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"Beyond Ridgeway – Judicial Responses to Ridgeway and other aspects of illegality"

by

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Abstract

This paper examines the decision of the High Court in the matter of *Ridgeway v R* and some of the responses to that decision in the States of Australia, particularly South Australia and Victoria. The thesis of the paper is that *Ridgeway* represents an important development by the High Court in terms of the fundamental principles applicable in the criminal justice system in Australia. It is argued that the case stands for more than a mere extension or re-statement of the principles espoused in *Bunning v Cross* and that more importantly, when the rationales of the reasons for decision are examined, the case reveals the beginning of a recognition of minimum standards to be applied in any democratic society in the criminal justice system.

It is further argued that attempts in the various States of the Commonwealth to limit or restrict the scope of the decision are moves based on a failure to recognise the more important underlying significance of the decision in the context of other more recent judgements of the High Court, particularly *Wilson v The Minister for Aboriginal Affairs*, and *Kable v Director of Public Prosecutions (NSW)*.

The decision of *Ridgeway v R* is an important development in the administration of criminal justice in the Commonwealth of Australia. At first glance, the case concerns the now common case of an undercover operation whereby police commit illegal acts and the evidence thereby obtained is subsequently excluded by the Court. This is the familiar *Bunning v Cross* type situation and indeed it represents nothing new or radical. However, the approach of the Court in *Ridgeway* does represent a departure from *Bunning v Cross* and can now be seen as something more than a mere re-statement of the principles established in that case – that there are now judicially recognised standards to which the executive must comply in the enforcement of the law, and that the failure to so comply will lead to Courts marking their disapproval of such conduct by a stay of proceedings.

The Facts of the Case

The facts are comprehensively referred to in the judgement of the majority of the Court, however it is useful for present purposes to mention a few of the more salient features of the case.

Ridgeway, who was suspected by the police of being a dealer in drugs, was the subject of an international undercover operation aimed at securing his conviction for drug offences. The operation was international in scope with both the police and other government departments in Australia and Malaysia being involved therein.

The basic plan was to procure the purchase in Malaysia of an amount of heroin which was then to be imported into Australia under the auspices of the Australian Federal Police and with the knowledge and concurrence of the Customs authority. Once the heroin was in the country, it was arranged for Ridgeway to be contacted with a view, hopefully, to his purchasing the drugs and thereafter to his being arrested.

This is in fact what came to pass, with the police as well as undercover operatives meeting in a metropolitan hotel where the exchange would take place. Ridgeway was given possession of a bag containing heroin although it was argued at his trial that he did not know the contents of that bag.

Ridgeway was charged with the possession of a prohibited import pursuant to section 233B of the *Customs Act, 1901* (Cth) and was put upon his trial in the District Court of South Australia where he was eventually found guilty of that crime.

Ridgeway appealed his conviction to the Full Court of the Supreme Court of South Australia where it was once again argued that the evidence ought to have been excluded on public policy grounds given that the police had committed illegalities. The argument was rejected by that Court (although his Honour Justice Legoe dissented). Thereafter, an application for special leave to appeal to the High Court was granted.

The Arguments in the High Court

It was argued in the High Court that the decision of the South Australian Full Court was wrong on various grounds including the traditional *Bunning v Cross* arguments concerning public policy. However, in addition, two further arguments were presented, namely:

1. That the Court ought to recognise and adopt the doctrine of entrapment as a substantive defence as was the case in other common law jurisdictions; and

2. More importantly, that if 1 was rejected, that the Court ought to adopt an objective test in determining the admissibility or otherwise of evidence obtained by police in contravention of the law.

As is now known, the Court rejected the recognition of entrapment as a substantive defence. It did find, however, that where the police conduct is in clear contravention of the law, and where other circumstances are found to exist (which are discussed below), there will be an overwhelming case made out for the exclusion of evidence. It should be noted that it would not be every case where the evidence would be excluded, however, the Court did go some way to the establishment of categories of case by which this issue may be determined.

The Judgement

The best way to explain the judgements of the High Court is to reproduce the more important extracts from the judgements of both the majority and minority, both of which are important.

At ALR 43 the majority, (comprising Mason CJ, Deane and Dawson JJ) said:

> "... the objective elements of the offence of which the appellant was convicted were: (i) possession of heroin; (ii) absence of reasonable excuse; and, (iii) prior importation of the heroin into Australia in contravention of the Act. There is no doubt that the first two of those elements were satisfied in the present case. The appellant was in possession of the heroin when he was taken into custody. There is no suggestion that he had any reasonable excuse for that possession. Obviously, he had acquired and was in possession of the heroin for unlawful purposes.
>
> Nor is it argued on the appellant's behalf that the third objective element of the offence was not established. To the contrary, **the illegality of the importation of the heroin was and is a central plank of the appellant's argument both in the South Australian Full Court and in this court**. That argument is that the proceedings against the appellant should have been stayed or the evidence of the appellant's guilt should have been excluded on discretionary grounds by reason of the fact that the heroin had been illegally imported into Australia under the auspices of, and with the active involvement of, the Australian Federal Police so that it could be supplied to the appellant."

And further at pages 46-7:

> "Analysis of the majority judgments in the United States Supreme Court discloses that they provide no satisfactory conceptual basis for the acceptance of entrapment as a substantive defence to a criminal charge under our law. In particular, those judgments do not identify any common law principle which is capable of sustaining the proposition that an otherwise guilty person is not guilty if, lacking previous intent or purpose, that person was induced or persuaded to do what he or she did by some government officer. As has been seen, their basis is a presumption of legislative intent, namely, that it was not the intention of Congress that "otherwise innocent" persons should be entrapped into the commission of criminal offences. That basis is not, however, adequate to sustain the creation of a substantive defence of entrapment in this country. Even if it be assumed that it would not have been the legislative intent that persons should be induced by government officials to commit crimes which they otherwise would not have committed, it is a very long step to the conclusion that, if a person does in fact commit a crime as a result of such inducement, he or she is none the less not guilty of it for the reason that there should be read into the express terms of every provision creating a statutory offence an unexpressed qualification establishing an applicable defence which is unknown to, and quite contrary to, our common law. Whatever may be the position in the United States, the principles of statutory construction provide no warrant for the taking of such a step by our courts."

At 48-50:

> "More importantly, the considerations of "high public policy" which justify the existence of the discretion to exclude particular evidence in the case where it has been unlawfully obtained are likewise applicable to support the **recognition of a more general discretion to exclude any evidence of guilt in the case where the actual commission of the offence was procured by unlawful conduct on the part of law enforcement officers for the purpose of obtaining a conviction. In both categories of case, circumstances can arise in which the need to discourage unlawful conduct on the part of law enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in the conviction of those guilty of crime.** In both categories, the objective of the unlawful conduct is the obtaining of curial advantage: the use of the unlawfully procured evidence in one category; the obtaining of a conviction for the unlawfully procured offence in the other. In both, the reception of the evidence by the courts is a critical step in the obtaining of that objective. If, in relation to either category, no judicial discretion existed to prevent the curial advantage being derived from the unlawful conduct, statements of judicial disapproval would be likely to be hollow and unavailing and the administration of justice would be likely to be "demeaned by the uncontrolled use of the fruits of illegality in the judicial process". Indeed, there is much to be said for the view that the considerations favouring the exclusion of unlawfully procured evidence of a crime which had already been committed are likely to be less compelling than those favouring the exclusion of evidence of a crime which would never have been committed but for such unlawful conduct on the part of law enforcement officers designed to bring about its commission.
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> Moreover, the two principal considerations weighing against the recognition of a judicial discretion to reject evidence of an offence procured by illegal conduct on the part of law enforcement officers were also the principal considerations which weighed against the recognition of the discretion to reject unlawfully procured evidence. The first of those considerations is that to which reference has already been made, namely, the legitimate public interest in the conviction of those guilty of crime. In Ireland and Bunning v Cross, that consideration was rightly seen as not justifying a denial of the existence of a discretion to exclude unlawfully procured evidence but as constituting the primary factor to be put in the balance against the considerations favouring a rejection of the evidence in determining how the discretion should be exercised in all the circumstances of a particular case. It should be similarly seen in relation to a discretion to exclude evidence of an offence procured by unlawful conduct. The second of those considerations lies in the separation, under our system of the administration of criminal justice, of executive and judicial functions. The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution, when initiated and while maintained, is that of the courts. None the less, it has long been established that, once a court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances, reject relevant and otherwise admissible evidence on discretionary grounds or temporarily or permanently stay the overall proceedings to prevent abuse of its process. "

The most important feature of this extract, and that to which I return below, is the necessity to "preserve the integrity of the administration of criminal justice" or at the least judicial involvement in that system. It is my submission that it is that important principle which underlies the entire judgement.

The Court goes on at 50-51 to cite some relevant Unites States decisions to the same effect:

> "As Frankfurter J wrote in *Sherman*:
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> > "In so far as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognised jurisdiction to formulate and apply "proper standards for the enforcement of the federal criminal law in the federal courts", *McNabb v United States*, an obligation that goes beyond the conviction of the particular defendant before the court. **Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.**"
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> Subsequently, Frankfurter J quoted with approval the substance of the following passage from the opinion of Roberts J in *Sorrells*:
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> > "The doctrine [ie of entrapment] rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention."
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> In our view, the reasoning in those minority opinions and in the minority opinions of Douglas J (Brennan J concurring) and Stewart J (Brennan and Marshall JJ joining) in *United States v Russell* provides persuasive support for the recognition in this country of a judicial discretion to exclude evidence of **an ILLEGALLY PROCURED OFFENCE analogous to the *Bunning v Cross* discretion to exclude ILLEGALLY PROCURED EVIDENCE** ."

Thus it will be seen that the High Court created a **new** judicial discretion, the discretion to exclude the ILLEGALLY PROCURED OFFENCE, based on the touchstone of the necessity to maintain public confidence in the administration of criminal justice.

The High Court continued at 52 to go further and to state that even the "immorally" procured offence could erode public confidence in the administration of criminal justice. They said:

> "In a context where ancillary offences — such as counselling, being knowingly concerned in, inducing, aiding, abetting and procuring — exist, in one form or another, in all Australian jurisdictions and where no laws exist authorising law enforcement officers to encourage or participate in the commission of criminal offences in order to enable the apprehension and procure the conviction of those whom they believe to be involved in criminal activity, it is likely that conduct which intentionally procures the commission of a criminal offence by another will itself be criminal. None the less, circumstances can conceivably exist in which a law enforcement officer intentionally brings about the opportunity for the commission of a criminal offence by conduct which is not criminal but which is quite inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement. Extreme cases of creating circumstances of temptation under which a vulnerable but otherwise law-abiding citizen commits an offence of a kind which (so far as the police are concerned) he or she otherwise might not have committed provide possible examples."

Next the majority go on to discuss the various categories of cases at 54-55:

> "References in this judgment to an offence being "procured" by illegal conduct on the part of law enforcement officers are intended to refer to two distinct, but possibly overlapping, categories of case. The first category consists of cases in which the police conduct has induced an accused person to commit the offence which he

or she has committed. In that category of case, the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations except in what we would hope to be the rare and exceptional case where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched *(and these are disjunctive not conjunctive)* that it is clear that considerations of public policy relating to the administration of criminal justice require exclusion of the evidence. The other category of case is where illegal police conduct is itself the principal offence to which the charged offence is ancillary or creates or itself constitutes an essential ingredient of the charged offence. An example of that category is a case where a person is charged with receipt or possession of stolen property in circumstances where not only the supply, but the actual theft, of the stolen property had been organized by the police for the purpose of obtaining the conviction of the person to whom it is supplied. **In that category of case, the police illegality and the threat to the rule of law which it involves assume a particularly malignant aspect.** Even in such a case, if the police conduct is disowned by those in higher authority and criminal proceedings have been instituted against the police as well as the accused, it is unlikely that considerations of public policy relating to the integrity of the administration of criminal justice would require the exclusion of evidence either of the accused's offence or of the particular element of it created by the police illegality. If, however, the illegal police conduct would appear to be condoned by those in higher authority and it does not appear that criminal proceedings have been brought against the police, those considerations of public policy will be so strong that an extremely formidable case for exclusion will be raised. Indeed, if the courts were prepared to allow curial advantage to be derived from the police illegality in such circumstances, there could be no satisfactory answer to Macrossan CJ's rhetorical question "at what point would it ever be appropriate to demur and offer objection?"

At page 58:

"... in the context of the fact that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as heroin, it is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the Legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone, regardless of whether he or she be government officer or ordinary citizen. To do otherwise would be to undermine the rule of law itself."

I examine in the latter part of this paper some of the "legislative regimes" which have been introduced in South Australia and Victoria.

Gaudron J

Her Honour echoes the importance of the integrity of the public perception of the judiciary in the administration of justice and says at page 85:

"... in cases which go beyond the provision of mere opportunity, where the offence results from the illegal actions of those whose duty it is to uphold the law, it is they who, in a real sense, are responsible for its commission, not the accused. In such circumstances the accused and society in general may well view prosecution as a serious injustice.

But what is more important is that the administration of justice is inevitably brought into question, and public confidence in the courts is necessarily diminished, where the illegal actions of law enforcement agents culminate in the prosecution of an offence which results from their own criminal acts. Public confidence could not be maintained if, in those circumstances, the courts were to allow themselves to be used to effectuate the illegal stratagems of law enforcement agents or persons acting on their behalf. **So far as public confidence in the administration of justice is concerned, the position is even worse if, as is usually the case, the law enforcement agents or those acting on their behalf are not brought to account for their criminal acts. In cases of that kind, the courts are brought into greater disrepute because they give the appearance of sanctioning illegality. And that appearance is given even if criticism is made of the police conduct involved. Indeed, criticism may well appear to be mere humbug and, itself, lead to a further erosion of confidence in the courts.**

> The prosecution of an offence which results from the illegal acts of law enforcement agents is not vexatious or oppressive, in the sense that those terms are generally understood. Nor is it properly described as a proceeding the predominant purpose of which is improper, that being the accepted test whether proceedings have been brought for an improper purpose. That is because, ordinarily, law enforcement agents will have acted, as they say they did in this case, solely or mainly for the purpose of investigating or detecting crime. Equally, prosecution authorities will ordinarily have acted, as they also say they did in this case, solely or mainly for the purpose of ensuring the prosecution of those who perpetrate crime. But those considerations are beside the point when the inevitable consequence of the proceedings is to weaken public confidence in the administration of justice. Proceedings of that kind are, on that account, an abuse of process. **And that is so no matter the purpose or motive with which they are brought and no matter that a fair trial is possible."**

Her Honour is using "fair trial" in the sense that in all **other** respects the trial is fair.

While there is a great deal more involved in the case than the extracts which I have here reproduced, the above passages at the least provide the essential features of the decision. It has been argued, however, that the decision in *Ridgeway* is rather more narrow than those passages would suggest. It is my view, however, that such a narrow view can prevail only if emphasis is placed on the issues of the admissibility or otherwise of the evidence obtained and that there is a consequent failure to concentrate on the reasons for that exclusion.

There is a more fundamental approach to be taken to this case, and that concerns that aspect which deals with the creation of minimum standards, on the one hand, and the necessity to ensure that the appearance of the Courts as impartial bodies in the administration of justice is preserved. These latter two principles are crucial to an understanding of the case for in my view it is by a concentration on these aspects of the case that the decision in *Ridgeway* can be located in a broader context.

The Responses of the State Supreme Courts

Before going on to consider these issues in more detail, it is first necessary to examine the approach of some of the Courts of the States to this decision. Time constraints do not permit an extensive examination, and nor is it possible to examine the reactions in every State. For these reasons, I concentrate on two important features in South Australia and Victoria.

It is my respectful submission that the Courts in these States have failed to properly apply the decision in *Ridgeway* by concentrating exclusively on the question of the admissibility of evidence with a concomitant failure to embrace the wider implications for the criminal justice system as a whole.

South Australia

It is important to examine the response of the South Australian Supreme Court to *Ridgeway* since it is from that State that the decision was appealed.

It is submitted that the South Australian Courts have essentially ignored *Ridgeway* by distinguishing that case on its facts. On the basis that in that case the accused was charged with a federal offence (an element of which was the very act of importation) and that that fact serves to distinguish the case from the "ordinary" controlled buy situation where State police are seeking to "entrap" persons in relation to purely State offences. In relation to those offences, importation is not an

element of the offence and as such, the considerations which led the High Court to exercise their discretion to exclude the evidence would have been exercised differently (so it is asserted)

It is sufficient to refer to the recent decisions of *R v Albu and Gheorghita* and *R v Martelli* which were both cases of the classic "controlled buy", namely a situation where the accused who is invariably a known drug dealer, is approach by the police with a view to their purchasing drugs from that suspect. The purchase monies for the drugs was supplied by the police, and the request for the purchase was theirs also. In South Australia, the offence with which the accused is usually charged is one of the two alternatives in section 32 of the *Controlled Substances Act, 1984* (SA) – either selling or taking part in the sale of a drug or substance.

In *Albu* and *Martelli*, the accused argued that evidence of the purchase and/or sale should be excluded in accordance with the decision in *Ridgeway*. In both cases, the argument was rejected both at the trial stage and on appeal to the criminal jurisdiction of the Full Court. In both cases it is the fact that importation is not an element of the offence in these State offences which formed the basis upon which *Ridgeway* was distinguished. Further, it was argued that unlike *Ridgeway*, none of the conduct of the police was an essential element of the offence. It is submitted, however, to concentrate on these factors alone, to the exclusion of the more fundamental principles of whether the conduct of the police was acceptable conduct in an objective sense, leads inevitably to the situation where the standards applied in the criminal justice system are eroded to such an extent that questions arise as to the ability of that system to be viewed by the public as an impartial system in the administration of justice.

The basic fact remains that in South Australia, it is common and commonly accepted by the Courts, that police can engage in this sort of "controlled buy" activity and that this is so despite the fact that that conduct is criminal conduct. I am not suggesting that this criminality is committed for anything but the best of motives ie "the end justifies the means". We can all agree that the drug problem is a serious problem which requires solutions. The solution, however, cannot be achieved by bringing our system of criminal justice into contempt. In other words, one can understand the drug dealer who says that the Police Officer got a promotion whilst he got 5 years for doing exactly the same thing.

It is my submission that it can never be acceptable in a criminal justice system in a responsible democratic society for there to be an inconsistent application of the criminal laws. Such a situation runs counter to the very doctrine of the rule of law which underpins the essence of a democratic system.

It is relation to this last aspect that I wish to examine the position in Victoria which in a very direct sense deals with the dilemma in terms of the rule of law.

Victoria

The important feature of the Victorian position upon which I seek to concentrate is a combination of section 51 of the *Drugs Poisons and Controlled Substances Act, 1981* (Vic.) and the judicial interpretation of that section in the matter of *R v Papoulias* [1988] VR 858. The effect of the combination of these two factors is that in Victoria, as in South Australia, it is acceptable and accepted by the Courts that police can engage in the same sorts of criminal activity which they are seeking to prevent.

Section 51 of the *Drugs Poisons and Controlled Substances Act* provides:

> "**51**. No member of the police force or person if the member or person is acting under instructions given in writing in relation to a particular case by a member of the police force not below the rank of senior sergeant shall be deemed to be an offender or accomplice in the commission of an offence against this Act although the first mentioned member or person might but for this section have been deemed to be such an offender or accomplice."

The intent of the section is clear. It is to ensure that the police are not prosecuted for any criminal conduct in which they might engage while acting in the course of an undercover operation. The difficulty, however, is that in construing this section, the Supreme Court of Victoria has held that the section means something very different from the mere granting of an immunity from prosecution. In *R v Papoulias*, the Full Court of the Supreme Court of Victoria held that police officers acting within the scope of their section 51 authorisations are not merely immune from prosecution, but further that they are to the "adjudged" as if they had never committed a crime. The Court said at 862:

> "In our opinion the effect of s. 51 in the circumstances is that the police officers... committed no offence against the Act by what they did; and moreover that they were not to be judged as accomplices of others who might have committed offences against the Act. It follows and counsel for the applicant ultimately conceded, that the evidence that the officers gave could not be characterised as evidence illegally obtained in the sense that it was evidence of crimes committed as much by them as by the applicant."

Needless to say it is my submission that this case was wrongly decided but more importantly, that the decision is dangerous to the extent that it interferes with the fundamental doctrine of the rule of law in that, while on the one hand it cannot be denied that the police have committed illegalities, the effect of the decision is that it purports to create a legal fiction by holding that otherwise is the case. Such a position is most obviously repugnant to the important feature of equality before the law which, in essence, is the very heart of the doctrine of the rule of law.

As is often said, difficult cases make bad law, and it is clear that *Papoulias* is a present example of this truism. The difficulty for the Victorian Court was that it was faced with the question of whether the ordinary principles of exclusion of evidence apply despite the fact that police are effectively conferred immunity from prosecution. The argument is simply that the fact of immunity does not alter the fact – for the purposes of the discretion – that the conduct engaged in by the police was criminal conduct. *Bunning v Cross* can still apply, but more importantly *Ridgeway* also applies.

The response of the Courts has simply been an attempt to "get around" *Ridgeway*. Again, while this may be for what are perceived by the judges of our States to be the most noble of reasons, it is my submission that such an approach is essentially short sighted and based on a failure to recognise the more important principle at work in these situations, namely the maintenance of minimum standards in the enforcement of the law. It is my submission that such an approach fails to recognise that there are more important principles at stake than a balancing of the degree of seriousness of offending against the public interest in punishing wrongdoers. Rather, the Courts should include, as a factor in the exercise of their discretion, the question of whether the judicial condoning of this sort of police conduct is likely to have an impact on the standing and perception of the Court in the public eye. Such a feature is a crucial to the ability of the Court to continue to operate effectively in society for needless to say not only must justice be done, it must be seen to be done.

It is to this feature of the importance of the perception of the Courts in the public arena that I now wish to turn. It is my submission that that feature, is a more important consideration to be taken into account by a trial judge in exercising a judicial discretion to admit or exclude evidence illegally obtained. This factor was clearly and obviously at the forefront of the consideration of the High Court in *Ridgeway*, and conversely has been and still is given little weight in the State Courts (where after all the everyday business of determining judicial discretion is carried out).

The Importance of Public Perception

In some of the more recent cases in the High Court, there has emerged a strong re-statement of the importance in any democratic society of the independence of the judiciary. Absent such independence there can be no true democracy. Just as important as independence, however, is the necessity that the public who are the members of such a democracy have faith in that independence.

It is this latter feature in the context of the *Ridgeway* discretion upon which I wish to concentrate in the remainder of this paper.

In the two recent cases of *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 the High Court has enunciated two ways in which it is essential to ensure that the Australian judicial system is and remains independent, and more importantly, they have employed the requirement that the courts be seen to be as such by the public.

In *Kable*, the concern of the High Court was with the judiciary as an institution as a whole whereas in *Wilson* the focus was directed more specifically at judges. It was held in both cases that in both respects the importance of the appearance of independence is just as important as the fact of independence.

Kable v DPP for NSW (1996) 138 ALR 577

In *Kable* the Court was called upon to consider a provision of the *Community Protection Act, 1994* (NSW) which allowed a judge of the Supreme Court of New South Wales to make a "preventative detention order" as that term was defined by the Act, namely an order for the custody of a person without first finding them guilty of an offence. The Court found, by majority,[1] that the power imposed on the Supreme Court to make an order for the detention of a person – Kable – without requiring that Court to engage in judicial processes for arriving at a finding of guilt, was so inimical to the judicial process as to render that process inconsistent with the Court as a Court invested with federal jurisdiction and exercising the judicial power of the Commonwealth pursuant to Chapter III of the Commonwealth Constitution. Importantly, in declaring the invalidity of the Act, the Court did not rely (and indeed rejected) submissions based on the suggestion that there was some sort of separation of powers at the State level, and also that the Act was beyond the legislative power of the Parliament of New South Wales. The sole basis upon which the declaration was made was the incompatibility of the function conferred upon the Court with that Court as a Chapter III Court.

[1] Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

I do not wish to concentrate on the facts of this case. Indeed, I want to deal with the observations of the Court in relation to the issue of public perception. To this end, the following extracts from the majority judgements are important.[2]

Toohey J

His Honour said at page 608:

> "The extraordinary character of the legislation and of the functions it requires the Supreme Court to perform is highlighted by the operation of the statute upon one named person only. In this respect the Act is virtually unique. It does not define "a specified person" by reference to any class or category and it carries no consequences for any person, other than the appellant, to whom its language might otherwise be applicable.
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> The Act answers that aspect of incompatibility which was identified in *Grollo v Palmer* as "the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution ... is diminished". The function exercised by the Supreme Court under the Act offends Ch III which, as I said in *Harris v Caladine*, reflects an aspect of the doctrine of separation of powers, serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive. The function offends that aspect because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt. On that ground I would hold the Act invalid. It is not possible to sever s 5 from the rest of the Act which exists only to give effect to that section."

Gaudron J

Her Honour's judgement is important in that it explains that in the context of the arguments in *Kable*, it is relevant to consider that State Courts, just like federal Courts, are members of the national judiciary which is mandated by the Commonwealth Constitution.

At page 609-610:

> "It is convenient to consider the constitutional position of State courts before turning to the provisions of the Act. It has been said that "[t]he Constitution, by Ch III, draws the clearest distinction between federal courts and State courts, and ... recognises in the most pronounced and unequivocal way that they remain 'State Courts' ". However, that is not a distinction that appears in s 71, the opening provision of Ch III. On the contrary, the first sentence of that section provides, without distinction between State and federal courts created by the parliament, that:
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> > "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the parliament creates, and in such other courts as it invests with federal jurisdiction."
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> Moreover, no distinction appears in the concluding provisions of Ch III, namely, s 78, which is concerned with the right to proceed against the Commonwealth and the States in respect of matters within the limits of the judicial power of the Commonwealth, s 79, which provides that "[t]he federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes" (emphasis added), and s 80, which requires trial by jury for all indictable offences against the laws of the Commonwealth.
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> Special provision is made in s 74 with respect to appeals from this court to the Privy Council. And separate provision is made in ss 73, 75 and 76 as to the jurisdiction of this court. Sections 75 and 76 also serve to identify the matters which fall for resolution in the exercise of the judicial power of the Commonwealth. Neither s 75 nor s 76 refers to any court other than this court. There are, however, references to other courts in s 73

[2] I do not here deal with the dissenting judgements of the Chief Justice or that of Dawson J.

which provides with respect to the appellate jurisdiction of this court. By s 73(i) and (iii), respectively, this court has "jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes" to hear and determine appeals from various determinations made by justices of this court and the Inter-State Commission. And by s 73(ii) it has jurisdiction, again subject to such exceptions and regulations as are prescribed, "to hear and determine appeals from all judgments, decrees, orders, and sentences ... [o]f any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal [lay] to the Queen in Council". No distinction is made in that subsection between State courts, as courts exercising federal jurisdiction, and federal courts created by the parliament.

There is also special provision with respect to the Supreme Courts of the States in the second and third paragraphs of s 73. By the second paragraph, no exception or regulation prescribed by the parliament "shall prevent [this] Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal [lay] from such Supreme Court to the Queen in Council". And it is provided in the third paragraph of s 73 that "[u]ntil the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court". However, these paragraphs do not distinguish between State courts and federal courts created by the parliament as repositories of the judicial power of the Commonwealth.

No mention has yet been made of ss 72 and 77, the only other provisions to be found in Ch III. If they are put to one side, the provisions of Ch III clearly postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth, with this court at its apex as a constitutional court and as a court exercising appellate jurisdiction for the whole of Australia, and with no distinction, so far as concerns the judicial power of the Commonwealth, between State courts and federal courts created by the parliament."

From this conclusion certain consequences follow, most notably for present purposes the significance of public perception of the Courts.

Her Honour goes on in *Kable* at 611-612:

"Neither the recognition in Ch III that State courts are the creatures of the States nor its consequence that, in the respects indicated, the Commonwealth must take State courts as it finds them detracts from what is, to my mind, one of the clearest features of our Constitution, namely, that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth. Moreover, neither that recognition nor that consequence directs the conclusion that State parliaments may enact whatever laws they choose with respect to State courts. If Ch III requires that State courts not exercise particular powers, the parliaments of the States cannot confer those powers upon them. That follows from covering cl 5, which provides that the Constitution is "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State", and from s 106, by which the Constitution of each State is made subject to the Australian Constitution. And so much was recognised in *Commonwealth v Queensland* where it was said that State legislation in violation of "the principles that underlie Ch III" is invalid.

The question whether the Constitution requires that State courts not have particular powers conferred upon them depends, in my view, on a proper understanding of the integrated judicial system for which Ch III provides — the "autochthonous expedient", as it has been called. One thing which clearly emerges is that, although it is for the States to determine the organisation and structure of their court systems, they must each maintain courts, or, at least, a court for the exercise of the judicial power of the Commonwealth. Were they free to abolish their courts, the autochthonous expedient, more precisely, the provisions of Ch III which postulate an integrated judicial system would be frustrated in their entirety. To this extent, at least, the States are not free to legislate as they please."

And further at 612:

"Two other matters of significance emerge from a consideration of the provisions of Ch III. The first is that State courts are neither less worthy recipients of federal jurisdiction than federal courts nor "substitute tribunals", as they have sometimes been called. To put the matter plainly, there is nothing anywhere in the

Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the parliament.

The second and, perhaps, the more significant matter which emerges from a consideration of the provisions of Ch III is, as I pointed out in *Leeth v Commonwealth*, that State courts, when exercising federal jurisdiction "are part of the Australian judicial system created by Ch III of the Constitution and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States". Once the notion that the Constitution permits of different grades or qualities of justice is rejected, the consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.

The prohibition on State legislative power which derives from Ch III is not at all comparable with the limitation on the legislative power of the Commonwealth enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia*. The Boilermakers' doctrine, as it is sometimes called, prevents the Parliament of the Commonwealth from conferring judicial power on bodies other than courts and prevents it from conferring any power that is not judicial power or a power incidental thereto on the courts specified in s 71 of the Constitution. It also prevents the parliament from conferring functions on judges in their individual capacity if the functions are inconsistent with the exercise of judicial power in the sense explained in *Grollo v Palmer*. The limitation on State legislative power is more closely confined and relates to powers or functions imposed on a State court, rather than its judges in their capacity as individuals, and is concerned with powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.

Although the limitation is one relating to the conferral of powers on courts, rather than on judges in their capacity as individuals, it is, nevertheless, one that is closely related to the limitation on Commonwealth power to confer functions on judges of this and other federal courts in their capacity as individuals. In both cases the limitation derives from the necessity to ensure the integrity of the judicial process and the integrity of the courts specified in s 71 of the Constitution."

At 615:

"The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. Particularly is that so in relation to criminal proceedings which involve the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences. Public confidence cannot be maintained in the courts and their criminal processes if, as postulated by s 5(1), the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so.

Mention should be made of one other aspect of the function purportedly conferred on the Supreme Court by s 5(1) of the Act. **Public confidence in the courts requires that they act consistently and that their proceedings be conducted according to rules of general application. That is an essential feature of the judicial process. It is that feature which serves to distinguish between palm tree justice and equal justice. Public confidence cannot be maintained in a judicial system which is not predicated on equal justice.** "

McHugh J at pages 623-624 said:

"Courts exercising federal jurisdiction must be perceived to be free from legislative or executive interference

One of the basic principles which underlie Ch III and to which it gives effect is that the judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government. Given the central role and the status that Ch III gives to State courts invested with federal jurisdiction, it necessarily follows that those courts must also be, and be perceived to be, independent of the legislature and executive government in the exercise of federal jurisdiction. Public confidence in the impartial exercise of federal judicial power would soon be lost if federal or State courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature or the executive government.

In the case of State courts, this means they must be independent and appear to be independent of their own State' s legislature and executive government as well as the federal legislature and government. Cases concerning the States, the extent of the legislative powers of the States and the actions of the executive governments of the States frequently attract the exercise of invested federal jurisdiction. The Commonwealth Government and the residents and governments of other States are among those who litigate issues in the courts of a State. Quite often the government of the State concerned is the opposing party in actions brought by these litigants. Public confidence in the exercise of federal jurisdiction by the courts of a State could not be retained if litigants in those courts believed that the judges of those courts were sympathetic to the interests of their State or its executive government."

And he continued:

"Furthermore, although nothing in Ch III prevents a State from conferring executive government functions on a State court judge as persona designata, if the appointment of a judge as persona designata gave the appearance that the court as an institution was not independent of the executive government of the State, it would be invalid. No doubt there are few appointments of a judge as persona designata in the State sphere that could give rise to the conclusion that the court of which the judge was a member was not independent of the executive government. Many Chief Justices, for example, act as Lieutenant-Governors and Acting Governors. But, given the long history of such appointments, it is impossible to conclude that such appointments compromise the independence of the Supreme Courts or suggest that they are not impartial. Similarly, a law that provided for a judge of a State court to be appointed as a member of an Electoral Commission fixing the electoral boundaries of the State would not appear to suggest that the court was not impartial. However, a State law which purported to appoint the Chief Justice of the Supreme Court to be a member of the Cabinet might well be invalid 208 because the appointment would undermine confidence in the impartiality of the Supreme Court as an institution independent of the executive government of the State.

It follows therefore that, although New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution' s plan of an Australian judicial system with State courts invested with federal jurisdiction that **no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts. If it could, it would inevitably result in a lack of public confidence in the administration of invested federal jurisdiction in those courts. State Governments therefore do not have unrestricted power to legislate for State courts or judges**. A State may invest a State court with non-judicial functions and its judges with duties that, in the federal sphere, would be incompatible with the holding of judicial office. But under the Constitution the boundary of State legislative power is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions invested in the court.

The Act has the tendency to undermine public confidence in the impartiality of the Supreme Court of New South Wales"

And his Honour concludes at 628-629:

"At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired. The Act therefore infringed Ch III of the Constitution and was and is invalid."

His Honour said at 636-637:

> "In the United States, in the context of Art III of the United States Constitution, these [concerns] have been expressed as follows:
>
> > "One is that attention to extrajudicial activities is an unwanted diversion from what ought to be the judge's exclusive focus and commitment: deciding cases. Another is that, inasmuch as the judicial method is inappropriate for coping with non-judicial issues, federal judges have no special competence for disposing of them. Since these issues involve democratic choice, it is politically illegitimate to assign them to the federal judiciary, which is neither responsive nor responsible to the public will. Moreover, it misleads the public to camouflage the legislative character of a social decision and shore up its acceptability by committing it to the judiciary, thereby cashing in on the judicial reputation. Most critically, public confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity ... The need to preserve judicial integrity is more than just a matter of judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honourably and efficiently. Litigants and our citizenry in general must also be satisfied."
>
> This was a dissenting judgment, but it was later referred to favourably by the Court of Appeals for the Eleventh Circuit in *Re Application of the President's Commission on Organized Crime* and by Kozinski J in giving the judgment of the Court of Appeals for the Ninth Circuit in *Gubiensio-Ortiz v Kanahele*.
>
> The translation of what may be a politically difficult choice into what one distinguished United States judge called "a grossly unjudicial chore" **jeopardises the integrity of the federal or State court in question in the exercise in other cases of the judicial power of the Commonwealth. It saps the appearance of institutional impartiality and the maintenance of public confidence**. The point was made by the Supreme Court of the United States in *Mistretta*:
>
> > "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action."

What is clear from *Kable* is that the High Court was there more concerned with the conferral upon the various Courts of the States of functions which – in relation to the Court as a whole – would be undesirable functions. The significance of all of this can be seen more starkly in terms of the Victorian position in relation to section 51 of the Drugs Act and the judicial pronouncements in *R v Papoulias* in relation thereto.

As was explained above, section 51 creates a legal fiction, the purpose of which is to ensure that police officers are given an immunity from prosecution. The way it does this is by deeming persons to be innocent of a crime where they have otherwise engaged in the conduct which constitutes such a crime.

It is my submission that to the extent that section 51 of the Act confers such a function on the Supreme Court of Victoria, then that function is invalid in that it has a clear tendency to lead to the erosion of the public confidence in the integrity and impartiality of the Court as an institution concerned with the administration of criminal justice. As was made clear by Gaudron J, in a democratic society, it is essential that a Court engage in this administration in a fair and equal manner. This is what distinguishes our system from "palm tree" justice, and indeed as her Honour also makes clear, there can never be a situation where there are difference qualities of justice according to varying categories of case.

By ignoring issues such as the creation of minimum standards of police conduct, the State Courts have failed to understand that this will eventually lead to a situation where the quality of justice, and indeed the fairness of a trial itself, will be impaired. I return to this below *(Indicia of a Fair Trial)*.

The issue of the public perception of justice was also considered by the High Court in *Wilson*. As was noted above, the issue in that case was a little different from *Kable* in that the Court was concerned with protecting the integrity of the judicial system by examining the acceptable limits on the function to be performed by judges apart from the Courts on which they sit.

Wilson v The Minister for Aboriginal and Torres Strait Islander Affairs

This case arose out of the dispute in South Australia over the Hindmarsh Island Bridge. The Federal Minister for Aboriginal Affairs purported to appoint a Federal Court judge to exercise what were effectively executive functions under the relevant Act, and challenge was made to that appointment on the grounds that it was in breach of the principles of the separation of powers.

It is my submission that although the case was essentially decided in the Commonwealth sphere, the observations of the Court in relation to the public perception of the Courts and Judges are applicable at the State level. Indeed in any case, *Kable* ensures that this is the case.

The following are the more important extracts from *Wilson*.

The Majority – Brennan CJ, Dawson, Toohey, McHugh Gummow JJ

At 225:

> "The question which does arise in this case is whether performance of the function of reporting to the minister under s 10 is a function which is constitutionally compatible with the holding of office as a judge appointed under Ch III of the Constitution. That there is a constitutional restriction on the availability of Ch III judges to perform non-judicial functions is undoubted. The general principle was stated by the joint judgment in *Grollo v Palmer*:
>
>> "The conditions ... on the power to confer non-judicial functions on judges as designated persons are twofold: first, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and, secondly, 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 incompatibility condition). These conditions accord with the view of the Supreme Court of the United States in *Mistretta v United States* where the court said:
>>
>>> "This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch." "

One reason why the Constitution restricts the availability of Ch III judges to perform non-judicial functions was stated in a passage in the opinion of the Supreme Court of the United States in *Mistretta* adopted by McHugh J and Gummow J in *Grollo*:

> "The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action."

The passages cited from *Mistretta* are equally relevant to the interpretation of Ch III of the Constitution of this country. Constitutional compatibility of function is not a question of judicial sensitivity. Nor is it a question of the desirability of employing judicial skills in order to perform a service for the Executive Government."

At 226-230:

"Harrison Moore wrote that under the Australian Constitution there was, between legislative and executive power on the one hand and judicial power on the other, "a great cleavage". The function of the federal judicial branch is the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation. This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion. The result is promulgated in public and implemented by binding orders. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government.

The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges. In *R v Davison*, Kitto J identified the conceptual basis of the Constitution' s division of the functions of government:

> "It is well to remember that the framers of the Constitution, in distributing the functions of government among separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed. As an assertion of the two propositions that government is in its nature divisible into law-making, executive action and judicial decision, and that it is necessary for the protection of the individual liberty of the citizen that these three functions should be to some extent dispersed rather than concentrated in one set of hands, the doctrine of the separation of powers as developed in political philosophy was based upon observation of the experience of democratic states, and particularly upon observation of the development and working of the system of government which had grown up in England."

In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Windeyer J traced back the doctrine of separation of powers to Montesquieu's proposition that "there is no liberty if the judiciary power be not separated from the legislative and executive power". Blackstone adapted Montesquieu's proposition to the realities of the British Constitution, especially the law-making function of the Judiciary. Blackstone, as Brennan J has noted elsewhere, commended as a protection of liberty "the separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown".

The separation of the judiciary is no mere theoretical construct. Blackstone rightly perceived that liberty is not secured merely by the creation of separate institutions, some judicial and some political, but also by separating the judges who constitute the judicial institutions from those who perform executive and legislative functions. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Windeyer J said that:

> "it is well-recognised dogma for us that the judicial power is to be exercised separately from the exercise of the other two powers, and by different people. This is a necessity of our written constitutional law as well as a compelling part of our inheritance of the British tradition of the independence of the judges [emphasis added]."

The inherited tradition of judicial independence is rooted in and manifested by the Act of Settlement 1700 — which provided for judges to hold their commissions during good behaviour and for their salaries to be "ascertained and established" and which stated that removal from office might lawfully be effected upon the address of Lords and Commons — and by Ch III of the Constitution. Neither of these laws speaks of

independence but both enhanced the security of tenure of judges as the means of buttressing judicial independence.

The separation of judicial function from the political functions of government is a further constitutional imperative that is designed to achieve the same end, not only by avoiding the occasions when political influence might affect judicial independence but by proscribing occasions that might sap public confidence in the independence of the Judiciary. That independence is especially important in a federal system. In *Attorney-General (Cth) v R*, Viscount Simonds said:

> "in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."

McHugh J restated that proposition in *Harris v Caladine*:

> "Those who framed the Constitution were aware of the need to insulate the federal judiciary from the pressures of the Executive Government of the Commonwealth and the Parliament of the Commonwealth so that litigants in federal courts could have their cases decided by judges who were free from potential domination by the legislative and executive branches of government: cf Commodity Futures Trading Commission v Schor."

His Honour cited the speech of Mr Kingston at the Adelaide Convention in 1897 in discussing what became s 72 of the Constitution:

> "I think we should be at great pains to secure the absolute independence of the judges of the Federal Court, particularly of the judges of the High Court of Australia, who are intended to adjudicate on matters which may affect the Federal Executive and the Federal Parliament. To my mind we shall be committing a glaring mistake if we do not protect these judges from ill-considered action either by the Federal Executive or by the Federal Parliament."

The separation of judicial functions from the political functions of government is not so rigid as to preclude the conferring on a Ch III judge with the judge's consent of certain kinds of non-judicial powers. The difficult question is to determine the dividing line between the kinds of non-judicial powers that can, and those that cannot, be so conferred. In *Grollo*, McHugh J pointed to this difficulty:

> "Clearly, a tension exists between complying with the principle of the separation of powers and vesting powers in federal judges as persona designata. If the separation of powers doctrine is to continue effectively as one of the bulwarks of liberty enacted by the Constitution, the incompatibility qualification on the persona designata doctrine is a necessity. Without that qualification, it would permit the parliament "to sap and undermine" the separation of legislative, executive and judicial powers that is inferentially expressed by ss 1, 61 and 71 of the Constitution and which was rigorously applied by this court and the Judicial Committee of the Privy Council in the Boilermakers' case. The constitutional wall that separates the exercise of judicial power and the exercise of executive power would be effectively breached if a federal judge could exercise any executive power invested in him or her as persona designata."

The constitutional condition on the vesting of non-judicial power in (or the conferring of a non-judicial function on) a Ch III judge is that the exercise of the power (or the performance of the function) be compatible with performance of judicial functions as stated in *Grollo*. When that condition is satisfied, judges not only are, but are seen to be, independent of the other branches of government. The appearance of independence preserves public confidence in the judicial branch.

The majority in *Grollo*, another case relating to judicial warrants for telephonic interception, described the kinds of incompatibility which preclude the availability of a Ch III judge to perform non-judicial functions:

> "The incompatibility condition may arise in a number of different ways. Incompatibility might consist in 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. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the

judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished. Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth."

In *Grollo* all members of the court accepted the existence of the incompatibility doctrine. There was division of opinion as to its application. In the joint judgment great weight was placed on the independence of the function to be performed by Ch III judges and on international practice in coming to the conclusion that the condition of compatibility on the conferring of the power to authorise telephonic interception was satisfied. Gummow J held the condition to be satisfied but on narrower grounds than those in the joint judgment. McHugh J, concentrating on the nature of the power and the prescribed manner of its exercise, held the condition not to be satisfied.

Grollo was concerned with constitutional incompatibility, derived from the constitutional separation of the functions of the Judiciary from the functions of the parliament and the Executive. It is a doctrine wider than, and to be distinguished from, the common law doctrine of incompatibility. The common law doctrine operates to vacate an office to which a person has been appointed when that person accepts another office and the duties of the two offices cannot be faithfully and impartially discharged by the same person. The common law doctrine is based on inconsistency between the duties of the two offices; it eliminates the inconsistency by vacating one of the offices. The doctrine, at least in its original form, vacated the office first held but a later development suggests that, if a person be appointed to two offices the duties of which are incompatible, the first office is not vacated and that, rather, the party is "incapacitated" from accepting the second, save where the appointor to the second office has power to accept a resignation of the first. The constitutional doctrine is to be distinguished in its purpose and probably in its effect. Its purpose is to protect effectively the independence of Ch III judges from the political branches of government as a guarantee of liberty and as a buttress to public confidence in the administration of justice by Ch III courts.

The effect of the application of the constitutional doctrine, which might differ from the effect of application of the common law doctrine, is not to vacate the office to which the Ch III judge has been appointed but to sterilise the power to interfere with the protection which the Constitution gives to the independence of Ch III judges. Section 72 of the Constitution provides that the appointment of a justice terminate only by removal, expiry of the term of the appointment or resignation. No common law doctrine can alter the security of the tenure thus created.

The capacity of Ch III judges to perform their judicial duties throughout the terms of their appointment independently of the political branches of government cannot be prejudiced by their appointment to non-judicial office or to perform non-judicial functions. If an appointment to non-judicial office or performance of non-judicial functions prejudices that capacity it is incompatible with the office and function of a Ch III judge. And that is inconsistent with s 72 of the Constitution. Thus constitutional incompatibility limits legislative and executive power; it does not effect a vacation of judicial office."

Further at 230:

"Bearing in mind 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, no functions can be conferred on a Ch III judge that would breach that separation."

And at 233:

"The Constitution is concerned not with the conduct of a judge who exercises his or her discretion to maintain independence from the Legislature or the Executive Government but with the limits on legislative and executive power that might be exercised to confer a function bridging the separation of the Judiciary from the Legislature and the Executive Government."

At page 234:

> "Because of the need to adjudicate disputes involving the polities constituting the federation — polities which are "independent governments existing in the one area and exercising powers in different fields of action carefully defined by law" — judicial power occupies a special position in a federal system of government. It will later be necessary to refer to that matter in greater detail. For the moment, it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on two things. It depends on the courts acting in accordance with the judicial process. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.
>
> So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, judicial power is not simply a power to settle justiciable controversies, but a power which must be and must be seen to be exercised in accordance with the judicial process. As I explained in *Harris v Caladine*, the parliament is, on that account, precluded from conferring powers on a court that are to be exercised in a partisan manner or in a non-judicial way. Moreover, parliament cannot require the courts to act in a way that tends to bring their reputation for impartiality or the integrity of the judicial process into question. Equally, parliament cannot confer a function on a judge in his or her individual capacity if it has the capacity to bring the reputation of the judge or that of the courts into question."

At p.238:

> "As earlier indicated, impartiality and the appearance of impartiality are defining features of judicial power. Where, as in our federal constitutional system, the judicial power of the Commonwealth is to be exercised in resolution of justiciable controversies involving the polities constituting the federation and concerning their powers under the Constitution, impartiality requires that the courts exercising that power be and be seen to be completely independent of the legislatures and executive governments of those polities. If they are not independent in fact and in appearance, public confidence will be diminished in the judicature constituted by s 71 of the Constitution and, ultimately, in the Constitution itself.
>
> Public confidence in the independence of the judiciary is diminished if, even in their capacity as individuals, judges perform functions which place them or appear to place them in a position of subservience to either of the other branches of government. Similarly, public confidence is diminished if the performance of non-judicial functions gives the appearance that a judge is acting as the servant or agent of either of those other branches of government.
>
> Whether or not a function gives or is capable of giving the appearance that there is an unacceptable relationship between the judiciary and the other branches of government is a question that has to be answered both by reference to functions that have, historically, been carried out by judges in their capacity as individuals (for example, Royal Commissions) and by a consideration of contemporary needs. However, in considering functions that have been carried out in the past, it is necessary to bear in mind that, to a large extent, those functions were not carried out by Ch III judges.
>
> In general terms, a function which is carried out in public, save to the extent that general considerations of justice otherwise require, which is and which is manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government. And there may be functions (for example, the issuing of warrants such as those considered in *Hilton v Wells* and in *Grollo*) which do not satisfy these criteria but which, historically, have been vested in judges in their capacity as individuals and which, on that account, can be performed without risk to public confidence. However, history cannot justify the conferral of new functions on judges in their capacity as individuals if their performance would diminish public confidence in the particular judges concerned or in the judiciary generally."

The Exclusion of Evidence and Public Confidence

I have sought in this paper to draw a clear link between the decision in *Ridgeway* and other decisions of the High Court in the area of constitutional law. As explained at the outset, what is important when considering the decision in *Ridgeway* is that we look beyond the mere question of the discretion to exclude evidence and more significantly that we concentrate upon the reasons which necessitate that exclusion. The most notable reason is to ensure that there are minimum standards observed by all relevant participants in the criminal justice system.

One such aspect of the necessity to ensure minimum standards is that in this, as in any other area of the law, the role of the public perception of the Courts as well as of judge's is crucial to a proper functioning of the system.

This being the case, it is my submission that when considering the exercise of the discretion to exclude evidence on the grounds of illegality, a trial judge should take into account the relevance of the perception of the public to the decision ultimately arrived at. It is suggested that if, as appears to be the case, the admission of illegally obtained evidence is a matter of course with no real examination made of the implications of these decisions, there is likely to develop a general cynicism by members of the public in relation to the role of the Courts when faced with these illegalities.

As the High Court noted in *Ridgeway*, a Court in a democracy cannot be seen to be condoning police illegalities, and indeed while it is always a question of degree, it is my considered opinion that the responses in the States to the decision in *Ridgeway* have not been fully thought out responses. The South Australian and Victorian experiences show that all that has really been achieved is that that case has been distinguished on its facts with no real regard paid to the more important and underlying considerations of principles such as the rule of law and equality before the law.

As criminal lawyers, we are well suited to be able to ensure that Courts are constantly reminded of the necessity to protect peoples rights, and while often it may appear that the confines of a normal criminal trial are not the forum for such debate, I hold a contrary view. Indeed it is on a person's trial that his or her rights are in a very real sense weighed and accorded.

It is my view that there are inherent dangers involved with condoning this sort of activity in any democratic society. Once such way that, as criminal lawyers, we can ensure that these considerations of high public policy are kept alive is by urging upon the Courts – at the *voir dire* stage if necessary – that these are considerations which can be taken into account in the exercise of the discretion to admit or exclude evidence.

From this, the final matter to which I wish to allude is the question of whether and how the admissibility of this sort of evidence can impinge upon the fairness or otherwise of a criminal trial.

The Indicia of a Fair Trial – (i) The Requirement of Public Perception

An essential feature of a fair trial includes not only procedural considerations, but also that both members of the public, and the accused themselves, believe that they have had a fair trial. While as lawyers we may discover whether an accused person has or has not had a fair trial, paradoxically, as lawyers we are often unable to perceive the issue of fairness from the perspective of either the accused or the public generally.

It is commonly the case in a criminal trial that counsel for both the defence and the prosecution have no doubt about the admissibility or otherwise of evidence, even in cases where the police have committed illegalities. However, and while I would not go so far as to say that the perceptions of those parties are irrelevant, I do assert that neither should they be exclusive. What matters is not merely whether the evidence is admissible, but whether, if the evidence is to be admitted, will this have implications for the fairness of a trail when that is considered from the perspective of the accused or a member of the public. Or:

> What is the status of a trial which is procedurally fair, but perceived, on reasonable grounds, to be otherwise? Is such a trial a fair or unfair trial?
>
> Is the public perception of unfairness sufficient to render a trial unfair?

When evidence of police illegality is admitted at trial, and disregard is had to the question of the effect this will have on the public perception of justice, it is arguable that a Court of Appeal should overturn any conviction based thereon if the effect of allowing such a conviction to stand is that the integrity of the Court will be called into question by the public. And while in any single case where this is so, the implications may not be clear and obvious, the gradual accumulation into acceptable practice cn and will have adverse implications for the judiciary as a whole.

This is not a short term issue. If the public perception of the Courts is ignored, then it is essentially a mockery to speak of the requirement that justice be done as well as being seen to be done. If as a matter of course illegally obtained evidence is admitted and allowed to form the basis of a criminal prosecution, then in due course, there must inevitably be an erosion of the perception of the Courts as impartial institutions.

The question then becomes:

> In exercising its discretion, should a trial judge be inclined to exclude admissible evidence in order to ensure that the positive perception of that Court by the public is maintained?

I am arguing here for an extension of the bases upon which the discretion to exclude evidence can be exercised. I suggest that, in line with the judgements of the High Court in *Kable* and *Wilson*, the requirement to preserve public confidence in the judiciary, in and of itself, ought to form the basis of exercising the discretion to exclude. While this may at first appear novel in the sense that these sorts of arguments are usually framed in terms of the invalidation of legislation, it is my view that there is nothing in the nature of these important principles which should exclude them from consideration at the very first instance – namely, the voir dire.

However, a major hurdle in front of the recognition of such a discretion is the requirement that the Courts firstly come to a clear realisation of the fact that the requirement for a proper public perception of the judiciary is no mere fanfare and that unless such integrity is preserved in the eyes of the public, there are serious implications, in the long term, in terms of the ability of the judiciary to be properly placed to resolve disputes with confidence.

The Indicia of a Fair Trial – (ii) No Second Rank Justice

The decision is *Kable* is the first step toward a recognition – at the state level – that the Supreme Courts of the various States and Territories are not mere isolated outposts where the judgements of

the High Court can simply be distinguished or ignored. Indeed as the High Court noted, one important feature of Chapter III of the Constitution – "the autochthonous expedient" – is that it necessitates the continued existence of the State Courts in order that those Courts exercise federal judicial power where necessary. As James Miller noted recently,[3] referring to the judgement of McHugh in *Kable*:

> "As the continued existence of State supreme courts from which an appeal can be made to the High Court is a precondition of the "...unified system of common law that the constitution intended should govern the people of Australia", they are an essential part of the federal scheme established by the Constitution and therefore have a "... status and role that extends beyond their status and role as part of the State judicial systems."

and[4]

> "If State supreme courts are an "essential part" of an integrated national legal system established at the tim of Federation, reason alone suggests that there must be some direct relationship between the Constitution and State courts."

In other words, the State Courts have a Constitutional duty to ensure that they are doing their part in preserving the integrity of the judiciary. Indeed this is so despite the fact that State Courts are often slow to either acknowledge or accept that they have such a role to play in the federal sphere. However, there is no reason to support this view, and indeed good reasons to the contrary:

> "... the majority [in *Kable*] made known its view that there is no special margin of "forgiveness" available to State courts on the basis that, compared with what may be expected of federal courts, some lesser quality or standard or "justice" may be appropriate in the light of the "distance" of State courts from the effects of the Constitution."[5]

And indeed as Gaudron J noted, there nothing in the nature of a State Supreme Court which renders that Court less deserving of the power to exercise the federal judicial power than, say, the Federal Court.

It is my view that having been give this judicial "pat on the back" the Courts of the State should seize the opportunity and do their part for the creation of unified standards or principles applicable throughout the Commonwealth of Australia.

Finally, in the light of the title of this paper, I should say that perhaps the most ironic conclusion is that only two weeks ago, John Anthony Ridgeway was convicted of, and sentenced for, an offence of taking part in the sale of a drug of dependence based on the very same facts of the case which was permanently stayed by the High Court. He is due to be sentenced in the next two weeks.

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[3] Criminal Law Journal, Vol. 21, pp 92-103, April 1997 at page 98.

[4] See note 3.

[5] See note 4.

LIST OF AUTHORITIES

1. *Bunning v Cross* (1978) 141 CLR 54.

2. *R v Papoulias* [1988] VR 858.

3. *Ridgeway v R* (1995) 129 ALR 41.

4. *R v Albu and Gheorghita* (1995) 65 SASR 439.

5. *R v Martelli* (unreported, CCA SA, File No. 249 of 1995, 20/11/95).

6. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220.

7. *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.