DOROTHY ANN WILSON v MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS*

I INTRODUCTION

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs is the latest in a series of decisions reviewing the meaning, validity and limitations of the provisions of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), both generally[1] and in relation to the Hindmarsh Island Bridge proposal in particular.[2] The central issue in the case — whether a federal judge was competent to provide a report for the Minister under s 10 of the Act — required further consideration by the High Court of the separation of powers doctrine previously considered in *Hilton v Wells*[3] and *Grollo v Palmer*.[4] Whilst upholding the validity of the grant of power to federal judges under the Telecommunications (Interception) Act 1979 (Cth) in these two cases, a majority of the High Court in *Wilson* held that the grant of non-judicial power to a federal judge under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) was invalid. *Wilson* provides a useful insight into the specific factual circumstances which the High Court considers will constitute crossing the boundary of judicial power and independence under Chapter III of the Constitution. The difficulty in determining where the line should be drawn is illustrated by Kirby J's minority judgment and his Honour's treatment of the statute and the circumstances of the grant of non-judicial power in this case.

II THE ACT

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) is legislation of last resort, available where relevant State legislation has failed to provide protection.[5] The relevant section of the Act is s 10 which empowers the Minister to make a declaration protecting an area where she or he is satisfied that

* (1996) 138 ALR 220. High Court of Australia, 6 September 1996, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ ('*Wilson*').

1 *Tickner v Bropho* (1993) 40 FCR 183; *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144; *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (Federal Court of Australia, Black CJ, Burchett and Kiefel JJ, 28 May 1996).

2 *Chapman v Tickner* (1995) 55 FCR 316; *Tickner v Chapman* (1995) 57 FCR 451; *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 558; *Aboriginal Legal Rights Movement v South Australia* (Supreme Court of South Australia, Doyle CJ, Bollen and Debelle JJ, 26 July 1995).

3 (1985) 157 CLR 57 ('*Hilton*').

4 (1995) 184 CLR 348 ('*Grollo*').

5 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 7. See generally Graeme Neate, 'Power, Policy, Politics and Persuasion — Protecting Aboriginal Heritage Under Federal Laws' (1989) 6 *Environmental and Planning Law Journal* 214.

the area is 'a significant Aboriginal area'[6] as defined in s 3 of the Act[7] and is 'under threat of injury or desecration'.[8] Before making her or his decision, the Minister must have 'received a report under sub-section 4 in relation to the area from a person nominated by him [*sic*] and ... considered the report and any representations attached to the report.'[9]

Section 10(4) of the Act sets out the matters with which a report should deal. These include the significance of the area, the nature and extent of the threat, the extent of the area that should be protected, the prohibitions and restrictions to be made in relation to the area, the effect of any declaration on the proprietary or pecuniary interests of persons other than the applicants, the duration of the declaration, the extent and effectiveness of protection, if any, afforded by relevant State legislation and such other matters as are prescribed.

Section 10(3) of the Act sets out the very limited procedure that must be followed by the person appointed to provide a report. This includes the publication of a notice in the Gazette and local newspaper setting out the purpose of the application and the matters to be dealt with in the report,[10] inviting representations from interested persons[11] and indicating an address to which representations may be sent.[12] The reporter is required to 'give due consideration to any representations so furnished and ... attach them to the report'.[13]

III FACTUAL BACKGROUND

The majority judgment in *Wilson* identified the relevant starting point for its deliberations 'on or about 16 January 1996'[14] when the Minister for Aboriginal and Torres Strait Islander Affairs 'nominated the Hon Justice Jane Mathews ... to prepare a report under s 10(1)(c) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).'[15] Whilst this was the specific event giving rise to the application to the court, there was a considerably longer history leading up to Justice Mathews' appointment and the application by the plaintiffs, commencing in 1989 when a company called Binnalong Pty Ltd obtained approval from the South Australian Government to build a marina and residential and commercial complexes on Kumarangk (Hindmarsh Island). The approval was conditional upon the building of a bridge subject to a satisfactory environmental impact statement and compliance with the Aboriginal Heritage Act 1988 (SA). The bridge was to replace the vehicular ferry to the island, which lies at the

6 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 10(1)(b)(i).

7 'Significant Aboriginal area' means: (a) an area of land in Australia or in or beneath Australian waters; (b) an area of water in Australia; or (c) an area of Australian waters, being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

8 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 10(1)(b)(ii).

9 Ibid s 10(1)(c).

10 Ibid s 10(3)(a)(i).

11 Ibid s 10(3)(a)(ii).

12 Ibid s 10(3)(a)(iii).

13 Ibid s 10(3)(b).

14 *Wilson* (1996) 138 ALR 220, 222.

15 Ibid.

mouth of the Murray River in Lake Alexandrina. Although a series of reports on Aboriginal interests in the area were completed, none were considered by the relevant Minister to provide sufficient heritage information to prevent the bridge from proceeding and the State Aboriginal Affairs Minister indicated on 3 May 1994 that construction of the bridge could proceed.[16]

Ngarrindjeri people had occupied Kumarangk (Hindmarsh Island) prior to, and for many years following, colonisation of the area.[17] Some members of that group in conjunction with the local Lower Murray Aboriginal Heritage Committee and the Aboriginal Legal Rights Movement wrote to the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs in November 1993 and again in April 1994. The letters expressed concern about the bridge proposal and sought action by the Minister under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). They also sought an emergency declaration under s 9 of the Act. The April correspondence to the Minister was the first time that the existence of beliefs particularly important to, and knowledge of which was restricted to, women, was first aired. The Minister made the emergency declaration (for 30 days) during which time Professor Cheryl Saunders prepared a report for the Minister pursuant to s 10(4) of the Commonwealth Act. The particular beliefs of importance to women which became known as 'women's business' were expanded upon to Professor Saunders and included in her report to the Minister. On the basis of Professor Saunders' report, on 9 July 1994 the Minister exercised his powers under s 10 of the Commonwealth Act and made a declaration for 25 years prohibiting a range of acts in the area including 'any act done for the purpose of constructing a bridge in any part of the area.'[18] This declaration was successfully challenged in the Federal Court on the basis of procedural fairness. The Minister unsuccessfully appealed this decision to the Full Court.[19]

Some Ngarrindjeri women denied both the existence of the 'women's business' and that it was a part of the Ngarrindjeri belief system. When these dissident views emerged, the South Australian Government established a Royal Commission to inquire into the 'authenticity' of the 'women's business'.[20] The Commission was itself the subject of an unsuccessful challenge on two bases. First, it sought to inquire into the authenticity of religious beliefs and this, it was argued, was contrary to the Racial Discrimination Act 1975 (Cth). Second, the extent to which the State Minister was required to consult with Aboriginal people prior to releasing confidential cultural information to the Royal Commission under the

[16] Colin James, 'Sacred Sites Outrage: Row Looms as Bridge Goes Ahead', *Adelaide Advertiser*, 4 May 1994, 2. See *Chapman v Tickner* (1995) 55 FCR 316, 322-3 for a narrative of the events leading up to this point.

[17] *Report of the Hindmarsh Island Bridge Royal Commission* (1995) 44-6 ('*Royal Commission Report*').

[18] Commonwealth of Australia Gazette Special, No S 270, 10 July 1994.

[19] *Tickner v Chapman* (1995) 57 FCR 451.

[20] *Royal Commission Report*, above n 17, Appendices, 312.

Aboriginal Heritage Act 1988 (SA) was also challenged.[21] Ngarrindjeri people supporting the application to the Commonwealth Minister did not give evidence. However, the Commission reported on 19 December 1995 that 'the whole of the "women's business" was a fabrication [in order] to prevent the construction of a bridge between Goolwa and Hindmarsh Island.'[22]

On the same day the Royal Commission was announced, the Commonwealth Minister for Aboriginal Affairs announced that a second inquiry and report under s 10 (1)(c) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) would be undertaken.[23] On 22 June 1995 the Minister announced that Justice Jane Mathews would prepare the report.[24] Justice Mathews was then, and is now, a Justice of the Federal Court of Australia, the President of the Administrative Appeals Tribunal, Deputy President of the National Native Title Tribunal and a member of the Administrative Review Council of the Commonwealth.[25] The nomination was formally made on 16 January 1996 by Senator Rosemary Crowley acting for and on behalf of the Minister for Aboriginal and Torres Strait Islander Affairs,[26] after the Full Court of the Federal Court handed down its decision. It was this appointment and subsequent work on the report that were the subject of the High Court decision.

The plaintiffs in this action were the group of Ngarrindjeri women who had challenged the existence of the 'women's business' and became known as the 'dissident women'. The defendants were the Minister for Aboriginal and Torres Strait Islander Affairs and Justice Mathews. The application sought a declaration that the appointment of Justice Mathews was 'incompatible with her commission as a judge of the Federal Court ... and/or with the proper performance of her judicial functions as a Judge of that Court.'[27]

The Chief Justice reserved two questions for the consideration of the Full Court:

> Is the nomination and/or appointment of the second defendant by the first defendant to make a report under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) effective to authorise the second defendant to make a report to the first defendant in satisfaction of s 10(1)(c) of the Act? If yes to question 1:
>
> Is the second defendant incapable by reason of judicial office of accepting the nomination and/or appointment by the first defendant of the second defendant to make a report under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)?[28]

[21] *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 558; *Aboriginal Legal Rights Movement v South Australia* (Supreme Court of South Australia, Doyle CJ, Bollen and Debelle JJ, 26 July 1995).

[22] *Royal Commission Report*, above n 17, 299.

[23] Colin James, 'Bridge Saga in Deeper Turmoil', *Adelaide Advertiser*, 9 June 1995, 1.

[24] Colin James, 'Tickner in New Row over Second Bridge Claim', *Adelaide Advertiser*, 22 June 1995, 8.

[25] *Wilson* (1996) 138 ALR 220, 240.

[26] Ibid 239.

[27] Ibid 222.

[28] Ibid.

IV THE HIGH COURT DECISION

1 *The Plaintiffs' Argument*

In response to the questions reserved by the Chief Justice, the plaintiffs' argument had two major and related limbs. Both limbs of the argument were dependent upon the separation of powers doctrine.

The first argument was that the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) did not contemplate the appointment of a federal judge to perform the reporting function under s 10 of the Act: the 'judge is not a "person"'[29] argument. Parliament could be presumed to know and take account of the separation of powers doctrine when passing statutes. Where, as an exception to the separation of powers rule, Parliament intended to use a federal judge, as a designated person, to perform functions for the executive, it would (and had) done so expressly, as in the Telecommunications (Interception) Act 1979 (Cth).[30] Such an appointment might also be expected to provide for a number of things such as detachment of the judge from the Federal Court as in s 7A of the Administrative Appeals Tribunal Act 1976 (Cth), tenure of the judge notwithstanding appointment to the non-judicial role, immunity from civil suits, performance of the duties in public (although this may not always be so), appointment by instrument rather than merely by letter and some formal status for the judge's report rather than providing for a report as 'a mere pre-condition to the exercise of ministerial statutory power'.[31] Such provisions provided some protection against the 'debasement of the separation of the judicial from the other branches of government'.[32] Where matters such as these were not present, as was the case under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), the legislation should be read down to exclude its application to federal judges.

The second argument was that any law that permitted the appointment of a federal judge, or any executive act of appointing a federal judge, to undertake a non-judicial task was unconstitutional as it was incompatible with the judicial office of a Chapter III judge and was therefore void. This was said to be the effect of s 10(1)(c) and (4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). While the basis of the incompatibility may vary, the argument was that the legislature cannot confer on a federal judge in her or his individual capacity any function that will or may have the effect of bringing the reputation of the judge or the courts into question. This argument relied almost exclusively on the constitutional incompatibility[33] idea elaborated by the High Court in *Grollo*.

[29] Ibid 244 (Kirby J).

[30] Provisions to this effect were the subject of consideration by the High Court in *Hilton* and *Grollo* respectively, and were central to the Court's decision in this case.

[31] *Wilson* (1996) 138 ALR 220, 245.

[32] Ibid.

[33] *Wilson* (1996) 138 ALR 220, 234 (Gaudron J).

2 *The Majority Judgment*

The majority, consisting of the Chief Justice Brennan, Dawson, Toohey, McHugh and Gummow JJ, answered the first question in the negative and thus found it unnecessary to answer the second. It did not separate the two elements of the plaintiffs' argument in addressing the first of the questions reserved by the Chief Justice. The first aspect of the argument was subsumed in the majority's approach to the second and dominant issue: '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.'[34] In particular, the majority saw the meaning of the term 'person' as central to the success of the challenge but on the basis that if the reporting function under s 10 was incompatible with the holding of judicial office, then the term person must be read down to exclude Chapter III judges from appointment under s 10.

The majority proceeded on the basis that neither the language of s 10 nor the letter of appointment purported to confer a judicial power on Justice Mathews. Thus, in contrast to the appointment considered by the Court in *Hilton* where the argument put forward was that the appointment involved the imposition of a non-judicial power on a judge acting as a judge, the appointment of Justice Mathews was as an individual — as *persona designata.*

While acknowledging that not all appointments of judges to perform non-judicial functions as designated persons will contravene the separation of powers doctrine inherent in Chapter III of the Constitution, the majority indicated that there is undoubtedly some restriction on such appointments, and relied on *Grollo*[35] in setting out the two applicable conditions: '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).'[36] Adopting the view of the United States Supreme Court in *Mistretta v United States*,[37] the majority identified '[t]he ultimate inquiry' as 'whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.'[38] Indeed, 'the difficult question', according to the majority, 'is to determine the dividing line between the kinds of non-judicial powers that can, and those that cannot'[39] be conferred on the judiciary.

The majority then set about the task of determining whether this particular extra-judicial assignment was constitutionally incompatible — that is, on which side of the dividing line this conferral fell. In doing so, it identified the judicial

[34] *Wilson* (1996) 138 ALR 220, 224.
[35] *Grollo* (1995) 184 CLR 348, 364-5.
[36] *Wilson* (1996) 138 ALR 220, 224.
[37] 488 US 361 (1989) ('*Mistretta*').
[38] Ibid 404; *Wilson* (1996) 138 ALR 220, 224.
[39] *Wilson* (1996) 138 ALR 220, 228.

task in the Constitution as threefold — the determination of disputes between citizens, between citizens and government and between the various polities in the federation. In performing this task, the judiciary engaged in the 'ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion.'[40] The separation of the judiciary from the executive in the performance of these functions is fundamental to the protection of individual liberty. As a result, the maintenance of the separation is important in ensuring public confidence in the integrity of the judiciary.

Again relying on *Grollo*,[41] the majority identified three different ways in which incompatibility may arise:[42] (i) where there is such a commitment to the non-judicial task that the continued performance of judicial functions is not practicable; (ii) where the nature of the non-judicial functions are such that the capacity of the judge to perform her or his judicial tasks is compromised; or (iii) where the nature of the non-judicial functions are such that public confidence in the integrity of the judge or the judiciary is compromised. In *Wilson*, the court considered the relevant incompatibility to be the third category of incompatibility.

Where such incompatibility exists then it will be constitutional incompatibility, the consequences of which will be to limit legislative and executive power to the extent necessary to preserve the status of an independent judiciary, usually by rendering the non-judicial appointment ineffective or void.[43] Such incompatibility is to be determined by reference to the non-judicial function to be performed by the judicial officer in order to exercise the power conferred. Thus the statute pursuant to which the power is conferred must be examined in order to determine whether this constitutional incompatibility exists. Examination of the statute involves essentially a three stage process.[44] Is the function to be performed integral or closely connected with the legislature or the executive? Is the function to be performed independently of instruction, advice or wish of the legislature or the executive? If the answer to either question is 'yes', then there is constitutional incompatibility. However, even if the answer to these question is 'no', a further question arises, namely, whether any discretion is to be exercised on political grounds. A requirement for procedural fairness does not of itself take the discretion outside the realm of the political.

In applying these principles to the role of the reporter under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) the majority concluded that it was not possible to separate the role of the reporter from the power of the Minister to make her or his decision and that in fact the report is only a condition precedent to the exercise of Ministerial power. There is no

[40] Ibid 226.

[41] *Grollo* (1995) 184 CLR 348, 365.

[42] *Wilson* (1996) 138 ALR 220, 228-9.

[43] Ibid 230. This is contrasted with common law incompatibility which is avoided by vacating one of the offices.

[44] Ibid 230-1.

immunity for the reporter as exists in other legislation[45] and the reporter may be removed by the Minister. As a result, the reporter's role is firmly entrenched as part of the Ministerial decision-making process.[46]

The majority focused on several other aspects of the reporter's appointment and role in concluding that it was incompatible with a judge's judicial role. In particular, under s 10(4)(g) the reporter is required to give an advisory opinion in relation to the extent to which any law of a State or territory may provide protection. Further, the reporter has no obligation to hold a hearing (although she or he may be required to observe procedural fairness) or to act in any way that is independent of or separate from the Minister. The report may be prepared in accordance with ministerial policy, there being no obligation to avoid such an outcome. The reporter is required to determine 'the competing interests of Aboriginal applicants and others whose proprietary or pecuniary interests are liable to be affected.'[47] This is essentially a political decision. As a result of all these matters, the majority concluded that the role of the reporter was political. Because of the indivisible nature of the reporter's role from the Minister and its political nature, there is a constitutional incompatibility.[48]

The approach in cases such as this is to find the limits of legislative or executive power. These are to be gleaned from the legislation. In this case these were breached because of the political nature of the reporter's role. Therefore the Act must be read down in order to limit the power of the legislature and the executive in preserving the separation of the judiciary as required by Chapter III of the Constitution. The consequence of this reading down is that the Minister cannot properly appoint a federal judge to perform the reporting function under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

3 *Gaudron J*

Although Gaudron J delivered a separate judgment, it was in all major respects very similar to that of the majority. As with the majority, her Honour answered the first question in the negative and found it unnecessary to answer the second question.

Her Honour, too, relied on the majority judgment in *Grollo* and, in particular, the third of the three identified elements for constitutional incompatibility,[49] namely, where the public confidence in the judiciary's integrity or the capacity of the individual judge to perform her or his judicial functions with integrity is diminished. In this regard her Honour focused on the importance of the level of confidence that ordinary citizens may have, not just in the judiciary but also in

[45] Telecommunications (Interception) Act 1979 (Cth) s 6D(4); Royal Commissions Act 1902 (Cth) s 7(1); Administrative Appeals Tribunal Act 1975 (Cth) s 60(1); Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 53A(1); Native Title Act 1993 (Cth) s 180(1).

[46] *Wilson* (1996) 138 ALR 220, 232.

[47] Ibid.

[48] Ibid 232-3.

[49] *Wilson* (1996) 138 ALR 220, 234; *Grollo* (1995) 184 CLR 348, 365.

the judicial process. This she identified as an integral part of this element of judicial integrity.

Her Honour concluded that there was no doubt that Justice Mathews could carry out the functions of a reporter without this having an impact on her ability to carry out her judicial functions with integrity. However, the test is whether the function was 'of such a nature that public confidence in the integrity of the judiciary as an institution ... is diminished',[50] that if judges perform these functions they will 'place them or appear to place them in a position of subservience to either'[51] the legislature or the executive. The criteria that her Honour sets out for determining this issue are: whether a function is carried out in public, whether that function is free of outside influence, whether that influence results in a report that can be assessed according to its own terms and does not give the appearance of an unacceptable relationship with the legislature or the executive. Where all the criteria may not be satisfied, then the fact that the duties have historically been carried out by judges may mean they can survive the public confidence test.[52]

In applying this principle to s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), Gaudron J found that the appointment offended the relevant constitutional principle because it was not historically carried out by judges, nor was it required to be carried out in public, and, as the report need not be public, it cannot be assessed on its own merits and the report is simply part of a process that helps the Minister make a decision. It cannot, therefore, be seen as separate from the executive.

As a result, s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) must be read down to exclude the appointment of persons who are federal judges.

4 *The Minority — Kirby J*

Kirby J answered the first question reserved in the affirmative and the second in the negative. His Honour rejected the plaintiffs' argument that a judge was not 'a person' for the purposes of s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) on three main bases. He rejected the argument that a judge was not normally seen to be within the purview of the term 'person' as there were similar statutes, in particular the Royal Commissions Act which used the term 'person' but which contemplated the appointment of judges. The lack of specificity about release of judges from their judicial duties merely reflected the fact that most reporters will not be judges.[53]

His Honour also rejected the argument, so central to the majority judgments, that the role of the reporter was merely as an adjunct to the Minister. He identified an independent role for the reporter for the following reasons: the Minister

[50] *Wilson* (1996) 138 ALR 220, 234, quoting *Grollo* (1995) 184 CLR 348, 365.
[51] *Wilson* (1996) 138 ALR 220, 237.
[52] Ibid.
[53] Ibid 246-7.

has no role to play in between the time of nomination and the delivery of the report, the manner in which representations are to be received is specified as are the matters on which the reporter must report (and these cannot be altered by Ministerial action), and the Federal Court has found that the reporter is bound by the rules of procedural fairness.[54] Justice Mathews' procedural rulings in the inquiry indicated that she had a strong view of her independence in the inquiry. The implicit power of the Minister to remove the reporter should not be overemphasised as it exists in many statutes and has not previously been fatal to the appointment of judges to perform non-judicial functions.[55]

Finally, his Honour rejected the argument that the reporter's role was advisory only. He indicated that most inquiries, including Royal Commissions, were also advisory and do not fall within the prohibition on federal judges giving advisory opinions. Nor is the inquiry one where the reporting role is foisted on the judge. The appointment was voluntary. The conclusion in relation to the plaintiffs' first argument was that the statute should not be read down to exclude judges from the meaning of 'a person'.[56]

His Honour then considered the constitutional prohibitions on the use of judges for such an inquiry. While his Honour generally referred to and relied on the same authorities as the majority judgments and applied the same principles, his conclusion differed in that he considered that the cases of *Hilton* and *Grollo* represented activities that were much closer to the executive and more likely to infringe the constitutional prohibition than the appointment of a judge as a reporter under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). Thus, while substantially agreeing with the majority on the question of the principles to be applied, the application of the law to the facts produced the opposite result to the majority.

Such an outcome is not surprising given that his Honour suggested early in his judgment that '[t]he dissenting opinions in each of those decisions [*Hilton* and *Grollo*] illustrate the differences which can arise over the boundary for the lawful conferral of non-judicial functions upon federal judges'[57] and that 'the task of a court is typically to decide where "the constitutional wall" that separates the exercise of judicial power from the other powers of government stands.'[58]

His Honour expressed concern that the placement of the 'constitutional wall' should reflect a consistent approach rather than the 'individual predispositions of judges of ultimate courts, responding to the facts of particular cases'.[59] He then set out some of the criteria to be applied in these cases:

- whether the position is of such duration and involves such activities that the performance of the judicial functions of the appointee are unable to be performed;

[54] *Chapman v Tickner* (1995) 55 FCR 316; *Tickner v Chapman* (1995) 57 FCR 451.
[55] *Wilson* (1996) 138 ALR 220, 247.
[56] Ibid 248.
[57] Ibid 239.
[58] Ibid 249.
[59] Ibid 251.

- whether the specific duties to be undertaken by the appointee could prejudice the independence of the judiciary, for example the reservations expressed by McHugh J in *Grollo* that the involvement of federal judges in authorising telephone taps resulted in their becoming 'part of the criminal investigative process';[60]
- whether the functions involved draw on judicial experience such as 'neutrality, detachment and disinterestedness; receiving evidence, assessing its credibility and evaluating submissions upon it; and reaching conclusions'[61] and the fact that the matter is political or controversial does not necessarily render it incompatible with judicial appointment; and
- whether the appointment of a judge would seriously erode public confidence in the integrity of the judiciary as an institution and in its individual members.

The issue is not one of desirability but of the validity of the appointment.

His Honour then suggested some additional matters that the court should address in reaching a decision. These include the substance of the functions of the appointment rather than the form or instrument of appointment and the actual extent to which independence and integrity of the judge may be compromised as well as the community perception of these issues.

In the instant case his Honour concluded that there was no incompatibility between the appointment of Justice Mathews as reporter and her functions as a federal judge. There was a clear separation between Justice Mathews' role as reporter, freely accepted, and her judicial role — not only are the actual duties to be performed closer to those of a judicial office holder than those upheld in *Hilton* and *Grollo*, but her Honour's skills were directly relevant to the conduct of her role as reporter. Moreover, the inquiry and report were of short duration, some of her proceedings were to be conducted in public and (unlike the appointments in *Hilton* and *Grollo*) Justice Mathews' appointment was publicly announced.

The distinction between this case and that of *Hilton* and *Grollo* was continually emphasised in the judgment and particularly in its concluding paragraphs. His Honour suggested that these earlier cases represented a far greater degree of closeness between the executive and the judiciary where a federal judge was held to have valid power to 'secretly and anonymously authoris[e] telephonic intercepts'[62] than was the case in *Wilson.*

V COMMENT

All the judgments in *Wilson* relied on three main authorities: *Hilton* and *Grollo* and *Mistretta.*

Both *Hilton* and *Grollo* required the High Court to consider the validity of the power bestowed on federal judges under the Telecommunications (Interception) Act 1979 (Cth). In *Hilton* the major question for determination by the Court was

[60] Ibid 252.
[61] Ibid 253.
[62] Ibid 257.

whether the non-judicial power vested in a judge to authorise the issue of warrants for telephone interception was invalid because the non-judicial power was vested in a federal court or a judge acting as a member of a federal court, and thus whether the power was incidental to exercise of judicial power. The High Court, by majority (Gibbs CJ, Wilson and Dawson JJ), upheld the validity of the grant on the basis that the Act bestowed the non-judicial power on the judge as *persona designata* rather than as a member of the court. The majority in *Wilson*[63] distinguished *Hilton* on the basis that there was no suggestion that the power was bestowed on a judge as member of a federal court or acting as a judge. Thus the majority suggested that *Hilton* was not directly relevant to its deliberations in *Wilson.*[64] However the minority (Mason and Deane JJ) in *Hilton* suggested that the conferral of non-judicial power on a judge as *persona designata* might still offend the separation of powers doctrine 'if it is not kept within precise limits'.[65]

It was this issue, identified by the minority in *Hilton*, which was taken up in *Grollo*. The major argument for determination in *Grollo* was very similar to that in *Wilson*: whether the non-judicial power conferred on a federal judge as *persona designata* to authorise the issue of warrants was incompatible with the judge's judicial functions and therefore in breach of Chapter III of the Constitution.

The major elements of the power conferred in *Grollo* were that the application for a warrant was made *ex parte* and in secret, the identity of the issuing judge was to remain secret as was the existence of the warrant, no records were kept and no return on the warrant was ever required or made so that there was no review of its lawfulness or execution was possible and no reasons for the decision by the judge granting the warrant were necessary.[66] The majority (Brennan CJ, Deane, Dawson and Toohey JJ) in fact relied on the secretive and unreviewable nature of the power as the *very* reason why the power should be exercised by a person 'with the professional experience and cast of mind of a judge'.[67]

In reaching this decision the majority set out the principles later quoted and relied upon by the majority in *Wilson*[68] namely the matters to be taken into account in determining constitutional compatibility.[69] Such compatibility was to be determined by reference to the non-judicial function to be performed by the judicial officer in order to exercise the power conferred and therefore the statute pursuant to which the power is conferred must be examined. This process led the majority to its view that the exercise of power by a judge as a designated person, in secret, to authorise a warrant for telephone tapping was not incompatible with, nor did it compromise, public confidence in the exercise of judicial power.

63 Ibid 224.
64 Ibid.
65 *Hilton* (1985) 157 CLR 57, 81.
66 *Grollo* (1995) 184 CLR 348, 367.
67 Ibid.
68 *Wilson* (1996) 138 ALR 220, 228.
69 *Grollo* (1995) 184 CLR 348, 365.

This conclusion is in sharp contrast with that of McHugh J who, in a minority judgment, suggested the major limitation on judges acting as *persona designata* was the closeness of the function to the performance of executive functions and the extent to which it might create an impression of compromise on the impartiality of the judge.[70] In applying this principle to the facts in *Grollo* his Honour concluded that the nature of the power, being the invasion of privacy in the course of a criminal investigation and, more importantly, the manner of its exercise made the power incompatible with the concurrent exercise of judicial power.[71] The power is not dependent on compliance with objective conditions, it is exercised *ex parte* and in secret, no records are kept, the names of eligible judges are not published, judicial review is practically impossible and there is an obligation to keep all information confidential. All these factors may give rise to direct conflicts with a judge's judicial functions in that a judge would be inhibited in making the information available in the event that a judge wished to disqualify her or himself. Thus 'the duty of secrecy imposed by the Act is in conflict with the exercise of federal judicial power'.[72]

In *Wilson*, the majority and minority identified the same set of facts as the most significant, but reached opposing decisions in the application of the principles to the facts. Kirby J found this unsurprising given the fine dividing line between compatibility and incompatibility.[73] What is surprising, as Kirby J continually pointed out in his judgment, is that the public appointment of judge as a reporter under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), with powers defined by statute, who is bound by rules of procedural fairness and whose report will normally be accessible to the public should be seen to be incompatible whereas a broad power, exercised in secret, without records, bound by confidentiality, that is broadly unreviewable and a direct involvement of the judiciary in the criminal investigation process, should be held constitutionally compatible.

Apart from Gaudron J's reliance on the fact that the telephone tapping power has historically been conferred on judges, in all other respects the criteria her Honour sets out in *Wilson* would appear to be present in the facts of *Wilson*[74] but absent in *Grollo*. Similarly, it is difficult to discern any clear guidance from the majority that explains the different outcomes in the two cases. In *Wilson*[75] the majority suggested the basis of the *Grollo* decision was the independence of the function undertaken together with the international practice of conferring power on judges to authorise warrants. This might be contrasted with the perceived lack of independence in *Wilson*[76] where the reporter's activity was perceived as an adjunct to the Minister's power. This perceived lack of independence is likely to

[70] Ibid 377.
[71] Ibid 378.
[72] Ibid 381.
[73] *Wilson* (1996) 138 ALR 220, 239.
[74] Ibid 234.
[75] Ibid 229.
[76] Ibid 232.

diminish public confidence in the judiciary. However, a reading of *Grollo* suggests that the major emphasis was on the public perception of the activity itself, ie the need for judicial-type independence in authorising warrants, rather than the public perception of a judge acting in secret and unaccountably. Thus it is difficult to reconcile the majority decisions in the two cases. The approach of the majority in *Wilson* appears to be more consistent with that of McHugh J in his minority judgment in *Grollo.* While the majority judgment may serve to clarify the principles applicable in these cases, its application of the principles is sufficiently inconsistent with the majority in *Grollo* to create uncertainty rather than clarity.

Kirby J focuses more specifically on the nature of the power granted under s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) and the transparency with which the reporter must conduct her or his inquiry. This approach appears to attach more importance to public perception of *how* the task is undertaken rather than whether *judicial-type skills* are required to ensure public confidence in the activity undertaken. As a result, it is suggested that Kirby J's application of the principles enunciated by the majority in both *Grollo* and *Wilson*, (but, it is suggested, applied inconsistently) produces both a clearer exposition of the applicable principles and a more consistent and comprehensible application to the facts.

Both the majority and the minority refer to other circumstances in which federal judges are asked to perform non-judicial functions and the decision may well have implications for the practice of conferring such functions on federal judges. Kirby J's view on the power conferred under the Telecommunications (Interception) Act 1979 (Cth) has been discussed.[77] In addition his Honour suggests that an inflexible application of the rule in relation to federal judges undertaking non-judicial functions would deprive Australia of the skills and expertise of such judges on a myriad of tribunals and Royal Commissions — a practice that has historically occurred and has enhanced good government. To this extent, his Honour suggests that history may be relevant in determining where the line should be drawn but that a liberal approach should be taken.[78] To some extent Gaudron J also relies on historical practice to 'save' appointments that might otherwise fail the strict test set out in her Honour's decision.[79]

On the other hand, the majority specifically refers to a number of these tribunals and to Royal Commissions and set out the bases upon which it considers these appointments avoid offending the incompatibility principle.[80] In particular, reference is made to the immunity offered to judges appointed as presidential members of the Native Title Tribunal[81] and to the Land Rights Commissioner.[82] In spite of the range of matters referred to as offending the incompatibility

[77] See above nn 57-62 and accompanying text.
[78] *Wilson* (1996) 138 ALR 220, 250-1.
[79] Ibid 237.
[80] Ibid 232.
[81] Native Title Act 1993 (Cth) s 180(1).
[82] Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 53A(1).

principle, this appears to be the major point of departure between these appointments and those of a reporter under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). Certainly this is the only distinction between the appointment considered in *Grollo* under the Telecommunications (Interception) Act 1979 (Cth) and the appointment of a reporter under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

The immunity provision is also a distinction between appointment of presidential members of the Administrative Appeals Tribunal[83] and the appointment of a reporter under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). In spite of the emphasis placed upon other procedural aspects of the appointment and the proximity of the reporter and the Minister, these factors appear to be balanced by the requirement for the reporter to act with procedural fairness under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), leaving the immunity issue as the clear differentiation between these appointments.

The role of Royal Commissioners is less clear. The Royal Commissions Act 1902 (Cth) also includes an immunity provision[84] and the majority refers to this provision.[85] However, its discussion of Royal Commission appointments is equivocal. The proximity of such inquiries to the executive is recognised by the majority which says that '[t]he terms of reference of the particular Royal Commission and of any enabling legislation will be significant.'[86] The inference is that in some circumstances, the immunity provision may not be sufficient to save an appointment. However, the majority ultimately emphasises the validity of such appointments on the basis that the Royal Commissioner 'will be required to act judicially in finding facts and applying the law and will deliver a report according to the judge's own conscience without regard to the wishes or advice of the Executive'.[87] This conclusion resounds with elements of Kirby J's reasoning and suggests that in this regard both the majority and minority are closer to each other and the majority in *Grollo* than the final decision in *Wilson* suggests.

Finally, it is worth noting the consequences of the decision for the bridge to Kumarangk (Hindmarsh Island). The invalidity of Justice Mathews' appointment meant that the Minister had to appoint a new reporter and obtain a new report before he could have lawfully reconsidered the application for a declaration under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). Rather than take this course, the Government introduced legislation in the Parliament on 17 October 1996 which will enable the bridge to proceed.[88]

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[83] Administrative Appeals Tribunal Act 1975 (Cth) s 60(1).

[84] Ibid s 7(1).

[85] *Wilson* (1996) 138 ALR 220, 232.

[86] Ibid 231.

[87] Ibid.

[88] Hindmarsh Island Bridge Bill 1996 (Cth); Commonwealth, *Hansard*, House of Representatives, 17 October 1996, 5802-3.

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