in the Tweed Hospital in New South Wales, where she remained until 4 April 2011. On 5 April 2011, Ms Billington lodged an application for the benefit, commonly known as the “Baby Bonus”. However, on 31 March and 1 April 2011 a Queensland magistrate at Southport made orders under the *Child Protection Act 1999* (Qld) whose purported effect was to place the child in the care of the Chief Executive of the Queensland Department of Community Services. In point of fact, from 4 April 2011 the child has been in foster care.

Initially, a delegate within Centrelink rejected Ms Billington’s claim. On internal review it was determined she was entitled to be paid the Baby Bonus for one day, namely, 30 March 2011. In the AAT it was determined she was entitled to two days (30 and 31 March 2011): see [2012] AATA 181. Ms Billington sought an “appeal” under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) to the Federal Court in relation to a very small question: she claimed she was entitled to a bonus payment for five days, rather than two (30 and 31 March, and 1, 2 and 3 April).

However, some very large legal questions were, with respect rightly, identified by Logan J. His Honour had little difficulty in determining that there was power under s 2 of the *Constitutional Act 1867* (Qld), as confirmed (or extended) by s 2 of the *Australia Acts 1986*

(Cth) and (UK): see at [32]-[33]. Each of the parents lived in Queensland, and at birth the child acquired a domicile of origin of Queensland.²⁶

The most important issue arose from the existence of a New South Wales counterpart to the Queensland legislation, namely the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which applied in the same place and to the same person (although the application of the NSW Act was contingent, there being no evidence to support a finding that the child was at risk of harm in New South Wales, and certainly no order had been made under the NSW Act). The position resembles operational inconsistency cases like *The Kakariki*, in a s 109 context, where both federal and State laws confer powers only one of which is exercised. However, Logan J, with respect correctly, recognised that s 109 had no operation to a conflict between two State laws. He placed considerable reliance upon Professor Carney’s analysis in *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) which is critical of the “predominant territorial nexus” test to resolve a conflict between two inconsistent State laws, and instead applied what had been said by Kirby J in *BHP Biliton Ltd v Schultz* (2004) 221 CLR 400 at [144], to the effect that there not being an unavoidable conflict between the laws of two states, the court would not pronounce on the question:

In the absence of such conflict and in the presence of a relevant connection to sustain extra-territorial legislative competency, extra-territorial effect will be given to a State law purporting to have that effect.

In effect that applies, with respect sensibly, substantially similar principles of “operational inconsistency” to resolve a conflict between two State laws or, more accurately, a potential conflict between orders pursuant to two State laws. Seen in that light, there is no conflict at all. This emphasises that irrespective of the merits of the predominate territorial nexus test, a precondition to applying it is that there is an actual, rather than merely potential, conflict between State laws.

Oz Minerals

In *Commissioner of State Revenue v Oz Minerals Ltd* [2013] WASCA 239 the Court of Appeal readily rejected a challenge to Western Australian stamp duty legislation being beyond power as not having “even a remote or general connection” with Western Australia. The underlying facts were a transfer of shares leading to a change in control of a corporation incorporated and registered outside Western Australia, where both transferor and transferee had no connection with Western Australia, but there was sufficient connection because the taxpayer indirectly owned land in Western Australia, even though the obligation was only engaged because rights under a contract of work between the government of Indonesia and an Indonesian subsidiary was a “tenement, right or interest that was” similar to a tenement or right under Western Australian law and held under the law of another jurisdiction.

Lewis

Finally, in *Lewis v Chief Executive, Department of Justice and Community Safety* [2013] ACTSC 198, Reshaug ACJ dealt with an elaborate series of arguments, heard over three days in 2009 (2 and 3 July and 16 November). Mr Lewis had been convicted and sentenced by the Magistrate’s Court to twelve months imprisonment on 24 January 2008 for recklessly or intentionally inflicting actual bodily harm in the course of watching football on a television

²⁶ *Udney v Udney* (1869) LR 1 Sc & Div 441. Because the child was not a foundling, his place of birth (New South Wales) was not relevant: *Somerville v Somerville* (1801) 5 Ves 750 at 757; 31 ER 839 at 858.

in a tavern in Fyshwick, the sentence to be served by way of periodic detention. Thereafter, Mr Lewis failed to attend at the periodic detention centres, and the Territory Sentence Administration Board held an inquiry in his absence, cancelled the periodic detention, and issued a warrant for his arrest. Mr Lewis commenced serving the balance of his sentence on 5 January 2009.

It was said that the power conferred by Territory legislation upon the Board to cancel periodic detention impaired the integrity of the Supreme Court of the Territory. However, what had occurred appears to have been the automatic cancellation following Mr Lewis's failure to attend on two or more occasions for periodic detention, brought about by statute.

Likewise, there was a straightforward answer to the other Ch III challenges to the Board's cancellation decision, namely that as had been said by Kitto J in *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378, "the determination [by the tribunal] itself has no operative effect: it constitutes the factum by reference to which the Act operates to alter the law in relation to the particular case", applied by McHugh, Gummow, Hayne and Heydon JJ in *Baker v The Queen* (2004) 223 CLR 513 at [43]: "in general a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence".

Nevertheless, the reasons elaborately ask and answer a much more general and important question (at [292]-[354]), namely, may judicial power be given to the Board? His Honour found that even had the powers of the Board to cancel periodic detention been the exercise of judicial power, then the ACT legislative assembly had power to invest the Board with that jurisdiction. That amounted to what may be regarded as a surprising conclusion:

Having given the matter anxious and careful thought and not without some hesitation, I am of the view that the current state of authority is that there is no applicable doctrine of the separation of powers flowing from the Australian Constitution that applies in the ACT as an independent self-governing territory, and that, while the ACT courts may be invested with federal jurisdiction, as are the State courts, the judicial power of the ACT is not the judicial power of the Commonwealth.

If by that paragraph his Honour was saying that the Territory courts *invariably* exercise the judicial power of the ACT and not the judicial power of the Commonwealth, then that proposition is incorrect.²⁷ Indeed, his Honour was exercising the judicial power of the Commonwealth, hearing and determining a panoply of constitutional submissions which amounted to a s 76(i) matter.

However, in my opinion the better view is that Territory courts *invariably* exercise the judicial power of the Commonwealth. That had been held by Finn J in *O'Neill v Mann* (2000) 101 FCR 160 at [26]-[30], for careful reasons, which accorded with what had been said by Dixon J in *Laristan*, Gummow J in *Kruger*, and advocated by Professors Cowan and Zines. It aligns with the "integrating" decisions which have been seen in the last decade.²⁸

²⁷ It is contrary to what was held in *Northern Territory v GPAO* (1999) 196 CLR 553 and *Spinks v Prentice* (1999) 198 CLR 511, as well as the unanimous decision in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [28] ("a court of the territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament").

²⁸ I should acknowledge that it is a view I have endorsed (in *Authority to Decide* at 24-26, a book published three years after the case was heard, and one year before judgment was delivered), and also that there are

The only authority squarely on point is *O'Neill v Mann*, where Finn J held unequivocally that because the source of *all* enforceable laws in the Territory (including the common law action in defamation before him) arose indirectly under the *Seat of Government Acceptance Act 1909* and ss 3 and 4 of the *Seat of Government (Administration) Act 1910*, there was a s 76(ii) matter. That reasoning was, and was expressed to be, essential to Finn J's conclusion that (sitting in the Federal Court) he was validly exercising cross-vested jurisdiction. His Honour did not refer to (and may not have been taken to) Finn J's reasons. That suggests that the decision may be regarded as having been decided *per incuriam*.

The general question is of considerable importance to all three self-governing Territories. There were other, narrower ways, argued by the parties, by which the same result could have been reached. In short, there are in my respectful opinion a number of criticisms which may be made of *Lewis*, which stands alone as an atypical example of a non-incremental constitutional law decision made in 2013 by courts below the High Court.

Conclusion

Whether or not one agrees or disagrees that all of these decisions properly answer the description of "constitutional" is not to the point. If a review of them has caused people to think again about the nature of constitutional litigation, in the Australian legal system – a legal system which is one of the most mature in the common law world – then a principal purpose of this paper will have been achieved. The decisions also illustrate the important incremental role of courts below the High Court working out the metes and bounds of constitutional principle; which is simply the ancient tradition of the common law in action.

Addendum

I am grateful to Mr Stephen McDonald, Mr Stephen McLeish SC SG and Ms Kris Walker for referring me, after the conference, to four further decisions from the Supreme Courts of Victoria and South Australia. I should have included reference to three South Australian Full Court decisions: *Attorney-General (SA) v Bell* [2013] SASCF 88; 117 SASR 482, *Police v Murray* [2013] SASCF 68; 116 SASR 482 and *R v Giannakopoulos* [2013] SASCF 50; 116 SASR 262. The first and second dismissed *Kable* challenges, upholding the validity of (a) a "three-strikes" scheme involving the forfeiture of the offender's motor vehicle following his or her conviction for three offences involving misuse of motor vehicles, and (b) a law obliging a magistrate to make a nominal order for costs if a magistrate found an accused guilty, unless the prosecution agreed otherwise. The third analysed the operation of evidence obtained covertly at a Commonwealth place (Adelaide Airport) pursuant to State law, dismissing a raft of statutory and constitutional challenges; special leave was refused: [2013] HCATrans 324. Finally, Kyrou J upheld a challenge to an order imposing a charge by the Murray Valley Citrus Board in *Seven Fields Property Pty Ltd v Murray Valley Citrus Board* [2013] VSC 423. Although strictly the decision turned only on whether or not the order was a fee for services, and therefore authorised by the State law, there is a careful and useful review of the decisions under s 90. I have been told there is to be no appeal.

alternative, and entirely respectable, views (see for example, T Pauling and S Brownhill, "The Territories and Constitutional Change" (2007) 28 *Adelaide Law Review* 55 at 71-72 and 78).