HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

NORTH AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INC — APPELLANT

AND

HUGH BURTON BRADLEY & ANOR — RESPONDENTS

North Australian Aboriginal Legal Aid Service Inc v Bradley
[2004] HCA 31
17 June 2004
D2/2003

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation:

S J Gageler SC with A R Moses and P D Keyzer for the appellant (instructed by Geoff James)

No appearance for the first respondent

T I Pauling QC, Solicitor-General for the Northern Territory, with P J Hanks QC for the second respondent (instructed by Solicitor for the Northern Territory)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth, with C J Horan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia, with C D Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor of the State of South Australia)

CATCHWORDS

North Australian Aboriginal Legal Aid Service Inc v Bradley

Statutes – Construction – *Magistrates Act* (NT), s 6 – Requirement that a magistrate be paid such remuneration and allowances as determined from time to time by the Administrator – Respondent appointed Chief Magistrate with 11 years to serve before age of compulsory retirement – Initial determination of remuneration by Administrator limited to a two year period – Whether appointment valid pursuant to *Magistrates Act* (NT).

Constitutional law (Cth) – Judicial power of the Commonwealth – Vesting in State and Territory courts – Minimum requirements for the appearance of impartiality and independence – Whether contravened by appointment where salary determined for a limited period.

Constitution, Ch III.
Magistrates Act (NT), ss 4, 6, 7, 19A.
Remuneration Tribunal Act (NT).

1 GLEESON CJ. The appellant brought proceedings in the Federal Court of Australia to challenge the validity of the appointment of the first respondent as Chief Magistrate of the Northern Territory. The challenge failed before Weinberg J[1]. An appeal to the Full Court of the Federal Court was dismissed (Black CJ and Hely J; Drummond J dissenting)[2].

2 The case for the appellant, as argued in this Court, is based upon a contention that, upon its true construction, the *Magistrates Act* (NT) ("the Magistrates Act"), pursuant to which the first respondent was appointed, did not authorise the appointment in the circumstances that existed in relation to the determination of his remuneration. The construction argument was said to be supported by constitutional and common law principles concerning judicial independence and impartiality, and by the consideration that a purpose of the Magistrates Act was to further the independence of the Northern Territory's magistracy. The appellant also argued that, if the Magistrates Act had purported to authorise the appointment in the circumstances, then to that extent it would infringe the principle in *Kable v Director of Public Prosecutions (NSW)*[3]. This was said to be a reason to construe the statute in the manner for which the appellant contends. Alternatively, it was said to result in partial invalidity.

3 The fundamental importance of judicial independence and impartiality is not in question. It was recently affirmed by this Court in *Ebner v Official Trustee in Bankruptcy*[4]. It was declared in Art 2.02 of the *Universal Declaration of the Independence of Justice* and in the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*. The content of the principle that citizens have the right to have disputes decided by an independent and impartial tribunal has been examined in cases concerning Art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[5] and s 11(d) of the *Canadian Charter of Rights and Freedoms*[6]. In

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1 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 192 ALR 625.

2 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 122 FCR 204.

3 (1996) 189 CLR 51.

4 (2000) 205 CLR 337 at 343 [3].

5 *Findlay v United Kingdom* (1997) 24 EHRR 221; *V v United Kingdom* (1999) 30 EHRR 121; *Porter v Magill* [2002] 2 AC 357; *R v Home Secretary; Ex parte Anderson* [2003] 1 AC 837; *Clark v Kelly* [2003] 2 WLR 1586; [2003] 1 All ER 1106.

6 *Valente v The Queen* [1985] 2 SCR 673; *Mackin v New Brunswick* [2002] 1 SCR 405; *Ell v Alberta* [2003] 1 SCR 857.

Porter v Magill[7], the House of Lords cited the statement of the European Court to the effect that, in considering whether a tribunal is independent, regard must be had inter alia to the manner of appointment of its members and their term of office, and the existence of guarantees against outside pressures. The Supreme Court of Canada has said that "[t]he manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal"[8]. It has also pointed out that "[c]onceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible"[9]. Within the Australian judiciary, there are substantial differences in arrangements concerning the appointment and tenure of judges and magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and court administration. All those arrangements are relevant to independence. The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements. For example, s 72 of the Constitution does not permit the appointment of federal acting judges. On the other hand, acting judges are commonly appointed for fixed, renewable, terms in some State and Territory courts. This Court decided in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[10] that acting judges may be appointed in the Supreme Court of the Australian Capital Territory. In the Northern Territory, the legislation with which this case is concerned provides for the appointment of acting magistrates (s 9). (The legislation also provides for the appointment of justices of the peace as Special Magistrates (s 14).)

4 The role of the magistracy in the administration of civil and criminal justice in the various Australian jurisdictions continues to evolve. In New South Wales, Governor Phillip held a commission as a justice of the peace. From the foundation of that colony, stipendiary magistrates, as well as administering justice in summary proceedings, had extensive administrative responsibilities. Originally, they were organised as part of the colonial, and later State, public service. It was not until 1955 that new recruits to the New South Wales magistracy had to be legally qualified[11]. In 1986, New South Wales magistrates

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7 [2002] 2 AC 357 at 489 [88] per Lord Hope of Craighead.

8 *Ell v Alberta* [2003] 1 SCR 857 at 873 [30].

9 *Valente v The Queen* [1985] 2 SCR 673 at 692.

10 (1999) 200 CLR 322.

11 Golder, *High and Responsible Office: A History of the NSW Magistracy* (1991) at 175.

were taken out of the public service, and given structural independence, including judicial tenure[12]. A turning point in the history of the Northern Territory magistracy was the 1976 decision in *Fingleton v Christian Ivanoff Pty Ltd*[13], which exposed problems resulting from the circumstance that, in the South Australian public service, magistrates and prosecuting officers were members of the same Department. This decision led to the removal of Northern Territory magistrates from the public service by the legislation presently under consideration.

5 It may be accepted that it was an object of the Magistrates Act to give Northern Territory magistrates a degree of personal and institutional independence significantly in advance of what they had previously enjoyed. Under the Act, a magistrate holds office until the age of 65, subject to earlier resignation (ss 7, 8). A magistrate shall not be removed from office unless specified conditions are satisfied (s 10). Appointment and removal is by the Administrator of the Territory (ss 4, 10). Magistrates upon appointment take oaths or make affirmations in the same form as Justices of this Court and the members of other federal courts. Section 62A of the *Interpretation Act* (NT) ("the Interpretation Act") provides that, in interpreting an Act, a construction that promotes the purpose or object underlying the Act is to be preferred to a construction that does not promote the purpose or object. It is, however, one thing to say that the Magistrates Act has a purpose of advancing the independence of the magistracy. It is a different thing to say that it has a purpose of securing such independence to the highest possible degree in every respect. As has been noted, there is no ideal model of independence, and both historically and at the present time, arrangements capable of affecting independence have varied, and continue to vary, between Australian jurisdictions. As a number of decisions of the Supreme Court of Canada demonstrate, it is possible to identify certain minimum conditions that must be satisfied if a judicial body is to be regarded as independent and impartial[14]. Beyond those minimum conditions, however, both history and current practice reveal that there is significant room for divergence.

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12 *Judicial Officers Act* 1986 (NSW).

13 (1976) 14 SASR 530.

14 *Valente v The Queen* [1985] 2 SCR 673; *R v Beauregard* [1986] 2 SCR 56; *R v Généreux* [1992] 1 SCR 259; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.

6 Section 4 of the Magistrates Act, which established the office of Chief Magistrate, empowers the Administrator to appoint to that office, or to the office of Magistrate, a person eligible for appointment in accordance with s 5. Section 6 provides that a Magistrate, including a Chief Magistrate, shall be paid such remuneration and allowances, and hold office on such terms and conditions, as the Administrator from time to time determines.

7 The capacity, conferred on the Administrator by s 6, to determine the remuneration of a Magistrate, including the Chief Magistrate, from time to time, involves both a power and a duty. Section 6 is not expressed in terms that are either permissive or obligatory. It simply provides that an appointee is to be paid such remuneration and allowances as the Administrator determines. Leaving to one side any question as to the form and content of such a determination, whether it can be for a fixed period, or for an interim period, or of indefinite duration, and whether and in what circumstances a redetermination may be made, the section clearly confers on the Administrator an authority to make a determination in respect of any appointee. It may be made in respect of a class generally, or it may be made in respect of an individual, such as a Chief Magistrate. It is a matter of statutory interpretation to decide whether there is a duty as well as a power to exercise the authority. It is to be used, at least in part, for the benefit of an appointee, and this in itself is a strong indication that there is a duty to exercise it at least once in relation to any given appointee[15]. Another strong indication is that the existence of the Northern Territory magistracy, in a practical sense, depends upon having in place, at any time, appropriate arrangements for the remuneration of magistrates. A statutory provision that an office holder "shall be paid" such remuneration as the Executive, from time to time, determines, should not be understood to mean that the Executive may choose never to make a determination, or never to make a determination in relation to an office holder, in which event the office holder will be paid nothing; least of all where the office holder is meant to be independent of the Executive. On any view, therefore, the Administrator is obliged to make at least one determination of the remuneration to be paid to a Chief Magistrate. Section 41 of the Interpretation Act provides that, where an Act confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as the occasion requires. The Administrator is entitled to make further determinations of such remuneration from time to time as the occasion requires, and there may be circumstances giving rise to an obligation to do so. An example of such a requirement would be the expiry of an earlier determination. Apart from the circumstances of the present case, to which reference will be made below, it is not difficult to imagine how that might occur. Suppose, for

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15 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223; *Ward v Williams* (1955) 92 CLR 496 at 505-506; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 346 [22]; *Samad v District Court (NSW)* (2002) 209 CLR 140.

example, that, as sometimes happens, the Executive decides that there is to be a general review of remuneration and allowances of magistrates, and it is expected that such review may take a considerable time to complete. The statute would permit an interim determination pending the outcome of the review. The completion of the review may then be an occasion requiring a further determination. This is not uncommon, and is not inconsistent with the requirements of independence. There is no reason to give the general words of s 6 a strained and narrow construction which would prevent the making of a determination for an interim period, or a determination that for some other legitimate reason may come to an end in circumstances that require the making of a further determination. Such a construction does not advance any legislative purpose. It produces a result that is unreasonable. It should be rejected.

8 In the present case, the Chief Magistrate, the first respondent, was appointed by an instrument dated 27 February 1998, signed by the Administrator, to hold office on and from 9 March 1998. On its face, the instrument of appointment complied with s 4 of the Magistrates Act. There is no question as to the first respondent's eligibility under s 5.

9 The vice in the procedure adopted is said to exist in the nature of the determination of the first respondent's remuneration, made in purported pursuance of s 6. The determination, which was also dated 27 February 1998, and signed by the Administrator, specified the remuneration and allowances of the first respondent for a fixed period of two years, from 9 March 1998 to 8 March 2000. The reason for that will be explained below. It is contended that the determination was invalid because it was not of a kind authorised by s 6. The first comment to be made about that submission is that, even if the premise were correct, the conclusion would not follow. If it were correct to say that, at the time of the appointment of the first respondent, there was no valid determination of his remuneration, then all that would follow would be that he was entitled to have his remuneration validly determined; an entitlement that could be enforced, if necessary, by proceedings for mandamus against the Administrator. The Magistrates Act does not expressly make the existence of a valid determination under s 6 a condition precedent of the validity of an appointment under s 4. No implication to that effect is required or justified. The power to make an appointment under s 4 is vested in the same person as the power and the duty to make a determination under s 6. The making of an appointment assumes a willing appointee. It is unlikely that a person would accept an appointment without at least believing that there was a valid determination of remuneration. Such a belief might be founded upon some misapprehension, including an error of law, but in the ordinary scheme of things an appointee would want to be satisfied with the arrangements for his or her remuneration before accepting office. Since there is, in any event, a duty under s 6 to make at least one determination of a chief magistrate's remuneration, there is no occasion to read into s 4 what is certainly not there expressly, that is to say, that the existence of a valid determination under s 6 is a condition of the exercise of the power given by

s 4. The present case is different from *Buckley v Edwards*[16], where a question arose as to the power of the Governor of New Zealand to appoint an additional judge of the Supreme Court of New Zealand without Parliament having made any provision for the salary of a judge so appointed[17]. There the power to appoint was vested in the Governor, but it was for the Parliament to provide for the salary. And the relevant legislation provided that a judge's salary was to be at least that which, at the time of appointment of the judge, was provided by law. It may be added that, on 27 February 1998, there was in existence a previous determination of the remuneration and allowances of the Chief Magistrate of the Northern Territory. The determination of 27 February purported to revoke that earlier determination but, if it were invalid, it is strongly arguable that the revocation was ineffective and that the earlier, admittedly valid, determination remained in force. It seems unlikely that the Administrator would have intended the revocation of the earlier determination to be independent of the operation of the new determination. Again, the question that arises is one of interpretation of the instrument of revocation and further determination and of whether the two acts were interdependent. On the face of the instrument, the revocation appears to be interdependent with the new determination. For the reasons that follow, however, it is not necessary to pursue that argument.

10 The premise upon which the appellant's case depends is not to be accepted. The form of the determination of 27 February 1998 is explained by the following circumstances, which are set out at greater length in the joint reasons of Black CJ and Hely J in the Full Court[18]. Over a period before the appointment of the first respondent, there was a proposal in the Northern Territory for the introduction of contract appointments for magistrates. This was controversial, and was ultimately abandoned, but it resulted in some administrative confusion concerning the terms and conditions of the first respondent's appointment. Adding to the confusion was the fact that, when the first respondent (a Northern Territory legal practitioner) was approached with an offer of appointment, he said that he was only willing to remain in the office for two years. (He was then aged 54). Although, in the events that occurred, the first respondent's appointment was for an indefinite period, and would therefore last for 11 years unless he resigned earlier, the determination of remuneration under s 6 fixed his remuneration for a period of two years. It may be mentioned in passing that, as was acknowledged in the course of argument, the Northern Territory has had a history of importing judicial officers from other jurisdictions, many of whom took appointment on the understanding that it would be for a limited term.

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16 [1892] AC 387.

17 See [1892] AC 387 at 391.

18 (2002) 122 FCR 204 at 208-211 [9]-[31].

Although there has been a different trend in recent years, the first respondent's original attitude was not novel.

11 The making of the two-year determination did not exhaust either the power or the duty of the Administrator under s 6. The section contemplates determinations from time to time as the occasion requires. When the two-year period expired, the Administrator was obliged to make a fresh determination. The remuneration fixed by it could have been the same as, or different from, the remuneration fixed for the two-year period. It is not necessary, in my view, to decide whether it could have been less. If (and I am not to be taken to accept that this is the case) the Administrator has the power to reduce the remuneration of magistrates, then that power would exist whether the first determination applicable to a magistrate is for a fixed term, or an interim period, or an indefinite period.

12 Plainly, there is no warrant for taking s 6 to mean that the only power in the Administrator, when he appointed the first respondent, was to fix his remuneration, unalterably, for 11 years[19]. Such an interpretation of s 6 would have consequences seriously adverse to the interests of magistrates. Magistrates in Australia typically take up office at a younger age than 54; most of them are much younger when appointed. To some of them, a conclusion that their remuneration was fixed unalterably from the time of their appointment until they reached the age of 65 would cause serious financial disadvantage, especially in times of substantial inflation. At such times, the most effective way for any government to reduce the real incomes of judicial officers is to do nothing. No one suggests that this is the correct interpretation of s 6.

13 An alternative course that would have been permitted by s 6 was to fix the first respondent's remuneration for an indefinite period, on the basis that it could be altered by a later determination if that is what the Administrator decided to do. The appellant contends, not only that this course was open to the Administrator, but that it was the only course available. This is said to be required by principles of independence. For reasons already given, it is inconsistent with the general language of s 6. And how would such a course have left the first respondent in a better, or more independent, position than the course that was taken? It is argued that the first respondent was left in the position, if he desired to stay on at the end of two years, of having to "re-negotiate" his remuneration with the Executive. It is not clear what the concept of negotiation is said to involve over and above what applies in the case of most judicial officers, including federal judges, when their remuneration is under review. Judicial remuneration is regularly reviewed by remuneration tribunals, but the ultimate power to decide such remuneration from time to time rests with Parliament. Judicial officers are given an

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19 *Day v Hunkin* (1938) 61 CLR 65.

opportunity to make representations as to changes that should be made, and that opportunity is sometimes taken up. This is not a process of negotiation. It is a common procedure, consistent with requirements of fairness, transparency and accountability, and consistent also with judicial independence. If the first respondent's remuneration had been determined for an indefinite period, it is possible that at the end of two years, and almost certain that at some time thereafter, had he remained in office, he would have been seeking an alteration. He could have put a case to the Administrator for a review of his remuneration. It might have been necessary for him to do so in order to obtain proper consideration of his position.

14 In the events that occurred, because the determination of 27 February 1998 was structured on the assumption that the first respondent would remain in office for two years only, fairness both to him and to the Northern Territory Government required that it be altered if he decided to stay on indefinitely. That, in fact, is what occurred. The question of principle, however, is whether the making of a determination for a fixed period compromised the independence of the first respondent, bearing in mind that the only alternative course suggested is that his remuneration and allowances should have been set for an indefinite period with the possibility of further redetermination if and when the Administrator so decided. If that question of principle is answered in the negative, then the foundation of the appellant's construction argument disappears, and its reliance on *Kable* is misplaced. The question does not arise in the abstract. It is a concrete, practical issue, to be resolved having regard to what is said to be the other course that could and should have been adopted. That the other course was available is clear. Whether it was the only available course, consistent with proper respect for the independence of the first respondent, is what is in question. I would answer that question in the negative. I am unable to accept that, in a practical sense, the determination of 27 February 1998, by reason of the form it took, left the first respondent in any position of dependency or disadvantage materially different from the position that would have applied had the determination been for an indefinite period. If the first respondent remained in office after the expiration of two years, the Administrator was obliged to make a further determination. The issues that would arise for consideration in that event would be the same as the issues that would have arisen, sooner or later, as the passage of time inevitably rendered the terms of an indefinite determination inequitable or inappropriate.

15 The appeal should be dismissed. I agree with the consequential orders proposed by McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

16 McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. The appellant ("the Legal Aid Service") renews in this Court its unsuccessful challenge to the validity of the appointment with effect from 9 March 1998 of the first respondent ("Mr Bradley") as Chief Magistrate under the *Magistrates Act* (NT) ("the Magistrates Act"). Mr Bradley has taken no active part in the litigation. The active opposition has been that of the Northern Territory of Australia ("the Territory"). The proper construction of the Magistrates Act is of primary and critical importance for the Legal Aid Service's case. When the statute receives its proper construction, the grounds upon which the Legal Aid Service urges invalidity cannot succeed. Accordingly, the appeal must fail.

Appointment

17 The convenient starting point for consideration of the appeal is an instrument dated 27 February 1998 under the hand of the Administrator of the Territory. The instrument is headed "APPOINTMENT OF CHIEF MAGISTRATE" ("the Appointment") and reads:

> "I, NEIL RAYMOND CONN, the Administrator of the [Territory], acting with the advice of the Executive Council, in pursuance of section 4(3) of the [Magistrates Act], appoint Hugh Burton Bradley, a person who is eligible to be appointed, to hold the office of Chief Magistrate on and from 9 March 1998."

18 The reference to the Magistrates Act is to legislation which began its life as the Magistrates Ordinance 1977 (NT) enacted by the Legislative Council for the Territory under the *Northern Territory (Administration) Act* 1910 (Cth) as continued in force by s 57 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act")[20]. The Magistrates Act has been amended from time to time by the Legislative Assembly of the Territory exercising its authority under s 6 of the Self-Government Act. Thus, the history of the

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20 Section 57(1) of the Self-Government Act states:

> "Subject to this Act, on and after the commencing date, all existing laws of the Territory have the same operation as they would have had if this Act had not been enacted, subject to alteration or repeal by or under enactment."

See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 624-625.

Magistrates Act reflects the development of the constitutional status of the Territory.

19 On the same day as he made the Appointment, the Administrator signed an instrument headed "DETERMINATION OF REMUNERATION, ALLOWANCES AND TERMS AND CONDITIONS OF CHIEF MAGISTRATE" ("the 1998 Determination"). The presently critical text thereof is as follows:

> "I ...
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> (b) in pursuance of section 6 of the [Magistrates Act], determine that for *the period on and from 9 March 1998 to and including 8 March 2000 –*
>
> (i) the salary payable to the Chief Magistrate is $193,602 per annum, payable fortnightly in arrears, and the salary will increase at the same percentage rate, and from the same date, that Stipendiary Magistrates' salaries increase;
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> (ii) the Chief Magistrate is entitled to be provided with a Holden Calais motor vehicle that is to be maintained at the expense of, and the running costs are to be met by, the Territory;
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> (iii) the Chief Magistrate is entitled to 'business first' class air travel for the performance of his duty; and
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> (iv) subject to subparagraphs (i), (ii) and (iii), the Chief Magistrate is entitled to the same allowances and holds office on the same terms and conditions as other Stipendiary Magistrates." (emphasis added)

20 The 1998 Determination was not based on any report and recommendation of the Remuneration Tribunal under the *Remuneration Tribunal Act* (NT) ("the Remuneration Act"). It is not suggested that the existence of such a recommendation was a necessary condition for the making of the 1998 Determination. The evidence does indicate that the Administrator, in making the 1998 Determination, acted upon advice that Mr Bradley had indicated that he then wished only to serve for a period of two years and that his salary therefore had been adjusted to make allowance for the circumstance that he would obtain no superannuation benefit for that period of service.

21 The opening words of par (b) of the 1998 Determination, with the specification of the period from 9 March 1998 to 8 March 2000, are significant for what follows. Subject to the provisions of the Magistrates Act, such as those in s 10 dealing with removal for cause, s 7(1) provided that the Chief Magistrate "holds office until he attains the age of 65 years". Mr Bradley was born in 1944. However, when he assumed office on 9 March 1998, there was in existence no determination of his remuneration for any part of the balance of his term of office which would begin on 9 March 2000. In the events that happened, Mr Bradley has served beyond the two year period. In the meantime, two further determinations were made on 30 November 1999 ("the 1999 Determinations"). These had the effect of revoking the 1998 Determination and making fresh provision in respect of Mr Bradley both until and including 8 March 2000 and thereafter.

The litigation

22 The litigation was initiated in the Supreme Court of the Territory by motion dated 20 April 2000. A declaration was sought of the invalidity of the appointment of Mr Bradley to the office of Chief Magistrate of the Territory. On 13 June 2000, Olney J ordered summary judgment for the defendants but an appeal by the Legal Aid Service to the Court of Appeal (Priestley J, Doyle and Brooking AJJ) was successful and the action was reinstated[21]. Thereafter, on 6 June 2001, Olney J transferred the action to the Federal Court of Australia and it went to trial before Weinberg J. Various issues were raised at trial which are not now in play before this Court. Weinberg J delivered detailed reasons for judgment on 7 December 2001 and dismissed the application[22]. An appeal to the Full Court of the Federal Court (Black CJ and Hely J; Drummond J dissenting) was dismissed[23].

23 The appeal to this Court is brought from that decision of the Full Court of the Federal Court.

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21 *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2000) 10 NTLR 103.

22 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 192 ALR 625.

23 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 122 FCR 204.

The case in this Court

24 In the course of argument, the case for the Legal Aid Service was developed and refined. The contention is that a declaration should be made that Mr Bradley was not validly appointed to the office of Chief Magistrate. That invalidity would be the consequence of a holding which should be made by this Court that the Magistrates Act is invalid in so far as it authorised the appointment of a Chief Magistrate to age 65 but with remuneration fixed only for the first two years of the term. The invalidity of the Magistrates Act and, as a consequence, the invalidity of the appointment of Mr Bradley, is said to follow from the application to the statute of the principles derived from *Kable v Director of Public Prosecutions (NSW)*[24]. In particular, the Legal Aid Service submits that the provisions in the Magistrates Act respecting appointment and remuneration deprive the courts of the Territory in which the appointees serve of the character of independent and impartial tribunals.

25 The Local Court is established as a court of record by s 4 of the *Local Court Act* (NT) ("the Local Court Act"). The jurisdiction conferred upon it may be exercised by a magistrate sitting alone (s 5(1)). Part III of the Local Court Act confers an extensive jurisdiction on the Local Court within a jurisdictional limit of $100,000 (s 3). Further, with respect to summary and indictable offences, s 18 of the Magistrates Act gives to each magistrate the jurisdiction, power and authority to do alone what may lawfully be done by one, two or more Justices under the *Justices Act* (NT)[25] or any other statute.

26 The Legal Aid Service relies upon the analysis by Spigelman CJ of *Kable* in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*[26], where his Honour said:

> "The reasoning of the majority in *Kable* was not confined to the *character* of a function or power conferred by a State law. Some of the reasoning encompasses the *manner* in which a function or power is to be performed. Although *Kable* was concerned with the compatibility of a

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24 (1996) 189 CLR 51.

25 Originally the Justices Ordinance 1928 (NT) ("the Justices Ordinance").

26 (2000) 181 ALR 694 at 698.

specific non-judicial power (to order imprisonment without any finding of criminal guilt) with the exercise by a state Supreme Court of the judicial power of the Commonwealth, the reasoning of the majority did involve principles of broader application: see *Bruce v Cole*[27]."

27 Further, in *Ebner v Official Trustee in Bankruptcy*[28], Gaudron J observed:

> "Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires, in accordance with *Kable v Director of Public Prosecutions (NSW)*[29], that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction. And as courts created pursuant to s 122 of the Constitution may also be invested with the judicial power of the Commonwealth[30], it should now be recognised, consistently with the decision in *Kable*, that the Constitution also requires that those courts be constituted by persons who are impartial and who appear to be impartial."

In his reasons in *Ebner*[31], Kirby J, by reference to *Kable*, also expressed the view that:

> "in Australia, the ultimate foundation for the judicial requirements of independence and impartiality rests on the requirements of, and implications derived from, Ch III of the Constitution".

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27 (1998) 45 NSWLR 163 at 166.

28 (2000) 205 CLR 337 at 363 [81].

29 (1996) 189 CLR 51.

30 See *Northern Territory v GPAO* (1999) 196 CLR 553 at 603-604 [127] per Gaudron J; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 336-340 [25]-[36] per Gaudron J, 348 [63] per Gummow and Hayne JJ; cf at 354-356 [84]-[88] per Kirby J.

31 (2000) 205 CLR 337 at 373 [116].

28 Counsel for the Legal Aid Service put an argument in three steps. The first is that a court of the Territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament. That proposition, to which there was no demurrer by the Territory or by the Attorney-General of the Commonwealth who intervened in this Court, is supported by the citations of authority by Gaudron J in the above passage from *Ebner*. It should be accepted.

29 The second step in the Legal Aid Service's argument is that it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal. That proposition, which again appears in the passage from *Ebner*, also should be accepted.

30 The difficulty arises with the third step. This requires discernment of the relevant minimum characteristic of an independent and impartial tribunal exercising the jurisdiction of the courts over which the Chief Magistrate presides. No exhaustive statement of what constitutes that minimum in all cases is possible. However, the Legal Aid Service refers in particular to the statement by McHugh J in *Kable*[32] that the boundary of legislative power, in the present case that of the Territory:

> "is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the [Territory] court as an institution was not free of government influence in administering the judicial functions invested in the court".

31 Much then turns upon the permitted minimum criteria for the appearance of impartiality. In that regard, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[33] established that s 72 of the Constitution had no application to the Supreme Court of the Australian Capital Territory because that Court was not a court "created by the Parliament" within the meaning of s 72 of the Constitution. It followed that there was no objection based upon the tenure requirement of s 72

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32 (1996) 189 CLR 51 at 119; see also at 98 per Toohey J, 108 per Gaudron J, 133-134 per Gummow J.

33 (1999) 200 CLR 322.

to the appointment of an acting judge in that Court. Although in *Eastman*[34] and in earlier cases[35] other views have been stated on this subject, for these proceedings the point should be taken as settled.

32 Moreover, it may be added that the absence of a full commission to the trial judge in *Eastman* did not gainsay the appearance of impartiality. No question arose in *Eastman* respecting the effect upon that appearance of impartiality and the application of *Kable* to a series of acting rather than full appointments which is so extensive as to distort the character of the court concerned. No such question arises in this case.

33 Territorial legislatures may be moved to legislate with respect to their courts by considerations extending beyond compliance with constitutional imperatives. Legislation may be designed to further the fact and the appearance of impartial judicial determinations. Provisions respecting security of remuneration assist that end, as McHugh J pointed out in *Harris v Caladine*[36].

34 Accordingly, in the present case, the first step, logically anterior to the application of constitutional norms, is to ascertain whether on the proper construction of the Magistrates Act there is evidenced a legislative purpose to advance the status of the magistracy of the Territory in the manner just indicated. When that has been done, the submissions as to invalidity will fall for consideration.

The provenance of the Magistrates Act

35 The Magistrates Act is to be construed with several matters in mind. One, already indicated in these reasons, is the statement in the joint judgment in

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34 (1999) 200 CLR 322 at 355-356 [88] per Kirby J.

35 For example, in *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 612-613 per Windeyer J.

36 (1991) 172 CLR 84 at 159. See also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at 89-90; Johnston and Hardcastle, "State Courts: The Limits of *Kable*", (1998) 20 *Sydney Law Review* 216 at 239-240.

Ebner[37] that "fundamental to the Australian judicial system" is the conduct of adversarial trials by an independent and impartial tribunal. Another is the application of that principle in the development of the courts of summary jurisdiction in this country. In 1958, the New South Wales Full Court observed in *Ex parte Blume; Re Osborn*[38]:

> "It is a Departmental rule of long standing that the judicial functions of magistrates are not interfered with by the Department and that it is not competent for the Minister or any member of the Executive to give any direction affecting his judicial functions to a judicial officer."

But this was written at a time when it was recognised that the summary courts had origins in England differing from those of the superior courts, deriving ultimately from local courts constituted by justices of the peace and not from the Royal Courts of Justice at Westminster.

36 Thus, in *Spratt v Hermes*[39], which concerned the position of Mr Hermes as a stipendiary magistrate in the Australian Capital Territory, Windeyer J observed[40]:

> "The rule that judges hold their offices during good behaviour and not at pleasure is not of general application. It is not part of the common law. It describes an exceptional tenure, one which judicial officers of subordinate courts, for the most part, do not enjoy[41]. It is therefore not surprising, nor is it contrary to tradition or principle, that the *Court of Petty Sessions Ordinance* 1930-1961 of the Australian Capital Territory provides for the appointment by the Governor-General of stipendiary magistrates who 'shall be paid such remuneration, and shall hold office on such terms and conditions as the Governor-General determines'."

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37 (2000) 205 CLR 337 at 343 [3].

38 (1958) 75 WN (NSW) 411 at 415.

39 (1965) 114 CLR 226.

40 (1965) 114 CLR 226 at 271-272.

41 See the remarks of Lord Goddard CJ in *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482 at 495, 496.

37 The differing origin of the superior and inferior courts was reflected in the circumstances that until quite recent times in Australia magistrates were members of the public services of the States and subjected to the regulation and discipline inherent in that position[42]. For example, at the time of the decision in *Blume*, the position in New South Wales was[43]:

> "The appointment of magistrates is made under s 49 of the *Public Service Act* [1902 (NSW)] namely, by the Governor on the recommendation of the Public Service Board. Such an appointment can only be made if the proposed appointee has certain qualifications. A magistrate is an officer of the Department of Justice and the Under-Secretary of Justice is the permanent head of that Department. Magistrates may be dismissed or removed from office for breaches of certain statutory obligations (s 56) and may be suspended by the senior officer of the branch in cases of emergency, otherwise by the permanent head of the Department. The Public Service Board may inquire into cases of suspension, the officer having an appeal from the Board's decision to the Crown Employees' Appeal Board."

38 In the Territory, provision first was made for the appointment of Special Magistrates who were to have, as a condition of eligibility of appointment, not less than five years standing as a solicitor or barrister, by the Justices Ordinance 1928 (NT)[44]. The legislation was amended by the Justices Ordinance 1973 (NT) to provide for the appointment of a Chief Magistrate. However, throughout this period the magistracy remained members of the public service of the Commonwealth.

39 The enactment in the Territory of the Magistrates Act in 1977 was precipitated by the decision of the South Australian Full Court in *Fingleton v Christian Ivanoff Pty Ltd*[45], delivered on 30 August 1976. Several departments of the public service of South Australia were amalgamated as the Department of

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42 See Golder, "The Making of the Modern Magistracy", (1991) 77 *Journal of the Royal Australian Historical Society* 30 at 35-38.

43 (1958) 75 WN (NSW) 411 at 415.

44 s 10(3)(c).

45 (1976) 14 SASR 530.

Legal Services with the Crown Solicitor being the acting head of the new department. Upon a complaint for an offence coming on for hearing in a court of summary jurisdiction, a question was raised as to whether the Special Magistrate constituting that court was disqualified from hearing the complaint by reason of the fact that in consequence of the amalgamation both the magistrate and a solicitor from the Crown Law Department who prosecuted for the complainant were members of the Department of Legal Services and subject to the same departmental head.

40 In *Fingleton*, the Full Court held that in the circumstances the magistrate was disqualified by appearance of bias from hearing and determining the complaint. Bray CJ observed[46]:

> "To some minds, it might seem anomalous that a magistrate should be subject to the *Public Service Act* [1967 (SA)] at all and that in view of the important functions he has to perform, touching so nearly and so often the ordinary life of the citizen in so many aspects, he should be given the same independence and freedom from administrative control as are enjoyed by the Judges of this Court."

41 Thereafter, on 17 November 1976, the Bill for what was to become the Magistrates Act was introduced into the Legislative Council. The need for urgency was said to arise by reason of the recent decision in *Fingleton*. The Second Reading Speech stated[47]:

> "Whilst it is not admitted that the same principle of law necessarily applies in the Northern Territory, it is possible that at some future time some reliance may be placed on the South Australian decision in a Territory court. To avoid the possibility of a decision of the Territory court being held invalid, it is thought desirable that the magistrates should be taken out of the public service at the earliest time."

42 In the Second Reading Speech, it was pointed out that, although the Justices Ordinance did not require magistrates to be members of the Australian public service, they were, at that stage, appointed within that service and came

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46 (1976) 14 SASR 530 at 537.

47 Northern Territory, Legislative Council, *Parliamentary Debates* (Hansard), 17 November 1976 at 772.

under the Attorney-General's Department. Reference was made to the decision of the federal government that the Territory should be left to enact its own legislation respecting the magistracy and that the Territory had been given "the opportunity of legislatively expressing its support for the principle of judicial independence"[48].

43 The Bill was said to have two objectives. First, to make it clear that magistrates were to be appointed and hold office independently of the public service and the second to create a satisfactory basis for the appointment of magistrates by giving them a degree of independence and a security of tenure they did not then enjoy[49]. The Bill was said to contain sufficiently comprehensive provisions to cover all aspects relating to the employment of magistrates, thereby rendering it unnecessary to utilise public service legislation[50].

44 The passage of the Magistrates Act thus was part of a movement at that time throughout Australia whereby magistrates achieved a legal status more compatible with judicial independence; for example, Pt 2 of the *Magistrates' Court Act* 1989 (Vic) provided for security of tenure (ss 11, 12). The *Judicial Officers Act* 1986 (NSW) subjected all "judicial officers", including judges of all courts of the State and magistrates, to the same disciplinary regime and by s 5(4) included the Chief Magistrate as an ex officio member of the Judicial Commission along with the heads of other courts in New South Wales[51].

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48 Northern Territory, Legislative Council, *Parliamentary Debates* (Hansard), 17 November 1976 at 772.

49 Northern Territory, Legislative Council, *Parliamentary Debates* (Hansard), 17 November 1976 at 771.

50 Northern Territory, Legislative Council, *Parliamentary Debates* (Hansard), 17 November 1976 at 772.

51 Further provision respecting the advancement of the status of the magistracy was made in 1992 by amendments to the *Constitution Act* 1902 (NSW), ss 52-54. See also Winterton, *Judicial Remuneration in Australia*, (1995) at 11-12.

The text and structure of the Magistrates Act

45 It is convenient now to turn to the relevant provisions of the Magistrates Act. An important provision is s 19A. This states:

> "A Magistrate has, in the performance of his or her duties as a Magistrate, the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge."

46 Section 4 constitutes "an office of Chief Magistrate" (s 4(1)(a)) and "so many other offices of Deputy Chief Magistrate and Stipendiary Magistrate as the Attorney-General thinks fit" (s 4(1)(b)). The Administrator is empowered by s 4(3) to appoint persons to hold those offices. The Chief Magistrate and each Deputy Chief Magistrate is a stipendiary magistrate (s 4(2)). Provision is made in s 20 for the taking of an oath of office by each person appointed under s 4(3). The oath is to be taken before a judge of the Supreme Court (s 20(2)) in the form of the Schedule to the statute. This provides for the traditional oaths or affirmations of allegiance administered to judicial officers, namely of allegiance and to do right to all manner of people according to law, without fear or favour, affection or ill will.

47 Section 13A empowers the Chief Magistrate to give directions to magistrates including directions as to the places in the Territory where the magistrate is to perform the duties of office (s 13A(1)). However, whilst the magistrate must comply with that direction (s 13A(3)), the Chief Magistrate must not give a direction "for the purpose of affecting the exercise by a Magistrate ... of his or her judicial discretion" (s 13A(2)).

48 A magistrate is not to engage in practice as a legal practitioner (s 11(1)), but the acceptance "of appointment to a judicial office in another Territory" does not affect office under the Magistrates Act (s 11(3)).

49 The professional qualifications for eligibility for appointment are specified in s 5. Section 7 deals with tenure. It states:

> "(1) Subject to this Act, a Magistrate appointed under section 4(3) holds office until he attains the age of 65 years.
>
> (2) A person who has attained the age of 65 years shall not be appointed under section 4(3)."

A magistrate appointed under s 4(3) may resign office by writing, signed and delivered to the Attorney-General (s 8). Section 10 provides in the following manner for removal from office:

> "A Magistrate appointed under section 4(3) shall not be removed from office unless –
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> (a) he or she has failed to comply with a direction given by the Chief Magistrate under section 13A(1)(b); or
>
> (b) the Administrator is satisfied that the Magistrate is –
>
> (i) incapable of carrying out his or her duties;
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> (ii) incompetent to carry out his or her duties; or
>
> (iii) for any other reason unsuited to the performance of his or her duties."

50 The provision of central importance for this appeal is s 6. This states:

> "Unless and until express provision is made in relation thereto, by or under an Act, a Magistrate appointed under section 4(3) –
>
> (a) shall be paid such remuneration and allowances; and
>
> (b) holds office on such terms and conditions,
>
> as the Administrator, from time to time, determines."

Section 6 of the Magistrates Act

51 The opening words of s 6 of the Magistrates Act are apt to include the operation of the Remuneration Act, to which reference has been made. Section 10 of the Remuneration Act empowers the Administrator to request the Tribunal established under s 6 of that Act to inquire into and to report with recommendations on "the remuneration and allowances to be paid to a person or class of persons, and the other entitlements to be granted". The presence of this procedure under the Remuneration Act does not detract from what follows from the balance of s 6 of the Magistrates Act.

52 Section 6 confers upon a magistrate appointed under s 4(3) the right to receive certain remuneration and allowances and attaches terms and conditions to the office held by the magistrate. The content of the right to receive payment is supplied by the determination by the Administrator. The section does not in terms repose in the Administrator the power or authority to make determinations. However, consistently with a line of authority in this Court[52], the provision should be construed as impliedly conferring on the Administrator the statutory authority to make "from time to time" the determinations of which s 6 speaks. That power to make determinations necessarily carries a power of revocation[53]. Further, in oral submissions it was properly accepted by the Territory that this power to make determinations was attended by a duty to exercise it from time to time "as occasion demands". What those occasions may be involves further questions of construction to which we now turn.

53 Section 6 is to be construed by preferring "a construction that promotes the purpose or object underlying the [Magistrates] Act (whether the purpose or object is expressly stated in the Act or not) ... to a construction that does not promote the purpose or object". The text is that of s 62A of the *Interpretation Act* (NT). It is with that precept in mind that the phrase in s 6, "from time to time", is to be determined.

54 The purpose or object of the Magistrates Act included the advancement of the standing of the magistracy in the Territory by supporting what in the Second Reading Speech had been identified as "the principle of judicial independence"[54]. Provisions securing remuneration serve that end and enhance the appearance of impartial decision-making. A construction of s 6 which requires a determination to be made by the Administrator with initial or continued effect at the

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52 *In re Davis* (1947) 75 CLR 409 at 414, 419, 423, 427; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 301-302; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 273; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 157; *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 171-172 [16]; *A Solicitor v Council of Law Society (NSW)* (2004) 78 ALJR 310 at 312 [3]; 204 ALR 8 at 10.

53 *In re Davis* (1947) 75 CLR 409 at 414, 419, 423, 427.

54 Northern Territory, Legislative Council, *Parliamentary Debates* (Hansard), 17 November 1976 at 772.

commencement of an appointment by the Administrator under s 4(3) advances the purpose or object of the legislation. A contrary construction promotes the dependence of the magistracy if, indeed, qualified persons were to be found who would accept an office in these circumstances[55]. The first construction indicated above thus should be accepted. The sequence of events in this case conformed to it. The 1998 Determination was made before and commenced its operation on 9 March 1998, the date on which Mr Bradley's appointment as Chief Magistrate took effect.

55 However, the appointment would, unless Mr Bradley earlier resigned under s 8 of the Magistrates Act, continue for many years, until Mr Bradley attained the age of 65 years (s 7). Yet, the 1998 Determination would have expired long before that event, on 8 March 2000. It is here that the Legal Aid Service contends a fatal deficiency is exposed, an impermissible hiatus.

56 But the phrase "from time to time" is not to be read as permitting the Administrator to fail to exercise the power under s 6 where that failure would produce an hiatus where no determination was in operation. A construction which permitted such a state of affairs would place the officeholder wholly at the favour of the executive government respecting a basic attribute of the judicial independence the legislation was designed to promote. However, as already has been indicated, the 1999 Determinations preceded the end of the initial two year period covered by the 1998 Determination. There was no such hiatus. Upon the proper construction of s 6, none was contemplated or provided for by that section.

57 There is no more effective means of depleting the substance of remuneration to an officeholder than by inattention on the part of the legislative or executive branch of government. Given the different constitutional status of judges appointed under s 72 of the Constitution[56], it is unnecessary for present purposes to consider any consequences that might attach to prolonged legislative inattention to the refixing of the "remuneration" spoken of in s 72(iii). That is not an issue here. To the contrary, where a determination has been made under s 6 of the Magistrates Act for a limited period, as in this case, the Administrator

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55 cf *Buckley v Edwards* [1892] AC 387 at 396-397.

56 The Federal Magistrates Court is created by s 8 of the *Federal Magistrates Act* 1999 (Cth) as a federal court under Ch III of the Constitution.

is required to make a subsequent determination in the manner described above. The purpose or object of the exercise of that power, consistently with that of the statute, cannot be to diminish that which has been provided already; it must be to continue or to enhance that provision.

58 It should be added that the phrases "remuneration and allowances" and "terms and conditions" have a fairly broad meaning. In *Austin v The Commonwealth*[57], the view was expressed in the joint reasons of the majority that the term "remuneration" in s 72(iii) of the Constitution includes non-contributory pension plan entitlements. The other members of the Court accepted as much or treated the term in the same way[58]. No question arises in this case respecting the overall effect on Mr Bradley of the differences between the 1998 Determination and the 1999 Determinations.

59 The position thus is reached that the premise upon which the Legal Aid Service based its argument, namely that Mr Bradley took up his office with no rights secured under s 6 beyond 8 March 2000, is not made good. To the contrary, the obligations which the legislation imposed upon the Administrator conferred rights upon Mr Bradley, cognisable, if need be, by procedures for administrative review under the general jurisdiction conferred upon the Supreme Court of the Territory by the *Supreme Court Act* (NT).

60 It should be added that the construction given to the power conferred upon the Administrator by s 6 of the Magistrates Act is not determined by what was decided in *Day v Hunkin*[59], to which reference was made in submissions. This Court there held that a power of determination of salary of an officeholder under the public service legislation of South Australia, the chairman of the Pastoral Board of that State, was not spent upon its first exercise. However, the subsequent exercises of power, which were upheld, reduced the chairman's salary. The considerations which influenced the construction given that public service legislation are indicative of the very concerns later manifested in the Magistrates Act to remove the magistracy from the public service structure.

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57 (2003) 77 ALJR 491 at 510 [72] per Gaudron, Gummow and Hayne JJ; 195 ALR 321 at 346.

58 (2003) 77 ALJR 491 at 493 [3] per Gleeson CJ, 533 [206] per McHugh J, 542 [249] per Kirby J; 195 ALR 321 at 323, 378, 390.

59 (1938) 61 CLR 65.

Conclusions

61 The Legal Aid Service submitted that, even if the Magistrates Act were to receive the construction which it has been given in these reasons, the third step of its argument would apply and there would have been a legislative failure to provide a minimum characteristic of an independent and impartial tribunal for the adjudication of adversary litigation. That would visit invalidity upon the appointment of Mr Bradley.

62 The suggested failure of the legislation was said to arise from the need to construe s 6 in its context. The legal context was the principle of securing, as Drummond J put it in his dissenting judgment in the Full Court[60], "to the greatest extent consistent with its language, the independence and impartiality of magistrates". The "factual" context was said to include the immediately preceding history of relations between the executive government and judiciary in the Territory. What Black CJ and Hely J had said were the "widely publicised" circumstances of the resignation of Mr Bradley's predecessor as Chief Magistrate over differences concerning the system of mandatory sentencing then in force in the Territory[61], and the apparently special and advantageous but short term conditions of appointment negotiated by the executive government with Mr Bradley.

63 There was a concession that it was inessential that the remuneration payable to the Chief Magistrate be charged upon the "public moneys of the Territory" provided for in Pt V of the Self-Government Act (ss 43-48). Nor did counsel appear to disavow the statement by the Supreme Court of Canada in *Ell v Alberta*[62] that "less stringent conditions are necessary in order to satisfy [the] security of tenure" of inferior courts.

64 The ultimate submission by the Legal Aid Service was that, alike with what was said to be the effect of s 72(iii) of the Constitution, an appointee to the office held by Mr Bradley should be "from the moment of appointment secure in

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60 (2002) 122 FCR 204 at 262.

61 (2002) 122 FCR 204 at 208.

62 [2003] 1 SCR 857 at 874.

the knowledge that throughout the tenure there will be remuneration *and that no action on the part of the Executive is necessary to secure that*" (emphasis added). But, as already indicated, it is sometimes the case that the very absence of action by the legislature or executive that serves over time to deplete the substance of the benefits secured by that remuneration.

65 It is true that, however unlikely that eventuality in practice, an officeholder under the system established by the Magistrates Act may be placed in the position of seeking the aid of the Supreme Court to compel observance of the obligations of the Administrator under s 6. But that circumstance does not render the magistracy of the Territory or the office of the Chief Magistrate inappropriately dependent on the legislature or executive of the Territory in a way incompatible with requirements of independence and impartiality. It does not compromise or jeopardise the integrity of the Territory magistracy or the judicial system[63]. Nor is it apt to lead reasonable and informed members of the public to conclude that the magistracy of the Territory was not free from the influence of the other branches of government in exercising their judicial function[64]. To the contrary, the legislative requirement of continued attention by the executive of the Territory to the preservation of adequate remuneration of the magistrates, including the Chief Magistrate, is apt to defend the interests of judicial independence and impartiality which inform the legislation.

Orders

66 The appeal should be dismissed. The reasons given above for that outcome do not fully take the path of those in the Full Court of the Federal Court. The settlement of the true construction of the provisions of the Magistrates Act is a matter of great importance for the judicial structure of the Territory. In all the circumstances, there should be no order as to the costs of the appeal in this Court. Necessarily, the orders made in the Full Court of the Federal Court will stand.

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63 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 107, 117, 119, 133.

64 cf *Ell v Alberta* [2003] 1 SCR 857 at 874-875.