HIGH COURT OF AUSTRALIA

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

LEIGH WILLIAM DALTON APPELLANT

AND

NSW CRIME COMMISSION & ORS RESPONDENTS

Dalton v NSW Crime Commission
[2006] HCA 17
10 May 2006
S334/2005

ORDER

1. Appeal dismissed.

2. Appellant to pay the costs of the NSW Crime Commission.

On appeal from the Supreme Court of New South Wales

Representation:

J F Bleechmore for the appellant (instructed by Ellinghaus & Lindner)

M G Sexton SC, Solicitor-General for the State of New South Wales with K M Richardson for the first and third respondents (instructed by Crown Solicitor for New South Wales)

D M J Bennett QC, Solicitor-General of the Commonwealth with M J Leeming for the second respondent (instructed by Australian Government Solicitor)

C J Kourakis QC, Solicitor-General for the State of South Australia with J-A Lake intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office (SA))

M Sloss SC with C J Horan intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Dalton v NSW Crime Commission

Constitutional law (Cth) − Power with respect to service and execution throughout the Commonwealth of civil and criminal process − Summons served under State law upon person in another State to attend State commission of inquiry with investigative functions − Summons a "subpoena" for the purpose of the *Service and Execution of Process Act* 1992 (Cth) − "Civil and criminal process" − Whether "civil and criminal process" includes process relating to purely investigative functions of tribunals which are not in aid of an adjudicative function − Whether s 76 of the *Service and Execution of Process Act* 1992 (Cth) a valid exercise of Commonwealth legislative power.

Constitutional law (Cth) – Power with respect to service and execution throughout the Commonwealth of civil and criminal process – Parties did not contend that such power is confined to process of the courts of the States – Whether the High Court can nevertheless consider whether such power is so confined – Paramountcy of the Constitution.

Constitutional law (Cth) – Power with respect to service and execution throughout the Commonwealth of civil and criminal process – Whether such power is confined to process of the courts of the States – Whether increased potential for infringement of liberty associated with extending such power to process of State non-court bodies is a consideration supportive of narrower construction of such power – Proliferation of State non-court bodies that issue process – Relevance to constitutional meaning of changing features of modern government.

Words and phrases − "civil and criminal process".

Constitution, s 51(xxiv).
Service and Execution of Process Act 1992 (Cth), Pt 4, ss 47-80.
New South Wales Crime Commission Act 1985 (NSW), ss 18, 18AA, 35.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. This appeal from the New South Wales Court of Appeal[1] turns upon the validity of s 76 of the *Service and Execution of Process Act* 1992 (Cth) ("the SEP Act"). This statute replaced the *Service and Execution of Process Act* 1901 (Cth) ("the 1901 Act")[2].

The SEP Act

2 Section 76 of the SEP Act empowers the Supreme Courts of the States and Territories[3] to grant leave to serve certain subpoenas outside the relevant State or Territory. The challenged provision appears in Pt 4 (ss 47-80). Part 4 is headed "Service of process of tribunals" and has four Divisions. Division 4 (ss 75-80) is headed "Service of subpoenas in the performance of investigative functions". Division 3 (ss 56-74) is headed "Service of subpoenas in the performance of adjudicative functions". Reference will be made later in these reasons to Div 3, but this appeal is centred upon Div 4.

3 The term "subpoena" is relevantly defined in s 47 as meaning in Pt 4:

> "a process that requires a person to do one or both of the following:
>
> (a) to give oral evidence before a *tribunal*;
>
> (b) to produce a document or thing to a tribunal;
>
> but does not include a process that requires a person to produce a document in connection with discovery and inspection of documents." (emphasis added)

---

1 *Dalton v New South Wales Crime Commission* (2004) 62 NSWLR 77.

2 The 1901 Act was repealed by s 3 of the *Service and Execution of Process (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth).

3 Section 5 of the SEP Act requires, with certain qualifications, each Territory to be regarded as a State. No question arises on this appeal with respect to the operation of the power conferred by s 122 of the Constitution to make laws for the government of the territories.

The term "tribunal" is defined in s 3(1) as follows:

> "***tribunal*** means:
>
> (a) a person appointed by the Governor of a State, or by or under a law of a State; or
>
> (b) a body established by or under a law of a State;
>
> and authorised by or under a law of the State to take evidence on oath or affirmation, *but does not include*:
>
> (c) *a court*; or
>
> (d) a person exercising a power conferred on the person as a judge, magistrate, coroner or officer of a court." (emphasis added)

The term "court", as presently material, is defined in s 3(1) as meaning "a court of a State" and as including "an authority exercising the powers of such a court"; in turn, "authority" is defined as meaning "a judge, magistrate, coroner or officer of a court appointed or holding office under a law of a State".

4 With that context in mind, it is convenient to return to the provisions in Div 4 for the service of subpoenas, including s 76. Subdivision A (ss 75-77) of Div 4 is headed "Service of subpoenas generally". Section 75 states that the subdivision applies to a subpoena that has been issued by a tribunal in connection with the performance of an investigative function by the tribunal and is addressed to a person who is not in prison, or who is in prison but need not attend before the tribunal for the purpose of complying with the subpoena.

5 The expression "investigative function" as used in s 75 is defined in s 3(1) as meaning "the function of conducting an inquiry other than an inquiry conducted in connection with the performance of an adjudicative function". The expression "adjudicative function" is itself defined in s 3(1) as meaning, in relation to a tribunal:

> "the function of determining the rights or liabilities of a person in a proceeding in which there are 2 or more parties, including the function of making a determination:

(a) altering those rights or liabilities; or

(b) relating to any matters of a kind mentioned in section 48".

Section 76, the critical provision for this appeal, reads:

"(1) The Supreme Court of a State in which a subpoena is issued may, on application, give leave to serve the subpoena outside the State.

(2) The court may give leave only if it is satisfied that:

(a) the evidence likely to be given by the person to whom the subpoena is addressed, or a document or thing specified in the subpoena, is relevant to the performance by the tribunal of the investigative function concerned; and

(b) if the evidence, document or thing may constitute or contain evidence that relates to matters of state – it is in the public interest that the evidence be given or the document or thing be produced.

(3) In granting an application, the court:

(a) is to impose a condition that the subpoena not be served after a specified day; and

(b) may impose other conditions."

The Commission

6 This litigation arises from the operations of the corporation constituted by s 5 of the *New South Wales Crime Commission Act* 1985 (NSW) ("the State Act") as the "New South Wales Crime Commission" ("the Commission"). The Commission "is to consist of" the Commissioner (appointed by the Governor) and any Assistant Commissioners that are appointed (ss 5(3), 5A, 5B). The Commission is empowered by s 13(1) of the State Act to hold hearings for the purposes of an investigation and by s 16(5) to take evidence on oath or affirmation. The Commission thus answers the definition of "tribunal" in the SEP Act, set out earlier in these reasons.

7 The principal functions of the Commission are set out in s 6 of the State Act. They include investigation of matters relating to certain criminal activity,

the assembling of evidence and the furnishing of reports relating to illegal drug trafficking and organised and other crime. Section 16(1) empowers a member of the Commission to summon a person to appear before it at a hearing to give evidence and to produce such documents or other things (if any) as are referred to in the summons.

8 A person served with a summons to appear as a witness at a hearing before the Commission shall not, without reasonable excuse, fail to attend as required or to attend from day to day unless excused or released from further attendance (s 18(1)). Failure to attend may lead to the issue by the Commissioner of a warrant for the arrest of the witness (s 18AA(1)) and detention until released by order of the Commissioner (s 18AA(5)). The Supreme Court is empowered by s 18AC to review these decisions made under s 18AA(5).

9 The Commission thus is an example, in corporate and permanent form, of the proposition that throughout Australia "general legislation [has] long existed arming commissions of inquiry with the power of compelling testimony". The words are those of Dixon J in *McGuinness v Attorney-General (Vict)*[4]. A striking instance is provided by the colonial legislation in Victoria. After amendment in 1872[5], ss 14 and 15 of *The Statute of Evidence* 1864 (Vic)[6] empowered boards or commissions appointed by the Governor in Council to summon witnesses to attend, be sworn and give evidence, on pain of committing an offence by failing to do so[7].

The course of the litigation

10 By notice under s 25 of the State Act dated 4 November 2003, the Management Committee of the Commission referred to the Commission for investigation circumstances implying and allegations that certain serious drug

---

4 (1940) 63 CLR 73 at 99.

5 By 36 Vict No 443.

6 27 Vict No 197.

7 Provision to similar effect was later made by ss 12 and 13 of the *Evidence Act* 1890 (Vic) and, after federation, in more detailed form by Pt 1, Div 5 (ss 14-21) of the *Evidence Act* 1915 (Vic).

offences and other offences had been committed. The investigation was conducted under the reference code named "Gymea IV".

11 On 12 March 2004, the Commission summoned the appellant pursuant to s 16 of the State Act, requiring him to appear before it on 5 April 2004 to give evidence in relation to the Gymea investigation. The summons was a "subpoena" within the meaning of s 47 of the SEP Act, and also related to the performance by the Commission of an "investigative function" within the meaning of s 75 of the SEP Act, as set out earlier in these reasons. The result was that s 76 (if valid) was then engaged upon application by the Commission to the Supreme Court of New South Wales.

12 On application of the Commission made to the Supreme Court on 17 March 2004, the Court granted leave for service of the subpoena issued on 12 March 2004. Leave was given to serve on the appellant whose address was shown in the order as an address in St Kilda East, Victoria.

13 Service was effected in Melbourne on 22 March 2004 and the appellant made what was described as a conditional appearance at the Commission.

14 Shortly thereafter, the appellant commenced against the Commission a proceeding in the Supreme Court from which the appeal to this Court derives. There was no dispute that the summons issued under s 16 of the State Act was a subpoena within the meaning of the definition in s 47 of the SEP Act which had been issued by "a tribunal in connection with the performance of an investigative function by the tribunal" as required by s 75 of the SEP Act. However, the relief sought by the summons filed on 16 April 2004 included an order setting aside the grant of leave under s 76 of the SEP Act on the ground that s 76 is "unconstitutional". The jurisdiction of the Supreme Court thus engaged was the federal jurisdiction conferred by a combination of s 30(a) and s 39 of the *Judiciary Act* 1903 (Cth), the matter being one arising under or involving interpretation of the Constitution.

15 By order made by a judge of the Supreme Court, proceedings were remitted to the Court of Appeal to determine questions including the validity of s 76 of the SEP Act. The Attorneys-General of the Commonwealth and for New South Wales intervened in support of the validity of s 76. The Court of Appeal (Spigelman CJ and Wood CJ at CL; Mason P dissenting)[8] held that the challenge

---

8 *Dalton v New South Wales Crime Commission* (2004) 62 NSWLR 77.

to the validity of s 76 failed. It is from that dismissal of the appellant's proceeding in the Supreme Court that the appeal to this Court is brought. The Attorneys-General of the Commonwealth and for New South Wales are joined as second and third respondents to the appeal. The Attorneys-General for Victoria and South Australia intervened in support of the validity of the federal law.

The interrelation between the State and federal statutes

16 Before turning to the issues bearing more immediately upon the validity of s 76, something more should be said of the interrelation between the State and federal statutes.

17 Section 35 of the State Act provides a regime for the service of documents for the purposes of that statute. On its face, the service for which s 35 provides is not limited to the taking of steps solely within New South Wales[9]. However,

---

9 Section 35 states:

> "(1) For the purposes of this Act, service of a document on a person may be effected:
>
> (a) on a natural person:
>
> (i) by delivering it to the person personally, or
>
> (ii) by leaving it at, or by sending it by pre-paid post to, the residential or business address of the person last known to the person serving the document, or
>
> (b) on a body corporate – by leaving it at, or by sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate,
>
> or in any other way in which service could have been effected had this section not been enacted.
>
> (2) In addition to the means of service provided for under subsection (1), service of a document on a person (whether a natural person or a body corporate) may be effected by facsimile transmission or other electronic means notified by the person as being an available means of communication.

(Footnote continues on next page)

par (a) of s 8(4) of the SEP Act provides that that statute applies "to the exclusion of a law of a State ... with respect to ... the service or execution in another State of process of the relevant State that is process to which this Act applies". Hence the steps taken in this case relied upon the SEP Act rather than upon any efficacy in s 35 of the State Act to found service upon the appellant in Victoria.

18 If the appellant were to succeed in the challenge to the validity of s 76 of the SEP Act, then a question would arise as to the reach of s 35 of the State Act. The Solicitors-General for New South Wales and the Commonwealth submitted that, upon its proper construction, there was nothing in the State Act to deny the efficacy of service of a summons outside New South Wales and elsewhere in Australia. In particular, the Solicitor-General of the Commonwealth emphasised a point made in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc*[10]. This is that a body such as the Commission does not exercise judicial power, whereas, in accordance with traditional concepts, the assertion of curial jurisdiction in personal actions depends upon service of the initiating process in the jurisdiction[11].

19 The relief which the appellant seeks in this Court includes declarations that the notice issued by the Commission on 12 March 2004 "was not validly served" and that the appellant is not required to appear at the Commission in answer to it. No declaration could be made in terms of that width without entering upon the issue respecting s 35 of the State Act which has been noted above[12].

20 However, the primary declaratory relief sought by the appellant concerns the invalidity of s 76 of the SEP Act. The appellant fails to demonstrate that invalidity. Accordingly service was effective in accordance with the federal law

---

(3) Service of a facsimile copy of a document in accordance with subsection (1) is taken to be service of the document for the purposes of that subsection."

10 (2003) 214 CLR 397 at 420-421 [59]-[61].

11 *Laurie v Carroll* (1958) 98 CLR 310; *Gosper v Sawyer* (1985) 160 CLR 548.

12 Questions might also arise respecting the existence of a sufficient geographical nexus for the commission of offences under the State Act and the operation in that regard of the *Crimes Act* 1900 (NSW), s 10C.

and no occasion further to consider s 35 of the State law is presented by this appeal.

The provenance of s 51(xxiv) of the Constitution

21 It is convenient to return to the question whether s 76 of the SEP Act is a law supported by par (xxiv) of s 51 of the Constitution. That paragraph reads:

> "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States".

22 As was pointed out by Quick and Garran[13], no provision corresponding to par (xxiv) is to be found in the Constitutions of the United States or of Canada. However, the provision did have a provenance in Australia and to this some attention first should be given.

23 Of s 51(xxiv), it was said by the whole Court in *Aston v Irvine*[14]:

> "The nature of this power, as well as the prior history of the subject to which it relates, provides strong ground for interpreting it as enabling the federal legislature to regulate the manner in which officers of the law in one State should act with reference to the execution of the process of another State. It is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each State in every other State. It is given to the central legislature because before federation it had been found that territorial limitations upon colonial power made the effective reciprocal action of the colonies in this field difficult, to the point of impossibility[15]. It is a power to be exercised in aid of the functions of the States and does not relate to what otherwise is a function of the Commonwealth. No doubt the words 'throughout the Commonwealth' include the Territories, at all events those

---

13 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 614.

14 (1955) 92 CLR 353 at 364.

15 See, for example, *Ray v M'Mackin* (1875) 1 VLR (L) 274, and other cases cited in Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 614-619.

within Australia, but that involves no material qualification of the statement."

24 Later, in *Ammann v Wegener*[16], Mason J remarked:

> "The difficulties which had existed in the Australian colonies in the nineteenth century affecting the service or execution in a colony of process issued in another colony lent some force to the notion that the law of a State may not have made adequate provision for the issue of a warrant in circumstances where a subpoena or summons issued in that State was served in another State and was not complied with. It was an established rule of construction that the process of a court did not run beyond its territorial jurisdiction[17]. And the courts of one colony might declare that a statute of another colony providing for an extra-territorial operation of its process was ultra vires on the ground that it exceeded the power to legislate for the good government of the colony[18]."

25 Section 15 of *The Federal Council of Australasia Act* 1885 (Imp) ("the Federal Council Act")[19] had given to the Council some legislative authority to deal with the difficulties caused by territorial limitations upon the powers of the colonial legislatures. Paragraphs (d), (e) and (f) of s 15 of the Federal Council Act stated:

> "(d) the service of civil process of the courts of any colony within Her Majesty's possessions in Australasia out of the jurisdiction of the colony in which it is issued:
>
> (e) the enforcement of judgments of courts of law of any colony beyond the limits of the colony:

---

16 (1972) 129 CLR 415 at 443.

17 *City Finance Co Ltd v Matthew Harvey & Co Ltd* (1915) 21 CLR 55.

18 See *Ray v M'Mackin* (1875) 1 VLR (L) 274 and the judgments in *R v Call; Ex parte Murphy* (1881) 7 VLR (L) 113 [cf *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Australia Act* 1986 (Cth), s 2(1)].

19 48 and 49 Vict, c 60.

(f) the enforcement of criminal process beyond the limits of the colony in which it is issued, and the extradition of offenders (including deserters of wives and children, and deserters from the Imperial or Colonial naval or military forces".

These powers were exercised and three statutes were in force at the commencement of the 1901 Act. Section 2 of the 1901 Act repealed *The Australasian Civil Process Act* 1886, *The Australasian Judgments Act* 1886 and *The Australasian Testamentary Process Act* 1897 ("the 1897 Act"). The first of these laws made provision for the service outside the colony of writs of summons issued out of the Supreme Court. The second provided for the enforcement of judgments recovered in a Supreme Court whereby any sum of money was made payable or the doing of or the forebearing to do any act was required or enjoined (s 2). The 1897 Act made provision for the enforcement by the Supreme Court of the first colony of orders made by the Supreme Court of the second colony for the production of testamentary instruments believed to be in the first colony and required to obtain probate or registration in the second colony.

"The civil and criminal process"

26 As will be apparent, pars (d) and (f) of s 15 of the Federal Council Act dealt separately with civil and criminal process. These two provisions were combined into the single par (xxiv) of s 51 of the Constitution. The reference therein to "process" in itself might have been understood as referring only to civil process; hence the phrase "civil and criminal" made it clear that the paragraph applied to all process. In that vein, Quick and Garran noted[20]:

> "Process includes the doing of something in a criminal court or proceeding, as well as in a civil court or proceeding. A summons from a judicial officer to appear and answer a criminal charge is a process. A warrant issued by a judicial officer, directing the arrest of a person on a criminal charge, is a process."

27 Counsel for the Commonwealth Attorney-General supported the submissions by the New South Wales Attorney-General that the phrase "the civil and criminal process" is apt to refer to all species of "process" and that the words "civil and criminal" are not terms of qualification or limitation to the scope of

---

20 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 617.

s 51(xxiv). In particular, the Commonwealth emphasised that something less than a bright line divides the terms "civil" and "criminal". The point is illustrated by recent decisions of this Court dealing with exemplary damages in tort[21], contempt of court[22] and customs prosecutions[23].

28 It should be accepted that the words "civil and criminal" are used in s 51(xxiv) not as words of limitation but to embrace within the head of legislative power all that might properly answer the description "process". But what does that term embrace and, more importantly, is s 76 of the SEP Act a law with respect to the service of the process of the State of New South Wales?

The ordinary meaning of "process"

29 Schroeder JA said of the ordinary meaning of the term "process"[24]:

> "The word 'process' viewed as a legal term is a word of comprehensive signification. In its broadest sense it is equivalent to 'proceedings' or 'procedure' and may be said to embrace all the steps and proceedings in a case from its commencement to its conclusion. 'Process' may signify the means whereby a Court compels a compliance with its demands. Every writ is, of course, a process, and in its narrowest sense the term 'process' is limited to writs or writings issued from or out of a Court under the seal of the Court and returnable to the Court."

But the term "process" was said by Schroeder JA "to extend to a formal writing issued under authority of law by an official having the authority to issue it as a means of enforcing a judgment of the Court"[25]. On the other hand, the exercise by a landlord of a common law power of distraint would not ordinarily be

---

21 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7-8 [16].

22 *Witham v Holloway* (1995) 183 CLR 525 at 534.

23 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 172-173 [29], 195 [107].

24 *Re Selkirk* [1961] OR 391 at 397.

25 *Re Selkirk* [1961] OR 391 at 397.

"process"[26]. It will be convenient to return to the term "process" after reference to the course of decision respecting s 51(xxiv).

Ammann v Wegener[27]

30 One question of the construction of s 51(xxiv) of the Constitution which arose in this Court was whether the phrase "of the courts of the States" qualified both expressions "the judgments" and "the civil and criminal process", or merely the former. In *Ammann*, it was held that the words "of the courts" do not form part of the description of the subject-matter in the paragraph so far as it concerns the civil and criminal process; the term "process" is not governed by the words "of the courts", and it is sufficient that the process in question be that of a State.

31 The occasion for the construction placed upon par (xxiv) was, as Gibbs J emphasised in *Ammann*[28], provided by the proposition that a magistrate conducting a preliminary examination for the purpose of deciding whether a person charged on an indictable offence should be committed for trial performs a ministerial, not a judicial, function. However, later authority shows that this proposition should not be taken too far. In *R v Murphy*[29], it was said in the joint judgment of six members of the Court:

> "The hearing of committal proceedings in respect of indictable offences by an inferior court is a function which is sui generis. Traditionally committal proceedings have been regarded as non-judicial on the ground that they do not result in a binding determination of rights. At the same time they have a distinctive judicial character because they are curial proceedings in which the magistrate or justices constituting the court is or are bound to act judicially and because they affect the interests of the person charged[30]."

---

26 *Ex parte Birmingham and Staffordshire Gas Light Company* (1871) LR 11 Eq 615 at 618.

27 (1972) 129 CLR 415.

28 (1972) 129 CLR 415 at 435.

29 (1985) 158 CLR 596 at 616.

30 *Sankey v Whitlam* (1978) 142 CLR 1 at 83-84.

It was this reasoning upon which the Court relied in *Murphy* for the conclusion that the federal law investing authority in the courts and magistrates of the States to commit for trial persons charged with offences against Commonwealth law was a law for investing a State court with jurisdiction in a "matter" arising under a law of the Commonwealth within the meaning of s 77(iii) of the Constitution. The entire "matter" comprised the commital proceedings and a subsequent trial[31].

32 The reasoning in *Murphy* to a degree was foreshadowed in several of the judgments in *Ammann*. Gibbs J said that[32]:

> "[a] summons issued by a justice for the purpose of securing the attendance of a witness at a committal proceeding is not only 'process' within the ordinary meaning of that expression, but is part of the criminal process of a State within par (xxiv), whether or not it can properly be described as the process of a court."

Mason J observed[33]:

> "[I]n my view the summons is process of a court if it is issued by or out of a court and it commands the witness to appear and give evidence in proceedings in that court. In each case the witness summons was issued by a magistrate under s 12 and s 23 of the *Justices Act* [1921 (SA)] and required the witness to give evidence in the matter of an information laid in a court of summary jurisdiction. It was, accordingly, a process of that court."

33 However, in *Ammann*, Gibbs J said[34]:

> "It might be thought that the words 'courts of the States' in s 51(xxiv) include all bodies which are courts according to the law of the States, whether or not those bodies exercise judicial power. However, it is not in my opinion necessary to decide whether a magistrate in South Australia

---

31 *R v Murphy* (1985) 158 CLR 596 at 617-618.

32 (1972) 129 CLR 415 at 438.

33 (1972) 129 CLR 415 at 442.

34 (1972) 129 CLR 415 at 436.

> when holding a preliminary examination for the purpose of deciding whether a person charged with an indictable offence should be committed for trial, or issuing a summons or warrant for the purpose of procuring the attendance of a witness at such a preliminary examination, can be described as one of 'the courts of the States' within s 51(xxiv) of the Constitution. It is therefore unnecessary to consider whether the words 'the courts of the States' in that paragraph refer only to tribunals exercising judicial powers, or whether the provisions of Pt V of the *Justices Act* show that a magistrate holding such preliminary examination or issuing such a summons or warrant is not a court according to the law of South Australia."

This was unnecessary because[35]:

> "s 51(xxiv) enables laws to be made with respect to the service and execution of (1) the civil and criminal process of the States, and (2) the judgments of the courts of the States".

Barwick CJ, McTiernan J, Menzies J, Walsh J, Stephen J and Mason J[36] agreed with this construction of s 51(xxiv).

34 The upshot of *Ammann* is what Wells J later called the "medial conclusion", that there may be "civil and criminal process" which is "of the States", although not "of the courts"[37]. In so far as the ordinary meaning of the term "process", discussed earlier in these reasons, is linked with litigation conducted in the courts, the Constitution speaks more broadly. It is with this consequence of *Ammann* that the appellant sought to cope in his submissions.

The appellant's submissions

35 The appellant does not challenge the holding in *Ammann* respecting the construction of s 51(xxiv). He does not assert that the process spoken of must be that of a court of a State; it is enough that the process is that of a State.

---

35 (1972) 129 CLR 415 at 436.

36 (1972) 129 CLR 415 at 422, 427, 429, 430, 439, 441 respectively.

37 *Alliance Petroleum Australia NL v The Australian Gas Light Company* (1983) 34 SASR 215 at 247.

Accordingly, there is no question presented as to the meaning of the phrase "the courts of the States" in s 51(xxiv), and whether these courts have the same characteristics as "the courts ... of every State" and "any court of a State" spoken of in covering cl 5 and s 77(iii) of the Constitution.

36 The appellant conceded that the summons issued by the Commission, if it qualified as civil or criminal process in the constitutional sense, was process of the State of New South Wales. The Commission was accepted as encompassed by the term "the State" within the meaning of s 51(xxiv)[38].

37 However, the appellant submitted, as he had in the New South Wales Court of Appeal, that the summons did not answer the description "the civil and criminal process". The constitutional expression was said to refer only to the process of bodies which determine disputes between persons, and the determination of the rights and liabilities thereof, or the enforcement of the criminal law by prosecution and trial; the circumstance that the laying of criminal charges is usually, albeit not always, preceded by an investigation does not render the investigative process of a body such as the Commission part of the criminal process.

38 The appellant challenged what he described as the core of the reasoning of the majority in the Court of Appeal, the conclusion by Spigelman CJ[39]:

> "The words 'criminal process' are capable, in their natural and ordinary meaning, of extending to encompass compulsory powers to force attendance to give evidence in a criminal investigation by such a statutory authority. The context which suggests that the words should be read down is the reference to 'service and execution'. However, the force of that context in narrowing the interpretation is considerably attenuated by the fact, established by *Ammann*, that the words 'of the courts' do not qualify the words 'civil or criminal process'. These words are at large, albeit in

---

38 cf, with respect to the meaning of "a State" in s 75(iv) and s 114 of the Constitution, *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 32-33, 38-40; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 229-233; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 66-68 [11]-[16], 79-80 [56]-[57], 102-103 [127]-[130].

39 (2004) 62 NSWLR 77 at 80.

the immediate context of 'service and execution'. No authority has been cited to the Court which would suggest that these words, in such a context, should be confined to the determination of legal disputes or the enforcement of laws."

39 It will be apparent from the foregoing that in this Court, as in the Court of Appeal, the appellant approached the question of the validity of s 76 of the SEP Act as depending upon its characterisation as a law with respect to the service of the criminal process of the State of New South Wales. This assumed a dichotomy between "civil" and "criminal" process which required the assignment of any operation of s 76 to one category or the other before turning to assess the validity of s 76. That approach illustrates the error identified earlier in these reasons in treating the words "civil" and "criminal" as they appear in s 51(xxiv) as words of limitation or qualification, rather than of universal description.

40 The correct approach is that urged by the respondents and interveners; this asks whether the conferral by s 76 of power to give leave to serve a subpoena outside the State is a law with respect to the service of the "process" of that State, in the constitutional sense of that term.

Investigative and adjudicative functions

41 The submissions for the appellant assumed a clear and decisive distinction, carried into s 51(xxiv), between investigative and adjudicative functions. The process with which s 76 is concerned, a subpoena answering the requirement in s 75 that it be issued by a tribunal in connection with the performance of an investigative function, cannot, the submissions continued, attract the support of par (xxiv) of s 51 of the Constitution.

42 Part 4 of the SEP Act (ss 47-80) is so drawn as to distinguish between the exercise by tribunals of adjudicative functions and investigative functions. In particular, Div 3 (ss 56-74) provides for the service of subpoenas in the performance of adjudicative functions. That term is so defined (in s 3(1), set out earlier in these reasons) as to require the determination (which may be attended by the alteration) of the rights or liabilities of a person in a proceeding where there are two or more parties. The appellant does not dispute that, at the State level, where the exercise of the judicial power of the Commonwealth is not involved, such functions may be given to a tribunal. It was accepted in *Alliance*

Petroleum Australia NL v The Australian Gas Light Company[40] that arbitration for the resolution of legal disputes between parties is an example. It would follow that s 57 of the SEP Act, which provides for the grant of leave by a court of a State to serve a subpoena in aid of an adjudicative function, is supported by s 51(xxiv) of the Constitution.

43 However, the appellant submits that s 76, because it relates to the investigative functions of tribunals, stands decisively apart from s 57 of the same statute. The proposition appears to accept that, whilst the process of courts is linked to the exercise of adjudicative functions and is plainly the subject for a law under s 51(xxiv) of the Constitution, so that there is an analogical extension in favour of the exercise of adjudicative functions by tribunals, the exercise by courts of investigative functions does not occasion or support the issue and service of process within the scope of s 51(xxiv). There is then no foundation for an analogical extension in respect of the investigative functions of tribunals.

44 The appellant in this regard relied heavily upon a passage in the judgment of Barwick CJ in *Ammann* as authority that the phrase "the civil and criminal process" in s 51(xxiv) is confined to the determination of legal disputes or the enforcement of laws. Barwick CJ said[41]:

> "No more is involved, in my opinion, in the notion of the civil and criminal process to which par (xxiv) refers than a document which may be served or an order which may be executed in relation to proceedings for the establishment of legal rights or the enforcement of the criminal law."

However, what is there said must be read in context. The Chief Justice was responding to an argument that the process spoken of in s 51(xxiv) is limited to that issued by a court or which initiates a legal proceeding. When read with that in mind, the passage in question does not give the present appellant the support he seeks to draw from it.

45 The proposition denying the investigative functions of courts should not be accepted. From a time well before federation, the courts of the Australian colonies, like those in England and elsewhere in the Empire, exercised a range of

---

40 (1983) 34 SASR 215.

41 (1972) 129 CLR 415 at 423.

administrative and investigative functions[42]. Provisions for the examination of judgment debtors, bankrupts, and officers of failed corporations are in point. In *Cheney v Spooner*[43], this Court upheld the application of the 1901 Act to an order by the Supreme Court of New South Wales under ss 123 and 124 of the *Companies Act* 1899 (NSW) which gave leave to the liquidator of a company in voluntary liquidation to summons a number of persons to attend for examination by the Master in Equity. The equity jurisdiction of the Supreme Courts with respect to bills of discovery[44] (or preliminary discovery in more recent parlance[45]) provides another instance of an investigative procedure. So also the courts of marine inquiry established in the Australian colonies[46]. Likewise the next of kin inquiry in an administration suit, conducted in New South Wales by the Master in Equity[47]. Further, the 1901 Act, as King CJ pointed out in *Alliance Petroleum*[48], applied to subpoenas and summonses issued by Coroners.

46 There is insufficient substance in the appellant's submission for its acceptance as limiting the scope of s 51(xxiv) of the Constitution.

The validity of s 76

47 But what positive criteria apply to support the validity of s 76 of the SEP Act? In answering that question, it is not the occasion to attempt a definitive exposition of the reach of the constitutional head of power. Observations by

---

42 See generally the discussion by Dixon CJ and McTiernan J in *R v Davison* (1954) 90 CLR 353 at 368.

43 (1929) 41 CLR 532.

44 See *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200 at 203-206; affd (1999) 96 FCR 1 at 9-10.

45 See *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 10-12.

46 See *Merchant Shipping Act* 1894 (Imp), s 478; *Marine Act* 1890 (Vic), s 183; *Navigation (Amendment) Act* 1899 (NSW), s 10; *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411.

47 Mason and Weston, *Precedents in Equity*, (1915) at 198-199.

48 (1983) 34 SASR 215 at 236.

Gummow, Hayne and Heydon JJ in *Singh v Commonwealth*[49] are in point. Their Honours said[50]:

> "The questions about the construction of the *Constitution*, which fall for decision in this Court, require particular answers to particular questions arising in a live controversy between parties. The task of the Court is not to describe the metes and bounds of any particular constitutional provision; it is to quell a particular controversy by deciding whether, in the circumstances presented in the matter, the relevant constitutional provisions do or do not have the consequence for which a party contends."

48 Three further points should be emphasised here. The first is that s 51(xxiv) is in that class of constitutional provisions, identified with examples by Gleeson CJ in *Singh v Commonwealth*[51], which contains terms which are naturally understood and applied with reference to their legal meaning. The second is that what the courts regard as their process is not fixed but develops over time[52]. Examples are the development of the asset preservation order[53] and the anti-suit injunction[54]. The third has been made earlier in these reasons. It is that the construction of s 51(xxiv) given in *Ammann* qualifies any ordinary meaning of "process" which links it to the conduct of litigation in the courts.

49 However, whatever may be the metes and bounds of s 51(xxiv) after *Ammann*, the present appeal may be resolved on fairly narrow grounds. Is the "subpoena" defined in s 47 of the SEP Act sufficiently analogous, in the circumstances of this case, to the process in aid of the investigative functions exercised by the courts at the time of federation and, if need be, as since developed by the courts?

---

49 (2004) 78 ALJR 1383; 209 ALR 355.

50 (2004) 78 ALJR 1383 at 1417 [152]; 209 ALR 355 at 402.

51 (2004) 78 ALJR 1383 at 1386 [10]; 209 ALR 355 at 359.

52 cf with respect to bankruptcy and insolvency the remarks of Gibbs CJ in *Storey v Lane* (1981) 147 CLR 549 at 558.

53 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

54 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

50 The definition in s 47 of the SEP Act specifies a process which "requires" the giving of oral evidence or the production of a document or thing. The term "require" indicates not a duty of imperfect obligation, but a sanction imposed by law. The analogy with a writ of subpoena will readily be apparent. The processes of the Court of Chancery as they developed up to the introduction of the Judicature system provided for the procuring of the attendance of witnesses to give evidence before an examiner by the issue and service of a writ of subpoena with sanctions for default culminating in an order for committal to prison under warrant of the Lord Chancellor[55].

51 The subpoena the subject of the order under s 76 in this case had the incidents under the State Act described earlier in these reasons. These included the arrest and detention of the recalcitrant witness with provision for review by the Supreme Court under s 18AC of the State Act.

52 The tribunal required by the definition of "subpoena" in s 47 of the SEP Act must be established by or under State law and be authorised to take evidence on oath or affirmation (s 3(1)). The Commission answers that description. The subpoena must be issued in connection with the performance of an "investigative function", which is the case here. Finally, s 76 conditions the service out of State upon leave by the Supreme Court of the State of issue.

53 All of these matters, taken together, show that the scheme of Pt 4, Div 4 of the SEP Act, in which s 76 is found, provides for the service of what may fairly be described as process of the States, by analogy to court process as understood even at federation, and certainly as circumstances have developed since. It may be that some legislative scheme falling short of that in Pt 4, Div 4 would also be supported by s 51(xxiv). But upon that question the Court should not now enter.

---

55 Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 799-805. The procedures of the common law courts had developed in a similar fashion: *Lush's Practice of the Superior Courts of Law at Westminster*, 3rd ed (1865), vol 1 at 524-534.

Orders

54 The appeal should be dismissed. The appellant should pay the costs of the Commission but not the costs of the Attorneys-General, whether as parties or interveners in this Court.

55 KIRBY J. Pursuant to the *Service and Execution of Process Act* 1992 (Cth) ("the SEP Act")[56], Mr Leigh Dalton ("the appellant") was served in the State of Victoria with a summons issued by the New South Wales Crime Commission ("the Commission"). The summons was issued under the *New South Wales Crime Commission Act* 1985 (NSW) ("the State Act"). It purported to require the appellant to appear as a witness at a hearing in New South Wales before the Commission. Pursuant to the State Act, a failure on the part of a person served to appear, and to attend until excused or released, would, in the absence of reasonable excuse, authorise the issue by the Commission of an arrest warrant[57] and the detention of the person served until released by order of the Commission[58].

56 The appellant challenged the power of the Commission, whether under the State Act or pursuant to the federal SEP Act, to oblige him to appear before it for the purpose of giving evidence or producing the documents or other things referred to in the summons[59]. Principally, the appellant contended that the State Act could not of its own force impose such obligations, he being in Victoria. So far as the federal SEP Act purported to so require, the appellant submitted that it was beyond the law-making powers of the Federal Parliament.

57 The constitutional challenge failed in the New South Wales Court of Appeal[60]. However, that Court divided. The validity of the SEP Act to render the Commission's summons effective in Victoria was upheld by Spigelman CJ (with whom Wood CJ at CL agreed). But Mason P dissented. He was of the view that the appellant was entitled to a declaration that the Commission's summons was not validly served on him because of a want of constitutional authority for the provisions of the SEP Act on which the Commission relied[61].

58 Doubtless because of the majority disposition and the course of the proceedings, the Court of Appeal did not proceed to consider whether the State Act, of its own force (or as applied by federal law in a court exercising federal

---

56 Section 76.

57 State Act, s 18AA(1).

58 State Act, s 18AA(5).

59 State Act, s 16(1).

60 *Dalton v New South Wales Crime Commission* (2004) 62 NSWLR 77.

61 The Commission relied on ss 76 and 77, read with the definition of "tribunal" and "investigative function" in s 3 and "subpoena" in s 47.

jurisdiction[62]), was sufficient without the SEP Act to compel the appellant to comply with the summons and to proceed to New South Wales to appear before the Commission.

59 By special leave, the appellant appeals to this Court against the judgment of the Court of Appeal. The appeal fails. The challenge to the constitutional validity of the federal SEP Act should be rejected. There is no need to consider questions as to the operation of the State Act, according to its own terms. The judgment of the Court of Appeal, reliant on the federal SEP Act, should be affirmed. The appellant must comply with the Commission's summons.

The facts, legislation and constitutional provisions

60 *The facts*: The facts were not in dispute. So far as they are relevant to this appeal, they are stated in the reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons")[63]. The appellant submits that the requirement, imposed on him by the terms of the Commission's summons (and the penalties for disobedience) constitute an infringement of his liberty. He seeks relief from them. Unless compelled by law, he is unwilling to submit to the investigatory processes of the Commission. It is a body created within the executive government of the State of New South Wales with large coercive powers from which he prefers to be free. Unless the summons served on him[64] is valid, that is his right.

61 *The legislation*: The relevant provisions of the SEP Act[65], the State Act[66] and earlier laws for the interjurisdictional service of process within Australia[67], are also set out in the joint reasons. Mention is made there of the somewhat narrower language of the *Service and Execution of Process Act* 1901 (Cth) ("the

---

62 Under the *Judiciary Act* 1903 (Cth), ss 30(a), 39.

63 Joint reasons at [10]-[15].

64 Pursuant to leave granted under the SEP Act by G R James J in the Supreme Court of New South Wales, *ex parte* on 17 March 2004.

65 Joint reasons at [2]-[5].

66 Joint reasons at [6]-[8], [17] and n 9.

67 Especially the *Australasian Civil Process Act* 1886; the *Australasian Judgments Act* 1886 and the *Australasian Testamentary Process Act* 1897, all made under the *Federal Council of Australasia Act* 1885 (Imp). See joint reasons at [25]. See also *Flaherty v Girgis* (1987) 162 CLR 574 at 582.

1901 Act"). It contained the provisions in force when questions of constitutional validity arose in earlier decisions of this Court[68].

62 The provisions of the State Act are coercive. The principal stated objects of that Act are "to reduce the incidence of illegal drug trafficking" and "to reduce the incidence of organised and other crime"[69]. Proved involvement in either of those activities would potentially expose a person to criminal liability attracting, upon conviction, substantial punishment. Even if no offence inculpating the appellant himself were alleged, or established, participation in assembling evidence for use "in the prosecution of a person for a relevant offence arising out of any such matters"[70], the review of an earlier police inquiry into matters relating to such criminal activity[71] and other functions of the Commission could potentially involve him in risks and dangers. Perhaps because of this, and unlike the courts, by the State Act a hearing before the Commission is to be "held in private"[72].

63 Although a person giving evidence before the Commission "may be represented by a legal practitioner"[73], the Commission has power to exclude legal representation in some circumstances[74]. The Commission also has large powers to control examination or cross-examination of witnesses[75]. It can suppress the publication of evidence, the contents of documents and other material facts[76]. A witness summoned to attend, or appearing before, the Commission at a hearing is not generally[77] excused from answering any question, or producing any document or thing, on the ground that the answer or production might

---

68 The terms of s 16 of the 1901 Act are set out in the reasons of Mason P: *Dalton* (2004) 62 NSWLR 77 at 84 [31].

69 State Act, s 3A.

70 State Act, s 6(1)(b).

71 State Act, s 6(1)(b1).

72 State Act, s 13(5).

73 State Act, s 13(4).

74 State Act, s 13B.

75 State Act, s 13(8).

76 State Act, s 13(9).

77 Cf State Act, s 18A.

incriminate or tend to incriminate the witness, "or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground"[78]. The answer made, or document or thing produced, by a witness at a hearing before the Commission is not ordinarily admissible in evidence against the person in any civil or criminal proceeding or in disciplinary proceedings[79].

64 Clearly, therefore, the procedures of the Commission amount to a departure from the principles of accusatory justice that ordinarily govern the conduct of criminal proceedings in this country. The "right to silence" and to put the prosecution to proof of serious criminal accusations that may be made against a person summoned (or the family or associates of that person) are severely modified by the State Act. That this is done in respect of matters within the legislative competence of the New South Wales Parliament is one thing. However, the appellant objects to the attempt to oblige him to leave Victoria and to proceed to New South Wales. He says that this has not been validly done by the State Act and, so far as the SEP Act purports to impose a federal legal obligation on him to do so, it exceeds the nominated heads of federal constitutional power.

65 I have explained the features of the State Act so that the practical issues in the appeal will be sharpened. This is not simply a case of an administrative tribunal with modest functions or a fact-finding body assisting in policy development. This case involves coercion and potential self-incrimination in the official investigation of serious criminal offences. The appellant asked: if the Commission could be brought within the SEP Act as a "tribunal", could a State, by its laws, empower a police constable or other person or body to gather evidence of any crime against the laws of the State in a similar way and then to impose on persons anywhere in the Commonwealth a requirement to present before that person or body in another State to answer incriminating questions, so long as leave was granted under the SEP Act for that purpose?

66 *The constitutional context*: The key provision of the Constitution invoked by the Commission, with the support of federal and State governmental interveners, to uphold the validity of the impugned provisions of the SEP Act was s 51(xxiv). Subject to the Constitution, that paragraph empowers the Federal Parliament to make laws with respect to:

> "The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States."

---

78 State Act, s 18B(1).

79 State Act, s 18B(2). Although cf s 18B(3).

67 Understandably, this provision is the focus of the joint reasons. However, I agree with Spigelman CJ in the Court of Appeal[80] that it is necessary to read this head of power in the full context of the Constitution keeping in mind the features of the federal polity that the Constitution establishes. Specifically, it is relevant to have regard to two other provisions pertinent to interjurisdictional law and process within the federation.

68 By s 51(xxv), the Federal Parliament has power to make laws with respect to:

> "The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States."

Moreover, s 118 of the Constitution provides:

> "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

69 Also important are the provisions of Ch III of the Constitution establishing the integrated Judicature of the Commonwealth; the interrelationship between the State and federal courts in that Chapter through the appellate jurisdiction of this Court[81]; and the power afforded to the Federal Parliament to make laws investing any court of a State with federal jurisdiction[82]. The separation of the integrated courts from the executive government of the Commonwealth and the States is part of the basic constitutional structure and design[83].

70 Finally, the Commonwealth, in support of the validity of the SEP Act, placed reliance on the incidental powers of lawmaking under the Constitution to supplement the express powers vested in the Parliament[84]. This submission was not elaborated. In the end, the constitutional questions were significantly narrowed by the way in which they were presented.

---

80 (2004) 62 NSWLR 77 at 80 [10].

81 Constitution, s 73(ii).

82 Constitution, s 77(iii).

83 Cf *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

84 Especially Constitution, s 51(xxxix).

The issues

71 *Three issues*: Three constitutional issues are potentially presented by this appeal:

(1) *The confinement to court process issue*: Whether the federal SEP Act is invalid because the only provisions that it may make for service and execution throughout the Commonwealth of "civil and criminal process" is for the "process" of "the courts of the States" and hence not the "process" of a defined non-court "tribunal", such as the Commission.

(2) *The criminal process issue*: Assuming (as authority suggests[85]) that the "civil and criminal process" referred to in s 51(xxiv) of the Constitution is not confined to that of "the courts of the States", but is disjunctive and free-standing, is the "process" envisaged confined to documents executed "in relation to proceedings for the establishment of legal rights or the enforcement of the criminal law"[86]? If it is, the appellant argued that the purpose of the "process" in question, being the investigation of whether there are any relevant legal obligations requiring enforcement of the criminal law, a summons issued by the Commission is not the kind of "process" envisaged by the Constitution and hence, so far as the SEP Act purports to attach coercive requirements to the Commission's summons, it exceeds the nominated source of power. It is invalid. No incidental or other power can breathe life into it.

(3) *The State law issue*: If the foregoing issues are determined against the appellant, does the State Act, by its own terms, (without the need for leave under federal law for interstate service) validly apply to the appellant anywhere within Australia so as to oblige his attendance before the Commission? Is the State Act "picked up" and applied in federal jurisdiction? Or, if the SEP Act is in this regard invalid, is the State Act constitutionally capable, by its own force, of applying beyond the State of New South Wales to a person such as the appellant, having regard to the

---

85 *Aston v Irvine* (1955) 92 CLR 353 at 364; *Ammann v Wegener* (1972) 129 CLR 415 at 429-430, 439, 441.

86 *Ammann* (1972) 129 CLR 415 at 423 per Barwick CJ. This was the view adopted by Mason P in the Court of Appeal: (2004) 62 NSWLR 77 at 86 [42].

principles governing the extra-territorial operation of State laws within the Commonwealth without any need for federal legislative support[87]?

72 *Resolution of the issues*: There are, as I shall show, significant arguments, never satisfactorily resolved by this Court, for confining the power in s 51(xxiv) of the Constitution to "civil and criminal process … of the courts of the States". However, this is not the present doctrine of this Court. In his appeal, the appellant did not challenge the present doctrine[88]. The first issue should therefore be assumed against him. Once this step is taken, the attempt to confine the "criminal process … of the States" to process incidental to the establishment of legal rights and obligations, cannot succeed. Conventional principles governing constitutional interpretation argue against that course. The second issue must therefore also be decided against the appellant. The SEP Act is thus valid in its application to the appellant according to its terms. It follows that it is unnecessary to decide any contentions as to the meaning and validity of the State Act, operating of its own force outside the State of New South Wales[89].

The arguable confinement of the power to court process

73 *Duty to the Constitution*: The duty of a judge of this Court, in deciding a matter brought before it, is to quell the controversy between the parties[90]. But the "quelling" must be done in accordance with law. Where the meaning and application of the Constitution is concerned, from which the judges of this Court derive their authority, there is an individual duty to the document[91]. That duty cannot be overridden or ignored because of the way parties choose to present their case[92]. Nor can past rulings or procedural restrictions[93] impede this Court's

---

87 See, eg, *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

88 [2006] HCATrans 006 at 134, 530.

89 Cf *Flaherty* (1987) 162 CLR 574 at 582.

90 *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1417 [152]; 209 ALR 355 at 402. See joint reasons at [47].

91 See *Shaw v Minister for Immigration & Multicultural Affairs* (2003) 218 CLR 28 at 55-57 [76]-[80] and cases there cited.

92 Cf *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144].

faithful application of the Constitution. These statements do not mean that judges approach constitutional questions as if the law reports contain blank pages. The greatest of respect is paid to the decisions of the past. However, many cases show that fresh consideration of such decisions can sometimes lead to new approaches, including on constitutional questions[94].

74 As I have mentioned, the appellant did not argue that the "civil and criminal process" mentioned in s 51(xxiv) of the Constitution referred only to the "process … of the courts of the States". Indeed, the appellant disclaimed that argument[95]. He did so although, were it to succeed, it would have been fatal to the validity of the SEP Act in its application to the interstate service of a summons issued by a "tribunal" such as the Commission.

75 Whatever arguments might be mustered to the effect that a magistrate conducting a preliminary hearing in an interstate police court is a "State court" for constitutional purposes[96]; that an interstate special magistrate conducting a preliminary examination in connection with a complaint that a defendant had committed an indictable offence is also a "court" for such purposes[97]; and further that an arbitration ordered under the *Arbitration Act* 1891 (SA) has sufficient resemblance to a curial arbitrator to be a "court" for such purposes[98], such arguments could not succeed here. The Commission is not on any arguable basis a "court[] of the State[]". It is an authority of the executive government of the State. Sufficient has been revealed of its functions and powers to show that it does not, and is not intended to, operate as a "court". Certainly, for the purpose for which the summons was issued by the Commission to the appellant, in order to interrogate him, no court-like adjudicative function was contemplated. The purpose of the summons was investigatory. Whilst Australian courts, in

---

93 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316. See also *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 673; *Shaw* (2003) 218 CLR 28 at 56 [77].

94 See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; (1921) 29 CLR 406; cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 and *Shaw* (2003) 218 CLR 28 at 55-56 [76]-[78].

95 [2006] HCATrans 006 at 134.

96 *Aston* (1955) 92 CLR 353 at 363.

97 *Ammann* (1972) 129 CLR 415 at 418.

98 *Alliance Petroleum Australia NL v Australian Gas Light Company* (1983) 34 SASR 215 at 236; cf at 244-245 per Zelling J, noted by Mason P (2004) 62 NSWLR 77 at 91 [73].

particular jurisdictions and in certain cases, sometimes perform investigatory functions, the broad-ranging investigation by the Commission with a view to identifying criminal liability and to commencing separate criminal proceedings is not a function of the "courts of the States" as contemplated by the Constitution.

76 It follows that, even if past authority of this and other courts on the meaning of s 51(xxiv) of the Constitution could be distinguished on the facts or explained with other justifications, the present appeal presents the first of the above issues squarely, assuming that the Court should decide it.

77 *The Court's present authority*: In its report *Service and Execution of Process*[99], the Australian Law Reform Commission addressed the alternative approaches to the meaning of s 51(xxiv) in terms that were repeated by Mason P in the Court of Appeal[100]:

> "It is possible to construe the power in two ways.
>
> - *Narrow view*. This view would read the power as 'the civil and criminal process, and the judgments, of the courts of the States'. On this interpretation the power would be confined to court process alone.
>
> - *Broad view*. This view would read the power as 'the civil and criminal process, and the judgments of the courts, of the States'. On this view Parliament could legislate with respect to process that was not court related."

78 In *Aston*, this Court appeared to prefer the broad meaning. In unanimous reasons, the Court said[101]:

> "The nature of this power, as well as the prior history of the subject to which it relates, provides strong ground for interpreting it as enabling the federal legislature to regulate the manner in which officers of the law in one State should act with reference to the execution of the process of another State. It is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each State in every other State. It is given to the central

---

99 Report No 40, (1987) at 20 [38]. The Commission's report led to the enactment of the SEP Act replacing the 1901 Act.

100 (2004) 62 NSWLR 77 at 83 [28].

101 (1955) 92 CLR 353 at 364 (citations omitted).

> legislature because before federation it had been found that territorial limitations upon colonial power made the effective reciprocal action of the colonies in this field difficult, to the point of impossibility."

Later in the same reasons, this Court pointed out that[102]:

> "A justice of the peace is not a court and in at least one State he has no strictly judicial functions."

On the other hand, the actual constitutional issues decided in *Aston* were not specific to the issue whether "the civil and criminal process" referred to in s 51(xxiv) of the Constitution was confined to that "of the courts of the States". The request in that case, for leave to enforce the proceedings commenced in South Australia, concerned an attempt to have the defendants appear before the Police Court in Adelaide. Such a court (or its equivalent) would almost certainly now be considered one of the "courts of the States" within the meaning of that phrase in s 51(xxiv), giving the words the broad interpretation proper to a constitutional provision. Two other issues argued in *Aston* concerned the supposed impermissibility of entrusting to State officers "part of the executive power of the Commonwealth"[103] or invalidly conferring on State magistrates part of the judicial power of the Commonwealth[104].

79 Whether the remarks in *Aston* could be treated as *obiter dicta* or not, the later decision in *Ammann*[105] contains a number of observations endorsing the broad view of the meaning of s 51(xxiv). Thus, Gibbs J said[106]:

> "[I]n s 51(xxiv), which empowers the Parliament to make laws with respect to 'the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States', the word 'process' is not governed by the words 'of the courts'; those words refer only to 'judgments'. In other words, s 51(xxiv) enables laws to be made with respect to the service and execution of (1) the civil and criminal process of the States, and (2) the judgments of the courts of the States."

---

102 (1955) 92 CLR 353 at 365.

103 (1955) 92 CLR 353 at 364.

104 (1955) 92 CLR 353 at 365.

105 (1972) 129 CLR 415.

106 (1972) 129 CLR 415 at 436.

80 In *Ammann*, Walsh J and Stephen J agreed in the reasons of Gibbs J and with the orders that he proposed. Somewhat similar opinions on the ambit of the power appear in the reasons of Menzies J[107] and of Mason J[108]. Although he dissented in the result, Barwick CJ expressed a like view on the question whether the words "of the courts" in s 51(xxiv) formed part of the description of the subject matter "so far as it concerns the civil and criminal process". In Barwick CJ's view "[t]hose words … form part of the description of the other section of the subject-matter of the paragraph, namely, the judgments of the courts of the States."[109] The result is that the reasoning in *Ammann* resists any reconfiguration of the operation of the closing phrase of s 51(xxiv) of the Constitution. No doubt, this explains why the appellant elected not to argue the opposite and proceeded directly to the second issue on which, he hoped, more promising prospects awaited him.

81 *Contrary arguments*: Despite the present state of authority there are, as it seems to me, significant textual, contextual and other arguments against the Court's doctrine as it now appears to be established.

82 First, the text, standing alone, suggests that the words "of the courts of the States", appearing at the end of the paragraph, govern both "the civil and criminal process" and "the judgments" stated earlier in the paragraph. There is no punctuation in the paragraph (as there is in s 51(xxv) and in s 118 of the Constitution) to indicate clearly that the closing phrase relates only to some words and not to others. The text itself lends support to a suggestion that "the courts of the States" is intended to govern the entirety of the preceding expression, namely "the civil and criminal process and the judgments". Both elements in that expression constitute the universe of the activities that the "courts of the States" are engaged in. *Before* any court determination, there is "civil and criminal process". *After* determination there are "the judgments" of the courts. Put together, therefore, the two expressions capture the totality of the formal activities of "the courts of the States" in respect of which "service and execution throughout the Commonwealth" might be required.

83 Moreover, the repetition in the text of the definite article ("the") before each of "civil and criminal process" and "judgments" suggests that the closing phrase was intended to govern each of the separately identified curial activities. Such a result would not be unusual in a federal Constitution, conceived in the

---

107 (1972) 129 CLR 415 at 429.

108 (1972) 129 CLR 415 at 441.

109 (1972) 129 CLR 415 at 422.

1890s, aimed at curing the dual colonial problems of service and execution of "the civil and criminal process … of the courts" and service and execution of "the judgments of the courts". With respect, as a matter of text and apparent purpose, there is therefore much to be said for a view of the ambit of the power contrary to that preferred in *Ammann*.

84 Secondly, the constitutional context lends support to this conclusion. If it had been intended to sever "the judgments of the courts of the States" from service and execution of "the civil and criminal process" of the States, it might have been expected that punctuation would have marked the severance, as did the comma placed before the closing phrase in s 51(xxv), respecting "judicial proceedings". In an economically stated and carefully drawn text, the differential absence of such punctuation supports a functional interpretation of s 51(xxiv). Unsurprisingly, that function is one concerned with all of the activities of "the courts of the States". They are the bodies, as such, apt to require "service and execution throughout the Commonwealth"[110]. This includes both "process" and "judgments". A similar argument of punctuation and arrangement can be drawn from the terms of s 118 of the Constitution.

85 The provision for the service and execution of "the civil and criminal process", referred to in s 51(xxiv), would also seem more naturally to relate to the process "of the courts of the States". This is because Ch III of the Constitution is at pains to create an integrated Judicature and thus to evidence a federal constitutional concern with the operation throughout the Commonwealth (a borderless society for this purpose) of the State courts' processes and judgments. There is no equivalent provision in the Constitution for the integration of the formal processes of the non-court federal and State executive powers. At least this is so unless the moribund Interstate Commission, envisaged by s 101 of the Constitution, provides the means, but then as a federal body.

86 Whilst, in the way the Commonwealth has developed, the grant of a federal legislative power to make laws for the service and execution of the civil and criminal process of the States outside the courts might be viewed by some as convenient, it does not fit naturally within the basic ideas of the Constitution envisaging integration of the courts as a matter of legitimate federal governmental concern but separation of the "processes" of the executive governments, being the several "sovereignties" together united in the Commonwealth but maintaining their separate governmental identities and functions.

---

110 Coroners ordinarily have no power to determine the legal rights and liabilities of persons but certainly have "courts" and "process": *Bird v Keep* [1918] 2 KB 692 at 698.

87 Thirdly, an historical recollection adds further support for this view. As the joint reasons point out[111], the colonial difficulty that preceded the adoption of the Constitution in terms of s 51(xxiv) produced the Federal Council of Australasia, established under the imperial statute of that name[112]. As appears from s 15 of that statute (cited in the joint reasons) there is no doubt that the mischief identified in that Council, which was also in the minds of those who later drafted and adopted the federal Constitution, concerned, and concerned only, the activities "of the courts", "of courts of law" and of "criminal process" which, at that time, meant only process in and of "the courts". Nothing in the statute establishing the Council or in the three Australasian statutes for service and execution of process made by the Council[113], lends any historical support for a suggestion that the interstate enforcement of the "civil and criminal process" of an executive government was contemplated by the adoption of s 51(xxiv). On the contrary, placed in its historical setting, the language of s 51(xxiv) appears to be a tighter, briefer expression of the powers formerly belonging to the Federal Council. They were powers confined to the process "of the courts".

88 Fourthly, whilst it must be conceded that the exposition of the majority reasons in *Ammann* supports the broad interpretation of s 51(xxiv), on one view the determination of the point was not essential to reach the Court's orders in that case. This is because, for constitutional purposes, the subpoena addressed to the applicants in *Ammann* was arguably part of the "criminal process … of [a] court[] of the State[]" of South Australia, namely of the Adelaide Magistrates' Court before which they were required to appear to give evidence in committal proceedings.

89 Although, for some purposes, committal proceedings have been viewed as administrative, and not judicial, in character, for constitutional purposes it would be difficult, at least today, to describe the Adelaide Magistrates' Court, or its equivalent, in *Ammann* (any more than the Police Court in *Aston*) as other than a "court[] of the State[]" within s 51(xxiv)[114]. At various points in their reasons, both Barwick CJ[115], Gibbs J[116] and Mason J[117] appear to acknowledge that the

---

111 Joint reasons at [25].

112 *Federal Council of Australasia Act* 1885 (Imp), s 15(d), (e) and (f).

113 See above n 67.

114 *R v Murphy* (1985) 158 CLR 596 at 617-618.

115 (1972) 129 CLR 415 at 423.

116 (1972) 129 CLR 415 at 436.

"process" in *Ammann* was that of the "courts of the State[]" issuing the subpoena. Yet if that were so, there was no need in *Ammann* (any more than earlier in *Aston*) to differentiate between "the civil and criminal process … of the States" and the "civil and criminal process … of the courts of the States". The facts of each case applied equally to either interpretation.

90 Fifthly, the risks of enlarging the imposition on the liberty of individuals of obligatory interstate executive government "process", issued by inquisitorial bodies such as the Commission, arguably present greater dangers than the interstate service and execution of the "process and the judgments of the courts". This is because the courts in Australia are guaranteed a minimum degree of constitutional independence, either directly under Ch III of the Constitution, in the case of federal courts, or, in the case of State courts, under the principle upheld in *Kable v Director of Public Prosecutions (NSW)*[118]. Important safeguards for the rights of the individual normally lie in the process of courts.

91 There is no similar constitutional guarantee in the case of the executive governments, their officers and agencies. As the State Act illustrates in the present case, the ambit of the powers of such executive agencies, and the manner of their functioning, may not be as attentive to individual rights as, traditionally, the "courts of the States" have been. Ordinarily, courts perform their functions in public; they are independent of external influence; they allow parties to be legally represented; and usually their dispositions are susceptible to appeal. These are not necessarily features of bodies within the executive government – federal, State or Territory.

92 In recent years, the number and variety of State investigatory bodies have proliferated significantly[119]. Therefore, to contemplate a power in the Federal Parliament to provide for the service and execution of the "process" of so many such State bodies is, to say the least, to envisage a net of power, potentially diminishing freedoms, cast far beyond that previously provided and wholly beyond that envisaged when s 51(xxiv) of the Constitution was adopted[120].

---

117 (1972) 129 CLR 415 at 441.

118 (1996) 189 CLR 51.

119 State crime investigation bodies exist in New South Wales (the State Act; *Independent Commission Against Corruption Act* 1988 (NSW), s 4(1); *Judicial Officers Act* 1986 (NSW), s 5(1)), Queensland (*Crime and Misconduct Act* 2001 (Q), s 5(1)), Victoria (*Major Crime (Investigative Powers) Act* 2004 (Vic)) and Western Australia (*Corruption and Crime Commission Act* 2003 (WA), s 8(1)).

120 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 617. See joint reasons at [26].

93 Royal Commissions and official Commissions of Inquiry existed in the several colonies of Australasia before federation[121]. However, the interjurisdictional enforcement of their "process" was not a cause of concern to explain the "innovative" power to permit interstate service and execution of process in such a case. Doubtless this is why Mason J in *Ammann*[122] expressly reserved the question whether the power afforded by s 51(xxiv) extended to "the process of Royal Commissions and tribunals which are not courts in the strict sense". Such reservation would not strictly have been necessary if the "process" of non-courts was within the ambit of the power. Arguably, if all that was required was that the "process" be that "of the States", it was not necessary for Mason J to express the reservation as he did.

94 *Conclusion: an assumed construction*: Having regard to the foregoing, it will be obvious that I have distinct reservations about the interpretation of s 51(xxiv) of the Constitution that this Court accepted in *Aston* and in *Ammann*. I acknowledge the need to adopt a broad approach to a grant of legislative powers appearing in the Constitution, such as in the paragraphs of ss 51 and 52[123]. Especially so where the purpose of the power is, as here, to provide facilitative procedures; to reduce uncertainties and inconvenience in the operations of the applicable organs of government within the nation; and to respond to the changing features of modern government[124], which certainly now includes the proliferation of court-like tribunals[125] exercising adjudicative functions sometimes akin to those of the courts[126]. However, the language of s 51(xxiv)

---

121 Harrison Moore, "Executive Commissions of Inquiry", (1913) 13 *Columbia Law Review* 500. See also *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 101; *Clough v Leahy* (1904) 2 CLR 139 at 153; McClemens, "The Legal Position and Procedure Before a Royal Commissioner", (1961) 35 *Australian Law Journal* 271. Cf *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 52, 88.

122 (1972) 129 CLR 415 at 441.

123 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; *Ammann* (1972) 129 CLR 415 at 422.

124 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 522-523 [111].

125 Cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 510-512.

126 *Ammann* (1972) 129 CLR 415 at 436, 442.

demands that content be given to the expression "of the courts". The controlling effect of that expression must be determined accurately. Constitutional convenience does not erase the text or resolve the doubts to which it gives rise[127]. The provision must still be given its true meaning.

95 In constitutional adjudication there is often need for stability and settled conclusions. Absent fresh insights, stability in constitutional interpretation is often desirable. Eventually, judicial hesitations may have to bend to majority wisdom. But it may overstate things to say, as O'Connor, Kennedy and Souter JJ did in *Planned Parenthood of Southeastern Pennsylvania v Casey*[128] that "[t]he legitimacy of the Court would fade with the frequency of its vacillation"[129]. In this respect, Australians are more resilient and realistic in their understanding of the contestable character of much constitutional decision-making[130].

96 Because the appellant did not argue against the approach adopted in *Aston* and *Ammann*, this appeal substantially took the course of accepting that approach, particularly as expressed in the reasons of Gibbs J in *Ammann*[131]. This is not, therefore, a suitable occasion in which to give effect to a contrary opinion. Whatever reservations I may feel concerning the interpretation of s 51(xxiv) adopted before this case (and as to the necessity and operation of the remarks expressed having regard to the identity of the State "court[]" in each case issuing process for execution interstate[132]) the proper course is for me to accept the present doctrine, having voiced my doubts about it[133].

97 The present state of constitutional authority (and the convenience to governments of the constitutional result arrived at) may cement the present

---

127 Molot, "The Rise and Fall of Textualism", (2006) 106 *Columbia Law Review* 1 at 35-37.

128 505 US 833 (1992).

129 505 US 833 at 866 (1992).

130 Cf Posner, "Foreword: A Political Court", (2005) 119 *Harvard Law Review* 31 at 39.

131 See above these reasons at [79].

132 There is also a change from the 1901 Act, considered in *Aston* (1955) 92 CLR 353, and the SEP Act applicable to the present appeal. However, the differences of language do not appear to be material.

133 *Shaw* (2003) 218 CLR 28 at 55-57 [76]-[80]; *Ruddock v Taylor* (2005) 79 ALJR 1534 at 1563 [179]; 221 ALR 32 at 71.

doctrine in place so that it passes into the unquestioned meaning of the Constitution[134]. On the other hand, it may be that a future misuse, or over-use, of interstate service and execution of State executive government process will encourage a fresh look at whether this was the correct meaning of s 51(xxiv) of the Constitution. Whatever happens in the future, I have expressed my reservations.

The summons is "criminal process" within power

98 The constitutional position reached: I have examined the operation of the closing words "the courts of the States" in s 51(xxiv) for a reason. Although the appellant did not advance an argument that those words governed the phrase "the civil and criminal process", effectively his concession is, in my view, fatal to his constitutional challenge.

99 Once it is accepted that the power afforded to the Federal Parliament by the paragraph is to make laws with respect to "[t]he service and execution throughout the Commonwealth of the civil and criminal process … of the States" (and not "of the courts of the States") it is impossible for the appellant to succeed. This is because the removal of the reference to "the courts" removes the phrase that is essential, in my view, to erecting an argument that "the civil and criminal process" referred to is limited to the type of "civil and criminal process", involving the adjudication of rights and liabilities, such as is performed by "courts".

100 Once this point is reached, it follows that the power extends to the "civil and criminal process … of the States", including as the States act through the executive government and its agencies (and perhaps also any such process of the parliaments of the States[135]). There is no apparent reason then to stamp the "civil and criminal process" referred to with a confining ambit. Indeed, when the controlling character "of the courts of the States" is taken away from the "civil and criminal process" referred to in s 51(xxiv), it is much less likely that such "process" would be incidental to the adjudication of rights and liabilities. Adjudication is normally a function of the courts, including in State jurisdiction. But, whereas in State jurisdiction, non-court tribunals, executive bodies and, occasionally, State parliaments and their committees, may sometimes affect, by adjudication, the rights and obligations of those coming before them, this is not a universal feature of non-court "process". It is quite common, indeed usual, for

---

134 Cf Lane, *Commentary on the Australian Constitution*, 2nd ed (1997) at 268.

135 Cf Constitution, s 107: *Egan v Willis* (1998) 195 CLR 424. See also *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

tribunals and other bodies within the executive government of the States (and even sometimes for State parliaments and their committees) to engage in far-reaching inquiries. The decisions of such non-court bodies may be adjunct to the provision of evidence or other information upon which policies and proposed laws will be devised, or subordinate legislation made, by the executive. Or they may be incidental to legislation considered, or developed, by a State Parliament. Removal of the controlling element of "process" as ancillary to "the courts" subtracts the invariable feature of adjudication of rights and obligations that the appellant would now have this Court read into the power.

101 If the alternative ("narrow") interpretation of the structure of the paragraph had been adopted, there would be great force in the appellant's submission. But, having abandoned that argument, the appellant's endeavour to draw the character he described out of nothing more than the words "the civil and criminal process" fails. Certainly, it fails in this case where the summons of the Commission clearly falls within the words "the criminal ... process ... of [a] State[]", being a "process" designed, amongst other things, to investigate "relevant criminal activity referred … for investigation" and to "assemble evidence [for] the prosecution of a person for a relevant offence" (including a "serious drug offence") as defined[136] with a view to fulfilling the objects of the Act, namely to reduce the incidence of illegal drug trafficking and organised and other crime[137].

102 Accepting, then, that non-court "process" is included in the power afforded by s 51(xxiv), how could it be said that the summons issued in this case was otherwise than part of the "criminal process"?

103 *Past authority on "process"*: In an attempt to rescue his submissions, the appellant relied (as did Mason P in the Court of Appeal[138]) on a passage in the reasoning of Barwick CJ in *Ammann*[139]:

> "No more is involved, in my opinion, in the notion of the civil and criminal process to which par (xxiv) refers than a document which may be served or an order which may be executed in relation to proceedings for the establishment of legal rights or the enforcement of the criminal law."

104 There are some hints of a similar approach in the reasons of Menzies J in that case when he said[140]:

---

136 State Act, s 6(1), by reference to the definition of "relevant offence" in s 3(1).

137 State Act, s 3A.

138 (2004) 62 NSWLR 77 at 86 [42].

139 (1972) 129 CLR 415 at 423.

> "Its issue and execution is to make effective the civil or criminal process of a State to compel the attendance of witnesses required to give evidence at civil or criminal proceedings instituted in the State."

105 However, once the reference to "of the courts" is attached solely to "the judgments" and is detached from "the civil and criminal process" there is no reason for reading the latter expression as limited to the court-like functions of "establishment of legal rights" or "the enforcement of the criminal law".

106 Nor, with respect, once the interpretation in *Ammann* is accepted, can it easily be held that the "civil and criminal process … of the States" is confined "to process which formed an integral part of the *established* criminal procedure but which … could not properly be described as the process of a court"[141]. It would not be conventional to give such a facultative constitutional power a meaning limited by "*established* criminal procedure". The word "established" seems to have been used to emphasise that a witness summons to appear before a committal proceeding, after the laying of a criminal charge, was within the expression "criminal process" of the States, even if the proceedings themselves could not be classified as a "process of a court". Yet because "process … of the courts" was a meaning of s 51(xxiv) that this Court rejected in *Ammann*, the comparator was strictly irrelevant. All that this Court had to decide in that case was whether the summons answered to the constitutional description of "the civil [or] criminal process … of the courts of the States". Clearly it did, assuming that, for technical reasons, it might not have qualified as "criminal process … of [a] court[]" at that initial stage of the court's functions.

107 The reasons of Mason J in *Ammann*[142] make it clear, with respect, that it was unnecessary in that case to conclude the constitutional question of whether the postulated "process" did, or did not, have to answer to the description of a "process of a court".

> "[T]he summons is a *process of a court* if it is issued by or out of a court and it commands the witness to appear and give evidence in proceedings in that court. In each case the witness summons was issued by a magistrate under s 12 and s 23 of the *Justices Act* [1921 (SA)] and required the witness to give evidence in the matter of an information *laid*

---

140 *Ammann* (1972) 129 CLR 415 at 429.

141 *Ammann* (1972) 129 CLR 415 at 437 (emphasis added). It may be that, in context, Gibbs J was not suggesting such a limitation.

142 *Ammann* (1972) 129 CLR 415 at 442 (emphasis added).

in a court of summary jurisdiction. It was, accordingly, a *process of that court*."

108 The foregoing reasoning, and Mason J's subsequent reservations concerning the status of a summons of an interstate royal commission[143], suggest that *Ammann* was not the right case in which to resolve the ambit of s 51(xxiv). If the process issuing body there was, in fact and law, one of "the courts of the States" it was unnecessary, in order to reach a conclusion on the validity of the application of the federal law to the summons, to decide what portion of the language of s 51(xxiv) the words "of the courts" qualified. But that did not stop the other members of the Court expressing a constitutional conclusion now deployed against the appellant.

109 Once it is accepted, as the appellant did, that the phrase "of the courts" did not qualify "the civil and criminal process", the foundation for Barwick CJ's opinion that the "criminal process" referred to was one "for the establishment of legal rights or the enforcement of the criminal law" cannot be sustained. In *Ammann*, Barwick CJ was in dissent. Although, elsewhere in his reasons, his Honour endorsed the majority approach on the ambit of s 51(xxiv), the definition that he adopted for "criminal process … of the States" could only be accepted if the "criminal process" referred to in the grant of power was one limited to a "process … of the courts". There is no reason for reading such "process" in the confined way suggested, once the "criminal process" contemplated is not confined to that "of the courts" but extends to any "criminal process" of the executive government or (so far as such a power exists) of a State Parliament.

110 It follows that there is no binding or persuasive authority of this Court to sustain the appellant's argument on the second issue.

111 *Textual and contextual factors*: The appellant submitted that, notwithstanding the larger ambit of "process" consistent with *Ammann*, the word in the context of s 51(xxiv) of the Constitution was a technical legal word, invariably related to a proceeding before a court or tribunal, involving for that reason a process of adjudication or of the enforcement of the criminal law by the trial of offenders. A summons by the Commission therefore fell outside "criminal process", so conceived.

112 In support of this submission, the appellant cited the definition of "process" in Wharton's *Law Lexicon*[144], used by Gibbs J in *Ammann*, as follows[145]:

---

143 (1972) 129 CLR 415 at 441.

144 9th ed (1892).

> "It is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end; strictly, the summons by which one is cited into a court, because it is the beginning or principal part thereof, by which the rest is directed."

113 Immediately after this citation, Gibbs J proceeded to reject any suggestion that "process" in s 51(xxiv) was confined to originating proceedings[146]. Moreover, his rejection of the necessity for the "process" to be process "of the courts of the States", as such, meant that he rejected the limitation of the expression to process ancillary to court proceedings. So the citation of Wharton is of limited assistance.

114 The appellant then invoked the definition of "process" contained in Jowitt's *Dictionary of English Law*, cited in this case by Mason P[147]. This is very similar to Wharton's definition. It is defective for the same reasons. Butterworth's *Australian Legal Dictionary* defines "process" as "a document issued or filed with a court or tribunal in proceedings, which requires a person to attend before the court." That definition is broad enough to include the Commission's summons in this case, once "process" of non-courts is regarded as constitutionally permissible. Yet even that definition is then unduly narrow when a non-court State body is accepted as entitled to issue "process" that enlivens the constitutional power. So long as that can validly happen, the "process" involved will be that proper to the non-court issuing body. It is not necessarily confined to the functions traditional to court "process".

115 There are dangers in using legal dictionaries to give meaning to the composite expression "civil and criminal process". Until comparatively recently, most such legal "process" was undoubtedly issued by courts. Therefore, so far as "process" of the kind requiring "service and execution throughout the Commonwealth" was concerned, it was typically that issued by courts and it related to the adjudicative work that courts normally perform.

116 In recent times, but not only then, "process" that qualifies as "civil and criminal", has been entrusted to non-court bodies in the branches of government outside the courts. A common feature of "civil and criminal process" is that it requires attendance of a person before a body established by law relevant to the enforcement of the criminal law under the sanction of a penalty for disobedience.

---

145 Cited in *Ammann* (1972) 129 CLR 415 at 437.

146 (1972) 129 CLR 415 at 437-438.

147 (2004) 62 NSWLR 77 at 87 [49].

This is what the summons issued by the Commission to the appellant purports to do.

117 Unless the Constitution is to be confined to the meaning of "civil and criminal process" at the time of federation, it is necessary to give meaning to the phrase by reference to its essential features, and functional purposes, rather than its historical or traditional characteristics[148]. The examination of the meaning of "process" in general dictionaries suggests that the essential features of "process" relate to "a systematic series of actions directed to some end" or "a continuous action, operation or series of changes taking place in a definite manner"[149]. Although the words "civil and criminal" import a curial connotation, general dictionaries include amongst legal meanings "the whole course of the proceedings in an action at law"[150]. In the context, this does not use "at law" in a technical sense but refers simply to proceedings having a legal character.

118 Removal of the confinement of the "process" from necessary connection with the "courts" demands acceptance of the wider functions to which the "process" may be ancillary. Such "process" must still be capable of characterisation as "civil and criminal". It is not completely cut loose from its traditional legal characteristics. However, the notion of functions incidental only to the adjudication and determination of rights and obligations is not inherent in the word "process" for which s 51(xxiv) provides. The contrary conclusion could not be reconciled with the holding in *Ammann* accepted by the appellant.

119 *Constitutional words*: Despite his acknowledgment that the phrase "civil and criminal process" in s 51(xxiv) of the Constitution represented constitutional words, the meaning of which was to be found in their "essential features"[151], some of the appellant's submissions appeared to support a purely historical interpretation of the expression, assigning to it the meaning accepted when the Constitution was adopted in 1900 and in England before that.

120 Thus, the appellant urged that "criminal process" was historically traced to the courts as "the Queen's courts" so that all power exercised in that respect was

---

148 See, eg, *Ng v The Queen* (2003) 217 CLR 521 at 526 [9]-[10], 532-534 [33]-[37]; *Singh* (2004) 78 ALJR 1383 at 1391 [27], 1396-1398 [51]-[58], 1434-1438 [244]-[266]; 209 ALR 355 at 366, 372-375, 426-431.

149 *Macquarie Dictionary* (Federation ed), (2001), vol 2 at 1514.

150 *Macquarie Dictionary* (Federation ed), (2001), vol 2 at 1514.

151 *Ng* (2003) 217 CLR 521 at 526 [9], 531-534 [29]-[37]; *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54], 321-327 [125]-[138].

"by, or by delegation from, the Crown"[152]. Such notions cannot confine, or control, the meaning of the Australian Constitution, written and accepted by Australians for their governance. Whilst historical considerations may certainly inform words and concepts in the Constitution, this Court has a duty to give meaning to the text, based on the words used, informed by history, guided by authority and applying any relevant constitutional interpretive principles.

121 It is often useful to examine the Convention Debates and pre-federation history in interpreting provisions of the Constitution. However, such considerations cannot control the meaning[153]. Necessarily, the Constitution is given meaning as an instrument of government the purpose of which is to operate for the ages. Inevitably, different generations read the text as an organic instrument[154]. They see meanings and applications which earlier generations, with their different experiences, did not see[155].

122 *Changing "criminal process"*: The content of "criminal process" is a case in point. In 1900, that phrase would have conjured up significantly different notions for a reader of the Constitution than it does today. Apart from the wider range of executive (and possibly legislative) bodies that now play a part in aspects of what can broadly be described as "criminal process", the subject matter and content of what is "criminal" has greatly changed. Some of the change, but not all, has come about because of changing technology[156].

---

152 Appellant's written submissions at [31] citing Plucknett, *A Concise History of the Common Law*, 5th ed (1956) at 80-81.

153 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553-554 [45]-[47]; *Grain Pool* (2000) 202 CLR 479 at 529-530 [126]-[129]. The capacity of legal process, as envisaged in the constitutional text, to expand beyond that applicable in 1900 was recognised in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92-94 [18]-[25], 132-135 [135]-[141].

154 *Ammann* (1972) 129 CLR 415 at 422. It necessarily envisages changed "processes" available in a State from time to time: see *Alliance* (1983) 34 SASR 215 at 250 per Wells J.

155 Cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 628 [187] citing *Lawrence v Texas* 539 US 558 at 576-577 (2003) per Kennedy J for the Court.

156 Smith, "Criminal Law: The Future", (2004) *Criminal Law Review* 971; Kirby, "The Future of Criminal Law", (1999) 23 *Criminal Law Journal* 263; Kirby, "Criminal Law Futurology", (2006) 1 *International Journal of Punishment and Sentencing* 79.

123 Cybercrime, biological crimes, crimes involving acts of terrorism, trans-border crimes and crimes involving a wide variety of narcotic drugs, as well as new means of proving criminal involvement and propensity, all suggest that new content will be given to the constitutional expression "criminal process" today, when compared with 1900. The constitutional text accepts such broader meanings. It responds to the changing ambit of the word "criminal" and the developing notion of "process" in s 51(xxiv). The power is not open-ended and wholly without boundaries. But the boundaries have expanded. They are not confined to those known to the founders in 1900[157].

124 To the extent that *Ammann*, and the present appeal, endorse an application of s 51(xxiv) of the Constitution to the "process" of executive (and possibly parliamentary) bodies outside the "courts of the States", and conjure up a "parade of horribles"[158] with people oppressed by non-court summonses demanding their attendance before inquisitorial bodies in distant parts of the Commonwealth, the Constitution and federal law give three answers. Protection against misuse rests principally in the, admittedly imperfect, democratic and accountable features of the system of government created in the Constitution. The "process" involved, whilst not necessarily of a court of a State, must still answer to the requirement that it is of a "civil" or "criminal" character. The SEP Act requires judicial leave[159] before the obligation of attendance is imposed by federal law.

125 *Conclusion: s 51(xxiv) applies*: The summons issued by the Commission under s 15 of the State Act was certainly a "criminal process" within s 51(xxiv) of the Constitution. Essentially, it was a subpoena. This is a recognised, essential and well-established form of "civil and criminal process" as that phrase is understood in Australia[160]. Accepting (as the appellant did) that it did not have to be "process … of the courts", it was "process … of [a] State[]". It therefore validly enlivened the SEP Act. It authorised the grant of leave, providing for its service out of the State of New South Wales and in the State of Victoria. Once served, it bound the appellant to conform to its terms. It did so by the combination of the State Act, operating in federal jurisdiction by virtue of the

---

157 *Jumbunna* (1908) 6 CLR 309 at 367; *Shaw* (2003) 218 CLR 28 at 60 [90].

158 Posner, "Foreword: A Political Court", (2005) 119 *Harvard Law Review* 31 at 96.

159 SEP Act, s 76. However, mandatory reports to Parliament on the number and proportion of refusals of judicial leave in such cases show how rarely they arise, suggesting the limited protection offered by such engagement of the judiciary in the executive's business: see *Grollo v Palmer* (1995) 184 CLR 348 at 365, 377, 382, 392; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 8, 21, 43-44.

160 Carter, *Subpoena Law and Practice in Australia* (1996) at 3.

Judiciary Act 1903 (Cth), together with the facultative provisions of the federal SEP Act.

126 It follows that, on the postulate accepted by the appellant as to the meaning of s 51(xxiv) of the Constitution, endorsed by the decisions of this Court, the SEP Act was, in this respect, valid. The majority of the Court of Appeal were correct to so hold.

The State law issue need not be considered

127 In light of this conclusion, it is unnecessary to consider whether, standing alone (and having regard to current understandings of the extraterritorial operation of State statutes in Australia) the State Act was sufficient without federal support to impose on the appellant an enforceable legal obligation to comply with the Commission's summons. Amongst other things, that issue would raise the question whether, as the Commonwealth submitted, because of s 8(4), the SEP Act covered the relevant field of inter-State service of the specified process and thus enacted the entire law for such service of summonses issued by State investigative tribunals such as the Commission. Because it is unnecessary to decide the question, I will refrain from doing so. The foregoing reasoning is enough to sustain the order that I reach. But I propose that order mindful of an arguable constitutional flaw that the appellant elected not to argue. One day, I predict, it will return for fresh consideration.

Order

128 I agree in the orders proposed in the joint reasons.