The *Australian Constitution*: A Century of Irrelevance

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The *Australian Constitution* has generated an enormous amount of academic interest during its first century. There has been much ink spilt discussing its finer aspects; constitutional cases have occupied countless hours of court time, and generations of law students have been required to master its key features. Some scholars have become quite excited by some of the issues emerging in relation to the *Constitution*, labeling some debates as 'great'. We do not think so. In fact, we believe the opposite is the case. For the most part, the provisions of the *Australian Constitution* are largely irrelevant.

The fact that so many judges and lawyers have spent so much time and mental energy interpreting its provisions, and so many scholars have written so much on its operation, is a classic example of the propensity for intelligent people to fail to see the big picture. This article elaborates on why the *Australian Constitution* is irrelevant, and the ramifications that this should have for the way in which constitutional cases are litigated, the interpretative approach applied to constitutional provisions, and the teaching of constitutional law.

The thrust of our argument is simple. The state of Australian society, in terms of the opportunities enjoyed by its citizens and the capacity for them to flourish, would in all likelihood be no worse had the interpretation that is ascribed to the most litigated sections of the *Australian Constitution* been decided by the toss of a coin, as opposed to being subject to (ongoing) 'considered' judicial analysis.

In the first section, we elaborate on what we mean by the concept of importance, or relevance. In the second section, we will focus on some of the main sections of the *Australian Constitution* (namely s 90, ss 51(ii) and (xx), s 92 and s 96), and suggest why they are irrelevant. In the third section, we look at some implications that have drawn from the separation of powers under the *Constitution*, which offer some degree of promise in terms of relevance. In the concluding re-

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marks, the authors will raise the suggestion that the study of constitutional law should be reconfigured to place greater emphasis on core constitutional concepts and principles.

To be sure, we are not advocating that the *Constitution* and the whole area of constitutional law is unimportant – this would be bordering on the absurd. Thus, we are not questioning the importance of constitutionalism; only the relevance of the interpretation ascribed to what have become the most controversial sections (in terms of the number of cases litigated and topics that are taught) of the *Australian Constitution*. To emphasise the difference, a little needs to be said concerning the nature of constitutionalism.

A constitution, by definition, is the foundation of law.[1] This entails that a constitution must establish the conditions necessary for a legal system to exist. Hart identifies the following rules as being necessary to convert a pre-legal world into a post-legal society:[2]

(a) a rule of recognition, which sets out the criteria by which a rule becomes a law;[3]

(b) a rule of change, which confers powers on a body to introduce new law;[4] and

(c) a rule of adjudication, which defines the body that can authoritatively decide if a law has been broken.[5]

Once the above three preconditions are satisfied, a plan or structure of government will also incidentally be created.[6] An illuminating aspect about the nature of a constitution is that while these elements may describe its necessary and sufficient features, there is no limit to the range of matters that can be included in a constitution. Theoretically, the framers of the *Constitution* could have included provisions

1 G Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *American Political Science Review* 853, 855.

2 H L A Hart, *The Concept of Law* (1961) 89-97.

3 In the federal and State system, the rule of recognition essentially requires that for a rule to become a law, it must be passed by both Houses of Parliament and assented to by the Governor-General.

4 In the context of the *Constitution*, see s 128.

5 In the context of the *Constitution*, it is the High Court.

6 There is no end, however, to the different styles and types of government. The sole distinguishing feature of government from every other body or organisation in the community, such as a sporting club, a professional body, or a group of friends, is that only governments have the ability to turn a rule or norm into a law. The rule of recognition will necessarily identify the body that can make law, and accordingly, a constitution will necessarily establish a process of government.

dealing with relatively trivial matters, such as banning dogs from parks, design specifications for kitchens, and rules of etiquette. Despite this, the 'additional extras' found in constitutions typically do not deal with trivial matters, but are invariably confined to matters that the authors perceive as being of fundamental importance, such as human rights or nation-building. It is for this reason that Sartori noted that an essential aspect of constitutionalism is *garantisme*: the establishment of an institutional arrangement, which restricts arbitrary power and protects fundamental interests.[7]

This article focuses on the additional extras that the framers did decide to include in the *Constitution* – not sections that affect the stability of the Australian legal system, such as the law-making process it prescribes. The additional extras included in the *Constitution*, such as demarcating which level of government has power to levy excise tax or regulate corporations, were a desirable step in creating a political, social and economic model that would forge a nation, but in the end it hardly mattered which way the framers decided when demarcating governmental power, in the same way that it is irrelevant whether citizens are required to drive on the left or right hand side of the road – the only thing of importance is that *a* choice is made. Recognition of this would assist in the approach and analysis taken on future constitutional issues. What has made the *Constitution* largely irrelevant is what the framers elected not to put in – provisions safeguarding important interests (such as the right to life, liberty and property).[8] There are, of course, exceptions to this, albeit modest, namely the sections providing for just terms for the acquisition of property (s 51(xxxi)); trial by jury (s 80); protection in relation to religion (s 116); prohibition against interstate discrimination (s 99) and sections 1, 7, 24, 30 and 41, which collectively have been used to endorse a right to free speech on political matters.

Relevance and the Concept of Importance

In order to label an activity as being irrelevant, it is necessary to have a conceptual framework for this. The concept of relevance is connected with importance: if something is not important to a person or thing, then it will not be of any relevance to them. The importance of

7 Sartori, above n 1.

8 For further discussion regarding the hierarchy of human interests, see M Bagaric, *Punishment and Sentencing: A Rational Approach* (2001) ch 6; A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, and the discussion below at pp 93-5.

all human activities is generally governed by the one standard criterion: the effect or impact that it has on the lives of other people, and in some cases, animals or objects. This is determined in light of the objectives of the practice in question.

For example, the objective of most sporting sides is to win the relevant competition. We distinguish between important sporting events and less important ones on the basis of the impact that the game may have on the overall success of the sides. Thus, the grand final is more 'important' than a practice match. And a goal kicked after the siren to win a match is considered more important than the first goal of the match.

Variables Relevant to Importance – Intensity (Depth) of Interests and Number of People Affected (Breadth)

In the case of law, the rule of law suggests that the broad purpose of this practice is to prescribe standards of conduct that define the rights and duties of citizens. It follows that important laws are those touching upon key human interests. The criminal law ranks highly in this regard, because people place a high value on their liberty. Family law also matters because central to the happiness of most people is the capacity to spend time with their children and to enjoy the financial wealth that they have accumulated. Fencing law, on the other hand, is not so important – people tend to flourish pretty well irrespective of the nature of their fence. Apart from this aspect of depth (that is, how centrally a legal provision relates to an important human interest), the other variable that is relevant to an assessment of the importance of a law is its breadth: the amount of citizens who are (actually or potentially) affected by the law. In this regard, it is predominantly a numbers game – but not totally. The more people that are affected by a legal norm, the higher it ranks in the importance (and thus, relevance) stakes. The requirement is, however, subordinate to the one of depth. Even laws that affect a great number of people can, on the whole, be relatively unimportant and irrelevant. Thus, a law prohibiting people painting their cars red, or from owning a parrot or requiring them to drive on the right hand side of the road, are quite trivial even though they potentially apply to millions. This is because they do not touch upon any interests that are typically regarded as being important to well-being. The law affects each person only in a negligible manner – one million times zero is still zero. Thus, for the breadth variable to come into play in a meaningful regard, the content of the law must satisfy a certain threshold so far as the importance of the interests it affects is concerned.

Depth Main Variable

The same is not true of the depth requirement. A law that affects a central interest of a *single* person is important. A practical example is the *Community Protection Act 1994* (NSW), the validity of which was considered by the High Court in *Kable v Director of Public Prosecutions (NSW)*.[9] The *Community Protection Act 1994* provided that a court could order the preventative detention of one Gregory Wayne Kable for up to six months where it was satisfied on the balance of probabilities that Kable was more likely than not to commit a serious act of violence (s 5(1)). This Act was applicable only to Gregory Wayne Kable, and was enacted due to concerns that Kable, who was due for release after serving a sentence for the manslaughter of his wife, would harm relatives of the deceased whom he had sent threatening letters from jail. Multiple applications could be made for the detention of Kable. By a four to two majority,[10] the High Court held that the Act was invalid, because the legislation conferred a non-judicial function on the Supreme Court: the Act required the Court to participate in a process that was 'far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person',[11] and was so repugnant that it exceeded the outer limits of judicial power – thereby violating the separation of powers doctrine.[12] The repugnance of the law was in fact made worse, rather than diluted, by the fact that it only applied to the one individual.

Well-Being Not Too Indeterminate

The breadth and depth test for evaluating the importance of a law could be criticised on the basis that underlying this formulation is a

9 (1996) 189 CLR 51 ('*Kable*').

10 Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

11 (1996) 189 CLR 51, 122 (McHugh J).

12 Each member of the majority had different reasons for striking down the Act. However, there were several features of the Act that the Court found particularly offensive. For one, it removed the ordinary protections inherent in the judicial process by permitting the depravation of liberty without a finding of guilt for an offence (see Gaudron J at 106-7, Toohey J at 98, McHugh J at 122, Gummow J at 132-4), and enabled an opinion to be formed on the basis of material that may not be admissible in legal proceedings (see Gaudron J at 106-7, McHugh J at 122). Also, the outcome of any application (the imprisonment of Kable) appeared to be pre-determined by the legislature and therefore the Act seemed to make the Court an instrument of a legislative plan, since it was apparent that it was not envisaged that an order to detain Kable would be refused (McHugh J at 122). Finally, there was the *ad hominem* nature of the legislation (Gummow J at 134, Toohey J at 98).

concept that is too nebulous and indeterminate to provide meaningful guidance. The concept of an *important human interest* and, moreover, a hierarchy of such interests, may to many be illusory given the apparent diversity of human nature and conduct. However, on closer analysis, this is not the case. There is a large amount of promise on this front. Lawyers, philosophers and social scientists seem to be coming to the view that people are not different in terms of the things that are crucial to their subjective sense of well-being.

At the theoretical level, Andrew von Hirsch and Nils Jareborg,[13] in the context of evaluating criminal offence seriousness, have developed a 'living standard' criterion that measures the importance that relevant interests have for a person's standard of 'living'. In this regard they have proposed that the most important interests to human flourishing, in descending order of importance, are: physical integrity; material support and amenity (ranging from nutrition and shelter to various luxuries); freedom from humiliating or degrading treatment; and privacy and autonomy.[14]

Empirical studies have been more informative concerning the things that really matter to people. For example, it has been identified that a key to happiness seems to be companionship, which is far more important than material goods. Professor Lane has found that contrary to the belief of economists that income (together with leisure) is the source of all good, evidence shows that companionship, which does not pass through the market, has higher utility and contributes more to well-being than does income.[15] The number of friends one has is a much better indicator of overall happiness than personal wealth. People are far more likely to achieve happiness by spending time with

[13] von Hirsch and Jareborg, above n 8.

[14] It has been argued that the approach adopted and conclusions reached by von Hirsch and Jareborg have uncanny similarities with a transparently utilitarian evaluation of harm analysis. The considerations they identify are no more than a rough arm-chair utilitarian scale of the primacy of interests relevant to happiness. For example, it seems evident that the most essential requirement to the attainment of any degree of meaningful happiness is physical integrity and subsistence, followed by material support and minimal well-being, and so on. The type of infringement that most seriously interferes with our capacity to attain happiness is our physical integrity. The next thing many seem to value most is material support. Freedom from humiliation, and privacy and autonomy, though not necessarily in this order, are also important interests towards the road to happiness. See M Bagaric, 'Proportionality in Sentencing: Its Role and Justification' (2000) 12 *Current Issues in Criminal Justice* 142.

[15] R E Lane, 'Diminishing Returns to Income, Companionship – and Happiness' (2000) 1 *Journal of Happiness Studies* 103. Other studies have shown a range of other factors that are relevant to happiness.

friends and family than by striving for higher income. Once one is beyond the poverty level, a larger income contributes almost nothing to happiness.[16]

A study by Professor Argyle is consistent with these findings. He notes that people on middle incomes are just as happy as the rich, and only the very poor are less happy (happiness only increases with income where people believe they are being paid more than they expect). In keeping with this, it was revealed that the purchase of luxury items, such as expensive clothes and oil paintings, makes us no happier. One of the main guarantees of happiness (especially for men) is marriage, largely due to the companionship and emotional support that it provides. The corollary of this is also true: divorced and separated people are the least happiest (even more so than people who have been widowed). Also, the more challenged a person is, whether by a job, hobby or sport, the happier he or she is likely to be.[17] This last finding seems to be consistent with the view that the unemployed are much less happy than the employed, independent of income. Another interesting point to emerge is that the more developed the institutions of direct democracy, the happier the individuals are, irrespective of the outcome of the democratic process.[18]

Accordingly, it would seem that several key components of happiness are: companionship and projects (such as jobs); the ability to participate in the decisions that affect our lives; and a threshold level of income or amount of property ownership. More importantly, in the context of the discussion at hand, it is nonsense to suggest that human nature is so diverse that fairly accurate predictions cannot be made concerning the impact that an event or regulatory norm may have on well-being.

[16] See further, R E Lane, *Loss of Happiness in Market Democracies* (2000). But see R A Cummins, 'Personal Income and Subjective Well-being: A Review' (2002) *Journal of Happiness Studies* 133, who argues that there is a stronger link between wealth and happiness.

[17] One quirky result was that people who watch television soaps were happier than those who did not, but watching a lot of television soaps was counter-productive to happiness. See T Reid, 'Some Research That May Bring You a Degree of Happiness', *The Age* (Melbourne), 6 October 1998, 10.

[18] D S Frey, 'Happiness Prospers in Democracy' (2000) 1 *Journal of Happiness Studies* 79.

Australia's *Constitution* – Does Not Directly Affect Important Interests

When constitutional law is subjected to the breadth and depth test its ranking is very low. The principal sections of the *Australian Constitution* have nothing to do with the important interests, rights and duties of Australians. It has precious little to say about life, liberty and property. Most of the provisions are procedural, not substantive in nature. Effectively, they stipulate which branch of government can make substantive laws on the designated subject matters. Thus, the *Australian Constitution* lays down a broad framework for whether the Commonwealth or State governments can make laws with respect to, for example, excise tax, corporations and lighthouses. In itself, this does not diminish the importance of the *Constitution*. Indeed, sometimes the choice of who gets to make a decision is of fundamental importance. For example, it is far better that the parents in a household make the financial decisions than their five year-old son. But in the case of constitutional law, there is no demonstrable reason for believing that the choice of decision-maker, or rather, law-maker, matters.

Quite simply, there is no empirical evidence to show that one level of government is more effective than the other in dealing with matters of finance and trade, and whether it is the Commonwealth or the States that impose taxes, fees etc is of no real concern to ordinary citizens – either way, they are required to pay the particular taxes or fees. Their lives are not going to be significantly affected depending on whether it is the Commonwealth or the States that are responsible for levying the taxes or fees.

Test for Special Leave – De Facto Breadth and Depth Test?

The High Court will obviously continue to hear constitutional cases given the original jurisdiction conferred to it under s 76 of the *Constitution* and the *Judiciary Act 1903* (Cth). However, as a matter of principle, this should not be the case. The Court is already massively overburdened with cases, such that they reject special leave for literally hundreds of cases which, without doubt, would have far more impact on the rights and duties of citizens. Indeed, in most cases, constitutional issues would not even satisfy the test for special leave applied by the Court.

Section 35A of the *Judiciary Act 1903* outlines the matters that the Court must have regard to when considering whether special leave should be granted. It states:

> In considering whether to grant an application for special leave to appeal to the High Court under this Act or any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:
>
> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
>
> (i) that is of public importance, whether because of its general application or otherwise; or
>
> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
>
> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

According to former Chief Justice of the High Court, Sir Anthony Mason, the grant or refusal of special leave essentially turns on s 35A(a)(i), that is, whether the application relates to a question of law 'that is of public importance'.[19] In his article, 'The High Court as Gatekeeper', discussing the test under s 35A of the Act, Sir Anthony states:

> One purpose of the requirement for special leave as a condition of an appeal to the High Court is to ensure that the workload of the Court is of a *character that is worthy of the Court's attention*. The only justification for a second appeal is that some questions of law are of such *fundamental importance that they require consideration by the highest court in the land*.[20]

The first thing to note about the test for application for special leave is that, in substance, it adopts the breadth and depth test postulated above: s 35A(a)(i) seems to endorse the breadth requirement, and s 35A(b) roughly equates with the depth variable. Secondly, in light of our statements above that the importance or relevance of law must be determined according to its ability to affect the rights and duties of citizens, surely the majority of what have been described as the great constitutional cases would not even come close to meeting the test of 'public importance' for the grant of special leave, even though the High Court has stated (mistakenly, in our opinion) that in exercising its special leave jurisdiction, the Court gives greater emphasis to the

19 Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784.

20 Ibid 785 (emphasis added).

public role of the Court in the evolution of the law than to the private rights or interests of the parties to the litigation.[21]

Given that the High Court's limited resources are already being stretched to be able to hear and determine these constitutional issues, we believe that the Parliament should introduce a test similar to that under s 35A, so that when considering whether to exercise its original jurisdiction to hear a case at first instance that involves interpreting the *Constitution*, the High Court must be required to consider whether the matter may affect in a significant manner the rights and duties of individuals. In the opinion of the authors, the number of constitutional cases before the Court would plummet. As is discussed in the following section, determination of esoteric constitutional points are not of a character worthy of the Court's attention, and, by not affecting substantive rights or duties, are certainly not of such fundamental importance that they require consideration by the highest court in the land.

The Outcome of 'Great' Constitutional Issues

In this section the authors consider briefly the interpretation of some of the main provisions of the *Australian Constitution*, and explain why the jurisprudence on each of them is largely irrelevant on the basis of the test of importance or relevance established and elucidated upon in the previous section.

Excise Duties

The points asserted in the preceding section of the article are readily illustrated by considering some of the great constitutional debates over the past century. Perhaps the most litigated section of the *Constitution* is the excise tax power. The history of s 90 is simple: the debate between a 'wide view' and a 'narrow view' of 'excise'. A narrow meaning would give the States greater fiscal control, whereas a wider view would have the reverse effect. Early in the last century, the 'narrow view' given to the section by the High Court allowed the States to levy taxes on the production and manufacturing of goods.[22] As the 'wide view' started to gain judicial support,[23] the States circumvented

[21] See *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 218 as discussed in David O'Brien, *Special Leave to Appeal* (1996) 76.

[22] See, for example, *Peterswald v Bartley* (1904) 1 CLR 497.

[23] In cases such as *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 and *Parton v Milk Board (Vic)* (1949) 80 CLR 229.

the prohibition in s 90 by use of techniques such as back-dating devices.[24] The States became increasingly dependent on this form of tax for their revenue. In 1995-96, franchise fees raised $4.9 billion and represented 16 per cent of State revenue.[25] Indeed, the States had become so dependant on this source of revenue that some commentators thought it was pragmatically not feasible for the High Court to invalidate such arrangements – the States would collapse.

But then in 1997, the High Court in the *Ha*[26] case invalidated the arrangements. And the effect? Zero. Not a ripple in the community. Each citizen woke up the next day enjoying all the same rights and freedoms as the day before. The implications of *Ha* have not been 'catastrophic' for the States as was thought. The Australian federation survived, and citizens went about their ways as if nothing had happened. Following *Ha*, the Commonwealth immediately acted by passing a 'rescue package'. The Commonwealth imposed customs and excise duties on tobacco, and petrol was increased, as was sales tax on alcohol, with proceeds paid to the States as 'revenue replacement grants' under s 96.[27] This arrangement was then essentially subsumed by the GST regime, in which the entire amount of revenue from the GST now goes to the States.[28] In the end, the decision probably did not affect a single person in the community (other than a small section of government employees). In fact, the decision in *Ha* impacted on fewer citizens than a piece of legislation requiring dog owners to pick up dog droppings.

Taxation Power and Section 96

By 1918-19, almost two decades after Federation, the States had become very independent financially, as a great deal of revenue was derived from the imposition on income tax. Grants from the Commonwealth declined to 17 per cent of State revenue, as revenue from income tax increased to one-half of the States' total tax receipts (representing 32 per cent of revenue). By 1938-9, grants from the

[24] See, in particular, *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529.

[25] See Denis James, 'Federal and State Taxation: A Comparison of the Australian, German and Canadian Systems' (1997-98) 5 *Current Issues Brief* (Department of the Parliamentary Library) <http:www.aph.gov.au/library/pubs/CIB/1997-98/98cib05.htm>.

[26] *Ha v New South Wales* (1997) 189 CLR 465.

[27] See G Williams and T Blackshield, *Australian Constitutional Law and Theory* (2002) 1035-6.

[28] See generally C Saunders, 'Federal Fiscal Reform and the GST' (2000) 11 *Public Law Review* 99.

Commonwealth had decreased to 14 per cent of revenue, with 61 per cent of revenue derived from tax receipts – with more than half of this from income tax.[29]

Then, in the *First Uniform Tax Case*[30] during the Second World War, the High Court held that the Commonwealth could use its power to provide financial grants to the States under s 96 of the *Constitution* to essentially force the States out of the income tax field (a decision reaffirmed with some qualification in the *Second Uniform Tax Case*[31] in 1957). These decisions established a trend towards economic centralisation, rather than fiscal federalism. The result of the Uniform Tax Cases is that income tax is now only levied by the Commonwealth.

This drove rhetorical claims that the Uniform Tax Cases had ended fiscal federalism in Australia and imposed hardship on the States. Yet does it really matter whether it is the Commonwealth or the States that collects these taxes? There is no empirical evidence to show that the Commonwealth or the States are better able to collect income taxes and distribute revenue raised from these taxes. Furthermore, whether it be both the Commonwealth and the States imposing income tax, or just the Commonwealth, the reality is that the public still pays the same amount of tax. Even if, to quote former Australian Prime Minister Alfred Deakin, the States now find themselves 'legally free, but financially bound to the chariot wheels of the Commonwealth',[32] it simply does not matter in the general scheme of things. Our test of relevance simply relegates this issue to one of relative unimportance.

Corporations Power

The High Court's two most important decisions dealing with the corporations power under s 51(xx) are the *Incorporation Case*[33] and *Re Wakim*.[34] The impact of these decisions demonstrates that the corporations power fails the test of relevance. It was considered that both cases dealt with monumental constitutional issues, but both were re-

29 See James, above n 25.

30 *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*').

31 *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Second Uniform Tax Case*').

32 A Deakin, *Federated Australia: Selections from Letters to the Morning Post 1900-1910* (1968).

33 (1990) 169 CLR 482.

34 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('*Cross Vesting Case*').

solved through legislative initiative without any substantial impact on the rights or obligations of anyone.

In the *Incorporation Case*, the High Court ruled that a major legislative package (the *Corporations Act 2001* (Cth)), by which the Commonwealth sought to establish a national regime of corporations and securities law, was not supported by s 51(xx) of the *Constitution*. This provision did not give the Commonwealth the power to regulate the incorporation of companies, but only the power to regulate companies that were already formed. The decision in the *Incorporation Case* meant that the Commonwealth could not, by itself, establish a corporations and securities law scheme, but could only do so in cooperation with the States.[35] At the time, the decision was considered to be a devastating affront to the principles of federalism and legislative democracy. Nevertheless, a national regime of corporations and securities (the Corporations Law) was still implemented, achieved through the Commonwealth, State and Territory governments agreeing (the so-called 'Alice Springs Agreement') to cooperate and pass identical legislation to that passed by the Commonwealth for the Australian Capital Territory (using the territories power under s 122 of the *Constitution*).

In the *Re Wakim* decision in 1999, a majority of the High Court held that s 51(xx), as well as Chapter III of the *Constitution*, did not support the corporations cross-vesting scheme whereby the Federal Court received jurisdiction to hear State-enacted Corporations Law matters. Following this decision, the Commonwealth and States agreed voluntarily to transfer their powers to incorporate and regulate corporations to the Commonwealth, in order for the Commonwealth to re-enact the *Corporations Act 2001* to give the Federal Court jurisdiction to hear matters arising under the Act.[36] It was feared that federation would collapse under the weight of the decision, yet the practical effect was basically zero.

The statements made by McHugh J in his judgment in *Re Wakim* reveal the extent to which the *Constitution* is disinterested in the rights and interests of ordinary citizens. Particularly notable was the statement by McHugh J that:

35 See Williams and Blackshield, above n 27, 723.

36 Ibid 267-8. See also G Williams, 'Cooperative Federalism and the Revival of the Corporations Law: Wakim and Beyond' (2002) 20 *Company and Securities Law Journal* 160.

> It would be very convenient and usually less expensive and time consuming for litigants in the federal courts if those litigants could deal with all litigious issues arising between the litigants, irrespective of whether those issues have any connection with federal law. From the litigant's point of view that is saying a great deal. But unfortunately, from a constitutional point of view, it says nothing.[37]

Section 92

The study and debate of s 92 of the *Constitution* over the past century proves our point that the *Constitution* is irrelevant according to our test. The High Court has devoted more time and energy to the issues arising under this section of the *Constitution* than any other constitutional issue.[38] There have been approximately 150 decisions of the High Court dealing with s 92 since Federation.[39]

The Court has considered that the most fundamentally important duty it has is to determine what 'absolutely free' interstate trade, commerce and intercourse means in the context of s 92. Indeed, as Isaacs J said in *Duncan v Queensland*, a case dealing with whether s 92 applies to compulsory acquisitions of goods across State borders, and whether this related to ownership, not trade:

> This is one of the most important cases, if indeed it not be the most important of all the cases, that have ever occupied the attention of this Court. It concerns what I regard as one of the most fundamental pacts of the Constitution under which we live, the absolute right of freedom of trade and commerce between the States.[40]

That is, because of the way Australia's *Constitution* is framed, the High Court considers that elucidating what is meant by free trade and commerce is more important from a constitutional point of view than the freedom of individuals and protection of their rights through the *Constitution*. Can it really be said that whether or not interstate trade is free from discriminatory and protectionist measures has a substantial practical impact on the rights and obligations of ordinary citizens? We think not.

37 *Re Wakim* (1999) 198 CLR 511, 548.

38 Consider the statement of the Court in *Cole v Whitfield* (1988) 165 CLR 360, 383:

> No provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s 92. That notwithstanding, judicial exegesis of this section has yielded neither clarity of meaning nor certainty of operation.

39 Williams and Blackshield, above n 27, 1037.

40 (1916) 22 CLR 556, 605.

The Separation of Powers Doctrine – A Potentially Important Feature of the *Constitution*

We do not suggest that all aspects of the *Constitution* are of marginal relevance. By way of contrast with the provisions of the *Constitution* discussed above that merely divide powers between the Commonwealth and State Parliaments, there is at least one aspect of the *Constitution* that is highly important when assessed by reference to the breadth and depth test indicated above. The separation of powers, when concerning judicial power, is a doctrine of emerging significance in relation to its capacity to affect meaningfully the quality of people's lives. It has replaced the stalled, if not now defunct, implied rights doctrine as the main source of constitutional protection for individual interests. The separation of powers doctrine has developed significantly since it was noted by Justice Deane in *Street v Queensland Bar Association* that:

> the Constitution contains a significant number of express or implied guarantees ... [and that] ... the most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Chapter III.[41]

We briefly outline the scope and nature of the doctrine to make sharper the distinction between important and less important laws.

Justification for the Separation of Judicial Power

In the purest sense, the separation of powers doctrine provides that there are three categories and organs of governmental functions: legislative, executive and judicial, and that each function of government should be exercised only by the relevant organ. Accordingly, the functions of government should be kept separate and autonomous.[42]

Although strictly the separation of powers doctrine requires the functions of each organ to be kept separate, the High Court has effectively not enforced the separation of powers doctrine between the legislative and the executive. This is largely because our system of responsible government requires a close integration between Parliament and the executive.[43] However, apart from several narrow and

41 (1989) 168 CLR 461, 521.

42 See, for example, P Hanks and D Cass, *Australian Constitutional Law: Materials and Commentary* (6th ed, 1999) 350.

43 G Winterton, *Parliament, the Executive and the Governor-General* (1983) 64. See also *Victorian Stevedoring and the General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. However, the High Court has indicated that there are some constraints regarding

generally well-defined exceptions,[44] the High Court has been far more insistent upon the separation of judicial power.

Initially, the justification for the separation of judicial power stemmed from the text and structure of the *Constitution*. Chapter I deals with 'The Parliament'; chapter II, 'The Executive Government'; and chapter III, 'The Judicature'.[45] The justification in focusing on the division of governmental function has now been discarded in favour of a more purposive approach; one that makes the protection of individuals' rights and freedoms its goal.

The need for the separation of judicial power to act as a restraint on governmental power derives from the fact that it is dangerous to accumulate all governmental powers into the one government organ.[46] 'The lesson of history is that the separation of powers doctrine serves a valuable purpose in providing safeguards against the emergence of arbitrary or totalitarian power'.[47]

the integration of the legislature and the executive, so that while Parliament may delegate legislative power to the executive, it may not abdicate it: *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365, 373-4.

44 The well-developed exceptions to the separation of judicial power include: courts are permitted to exercise powers that are legislative in character that are incidental to the exercise of judicial power (*Davison* (1954) 90 CLR 353; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144); judges acting in their personal capacity may exercise administrative or executive functions – pursuant to the *persona designata* doctrine (*Hilton v Wells* (1985) 157 CLR 57; *Grollo v Commissioner of Australian Federal Police* (1995) 131 ALR 225; *Wilson v Minsiter for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220); and Parliament may convict and impose punishment for contempt of Parliament – pursuant to s 49 of the *Constitution* (*Richards; Ex parte Browne and Fitzpatrick* (1955) 92 CLR 157). Sir Anthony Mason ('A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1) states that the exercise of jurisdiction by service tribunals is also an exception to the separation of judicial power. While pragmatically this may be so, it has been held that the nature of the power reposed in public service tribunals to impose punishment is not judicial, but is merely a process through which an administrative tribunal maintains the discipline of the Commonwealth Service in the manner prescribed by law (*White* (1963) 109 CLR 665, 671).

45 In *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 271, the High Court stated:

> if attention is confined to Chapter III it would be difficult to believe that the careful provisions for the creation of a federal judicature as the institution of government to exercise judicial power and the precise specifications of the content or subject matter of that power were compatible with the exercise by that institution of other powers.

46 This has been described as the 'very definition of tyranny': *United States v Brown*, 14 L Ed 2d 484, 488 (1965). See also H Roberts, 'Retrospective Criminal Laws and the Separation of Judicial Power' (1997) 8 *Public Law Review* 170, 175-6.

47 Mason, 'A New Perspective on Separation of Powers', above n 44, 2.

Thus the main objective of the separation of powers doctrine is the protection of individual rights and freedoms that are related to the curial process.[48] In *Kable*[49] Gaudron J stated that one of the central purposes of the judicial process is to protect

> the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights not interfered with other than in consequence of the fair and impartial application of the relevant law to the facts which have been properly ascertained.[50]

The separation of judicial power is also essential in order to maintain the independence of the judiciary and thereby instil public confidence in the administration of justice.[51]

The separation of judicial power imposes two separate broad limits on governmental power. First, Parliament cannot exercise judicial power (it cannot usurp judicial power).[52] Secondly, functions cannot be conferred on courts that are incompatible with the exercise of judicial power: judicial power may only be exercised in accordance with the judicial process.[53] Although on its face the separation of powers

48 Ibid.

49 (1996) 189 CLR 51.

50 Gaudron J at 103-4, adopting her remarks in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497.

51 Mason, 'A New Perspective on Separation of Powers', above n 44, 7.

52 The courts have encountered considerable difficulties in defining judicial power, and it has been noted that it is not susceptible to precise definition. However, this definitional problem is not of significance for the purposes of this discussion. For we are here not concerned with the grey area regarding the nature of judicial power, but purely its paradigm features. As Gaudron J stated in *Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167 (emphasis added):

> in general terms, however, it [judicial power] is that power which is brought to bear in making binding *determinations as to guilt or innocence*, in making binding determinations as to *rights*, liabilities, powers, duties or status put in issue in justiciable controversies, and, in making binding adjustments of rights and interests in accordance with legal standards.

Similarly, Deane J has noted that the essential difference between judicial and legislative power is that the object of the former is normally the ascertainment of *rights and liabilities or of guilt or innocence under laws supposed to already exist*, whereas legislation looks to the future and changes existing conditions by making new rules to apply: *Polyukhovich* (1991) 172 CLR 501, 606 (*'War Crimes Act Case'*).

53 For example, in the *War Crimes Act Case* (1991) 172 CLR 501, 606, Deane J stated that:

> accordingly, the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power ... by itself purporting to exercise judicial power in the form of legislation. Nor can it infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power.

doctrine is procedural in nature – demarcating the outer limits of governmental power – it has been applied in a manner that affords substantive (and procedural) protection to individuals.

Rights Protected by the Separation of Judicial Power

The substantive aspect of the doctrine was illustrated in *Leeth v Commonwealth*, where Deane, Toohey and Gaudron JJ held that the concept of equality is inherent in the judicial process.[54] The separation of powers doctrine has also been invoked as a basis for providing that laws which impose punishment without antecedent trial by courts, including bills of attainder, are invalid.[55] The same applies for laws that prevent courts releasing people from custody,[56] or retrospectively provide for the detention of people.[57] In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ noted that apart from very well-defined and exceptional situations,[58] 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[59]

As far as procedural safeguards are concerned, laws that direct courts to make a particular finding are invalid.[60] And it has been argued that an accused has a right to a fair trial,[61] including the right to adjourn a

It has also been observed that 'the distinction between an infringement and a usurpation of judicial power is of little, if any practical importance but, speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and an usurpation occurs when the legislature has exercised judicial power on its own behalf': *Nicholas* (1998) 151 ALR 312, 345 (McHugh J).

54 (1992) 174 CLR 455, 485 (Deane and Toohey JJ), 502 (Gaudron J). See also *Nicholas* (1998) 151 ALR 312, 335 (Gaudron J).

55 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580; *War Crimes Act Case* (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

56 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27.

57 *Liyanage v R* [1967] 1 AC 259.

58 Namely, custody pending trial (where the detention is ancillary to the adjudication of guilt), involuntary detention in cases of infectious disease or mental illness, and the power of Parliament to punish for contempt and of military tribunals to punish for breach of discipline.

59 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

60 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27.

61 In *NSW v Canellis* (1994) 181 CLR 309, 328, the majority of the High Court noted that the result in *Dietrich v R* (1992) 177 CLR 292 'is based on, and derives, from the accused's right to a fair trial'. See also the comment of Sir Anthony Mason that: 'The right to a fair trial before a court is an indispensable element in

criminal trial where an indigent person has no legal representation,[62] or to have a prosecution stayed on the ground of abuse of process.[63]

The Scope of the Separation of Powers Doctrine – State Courts

In *Kable v Director of Public Prosecutions (NSW)*,[64] the High Court held that the separation of powers doctrine, as far as it relates to judicial power, applies to State superior courts. In his judgment, Gummow J stated that the *Constitution* provides for 'an integrated Australian legal system, with, at its apex, the exercise by the [High Court] of the judicial power of the Commonwealth'.[65] Justice McHugh also noted that 'the Constitution contemplates no distinction between the status of State courts invested with federal jurisdiction and those created as federal courts'. It follows from this 'that there are not two grades of federal judicial power'.[66]

the judicial process which culminates in conviction and punishment': Mason, 'A New Perspective on Separation of Powers', above n 44, 5.

62 *Dietrich v R* (1992) 177 CLR 292, especially Deane and Gaudron JJ. The *Crimes (Criminal Trials) Act 1983* (Vic) s 360A purportedly overrides this, however, given that since *Kable* the separation of judicial powers doctrine applies to State courts, it is questionable whether s 360A would survive challenge: see J Miller, 'Criminal Cases in the High Court' (1997) 21 *Criminal Law Journal* 92.

63 *Nicholas v R* (1998) 151 ALR 312, 349-50 (McHugh J); *Jago v District Court (NSW)* (1988) 168 CLR 23. However, the legislature is also free to interfere with evidentiary burdens of proof. In *Nicholas v The Queen* (1998) 193 CLR 193, at issue was Commonwealth legislation which sought to modify the *Ridgeway* discretion so that the courts could not take into account offences committed by law enforcement officers when gathering evidence of narcotic drug offences. The Court held that the legislation did not offend the *Constitution*, as although the procedure for determining the admission of evidence of illegal importation was affected, the fact-finding function of the judiciary was unchanged and the judicial power to be exercised in determining guilt remained unaffected. Accordingly, the law did not impermissibly interfere with the 'essential functions of the court'. At 188, Brennan CJ stated: 'A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising a discretion', and at 191: 'The procedure for determining the admission of evidence of illegal importation is affected, but the judicial function of fact finding is unchanged and the judicial power to be exercised in determining guilt remains unaffected.'

64 (1996) 189 CLR 51.

65 Ibid 143. The *Constitution* provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth: 'there is nothing in the Constitution to suggest that it permits of different grades or qualities of justice depending on whether the judicial power is exercised by State courts or federal courts created by the Parliament' (ibid 103 (Gaudron J)).

66 Ibid 114-5.

Following *Kable* it has been questioned whether the separation of powers doctrine *always* applies to State courts or *only when they are exercising federal jurisdiction.* McHugh and Gaudron JJ held that it always applies to State courts,[67] while Toohey J held that the doctrine only applies where the court is exercising federal jurisdiction. In any event, the contrast between legal principles such as the separation of powers doctrine and the highly litigated sections of the *Constitution* is hopefully now clearer. The separation of powers doctrine acts as a shield to protect some human interests from arbitrary or unfair erosion by the government. A principle which ensures that people cannot, for example, be arbitrarily imprisoned, is highly important to the capacity for individuals to flourish.

Similar considerations do not apply concerning constitutional provisions such as excise tax and the corporations power. Quite simply, these sections merely lay down rules concerning which law-making institution (the federal or State legislatures) is entitled to make laws on such matters. The sections are neutral so far as the content of such laws is concerned.

The community *does* not care whether the Commonwealth Parliament or the State Parliaments decide how much excise tax to levy or how to regulate corporations. Nor *should* it. As far as the quality of law-making is concerned, there is no evidence that either level of government is more or less capable. This is not surprising given that the political framework at the State and federal levels is virtually identical. Both levels adopt a Westminster system of government. We find three branches of government: the legislature is comprised of two houses of Parliament (with the obvious exception of Queensland) and the Queen's representative; the executive is headed by the Queen's representative, advised by the relevant ministers; and the judiciary is found in a system of courts throughout the relevant jurisdiction. Further, the voting system in each jurisdiction is roughly the same, ensuring similar levels of responsiveness by politicians to their respective constituencies. There is also nothing to suggest that there is any meaningful difference in the background and profile of the politicians around the country. They are generally Australian born, (increasingly) tertiary educated, middle aged men who belong to either the Labor or Liberal Party. The similarity of the decision-making at the federal and State levels is evidenced by the *outcome* fol-

[67] Ibid 118 (McHugh J), 103 (Gaudron J). See also Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of Kable' (1998) 20 *Sydney Law Review* 218, 224-5.

lowing cases such as *Ha*.[68] This decision had the *potential* to have a significant impact on people's lives, and the only reason it did not was political will on the part of the federal government.[69] In the end, however, there was simply no appetite to change the status quo – a reoccurring theme in the context of the relationship between federal and State governments.[70]

Thus, it is irrelevant whether Commonwealth Parliament or the State Parliaments decide how much excise tax to levy or how to regulate corporations. The only people who probably care about such matters are the politicians themselves. But this is simply a petty power struggle for no greater purpose than the capacity to be able to exercise power. The time has come to view it in this way.

Conclusion and Recommendations

Far from being a great document of legal and political significance, the *Australian Constitution* is to a large extent irrelevant. While an expansive reading of some aspects of the *Constitution*, such as the separation of powers doctrine, along with the possibility of a constitutionally-entrenched bill of rights, provide the prospect for a constitution that is more committed to principles of relevance to the citizenry into its second century of operation, we must now reconsider whether the role played by the *Constitution* in Australian society is as important as it should be.

Generally speaking, the effort spent interpreting many sections of the *Australian Constitution* over the last century has, in our opinion, been a waste of the High Court's time and energy. The application of the *Dogs Act* has probably had a greater impact on Australian society than these esoteric constitutional decisions of the High Court. There are several important implications that our discussion has for Australian constitutionalism. First, the High Court should accept that little, if any, importance turns on the interpretation that is given to most provisions of the *Australian Constitution*. Given that no important rights and duties are at stake, consistency should become the main objective for the Court in such cases. Thus, the High Court should simply follow precedent each time a constitutional issue arises. This would dis-

68 *Ha v New South Wales* (1997) 189 CLR 465.

69 We thank the anonymous referee for this point.

70 As the anonymous referee pointed out, the *Incorporation Case* (1990) 169 CLR 482 also had the potential to have a huge impact on people's lives – as, no doubt, did the *First Uniform Tax Case* (1942) 65 CLR 373.

courage constitutional law litigation, and in turn save enormous amounts of taxpayers' money.[71]

As far as teaching constitutional law is concerned, students should be alerted to the fact that a common feature of the majority of sections in the *Constitution* is the mere distribution of power to the relevant branch of government, and that in some cases this has led to a lot of litigation. Accordingly, less time should be spent focusing on mechanistic case law and more emphasis should be placed on the values and ideals that inform the content and development of constitutional principles, such as the fundamental nature of constitutionalism and concepts such as the separation of powers doctrine, which, as has been argued, has the potential to impact on the rights of individuals.

[71] It could be contended that the fact that the bulk of constitutional jurisprudence is on mercantile matters is not necessarily a criticism of the manner in which the High Court has approached the task of constitutional interpretation. The text of the *Constitution* is largely preoccupied with trade, tax and other commercial matters because these weighed heavily on the minds of the drafters, and mercantile interests are the only interests that can afford the high cost of constitutional litigation. (We thank the anonymous referee for this point). This, however, does not fully absolve the Court from any involvement in this regard. The preparedness of the Court to constantly revisit the meaning that should be given to constitutional provisions (see section 2 above, 'The Outcome of "Great" Constitutional Issues') has no doubt encouraged parties to initiate constitutional litigation.