

The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia

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As the rights revolution in Australian constitutional law takes its course, the attention of judges and commentators has focused largely on implications from representative government. This is only to be expected of a legal landmark of the dimensions of *Australian Capital Television Pty Ltd v Commonwealth*.¹ But as the progeny of that case wend their way through the High Court, it should not be forgotten that in his prescient statement in *Street v Queensland Bar Association*² to the effect that the Australian Constitution 'contains a significant number of express or implied guarantees of rights and immunities',³ Deane J referred only indirectly to representative government.⁴ Instead, his Honour announced that the 'most important' constitutional guarantee 'is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the "courts" designated by Ch.III (s 71)'.⁵

In recent years, members of the High Court have recast the Constitution's exclusive vesting of federal judicial power in Chapter III courts (recognized as a legal limitation upon the powers of the Commonwealth as early as 1909⁶) so as to operate not only as a constraint in the establishment and empowering of federal courts and tribunals but also as a source of implications protective of individual rights, a development which accords with the long history in western thought of the separation of powers as a device for limiting governmental

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¹ (1992) 177 CLR 106.

² (1989) 168 CLR 461.

³ Id 521.

⁴ Merely referring to 'the guarantee of direct suffrage and of equality of voting rights among those qualified to vote (ss 24 and 25)' (id 522). Admittedly, Deane J's list of guarantees was not meant to be exhaustive (id 521).

⁵ Id 521. Section 71 of the Constitution relevantly provides that 'the judicial power of the Commonwealth shall be vested in . . . 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'.

⁶ See *Huddart, Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth* (the *Inter-State Commission* case) (1915) 20 CLR 54 and *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 recognizing that federal judicial power can be exercised only by the courts designated in s 71 of the Constitution. The High Court subsequently recognized in the *Boilermakers'* case that federal courts are confined to the exercise of federal judicial power and powers incidental thereto (and thus cannot validly be invested with any other category of function) (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 and affirmed on appeal to the Privy Council in *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529).

power and enhancing individual liberty.⁷ Although several rights implications flow from the prohibition upon legislative and executive usurpation of, and interference with, the judicial function,⁸ this article is concerned with the constitutional constraints which attend the manner of exercise of judicial power by Chapter III courts — specifically, the unfolding requirement, highlighted in recent dicta of the High Court, of due process in the exercise of federal judicial power. The article begins with those dicta, explores the rationale of the due process requirement and goes on to consider in detail two of the more prominent due process applications identified by the High Court: the guarantee of a fair trial in the exercise of federal judicial power and the (contested) guarantee of equal justice in the exercise of federal judicial power. As will be seen, the former guarantee has much to commend it and has a foothold in High Court thinking dating back many decades. A guarantee of substantive equality in the exercise of federal judicial power should not, however, be accepted.

A CONSTITUTIONALLY ENTRENCHED LIMITATION UPON THE MANNER OF EXERCISE OF FEDERAL JUDICIAL POWER

In *Chu Kheng Lim v Minister for Immigration*⁹ Brennan, Deane and Dawson JJ commenced a section of their judgment concerned with Chapter III of the Constitution by affirming that ‘the Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers’.¹⁰ But in a passage which followed, their Honours ascribed to this doctrine something more than its traditional operation:

Thus, it is well settled that the grants of legislative power contained in s 51 of the Constitution, which are expressly “subject to” the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. *Nor do those grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner*

⁷ See generally in relation to the doctrine of the separation of powers, WB Gwyn, *The Meaning of the Separation of Powers* (1965) and MJC Vile, *Constitutionalism and the Separation of Powers* (1967). See also in relation to the High Court’s altered conception of the separation doctrine, C Parker ‘Protection of Judicial Process as an Implied Constitutional Principle’ (1994) 16 *Adel LR* 341 and G Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in *Future Directions in Australian Constitutional Law* (G Lindell, ed, 1994).

⁸ See, for example, the opinion of a majority of the High Court in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 that a federal Act of Attainder would be invalid. In relation to rights implications flowing from the constitutional prohibition upon legislative and executive usurpation of, and interference with, the judicial function see generally G Winterton, *op cit* (fn 7) 190–9; L Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Syd LR* 166, 169–75.

⁹ (1992) 176 CLR 1.

¹⁰ *Id* 26.

which is inconsistent with the essential character of a court or with the nature of judicial power.¹¹

Nearly four years earlier in *Re Tracey; Ex parte Ryan*,¹² Deane J had described the separation doctrine as 'the Constitution's only general guarantee of due process'¹³ — a description which he repeated in *Re Tyler; Ex parte Foley*.¹⁴ While neither of these remarks was in terms directed to the notion that judicial power must be exercised in a manner consistent with the essential character of a court, they clearly suggest the shorthand label of *due process* in the exercise of federal judicial power.¹⁵

Lim was not the first case in which voice was given to the existence of the due process requirement, but its significance lies in the fact that Brennan and Dawson JJ joined with Deane J in expressly recognizing this constitutional constraint. In the previous year in *Polyukhovich v Commonwealth*¹⁶ Deane, Toohey and Gaudron JJ had each acknowledged the due process principle. Toohey J observed that 'if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power . . . a contravention of Ch.III may be involved'.¹⁷ Gaudron J, a strong proponent of the curial due process implication, maintained in *Polyukhovich* that 'an essential feature of judicial power is that it be exercised in accordance with the judicial process'.¹⁸ And Deane J insisted, as in *Lim*, that the Commonwealth Parliament could not sanction the exercise of federal judicial power 'in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power'.¹⁹

According to Deane J in *Polyukhovich*, the requirement of due process was closely related to the main object or purpose of the separation doctrine which was to ensure the supremacy of law over arbitrary power.²⁰ The exclusive vesting of federal judicial power in Chapter III courts could hardly serve that purpose if it merely imported the formal requirement 'that the repository of

¹¹ Id 26–27 (footnote omitted and emphasis added).

¹² (1989) 166 CLR 518.

¹³ Id 580.

¹⁴ (1994) 181 CLR 18, 34 referring to Chapter III as enshrining 'the Constitution's fundamental and overriding guarantee of judicial independence and due process'.

¹⁵ Both Professors Winterton and Zines have adopted the terminology of due process in relation to this limitation (G Winterton, *op cit* (fn 7) 200; L Zines, *op cit* (fn 8) 167–8). Compare the terminology of 'judicial process' in C Parker, *op cit* (fn 7).

¹⁶ (1991) 172 CLR 501.

¹⁷ Id 689. See also id 685 and 692 per Toohey J; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 608 per Toohey J.

¹⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703. See also *Harris v Caladine* (1991) 172 CLR 84, 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220, 234–5 per Gaudron J; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 616 per Gaudron J; M Gaudron, 'Some Reflections on the Boilermakers Case' (1995) 37 *Journal of Industrial Relations* 306, 308.

¹⁹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

²⁰ Id 606–607 referring, as had Isaacs J in *Huddart, Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 382–3 to Blackstone's injunction that were the judicial power joined with the legislative 'the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law' (W Blackstone, *Commentaries on the Laws of England*, vol 1 (1765) (facsimile ed, 1979) 259).

judicial power be called a court'.²¹ Instead, 'in insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch.III, the Constitution's intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires'.²² In this regard, Chapter III was based 'on the assumption of traditional judicial procedures, remedies and methodology'.²³ In *Leeth v Commonwealth*,²⁴ decided after *Polyukhovich* but before *Lim*, Deane and Toohey JJ in a joint judgment telescoped these arguments into the claim that the provisions of Chapter III were concerned with more than the bare allocation of federal judicial power:

They also dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance. Thus, in Ch.III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially.²⁵

In other words, the exclusive vesting of federal judicial power in Chapter III courts carries with it the requirement that that power be exercised in accordance with the 'traditional judicial process',²⁶ for why else would s 71 have made a point of vesting the judicial power of the Commonwealth in such courts in the first place?²⁷

Reflecting on these statements of principle, the first point to note is that, bearing in mind *Lim*, the curial due process requirement has attracted wide support in the High Court. But what exactly do the above-collected pronouncements mean? Statements that judicial power must be exercised in

²¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

²² *Ibid.*

²³ *Ibid.* See also *id* 614–15.

²⁴ (1992) 174 CLR 455.

²⁵ *Id* 486–7. And see also *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 per Deane J. 'The guilt of the citizen of a criminal offence and the liability of the citizen under the law, either to a fellow citizen or to the State, can be conclusively determined only by a Ch.III court acting as such, that is to say, acting judicially.'

²⁶ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 per Deane and Toohey JJ affirming that 'no part of the judicial power of the Commonwealth can be exercised either by a body which is not a Ch.III court or in a manner which is inconsistent with our traditional judicial process' (footnote omitted).

²⁷ It should be pointed out that Gaudron J, although sharing the supremacy of law rationale of the due process requirement (see *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496–7), has reasoned to its existence via a somewhat different route from Deane J. Gaudron J maintains that a power not exercised in accordance with the judicial process would not be judicial power and thus could not validly be conferred by the Commonwealth Parliament on a Chapter III court (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703–4; *Leeth v Commonwealth* (1992) 174 CLR 455, 502–3). At first sight, this approach seems to invoke the rule established in the *Boilermakers'* case rather than the exclusive vesting of federal judicial power in Chapter III courts. Nonetheless, her Honour has noted (correctly) that even leaving aside the majority judgment in *Boilermakers'*, 'it is not in doubt that s.71 imposes limits as to the powers which the Parliament may confer on a court' (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703). It may be then, as Professor Winterton says, that Gaudron J's view 'does not depend on *Boilermakers'*, (G Winterton, *op cit* (fn 7) 202, fn 117), but instead draws from the basic allocation of federal judicial power to the courts designated in Chapter III.

accordance with the 'essential character of a court', 'the judicial process' or 'the essential requirements of the curial process' each suggest (but are not necessarily confined to) observance of the rules of natural justice. And indeed, Gaudron J has explicitly acknowledged that 'the judicial process' involves (amongst other things) 'the application of the rules of natural justice';²⁸ Deane and Toohey JJ have said that one of the 'essential requirements of the curial process' is 'the obligation to act judicially';²⁹ and Mason CJ, Dawson and McHugh JJ have observed that 'it may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power'.³⁰ However, beyond certain core applications (for example, the rule against bias and the basic right to be heard) the content of this constitutionally entrenched natural justice obligation is less than clear. Deane J and Gaudron J have indicated that they regard the due process requirement as embracing the emerging fair trial principle (a principle which incorporates natural justice, but seems broader than it), thus founding an implied constitutional guarantee of a fair trial of a federal offence.³¹ But, the further one moves from the natural justice heartland, the less consensus there is as to the elements of due process. Thus, Deane J and Gaudron J, with some support from Toohey J, have stated that the application by a Chapter III court of a retroactive criminal law would be a denial of due process,³² (in the words of Deane J 'it would represent an abdication of the judicial function of determining in a criminal trial whether past conduct had contravened the law'³³), a proposition which Mason CJ, Dawson and McHugh JJ have rejected.³⁴ Gaudron J has also accepted that the 'judicial process' encompasses a species of equality rights,³⁵ a claim which some High Court judges have denied³⁶ but others might be inclined to endorse in one form or another.³⁷

²⁸ *Harris v Caladine* (1991) 172 CLR 84, 150. And see also *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J.

²⁹ *Leeth v Commonwealth* (1992) 174 CLR 455, 487.

³⁰ Id 470. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 622 per McHugh J.

³¹ *Dietrich v R* (1992) 177 CLR 292, 326 per Deane J and 362 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703 per Gaudron J. Other members of the High Court are yet to declare themselves on this point. Referring to *Dietrich* and *Polyukhovich*, Kirby J (while President of the NSW Court of Appeal) has observed that 'the fair trial right of persons accused of crimes . . . may itself be implied in the Constitution . . . I say nothing more of that for it has not been argued' (*John Fairfax v Doe* (1995) 130 ALR 488, 515).

³² *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 612-15 per Deane J and 706-8 per Gaudron J. See also id 689 per Toohey J.

³³ Id 614.

³⁴ Because although they did not specifically consider this point in *Polyukhovich v Commonwealth*, they each found that s 9 of the *War Crimes Act 1945* (Cth) (as amended) which created a retroactive federal offence was a valid law of the Commonwealth and did not infringe Chapter III of the Constitution. It seems that Brennan CJ agrees with Mason CJ, Dawson and McHugh JJ on this point (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 554 per Brennan J).

³⁵ *Leeth v Commonwealth* (1992) 174 CLR 455, 501-3.

³⁶ Id 469-71 per Mason CJ, Dawson and McHugh JJ.

³⁷ See text accompanying fn 223-34 infra.

A number of these specific applications of the due process requirement are considered below.³⁸ Before embarking on that survey, however, the abstract conception of curial due process warrants further scrutiny. As foreshadowed in the introduction to this paper, curial due process is but one of several constitutional implications protective of individual rights recognized by members of the High Court in recent years: the freedom of political discussion³⁹ and the guarantee of legal equality⁴⁰ are other prominent examples. This emerging jurisprudence of implied constitutional rights is in turn part of a broader resurgence of judicial interest in, and enforcement of, individual rights, whether founded in constitutional, statutory or common law.⁴¹ Against this backdrop, the due process requirement serves to protect individual rights by insulating certain 'judicial procedures, remedies and methodology'⁴² (to adopt the words of Deane J in *Polyukhovich*) from legislative interference, thereby directly enhancing the autonomy of Chapter III courts vis-a-vis the elected arms of government. In this sense, recognition of the due process requirement complements an older institutional vision; just as a series of High Court decisions prior to 1920 staked the judiciary's claim to a guaranteed minimum set of functions immune from either legislative or executive usurpation (these functions being exclusively 'judicial' in nature),⁴³ so too the due process implication secures to the courts a guaranteed measure of control over their own procedures at the expense of Parliament.

The link between these mutually reinforcing institutional visions is supplied by the rule of law. The exclusive vesting of federal judicial power in Chapter III courts, although suggested by s 71 of the Constitution, draws decisive force from our inherited legal traditions and the need to promote the supremacy of law over arbitrary power (including therein the impartial administration of justice).⁴⁴ The curial due process implication enjoys a less secure textual foundation than this basic rule allocating federal judicial power, but as is apparent from Deane J's explanation in *Polyukhovich*, also gives life to rule of law considerations. The nexus, in terms of adherence to the rule of law, between the ideal of courts as the repositories of judicial power in our society and the manner of exercise of that power, was recognized by Street

³⁸ The notable omission is the application by a Chapter III court of a retroactive criminal law which issue needs to be considered in a setting which also examines the constitutional prohibition upon legislative usurpation of federal judicial power (see *Polyukhovich v Commonwealth* (1991) 172 CLR 501). Such an examination is beyond the scope of this paper.

³⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

⁴⁰ *Leeth v Commonwealth* (1992) 174 CLR 455 (noting that the implied guarantee of legal equality is yet to be endorsed by a majority of the High Court).

⁴¹ A Mason, 'The State of the Judicature' (1994) 20 *Mon LR* 1, 10.

⁴² *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

⁴³ *Huddart, Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth* (the *Inter-State Commission* case) (1915) 20 CLR 54 and *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

⁴⁴ *R v Quinn; ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11 per Jacobs J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220, 226-7 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; L Zines, *The High Court and the Constitution* (4th ed, 1997) 212.

CJ speaking in the New South Wales context in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*:⁴⁵

Fundamental to the rule of law and the administration of justice in our society is the convention that the judiciary is the arm of government charged with the responsibility of interpreting and applying the law as between litigants in individual cases. The built-in protections of natural justice, absence of bias, appellate control, and the other concomitants that are the ordinary daily province of the courts, are fundamental safeguards of the democratic rights of individuals.⁴⁶

Thus, recognition of the due process requirement has involved the High Court in an ostensibly purposive brand of constitutional interpretation;⁴⁷ the Constitution allocates federal judicial power to Chapter III courts in order to promote the supremacy of law over arbitrary power but that purpose would be defeated were those courts to proceed in other than a fair and impartial manner. Hence the necessity of the curial due process implication which relieves against the possibility of s 71 being treated as a formalistic incantation rather than a constitutional command of substance.

This purposive approach to constitutional interpretation with its emphasis on substance over form is not in itself a novel development.⁴⁸ *Cole v Whitfield*,⁴⁹ for example, embodies a not dissimilar interpretative approach, the question-begging text of s 92 being accorded a meaning by a unanimous High Court commensurate with its historically determinable purpose. Although the Convention Debates have little to say on the topic of the separation of powers,⁵⁰ the attribution of a rule of law rationale to s 71 of the Constitution can hardly be gainsaid. It accords with deeply held legal and

⁴⁵ (1986) 7 NSWLR 372.

⁴⁶ Id 375–76. See also J Rawls, *A Theory of Justice* (1972) 238–9 and J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 201.

⁴⁷ See generally A Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1.

⁴⁸ See for example, JJ Doyle, 'Constitutional Law: "At the Eye of the Storm"' (1993) 23 UWALR 15.

⁴⁹ (1988) 165 CLR 360.

⁵⁰ See F Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Pub LR* 96. It should be noted, however, that the framers specifically considered and rejected a due process clause directed to the States modelled on the fourteenth amendment to the United States Constitution. See, for example, the clause sponsored by Richard O'Connor at the Melbourne session of the second Convention in order to ensure that 'no impulse . . . which might lead to the passing of an unjust law shall deprive a citizen of his right to a fair trial' (*Official Record of the Debates of the Australasian Federal Convention* (1898) 673, 683) and its rejection by other delegates on the basis that Australian history did not suggest that the rights of persons were at risk in this regard (id 678 (Kingston); 683 (Symon); 687–88 (Isaacs) and 688 (Cockburn)). See also JA La Nauze, *The Making of the Australian Constitution* (1972) 231 and JM Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "Fourteenth Amendment"' (1996) 42 *Australian Journal of Politics and History* 10. This decision that a due process clause was unnecessary might, from an originalist's perspective, undercut the interpretation of s 71 of the Constitution presented in this article. But acceptance of such an originalist argument would deny a procedural dimension to s 71 — an outcome wholly at odds with our legal traditions.

social traditions and is reinforced by other provisions of Chapter III, notably s 72 (making essential provision for the independence of the federal judiciary) and s 75. Moreover, the doctrine of the separation of powers finds its primary justification as a matter of political theory in the creation of an institutional environment in which the supremacy of law will be fostered.⁵¹ The rule of law thus forms an assumption of the Constitution⁵² and may even be embedded in its terms.⁵³

It follows that the curial due process implication, considered generally, is consistent with established, or at least contemporary, interpretative technique.⁵⁴ In addition, the contemporary unfolding of curial due process draws unexpectedly strong support from the fact that the notion of constitutionally entrenched limitations upon the manner of exercise of federal judicial power is not new. It emerged as early as 1938 in the context of judicial adherence to the impartiality limb of the natural justice obligation and has been effectively recognised by members of the High Court on a number of occasions since.⁵⁵ The section which follows not only underscores the legitimacy of the due process implication, but explores its operational heartland.

⁵¹ See for example, Montesquieu, *The Spirit of the Laws* (A Cohler, B Miller and H Stone translators and eds, 1989) Book 11, Ch 6; WB Gwyn, *The Meaning of the Separation of Powers* (1965) 128 fn 1.

⁵² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 per Dixon J.

⁵³ See A Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in *Interpreting Constitutions* (C Sampford and K Preston, eds, 1996) 29. See also *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670 per Murphy J: 'from the nature of our society, reinforced by the text [of the Constitution] (particularly Ch.III, "The Judiciary", and Ch.I, "The Parliament") in my opinion, an implication arises that the rule of law is to operate, at least in the administration of justice'.

⁵⁴ Note in this regard the view of an American commentator who, despite acknowledging that adjudicative fairness in the United States is primarily a function of the due process clause, has observed of the United States Constitution that: 'Historically, the common law system presumed the impartiality of the courts. Thus article III's investiture of "judicial power" in the federal courts probably represents an implicit requirement of fairness in adjudication' (RL Brown, 'Separated Powers and Ordered Liberty' (1991) 139 *University of Pennsylvania Law Review* 1513, 1545 fn 145).

⁵⁵ See also J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720: 'This Constitution vests the legislative, executive and judicial powers respectively in distinct organs; and, though no specific definition of these powers is attempted, it is conceived that the distinction is peremptory, and that any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions, would be equally unconstitutional. Thus it has been held in the United States that "neither the legislative nor the executive branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner. Nor can the executive or legislative departments review or sit as a court of errors on the judicial acts or opinions of the courts of the United States". (Baker's Annot. Const. of the U.S., p. 121)' (emphasis added).

CURIAL DUE PROCESS AND THE BASIC FEATURES OF THE NATURAL JUSTICE OBLIGATION

The 1938 decision alluded to above is *R v Federal Court of Bankruptcy; Ex parte Lowenstein*⁵⁶ in which a majority of the High Court upheld s 217 of the *Bankruptcy Act 1924* (Cth) which empowered the Federal Court of Bankruptcy upon an application for an order of discharge to charge a bankrupt with an offence against the Act and to try her or him summarily. Counsel for the applicant bankrupt in *Lowenstein* — Garfield Barwick — had argued the case (inter alia) in terms of the separation doctrine, seemingly urging the Court both that non-judicial powers could not validly be conferred on a federal court (a proposition which was ultimately accepted in 1956 in the *Boilermakers'* case,⁵⁷ but at the time of *Lowenstein* remained undecided) and, in the alternative, that the impugned provision 'constitutes an attempt to invest a court with a non-judicial function inconsistent with its judicial function',⁵⁸ the essence of his attack being that 'in effect, the Bankruptcy Court acts as prosecutor and judge in the particular matter'.⁵⁹ Latham CJ, Rich, Starke and McTiernan JJ, however, evinced little sympathy for these submissions. Latham CJ (with whom Rich J agreed) declined to recognize a blanket prohibition upon the admixture of judicial and non-judicial functions in the one judicial body.⁶⁰ Nonetheless, he conceded that the two functions could not be combined in all circumstances:

If a power or duty were in its nature such as to be inconsistent with the co-existence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it.⁶¹

Yet, surprisingly, this qualification (henceforth referred to as the 'incompatibility' qualification) upon the power of Parliament to combine judicial and non-judicial functions — a limitation which no judge today would deny whatever her or his views on the rule established in the *Boilermakers'* case⁶² — was not attracted on the facts of the case. Drawing amongst other things on the long accepted practice of the same tribunal both charging and trying an individual for contempt in the face of the court, Latham CJ found that the relevant provision of the *Bankruptcy Act* did not confer incompatible functions upon the Bankruptcy Court.⁶³ Starke J simply asserted that the functions

⁵⁶ (1938) 59 CLR 556.

⁵⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC) and *Attorney-General (Cth) v R* (1957) 95 CLR 529 (PC).

⁵⁸ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 559 (summary of argument).

⁵⁹ Id 558 (summary of argument).

⁶⁰ Id 566.

⁶¹ Id 567.

⁶² See for example, the dissent of Williams J in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220; G Winterton, *Parliament, the Executive and the Governor-General* (1983) 63–4.

⁶³ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 567–70.

in question were ‘clearly connected with and incidental to judicial power and to the functions of a court of bankruptcy’.⁶⁴ McTiernan J found that the provision in question did not vest the Bankruptcy Court with any power ‘inconsistent with the due exercise of its judicial power’ because it did not intend to make the court a party to the proceedings.⁶⁵

By contrast, Dixon and Evatt JJ in *Lowenstein* wrote a joint dissenting judgment which, it is submitted, represents the preferable application of the separation doctrine. And it is in this judgment that the curial due process requirement can be more readily discerned. Garfield Barwick’s twin submissions based upon the separation of powers had placed Dixon and Evatt JJ in an awkward position in the framing of a joint opinion for they had previously expressed opposing views on whether the Commonwealth Parliament could validly invest a federal court with non-judicial functions: Dixon J had already committed himself to the view that federal courts were confined to the exercise of federal judicial power⁶⁶ whereas Evatt J had denied the existence of a general prohibition upon the admixture of judicial and non-judicial functions.⁶⁷ This disagreement over the scope of the separation doctrine, however, explains the language in which Dixon and Evatt JJ expressed their disapprobation of s 217 of the *Bankruptcy Act*.

Having confirmed that federal judicial power in bankruptcy must conform to the requirements of Chapter III of the Constitution, Dixon and Evatt JJ reasoned that Parliament’s attempt to confer on the Bankruptcy Court the twin functions of prosecutor and judge was ‘outside the conception of judicial power’.⁶⁸ The maxim *nemo potest esse simul actor et iudex* (no one can be at once suitor and judge) was not ‘a mere caution against human frailty’.⁶⁹ Instead, it captured an essential feature of the English notion of the judicial function. Of this function Dixon and Evatt JJ said:

A long course of development produced a conception of the judicial process which placed the court in the position of a detached tribunal entertaining and determining civil and criminal pleas brought before it. It is true that in relation to contempt of court the courts of justice are armed with powers of summary punishment, at all events for contempts *in facie curiae* exercisable *ex mero motu*. But this has always been regarded as an exceptional power based on the necessity of keeping order and of preserving the court from actual interference in the discharge of its duties. . . . *The judicial power does not include the promotion, prosecution and proof of criminal charges by a court for its own determination.*⁷⁰

⁶⁴ Id 577.

⁶⁵ Id 590–91.

⁶⁶ *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 97–8. Dixon J’s view was, of course, ultimately to prevail in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (HC) and *Attorney-General (Cth) v R* (1957) 95 CLR 529 (PC).

⁶⁷ In *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 Evatt J had denied that judicial power alone could be reposed in federal courts pointing to the example of the Commonwealth Court of Conciliation and Arbitration which exercised both judicial and arbitral functions: id 116–17.

⁶⁸ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 588.

⁶⁹ *Ibid*.

⁷⁰ Id 588–9 (emphasis added).

And this in turn led to their Honours' conclusion which successfully camouflaged their difference of opinion with respect to what ultimately would become known as the rule in the *Boilermakers'* case:

However it [s 217] may be described, whether as a combination of functions, as a course of procedure, or as a jurisdiction or authority, it terminates in an act which under the Constitution can be done only in the exercise of judicial power, namely, the conviction of an offender and the passing of judgment upon him; *yet the duty is to be performed in a manner at variance with the conception of judicial power.*⁷¹

Thus contrary to the view of the majority, s 217 of the *Bankruptcy Act* was invalid as travelling beyond Chapter III of the Constitution.

Of course, this judgment of Dixon and Evatt JJ in *Lowenstein* can be interpreted as a decision that the function of charging the bankrupt was inconsistent with the judicial function of trying him or her on that charge. So conceived, the decision represents an application of the incompatibility limitation. But in the passage quoted immediately above their Honours suggest as an alternative basis for their decision that Parliament was asking the Court of Bankruptcy to try an individual for a federal offence 'in a manner at variance with the conception of judicial power', the lack of due process arising from the circumstance that the tribunal of fact and law had itself launched the charge against the individual in question contrary to generally accepted principles of apprehended bias.⁷²

The overlap which *Lowenstein* thus reveals between the due process requirement and the incompatibility qualification arises from the fact that when a legislative or executive power is described as incompatible with the exercise of judicial power, this generally means that were a court to undertake the relevant legislative or executive function, this would reflect adversely on its manner of exercise of judicial power. Thus, if a court were to charge an individual with an offence, that fact — while not preventing the court from proceeding summarily with the trial of the offence in either a physical or temporal sense — would nonetheless undermine the appearance of impartiality in the court's exercise of judicial power.

It is not surprising then that Williams J in his exposition of the incompatibility test in his dissenting judgment in the *Boilermakers'* case uses language suggestive of the idea that the exclusive vesting of federal judicial power in Chapter III courts carries with it the requirement that that power be exercised in accordance with 'the judicial process'. Although Williams J rejected the

⁷¹ Id 589 (emphasis added).

⁷² One other member of the Court in *Lowenstein* — McTiernan J — recognized a principle coming very close to (if not corresponding with) the due process principle. His Honour said that the case before him raised the question 'whether the court would by exercising any of the powers expressed in [s 217] take any part in the proceedings other than that of a judge. If the answer to that question is yes, it would not be correct to say that the bankrupt was being tried by a court which sec.71 intended to exercise the judicial power of the Commonwealth, and it would follow that the provisions of sec.217 which brought about that result would be invalid'. However, McTiernan J went on to deny that 'sec.217 gives to "the court" any power that is inconsistent with the due exercise of its judicial power': id 590. In terms of the recognition of a due process principle, compare however id 567 per Latham CJ.

view that judicial power alone could be conferred on Chapter III courts, he (like Latham CJ) was not prepared to sanction every combination of judicial and non-judicial functions. To the contrary, the exclusive vesting of judicial power in Chapter III courts meant that ‘nothing must be done which is likely to detract from their complete ability to perform their judicial functions’.⁷³ This in turn led to the following implied limitation upon the admixture of judicial and non-judicial powers:

The Parliament cannot . . . by legislation impose on the courts duties which would be at variance with the exercise of these functions or duties *and which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions*. (What Fry LJ in *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* calls their ‘fixed and dignified course of procedure’).⁷⁴

In other words:

The functions must not be functions which courts *are not capable of performing consistently with the judicial process*.⁷⁵

Of course, Williams J’s incompatibility test was overtaken by the broader rule articulated by the majority in the *Boilermakers’* case. But as *Grollo v Palmer*⁷⁶ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁷⁷ demonstrate, even accepting that non-judicial functions cannot be conferred by the Commonwealth on Chapter III courts, the incompatibility limitation survives as a constraint upon the ability of Parliament to vest executive functions in federal judges considered as designated persons.⁷⁸ If in the realm of the designated person principle, the separation doctrine and ‘the conditions necessary for the valid and effective exercise of judicial power’⁷⁹ ordain that:

no function can be conferred [on a judge considered as a designated person] 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 power⁸⁰

such incompatibility arising from, for example, a perceived threat to judicial impartiality,⁸¹ it is but a short step to the due process requirement. This is

⁷³ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 314.

⁷⁴ *Ibid* (emphasis outside brackets added, footnote omitted).

⁷⁵ *Id* 315 (emphasis added). The relationship between the incompatibility qualification and curial due process is also evident in the judgment of Toohey J in *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 608.

⁷⁶ (1995) 184 CLR 348.

⁷⁷ (1996) 138 ALR 220.

⁷⁸ See also *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

⁷⁹ *Grollo v Palmer* (1995) 184 CLR 348, 365 per Brennan CJ, Deane, Dawson and Toohey JJ.

⁸⁰ *Ibid*.

⁸¹ See for example, *Hilton v Wells* (1985) 157 CLR 57, 73–4 per Gibbs CJ, Wilson and Dawson JJ speaking of the designated person principle and the incompatibility qualification attending it: ‘If the nature or extent of the [non-judicial] functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial functions, the principle underlying the *Boilermakers’ Case* would doubtless render the legislation invalid’.

because if Parliament cannot undermine judicial impartiality by conferring a particular type of non-judicial function upon a federal judge *persona designata*, then it can hardly do so directly by asking the court to exercise judicial power in a partial, or apparently partial, manner. To do so would fly in the face of the evident purpose of s 71's exclusive vesting of federal judicial power in Chapter III courts.

It is of course improbable in the extreme that Parliament would in terms authorize a Chapter III court to exercise judicial power in a partial manner. But this core natural justice application of the due process requirement can be infringed in more subtle ways. *Lowenstein* provides one example. The judgment of Gummow J in *Grollo* refers to another. In that case, a majority of the High Court upheld provisions of the *Telecommunications (Interception) Act 1979* (Cth) which conferred the non-judicial function of authorizing the issue of telecommunication interception warrants on Federal Court judges who had consented to act as designated persons. Gummow J recognized the designated person principle, but hesitated as to whether the Act nonetheless infringed the separation doctrine. In particular, Gummow J was troubled by the fact that the Act, as well as certain provisions of the *Crimes Act 1914* (Cth), appeared to impose a duty of confidentiality upon a *persona designata* in relation to information obtained in the course of a warrant application. This duty might conflict with the subsequent discharge of that person's judicial functions, preventing (for example) the disclosure to parties of facts which would otherwise found (or dispel) a claim of apprehended bias. In this regard, Gummow J described judicial independence as 'a necessary attribute of the exercise of the judicial power of the Commonwealth'⁸² having earlier observed that 'the rules as to reasonable apprehension of bias in their application to the courts have, at their root, the doctrine of the separation of the judicial from the political heads of power'.⁸³ Ultimately Gummow J concluded that as a matter of statutory construction the duty of confidentiality did not extend to the discharge by a *persona designata* of functions as a judge exercising federal judicial power.⁸⁴ But his Honour clearly indicated that had he found otherwise, the confidentiality requirement would have amounted to 'an impermissible undermining of the *Boilermakers*' doctrine'.⁸⁵

It should be acknowledged that Gummow J did not expressly link this 'impermissible undermining of the *Boilermakers*' doctrine' to dicta such as those from *Lim* and *Polyukhovich* quoted at the outset of this paper. Yet, Gummow J's concerns in *Grollo* fall within the due process rubric; to prevent a judge charged with the exercise of the judicial power of the Commonwealth from ensuring that no shadow of apprehended bias taints proceedings in a

⁸² *Grollo v Palmer* (1995) 184 CLR 348, 395. See also, for example, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220, 237 per Gaudron J: 'impartiality and the appearance of impartiality are defining features of judicial power'.

⁸³ *Grollo v Palmer* (1995) 184 CLR 348, 394 (footnote omitted).

⁸⁴ *Id* 397-8.

⁸⁵ *Id* 398.

particular matter derogates from one of the essential requirements of the curial process.⁸⁶

The rule against bias is but one manifestation of the natural justice obligation and there can be no doubt that under the due process requirement the hearing rule also operates as a constitutionally entrenched limitation upon the manner of exercise of federal judicial power, at least to the extent that parties are entitled to be present throughout the hearing of their matter and to put their side of the case to the tribunal of fact and law.⁸⁷ One possible consequence of the constitutionalization of the *audi alteram partem* rule is to check recent proposals to place time limits upon court hearings.⁸⁸ The High Court Rules restrict the time permitted for oral argument in applications for special leave to appeal to twenty minutes per side, the applicant enjoying an additional five minute reply.⁸⁹ Presumably the High Court regards this as consistent with the due process implication. Indeed, in light of the growing number of applications for special leave to appeal, Mason CJ foreshadowed in an address delivered in 1993 that the Court 'ultimately . . . will find it necessary to consider dealing with these applications on written argument' a procedure expressly contemplated by the High Court Rules in certain circumstances.⁹⁰ The requirement of special leave to appeal is, however, a 'filtering mechanism'⁹¹ and the special leave application cannot be likened to a full trial or appeal. It can be expected then that the High Court will closely scrutinize for conformity to constitutional principle any attempt under rule of court or statute to limit hearing times in federal jurisdiction.

In addition to the hearing rule, the 'judicial process' or 'the essential requirements of the curial process' would necessarily embrace the associated requirement that courts proceed, save in exceptional circumstances, by way

⁸⁶ See also McHugh J in *Grollo* who speculated 'it may be that constitutionally neither the Act nor s 70 of the *Crimes Act* can prevent a judge, exercising federal judicial power, from disclosing to the parties any information that might found an application that the judge disqualify him or herself for apprehended bias. But it is unnecessary to decide that question': id 381.

⁸⁷ For example, id 394 per Gummow J describing an 'essential attribute of the judicial power of the Commonwealth' as the resolution of justiciable controversies by application of the law to the facts 'so as to provide final results which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning'. See also *In the Marriage of Collins* (1990) 14 Fam LR 162, especially 174-5.

⁸⁸ For a call for such limitations see, for example, M Howell, '“Your Time is Up” — The Imposition of Time Limits for the Presentation of Cases at Hearings' (1996) 5 JJA 170.

⁸⁹ Order 69A rule 9.

⁹⁰ A Mason, 'The State of the Judicature' op cit (fn 41) 6. See also s 21(1) *Judiciary Act* 1903 (Cth) and High Court Rules 069A vis (1); A Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15 *U Tas LR* 1, 21.

⁹¹ A Mason, 'The State of the Judicature' op cit (fn 41) 6. See also A Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' op cit (fn 90) 6.

of open and public hearing.⁹² The exceptional circumstances qualification is important as it is generally accepted that certain matters, for example many of those involving children, should be heard in closed court.⁹³ This in turn draws attention to the fact that like any other constitutional implication protective of individual rights, the due process implication is surely subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.⁹⁴ Application of this reasonable limitations notion will of course involve the Court in 'policy evaluations'⁹⁵ and a balancing of social interests. Nonetheless, it is a balancing process which in other contexts the High Court has been prepared to undertake.⁹⁶

In conclusion, it should be emphasized that each of the aforementioned 'natural justice' limitations upon the manner of exercise of federal judicial power serves to promote the rule of law considerations implicit in s 71 of the Constitution.⁹⁷ In *Re Nolan; Ex parte Young*,⁹⁸ Gaudron J affirmed that curial due process does indeed necessitate application of the rules of natural justice and open and public hearings. And, in a crucial passage, her Honour went on in a crucial passage, to characterize the due process requirement (which she also regarded as including the right to a fair trial for federal offences and 'the ascertainment of the facts as they are . . . and the identification of the applicable law, followed by an application of that law to those facts'⁹⁹) as equivalent to the democratic process in terms of its transcendent importance to Australian society:

The determination in accordance with the judicial process of controversies as to legal rights and obligations and as to the legal consequences attaching to conduct is vital to the maintenance of an open, just and free society. Quite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice. Moreover and more directly, the judicial process protects the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained.

⁹² *Harris v Caladine* (1991) 172 CLR 84, 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J; *Grollo v Palmer* (1995) 184 CLR 348, 379 per McHugh J: 'Open justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power': id 394 per Gummow J (quoted at fn 86 supra).

⁹³ J Seymour, *Dealing With Young Offenders* (1988) 296-9.

⁹⁴ To borrow the formulation of the justified limits provision recommended by the Constitutional Commission as part of a new Chapter of the Constitution on rights and freedoms (*Final Report of the Constitutional Commission* (1988) 490).

⁹⁵ *Ibid* (quoting the rights committee).

⁹⁶ For example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁹⁷ J Raz, *op cit* (fn 46) 201.

⁹⁸ (1991) 172 CLR 460, 496.

⁹⁹ *Ibid*.

By reason of the interests which the judicial process protects, that process is properly to be seen as partaking of the same fundamental importance as the democratic process.¹⁰⁰

This passage underscores the rule of law rationale of the curial due process requirement (thus expressly aligning Gaudron J with Deane J in this regard) while hinting at the potentially broad scope of the principle beyond the core features of the natural justice obligation. As foreshadowed, Gaudron J accepted in *Re Nolan* that since judicial power must be exercised in accordance with the judicial process 'Ch.III provides a guarantee, albeit only by implication, of a fair trial of those offences created by a law of the Commonwealth',¹⁰¹ a statement which points to adherence to a super-added notion of procedural fairness (that is, to a notion of fairness not satisfied by mere compliance with the rule against bias and the core features of the hearing rule) as a potential due process extension, at least in criminal proceedings. That extension, pregnant as it is with possibilities for our criminal justice system, is considered in the section which follows.

CURIAL DUE PROCESS AND THE GUARANTEE OF A FAIR TRIAL OF A FEDERAL OFFENCE

General Considerations

In *Re Tracey; Ex parte Ryan*, Deane J observed that 'the guarantee involved in the vesting of judicial power exclusively in Ch.III courts is at its most important in relation to criminal matters'.¹⁰² As the liberty of the individual is at stake in such matters, it can readily be accepted that the curial due process requirement places special constraints upon the conduct of a trial for a federal offence (after all, the practical content of natural justice or procedural fairness varies with the circumstances of the case). Nonetheless, had Gaudron J's reference in *Re Nolan* to an implied constitutional guarantee of a 'fair trial' of a federal offence stood in isolation, there may have been doubt as to whether this imported more than trial by an impartial judge and (in the case of an indictable offence¹⁰³) impartial jury, the defendant having previously been supplied with particulars of the charge against her or him, being entitled to respond to the prosecution case, to adduce evidence and to cross-examine witnesses.¹⁰⁴ But, in *Dietrich v R*¹⁰⁵ Gaudron J (joined by Deane J) suggested

¹⁰⁰ Id 496-7.

¹⁰¹ Id 496.

¹⁰² (1989) 166 CLR 518, 581. See also *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11 per Jacobs J; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 per Deane J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 per Brennan, Deane and Dawson JJ; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 615 per Gaudron J describing criminal proceedings as involving 'the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences'.

¹⁰³ See s 80 of the Constitution.

¹⁰⁴ See generally *Jago v District Court (N.S.W.)* (1989) 168 CLR 23, 57 per Deane J.

¹⁰⁵ (1992) 177 CLR 292.

that by 'guarantee . . . of a fair trial' she envisaged a meeting between the curial due process requirement and a previously distinct and separately evolving body of law based upon the 'fundamental requirement' of our system of criminal justice 'that a person should not be convicted of an offence save after a fair trial according to law'.¹⁰⁶ This latter body of law can be termed the 'fair trial principle'.¹⁰⁷ (And in the discussion which follows, the composite expression 'fair trial' refers to that fair trial principle. The curial due process principle in its various applications is referred to as such).

In recent years, in cases involving both federal and non-federal offences, the High Court has placed renewed emphasis on an accused's right not to be tried unfairly and has 'redefin[ed] the essential elements of a fair trial' in response to changing perceptions of what fairness in the administration of criminal justice requires.¹⁰⁸ This revitalized fair trial principle finds its primary application 'in rules of law and of practice designed to regulate the course of the trial'.¹⁰⁹ The 'McKinney warning' to be directed to a jury as to the dangers of convicting an accused when substantially the only basis for a finding of guilt is an uncorroborated confession allegedly made whilst in police custody is an example of such a rule.¹¹⁰ The High Court has accepted, however, that sometimes there is nothing a trial judge can do during the course of a trial (in the form of directions, warnings and so forth) to counteract a source of unfairness to the accused. In this situation the inherent jurisdiction of the court 'extends to a power to stay proceedings in order "to prevent an abuse of process or the prosecution of a criminal proceeding . . . which will result in a trial which is unfair"'.¹¹¹ *Dietrich v R* (discussed immediately below) exemplifies the operation of the fair trial principle in this latter situation.

Fair Trial and Constitutionalization of the Abuse of Process Discretion

*Dietrich*¹¹² confirmed that an indigent accused in Australia does not enjoy a common law right to be provided with counsel at public expense.¹¹³ Nonetheless, a majority of the High Court held that where an accused is charged

¹⁰⁶ Id 362 per Gaudron J.

¹⁰⁷ M Weinberg, 'Criminal Procedure and the Fair Trial Principle' in *Essays on Law and Government vol 2: The Citizen and the State in the Courts* (PD Finn, ed, 1996) 159.

¹⁰⁸ A Mason, 'Fair Trial' (1995) 19 *Crim LJ* 7, 8. See generally J Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism' (1995) 4 *JJA* 171 (Part 1) 193 (Part 2); KP Duggan, 'Reform of the Criminal Law with Fair Trial as the Guiding Star' (1995) 19 *Crim LJ* 258; M Weinberg, op cit (fn 107) 159.

¹⁰⁹ *Dietrich v R* (1992) 177 CLR 292, 299-300 per Mason CJ and McHugh J (footnote omitted).

¹¹⁰ *McKinney v R* (1991) 171 CLR 468, 476, 478 per Mason CJ, Deane, Gaudron and McHugh JJ.

¹¹¹ *Dietrich v R* (1992) 177 CLR 292, 300 per Mason CJ and McHugh J (footnote omitted) quoting from *Barton v R* (1980) 147 CLR 75, 95-6 per Gibbs ACJ and Mason J. See also *Jago v District Court* (NSW) (1989) 168 CLR 23, 29-31 per Mason CJ; 71-2 per Toohey J; 75 per Gaudron J; DM Paciocco, 'The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept' (1991) 15 *Crim LJ* 315; G Zdenkowski, 'Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?' (1994) 18 *Crim LJ* 135, 147; A Mason, 'Fair Trial' (1995) 19 *Crim LJ* 7, 11.

¹¹² See generally in relation to the *Dietrich* case, G Zdenkowski, op cit (fn 111).

¹¹³ *Dietrich v R* (1992) 177 CLR 292, 297-8 per Mason CJ and McHugh J.

with a serious criminal offence, legal representation of the accused is generally essential to a fair trial. As a trial judge in the course of her or his conduct of the trial is unable to eliminate this source of unfairness to the accused, the appropriate remedy is a stay or adjournment of proceedings in order to prevent an abuse of process. Thus, a majority of the High Court in *Dietrich* subscribed to the following statement of principle:

[when] a trial judge . . . is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation . . . [then] in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If . . . an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.¹¹⁴

Gaudron J was a member of that *Dietrich* majority and in the opening sentences of her judgment explicitly linked the fair trial principle to curial due process:

It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law . . . The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch.III's implicit requirement that judicial power be exercised in accordance with the judicial process. Otherwise the requirement that a trial be fair is not one that impinges on the substantive law governing the matter in issue.¹¹⁵

Deane J, also part of the *Dietrich* majority, commenced his judgment in identical fashion:

The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch.III of the Constitution designates.¹¹⁶

Yet despite the fact that Mr Dietrich had been forced to proceed to trial unrepresented on serious *federal* offences, Deane J and Gaudron J failed to elaborate upon this link between the right of an accused not to be tried unfairly and the implication flowing from Chapter III of the Constitution that federal judicial power must be exercised in accordance with the judicial process. Their above extracted comments, taken in the context of the case as a whole, suggest, however, that Deane J and Gaudron J would regard the

¹¹⁴ Id 315 per Mason CJ and McHugh J summarizing the effect of the majority judgments. See also 337 per Deane J; 357 per Toohey J; 369–71, 374 per Gaudron J.

¹¹⁵ Id 362–3 (footnote omitted).

¹¹⁶ Id 326. The other members of the majority in *Dietrich* — Mason CJ, Toohey and McHugh JJ — were silent as to the constitutional issue.

inherent power of a court exercising federal jurisdiction to stay or adjourn proceedings to prevent what would otherwise be an abuse of its process — an unfair trial of a criminal offence — as immune from legislative abrogation. To put matters another way, were Parliament to deprive a Chapter III court of this aspect of its inherent jurisdiction,¹¹⁷ then an unrepresented accused in the situation of Mr Dietrich would be forced to submit to an unfair exercise of federal judicial power. And that, in the opinion of Deane J and Gaudron J, would be unconstitutional.

This analysis of *Dietrich* is confirmed by certain comments of Gaudron J in *Polyukhovich v Commonwealth*. In that case which concerned the constitutional validity of a federal provision creating a retroactive criminal offence, Gaudron J described the power to stay proceedings as 'an essential attribute of a superior court' which 'exists for the purpose of ensuring that proceedings serve the ends of justice and are not themselves productive of or an instrument of injustice'. Her Honour indicated that Parliament would have to make clear its intention to interfere 'with such an important and essential power', but warned that if it did so:

a question might arise, at least in circumstances which would call for the exercise of that power, whether its curtailment or abrogation transformed the power purportedly vested in the court into something other than judicial power and, thus, brought the provision into conflict with Ch.III.¹¹⁸

It was not necessary for Gaudron J to take this matter further on the facts of *Polyukhovich*. But these remarks, coming only a year prior to *Dietrich*, mesh neatly with Gaudron J's constitutional claim in that latter case.

It would seem to follow then that Deane J and Gaudron J believe that it would be contrary to Chapter III of the Constitution for Parliament to abrogate or, at least in certain circumstances, curtail the inherent power of a court exercising federal jurisdiction to stay proceedings to prevent an unfair criminal trial.¹¹⁹ But will other members of the Court subscribe to the constitutional entrenchment of this aspect of the fair trial principle? Of *Dietrich*, Professor Zines has written that 'if the right to counsel is in a particular case an essential element in a fair trial, it is difficult to see any judge deciding that Parliament may require courts exercising federal judicial power to conduct an unfair

¹¹⁷ The inherent jurisdiction of a superior court has many and varied applications extending well beyond the stay for abuse of process (see K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 ALJ 449).

¹¹⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703. See also *Dietrich v R* (1992) 177 CLR 292, 330–1 per Deane J and s 360A *Crimes Act 1958* (Vic) (inserted by s 27 *Crimes (Criminal Trials) Act 1993* (Vic)) regulating judicial discretion to grant an adjournment or a stay of a criminal trial in response to the *Dietrich* decision (in relation to which legislative provision see J Hope, 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *FL Rev* 173, 191).

¹¹⁹ If the Commonwealth were to abrogate the inherent power of a State court invested with federal jurisdiction to stay proceedings to prevent an unfair criminal trial, query whether this would breach the general rule that the Commonwealth must take a State court as it finds it.

trial'.¹²⁰ Certainly, viewed from one perspective the constitutional entrenchment in federal jurisdiction of the outcome in *Dietrich* can be seen as but a small extension of the proposition advanced earlier that the hearing rule operates as a constitutional limitation upon the manner of exercise of federal judicial power. As was said by the United States Supreme Court in *Powell v Alabama*, 'the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel'.¹²¹ This constitutes a powerful argument in favour of *Dietrich's* constitutionalization under the due process mantle, a like argument existing in relation to the provision of interpreter services for an accused who does not speak the language of the court.¹²² Significantly, both the right of an indigent accused to the assistance of counsel at public expense¹²³ and the right of an accused person to the free assistance of an interpreter if that person does not understand the language of the court¹²⁴ enjoy constitutional protection in certain other common law countries and are enshrined in various international instruments — a phenomenon which did not escape judicial attention in *Dietrich*.

But certain members of the High Court might be reluctant to treat *Dietrich* as the bridgehead to the constitutional entrenchment of the right to a fair trial of a federal offence in Australia. Both Brennan J and Dawson J dissented in *Dietrich*. Significantly, Brennan J's dissent was based on his conception of the role of the courts vis-a-vis the elected arms of government. His Honour insisted that the courts would be exceeding their constitutional function were they to compel the legislature and the executive to provide legal representation for an indigent accused.¹²⁵ The provision of a stay or adjournment in a situation like that which confronted Mr Dietrich would technically avoid such a direct demand upon the public purse, but was open to criticism as a refusal to exercise jurisdiction.¹²⁶ Brennan J took a narrower view of the abuse

¹²⁰ L Zines, 'A Judicially Created Bill of Rights?' op cit (fn 8) 168. See, as recognizing the issues facing the High Court here, A Mason 'A New Perspective on Separation of Powers' op cit (fn 47) 7.

¹²¹ 287 US 45, 68 (1932) quoted by Gaudron J in *Dietrich v R* (1992) 177 CLR 292, 371. And see also *New South Wales v Canellis* (1994) 181 CLR 309, 329 per Mason CJ, Dawson, Toohey and McHugh JJ: 'To the extent that the decision was derived from the concept of the accused's right to a fair trial, *Dietrich* may possibly be regarded as a manifestation of the rules of procedural fairness.'

¹²² *Dietrich v R* (1992) 177 CLR 292, 300 per Mason CJ and McHugh J; 330–1 per Deane J and 363 per Gaudron J. And see also *Final Report of the Constitutional Commission* (1988) 578.

¹²³ See Sixth Amendment to the United States Constitution ('In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence') as interpreted and also applied to the States via the due process clause of the Fourteenth Amendment in *Gideon v Wainwright* 372 US 335 (1963) and subsequent cases (HJ Abraham and BA Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (6th ed, 1994) 64–67); s 24(f) of the New Zealand Bill of Rights. See also Article 6(3)(c) of the European Convention on Human Rights and Fundamental Freedoms and Article 14(3)(d) of the International Covenant on Civil and Political Rights.

¹²⁴ See s 14 of the Canadian Charter of Rights and Freedoms and s 24(g) of the New Zealand Bill of Rights. See also Article 6(3)(e) of the European Convention on Human Rights and Fundamental Freedoms and Article 14(3)(f) of the International Covenant on Civil and Political Rights.

¹²⁵ *Dietrich v R* (1992) 177 CLR 292, 321, 323.

¹²⁶ Id 324.

of process discretion than his majority brethren, maintaining that 'not every case of unfairness amounts to an abuse of process':

When the criminal jurisdiction is invoked for the purpose it is designed to serve [and there was no suggestion to the contrary on the facts in *Dietrich*], there is no abuse of process. The jurisdiction must be exercised in a way that prevents unfairness as far as possible, but it must be exercised. As a matter of constitutional duty, the courts cannot indefinitely adjourn a trial to force the provision of legal aid.¹²⁷

And his Honour concluded:

The rhetoric that our system of administering criminal justice ensures a fair trial is comforting, but the reality is that the courts cannot always eliminate obstacles to a fair trial. Rhetoric does not always correspond with reality. If public funds are not available to provide legal representation in serious criminal cases, the administration of criminal justice will not be, or at least will not be seen to be, evenhanded. But the remedy does not lie with the courts; the remedy must be found, if at all, by the legislature and the executive who bear the responsibility of allocating and applying public resources.¹²⁸

Dawson J's dissent reflected similar concerns.¹²⁹

In assessing this minority reasoning in *Dietrich*, Brennan J's emphasis upon the constitutional distribution of powers between legislature, executive and judiciary is of particular importance. Surely a judge sympathetic to these views would be reluctant to take *Dietrich* further by constitutionalizing in the name of the separation of powers a principle which he or she regards as inimical to it.¹³⁰ Such an approach would derive further support from comments of Brennan J depicting refusal to exercise jurisdiction under an expansive abuse of process doctrine as contrary to the rule of law. As his Honour said in the abuse of process case of *Walton v Gardiner*:¹³¹

The rule of law depends on the certain performance by the court or tribunal of its duty to exercise its jurisdiction. To admit a power in the court or tribunal to decline to exercise its jurisdiction in a case instituted on reasonable grounds for a proper purpose is to assert a power to elevate abstract notions of unfairness or want of justification above the law itself.¹³²

But assuming that members of the Court will accept the constitutionalization in federal jurisdiction of the outcome in *Dietrich*, other situations calling for the exercise of the inherent power of a court to stay proceedings to prevent what would otherwise be an unfair criminal trial would seem to demand identical treatment. As has already been pointed out, curial due process

¹²⁷ Ibid.

¹²⁸ Id 324-325.

¹²⁹ See, in particular, id 345, 349-50.

¹³⁰ In this regard, note Brennan J's observation in *Dietrich* that 'in the present case, there is no constitutional or statutory provision which supports the applicant's case' (Id 318). See also generally Brennan J's judgment in *Jago v District Court (NSW)* (1989) 168 CLR 23.

¹³¹ (1993) 177 CLR 378.

¹³² Id 415.

proceeds from the rule of law rationale of the exclusive vesting of federal judicial power in Chapter III courts and adherence to that basic prescript of constitutionalism demands that judicial power be exercised in a procedurally fair manner (in the words of Joseph Raz, 'open and fair hearing, absence of bias and the like are obviously essential for the correct application of the law and thus . . . to its ability to guide action'¹³³). Thus, the 'guarantee . . . of a fair trial of those offences created by a law of the Commonwealth'¹³⁴ would include the power recognized in *Jago v District Court (NSW)*¹³⁵ to stay criminal proceedings where undue pre-trial delay has prejudiced an accused's fair trial entitlement, the power at issue in *R v Glennon*¹³⁶ to grant a stay of proceedings (almost invariably of a temporary nature) to protect an accused from an unacceptable risk that the effect of prejudicial pre-trial publicity will prevent her or his fair trial, and the power admitted in *Connelly v DPP*¹³⁷ and *Walton v Gardiner*¹³⁸ to stay proceedings which place a defendant in a situation of double jeopardy (at least to the extent that this power turns on an accused's fair trial entitlement¹³⁹).

Of course, Brennan J's point about failure to exercise jurisdiction must be conceded. But to the extent that this failure derogates from the rule of law, it must be weighed against the damage to the rule of law occasioned by a court being forced to lend its process to what it regards as an unfair criminal trial. Although the weighing of these competing considerations is not easy, it is submitted that, in the ultimate analysis, an unfair criminal trial poses a greater threat to the supremacy of law than a refusal to exercise jurisdiction in such a case. This is not only because of the threat which an unfair criminal trial poses to the liberty of the individual, but because Parliament and the executive are in a position to address (and prevent) many sources of unfairness so as to allow fair trials to proceed. To the extent that this involves the

¹³³ J Raz, *op cit* (fn 46) 201.

¹³⁴ *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J.

¹³⁵ (1989) 168 CLR 23. See also the protection accorded to the right of a charged person to be tried without undue delay in Article 14(3)(c) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms; s 11(b) of the Canadian Charter of Rights and Freedoms; s 25(b) of the New Zealand Bill of Rights; and the Sixth Amendment to the United States Constitution ('In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial') applicable to the States via the due process clause of the Fourteenth Amendment (see *Klopfer v North Carolina* 386 US 213 (1967) cited in HJ Abraham and BA Perry, *op cit* (fn 123) 76-8).

¹³⁶ (1992) 173 CLR 592.

¹³⁷ [1964] AC 1254.

¹³⁸ (1993) 177 CLR 378.

¹³⁹ See A L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993) 17 and A L-T Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] *Crim LR* 864, 866; *Davern v Messell* (1984) 155 CLR 21 (as cited in *Final Report of the Constitutional Commission* (1988) 584). The rule against double jeopardy is recognized in Article 14(7) of the International Covenant on Civil and Political Rights; s 11(h) of the Canadian Charter of Rights and Freedoms; s 26(2) of the New Zealand Bill of Rights; and the Fifth Amendment to the United States Constitution ('nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb') applicable to the States via the due process clause of the Fourteenth Amendment (see *Benton v Maryland* 395 US 784 (1969) cited in HJ Abraham and BA Perry, *op cit* (fn 123) 81-3).

elected branches of government in resource reallocation in response to a constitutional implication, Deane J was surely correct when he pointed out in *Dietrich* that:

Inevitably, compliance with the law's overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of public funds: for example, the funds necessary to provide an impartial judge and jury; the funds necessary to provide minimum court facilities; the funds necessary to allow committal proceedings where such proceedings are necessary for a fair trial.¹⁴⁰

And as Mason CJ and McHugh J observed in *Dietrich*, despite the Commonwealth and the States being provided with the opportunity to intervene in relation to the issues joined in that case, 'no argument was put to the Court that recognition of . . . a right for the provision of counsel at public expense would impose an unsustainable financial burden on government'.¹⁴¹ Yet even assuming the need for increased government expenditure, if we expect our criminal justice system to protect the innocent while convicting the guilty, and if, by reason of the interests which it protects, the judicial process 'is properly to be seen as partaking of the same fundamental importance as the democratic process',¹⁴² then perhaps we should all be prepared to pay more for its principled operation.

Fair Trial and Constitutionalization of 'Rules of Law and of Practice Designed to Regulate the Course of the Trial'

To leave the abuse of process discretion does not exhaust the 'guarantee . . . of a fair trial' recognized by Gaudron J in *Re Nolan*.¹⁴³ This is because, as was earlier stated, the fair trial principle is manifested not only in the abuse of process discretion, but also in 'rules of law and of practice designed to regulate the course of the trial'.¹⁴⁴ These rules of law and of practice which reflect the fair trial principle are many,¹⁴⁵ and as Mason CJ and McHugh J observed in *Dietrich* 'there has been no judicial attempt to list exhaustively the attributes of a fair trial'.¹⁴⁶ This is due in part to the nature of the criminal appellate process¹⁴⁷ and also to the fact that 'what is fair is not written in stone for all

¹⁴⁰ *Dietrich v R* (1992) 177 CLR 292, 330.

¹⁴¹ Id 312 per Mason CJ and McHugh J. See also A Mason, 'Defining the Framework of Government: Judicial Deference v Human Rights and Due Process' (paper delivered at Centre for Public Policy Workshop, Melbourne University, 7 June 1996, 19–20).

¹⁴² *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 per Gaudron J.

¹⁴³ Id 496.

¹⁴⁴ *Dietrich v R* (1992) 177 CLR 292, 299–300 per Mason CJ and McHugh J (footnote omitted).

¹⁴⁵ See, for example, id 363 per Gaudron J; Paciocco, op cit (fn 111) 332–3; A Mason, 'Fair Trial' (1995) 19 *Crim LJ* 7; Badgery-Parker, op cit (fn 108) 172–7 (Part 1); Weinberg, op cit (fn 107) 160.

¹⁴⁶ *Dietrich v R* (1992) 177 CLR 292, 300. See also, for example, id 353 per Toohey J: 'the concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the concept'.

¹⁴⁷ Id 300 per Mason CJ and McHugh J.

time’;¹⁴⁸ in other words ‘the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances’.¹⁴⁹ Nonetheless, despite this absence of a comprehensive judicial formulation of the elements of a fair trial, Mason CJ and McHugh J in *Dietrich* pointed out that broad definitions of some of the features of a fair trial could be found in various international instruments and national charters of rights, such as the International Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms.¹⁵⁰

It follows that these instruments may assist in identifying those ‘rules of law and of practice’ without which the exercise of federal judicial power in a criminal trial could not be said to be ‘fair’ and in accordance with the ‘judicial process’. Yet, even with such assistance it is not possible within the confines of this paper to identify each of the rules of criminal procedure ripe for constitutionalization in federal jurisdiction. (For example, questions of conformity with Chapter III might arise were Parliament to trench upon the established discretionary power of a Chapter III court to exclude otherwise admissible evidence in the name of fairness to the accused when ‘its weight and credibility cannot be effectively tested or . . . it has more prejudicial than probative value and so may be misused by the jury’.¹⁵¹ Other judicial discretions exercisable in the course of a criminal trial may raise similar questions.¹⁵²) Instead, it is proposed briefly to consider whether the ‘fundamental requirement that a trial be fair [which] is entrenched in the Commonwealth Constitution by Ch.III’s implicit requirement that judicial power be exercised in accordance with the judicial process’¹⁵³ is capable of encompassing two rules of law regarded as basic to our system of criminal justice — the presumption of innocence¹⁵⁴ and the associated requirement that an accused is not to be compelled to be a witness against herself or himself at her or his trial.

(i) *Constitutionalization of the Presumption of Innocence*

The presumption of innocence is enshrined in Article 14(2) of the International Covenant on Civil and Political Rights, Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms, s 11(d) of the Canadian Charter of Rights and Freedoms and s 25(c) of the New Zealand Bill of Rights. It is also incorporated in the due process clauses of the fifth and fourteenth amendments to the United States Constitution.¹⁵⁵ The presumption of innocence — which as the Constitutional Commission pointed out is

¹⁴⁸ A Mason, ‘Fair Trial’ (1995) 19 *Crim LJ* 7, 7.

¹⁴⁹ *Dietrich v R* (1992) 177 CLR 292, 328 per Deane J (footnote omitted). And see, for example, the joint majority judgment in *McKinney v R* (1991) 171 CLR 468.

¹⁵⁰ *Dietrich v R* (1992) 177 CLR 292, 300.

¹⁵¹ *Id* 363 per Gaudron J (footnotes omitted). See also, Badgery-Parker, *op cit* (fn 108) 175 (Part 1).

¹⁵² *Dietrich v R* (1992) 177 CLR 292, 363 per Gaudron J.

¹⁵³ *Id* 362 per Gaudron J.

¹⁵⁴ A Mason, ‘A New Perspective on Separation of Powers’ *op cit* (fn 477.)

¹⁵⁵ LH Tribe, *American Constitutional Law* (2nd ed, 1988) 741 fn 61 citing *In Re Winship* 397 US 358 (1970).

'no more than a shorthand expression for the general rule that, in criminal cases, the prosecution bears the onus of proving each element of the offence charged, beyond a reasonable doubt'¹⁵⁶ — has been variously described by members of the High Court as a 'fundamental principle of the common law'¹⁵⁷ and as 'fundamental to our system of criminal justice'.¹⁵⁸ As the report of the Constitutional Commission makes clear, the presumption of innocence (while also promoting respect for human dignity in the criminal process¹⁵⁹) is an important element in the right of an accused not to be tried unfairly:

It forces the prosecution to gather cogent evidence pointing to the guilt of the accused and it reduces the risk of convictions based on factual error. It serves as a counterbalance to the superior resources of the state and to the inference of guilt that may be drawn [from] the very fact that a criminal charge has been laid.¹⁶⁰

Thus, the presumption of innocence operates alongside the rules of natural justice as a procedural constraint upon the assertion of arbitrary power in our society. Moreover, acceptance of the contrary rule — that an accused must prove her or his innocence — would involve an alignment of the courts with decisions of police and prosecuting authorities apt to undermine the separation of executive and judicial functions.¹⁶¹ It is submitted, therefore, that in light of these considerations (and bearing in mind the interests of an accused at stake in a criminal trial) it should be accepted that where Parliament has placed upon the defendant the persuasive burden of proof in relation to an element of a federal offence, this is (*prima facie*) to ask a court exercising federal jurisdiction to conduct an unfair criminal trial because of the risk that under such circumstances a defendant will be convicted despite the existence of a reasonable doubt as to her or his guilt.¹⁶² Certainly, it is not stretching language to describe such an exercise of judicial power as other than in accordance with our 'traditional judicial process',¹⁶³ or 'traditional judicial

¹⁵⁶ *Final Report of the Constitutional Commission* (1988) 579.

¹⁵⁷ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501, 503 per Mason CJ and Toohey J; 527 per Deane, Dawson and Gaudron JJ; 550 per McHugh J.

¹⁵⁸ *Petty v R* (1991) 173 CLR 95, 128 per Gaudron J; Badgery-Parker, *op cit* (fn 108) 172.

¹⁵⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 546 per McHugh J; *R v Oakes* (1986) 50 CR (3d) 1, 15 per Dickson CJ (quoted in D Stuart, *Charter Justice in Canadian Criminal Law* (1991) 250).

¹⁶⁰ *Final Report of the Constitutional Commission* (1988) 579 (footnote omitted). See also *Ngoc Tri Chau v Director of Public Prosecutions (Cth)* (1995) 132 ALR 430, 445 per Kirby P.

¹⁶¹ ARN Cross, 'The Right to Silence and the Presumption of Innocence — Sacred Cows or Safeguards of Liberty?' (1970) 11 *Journal of the Society of Public Teachers of Law* 66, 74.

¹⁶² As is pointed out in PW Hogg, *Constitutional Law of Canada* (3rd ed, 1992) 1101 'it is a general rule of the criminal law that, when an element of a criminal offence has to be disproved by the accused, the standard of proof is not the criminal one of proof beyond a reasonable doubt but the civil one of proof on the balance of probabilities'. Nonetheless, this lower standard of proof still exposes an accused to conviction if all he or she can show is a reasonable doubt as to the non-existence of that element. See also M Aronson and J Hunter, *Litigation: Evidence and Procedure* (5th ed, 1995) 552-3.

¹⁶³ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 per Deane and Toohey JJ (footnote omitted).

procedures, remedies and methodology¹⁶⁴ — an argument which derives some support from the landmark decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*.¹⁶⁵ It should be acknowledged, however, that constitutionalization of the presumption of innocence would necessitate the High Court revisiting a number of cases, such as *Milicevic v Campbell*¹⁶⁶ and *Williamson v Ah On*¹⁶⁷ which have upheld federal legislative provisions reversing the onus of proof in criminal matters.¹⁶⁸

Were a majority of the High Court to accept the argument set out in the previous paragraph, the presumption of innocence would not be a constitutional absolute, but would be subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹⁶⁹ Thus the High Court, drawing from the Canadian jurisprudence associated with s 11(d) of the Charter (which provides that 'any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal') may be prepared to accept that the persuasive burden of proof can validly be borne by a defendant in relation to an element of an offence peculiarly within her or his own knowledge,¹⁷⁰ when 'there is a sufficient rational connection between proved and presumed fact'¹⁷¹ or, in exceptional cases, in the name of a pressing social problem presenting more than usual difficulties of law enforcement.¹⁷²

(ii) Constitutionalization of an Accused's Non-Compellability at Her or His Trial

Turning from the presumption of innocence to the rule that an accused cannot be compelled to be a witness against herself or himself at her or his trial, this

¹⁶⁴ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 per Deane J.

¹⁶⁵ (1996) 138 ALR 577, 614–16 per Gaudron J and 627–8 per McHugh J.

¹⁶⁶ (1975) 132 CLR 307.

¹⁶⁷ (1926) 39 CLR 95. Note also that in *Adelaide Steamship Co Ltd v R and Attorney-General (Cth)* (1912) 15 CLR 65 Griffith CJ, Barton and O'Connor JJ declined to express an opinion in response to an argument that a particular federal legislative provision reversing the onus of proof in a criminal matter was an attempted interference with the judicial power of the Commonwealth by seeking to direct courts to pass sentence without trial: id 102. Compare, however, Isaacs J at first instance who, without deciding, expressed an opinion in favour of validity (*R and Attorney-General (Cth) v Associated Northern Collieries* (1911) 14 CLR 387, 404–5).

¹⁶⁸ See also *Leask v Commonwealth* (1996) 140 ALR 1 where a number of members of the High Court accepted that the Commonwealth Parliament can validly reverse the onus of proof (22–3 per Toohey J citing *Milicevic v Campbell* with apparent approval; 42 per Kirby J) or alter the standard of proof from beyond reasonable doubt (13 per Dawson J; 23 per Toohey J; 34–5 per Gummow J) in criminal proceedings. On this aspect of the case, Gaudron J expressed her agreement with the judgment of Toohey J and McHugh J expressed his agreement with the reasons of Dawson J. Chapter III of the Constitution was not, however, in issue.

¹⁶⁹ *Final Report of the Constitutional Commission* (1988) 490.

¹⁷⁰ M Aronson and J Hunter, op cit (fn 162) 554–5.

¹⁷¹ *Final Report of the Constitutional Commission* (1988) 581 (summarizing the effect of certain Canadian cases).

¹⁷² *Milicevic v Campbell* (1975) 132 CLR 307, 320 per Mason J. See generally in relation to s 1 justifications of incursions upon the presumption of innocence under s 11(d) of the Canadian Charter, D Stuart, op cit (fn 159) 263–7.

too enjoys protection under various international instruments and national charters of rights.¹⁷³ Although it is possible to cite various judicial statements attesting to the importance of the right to silence in our system of criminal justice¹⁷⁴ (of which right to silence the accused's non-compellability at trial is but one feature),¹⁷⁵ it is possible that constitutionalization of the presumption of innocence would itself carry with it the right of an accused not to testify at her or his trial. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*,¹⁷⁶ Deane, Dawson and Gaudron JJ (dissenting) said that the right of an accused person 'to refrain from giving evidence and to avoid answering incriminating questions' was not wholly explained by reference to the maxim that no one is bound to betray himself.¹⁷⁷ Instead, the right in question:

is to be explained by the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way.¹⁷⁸

Mason CJ and Toohey J in their joint judgment discerned a similar relationship between the presumption of innocence and an accused's non-compellability at trial:

The fundamental principle of the common law that the onus rests on the Crown of proving guilt beyond reasonable doubt is complemented by the elementary principle that no accused person can be compelled by process of

¹⁷³ See Article 14(3)(g) of the International Covenant on Civil and Political Rights ('In the determination of any criminal charge against him, everyone shall be entitled . . . Not to be compelled to testify against himself or to confess guilt'); s 11(c) of the Canadian Charter of Rights and Freedoms ('Any person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence'); s 25(d) of the New Zealand Bill of Rights ('Everyone who is charged with an offence has, in relation to the determination of the charge . . . The right not to be compelled to be a witness or to confess guilt'). The Fifth Amendment to the United States Constitution provides, inter alia, that no person shall 'be compelled in any criminal case to be a witness against himself' (applied to the States via the due process clause of the fourteenth amendment (see HJ Abraham and BA Perry, op cit (fn 123) 67-9 citing *Malloy v Hogan* 378 US 1 (1964) and *Murphy v Waterfront Commission of New York Harbor* 378 US 52 (1964)).

¹⁷⁴ For example, *Weissensteiner v R* (1993) 178 CLR 217, 240 per Gaudron and McHugh JJ (describing the right to silence as 'a fundamental rule of the common law'). See also *Petty v R* (1991) 173 CLR 95, 101 per Mason CJ, Deane, Toohey and McHugh JJ (referring to the right to silence as a 'fundamental right'); A Mason, 'Fair Trial' (1995) 19 *Crim LJ* 7, 10 ('the right to silence is firmly entrenched in our common law'); *Hammond v Commonwealth* (1982) 152 CLR 188, 203 per Brennan J (describing the immunity from interrogation of an accused person as 'a freedom so treasured by tradition and so central to the judicial administration of criminal justice').

¹⁷⁵ *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30-1 per Lord Mustill.

¹⁷⁶ (1993) 178 CLR 477.

¹⁷⁷ Id 527.

¹⁷⁸ Ibid. See also 528 per Deane, Dawson and Gaudron JJ: 'the immunity enjoyed by an accused in a criminal trial extends to evidence of any kind, whether incriminating or not. The immunity is, perhaps, better explained by the principle that the prosecution bears the onus of proving its case, than by the more confined principle that an accused has a privilege against self-incrimination, notwithstanding that both have a common origin'.

law to admit the offence with which he or she is charged: 'an accused person is not bound to incriminate himself.'¹⁷⁹

Their Honours later described the presumption of innocence and the principle that 'an accused person cannot be required to testify to the commission of the offence charged' as 'companion rule[s]'.¹⁸⁰ Similarly, McHugh J regarded the presumption of innocence as 'reinforced by the further rule that an accused person cannot be compelled to give evidence in defence of his or her plea of not guilty'.¹⁸¹ As McHugh J explained:

If the prosecution could compel the answering of questions in the course of the trial and the answering of interrogatories and the production of documents for the purpose of the trial, the burden of proof on the prosecution would be immeasurably lightened and, in the case of the guilty, frequently discharged.¹⁸²

And a decade earlier in *Sorby v Commonwealth*,¹⁸³ Gibbs CJ had observed that:

It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt.¹⁸⁴

Of course, the statements just quoted also raise the different, but related, question of whether the curial due process principle is apt to embrace the privilege against self-incrimination.¹⁸⁵ The High Court has recently affirmed, on more than one occasion, that the privilege against self-incrimination is a 'basic and substantive common law right'¹⁸⁶ and a 'fundamental right',¹⁸⁷ but has also affirmed that it is liable to be overridden by statute¹⁸⁸ and has no

¹⁷⁹ Id 501 (footnote omitted).

¹⁸⁰ Id 503.

¹⁸¹ Id 550.

¹⁸² Id 551.

¹⁸³ (1983) 152 CLR 281.

¹⁸⁴ Id 294. For criticism of the High Court's rationalization of the right to silence in terms of the presumption of innocence, see M Aronson and J Hunter, op cit (fn 162) 330–2.

¹⁸⁵ As Aronson and Hunter point out, the privilege against self-incrimination 'is the term usually employed where the person being questioned . . . is otherwise obliged to answer': id 328. And see also in relation to the distinction between the accused's non-compellability at trial and the privilege against self-incrimination, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 per Mason CJ and Toohey J; 509, 517 per Brennan J; 527–8 per Deane, Dawson and Gaudron JJ.

¹⁸⁶ *Reid v Howard* (1995) 184 CLR 1, 11 per Toohey, Gaudron, McHugh and Gummow JJ.

¹⁸⁷ Id 14 per Toohey, Gaudron, McHugh and Gummow JJ. See also id 5 per Deane J; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498 per Mason CJ and Toohey J ('the privilege is now seen to be one of many internationally recognized human rights'); 522 per Brennan J (describing the privilege against self-incrimination as 'a fundamental bulwark of liberty for the individual'); 532–3 per Deane, Dawson and Gaudron JJ (the privilege against self-incrimination 'may be classified as a human right' and 'confers an immunity which is deeply embedded in the law' (footnotes omitted)).

¹⁸⁸ *Reid v Howard* (1995) 184 CLR 1, 5 per Deane J; 12, 14 per Toohey, Gaudron, McHugh and Gummow JJ; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503–4 per Mason CJ and Toohey J; 512 per Brennan J; 533–4 per Deane, Dawson and Gaudron JJ. See also *Sorby v Commonwealth* (1983) 152 CLR 281, 298–9 per Gibbs CJ; 306–9 per Mason, Wilson and Dawson JJ; and 313 per Murphy J rejecting

application to corporations.¹⁸⁹ Admittedly, these recent statements were not delivered in a context involving the exercise of federal judicial power, but it is submitted that constitutionalization of the privilege under the curial due process mantle raises some difficult questions, particularly as the privilege is frequently called in aid in non-judicial proceedings.¹⁹⁰ In addition, in *Sorby v Commonwealth*¹⁹¹ in the course of rejecting an argument that a federal legislative provision operating to displace the privilege in proceedings before a Royal Commission was invalid in light of Chapter III of the Constitution, Mason, Wilson and Dawson JJ said:

the privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch.III of the Constitution. It is a privilege that has been abrogated by legislative action in Australia, the United Kingdom and Canada without anyone having previously suggested that it involved the elimination of an integral element in the exercise of judicial power in a democratic society. . . . No doubt, like other features of our system of criminal justice, it has a long history and confers a very valuable protection. But it is quite another thing to say that it is an immutable characteristic of the exercise of judicial power.¹⁹²

There is support in the case law for the proposition that Parliament cannot, consistently with Chapter III, validly authorize a non-judicial body (such as a Royal Commission) to extract testimony from a person against whom federal charges are pending.¹⁹³ But this is because Parliament cannot interfere with the exercise of federal judicial power in a particular case — a separate, albeit related, doctrine to curial due process.

The Guarantee of a Fair Trial of a Federal Offence — Concluding Remarks

As apparent from the preceding discussion, the meeting between the curial due process requirement and the fair trial principle signalled by Gaudron J in *Re Nolan* and subsequently endorsed by Deane J and Gaudron J in *Dietrich* has the potential to reorient our federal criminal justice system by

an argument that an attempt on the part of the Commonwealth Parliament to abrogate the privilege against self-incrimination before a Royal Commission infringed Chapter III of the Constitution.

¹⁸⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

¹⁹⁰ For example, *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 281.

¹⁹¹ (1983) 152 CLR 281.

¹⁹² Id 308. See also 298 per Gibbs CJ ('The privilege against self-incrimination is not protected by the Constitution').

¹⁹³ *Hammond v Commonwealth* (1982) 152 CLR 188, 206–7 per Deane J. See also *Huddart, Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 379–80 per O'Connor J; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, especially 346 per Barton J but also 341 per Griffith CJ and compare 349–50 per Isaacs J (dissenting); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 105 per Murphy J; 161–2 per Brennan J; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 507 per Mason CJ and Toohey J; 557–9 per McHugh J; L Zines, *The High Court and the Constitution* (4th ed, 1997) 203–4.

entrenching benchmark standards of fairness and justice in the exercise of federal judicial power which the Commonwealth Parliament is free to surpass, but unable to derogate from save in exceptional situations.

The fact that constitutional entrenchment of the right to a fair trial would secure from attrition a safeguard of individual liberty 'deeply rooted in our system of law'¹⁹⁴ is a powerful consideration in favour of its acceptance. It was this view which led the Constitutional Commission to recommend that the Constitution be formally amended to incorporate a range of procedural protections for persons charged with a criminal offence.¹⁹⁵ On the other hand, judicial moves towards recognition of a constitutional right to a fair trial have been criticized in a recent article by Hope on the basis that the 'uncertainty and inflexibility' likely to be associated with such a right may imperil urgently needed reforms of our criminal justice system designed to ameliorate problems of expense and delay.¹⁹⁶ Hope emphasizes the uncertainty which attends the notion of 'fairness' in this context¹⁹⁷ and argues that 'the threat of having legislation declared invalid on unpredictable grounds' may deter governments from reformist ventures.¹⁹⁸ Moreover, from the point of view of the courts, Hope speculates that 'framing the right to a fair trial in constitutional terms might stunt its further development at common law, thereby making it less effective as a weapon against injustice in individual cases'.¹⁹⁹ These concerns are real and it must be conceded that circumstances exist in which a constitutional guarantee of a fair trial could stymie legislative attempts to enhance overall access to justice. Proposals to place time limits on court hearings have already been discussed.²⁰⁰ Another example of legislation which could founder on a constitutionally entrenched fair trial requirement, albeit drawn from state criminal law, relates to so-called 'rape shield' laws which operate to exclude from a criminal trial evidence of a victim's sexual history.²⁰¹

In light of these competing considerations, the appropriate balance between constitutional 'safeguards' and general law 'flexibility' is a value judgment dependent as much upon a personal assessment as to whether individual rights are more appropriately protected in our society by Parliament or the courts as anything else. As should be apparent, the present author's preference is for constitutional protection of the right to a fair trial. But if the High Court is to proceed in the direction heralded by Deane J and Gaudron J in *Dietrich*, then it has to face the fact that criminal law in Australia is administered overwhelmingly by State courts exercising state jurisdiction. As

¹⁹⁴ *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541 per Isaacs J (quoted in *Dietrich v R* (1992) 177 CLR 292, 326 per Deane J).

¹⁹⁵ *Final Report of the Constitutional Commission* (1988) 560–92, especially 569.

¹⁹⁶ J Hope, op cit (fn 118) 174.

¹⁹⁷ Id 177, 192–4.

¹⁹⁸ Id 198.

¹⁹⁹ *Ibid.* See also the comments of K Mason in *How Many Cheers for Engineers?* (M Coper and G Williams, eds, 1997) 138–9.

²⁰⁰ See text accompanying fn 87–91 *supra*.

²⁰¹ See for example, 'Staying a Trial for Unfairness: The Constitutional Implications' (1994) 18 *Crim LJ* 317 (editorial) and the comments of P Pether and K Mason in M Coper and G Williams (eds) op cit (fn 202) 137–9.

Professor Zines has pointed out, Chapter III of the Constitution 'even on [its] broadest construction . . . refers only to *federal judicial power*'.²⁰² The prospect of two streams of criminal procedure in Australia — one representing in large part a constitutionally entrenched guarantee of a fair trial, the other not — is hardly attractive.²⁰³ The extent to which the decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*²⁰⁴ ameliorates this position — either by extending the ambit of federal jurisdiction or by preventing the conferral of functions upon state courts incompatible with the exercise of federal judicial power — remains to be seen. Nonetheless, and putting *Kable* to one side, if the curial due process principle constitutionalizes in federal jurisdiction the developing fair trial principle, this fair trial principle (at least at the hands of the High Court) will presumably continue to represent the common law of State criminal procedure. State Parliaments will thus have to act to overcome its effects in specific instances — a politically difficult manoeuvre when to do so involves trenching upon what in federal jurisdiction is a constitutional 'right'.

But in one respect the emergence of a constitutional guarantee of a fair trial of a federal offence might involve the Commonwealth Parliament in acting. Section 68(1) of the *Judiciary Act* 1903 (Cth) provides:

The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

...
(c) their trial and conviction on indictment; and

...
for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

Section 79 of the *Judiciary Act* 1903 (Cth) also provides:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.²⁰⁵

The *Evidence Act* 1997 (Cth) does not generally apply to State courts exercising invested federal jurisdiction.²⁰⁶ Thus, at least in the case of those courts, the effect of ss 68 and 79 of the *Judiciary Act* is generally to apply State adjectival law to their proceedings. To the extent that any State legislative provision applicable to federal proceedings by ss 68 and 79 of the *Judiciary*

²⁰² L Zines, *op cit* (fn 8), 167 (emphasis added).

²⁰³ See *Leeth v Commonwealth* (1992) 174 CLR 455, 499 per Gaudron J ('it is entirely appropriate that the one body of law should regulate the conduct of proceedings in a court, whether State or federal jurisdiction is invoked'). See also 490 per Deane and Toohey JJ.

²⁰⁴ (1996) 138 ALR 577.

²⁰⁵ See also s 80 *Judiciary Act* 1903 (Cth).

²⁰⁶ Section 4.

Act was found to be inconsistent with the curial due process obligation, then it could have no operation.²⁰⁷ And this in turn may ultimately force the Commonwealth's hand in terms of the enactment of non-referential procedural laws.²⁰⁸

CURIAL DUE PROCESS AND EQUALITY

At the outset of this article when surveying the various applications of the curial due process principle thus far identified by members of the High Court, it was noted that Gaudron J has accepted that Chapter III of the Constitution founds a type of equality guarantee. In the final section of this paper it remains to explore her Honour's opinion in this regard and the associated question of whether the Commonwealth Constitution enshrines a guarantee of substantive due process in the exercise of federal judicial power.²⁰⁹

*Leeth v Commonwealth*²¹⁰ is the relevant authority. That case concerned the validity of s 4 of the *Commonwealth Prisoners Act 1967* (Cth) which directed a Chapter III court engaged in sentencing a federal offender to fix a non-parole period by reference to the law of the State or Territory where the offender was convicted. The relevant State and Territory laws governing the fixing of non-parole periods were not identical, with the result that the minimum term of imprisonment imposed upon persons convicted of the same federal offence could vary according to the State or Territory where their trial took place. The plaintiff argued that this legislative regime was discriminatory and infringed an implied constitutional prohibition flowing from the text and structure of the Constitution as a whole and/or the exclusive vesting of federal judicial power in Chapter III courts. A majority of the High Court (in a joint judgment of Mason CJ, Dawson and McHugh JJ and a separate judgment of Brennan J) rejected these contentions. Yet, given the terms of Brennan J's concurrence with the majority, *Leeth* fails decisively to resolve the question whether the Commonwealth Constitution contains an implied guarantee of legal equality. It is thus appropriate to start with the dissenting judgment of Gaudron J.

Gaudron J applied the curial due process notion to invalidate s 4 of the *Commonwealth Prisoners Act*. Her Honour accepted that s 4 was discriminatory in the sense that 'in the ordinary course of events, the exercise of that power would involve a failure to treat like offences against the laws of the Commonwealth in a like manner and also a failure to give proper account to genuine differences'.²¹¹ In so determining, her Honour emphasized that State courts exercising invested federal jurisdiction — in which most federal

²⁰⁷ For one approach to this issue see *DPP (Cth) v Bayly* (1994) 63 SASR 97, especially 116–19.

²⁰⁸ The uncertainty which can attend the question whether a particular court is exercising federal jurisdiction adds to the difficulties here.

²⁰⁹ See generally, G Winterton, *op cit* (fn 7) 201–8 adopting in this setting the terminology of procedural and substantive due process.

²¹⁰ (1992) 174 CLR 455.

²¹¹ *Id* 502–503.

offences are tried — are exercising ‘an Australian jurisdiction’²¹² and that ‘it is manifestly absurd that the legal consequences attaching to a breach of a law of the Commonwealth should vary merely on account of the location or venue of the court in which proceedings are brought’.²¹³ Gaudron J then set out her formulation of the curial due process principle, maintaining as in *Re Nolan* and *Polyukhovich* that ‘an essential feature of judicial power’ is that it ‘should be exercised in accordance with the judicial process’.²¹⁴ But her Honour added a previously unforeseen dimension to the operation of this implication:

All are equal before the law. And *the concept of equal justice* — a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such — *is fundamental to the judicial process*.²¹⁵

Thus it followed that since exercise of the power on the part of a Chapter III court to fix a non-parole period in accordance with s 4 of the Act ‘would necessarily involve impermissible discrimination’ it was ‘not part of the judicial power of the Commonwealth’.²¹⁶

Although there can be no doubt that the curial due process principle lies at the heart of the decision of Gaudron J in *Leeth*, her claim that the concept of equal justice is fundamental to the judicial process is problematic in a number of respects. From a purely practical point of view, it is unclear how broadly or narrowly her judgment extends. It is possible to argue that Gaudron J was simply of the opinion that it would be contrary to Chapter III of the Constitution for Parliament to direct a Chapter III court to exercise its judicial power so as to discriminate between persons on the basis of their locality within the Commonwealth. But her Honour’s unqualified invocation of the concept of equal justice would seem to point to a broader range of concerns, and it is hard to imagine that her judgment would have been any different had the *Commonwealth Prisoners Act* directed Chapter III courts to fix varying minimum terms of imprisonment for the same federal offence on the basis of race or gender.²¹⁷

What is clear is that Gaudron J regarded her ‘equal justice’ invocation of the curial due process requirement as significantly more confined than the basis upon which Deane and Toohey JJ invalidated s 4 of the *Commonwealth Prisoners Act*.²¹⁸ Deane and Toohey JJ found that s 4 of the Act infringed an implied constitutional guarantee of the ‘equality of the people of the Commonwealth under the law and before the courts’.²¹⁹ (Id 491.) Although

²¹² Id 498 (footnote omitted).

²¹³ Id 499 (footnote omitted).

²¹⁴ Id 502 (footnote omitted).

²¹⁵ *Ibid* (emphasis added). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 615 per Gaudron J; M Gaudron, ‘Equality Before the Law With Particular Reference to Aborigines’ (1993) 1 *The Judicial Review* 81, 88.

²¹⁶ *Leeth v Commonwealth* (1992) 174 CLR 455, 503.

²¹⁷ And see also *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, 615 per Gaudron J.

²¹⁸ *Leeth v Commonwealth* (1992) 174 CLR 455, 501–2.

²¹⁹ Id 486–7.

their Honours invoked the Constitution's exclusive vesting of federal judicial power in Chapter III courts in aid of recognition of this implied guarantee,²²⁰ they relied upon other considerations as well,²²¹ and it is clear that they contemplated that the guarantee operated as a general constraint upon federal governmental power and was not limited to the operations of Chapter III courts.²²² Deane and Toohey JJ did, however, support Gaudron J's claim that 'equal justice' tempers the exercise of federal judicial power for their Honours said in a passage which was earlier quoted in part:

In Ch.III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially. *At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.*²²³

But despite so stating, Deane and Toohey JJ expressly indicated that their decision on the basis of the implied guarantee of legal equality made it unnecessary to consider the plaintiff's alternative argument based solely on Chapter III.²²⁴

Support for the equal justice application of the curial due process principle might also be forthcoming from Kirby J for in the New South Wales Court of Appeal in *Ngoc Tri Chau v Director of Public Prosecutions (Cth)*²²⁵ his Honour observed that he had 'some sympathy for the notion of a constitutionally implied principle of equality of treatment in the application of the judicial power of the Commonwealth as discussed in *Leeth*'.²²⁶ Mason CJ, Dawson and McHugh JJ, however, have disavowed this development. In their joint judgement in *Leeth* they rejected the finding of Deane and Toohey JJ that the Constitution is predicated upon a finding of doctrine of legal equality, stating that 'there is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth'.²²⁷ But they also rejected Gaudron J's more limited approach suggesting that her 'equal justice' interpretation of the curial due process requirement failed to distinguish between 'the function of a court' (their Honours implying that the 'functional or procedural' dimension of a court's operation was a legitimate concern of curial due process²²⁸) and 'the law which

²²⁰ Notably the 'conceptual basis of the Constitution' being the 'free agreement of "the people" . . . of the federating Colonies to unite in the Commonwealth under the Constitution': (id 486) and 'the existence of a number of specific [constitutional] provisions which reflect the doctrine of legal equality': id 487.

²²¹ Id 491.

²²² See the discussion id 489-90.

²²³ Id 487 (emphasis added). And see G Winterton, op cit (fn 7) 203.

²²⁴ *Leeth v Commonwealth* (1992) 174 CLR 455, 493.

²²⁵ (1995) 132 ALR 430.

²²⁶ Id 445.

²²⁷ (1992) 174 CLR 455, 467.

²²⁸ Id 470.

a court is to apply in the exercise of its function²²⁹ (outside the ambit of curial due process).²³⁰

Whether the fourth member of the *Leeth* majority — Brennan J — would agree with this analysis of Gaudron J's judgment proffered by the joint majority judges is difficult to say. Brennan J went some of the way of Deane and Toohey JJ accepting that it 'would be offensive to the constitutional unity of the Australian people "in one indissoluble Federal Commonwealth" . . . to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and sentenced'.²³¹ However, s 4 of the *Commonwealth Prisoners Act* was concerned with minimum terms of imprisonment, and in his Honour's opinion, the discriminatory regime which it implemented was a rational (indeed, necessary) response to the system contemplated by s 120 of the Constitution of incarcerating Commonwealth prisoners in the same prisons as State offenders,²³² his Honour adding that 'discriminatory laws made under a constitutional head of power, where the discrimination is supported by the power, must be administered by the courts in which the judicial power of the Commonwealth is vested'.²³³ It followed that s 4 of the Act was valid, but had the Commonwealth Parliament directed Chapter III courts to impose different head sentences for like federal offenders depending upon their place of conviction, there is every reason to believe that Brennan J would have found in favour of invalidity — at least upon the basis of the generalized notion of the 'constitutional unity of the Australian people'.

As can be seen, the question whether there exists a doctrine of substantive due process in the exercise of federal judicial power (and, in that context, the scope of the principle articulated by Gaudron J in *Leeth*) awaits resolution by the High Court.²³⁴ It is submitted, however, that the High Court would not be justified in embracing the equal justice emanation of curial due process to the extent that it imports more than procedural equality in the exercise of the

²²⁹ Id 469.

²³⁰ See G Winterton, op cit (fn 7) 203 interpreting this passage from the judgment of Mason CJ, Dawson and McHugh JJ as evincing their Honours' opinion that s 71 entrenches only procedural as opposed to substantive due process.

²³¹ *Leeth v Commonwealth* (1992) 174 CLR 455, 475.

²³² Id 479.

²³³ Id 480.

²³⁴ The Full Court of the Family Court in *In the Marriage of B and R* (1995) 19 Fam LR 594, 621–3 per Fogarty, Kay and O'Ryan JJ cited with approval the passages from the judgments of Deane and Toohey JJ and Gaudron J in *Leeth* to the effect that equal justice tempers the exercise of federal judicial power. The Full Court then stated that 'the notion of equal justice binds the Family Court, as it does any Chapter III court': id 621. The case before their Honours did not involve the validity of federal legislation, but the Full Court used the equal justice notion as an element in its decision that the trial judge had erred in rejecting the admission of certain evidence in a custody dispute between an Aboriginal mother and a white Australian father relating to the historical experience of Aboriginal children growing up in white society. Although *In the Marriage of B and R* is probably best classified under the rubric of procedural due process, it shows that the distinction between substantive and procedural due process is by no means clear cut. On the question whether there exists a doctrine of substantive due process in the exercise of federal judicial power, see also *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687–91 per Toohey J.

judicial function.²³⁵ Professor Winterton makes the point that the inclusion of equality in the concept of 'judicial power' in *Leeth* was 'merely asserted',²³⁶ thus the precise basis upon which Deane, Toohey and Gaudron JJ arrived at their opinion in this regard is unclear. But if one examines legal history and experience, the conclusion is unavoidable that courts have developed and applied discriminatory common law doctrines.²³⁷ Indeed, this has been a frequent criticism directed to courts by contemporary legal commentators. Admittedly, in more recent times notions of substantive equality have infused many welcome legal developments.²³⁸ But as highly desirable as absence of discrimination in the exercise of all public and private power in our society is, equality in the substantive law which a court is to apply is not a necessary feature of the rule of law²³⁹ and, in the ultimate analysis, taps a vein of legal thought of too recent a provenance to be regarded as impliedly incorporated in s 71 of the Constitution.²⁴⁰

CONCLUSION

The applications of the curial due process principle considered in this paper are not the only possible offspring of a purposive construction of s 71 of the Constitution. For example, Deane J's claim in *Polyukhovich* that Chapter III is based upon 'the assumption of traditional judicial procedures, remedies and methodology'²⁴¹ suggests that Parliament may not be able to limit the

²³⁵ Procedural equality in the exercise of the judicial function (albeit at certain stages of Anglo-Australian legal history a relatively crude version thereof) does form part of our legal heritage. For example, insistence upon judicial impartiality and absence of bias is long established as is the necessity to hear both sides of a legal controversy. See also G Kennett, (Individual Rights, The High Court and the Constitution) (1994) 19 MULR 581, 603.

²³⁶ Winterton, *op cit* (fn 7) 205. And see the view of Professor Winterton that 'the "judicial power of the Commonwealth" should not generally be held to include substantive rights': *Id* 207 (footnote omitted) and generally 204-8.

²³⁷ See in relation to the common law D Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Mon LR* 194, 212 and G Kennett, *op cit* (fn 236) 611. It is submitted that the claim of Deane and Toohey JJ in *Leeth* that 'putting to one side the position of the Crown and some past anomalies, notably, discriminatory treatment of women, the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government' ((1992) 174 CLR 455, 486) is so heavily qualified as to beg the question of the principle identified. See in this regard L Zines, *op cit* (fn 8) 181.

²³⁸ For example, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1.

²³⁹ Raz, *op cit* (fn 46).

²⁴⁰ For an argument leading to the same conclusion, see Kennett, *op cit* (fn 236) 594, 603.

²⁴¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

availability of certain forms of relief on the part of a Chapter III court — a restraint upon legislative power of no small significance in a remedy driven system like the common law.²⁴² The judgments of Toohey J and Gaudron J in *Polyukhovich* also hint at further due process implications.²⁴³ In reality, The High Court has only just begun to divine the limits of Chapter III of the constitution, whose constitutional star is in the ascendant.

²⁴² See also A Mason, *op cit* (fn 47) 7.

²⁴³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687–90 per Toohey J; 704 per Gaudron J.