HIGH COURT OF AUSTRALIA

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

WILLIAM ARTHUR FORGE & ORS PLAINTIFFS

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ORS DEFENDANTS

Forge v Australian Securities and Investments Commission [2006] HCA 44
5 September 2006
C7/2005

ORDER

1. *The First and Second Defendants' Demurrers to the Statement of Claim dated 12 April 2005 are allowed.*

2. *Judgment for the Defendants with costs.*

Representation

R J Ellicott QC with J L Glissan QC, S M Whybrow and W J Wilcher for the plaintiffs (instructed by Ken Cush & Associates)

S J Gageler SC with M R Pearce SC for the first defendant (instructed by Australian Securities and Investments Commission)

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick for the second defendant (instructed by Crown Solicitor for New South Wales)

D M J Bennett QC, Solicitor-General of the Commonwealth with N L Sharp for the third defendant (instructed by Australian Government Solicitor)

Interveners

W C R Bale QC, Solicitor-General of the State of Tasmania with S K Kay intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Solicitor-General of Tasmania)

W C R Bale QC, Solicitor-General of the State of Tasmania with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor's Office (Western Australia))

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

P M Tate SC, Solicitor-General for the State of Victoria with S G E McLeish, K L Walker and R J Orr intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with R W Campbell intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

HIGH COURT OF AUSTRALIA

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION PLAINTIFF

AND

WILLIAM ARTHUR FORGE & ORS DEFENDANTS

Australian Securities and Investments Commission v Forge
5 September 2006
C12/2005

ORDER

1. *The questions reserved are answered as follows:*

    1. *As to the validity of the appointments under the* Supreme Court Act *1970 (NSW) of the Honourable Michael Leader Foster to act as a Judge of the Supreme Court of New South Wales, and the capacity of his Honour to act in the cause:*

        None of the successive appointments of the Honourable Michael Leader Foster to act as a judge of the Supreme Court of New South Wales was invalid.

    2. *As to the construction and validity of the transitional provisions of Chapter 10 of the* Corporations Act *2001 (Cth):*

        The proceedings commenced in the Supreme Court of New South Wales by the Australian Securities and Investments Commission against William Arthur Forge and others on 26 April 2001 and tried before Foster AJ constituted a matter arising under a law made by the Parliament within the meaning of s 76(ii) of the Constitution.

2. *The Defendants (other than the Fifth Defendant) to pay the Plaintiff's costs.*

Representation

S J Gageler SC with M R Pearce SC for the plaintiff (instructed by Australian Securities and Investments Commission)

R J Ellicott QC with J L Glissan QC, S M Whybrow and W J Wilcher for the first to fourth and sixth defendants (instructed by Ken Cush & Associates)

No appearance for the fifth defendant

Interveners

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

W C R Bale QC, Solicitor-General of the State of Tasmania with S K Kay intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Solicitor-General of Tasmania)

W C R Bale QC, Solicitor-General of the State of Tasmania with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor's Office (Western Australia))

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

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

P M Tate SC, Solicitor-General for the State of Victoria with S G E McLeish, K L Walker and R J Orr intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with R W Campbell intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

HIGH COURT OF AUSTRALIA

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

WILLIAM ARTHUR FORGE & ORS — APPLICANTS

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR — RESPONDENTS

Forge v Australian Securities and Investments Commission
5 September 2006
S301/2005

ORDER

1. *The time for the Applicants to file their application for special leave is extended.*

2. *Application for special leave dismissed.*

3. *Applicants to pay the costs of the First Respondent.*

On appeal from the Supreme Court of New South Wales

Representation

R J Ellicott QC with J L Glissan QC, S M Whybrow and W J Wilcher for the applicants (instructed by Ken Cush & Associates)

S J Gageler SC with M R Pearce SC for the first respondent (instructed by Australian Securities and Investments Commission)

No appearance for the second respondent

Interveners

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

W C R Bale QC, Solicitor-General of the State of Tasmania with S K Kay intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Solicitor-General of Tasmania)

W C R Bale QC, Solicitor-General of the State of Tasmania with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor's Office (Western Australia))

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

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

P M Tate SC, Solicitor-General for the State of Victoria with S G E McLeish, K L Walker and R J Orr intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with R W Campbell intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

CATCHWORDS

Forge v Australian Securities and Investments Commission

Constitutional law (Cth) – Chapter III – State Supreme Courts – Acting Judges – Section 37 of the *Supreme Court Act* 1970 (NSW) provided for appointments to act as a judge, for a period not exceeding 12 months – Former Federal Court Judge appointed as an Acting Judge of the Supreme Court of New South Wales under a series of commissions pursuant to s 37 of the *Supreme Court Act* – Whether the appointments as an Acting Judge were validly made – Whether s 37 of the *Supreme Court Act* was valid – Whether Acting Judges, when appointed other than on an occasional and exceptional basis, substantially impair public confidence in the Supreme Court's institutional integrity and impartiality and prevent that Court from answering to the constitutional description of "Supreme Court of any State" – Distinctions between permanent Judges and Acting Judges – Significance of a substantial increase in the number of Acting Judges appointed to the Supreme Court, the incidence of reappointing such Acting Judges and the duration of such appointments since 1989 – Whether changes in appointments of Acting Judges amounts to a fundamental alteration of the character and composition of the Supreme Court – Relevance of the fact that Acting Judges are typically retired Judges.

Constitutional law (Cth) – No objection to the appointment of the Acting Judge in question taken at trial or on appeal to the New South Wales Court of Appeal – Whether parties contesting the validity of appointment prevented from doing so by reason of acquiescence or waiver – Opposing parties did not submit acquiescence or waiver, if any, prevented objection to validity of appointment – Whether High Court should consider effect of acquiescence or waiver.

Constitutional law (Cth) – Judicial power of the Commonwealth – Vesting in State courts – Federal character of the Commonwealth – Power of State Parliament to confer function incompatible with exercise by State court of federal judicial power – Whether appointments of Acting Judges in large numbers consistent with judicial process and Chapter III of the Constitution.

Judges – Acting Judges – Validity of orders made by Acting Judge – Whether such orders valid regardless of validity of appointment of the Acting Judge by reason of the de facto officers doctrine.

Corporations law – Transitional provisions of Ch 10 of the *Corporations Act* 2001 (Cth) – ASIC brought proceedings, in 2001, against the parties contesting validity of the appointment of the Acting Judge in question alleging contravention, in 1998, of civil penalty provisions of the Corporations Law of New South Wales – Whether, after the repeal of the relevant civil penalty

provisions of the State corporations law and the enactment of the *Corporations Act*, the proceedings alleging contravention could be brought.

Words and phrases – "Acting Judges", "court", "impartiality", "institutional integrity", "judicial independence", "Supreme Court of any State".

Constitution, ss 71, 72, 73, 75, 76, 77(iii).
Corporations Act 2001 (Cth), Ch 10.
Judiciary Act 1903 (Cth), s 39(2).
Supreme Court Act 1970 (NSW), s 37.

1 GLEESON CJ. There are three proceedings before the Court. The first was commenced in the original jurisdiction of the Court. The second was commenced in the Supreme Court of New South Wales and removed in part into this Court under s 40 of the *Judiciary Act* 1903 (Cth). The third is an application for special leave to appeal to this Court from a decision of the Court of Appeal of the Supreme Court of New South Wales, which substantially dismissed an appeal from Foster AJ. It is convenient to refer to the moving parties in all those proceedings as "the applicants".

2 All three proceedings relate to, or arise out of, litigation in the Supreme Court of New South Wales between the Australian Securities and Investments Commission ("ASIC") and the applicants. On 26 April 2001, ASIC commenced an action ("the ASIC proceedings") in the Supreme Court of New South Wales for civil penalties, declarations and orders pursuant to Pt 9.4B of the Corporations Law of New South Wales ("the State law"), alleging contraventions in 1998 by the applicants of the State law. The State law was repealed as from 14 July 2001. The *Corporations Act* 2001 (Cth) ("the Commonwealth law") came into force on 15 July 2001. On and from that date ASIC continued, or purported to continue, the proceedings pursuant to the transitional provisions of the Commonwealth law. The action came on for hearing before Foster AJ in March 2002. The hearing concluded on 1 May 2002. On 28 August 2002, Foster AJ delivered judgment. He found in favour of ASIC, made declarations and imposed penalties. The applicants appealed to the Court of Appeal. On 7 December 2004, the appeal was dismissed except in relation to penalty. The Court of Appeal ordered that the matter be remitted to the Equity Division of the Court for hearing on penalty only. That penalty hearing has not yet taken place.

3 At that stage, the applicants, for the first time, raised a question as to the validity of the appointment of Foster AJ. No objection had been taken to Foster AJ sitting, and no point about the validity of his appointment had been raised before the Court of Appeal. An application for special leave to appeal to this Court raised as one proposed ground of appeal "that the appointment under section 37 of the *Supreme Court Act* 1970 (NSW) of Foster AJ, the trial judge, was invalid". The other proposed ground of appeal was based on a point that had been argued before the Court of Appeal. It concerned the legislative validity of the transitional provisions earlier mentioned. In addition, the applicants instituted the first two proceedings referred to at the commencement of these reasons. In those proceedings, a Justice of this Court has reserved two questions for the decision of a Full Court. The first question concerns the validity of the appointment of Foster AJ. The second concerns the validity of the transitional provisions of the Commonwealth law. If both of those questions are answered unfavourably to the applicants, then that will be decisive of the special leave application.

4 I agree with the answers to both questions proposed in the reasons of Gummow, Hayne and Crennan JJ. I also agree with their reasons for the answer

proposed to the second question, and have nothing to add to what is there said. My reasons for the answer to the first question are as follows.

The issue

5 It is important to be clear about the legal basis of the belated challenge to Foster AJ's appointment. It is that s 37 of the *Supreme Court Act* 1970 (NSW), the section that empowers the Governor of New South Wales to appoint acting Judges, is invalid.

6 The Honourable Michael Leader Foster was born on 27 November 1928. He served for a number of years as a Judge of the Federal Court of Australia. He reached the age of 70, at which age he was compelled by statute to retire from that Court, in November 1998. Under a series of commissions pursuant to s 37 of the *Supreme Court Act* he was appointed an acting Judge of the Supreme Court of New South Wales commencing on 31 May 1999 and ending on 26 November 2003, when he reached the age of 75, which is, by s 37(4A), the maximum age for an acting Judge of the Supreme Court. Each of those commissions except the last was for a period of one year. The appointments that were operative when the ASIC proceedings were heard and determined were the third and fourth of his appointments, commencing on 31 May 2001 and 31 May 2002 respectively. It is those two appointments that are challenged.

7 Subject to one qualification, the bare facts set out above constitute the only information before the Court concerning Foster AJ's appointments. He himself is not a party to any of the proceedings. The potential consequences for him, and for other litigants, if the challenge succeeds have not been explored. One of the arguments for the applicants countenanced the possibility that legislation could validly provide for the appointment of acting Judges to the Supreme Court in "special circumstances", but there is very little information about the circumstances in which Foster AJ was appointed, and, in any event, s 37 does not so provide. The nature of the case for the applicants is such that the circumstances of Foster AJ's appointments are irrelevant. If it were otherwise, it would be inappropriate to deal with the matter in its present form. This Court is in a position to decide, as a question of law, the validity of s 37 of the *Supreme Court Act*. It is not in a position to make any decision about the validity of Foster AJ's appointments on the hypothesis that the section stands, but that the validity of appointments made under the section depends upon the circumstances existing at the times of the appointments, or turns upon a judgment as to whether those circumstances were "special", whatever that might mean.

8 The qualification mentioned in the preceding paragraph is that reference was made in argument to some publicly available (and undisputed) figures about the numbers of people holding commissions as Judges, Judges of Appeal, Acting Judges and Acting Judges of Appeal, of the Supreme Court of New South Wales at annual intervals. The figures were taken from the Supreme Court's Annual

Reviews. As at 31 December 2001, there were 45 permanent Judges (including Judges of Appeal) of the Supreme Court of New South Wales. During the preceding calendar year 20 persons (all of whom were retired Judges of either the Federal Court or the Supreme Court, or serving Judges of the District Court) had been appointed as acting Judges or Judges of Appeal for specified terms. Some of those terms were for a year; others were for shorter periods, typically three months. None of the persons appointed as acting Judges were practising barristers. 31 December 2001 fell approximately in the middle of the dates of the two appointments in question. The corresponding figures for 31 December 2002 are not materially different. There were 44 permanent Judges and Judges of Appeal. During the calendar year 2002 seven acting Judges of Appeal and 13 acting Judges held appointments. Again they were all retired judges, or serving District Court Judges, but for one, who was a Master of the Supreme Court. Self-evidently, in calculating the proportion of judge sitting-time occupied by acting Judges it would be necessary to take account of the periods for which any acting Judge actually sat. That information is not before the Court. What the figures show is that, at the times of Foster AJ's appointments, putting to one side full-time serving judicial officers who were brought up temporarily from within the court system itself, the acting Judges of the Supreme Court of New South Wales were retired judicial officers; not practising barristers. The legal significance which the applicants seek to attach to that information is not clear. Section 37 was enacted in 1970, and it was not materially different from earlier legislation enacted in 1900. Indeed, legislation providing for acting appointments to the Supreme Court of New South Wales has an even longer history. It is only the appointments of Foster AJ that are in question. If s 37 is invalid, then it was invalid in 1970, and the appointments of Foster AJ were invalid.

9 The validity of the two relevant appointments of Foster AJ is not said to turn upon any circumstances personal to Foster AJ, or upon any particular circumstances that might have had any bearing on the decision by the Executive Government to exercise, in the case of the appointments of Foster AJ, the power conferred by s 37. There is no evidence, or agreement, as to what those circumstances might have been, even if they were otherwise relevant to any decision which it is within this Court's capacity to make.

Relevant legislation

10 The *Supreme Court Act* 1970 (NSW) "continued" the Court "as formerly established as the superior court of record in New South Wales" (s 22). It provided, in s 25, that the Court shall be composed of a Chief Justice, a President of the Court of Appeal and such other Judges of Appeal and Judges as the Governor may from time to time appoint.

11 The Act imposed no limit on the number of Judges that might be appointed, and made no provision about the circumstances in which

appointments might be made. It specified (in s 26) the qualifications of appointees. In s 27, it provided for tenure. Subject to the age of compulsory retirement (then 70 and now 72) Judges' commissions were to "continue and remain in force during ... good behaviour", subject to a power of removal by the Governor on an address of both Houses of Parliament. (The matter of tenure was later dealt with, to like effect, in the *Judicial Officers Act* 1986 (NSW), and later still by an amendment to the *Constitution Act* 1902 (NSW).) In brief, subject to the prescribed qualifications for appointment, the power to appoint Judges of the Supreme Court was left to the Executive Government in completely general terms. That is typical of legislation in all Australian jurisdictions.

12 It is necessary to say something more about the *Constitution Act* 1902 (NSW). Part 9 of that Act deals with the judiciary. It governs the removal of a holder of judicial office. By s 53, the holder of a judicial office can be removed from the office only by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. The provision extends to acting appointments to a judicial office, whether made with or without a specific term (s 53(5)). The provision applied to Foster AJ during the term of both the relevant appointments[1].

13 In *Valente v The Queen*[2], Le Dain J said:

> "The essence of security of tenure for purposes of s 11(d) [of the *Canadian Charter of Rights and Freedoms*] is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."

14 The appointments of Foster AJ satisfied that requirement.

15 To return to the *Supreme Court Act* of 1970 in its original form, s 37 conferred a power to appoint acting Judges. It provided:

> "(1) The Governor may, by commission under the public seal of the State, appoint any qualified person to act as a Judge for a time not exceeding six months to be specified in such commission.
>
> (2) In subsection one of this section "qualified person" means a person qualified for appointment as a Judge.

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[1] Contrast *Starrs v Ruxton; Ruxton v Starrs* 2000 JC 208; and compare *Kearney v HM Advocate* 2006 SC (PC) 1.

[2] [1985] 2 SCR 673 at 698.

(3) The person so appointed shall, for the time and subject to the conditions or limitations specified in his commission, have all the powers, authorities, privileges and immunities and fulfil all the duties of a Judge."

16 Section 37, in its form at the time of the appointments in question, is set out in the joint reasons. It accommodates the relatively recent development of appointing, as acting Judges, retired judges rather than practising barristers, as was the case during most of the history of the Supreme Court. However, save for the inclusion of a reference to Judges of Appeal in 1989[3], and the alteration of six months to 12 months, s 37(1) remains the same. That is the provision central to the present issue.

17 Legislation relating to the Supreme Court has long contained provision for the appointment of acting Judges. For example, s 13 of the *Supreme Court and Circuit Courts Act* 1900 (NSW), which was in force at the time of Federation, empowered the Governor to issue a special commission to any Judge of the District Court, or to any barrister of not less than seven years' standing, appointing him to act as a Judge of the Supreme Court. Such appointments could be made for the purpose of sitting at any Circuit Court, or at any place or places at which a Judge of the Court could not attend without detriment to the ordinary business of the Court, or for the purpose of sitting and acting as a Judge of the Court at Sydney in any one or more jurisdictions of the Court to be specified in such commission, and for a time not exceeding six months.

18 Subject to the qualification in the 1900 Act concerning appointments to sit at places outside Sydney, legislation, in New South Wales and elsewhere in Australia, empowering the Executive Government to appoint acting judges, like legislation providing for the appointment of permanent judges, has usually been expressed in general terms, without attempting to confine the circumstances in which it might be considered appropriate to exercise the power.

19 This is consistent with constitutional principle. Judges are appointed by the Executive Government in the exercise of powers conferred by Parliament. Judges are not appointed by the judicial branch of government. They are appointed by the political branches of government, and decisions as to appointment are subject to political accountability. No doubt many judges have strong opinions about matters relating to judicial appointments, whether permanent or temporary. Many judges have opinions about the number of judges that ought to be appointed, the qualities that ought to be looked for in appointees, and the procedures of selection that ought to be followed. Their opinions may deserve weight, because of their personal knowledge and experience. Even so, judges do not appoint one another. The responsibility for making decisions about

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[3] *Statute Law (Miscellaneous Provisions) Act* 1989 (NSW), ss 2(1), 3 and Sched 1.

judicial appointments, including numbers and circumstances of appointments, rests with those who have the responsibility of paying the salaries, and providing the necessary resources, of the appointees, and who have political accountability for bad or unpopular decisions about appointments.

20 Assertions are sometimes made about possible abuses of the power to appoint acting judges. What would constitute an abuse of the power might be a matter on which opinions would differ. Two points should be made. First, such opinions concern matters which are decided by the political branches of government, not by the judiciary. If it is said (as it is in this case) that there is a justiciable issue concerning the appointment of acting judges, there is a need to identify that issue with precision, and to ensure that what is being decided is a matter within judicial, and not executive or legislative, authority. The validity of s 37 is a justiciable issue. The general desirability of acting appointments is not. Secondly, the possibility of abuse of the power to appoint permanent judges is just as obvious as the possibility of abuse of the power of appointing acting judges. It requires no imagination to think of ways in which an Executive Government, if so minded, could misuse its power to appoint permanent judges, yet it has never been suggested that legislation which confers the power in unconfined terms is invalid.

21 Before concluding on the subject of New South Wales legislation, further reference should be made to the *Judicial Officers Act* 1986. That legislation established a scheme for dealing with complaints against judicial officers. In that Act, a reference to the holder of any judicial office includes a reference to a person appointed to act in that office (s 3(3)). Furthermore, an acting Judge is within the definition of "public official" in s 3 of the *Independent Commission Against Corruption Act* 1988 (NSW) and is therefore subject to the regime of scrutiny imposed by that Act in respect of departures from the standards of "honest and impartial exercise of official functions". These two legislative regimes post-date s 37. They are, however, part of the circumstances in which the appointments of Foster AJ were made and would need to be considered if, in some way, reliance were to be placed on those circumstances.

22 As with permanent Judges, the remuneration of acting Judges of the Supreme Court of New South Wales is fixed by recommendations made by an independent statutory authority, which recommendations are subject to disallowance by Parliament[4].

23 Finally, before an acting Judge enters upon the performance of duties pursuant to a commission, he or she must take the judicial oath or affirmation,

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[4] *Statutory and Other Offices Remuneration Act* 1975 (NSW), ss 13, 19A and Sched 1.

which is a commitment to do right to all manner of people without fear or favour, affection or ill-will[5].

24 In brief, an acting Judge of the Supreme Court of New South Wales is appointed by the same authority (the Governor-in-Council) as appoints a permanent Judge of that Court, takes the same oath of office binding him or her to impartiality, is subject to the same process of removal during a term of office (removal by the Governor on an address of both Houses of Parliament), is remunerated on the basis of recommendations of the same tribunal, is subject to the same system of complaints and discipline administered by the Judicial Commission of New South Wales, and is subject to the same scrutiny by the Independent Commission Against Corruption. It might be added that the last two statutory mechanisms for judicial accountability, which reinforce obligations of impartiality, go beyond any system that applies to federal judges, or to judges in most other parts of Australia. New South Wales judges, including acting judges, are subject to statutory regimes of scrutiny and accountability for misbehaviour (including bias) more extensive than those which apply to their counterparts elsewhere in Australia.

Acting Judges

25 In a perfect world, an Executive Government would appoint exactly the number of permanent judges required to enable all courts to operate efficiently and effectively, all courts would have consistent and predictable caseloads, there would be no temporary shortages of resources, there would be no need for delay reduction programmes, and the size of courts would expand to meet litigious demand. (What would happen in the event of a contraction of litigious demand is a question that raises its own problems.) No such world exists.

26 The appointment of acting judges, supplementing permanent judicial resources, has been an aspect of the administration of justice in New South Wales, and in other parts of Australia, from the beginning. Until fairly recently, most acting judges were practising barristers who agreed to accept judicial appointment for a limited term. Sometimes, judges of a lower court were appointed, temporarily, to a higher court. There are two main reasons advanced in opposition to appointments of the first kind. First, barristers who are appointed as acting judges are said to lack the necessary appearance of impartiality, especially if they are hoping for permanent appointment. Secondly, governments may be tempted to make acting appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary. Depending on circumstances, there may be substance in such concerns. Anybody familiar with the practicalities of government funding will know that temporary accommodation has a way of becoming permanent. These, however,

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[5] *Oaths Act* 1900 (NSW), s 8 and Fourth Schedule.

are matters that are generally the subject of political responsibility and accountability. As was noted above, there are sometimes concerns about aspects of government decisions on the making of permanent appointments. Such issues are usually fought out in the political arena. Resolution of justiciable issues requires identification of a legal norm and its application to established facts.

27 Earlier this year, the Privy Council, in *Kearney v HM Advocate*[6], applied the legal norm set out in Art 6(1) of the European Convention on Human Rights to the Scottish system of appointing practising advocates as temporary judges. The Article provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

28 Similar legal standards, usually based on constitutional provisions, or human rights instruments, have been applied by courts on a number of occasions, in deciding whether some aspect of a court, or a court system, complied with minimum requirements of independence and impartiality, and thus whether a decision-making authority answered the description of a "court". Decisions in those cases contain valuable analyses of the essential requirements of an independent and impartial court[7].

29 In *Kearney v HM Advocate*, the Privy Council concluded that the Scottish system complied with the requirement of Art 6(1). The reasons of Lord Hope of Craighead contain an account of the development in Scotland of the practice of appointing advocates as temporary judges. Lord Carswell, summarising the conclusions of the other members of the Privy Council, said that "there is no reason to doubt the independence or impartiality of temporary judges appointed from the Faculty of Advocates to act as judges in the High Court of Justiciary"[8]. Of course, that conclusion depended upon a close examination of matters of fact, and of the legal context in which the issue arose. The point is that what was addressed was a justiciable issue involving the application of a legal test to a particular system of appointing temporary judges. The system was held to satisfy the test.

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[6] 2006 SC (PC) 1.

[7] See, for example, *Valente v The Queen* [1985] 2 SCR 673; *R v Beauregard* [1986] 2 SCR 56; *R v Généreux* [1992] 1 SCR 259; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; *Van Rooyen v The State* 2002 (5) SA 246 (CC).

[8] 2006 SC (PC) 1 at 21 [63].

30 The use of part-time judicial officers in England and Wales is extensive. In the fourth edition of *Halsbury* it is said[9]:

> "It is a feature of the judicial system in England and Wales that there are many part-time judicial office holders, such as deputy High Court judges, deputy circuit judges and recorders. These appointees are usually barristers or solicitors in practice. They do not enjoy the high degree of security of tenure applicable to the full-time judiciary."

31 It has not been unusual in Australia for practising barristers to be appointed acting judges. This is illustrated by the fact that two of the first three members of this Court, Barton J[10] and O'Connor J[11], had been acting Judges of the Supreme Court of New South Wales, and Dixon J[12], Rich J[13], Williams J[14], Owen J[15] and Jacobs J[16] had also been acting judges of State Supreme Courts.

32 At the time of Federation, some of the State (formerly colonial) Supreme Courts were, by modern standards, very small. Each of the Supreme Courts of Tasmania[17], South Australia[18] and Western Australia[19] had only three members.

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9 *Halsbury's Laws of England*, 4th ed reissue, vol 8(2), par 301.

10 Bolton, *Edmund Barton*, (2000) at 131.

11 Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 509.

12 Ayres, *Owen Dixon*, (2003) at 48.

13 Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 605.

14 Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 713.

15 Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 518.

16 Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 365.

17 Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania, Its First Century 1824-1924*, (1995) at 141, 159, 165.

18 [1900] South Australian Law Reports.

19 (1899-1900) 1 & 2 Western Australian Law Reports.

An illness of a permanent judge could create a temporary need which governments might well be reluctant to meet by appointing another permanent judge. Similarly, departure of a permanent judge on a period of leave could result in a vacancy which a government might wish to fill by an acting appointment. Practical considerations of that kind were well understood by the Founders, who were familiar with the needs of States for systems that made it possible to appoint acting judges.

33 Quantitative analysis may be misleading. It was pointed out in argument that four of the ten Judges presently holding commissions in the Supreme Court of the Northern Territory are acting Judges. They perform a relatively small proportion of the Court's total work. That may vary from time to time. Depending upon the size of a court, a small number of acting appointments could influence strongly the proportion between permanent and temporary judges. From one point of view, the smaller the court the more necessary it may be to have some provision for acting judges. Again, however, the effective size of a court needs to be related to its workload. Comparison of the number of acting judges in a given court over a period of years without reference to changes in the number of permanent judges over the same period would be meaningless. According to the submissions of the parties, examination of the front pieces and memoranda in the State Reports of New South Wales and the New South Wales Law Reports shows that in 1907 there were seven permanent Judges, in 1929 there were nine, in 1935 there were ten, in 1952 there were 16, in 1969 there were 35, in 1988 there were 42, in 2001 there were 49 and in 2004 there were 50. The number of acting Judges fluctuated. In many years there were none. In several years (such as 1907, 1911, 1919, 1920, 1924, 1929, 1936, 1937, 1938, 1939 and 1952) the number of acting Judges was more than 20 per cent of the total number of Judges at the Court. That figure, in turn, is uninformative unless it is further refined by reference to the actual time for which individual Judges sat.

34 A change that has occurred in recent times in New South Wales has been a move towards the appointment of retired judges as acting Judges of the Supreme Court. At the time of his appointments, Foster AJ was not a practising barrister. None of the other acting Judges who held office at the same time as him were practising barristers. The age of compulsory retirement for a Federal Court Judge is 70. The corresponding age for a Judge of the Supreme Court of New South Wales is 72. The maximum age for an acting Judge of the Supreme Court of New South Wales is 75. If there are to be any acting judges at all, the reasons why governments might look to experienced, retired judges are plain. It may be added that retired Australian judges perform valuable service as judges, for limited terms, in a number of countries in the Pacific region and elsewhere.

35 Finally, it may be noted that, in 1999, this Court dismissed a challenge to the validity of an appointment of an acting Judge of the Supreme Court of the Australian Capital Territory, although the arguments advanced in that case were

somewhat different from the arguments in the present case. In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[20], a man who had been convicted of murder after a long criminal trial sought to challenge the conviction on the ground that the presiding judge, Carruthers AJ (a retired former member of the Supreme Court of New South Wales), had not been validly appointed. One of the grounds of invalidity was that he was appointed for a limited term only. If argument for the applicants in the present case is correct, it is difficult to see how the outcome in that case could be supported. Furthermore, the case provides a good example of the kind of circumstance that explains the existence of a power to appoint acting judicial officers. The Supreme Court of the Australian Capital Territory is a small court. The *Eastman* trial (which lasted for many months) placed a large, but temporary, strain on its limited resources. Hence the resort to what was described as "the facility regularly employed in many of the Australian States but with added practical justifications deriving from the circumstances of the Territories"[21].

The validity of Supreme Court Act, s 37

36 Australia has an integrated, but not a unitary, court system. As was pointed out in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[22], there is no single ideal model of judicial independence, personal or institutional. Within the Australian judiciary, there are substantial differences in arrangements that bear upon judicial independence. Until a constitutional amendment in 1977, Justices of this Court, and other federal courts created by Parliament, were required to be appointed for life. No one ever suggested that, in that respect, Ch III of the Constitution provided a template that had to be followed to ensure the independence of State Supreme Courts, much less of all courts on which federal jurisdiction might be conferred. Indeed, for most of the twentieth century, many of the judicial officers who exercised federal judicial power, that is to say, State magistrates, were part of the State public service[23]. If Ch III of the Constitution were said to establish the Australian standard for judicial independence then two embarrassing considerations would arise: first, the standard altered in 1977; secondly, the State Supreme Courts and other State courts upon which federal jurisdiction has been conferred did not comply with the standard at the time of Federation, and have never done so since.

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[20] (1999) 200 CLR 322.

[21] (1999) 200 CLR 322 at 365 [110] per Kirby J.

[22] (2004) 218 CLR 146 at 152 [3].

[23] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 153 [4].

37 Nothing better illustrates the room for legitimate choice that exists in connection with arrangements affecting judicial independence than the removal in 1977 of the requirement of life tenure for federal judges. That requirement probably explained why, before 1977, the federal judiciary was so small, and why so much federal jurisdiction was exercised by State judges, who did not have life tenure. At the time of Federation, life tenure was seen as necessary to secure the independence of the federal judiciary and, in particular, of the members of this Court. In 1977, it was seen as inconvenient. This Court did not become less independent in 1977. Tenure is an important aspect of the arrangements that support the individual and personal aspects of judicial independence; but it is only one of a number of aspects all of which have to be considered in combination. Furthermore, the essence of tenure is that explained in the quotation from *Valente v The Queen* set out earlier in these reasons.

38 It is s 72 of the Constitution which, in its provisions as to judicial appointment, tenure and remuneration, deals with topics relevant to judicial independence. Those provisions are said, by s 72, to apply to the Justices of the High Court and of other courts created by the Parliament. There is nothing in the Constitution that says, either expressly or by implication, that State Supreme Courts, or other State courts that may be invested with federal jurisdiction, must be subject to like provisions relating to appointment, tenure and remuneration. At the time of Federation they were not; and they never have been since then. There are, of course, substantial similarities between the provisions applicable to State Supreme Courts and those found in s 72; but there are differences. In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[24], it was held that s 72 did not apply to the Supreme Court of the Australian Capital Territory. Obviously, it does not apply to the Supreme Court of New South Wales. Its terms are such that it could not possibly do so.

39 The principal argument for the applicants, however, was less direct. It was acknowledged that the Constitution accepts the possibility that State courts, including State Supreme Courts, might be constituted differently from federal courts[25]. In *Le Mesurier v Connor*[26], Knox CJ, Rich and Dixon JJ cited the statement of Isaacs J in *R v Murray and Cormie; Ex parte The Commonwealth*[27] that "[t]he Constitution, by Chapter III, draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most

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[24] (1999) 200 CLR 322.

[25] *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49.

[26] (1929) 42 CLR 481 at 495-496.

[27] (1916) 22 CLR 437 at 452.

pronounced and unequivocal way that they remain 'State Courts.'" Their Honours went on to say:

> "The Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a State are the judicial organs of another Government. They are created by State law; that law, primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdictions are exercised."

40 The argument for the applicants invoked the principle in *Kable v Director of Public Prosecutions (NSW)*[28] that, since the Constitution established an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid. By parity of reasoning, it was said, s 37 is invalid. If, according to the principle invoked, a State Supreme Court may not have acting judges because they substantially impair its institutional integrity, then the institutional integrity of all State Supreme Courts has been impaired since Federation. This is not a case about a conferral of a function on a court; it is about State legislation providing for the constitution of a Supreme Court (and providing for it in a manner that has remained substantially unchanged since before Federation). Even so, it is argued, the same principle applies. If the conclusion for which the applicants contend truly followed from the principle, then the principle would require reconsideration.

41 It follows from the terms of Ch III that State Supreme Courts must continue to answer the description of "courts". For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the Constitution. It is the principle that governs the outcome of the present case. If State legislation attempted to alter the character of a State Supreme Court in such a manner that it no longer satisfied those minimum requirements, then the legislation would be contrary to Ch III and invalid. For the reasons given above, however, Ch III of the Constitution, and in particular s 72, did not before 1977, and does not now, specify those minimum requirements, either for State Supreme Courts or for other State courts that may be invested with federal jurisdiction.

42 State legislation which empowers the Governor of a State to appoint acting judges to a State Supreme Court does not, on that account alone, deprive the body of the character of a court, or of the capacity to satisfy the minimum requirements of judicial independence. Before and since Federation, such legislation has been common. Minimum standards of judicial independence are

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[28] (1996) 189 CLR 51.

not developed in a vacuum. They take account of considerations of history, and of the exigencies of government. There are sound practical reasons why State governments might need the flexibility provided by a power to appoint acting judges.

43 Judicial independence and impartiality is secured by a combination of institutional arrangements and safeguards. It has already been explained that acting Judges of the Supreme Court of New South Wales are appointed by the same authority as appoints permanent Judges; they take the same judicial oath; they may be removed only by the Governor on an address of both Houses of Parliament; and their remuneration is fixed by an independent tribunal. They are now subject to the scrutiny of the Judicial Commission of New South Wales and the Independent Commission Against Corruption.

44 In the case of a retired federal judge such as Foster AJ, it is difficult to imagine what doubts might reasonably have been entertained about his independence or impartiality, except such as could arise from the renewability of his temporary appointment. This consideration must be evaluated in the wider context mentioned in the preceding paragraph. There are aspects of the position of many permanent judges that could raise questions of at least as much significance. Consider, for example, the matter of judicial promotion. Judges are commonly promoted (by executive governments) within courts or within the judicial hierarchy. Such promotions may involve increased status and remuneration. Throughout the history of this Court, most of its members have arrived here by way of promotion. There may be some people who would say that could erode independence and impartiality. There may be permanent judges for whom judicial promotion would have at least as much attraction as an opportunity to spend another year as an acting judge would have to a 73 or 74 year old former judge. The usual response to such concerns is that a ban on judicial promotion would result in inflexibility and inconvenience; and that the independence and impartiality of judges is shored up by so many systemic and personal factors that this is not, in practice, a decisive objection. The same may be said of the renewability of Foster AJ's appointments. It is not a matter to be dismissed lightly, but in the wider context it is not decisive. It is difficult to legislate against the pursuit of self-interest, and neither s 72 of the Constitution nor any State or federal Act seeks to do so. A permanent judge with prospects of advancement might be seen by some observers as being at least as likely to seek to please the executive as a temporary judge with prospects of re-appointment. Issues such as these are generally dealt with by standards of professional behaviour, not legislative prescription. As the Attorney-General of Queensland pointed out in written submissions, ultimately what stands between any judge and the temptation of executive preferment is personal character.

45 Views may differ on the circumstances in which appointments of acting judges are desirable or appropriate, but it is difficult to legislate for such circumstances. Let it be assumed, for example, that executive governments

ought not to use the power of appointing acting judges to evade the responsibility of providing an adequately resourced court system. That proposition would probably command general acceptance; but it has large political and economic content, and corresponding uncertainty of application. Acceptance of that view does not lead to the conclusion that s 37 of the Supreme Court Act is invalid; indeed it raises issues that may not be justiciable. They are certainly not issues that are capable of being resolved on the information available to this Court as to the circumstances of the appointments of Foster AJ.

46 It is possible to imagine extreme cases in which abuse of the power conferred by s 37 could so affect the character of the Supreme Court that it no longer answered the description of a court or satisfied the minimum requirements of independence and impartiality. It is, however, a basic constitutional principle that the validity of the conferral of a statutory power is not to be tested by reference to "extreme examples and distorting possibilities"[29]. Possible abuse of power is rarely a convincing reason for denying its existence.

47 The challenge to the validity of s 37, and thus to the appointments of Foster AJ, fails.

Conclusion

48 I agree with the answers to questions, and orders, proposed by Gummow, Hayne and Crennan JJ.

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[29] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].

49 GUMMOW, HAYNE AND CRENNAN JJ. There are two issues that arise in the two matters in this Court[30], and also in an application for special leave to appeal to this Court that was heard at the same time[31]. The first issue raises fundamental questions about the operation of Ch III of the Constitution. It concerns the validity of the legislation permitting appointment of acting judges of the Supreme Court of New South Wales. It is with this issue that these reasons deal first.

Acting judges

50 The Honourable Michael Leader Foster was, from 1987 until his retirement on 26 November 1998, a judge of the Federal Court of Australia. By successive appointments, each made by commission under the public seal of the State, Mr Foster was appointed to act as a judge of the Supreme Court of New South Wales for terms of 12 months commencing on 31 May 1999, 2000, 2001 and 2002. Between March and May 2002, during the third of these periods of appointment, he tried proceedings brought in the Supreme Court of New South Wales by the Australian Securities and Investments Commission ("ASIC") against Mr Forge and others in which ASIC alleged the commission of contraventions of certain civil penalty provisions of corporations legislation. On 28 August 2002, during the fourth period of appointment, Foster AJ delivered judgment in those proceedings. Were the appointments of Foster AJ that were in force when these proceedings were heard and determined validly made?

51 It will be necessary, later, to identify the relevant civil penalty provisions more precisely when considering the second of the issues that arise in this Court but that is a task that need not be undertaken in considering the validity of the appointments of Foster AJ. For the moment, it suffices to recognise that the trial

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[30] Matter No C7 of 2005 is a proceeding instituted in the original jurisdiction of this Court against Australian Securities and Investments Commission, the State of New South Wales and the Commonwealth and in which the first and second defendants demurred to the whole of the plaintiffs' statement of claim. In Matter No C12 of 2005, part of a matter pending in the Supreme Court of New South Wales was removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth) and questions were reserved for the opinion of the Full Court.

[31] Against the orders of the Court of Appeal of the Supreme Court of New South Wales made on 7 December 2004 in *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574.

was an exercise of federal jurisdiction, the proceedings instituted by ASIC being proceedings brought by or on behalf of the Commonwealth[32].

52 Each appointment of Foster AJ was made in reliance upon the provisions of s 37 of the *Supreme Court Act* 1970 (NSW) which, in its terms, permits the appointment of a qualified person to act as a judge for a time not exceeding 12 months specified in the commission. Mr Foster was a "qualified person" because he had been a judge of the Federal Court of Australia[33]. Section 37 provides:

> "(1) The Governor may, by commission under the public seal of the State, appoint any qualified person to act as a Judge, or as a Judge and a Judge of Appeal, for a time not exceeding 12 months to be specified in such commission.
>
> (2) In subsection (1) ***qualified person*** means any of the following persons:
>
> (a) a person qualified for appointment as a Judge of the Supreme Court of New South Wales,
>
> (b) a person who is or has been a judge of the Federal Court of Australia,
>
> (c) a person who is or has been a judge of the Supreme Court of another State or Territory.
>
> (3) A person appointed under this section shall, for the time and subject to the conditions or limitations specified in the person's commission, have all the powers, authorities, privileges and immunities and fulfil all the duties of a Judge and (if appointed to act as such) a Judge of Appeal.
>
> (3A) The person so appointed may, despite the expiration of the period of the person's appointment, complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the person before the expiration of that period.
>
> (3B) The person so appointed is entitled to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act*

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[32] Constitution, s 75(iii); *Judiciary Act*, s 39(2); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

[33] *Supreme Court Act* 1970 (NSW), s 37(2)(b).

1975. The remuneration payable to an acting Judge is to be paid to the acting Judge so long as his or her commission continues in force.

(4) A retired Judge of the Court or of another court in New South Wales (including a retired judicial member of the Industrial Commission or of the Industrial Relations Commission) may be so appointed even though the retired Judge has reached the age of 72 years (or will have reached that age before the appointment expires), but may not be so appointed for any period that extends beyond the day on which he or she reaches the age of 75 years.

(4A) A person who is or has been a judge of the Federal Court of Australia or of the Supreme Court of another State or Territory may be so appointed even though that person has reached the age of 72 years (or will have reached that age before the appointment expires) but may not be so appointed for any period that extends beyond the day on which he or she reaches the age of 75 years.

(5) The conditions or limitations specified in a commission under this section may exclude the whole or any part of the period of appointment from being regarded as prior judicial service (within the meaning of section 8 of the *Judges' Pensions Act 1953*) by the person.

(6) The provisions of section 36(4) and (5) apply to an acting Judge who acts as a Judge of Appeal in the same way as they apply to a Judge who acts as an additional Judge of Appeal."[34]

53 The parties who contended that the appointments of Foster AJ, for the terms ending 30 May 2002 and 30 May 2003, were invalid (Mr Forge and others) alleged that s 37 is wholly invalid. Their basic proposition was that the Supreme Court of New South Wales "as an institution must be made up of full-time permanent judges with security of tenure". But, in the end, these parties did not appear to stake all upon acceptance of this basic proposition. Rather, recognising that both before and after federation, legislation establishing the Supreme Courts of all of the colonies, and later all of the States, made provision for appointment of acting judges[35], they accepted that some provision for acting appointments

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[34] Some questions about the construction and operation of sub-s (3A) were touched on in oral argument. Those questions need not be and are not addressed in these reasons.

[35] See, for example, as to New South Wales: *The Australian Courts Act* 1828 (Imp) (9 Geo 4 c 83), s 1; *Supreme Court and Circuit Courts Act* 1900 (NSW), ss 13-15.

might be constitutionally valid. They contended, however, that the power given by s 37 was not limited "as to numbers and the circumstances in which acting judges may be appointed". They then further contended that s 37 could not be read down because, so they submitted, no satisfactory criterion could be devised which would sufficiently confine exceptions to the basic proposition that the court must be made up of full-time permanent judges with security of tenure. In particular, the parties alleging invalidity contended that qualitative criteria governing the appointment of acting judges, like "in special circumstances", or "for temporary needs or purposes", should be rejected and could not be applied to read down s 37 and thus confine the power to appoint acting judges.

54 As will later be explained, none of the opposite parties, and none of the Attorneys-General who intervened (all of whom supported the validity of s 37 and the appointments of Foster AJ), contended that the power given by s 37 was unlimited. All accepted, correctly, that properly construed, the power to appoint acting judges under s 37 of the *Supreme Court Act* was not unlimited. The question in these matters, they submitted, is whether those limits were transgressed, and they contended that they were not.

55 The questions that arise in connection with this first issue are questions which touch upon fundamental aspects of the structure of government. They concern the way in which the Supreme Court of a State is constituted and therefore concern the structure of the judicial branch of government. As was pointed out in *D'Orta-Ekenaike v Victoria Legal Aid*[36]:

> "reference to the 'judicial branch of government' is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed."

See also *Supreme Court Act* 1890 (Vic), s 14; *Constitution Act* 1975 (Vic), s 81; *Supreme Court Act* 1855-56 (SA), s 5; *Supreme Court Act* 1935 (SA), s 11; *Supreme Court Act* 1867 (Q), s 33; *Supreme Court Act* 1892 (Q), s 12; *Supreme Court of Queensland Act* 1991 (Q), s 14; *Supreme Court Act* 1880 (WA), s 12 (permitting the appointment of Commissioners); *Supreme Court Act* 1935 (WA), s 11. As to Tasmania, *The Australian Courts Act* 1828 applied to Van Diemen's Land. (The *Supreme Court Act* 1887 (Tas) made no provision for appointment of acting judges.)

[36] (2005) 79 ALJR 755 at 761 [32] per Gleeson CJ, Gummow, Hayne and Heydon JJ; 214 ALR 92 at 99.

They are questions that will require examination of whether the institutional integrity of an essential element of the judicial branch of government has been compromised.

Chapter III

56 Although the issue concerns the constitution of a State Supreme Court it is necessary to begin the examination in the terms of the Commonwealth Constitution and Ch III in particular. The general considerations which inform Ch III of the Constitution were identified in *R v Kirby; Ex parte Boilermakers' Society of Australia*[37]. Central among those considerations is the role which the judicature must play in a federal form of government. The ultimate responsibility of deciding upon the limits of the respective powers of the integers of the federation must be the responsibility of the federal judicature. That is why, as was pointed out in *Boilermakers*[38], "[t]he demarcation of the powers of the [federal] judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become ... a consideration of equal importance to the States and the Commonwealth". But it also follows[39] that "[t]he organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained". It is these considerations that explain the provisions of Ch III of the Constitution. And it is these considerations that explain why it has been so long established by the decisions of this Court that it is beyond the competence of the federal Parliament to invest with any part of the judicial power of the Commonwealth any body or person, except a court created pursuant to s 71 of the Constitution and constituted in accordance with s 72, or another "court" brought into existence by a State or Territory that can be invested with federal jurisdiction.

57 Section 73 provides that this Court has jurisdiction "with such exceptions and subject to such regulations as the Parliament prescribes" to hear and determine appeals from all judgments, decrees, orders, and sentences "of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State". No exception or regulation prescribed by the Parliament may prevent this Court from hearing and determining any appeal from the Supreme Court of a State in any matter "in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in

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[37] (1956) 94 CLR 254 at 267-268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

[38] (1956) 94 CLR 254 at 268.

[39] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

Council". It is plain, then, as was recognised in *Kable v Director of Public Prosecutions (NSW)*[40], that Ch III not only assumes, it requires, that there will always be a court in each State which answers the constitutional description "the Supreme Court of [a] State". Chapter III also assumes, but it may not require, that there will, from time to time, be courts other than the Supreme Courts of the States, in which federal jurisdiction may be invested. Thus, s 77(iii) gives power to the Parliament to make laws with respect to any of the matters mentioned in s 75 or s 76 "investing any court of a State with federal jurisdiction". It is in reliance on that power that s 39(2) of the *Judiciary Act* 1903 (Cth) provides that:

> "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it ..."

58 What is meant in s 71 of the Constitution by "courts" in the expression "such other courts as it invests with federal jurisdiction"? What is meant in s 77(iii) by "court" in the expression "any court of a State"?

59 In *Kotsis v Kotsis*[41] and *Knight v Knight*[42], consideration was given to whether the reference in s 39(2) of the *Judiciary Act* to "Courts", and the reference to "court" in s 77(iii) of the Constitution, should be read as extending to permit the exercise of federal jurisdiction by an officer of a State court who was not a part of the court. In *Kotsis v Kotsis*, this Court held that the Supreme Court of New South Wales, as constituted by the then applicable State legislation[43], consisted of the judges of the Court and that it did not include other officers of the Court, even if those officers were authorised to exercise part of its jurisdiction by the relevant State laws. It followed, so the Court held, that the jurisdiction invested in the Supreme Court of New South Wales by s 39(2) of the *Judiciary Act* could be exercised only by the judges of the Court, not by a Deputy Registrar who was not identified, by the relevant State legislation, as part of the Court. *Knight v Knight* reached like conclusions with respect to a Master of the Supreme Court of South Australia.

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[40] (1996) 189 CLR 51.

[41] (1970) 122 CLR 69.

[42] (1971) 122 CLR 114.

[43] *Supreme Court and Circuit Courts Act* 1900 (NSW), *Matrimonial Causes Act* 1899 (NSW) and *Administration of Justice Act* 1968 (NSW).

60 *Kotsis v Kotsis* and *Knight v Knight* were overruled in *The Commonwealth v Hospital Contribution Fund*[44]. This Court held that "court of a State" in s 77(iii) of the Constitution and "Courts of the States" in s 39(2) of the *Judiciary Act* meant the relevant court "as an institution"[45], not the persons of which it is composed. Thus, regardless of whether a State court was constituted only by its judges, or was constituted by its judges and Masters, federal jurisdiction invested in the court could be exercised by a Master, Registrar or other officer of the court in whom the State legislation reposed the task, at least where the exercise of the jurisdiction by such a person remained subject to the supervision of the judges of the court on review or appeal[46].

61 In this, and in other related respects, reference is often made to the aphorism that when the federal Parliament makes a law investing federal jurisdiction in a State court, the Parliament "must take the State court as it finds it". This proposition, most often associated with *Le Mesurier v Connor*[47], but originating in the reasons of Griffith CJ in *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander*[48], should not be misunderstood. The provisions of Ch III do not give power to the federal Parliament to affect or alter the constitution or organisation of State courts[49]. It may be accepted that the constitution and organisation of State courts is a matter for State legislatures. In that sense, the federal Parliament having no power to alter either the constitution or the organisation of a State court, the federal Parliament must take a State court "as it finds it". It does not follow, however, that the description which State legislation may give to a particular body concludes the separate constitutional question of whether that body is a "court" in which federal jurisdiction may be invested. It is only in a "court", as

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44 (1982) 150 CLR 49.

45 (1982) 150 CLR 49 at 58 per Gibbs CJ, 59 per Stephen J, 64 per Mason J, 66 per Aickin J, 71 per Wilson J.

46 *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 64 per Mason J.

47 (1929) 42 CLR 481 at 495-496 per Knox CJ, Rich and Dixon JJ.

48 (1912) 15 CLR 308 at 313.

49 *Le Mesurier v Connor* (1929) 42 CLR 481 at 496, 498; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37; *Russell v Russell* (1976) 134 CLR 495 at 516, 530, 535, 554; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 74 per Brennan J.

that word is to be understood in the Constitution, that federal jurisdiction may be invested.

62 Recognising that to be so reveals an important boundary to the power given to the Parliament by s 77(iii). The Parliament may not make a law investing federal jurisdiction in a body that is not a federal court created by the Parliament or that is not a "court" of a State or Territory. But there is another and different proposition that is to be drawn from Ch III which has significance for State legislation concerning State Supreme Courts.

63 Because Ch III requires that there be a body fitting the description "the Supreme Court of a State", it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. One operation of that limitation on State legislative power was identified in *Kable*. The legislation under consideration in *Kable* was found to be repugnant to, or incompatible with, "that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system"[50]. The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislation required the Court to perform. At the risk of undue abbreviation, and consequent inaccuracy, the task given to the Supreme Court was identified as a task where the Court acted as an instrument of the Executive[51]. The consequence was that the Court, if required to perform the task, would not be an appropriate recipient of invested federal jurisdiction. But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)*[52] and *North Australian Aboriginal Legal Aid Service Inc v Bradley*[53], the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

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[50] *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1539 [101] per Gummow J; 210 ALR 50 at 78.

[51] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 124 per McHugh J, 134 per Gummow J.

[52] (2004) 78 ALJR 1519; 210 ALR 50.

[53] (2004) 218 CLR 146 at 164 [32].

64 It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal[54].

65 It by no means follows, however, that the only means of securing an independent and impartial Supreme Court is to require that the court is made up of none other than full-time permanent judges with security of tenure. This proposition, cast in absolute and universal terms, is not fundamentally different from a proposition that a State Supreme Court must be constituted by judges who have the same security of tenure as s 72 of the Constitution provides in respect of the Justices of this Court and of the other courts created by the Parliament. Yet Ch III makes no explicit reference to the appointment, tenure or remuneration of judges of State courts. Rather, s 71 refers to "such other courts as it [the Parliament] invests with federal jurisdiction", s 77(iii) speaks of "investing any court of a State with federal jurisdiction", and s 73 makes a number of references to the "Supreme Court" of a State. Questions of appointment, tenure and remuneration of judges of State courts are dealt with in Ch III only to whatever extent those subjects are affected by the identification of the repositories of invested federal jurisdiction as "any court of a State" and the identification of a court from whose judgments, decrees, orders and sentences an appeal may lie to this Court as "the Supreme Court of [a] State".

66 As explained in *Ebner v Official Trustee in Bankruptcy*[55], effect has been given to the fundamental importance which is attached to the principle that a court must be independent and impartial by the development and application of the apprehension of bias principle. Even the *appearance* of departure from the principle that the tribunal must be independent and impartial is prohibited lest the integrity of the judicial system be undermined. As further explained in *Ebner*[56], the apprehension of bias principle admits of the possibility of human frailty and its application is as diverse as human frailty. Thus when reference is made to the

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[54] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[55] (2000) 205 CLR 337 at 345 [7]-[8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[56] (2000) 205 CLR 337 at 345 [7]-[8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

institutional "integrity" of a court, the allusion is to what *The Oxford English Dictionary* describes[57] as "[t]he condition of not being marred or violated; unimpaired or uncorrupted condition; original perfect state; soundness". Its antithesis is found in exposure, or the appearance of exposure, to human frailties of the kinds to which reference was made in *Ebner*.

67 In applying the apprehension of bias principle to a particular case, the question that must be asked is whether a judicial officer *might* not bring an impartial mind to the resolution of a question in that case. And that requires no prediction about how the judge will in fact approach the matter. Similarly, if the question is considered in hindsight, the test is one which requires no conclusion about what factors actually influenced the outcome which was reached in the case. No attempt need be made to inquire into the actual thought processes of the judge; the question is whether the judge might not (as a real and not remote possibility rather than as a probability) bring an impartial mind to the resolution of the relevant question.

68 The apprehension of bias principle has its application in particular cases. No unthinking translation can be made from the detailed operation of the apprehension of bias principle in particular cases to the separate and distinct question about the institutional integrity of a court. But the apprehension of bias principle is one which reveals the centrality of considerations of both the fact and the appearance of independence and impartiality in identifying whether particular legislative steps distort the character of the court concerned.

69 As noted at the outset of these reasons, the immediate issue is the validity of the appointments of Foster AJ. That depends upon whether s 37 of the *Supreme Court Act* was validly engaged and it is necessary first to construe s 37.

The construction of s 37

70 The better construction of the *Supreme Court Act* is that it distinguishes between appointment *as* a judge (or Chief Justice) or *as* a judge of appeal (or President), and appointment to *act* as a judge, or judge of appeal, for a term not to exceed 12 months. Appointment *as* a judge (or Chief Justice)[58], or *as* a judge of appeal (or President)[59], is appointment to an office which, subject to removal on an address of both Houses of the State Parliament[60], is terminated only upon

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[57] *The Oxford English Dictionary*, 2nd ed (1989), vol 7 at 1066.

[58] Pursuant to s 26.

[59] Pursuant to s 31.

attainment of the retirement age of 72 years, sooner resignation by the office holder, or death. The appointee's remuneration may not be reduced during office[61].

71 By contrast, s 37 of the *Supreme Court Act* provides for short-term appointments to *act* as a judge: the term may not exceed 12 months. During that term the appointee may not be removed from office, save on an address of both Houses of the State Parliament[62], and the appointee's remuneration may not be reduced[63]. There is, however, a real and radical difference between an appointment to act as a judge for a term not longer than 12 months, and an appointment, as a judge, until a statutorily determined age of retirement (in this case 72 years of age[64]). Of course, the older the person appointed as judge at the time of appointment, the less the difference may appear to matter. But even if it is assumed, contrary to experience, that a person might be appointed a judge when that person has less than 12 months before attaining the age of retirement, the person so appointed as judge is not eligible for reappointment to that office after the appointment expires by effluxion of time. By contrast, a person appointed under s 37 to *act* as a judge, if aged less than 72, is eligible for permanent appointment *as* a judge and, if aged less than 75, is eligible for reappointment as an acting judge. The outer limit to reappointment as an acting judge is that the appointee's term may not extend beyond the day that person turns 75 years of age[65]. It is the possibility of permanent appointment, and the possibility of reappointment as an acting judge, which marks the two cases of appointment *as* a judge and appointment to *act* as a judge as radically different.

72 Given that it distinguishes between acting and permanent appointments in the way described, the *Supreme Court Act* would not easily be read as permitting the appointment of so few persons *as* judges, and so many to *act* as judges, as would permit the conclusion that the court was predominantly, or chiefly, composed of acting judges. On the proper construction of the Act the power to appoint acting judges under s 37 would not extend to authorising the making of so many appointments. And none of New South Wales, ASIC, the

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[60] *Constitution Act* 1902 (NSW), s 53.

[61] *Supreme Court Act*, s 29(2).

[62] *Constitution Act* 1902, s 53(5); *Judicial Officers Act* 1986 (NSW), s 41.

[63] *Supreme Court Act*, s 37(3B).

[64] *Judicial Officers Act*, s 44(1).

[65] *Supreme Court Act*, s 37(4) and (4A).

Commonwealth or the interveners submitted that the *Supreme Court Act* should be read as permitting such an exercise of the power under s 37 to appoint acting judges. All accepted that the power to appoint acting judges was limited at least to this extent. Some contended that this was a conclusion that followed from the words of the Act; some accepted that constitutional considerations reinforced or required that conclusion.

73 No matter whether the conclusion, that s 37 does not give unlimited power to make acting appointments, is seen as following from the words of the Act, or as reinforced or required by constitutional considerations, it is a conclusion that proceeds from an unstated premise about what constitutes a "court". Thus, the conclusion may proceed from a premise that a court, or at least the Supreme Court, of a State must *principally* be constituted by permanent judges (who have tenure of the kind for which the *Act of Settlement*[66] provided: appointment during good behaviour for life, or, now, until a set retirement age, with no diminution of remuneration during tenure). Or the conclusion may proceed from a premise that is stated at a higher level of abstraction: that the courts, and in particular the Supreme Court, of a State must be institutionally independent and impartial. The first statement of the premise may be seen as focusing upon quantitative considerations. On what terms are *most* of the judges appointed? The second statement of the premise may be seen as pointing to qualitative rather than quantitative considerations. But both statements of the relevant premise rest ultimately upon considerations of the fact and appearance of institutional independence and impartiality.

74 The former statement focuses upon institutional independence and impartiality by emphasising the particular steps taken in the *Act of Settlement* to ensure judicial independence from the Executive: steps replicated in legislation establishing all the Supreme Courts of the colonies and the States. But *Act of Settlement* terms regulating tenure and security of remuneration are not the only statutory and other principles which support judicial independence and impartiality. Reference has already been made to the apprehension of bias principle – a principle of great importance in reinforcing the impartiality of the courts. And judicial independence refers not only to independence from the Executive, it refers to independence from other sources of influence.

75 Thus a comprehensive statement of principles supporting judicial independence would have to take account of the principles governing the immunity of judges from suit for judicial acts[67]. While it is not necessary to

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[66] 12 & 13 Wm III c 2.

[67] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 762-763 [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ; 214 ALR 92 at 101-102;

consider the detail of those rules, it will be recalled that different rules developed in respect of courts of record from those applying to inferior courts and that the development of the law relating to judicial immunity was bound up with the law relating to excess of jurisdiction and when a judicial decision was open to collateral attack[68]. That a judge is immune from suit serves a number of purposes, not least the need for finality of judicial decisions. But it is also a principle which forecloses the assertion that the prospect of suit may have had some conscious or unconscious effect on the decision-making process or its outcome.

76 Further, if attempting to state comprehensively the measures that have been taken to support judicial independence, it would be necessary to take account of not only the arrangements for remuneration of judges while in office but also the provision made for payment of pensions on retirement. The "remuneration", which s 72(iii) of the Constitution states shall not be diminished during continuance in office, includes non-contributory pension plan entitlements which accrue under the federal judicial pensions statute[69].

77 Provision is made for judicial pensions for a number of reasons. One not insignificant reason is to reduce, if not eliminate, the financial incentive for a judge to seek to establish some new career after retirement from office. As was pointed out in argument, it may otherwise be possible to construe what a judge does while in office as being affected by later employment prospects.

78 No doubt the provisions that have been made to govern the security of both the tenure and the remuneration of judges are important in securing judicial independence and impartiality. But those provisions take their place in a much wider setting of principles that have been established or enacted and which also contribute to the maintenance of both the fact and the appearance of judicial independence and impartiality. For these reasons it is more useful to identify the premise that lies behind the contention that s 37 does not give an unlimited power to appoint acting judges as the more abstract premise described earlier: that the courts, and in particular the Supreme Court, of a State must be, and be seen to be, institutionally independent and impartial. Indeed, this statement of

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Holdsworth, "Immunity for Judicial Acts", (1924) *Journal of the Society of Public Teachers of Law* 17; Holdsworth, *A History of English Law*, (1924), vol 6 at 234-240.

[68] See, for example, *Rajski v Powell* (1987) 11 NSWLR 522.

[69] *Austin v The Commonwealth* (2003) 215 CLR 185 at 235 [72], 261 [155] per Gaudron, Gummow and Hayne JJ, 303 [288] per Kirby J.

the relevant premise is no more than the particular application of a more general premise identified in *Bradley*[70]: "that a court capable of exercising the judicial power of the Commonwealth [must] be and appear to be an independent and impartial tribunal". It follows that, although these reasons are principally directed to the position of the Supreme Courts of the States, the conclusions reached about those courts would apply equally to the Supreme Courts of the Territories.

79 The last matter that should be mentioned in connection with identifying the premise that lies behind the conclusion that s 37 does not give an unlimited power to make acting appointments is that to allow *any* valid operation for s 37 denies the central tenet of the arguments advanced by those contending the provision is invalid. Those parties contended that the Supreme Court of New South Wales "as an institution must be made up of full-time permanent judges with security of tenure".

80 Both those asserting invalidity and those supporting validity referred to various overseas sources in aid of their argument. In the end, however, overseas analogies provide little sure guidance to the resolution of the issues that must now be considered and such references may even be apt to mislead. First, they may serve to obscure the particular historical and governmental setting in which the issues that now arise in this Court must be decided. Secondly, they are, in many cases, the product of interpreting and applying the text of particular constitutional, legislative, or international instruments. To take only two of the several examples given in argument, the recorder system in England and Wales cannot be understood without paying adequate attention to the historical distinctions between the Royal Courts and the Quarter Sessions and other inferior courts in which, before the *Courts Act* 1971 (UK), recorders sat. Nor can the several decisions made about the validity of appointment of temporary or part-time judicial officers in the Scottish judicial system be understood except as an application of the relevant European principles. The most that can be derived from overseas decisions is that impartiality and integrity are generally seen as essential characteristics of a court. Rather than examining those overseas decisions in detail, attention must be focused upon the consequences of the constitutional recognition in, and requirement of, Ch III, that there is and remain in each State the Supreme Court of that State.

81 It is convenient to deal now with three points that emerged at various times in the course of argument: first, a point about the position of courts of summary jurisdiction and the investing of federal jurisdiction in those courts; second, a point about the numbers of acting appointments made; and third, a

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[70] (2004) 218 CLR 146 at 163 [29].

point about the qualifications for appointment as an acting judge. Each was said to bear upon whether any exception should be admitted to the proposition that the judges of the Supreme Court of a State must all be full-time permanent appointees with security of tenure. Each was said to bear upon the ambit of any exception to that rule.

Courts of summary jurisdiction

82 Both before and long after federation, courts of summary jurisdiction have been constituted by Justices of the Peace or by stipendiary magistrates who formed part of the colonial or State public services. As public servants, each was generally subject to disciplinary and like procedures applying to all public servants. Thus, neither before nor after federation have all State courts been constituted by judicial officers having the protections of judicial independence afforded by provisions rooted in the *Act of Settlement* and having as their chief characteristics appointment during good behaviour and protection from diminution in remuneration. That being so, if the courts of the States that were, at federation, considered fit receptacles for the investing of federal jurisdiction included courts constituted by public servants, why may not the Supreme Court of a State be constituted by an acting judge?

83 The question just posed assumes that all courts in a hierarchy of courts must be constituted alike. In particular, it assumes that inferior State courts, particularly the courts of summary jurisdiction, subject to the general supervision of the Supreme Court of the State, through the grant of relief in the nature of prerogative writs and, at least to some extent, the process of appeal, must be constituted in the same way as the Supreme Court of that State. Yet it is only in relatively recent times that the terms of appointment of judicial officers in inferior courts have come to resemble those governing the appointment of judges of Supreme Courts.

84 History reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court. The development of different rules for courts of record from those applying to inferior courts in respect of judicial immunity and in respect of collateral attack upon judicial decisions shows this to be so. The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases. But by contrast, the independence and impartiality of a State Supreme Court cannot be, or at least cannot so readily be, achieved or enforced in that way. Rather, the chief institutional mechanism for achieving those ends, in the case of the Supreme

Courts, has been the application of *Act of Settlement* terms of appointment to the Court's judges coupled with rules like the rules about judicial immunity mentioned earlier in these reasons.

85 That different mechanisms for ensuring independence and impartiality are engaged in respect of inferior courts from those that are engaged in respect of State Supreme Courts is, no doubt, a product of history: not least the historical fact that the inferior courts of England were often constituted by persons who were not lawyers or, if legally trained, held no permanent full-time appointment to office. But the differences that may be observed as a matter of history between, on the one hand, the inferior courts in Australia and their English forbears and, on the other, the colonial, and later State, Supreme Courts, do not deny the central importance of the characteristics of real and perceived independence and impartiality in defining what is a "court" within the meaning of the relevant provisions of Ch III. The observed differences do no more than deny that *Act of Settlement* terms of appointment are defining characteristics of *every* "court" encompassed by the expression, in s 77(iii), "any court of a State". But the existence of these observed differences does not necessarily mean that particular mechanisms for ensuring the independence and impartiality of State Supreme Courts may not be defining characteristics of those, constitutionally recognised and required, bodies. In examining what are *those* defining characteristics, it is necessary to consider whether *Act of Settlement* terms of appointment for *all* judges constituting a State Supreme Court are essential to the institutional integrity of those courts.

Numbers of acting appointments

86 Although those asserting the invalidity of s 37 denied that there could *ever* validly be an acting appointment, much emphasis was given in their oral arguments to the number of persons who had been appointed as acting judges of the Supreme Court of New South Wales between 2001 and 2004. Some of those persons were appointed for less than 12 months; some, like Foster AJ, were appointed for successive terms of 12 months. At 31 December of each of the years 2001 to 2004, at least five persons held a commission to act as a judge and at least a further three held a commission to act as a judge of appeal. But it is by no means clear what significance those asserting invalidity sought to attach to this information. As noted earlier, the position adopted by those asserting invalidity was that s 37 was wholly invalid and that, accordingly, no acting appointment could be made. The most that can be gleaned from the information about the numbers appointed pursuant to the power given by s 37 is that it appears to have been used in such a way that during the years 2001 to 2004 there were always some acting judges. What does not appear, however, is how often those persons sat as judges or why it may have been thought necessary or desirable to appoint them to act. And unless some quantitative criterion is

adopted as the limit on the power given by s 37, the number appointed, standing alone, is of little relevance to the problem that now arises, it *not* being contended that the Court was predominantly or chiefly constituted by acting judges. Rather, all that seemed to be drawn from the number of acting judges who had been appointed was that that number was not insignificant when compared with the number of permanent appointees.

87 No quantitative criterion should be adopted as limiting the exercise of power under s 37. Any such criterion would inevitably be arbitrary in its content and application. To explain why that is so, it is as well to notice some matters of history.

88 For many years it was common for colonial, and later State, legislatures to provide for the number of judges that constituted the Supreme Court of the colony or State concerned. There was no obligation to appoint persons to every office thus created. The statutorily identified number of judges fixed the maximum number that might be appointed. Often, legislation provided for the appointment of a person to act in stead of a judge who was absent on leave, or whether in consequence of sickness or some other reason was temporarily unable to perform the duties of office[71]. The application of provisions of that kind was, then, limited by the number of permanent office holders and by the occasion for making an acting appointment. But some Australian colonial and State legislation also provided for the appointment of acting judges in addition to the permanent office holders who constituted the court. Early examples of that are to be found in the *District Courts Act* 1858 (NSW)[72] and the *Judicial Offices Act* 1892 (NSW)[73]. The application of those provisions was not explicitly limited numerically and the occasion for exercising the power to make an acting appointment was often stated in very general terms. Now it is uncommon for State legislation to fix the number of judges who may be appointed to a Supreme Court. Now the legislation permitting appointment of acting judges is not ordinarily hinged upon absence or incapacity of a serving judge. The *Supreme Court Act* does not fix the number of judges who may be appointed to the Supreme Court of New South Wales. Section 37 is not hinged upon absence or incapacity of a serving judge.

89 In a large court like the Supreme Court of New South Wales the temporary absence of one judge may have less effect on the work of the court as

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[71] See, for example, *Supreme Court Act* 1958 (Vic), s 11.

[72] s 26.

[73] s 3.

a whole than the temporary absence of a judge in a smaller court. But both at federation and today, the State Supreme Courts include courts whose membership is not numerous. To hold that no acting judge may be appointed to any State Supreme Court may therefore have large consequences for the work of those smaller courts. Those consequences would be felt not only if, as the Attorney-General for Tasmania submitted, the members of the court were afflicted by some pandemic illness or other disaster, but also if a case were to come before the court in which all or most of the judges were embarrassed.

90 If it is accepted that some acting appointments may lawfully be made under s 37, a quantitative criterion for marking the boundary of permissible appointments would treat the circumstances seen by the appointing authority as warranting the appointment of an acting judge as wholly irrelevant to the inquiry about validity. It would assume that the external observer considering the independence and impartiality of the court as a whole should, or would, ignore why it had been thought necessary to appoint those who had been appointed to act as judges. Thus the necessity presented by sickness, absence for other sufficient cause, or the embarrassment of a judge or judges in one or more particular cases would be treated as irrelevant; all that would matter is how many have been appointed. And that, in turn, presents the question: how would the particular number or proportion of acting judges that would compromise the institutional integrity of the court be fixed? That is a question to which none but an arbitrary answer can be given. Rather than pursue the illusion that some numerical boundary can be set, it is more profitable to give due attention to the considerations that would have to inform any attempt to fix such a boundary: the fact and appearance of judicial independence and impartiality.

"Qualified" persons

91 As noted earlier, s 37 of the *Supreme Court Act* permits appointment of "any qualified person" to act as a judge. Qualified persons extend beyond those who are or have been a judge of the Federal Court of Australia or a judge of the Supreme Court of another State or Territory[74], they extend to any "person qualified for appointment as a Judge of the Supreme Court of New South Wales"[75]. Persons qualified for appointment as a judge of the court are now those who hold or have held "a judicial office" of New South Wales, the Commonwealth, or another State or a Territory[76], and legal practitioners of at

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[74] s 37(2)(b) and (c).

[75] s 37(2)(a).

[76] s 26(2)(a).

least seven years' standing[77]. (Reference to the holding of "a judicial office" was added in 2002 by the *Courts Legislation Amendment Act* 2002 (NSW).)

92 Different considerations affect these different classes of qualified persons. The prospect of appointment as a permanent judge, or reappointment as an acting judge, will most likely bear differently upon those who, at the time of appointment as an acting judge, are judges of the Federal Court or the Supreme Court of another State or Territory from the way in which they bear upon retired judges, judges of other, inferior, courts, or legal practitioners in active practice. The person in active practice may be thought by some to be concerned about prospects of future permanent appointment, or about the effect of what is done while an acting judge upon resumption of practice at the end of the period of appointment. The person who holds some other judicial office may be thought to be concerned about prospects of promotion to the Supreme Court. The retired judge may be thought to be concerned about the prospect of being able to continue to act as a judge beyond retirement and beyond the statutory retiring age with its consequences for continued professional engagement and enjoyment of a larger income. Is the availability of such arguments to be left for consideration under the principle of apprehended bias or are they considerations that bear upon the institutional integrity of the court?

93 Satisfaction of the constitutional description "Supreme Court of [a] State" is not sufficiently met by application of the apprehension of bias principle in particular cases. *Kable* demonstrates that the institutional integrity of the court must be preserved and that the preservation of that institutional integrity operates as a limit upon State legislative power. The institutional integrity of State Supreme Courts is not inevitably compromised by the appointment of an acting judge. But the institutional integrity of the body may be distorted by such appointments if the informed observer may reasonably conclude that the institution no longer is, and no longer appears to be, independent and impartial as, for example, would be the case if a significant element of its membership stood to gain or lose from the way in which the duties of office were executed.

94 There are circumstances, perhaps many circumstances, in which appointing a serving judge of the Supreme Court of one State to act as a judge of the Supreme Court of another State for a limited time (as, for example, to hear a matter in which the permanent judges of the court would be embarrassed) could, of itself, have no adverse effect on the institutional integrity of the court. It could have no adverse effect on the institutional integrity of the court because the person appointed in the circumstances described would have nothing to gain and nothing to fear. Prospects of permanent appointment or reappointment as an

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[77] s 26(2)(b).

acting judge would be irrelevant. As a serving judge of another court, the appointee would return to the duties of that office when the task in hand had been performed.

95 Once that possibility (of validly appointing a serving judge of another Supreme Court as an acting judge) is admitted, the absolute proposition advanced by those alleging invalidity is denied.

96 The appointment of a retired judge of the Federal Court or an interstate Supreme Court in the particular circumstances just described could likewise have no adverse effect on the institutional integrity of the court. It could have no adverse effect because, again, the appointment being made in the unusual circumstances of all (or most) permanent judges being embarrassed, and limited to the hearing of one case, the person appointed would have nothing to gain and nothing to fear from the performance of the task confided in that person. Because the circumstances of appointment are unusual and the appointment is limited, there is no immediate prospect of reappointment.

97 As noted earlier, however, the appointment of a legal practitioner to act as a judge for a temporary period, in the expectation that that person would, at the end of appointment, return to active practice, may well present more substantial issues. The difficulty of those issues would be intensified if it were to appear that the use of such persons as acting judges were to become so frequent and pervasive that, as a matter of substance, the court as an institution could no longer be said to be composed of full-time judges having security of tenure until a fixed retirement age. As was said in *Bradley*[78], there may come a point where the series of acting rather than full appointments is so extensive as to distort the character of the court.

98 It is necessary to explain how and why that may be so, if only for the purpose of drawing contrasts with the examples, earlier given, of the appointment of serving or retired judges as acting judges. The practitioner appointed to act as a judge for a temporary period, in the expectation that that person will return to active practice, may be portrayed as standing to gain the advantage of full-time appointment or to suffer detriment if, in the course of performing the duties of office, adverse decisions were made in matters in which those to whom that person would look for work on resumption of practice were engaged. The first of these possibilities is frankly acknowledged when it is said that appointment as an acting judge may allow the assessment of the appointee's "suitability" or "aptitude" for judicial work. And the second set of considerations is no less real

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[78] (2004) 218 CLR 146 at 164 [32].

if it is said that appointment as an acting judge may allow the appointee to decide if he or she enjoys judicial work.

99 That is not to say that the importance of these considerations may not be reduced if account is taken of the reasons that lead to the making of an acting appointment. The greater the necessity for the appointment, the less influential on perceptions of impartiality and integrity may be the considerations of the possible frailties of the person or persons appointed. That is, the institutional integrity of the court is less likely to be damaged by response to pressing necessity than it is by the change of character that may be worked by a succession of short-term appointments for no apparent reason other than avoiding the costs associated with making full-time appointments or, perhaps worse, a desire to assess the "suitability" of a range of possible appointees.

100 As is implicit in what is just said, "pressing necessity" refers to some necessity arising from the work of the court, not simply a desire, by the Executive, to avoid the costs of making full-time appointments. In particular, the proposition that a sudden increase in the work of a court may turn out to be "of a temporary nature only"[79] will seldom amount to such a pressing necessity. It is an assertion which serves only to obscure first, the fact that "[j]udicial power is exercised as an element of the government of society"[80] and secondly, and no less importantly, that "the third great department of government"[81] cannot discharge its functions without adequate financial support from the other two departments.

101 Whether, or when, the institutional integrity of the court is affected depends, then, upon consideration of much more than the bare question: how many acting judges have been appointed? Regard must be paid to who has been appointed, for how long, to do what, and, no less importantly, why it has been thought necessary to make the acting appointments that have been made. Those alleging invalidity in the present matter did not seek to make a case founded in any examination of the circumstances that led either to the successive appointments of Foster AJ, or any of the other appointments made at or about the time of his appointments. To the extent that those alleging invalidity sought to make any case separate from and additional to their basic proposition that s 37 is

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[79] cf *Kearney v HM Advocate* 2006 SC (PC) 1 at 11 [30].

[80] *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 761 [32] per Gleeson CJ, Gummow, Hayne and Heydon JJ; 214 ALR 92 at 99.

[81] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 719; *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 761 [33] per Gleeson CJ, Gummow, Hayne and Heydon JJ; 214 ALR 92 at 99-100.

wholly invalid, they did no more than point to the numbers of appointees. For the reasons that have been given, s 37 is not to be read down by reference to some numerical criterion.

102 Section 37 of the *Supreme Court Act* is not invalid. It is not demonstrated that s 37 was not validly engaged to appoint Foster AJ as an acting judge of the Supreme Court of New South Wales. The first issue tendered for decision in these matters and in the application for special leave should be resolved against those alleging invalidity.

Corporations Act 2001 (Cth) – Ch 10

103 The second issue that arises concerns the construction and validity of the transitional provisions of Ch 10 of the *Corporations Act* 2001 (Cth). That is the second question reserved for the consideration of the Full Court in that part of the matter pending in the Supreme Court of New South Wales removed into this Court. It is the second question that arises in consequence of the demurrers to the statement of claim in the proceedings instituted by Mr Forge and others in the original jurisdiction of the Court. It is the second issue that arises in the application for special leave to appeal.

104 As noted at the outset of these reasons, ASIC brought proceedings in the Supreme Court of New South Wales against Mr Forge and others alleging contravention of certain civil penalty provisions of corporations legislation. The conduct alleged to constitute the relevant contraventions occurred in April 1998. At that time the applicable corporations legislation was the Corporations Law of New South Wales. That law, the text of which was set out in s 82 of the *Corporations Act* 1989 (Cth), as in force for the time being, was applied in New South Wales by s 7 of the *Corporations (New South Wales) Act* 1990 (NSW).

105 In April 1998, s 232 of the Corporations Law of New South Wales provided for the duties and liabilities of officers of corporations. Some of the provisions of s 232 were identified as civil penalty provisions, a term defined then by s 1317DA of the Corporations Law, with the effect that the then provisions of Pt 9.4B of the Law (ss 1317DA to 1317JC) provided for the civil and criminal consequences of contravening any of them or of being involved in the contravention of any of them[82]. Section 1317EA empowered the court (in this case, the Supreme Court of New South Wales) to make civil penalty orders if satisfied that the person had contravened a civil penalty provision.

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[82] Corporations Law of New South Wales, s 232(6B).

106 In April 1998, s 243ZE of the Corporations Law of New South Wales made provisions for the consequences of a public company, or a "child entity"[83] of a public company, giving a financial benefit to a related party of that public company. Section 243ZE(5) provided that certain provisions of the section were civil penalty provisions, as defined by s 1317DA, so that Pt 9.4B of the Corporations Law provided for civil and criminal consequences of contravening or of being involved in the contravention of either of them.

107 On 13 March 2000, the *Corporate Law Economic Reform Program Act* 1999 (Cth) (usually referred to as "CLERP") came into force. CLERP amended the *Corporations Act* 1989 (Cth) and, by operation of s 7 of the *Corporations (New South Wales) Act* 1990 (NSW), the amendments made to the *Corporations Act* 1989 (Cth) operated as amendments of the Corporations Law of New South Wales. The changes made by CLERP included changes to the provisions governing the civil and criminal consequences of contravening civil penalty provisions but also included new provisions about the duties of directors and other officers, and about related party transactions. The old provisions concerning the duties of directors and other officers, concerning related party transactions and regulating the civil and criminal consequences of contravening civil penalty provisions were repealed.

108 CLERP inserted s 1473 into the law set out in s 82 of the *Corporations Act* 1989 (Cth), and thus, effectively, into the Corporations Law of New South Wales. Section 1473 provided:

> "(1) Part 9.4B of the old Law continues to apply in relation to:
>
> (a) a contravention of a civil penalty provision listed in section 1317DA of the old Law; or
>
> (b) an offence committed against one of those civil penalty provisions;
>
> despite its repeal.
>
> (2) Part 9.4B of the new Law applies in relation to a contravention of a civil penalty provision listed in section 1317E of the new law."

109 On 26 April 2001, ASIC commenced proceedings against Mr Forge and others in the Supreme Court of New South Wales alleging contraventions of ss 232 and 243ZE of the Corporations Law of New South Wales as that Law was in force in April 1998. As is apparent from what has been said earlier, these

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[83] Defined in Corporations Law of New South Wales, s 243D(2).

proceedings relied upon s 1473 of the Corporations Law operating upon what by then were the repealed sections of the Corporations Law regulating civil penalty proceedings in respect of those contraventions. As noted earlier, the State Corporations Law picked up and applied the *Corporations Act* 1989 (Cth) as it stood from time to time. The relevant federal Act, CLERP, on its true construction in the light of s 8 of the *Acts Interpretation Act* 1901 (Cth) did not, by repealing the earlier provisions, affect the continued operation of the provisions so repealed in respect of either the contraventions, or the legal proceedings brought for contravention.

110 The next legislative event of present significance was the enactment of the *Corporations (Commonwealth Powers) Act* 2001 (NSW) by which certain matters relating to corporations and financial products and services were referred to the Parliament of the Commonwealth for the purposes of s 51(xxxvii) of the Constitution. The matters referred were[84] the matters to which "the referred provisions" (being the tabled text of the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001) related, but only to the extent of the making of laws with respect to those matters by including the referred provisions in Acts enacted in the terms, or substantially in the terms, of that identified text. In consequence of that reference, and equivalent references made by other States, the *Corporations Act* 2001 (Cth) was enacted and came into force on 15 July 2001.

111 The central contention of Mr Forge and others was that although the necessary legislative chain permitting the institution of proceedings alleging contravention remained intact until 14 July 2001, the coming into force of the *Corporations Act* 2001 (Cth) broke that chain. The consequence, so they asserted, was that there was no matter before the Supreme Court of New South Wales.

112 To examine whether that is so, it is necessary to understand the position as it stood immediately before the coming into force of the *Corporations Act* 2001 (Cth). At that time, the rights and liabilities of the parties were governed relevantly by s 1317EA of the Corporations Law of New South Wales (repealed but continued in force by s 1473 of the Corporations Law of New South Wales) operating upon ss 232 and 243ZE of that Law which, despite their repeal, were still validly the subject of proceedings founded upon their application at the time of commission of the relevant conduct. The proceedings which had been instituted in the Supreme Court of New South Wales by ASIC were proceedings in federal jurisdiction. The Commonwealth or a person suing on behalf of the Commonwealth (ASIC) was a party. The jurisdiction was that conferred under

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[84] *Corporations (Commonwealth Powers) Act* 2001 (NSW), s 4(1).

s 77(iii) of the Constitution by s 39(2) of the *Judiciary Act* read with s 42(1) of the *Corporations (New South Wales) Act* 1990 (NSW) (which conferred jurisdiction on the Supreme Court in civil matters arising under the Corporations Law). The power given by s 1317EA of the Corporations Law of New South Wales to grant remedies was picked up and applied in federal jurisdiction by s 79 of the *Judiciary Act*[85].

113 Section 1401 of the *Corporations Act* 2001 (Cth) was evidently intended to deal with questions of transition from the old co-operative scheme laws to the new Commonwealth corporations legislation. Its provisions, though elaborate, must be set out in full.

> "(1) This section applies in relation to a right or liability (the ***pre-commencement right or liability***), whether civil or criminal, that:
>
> (a) was acquired, accrued or incurred under a provision of the old corporations legislation of a State or Territory in this jurisdiction that was no longer in force immediately before the commencement; and
>
> (b) was in existence immediately before the commencement.
>
> However, this section does not apply to a right or liability under an order made by a court before the commencement.
>
> (2) For the purposes of subsections (3) and (4), the new corporations legislation is taken to include:
>
> (a) the provision of the old corporations legislation (with such modifications (if any) as are necessary) under which the pre-commencement right or liability was acquired, accrued or incurred; and
>
> (b) the other provisions of the old corporations legislation (with such modifications (if any) as are necessary) that applied in relation to the pre-commencement right or liability.
>
> (3) On the commencement, the person acquires, accrues or incurs a right or liability (the ***substituted right or liability***), equivalent to the pre-commencement right or liability, under the provision taken to

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[85] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

be included in the new corporations legislation by paragraph (2)(a) (as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

Note: If a time limit applied in relation to the pre-commencement right or liability under the old corporations legislation, that same time limit (calculated from the same starting point) will apply under the new corporations legislation to the substituted right or liability—see subsection 1402(3).

(4) A procedure, proceeding or remedy in respect of the substituted right or liability may be instituted after the commencement under the provisions taken to be included in the new corporations legislation by subsection (2) (as if those provisions applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

Note: For pre-commencement proceedings in respect of substituted rights and liabilities, see sections 1383 and 1384."

114 ASIC rightly submitted that the effect of s 1401 of the *Corporations Act* 2001 (Cth) was, by sub-s (1), to look at, rather than to pick up, the rights and liabilities, inchoate and contingent, as they existed on 14 July 2001, and to label them "pre-commencement rights or liabilities". By sub-s (2), s 1401 then incorporated into the new *Corporations Act* 2001 (Cth), for the limited purposes of sub-s (3), the text of the provisions of the State law which had given rise to the pre-existing rights and liabilities (in this case ss 1317EA and 232 or 243ZE as the case required). Sub-section (3) then created, under the provisions thus incorporated into the new *Corporations Act* 2001 (Cth), new and substituted rights and liabilities equivalent to the old "as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability". Section 1401(3) thus provided for present and future consequences as to past acts[86].

115 The consequence of this was that on and from 15 July 2001 jurisdiction was conferred on the Supreme Court (again under s 77(iii) of the Constitution) to determine and enforce the newly created rights and liabilities. The matter founding that jurisdiction was, as counsel for ASIC rightly submitted, properly to be identified as the justiciable controversy arising from the disputed contention of ASIC of an entitlement to orders under the substituted, carbon-copy,

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[86] cf *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27 at 30; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 309 [57] per McHugh and Gummow JJ.

s 1317EA, for breach of the substituted, carbon-copy, s 232 or s 243ZE, as those sections were incorporated under s 1401(2) and as they are to be applied according to the assumption required by s 1401(3) when it speaks of the relevant provision which is taken to be included in the new corporations legislation applying "*as if* that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability". That is the matter that was before the Supreme Court of New South Wales.

Orders

116 For these reasons, the questions reserved should be answered:

1. None of the successive appointments of The Honourable Michael Leader Foster to act as a judge of the Supreme Court of New South Wales was invalid.

2. The proceedings commenced in the Supreme Court of New South Wales by the Australian Securities and Investments Commission against William Arthur Forge and others on 26 April 2001 and tried before Foster AJ constituted a matter arising under a law made by the Parliament within the meaning of s 76(ii) of the Constitution.

117 In the proceeding commenced by writ in this Court, the first and second defendants' demurrers should be allowed and judgment entered for the defendants.

118 An appeal against the orders of Foster AJ was allowed in part by the New South Wales Court of Appeal. The Court of Appeal remitted to the Equity Division issues relating to penalty. That cause pending in the Equity Division was, in part, removed into this Court and the questions answered above were reserved by a Justice to the Full Court.

119 The special leave application against part of the orders of the Court of Appeal was filed out of time. The necessary extension of time should be granted but the application for special leave should be dismissed.

120 In each of the matters, and in the application for special leave to appeal to this Court, there should be an order that William Arthur Forge, Jozsef Endresz, Dawn May Endresz, Allan Paul Endresz and Bisoya Pty Limited pay the costs of the opposing parties, other than those Attorneys-General who intervened in the proceedings in this Court.

121 KIRBY J. In *Ebner v Official Trustee in Bankruptcy*[87], in words endorsed by six members of this Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[88], I observed:

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

122 The central issue in these proceedings concerns the compatibility with Ch III of the Constitution of provisions of State law for the appointment of acting judges. In recent times, such judges have been appointed, at least in one State, in significant numbers, including to the Supreme Court of the State which enjoys a special status and role in the federal Constitution[89]. The question for decision is whether State laws, to the extent that they purport to authorise this development, and to allow for commissions to acting judges who in aggregate constitute a significant augmentation of such courts, are valid when measured against the federal constitutional standard, including as it was explained in *Kable v Director of Public Prosecutions (NSW)*[90].

123 The issue now arising is one that has been anticipated in a number of earlier decisions of this Court[91]. It has been the subject of controversy in judicial[92], political[93] and professional[94] circles. It is an issue of the kind that tests

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87 (2000) 205 CLR 337 at 373 [116] (footnote omitted). See also at 363 [81] per Gaudron J.

88 (2004) 218 CLR 146 at 163 [27].

89 Constitution, s 73(ii).

90 (1996) 189 CLR 51.

91 *Bradley* (2004) 218 CLR 146 at 164 [32]; cf *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1540 [104]; 210 ALR 50 at 79.

92 Young, "Acting judges", (1998) 72 *Australian Law Journal* 653; Kirby, "Acting Judges – A Non-theoretical Danger", (1998) 8 *Journal of Judicial Administration* 69; Drummond, "Towards a More Compliant Judiciary?", (2001) 75 *Australian Law Journal* 304.

93 See, eg, Ruddock, "Selection and Appointment of Judges", paper delivered at Sydney University, 2 May 2005 at [83].

94 New South Wales Bar Association, "Bar Tells NSW Government: No More Acting Judges", media release, 29 June 1997; Ray, "The Law and Order Bidding War", (2005) 132 *Victorian Bar News* 11 at 12.

this Court on a matter of basic constitutional principle. Our predecessors were not found wanting when similarly tested[95].

124 In my opinion, the number and type of acting appointments made under the impugned provisions of s 37 of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") are such as to amount to an impermissible attempt to alter the character of the Supreme Court. They attempt to work a change in a fundamental respect forbidden by the federal Constitution. What was intended as a statutory provision for occasional and exceptional additions to judicial numbers, in special circumstances, has become a means for an institutional alteration that is incompatible with the role of the State courts, particularly the Supreme Court. It has made the courts beholden to the Executive for regular short-term reappointments of core numbers of the judiciary. This is offensive to basic constitutional principle. In *Republican Party of Minnesota v White*, Stevens J, in the Supreme Court of the United States, explained succinctly the importance of ensuring that judges are removed from any necessity, or inclination, to court the good opinion of the government of the day[96]:

> "There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."

125 The time has come for this Court to draw a line and to forbid the practice that has emerged in New South Wales, for it is inimical to true judicial independence and impartiality. When viewed in context, the acting judicial commission in question in these proceedings was not an *ad hoc*, special one for particular purposes. When the line is crossed, this Court should say so. It should not postpone the performance of its role as guardian of the Constitution. The challenge to the validity of the legislation should be upheld.

The facts and the legislation

126 *The proceedings*: The three proceedings now before this Court are described in other reasons[97]. It is unnecessary for me to repeat that description. However, for the approach that I take, two additional issues must be identified[98].

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95 See Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003).

96 536 US 765 at 798 (2002).

97 Reasons of Gleeson CJ at [1]-[4]; reasons of Gummow, Hayne and Crennan JJ at [49]-[50]. The decision of the New South Wales Court of Appeal is reported: *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574.

127 *History of acting judges*: There is no dispute that, from early colonial times, legislation throughout Australia authorised the appointment of acting judges, including to the Supreme Courts[99]. The *Charter of Justice*[100], which applied in New South Wales, envisaged the appointment of an acting judge instead of another full-time judge to replace an absent judge, until that judge returned, or until a successor had been appointed. When the District Court of New South Wales was established in 1858, its statute provided for judges of that Court to act as judges of the Supreme Court under special commissions for the trial of issues, civil or criminal, at remote places[101].

128 The *Judicial Offices Act* 1892 (NSW) repealed the 1858 provisions. It replaced them with one which extended the power to appoint a District Court judge as an acting judge of the Supreme Court for a time not exceeding six months[102]. In his Second Reading Speech in support of the Bill that became the 1892 Act, the Attorney-General, Mr Edmund Barton, explained that this provision was intended to be used only for temporary purposes to clear a block in judicial business where cases had been a long time in arrears[103].

129 The *Supreme Court and Circuit Courts Act* 1900 (NSW) replaced the *Judicial Offices Act*. At the time of Federation, s 13 of the 1900 Act provided a

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For convenience, I will refer to the parties challenging the validity of the legislation as the plaintiffs, which is their status in the first of the three proceedings before this Court.

98 See below these reasons at [159].

99 At the time of Federation, all Australian colonies provided for the appointment of acting judges. See *Supreme Court and Circuit Courts Act* 1900 (NSW), s 13; *Supreme Court Act* 1890 (Vic), s 14; *Acting Judges Act* 1873 (Q), s 1; *Supreme Court Act* 1855-56 (SA), s 5; *Supreme Court Act* 1880 (WA), s 12; *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83), s 1. See generally reasons of Heydon J at [256].

100 4 Geo IV c 96, s 1.

101 *District Courts Act* 1858 (NSW), s 26.

102 *Judicial Offices Act* 1892 (NSW), s 3.

103 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 January 1892 at 4426.

power to appoint acting judges to the Supreme Court[104]. However, its terms made it clear that any such appointment was to be treated as special[105]:

> "(1) The Governor may issue a *special* commission to any Judge of the District Court, or to any barrister or solicitor of not less than seven years' standing, appointing him –
>
> …
>
> (b) to sit and act as a judge of the Court at Sydney in any one or more jurisdictions of the Court to be specified in such commission, and for a time not exceeding in any case six months to be specified in like manner." (emphasis added)

130 It is true that, pursuant to the 1900 Act, Mr Barton and other persons with the requisite qualifications were appointed acting judges of the Supreme Court of New South Wales. However, the record of such appointments, contained in the frontispiece to the authorised reports of that Court, confirms that such appointments were invariably of three types:

(1) A short-term elevation of a District Court judge for particular purposes;

(2) A short-term appointment of a qualified senior barrister, with a view to his early confirmation in office as a permanent judge of the Supreme Court when a vacancy arose; or

(3) (Rarely) the appointment of some other qualified person for a short period for special purposes, not followed by permanent appointment[106].

131 The appointment of a large and steady number of acting judges under the 1900 Act would have been inconsistent both with its explicit reference to the "special" character of the acting judge's commission[107] and with the actual practice observed in New South Wales back to the earliest colonial times.

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[104] See also s 15, providing for acting judges in special jurisdictions.

[105] See Walker, *The Practice of the Supreme Court of New South Wales at Common Law*, 4th ed (1958) at 707.

[106] A more recent instance of this class was the appointment of Mr E H St John QC as an acting judge of the Supreme Court of New South Wales: see (1995) 69 *Australian Law Journal* 307.

[107] Confirmed by the requirement, in the case of an Acting Chief Justice, for specially designated reasons to be fulfilled: see *Supreme Court and Circuit Courts Act* 1900 (NSW), s 12A, introduced in 1912.

132 *The 1989 change*: It is not correct to suggest that the nineteenth century practice simply continued. Section 37 of the Supreme Court Act, the meaning and validity of which are in issue in these proceedings, was enacted in 1970. The section is set out in other reasons[108]. There is no need for me to repeat it. Given that s 22 of the Supreme Court Act makes it clear that the Supreme Court of New South Wales, as "formerly established", is continued, it seems hardly likely that the Parliament of New South Wales intended, by the enactment of s 37, to introduce after 1970 a regime for acting judges that was significantly different from that which had lasted in that Court for so very long. Nothing explicit was said to suggest otherwise, either in s 37 itself or in the Second Reading Speech that accompanied the introduction of the Bill that became the Supreme Court Act.

133 In fact, the practice that had existed in New South Wales for the better part of the first century of Federation continued, substantially unaltered, until 1989. The memoranda in the frontispiece of the authorised reports of the Supreme Court of New South Wales over the twentieth century confirm the recollection that I hold from fifty years of observing, practising before and participating judicially in, that Court.

134 I intrude personal recollection in the same way as Lord Hope of Craighead did in his reasons in *Kearney v HM Advocate*[109]. In deciding a challenge to the appointment of a barrister as a temporary judge of the Court of Session in that case, his Lordship drew on his experience as Lord President in Scotland. In matters concerning the composition, practices and traditions of the judiciary, it is inevitable that serving judges will draw on their own memories. However, it is as well to check these recollections against recorded history, lest inclination contaminate the facts.

135 Table 1 sets out the number of appointments as acting judges of the Supreme Court of New South Wales from 1901 to 2004 as recorded in that Court's authorised reports.

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[108] Reasons of Gleeson CJ at [15]; reasons of Gummow, Hayne and Crennan JJ at [52].

[109] 2006 SC (PC) 1 at 11 [30].

TABLE 1
ACTING JUDICIAL APPOINTMENTS, NEW SOUTH WALES 1901–2004[110]

1901	**1902**	**1903**	**1904**	**1905**	**1906**
0	1 (1) [1]	0	0	0	1 (1) [1]
1907	**1908**	**1909**	**1910**	**1911**	**1912**
2 (2) [1]	0	0	0	2 (2) [2]	0
1913	**1914**	**1915**	**1916**	**1917**	**1918**
0	0	0	0	0	0
1919	**1920**	**1921**	**1922**	**1923**	**1924**
2 (2) [1]	3 (3) [2]	1 (1) [1]	1 (1)	1 (1)	3 (2)
1925	**1926**	**1927**	**1928**	**1929**	**1930**
2 (1)	2 (1) [1]	0	0	6 (3) [2]	0
1931	**1932**	**1933**	**1934**	**1935**	**1936**
0	2 (1) [1]	0	3 (2) [1]	0	6 (3) [1]
1937	**1938**	**1939**	**1940**	**1941**	**1942**
5 (4) [3]	6 (3) [2]	11 (5) [1]	0	1 (1) [1]	0
1943	**1944**	**1945**	**1946**	**1947**	**1948**
0	2 (1) [1]	1 (1) [1]	1 (1) [1]	0	0
1949	**1950**	**1951**	**1952**	**1953**	**1954**
2 (1) [1]	0	1 (1) [1]	6 (6) [2]	2 (2) [2]	0
1955	**1956**	**1957**	**1958**	**1959**	**1960**
0	0	0	0	0	0
1961	**1962**	**1963**	**1964**	**1965**	**1966**
0	2 (2) [2]	0	0	0	9 (6) [4]
1967	**1968**	**1969**	**1970**	**1971**	**1972**
5 (5) [3]	1 (1) [1]	0	0	0	0
1973	**1974**	**1975**	**1976**	**1977**	**1978**
0	0	0	0	0	0

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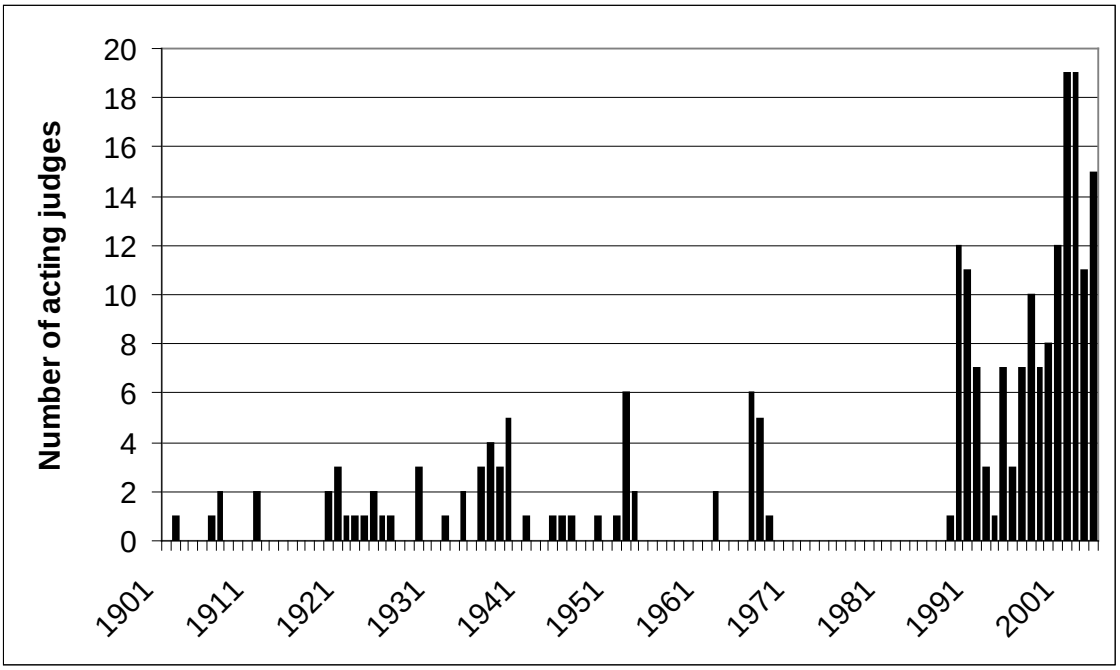
110 Acting appointments are taken from the *State Reports (NSW)* until 1971 and thereafter from the *New South Wales Law Reports*. The first figure in each cell indicates the number of commissions as acting judge of the Supreme Court issued during the year. The figure in round brackets indicates the number of acting judges appointed to the Supreme Court. The figure in square brackets indicates the number of acting judges of the Supreme Court who were subsequently appointed as permanent judges of the Supreme Court. Appointments as Acting Chief Justice and Acting President (which all came from permanent judges of the Court) have been disregarded. The appointment of acting judges of appeal is undifferentiated in this Table. From 1987, figures for appointments of acting District Court judges were published in the *New South Wales Law Reports*. The incidence of such appointments is recorded on the second line of each cell.

1979	**1980**	**1981**	**1982**	**1983**	**1984**
0	0	0	0	0	0
1985	**1986**	**1987**	**1988**	**1989**	**1990**
0	0	0	1 (1)	13 (12) [2]	13 (11) [2]
			12 (12)	18 (18)	18 (18)
1991	**1992**	**1993**	**1994**	**1995**	**1996**
7 (7) [2]	3 (3)	1 (1)	7 (7) [1]	3 (3) [1]	7 (7) [2]
13 (13)		3 (3)	3 (3)	4 (4)	36 (36)
1997	**1998**	**1999**	**2000**	**2001**	**2002**
10 (10) [1]	7 (7) [1]	8 (8)	12 (12)	21 (19) [1]	19 (19) [1]
42 (42)	70 (58)	23 (23)	29 (28)	35 (29)	30 (29)
2003	**2004**				
11 (11)	15 (15)				
34 (31)	44 (38)				

136 A significant change of practice in the appointment of acting judges to the Supreme Court occurred in 1989, in which year no fewer than 12 qualified persons were commissioned as acting judges. This is apparent from Table 1. The practice of making acting appointments in this way continued thereafter. Indeed, in the case of the District Court of New South Wales, appointments of acting judges from the practising legal profession for relatively short intervals became both very common and very numerous, a fact that casts light on the constitutional character of the concurrent acting appointments to the Supreme Court.

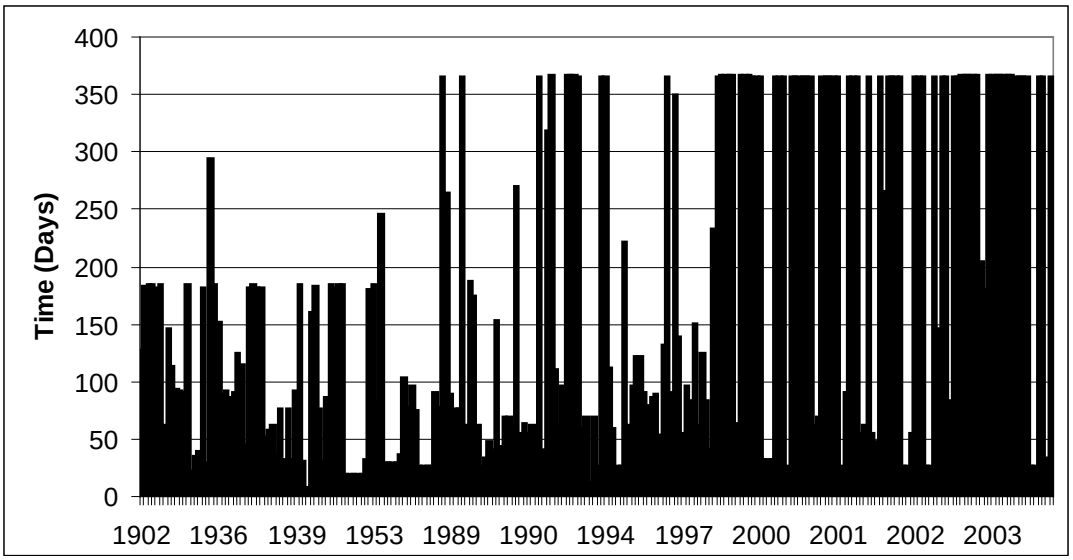
137 Two graphs (Figures 1 and 2) show, even more clearly, the change in the appointment of acting judges to the Supreme Court of New South Wales. Figure 1 illustrates the aggregate number of acting judge commissions over the course of the twentieth century. Figure 2 illustrates the duration of such commissions.

FIGURE 1
NUMBERS OF ACTING JUDGES AND ACTING JUDGES OF APPEAL
SUPREME COURT OF NEW SOUTH WALES, 1901-2004[111]



[111] Figure 1 was constructed from the data contained in Table 1.

FIGURE 2
DURATION OF COMMISSIONS OF ACTING JUDGES AND ACTING JUDGES OF APPEAL SUPREME COURT OF NEW SOUTH WALES, 1901-2004[112]



138 Once this institutional feature of the courts of New South Wales, specifically the Supreme Court, changed and persisted for a time, a danger was presented that the change would become permanent. What had begun, and long persisted, as an exception for a special and limited purpose (*ad hoc* requirements of particular "delay reduction programmes"[113]), became entrenched when its advantages to the Executive Government became apparent.

139 As Table 1 and Figure 1 demonstrate, the number of acting judges in the 1990s waxed and waned somewhat. However, by 2000, the numbers settled down to fairly stable figures. Acting judges then came to constitute a settled proportion of the complement of the Supreme Court. A further table, Table 2, produced by the plaintiffs in these proceedings, reveals the position that has now been reached. It describes the pattern of acting appointments to the Supreme Court of New South Wales between January 2000 and January 2005.

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[112] Like Table 1, Figure 2 was constructed using the authorised reports of the Supreme Court of New South Wales. The precise duration of a relatively small number of commissions of acting judges is not stated in the authorised reports. Such commissions have been omitted from Figure 2. Note that the Figure refers only to the years in which commissions have issued to acting judges. For most years in the period examined (56 out of 104 years) there were no acting judges.

[113] Reasons of Gleeson CJ at [25].

TABLE 2
NUMBERS OF ACTING JUDGES AND ACTING JUDGES OF APPEAL
SUPREME COURT OF NEW SOUTH WALES, 2000-2005[114]

Year	Judges of Appeal (Excluding President)	Judges (Excluding Chief Justice, President and Judges of Appeal)	Acting Judges	Acting Judges of Appeal	Total Acting Judges	Total Judges, Judges of Appeal, Acting Judges, Acting Judges of Appeal (Including Chief Justice and President)
As at January 2000	9	33	3	4	7	51
As at January 2001	10	32	1	7	8	52
As at January 2002	9	33	8	5	13	57
As at January 2003	10	33	7	4	11	56
As at January 2004	10	35	5	4	9	56
As at January 2005	10	34	4	8	12	58

140 Whereas all of the persons appointed acting judges or acting judges of appeal of the Supreme Court in 2004-2005 were former judges of that Court (or in two cases, former judges of the Land and Environment Court of New South Wales, in one case of the Federal Court and in three cases of the District Court), the position with acting appointments to the District Court of New South Wales in the same period was different. In 2004, no fewer than 38 persons were appointed acting judges of the District Court. Between 1 July 2004 and 30 June 2005, 20 such appointees were former judges of the District Court or of other superior courts. The rest had a background at the Bar, as solicitors or, in two cases, as legal academics.

141 These figures demonstrate a systematic and uninterrupted trend since 1989 to alter the composition of New South Wales courts by appointing acting judges in substantial numbers. Anyone who thinks otherwise must have forgotten the constitution of such State courts with which they grew up. The foregoing tables and figures provide an empirical antidote to imperfect memories.

142 There comes a time when quantitative change turns into a qualitative change; when special need becomes a settled practice; when a number of individual commissions becomes an institutional restructuring. This is what has happened in New South Wales courts, specifically in the Supreme Court. It has happened without an alteration of the relevant legislation to afford the specific

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114 This table is compiled using memoranda in the *New South Wales Law Reports*, volumes 48, 50, 52, 55, 57 and 61.

endorsement by the State Parliament of such restructuring. It has occurred by the use of statutory provisions, expressed in general terms, for appointing acting judges, although such provisions were obviously intended, and initially only used, for *ad hoc* and special needs. In the case of the Supreme Court, the cohort of acting judges has now effectively become part of the Court's institutional arrangements. This is even truer of the District Court. It is such arrangements that the plaintiffs challenge.

143 Evidence of a changed practice was relied on by the plaintiffs to make good their constitutional submission. However, the plaintiffs did not rely on numbers alone. They emphasised the pattern and continuity of the trend evident in the numbers as well as the variety and identity of the named persons appointed to acting judicial office in the State. One such pattern may be seen in the renewal of the commissions of certain acting judges and acting judges of appeal. Table 3 illustrates this point. Instead of appointing permanent judges to fill obvious and substantial institutional needs, these were filled by repeated renewals of acting judges, extended in successive years, on each occasion, for the maximum time allowed for acting appointments.

TABLE 3
RENEWAL OF ACTING COMMISSIONS
SUPREME COURT OF NEW SOUTH WALES, 1901-2004[115]

Acting Judge or Acting Judge of Appeal	Number of commissions received	Acting Judge or Acting Judge of Appeal	Number of commissions received
Badgery-Parker, Jeremy	3	Lee, Jack Austell	3
Barr, Graham Russell	2	Leslie, Arthur James	2
Barton, Edmund Alfred	2	Loveday, Ray Francis	2
Bell, Hubert Henry	2	Lusher, Edwin Augustus	2
Brownie, John Edward Horace	7	Markell, Horace Francis	2
Bruce, Vincent	2	Mathews, Jane Hamilton	4
Burchett, James Charles Sholto	4	Maughan, David	3
Callaway, Calvin Rochester	3	Maxwell, Alan Victor	2
Campbell, Michael William	2	McClellan, Peter David	2
Capelin, Peter R	2	McInerney, Peter Aloysius	2
Carruthers, Kenneth John	5	Meares, Charles Leycester Devenish	2
Clancy, John Sydney James	3	Miles, Jeffrey Allan	2
Clarke, Matthew John Robert	2	Murray, Brian Francis	3
Cooper, Harvey Leslie	2	Needham, George Denys	3
Cripps, Jerrold Sydney	3	Newman, Peter James	4
Davidson, Colin George Watt	2	Owen, William Francis Langer	2
Davidson, Thomas Swanson	4	Pearlman, Mahla Liane	2
Davies, John Daryl	5	Ralston, Alexander Gerard	5
Donovan, Brian Harrie Kevin	3	Rolfe, James Morton Neville	3
Edwards, Henry George	2	Roper, Ernest David	3
Fitzgerald, Gerald Edward	3	Sheppard, Ian Fitzhardinge	2
Foster, Michael Leader	5	Slattery, John Patrick	4
Holland, Kevin James	3	Smart, Rex Foster	6
Hope, Robert Marsden	3	Taylor, Kenneth Victor	2
Ipp, David Andrew	2	Webb, Paul	2
Ireland, Morris David	4	Whitlam, Antony Philip	2
Knight, William Harwood	2	Woodward, Philip Morgan	2

144 Between 1901 and 1988, 69 acting commissions in the Supreme Court were issued. Fourteen of these commissions (or 20.3%) were given to individuals who had already held an acting commission. Between 1989 and 2004, 158 acting commissions were issued. However, in contrast to the practice of commissions which had previously prevailed, 83 (or 52.5%) of these commissions were given to recipients who had already held an acting commission. These figures reveal the institutional significance of renewed acting commissions in recent years.

145 *Governmental submissions*: None of the parties seeking to defend the validity of the legislation[116] raised any formal or evidentiary objection to this

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[115] Table 3 is completed from data contained in the authorised reports of the Supreme Court of New South Wales. It records renewal of commissions given to acting judges and acting judges of appeal.

Court's receiving and acting on the matters of public record set out above. They joined issue on the facts as revealed in Table 2. Table 1 is no more than a retrospective to permit the figures in Table 2 to be understood against their historical background. Figures 1 and 2 and Table 3 constitute no more than a detailed breakdown of the same publicly available material.

146 However, the defendants were critical of the quality of this evidence. Thus, the Commonwealth pointed out that raw figures concerning the number of acting judges in New South Wales afforded no information, as such, on the backgrounds of such judges; the actual days of judicial work performed during individual appointments; and the nature of the judicial activity assigned during those days. The Commonwealth submitted that, in any case, expressed in such raw terms, the number of part-time Supreme Court judges as at January 2002 (comprising 22.8% of all judges of the Supreme Court) represented the "high water mark" when compared with the preceding years. Thus, according to the Commonwealth, the emerging position in the Supreme Court was as follows:

- As at January 2000 there were eight acting judges out of a total of 52 (both permanent and acting). Thus, 13.7% of judges of the Court were acting judges;

- As at January 2001 there were seven acting judges out of a total of 51 (both permanent and acting). Thus, 15.4% of judges were acting judges;

- As at January 2003 there were 12 acting judges out of a total of 57 judges (both permanent and acting). Thus, 21.1% of judges were acting judges; and

- As at January 2004 there were nine acting judges out of a total of 56 judges (both permanent and acting). Thus, 16.1% of judges were acting judges.

147 The acting judges of the Supreme Court could not be viewed as performing 22.8% or even 13.7% of the work of the Supreme Court during the respective years of the high and low figures. Obviously, the proportion of the work of the Supreme Court performed would depend on the days on which the acting judges were rostered for duty. The defendants sought to turn this paucity of information to their advantage. Thus, the Commonwealth argued that acting judges of the Supreme Court would not necessarily sit continuously but only as the need arose. They would thus perform a smaller (although unidentified) part of the business of the Supreme Court. By inference, on this argument, any defect

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116 The Australian Securities and Investments Commission ("ASIC") and the State of New South Wales. For convenience, I will refer to these parties as "the defendants".

introduced by the participation of non-permanent judges was to be treated as diminished because such participation affects only a small proportion of cases and litigants.

148 In the same vein, ASIC presented an analysis of the judicial reasons reported in the volumes of the *New South Wales Law Reports* from which the plaintiffs have taken their recent statistics concerning the numbers of acting judges of the Supreme Court[117]. According to ASIC, the analysis revealed that:

> "[I]n vol 48 there were 90 instances of judgments by permanent judges and only three instances of judgments by acting judges; in vol 50 there were 99 instances of judgments by permanent judges and six instances of judgments by acting judges; in vol 52: 73 permanent, 12 acting; in vol 55: 83 permanent and 13 acting; in vol 57: 91 permanent and 4 acting."

Whilst conceding that such figures did not disclose accurately the "proportion of work actually conducted by acting judges in the period 2000-2004", ASIC argued that "they do nevertheless suggest that amount is modest".

149 Modest infractions against the Constitution (if that they be) remain infractions. Moreover, the very "modesty" enlivens a different criticism concerning the recruitment of acting judges, at least at the level of appeals. This is that such judges may sometimes appear to participate in order to make up the numbers and not to be as fully engaged, fully supported and equally committed judicial officers, playing a fully active, entirely equal, and proportionate role in the work of the Court as their permanent colleagues. No conclusion could be reached on this suggestion without further evidence. However, the risk is undeniable. The perception of a problem is almost as serious as the suggested problem itself.

150 The State of New South Wales complained about the imperfections in the memoranda published in the authorised reports of the Supreme Court from which, substantially, the foregoing statistics and figures are derived. It is true that the materials are open to minor criticisms. However, they are clearly sufficient to illustrate accurately the overall trends and outcomes, which is what these proceedings are concerned with. Moreover, the State's criticisms cannot be given great weight when regard is had to its presumed capacity to secure access to its own more detailed records that would reveal perfectly the number, duration and variety of all of its acting judicial appointments since Federation. The failure of the State to produce competing evidence, to cast doubt on the patterns emerging from the foregoing tables and figures, suggests strongly that the published memoranda are adequate, accurate and representative. Given their sources, the contrary conclusion would be perverse.

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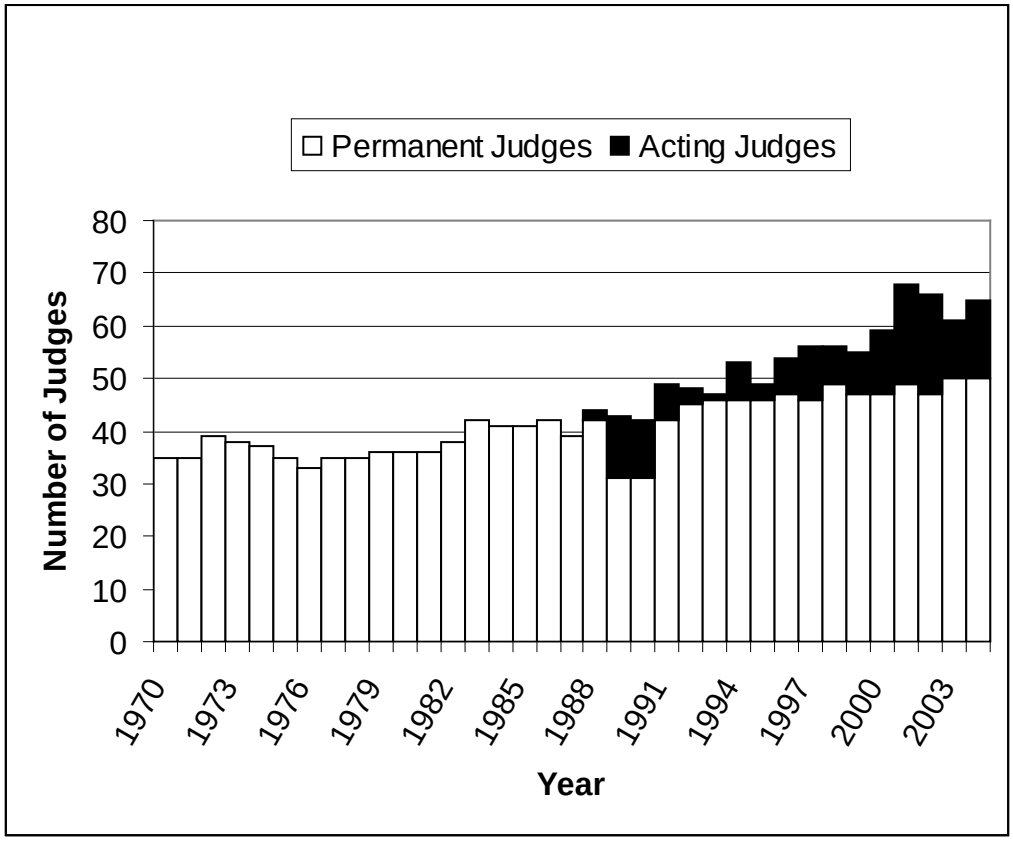
[117] Volumes 48, 50, 52, 55 and 57.

151 However, the State also suggested, cautiously, that the foregoing tables and figures "could be misleading" and "of limited utility". That submission was advanced on the basis of the fact that some of the acting judges of the Supreme Court in recent years (eg in 2002) were permanent judges of other State courts or former judges who may not have sat continuously throughout the period of their appointment as acting judges. That submission does not affect the accuracy of the statistics or the value of the figures based on them as illustrations of the institutional augmentation of the Supreme Court by outside personnel in large numbers after 1989.

152 The State denied that a significant change of practice in the appointment of acting judges occurred in 1989. It produced tables and figures in an attempt to support that submission. However, if the period of the operation of the Supreme Court Act following its enactment in 1970 is adopted, being the operation of the law challenged in these proceedings, the graphical representation supplied by the State itself clearly denies the accuracy, and certainly the persuasiveness, of its submission.

FIGURE 3
NUMBER OF JUDGES OF THE SUPREME COURT OF NEW SOUTH WALES, 1970-2004
SHOWING ACTING JUDGES IN RELATION TO PERMANENT JUDGES[118]



153 The State (supported by the Commonwealth) also argued that the number of acting judges may not reflect the level of representation of acting judges on the Court over time. No doubt exact figures would disclose precisely the number of judge days served (permanent and acting) in each year since 1901. The State did not provide such materials although it was in the best position to do so and was given a full opportunity for that purpose. It is proper to assume that such information did not advance the State's argument.

154 The State and the Commonwealth submitted that a more accurate impression of the participation of acting judges in the Supreme Court would arise by comparing the number of acting judges in any given year to the number of permanent judges. Yet even if this approach were adopted, the graphical representation of the ratio of such judges in the Supreme Court remains telling, based on the information supplied by the State. It is contained in Figure 4. That

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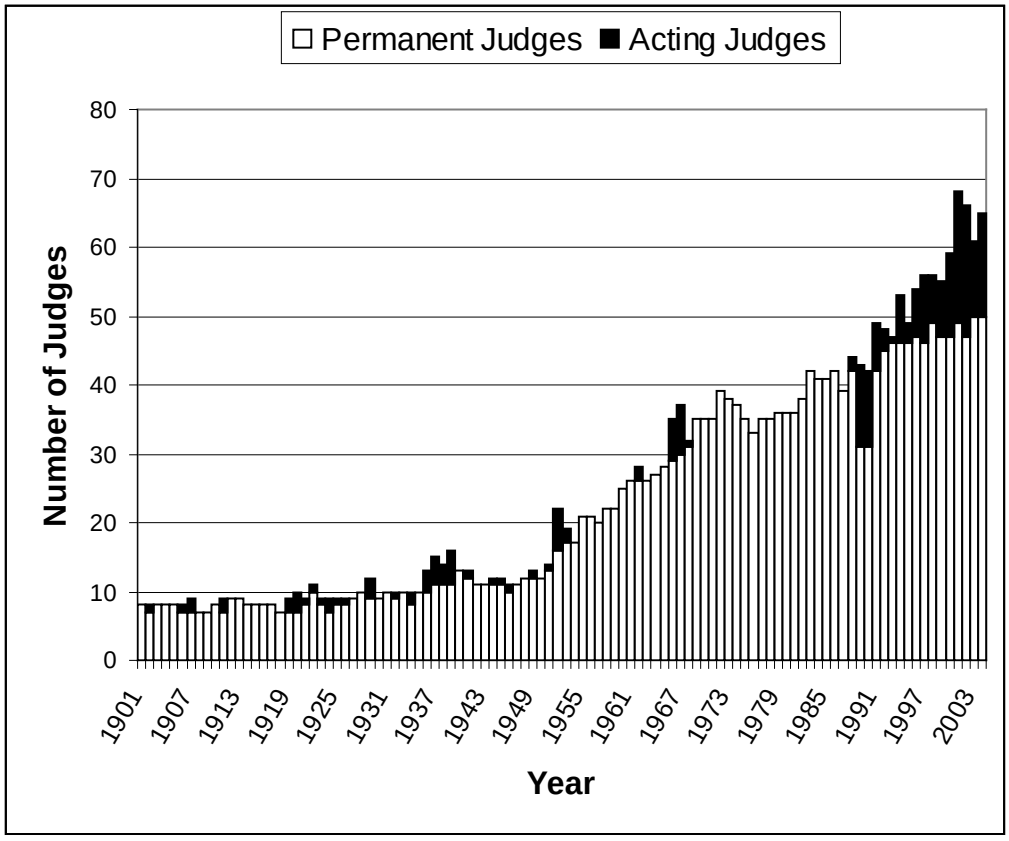
118 This Figure substantially reproduces a graphical representation of the identified years supplied by the State.

figure confirms the significant proportional alteration that has occurred in the participation of acting judges of the Supreme Court after 1989. It is that alteration that is the subject of these proceedings.

FIGURE 4
PROPORTION OF ACTING JUDGES TO PERMANENT JUDGES OF THE SUPREME COURT OF NEW SOUTH WALES, 1901-2004[119]



155 Other members of this Court may find the foregoing statistics and figures "meaningless"[120]. To the contrary, I regard them as demonstrating a clear trend that has the effect of altering the composition of a State Supreme Court. It is that trend that should enliven the concern, and response, of this Court. It should be stopped now before it becomes permanent and spreads, as departures from constitutional principle have a tendency to do.

156 *The evidence: conclusions*: The evidence relied on by the plaintiffs was qualified, limited and imperfect. Even when it is broken down a little more and

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[119] This Figure is based upon statistics supplied by the State.

[120] Reasons of Gleeson CJ at [33].

the same sources are analysed more closely, the entire picture is not presented. Yet its major outlines were not successfully challenged by the defendants. The general trend revealed in the appointment of acting judges in the frontispiece pages to the authorised reports of the Supreme Court of New South Wales, over more than a century, is reinforced by professional recollection and the well-remembered institutional tradition. In respect of the last decade or so it is confirmed by information contained in the *Annual Reviews* of the Supreme Court of New South Wales published in that time[121].

157 From the tables and figures set out in these reasons, this Court should draw a number of conclusions. Such conclusions are sufficient for the purposes of the proceedings. In my opinion, the conclusions available from the record and such other public material as is incontestable are:

(1) From the first establishment of courts in New South Wales in colonial times a power existed for the appointment of acting judges to the Supreme Court;

(2) Throughout the nineteenth and most of the twentieth centuries, such appointments were made in special circumstances, afforded on an *ad hoc* basis and issued in tiny numbers that never threatened to alter the institutional identity of the court concerned, specifically the Supreme Court;

(3) This settled practice changed in 1989. The change then introduced has been continued ever since. It has gathered pace in the past six years;

(4) Initially, in the early 1990s, appointees as acting judges of the Supreme Court included retired judges and judges of appeal, judges of other courts and qualified legal practitioners. This practice has changed further so that now only retired judges of the Supreme Court, Federal Court or of other courts are appointed acting judges or acting judges of appeal of the Supreme Court;

(5) The foregoing alteration has, however, not extended to acting appointments to the District Court of New South Wales. A significant number of legal practitioners and some academic lawyers have been appointed as acting judges of that Court;

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[121] The Supreme Court of New South Wales began to publish an *Annual Review* in 1990. Before that date, the number of appointments to that Court is to be found in the authorised reports and in the New South Wales *Law Almanac*, published annually.

(6) Acting appointments now represent a significant component of judicial appointments to the Supreme Court and, even more so, to the District Court; and

(7) Whilst the number of such appointments has varied over the past twenty years, in the Supreme Court it has now settled down so as to constitute a steady and significant component. It represents an important and relatively stable institutional supplementation of the judicial personnel of the Supreme Court. It is even more so in the District Court. The development is new and appears to be semi-permanent. There appears to be little prospect of diminution or abolition of the practice.

158 The question for this Court is whether the foregoing conclusions are of constitutional significance. In my opinion, they are.

The issues

159 Four issues arise for decision:

(1) *The acting judge issue*: Whether the provisions of s 37 of the Supreme Court Act, in so far as that section purports to authorise the issue of the commission as an acting judge of the Supreme Court of New South Wales to the Honourable M L Foster is invalid under the federal Constitution. Alternatively, was that commission invalid because it constituted an attempt to invoke the section (valid for other purposes) to support the appointment of a person as an acting judge in circumstances where doing so would impermissibly constitute part of a change to the character of the Supreme Court, rendering that Court, as a whole, a tribunal different from that envisaged, and required, by s 73 of the federal Constitution?

(2) *The transitional law issue*: Whether the proceedings commenced by ASIC against the plaintiffs in the Supreme Court of New South Wales, tried before Foster AJ, constituted a "matter" arising under a law enacted by the Federal Parliament within the Constitution[122]. In particular, assuming the validity of Foster AJ's commission, did the transitional provisions of Ch 10 of the *Corporations Act* 2001 (Cth) ("the Corporations Act") validly operate to confer jurisdiction on the Supreme Court to apply, and enforce against the plaintiffs, the civil penalty provisions of that Act? Or was there a break in the legal chain by virtue of the enactment of the federal Act in 2001 such that, for any successful proceedings against the plaintiffs, ASIC could not rely on the transitional provisions but would be obliged to commence fresh proceedings brought entirely under the federal law?

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[122] Constitution, s 76(ii).

(3) *The waiver or acquiescence issue*: Given that the plaintiffs, both in the trial and on appeal in the Court of Appeal, raised no objection to the validity of the appointment of Foster AJ, as an acting judge of the Supreme Court of New South Wales, are they, by their conduct, to be treated as having waived any objection to (or as having acquiesced in) the participation by Foster AJ in the trial? In short, is it too late for the plaintiffs to advance their objection to the validity of Foster AJ's commission as an acting judge of the Supreme Court?

(4) *The de facto officers doctrine issue*: In the event that the commission of Foster AJ is otherwise found to have been constitutionally invalid, are his acts, in purported fulfilment of his commission, valid by reason of the *de facto* officers doctrine?

Narrowing the issues

160 *The transitional law issue*: I can narrow the issues for decision in these proceedings immediately. For the reasons stated by Gummow, Hayne and Crennan JJ ("the joint reasons")[123], I agree that, if otherwise valid, the trial conducted in the Supreme Court of New South Wales before Foster AJ of the proceedings commenced in that Court by ASIC against the plaintiffs constituted a matter arising under a law made by the Federal Parliament. The plaintiffs' arguments to the effect that the transitional provisions of Ch 10 of the Corporations Act did not apply, in terms, to the proceedings concerning them should be rejected. I have nothing to add to the joint reasons on this issue. However, as will appear, this conclusion does not ultimately avail ASIC.

161 *The waiver or acquiescence issue*: This issue was not, as such, advanced by ASIC, or indeed by any party or intervener. However, it is suggested by the reasons delivered in the recent Privy Council decision in *Robertson v Higson*[124]. It should therefore be noticed.

162 The decision in *Robertson* is one of a number in which their Lordships have had to consider complaints by litigants about the validity of orders pronounced in the High Court of Justiciary of Scotland. Three bills of suspension were appealed to the Privy Council, operating in its new role under the *Scotland Act* 1998 (UK). The bills arose out of the decision of the High Court in *Starrs v Ruxton*[125].

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[123] Joint reasons at [103]-[115].

[124] 2006 SC (PC) 22.

[125] 2000 JC 208.

163 *Starrs* was a case in which it was held that a court, presided over by a temporary sheriff under the then arrangements applicable to the Scottish judiciary, did not constitute an "independent and impartial tribunal" in terms of Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention")[126]. The decisions of the temporary sheriffs, and their orders, were therefore found to be invalid. The correctness of the decision in *Starrs* was not challenged before the Privy Council[127]. The Lord Advocate of Scotland accepted in *Robertson* that, in each of the cases argued, the Procurator Fiscal had no power to proceed with the prosecution of the appellant before a temporary sheriff.

164 However, it was argued in *Robertson* that the appellants had acquiesced in their trials before the temporary sheriffs and so could not secure relief. Despite extensive media coverage given to the decision in *Starrs* in November 1999, no challenge by way of bill of suspension was filed against the appellants' convictions in those cases until October 2001 or later.

165 In *Robertson*, the Privy Council unanimously upheld the argument of acquiescence and dismissed the appeals. The argument that the conviction and sentence constituted a "fundamental nullity", so as to render the suggested argument of waiver inapplicable, was rejected[128]. The discussion of that subject by Lord Carswell resonates with the recent consideration in this Court of somewhat similar questions[129]. Lord Carswell[130] relied on Lord Radcliffe's speech in the House of Lords in *Smith v East Elloe Rural District Council*[131]:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

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126 2000 JC 208 at 231 per Lord Justice-Clerk Cullen; Lord Prosser agreeing at 231; Lord Reed agreeing at 257.

127 2006 SC (PC) 22 at 29 [22].

128 2006 SC (PC) 22 at 38 [52].

129 See *Berowra Holdings Pty Ltd v Gordon* (2006) 80 ALJR 1214 at 1218 [10], 1219 [16], 1230-1233 [82]-[101].

130 2006 SC (PC) 22 at 38 [54].

131 [1956] AC 736 at 769-770.

166 In the present proceedings, there was no earlier decision of this or any other court to hold, or suggest, that the orders made, and the judgment entered, by Foster AJ were constitutionally invalid. The objection raised by the plaintiffs is a fresh one. It presents a question of law, notably constitutional law. It does so in proceedings that are still alive before the Australian Judicature. There is no legal impediment to the point being raised, although belatedly, before this Court[132]. Once such a point is raised by a party (indeed, in my view, even if raised by the Court itself upon its perceiving a false assumption or concession relevant to jurisdiction which the parties should not have made[133]), it is the duty of the Court to decide the issue. Certainly, it must do so if the issue is necessary to the disposition of the proceedings in accordance with law.

167 Waiver and acquiescence connote, at least to some degree, a knowing participation in a legal proceeding without raising an objection to it in a timely manner. There is no suggestion in the materials before this Court, still less any proof, that the plaintiffs were guilty of such disqualifying conduct here. None of the defendants suggested so. It is therefore unnecessary in these proceedings to consider whether, if a constitutional defect were established, a party might, procedurally, be incapable of relying on it because of waiver or acquiescence. This is not a case in which the plaintiffs' principal issue can be avoided, as was that in *Robertson*.

168 *The de facto officers doctrine issue*: In its written submissions, ASIC argued that, if Foster AJ's appointment as an acting judge in the Supreme Court were invalid, his decision in finding the plaintiffs guilty of offences under the Corporations Act, and his orders giving effect to that decision, were valid in accordance with the *de facto* officers doctrine.

169 My difficulties with this "doctrine"[134] were expressed in reasons in which I joined with Hope JA in *G J Coles & Co Ltd v Retail Trade Industrial Tribunal*[135]. In the federal constitutional setting I have repeated the expression of these

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[132] *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 153-155 [135]-[138], 169 [184]; *Crampton v The Queen* (2000) 206 CLR 161 at 171-174 [12]-[21], 179-185 [38]-[57], 200-207 [105]-[123], 212-219 [145]-[165].

[133] *Dalton v NSW Crime Commission* (2006) 80 ALJR 860 at 875-876 [73]; 226 ALR 570 at 588-589; cf *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144].

[134] Which may be found in *State v Carroll* 9 Am Rep 409 at 427 (1871).

[135] (1986) 7 NSWLR 503 at 519-520.

difficulties in this Court in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[136]. In that case I observed that[137]:

> "[A] distinction has been drawn between the validity of the acts de facto of a person invalidly appointed to a valid office and the acts of a person appointed to an office which itself has no validity".

170 Assuming this to be a proper distinction, the frontal attack by the plaintiffs on s 37 of the Supreme Court Act would mean that, on their argument, the office of "acting judge" of the Supreme Court, to which Foster AJ was purportedly appointed, did not exist. At least, it did not exist to fulfil the institutional arrangements which Foster AJ's appointment was intended to advance. On this basis (even assuming it to be otherwise available to answer an established defect under the Australian Constitution), the *de facto* officers doctrine would not rescue the validity of the orders made by an invalid appointee.

171 In *Ruddock v Taylor*[138], I rejected an approach to the issue under consideration in that appeal which would have contradicted the Constitution or frustrated the making of orders upholding relevant constitutional provisions[139]. Similar considerations would inform my approach to any invocation of the *de facto* officers doctrine in these proceedings that sought to contradict a holding that Foster AJ's orders were invalid for reasons going to the heart of the requirements governing the Judicature under the Constitution.

172 However this may be, it is unnecessary finally to decide this point. During oral argument, ASIC made it clear that it did not ultimately press the *de facto* officers doctrine argument. Instead, ASIC indicated that it would only do so if this Court upheld the submissions made for South Australia (intervening), relevant to that subject.

173 In its arguments (intervening) in *Eastman*[140], South Australia drew attention to what it suggested was the need for a *de facto* officers doctrine in order to avoid the "anarchy and chaos" that would otherwise follow a ruling that

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[136] (1999) 200 CLR 322; cf *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 655 [64].

[137] (1999) 200 CLR 322 at 384 [156].

[138] (2005) 79 ALJR 1534 at 1561-1562 [170]-[174]; 221 ALR 32 at 69-70.

[139] See also *Coleman v Power* (2004) 220 CLR 1 at 63-64 [142]-[143] per McHugh J.

[140] (1999) 200 CLR 322 at 383 [155]. In *Eastman*, Western Australia joined in this submission.

would be unsettling to the basic constitutional principle of the rule of law[141]. The invalidation of judgments and orders of acting judges of a State Supreme Court was argued to involve "anarchy and chaos" of this kind. It was for such a situation that the *de facto* officers doctrine was said to be necessary[142].

174 In the United States of America, the Supreme Court has held that the *de facto* officers doctrine is inapplicable where the relevant appointment is invalid on "nonfrivolous constitutional grounds"[143]. This unedifying phrase is indication enough of the uncertain foundation of the doctrine in that country.

175 Even if some form of the doctrine exists in Australia, it would not appear to apply to the present case. First, on no account could the constitutional grounds urged by the plaintiffs be described as "frivolous". Secondly, success on the part of the plaintiffs would not lead to "anarchy and chaos". On the material placed before this Court, it would have little, if any, application to the judiciary in any other Australian State where acting judges have, until now, been comparatively rare. It would have no application to the federal judiciary, where acting judges do not exist. The constitutional flaw urged for the plaintiffs lay in the substantial and apparently stable number of acting judicial appointments that had altered the institutional character of the Supreme Court of New South Wales. Whether the argument would apply equally to the District Court of New South Wales (which is not expressly named in the Constitution) would remain for future debate. Thirdly, it is difficult to reconcile the doctrine with the fundamental role of the federal Constitution as the ultimate source of other laws. Constitutional rulings can occasionally be unsettling, at least for a period[144]. However, this is inherent in the arrangements of a nation that lives by the rule of law and accords a special status to the federal Constitution as its fundamental law.

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[141] See *Reference re Manitoba Language Rights* [1985] 1 SCR 721 at 765.

[142] cf Dixon, "De Facto Officers", in *Jesting Pilate*, 2nd ed (1997) 229 at 230; Pannam, "Unconstitutional Statutes and De Facto Officers", (1966) 2 *Federal Law Review* 37; Campbell, "De Facto Officers", (1994) 2 *Australian Journal of Administrative Law* 5.

[143] See *Glidden Co v Zdanok* 370 US 530 at 535-537 (1962); *Ryder v United States* 515 US 177 at 182-184 (1995).

[144] As occurred following eg *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (invalidation of the Commonwealth Court of Conciliation and Arbitration), *Cheatle v The Queen* (1993) 177 CLR 541 (invalidation of majority jury verdicts in trials of federal indictable offences) and *Ha v New South Wales* (1997) 189 CLR 465 (invalidation of tobacco licence fees).

176 *Conclusion: confining the objection*: Having regard to the tepid way in which ASIC ultimately pressed its argument on this point, I need say no more about it. None of the three identified subsidiary issues therefore controls the outcome of these proceedings. That outcome depends upon the principal argument for the plaintiffs. It rests on the plaintiffs' objection to the validity of the appointment of acting judges of the Supreme Court of New South Wales in the past decade, and specifically to the appointment of Foster AJ in ASIC's proceedings against them. I therefore turn to that objection.

The acting judge objection succeeds

177 *Source of invalidation*: As stated at the outset of these reasons, the answer to any question concerning the invalidation of a State law (or of a commission issued under that law) purporting to permit a person to be appointed as an acting judge of the Supreme Court for reasons of incompatibility with the federal Constitution, depends upon the constitutional text, or the implications necessarily derived from that text.

178 In the case of federal judges (including federal magistrates) provisions of the federal Constitution expressly govern the terms of their appointment, tenure, remuneration and removal[145]. Those provisions do not apply, according to their language, to State judges. From this feature of the Constitution, ASIC, and some of the States intervening, sought to derive much comfort – basically on an *expressio unius* argument. If the Constitution had intended to express requirements concerning the terms of appointments of State judges, they argued, it would have said so.

179 The dangers of deploying the *expressio unius* rule have been explained by this Court many times[146]. Those dangers are particularly evident in constitutional interpretation because of the brief terms in which the federal Constitution is expressed; the necessity of applying the Constitution to a myriad circumstances; the difficulty of securing formal amendment; and the changing circumstances to which the Constitution must continually apply. I explained these considerations in *Re Wakim; Ex parte McNally*[147]. The absence of an express provision concerning the appointment of State judges by no means excludes implied requirements necessitated by considerations of history, context and also the function of the Constitution as the instrument of government for the entire Australian nation.

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[145] s 72.

[146] See, eg, *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94.

[147] (1999) 198 CLR 511 at 605 [199]; cf *Ruhani v Director of Police* (2005) 79 ALJR 1431 at 1463-1467 [173]-[199]; 219 ALR 199 at 240-246.

180 Much is written in the reasons of the other members of this Court to explain the arguments advanced on the acting judge issue in these proceedings; relevant past authority of the Court; and the considerations that need to be given weight in reaching a conclusion on the plaintiffs' submissions. It is unnecessary for me to repeat this background material. However, it is useful to collect a number of matters of common ground.

181 *Common ground*: Some circumstances evident in these proceedings are not disputed or should be taken as given:

(1) The challenge is not personal to the Honourable M L Foster[148]. There was not the slightest suggestion that he had been biased against the plaintiffs or that he approached his duties as an acting judge in a way that was personally inappropriate. The issue for decision is a legal one. It is concerned with the nation's judicial institutions and the basic values of the Constitution, not personalities;

(2) Nor was it suggested by anyone that any particular circumstances[149] had contaminated the trial of the proceedings involving the plaintiffs. To the extent that it was argued that an evidentiary base for the plaintiffs' complaint was missing, I disagree. Nor do I accept that the issue presented by the plaintiffs is in any way lacking in justiciability. No party contested the essential constitutional facts presented by the plaintiffs. On the contrary, the defendants joined issue upon them. They too are non-personal. They exist in detail in official records. It is the institutional change of recent years that the plaintiffs contest. It is not the individual honour and integrity of the persons who, in good faith, have participated in those arrangements;

(3) The role of this Court is not, as such, to pronounce on the "general desirability"[150] of the appointment of acting judges. But neither is that issue one which belongs exclusively to a State Parliament, the Executive Government or officials. To the extent that a federal constitutional norm is invoked, the ultimate decision on that issue belongs to this Court. The Court cannot disclaim its responsibilities in resolving that issue;

(4) Whilst the plaintiffs' challenge has potential significance for State courts other than the Supreme Court, it was ultimately focussed on the validity of

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[148] Reasons of Gleeson CJ at [9].

[149] Reasons of Gleeson CJ at [9].

[150] Reasons of Gleeson CJ at [20]; reasons of Heydon J at [251].

appointments of acting judges in the Supreme Court of New South Wales. As is clear from the evidence and public records, different factual considerations arise in the case of the District Court of New South Wales because of the much greater number of acting appointments there and the large proportion of such appointments in recent years involving private legal practitioners[151]. Similarly, as the joint reasons demonstrate, different considerations arise in respect of the exercise of federal jurisdiction by State magistrates[152]. A determination of invalidity in the present case, in respect of an appointment as an acting judge of the Supreme Court, would not necessarily require the same outcome in respect of other courts, where the constitutional position is different[153];

(5) The materials placed before this Court, and other publicly known and available information, indicate that the same oaths or affirmations are administered, before taking up duty, to acting judges as to permanent judges; that the jurisdiction in New South Wales of the complaints procedure of the Judicial Commission and of the Independent Commission Against Corruption applies equally to both[154]; and that during appointment an acting judge enjoys immunity from removal or interference by the Executive Government in the same way as does a permanent judge. Nevertheless, acting judges do not enjoy the same security of tenure for an extended term (to the age of 70 years) that a permanent judge enjoys[155]. They hold office only during short terms, sometimes (but not always) successive. They are subject to renewal, even repeated renewal, at the behest of the Executive; and

(6) Inherent in the references in the federal Constitution to State courts (and specifically to the "Supreme Court of any State") is a conception of what such courts will be and how they will be constituted. As a minimum, the constitutional description of such courts connotes basic requirements of independence and impartiality on the part of the judicial officers constituting them[156]. The federal Constitution necessarily implies, and all democratic nations accept, that an independent and impartial judiciary is

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[151] See above these reasons at [140].

[152] Joint reasons at [84]-[85].

[153] Constitution, s 73(ii).

[154] Reasons of Gleeson CJ at [21]-[24]; reasons of Heydon J at [269]-[271].

[155] Reasons of Gleeson CJ at [36]-[38].

[156] Reasons of Gleeson CJ at [36].

essential to the maintenance of the rule of law[157]. The rule of law is a fundamental postulate of the Australian federal Constitution[158].

182 Given that the Constitution suggests that provision for the composition of State courts will be made under State law, how can an implication be derived from the provisions in Ch III to invalidate the action of the Parliament of New South Wales in authorising the appointment of acting judges in the terms of s 37 of the Supreme Court Act, even in unusually large numbers? How is the commission granted to Foster AJ, purportedly pursuant to that provision, rendered invalid in respect of the proceedings affecting the plaintiffs? In particular, how can such invalidity arise given that the federal Constitution posits the existence of States, as separate governmental entities, with institutions of government (including courts) that are basically left to conform to their own several constitutional requirements[159]? In investing the "courts of the States" with federal jurisdiction is not the Commonwealth ordinarily to be taken as accepting those courts as established under State law[160]?

183 The answer to these questions requires attention to the six steps by which the plaintiffs advanced their arguments before this Court. In order to give proper consideration to those arguments, it is necessary to examine these steps in turn.

184 *Needs of Australian federation*: The first step involves a full appreciation of the federal character of the Australian Constitution and the checks and balances which that feature stamps on the institutions of the Commonwealth, the States and the Territories.

185 It is the federal character of the Australian Constitution that necessitates, more than in nations differently organised, a judiciary that can decide federal contests in a way that is accepted by all participants in the polity[161]. Given the necessity of drawing lines that mark off the governmental powers respectively of the Commonwealth, the States and the Territories, it is essential that there be an independent and impartial constitutional umpire for the disputes that inevitably

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[157] Shetreet and Deschênes (eds), *Judicial Independence: The Contemporary Debate*, (1985) at xv.

[158] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

[159] *Yougarla v Western Australia* (2001) 207 CLR 344 at 378-380 [91]-[99].

[160] *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452; *Le Mesurier v Connor* (1929) 42 CLR 481 at 495; cf reasons of Gleeson CJ at [36], [38].

[161] See *Boilermakers* (1956) 94 CLR 254 at 276; cf *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 540-541; [1957] AC 288 at 315.

occur. This is why federalism is legalism. It is why judicial review is an essential feature of governmental arrangements in a federal nation. The judges who perform the task of judicial review in such a polity must be, and be seen to be, legally competent, independent and impartial in the discharge of such functions.

186 These features, necessary to, and inherent in, the Judicature of the Commonwealth, take on an added significance in Australia because of the integrated character of the national Judicature and the capacity of the Federal Parliament to invest the courts of the States (and also of the Territories) with federal jurisdiction[162]. In this respect, the Australian Constitution is not only different from that of the United Kingdom, hitherto a unitary state. It is also distinct from that of the United States and Canada where, although federations, different judicial arrangements apply. These features of the Australian constitutional system make it dangerous to assume that the organisation of the judiciary accepted in other countries will necessarily satisfy Australian constitutional norms.

187 During argument, much was made of the existence of courts with part-time members in the United Kingdom, both before and after Australian Federation[163]. Thus, the English arrangements for Recorders and Deputy High Court Judges, appointed part-time from practising barristers (as well as Scottish arrangements for temporary sheriffs[164] and temporary judges[165]), were described. Although the Scottish part-time sheriffs were recently found incompatible with the requirements of independence and impartiality in Art 6(1) of the European Convention, the very large number of part-time judicial officers throughout the United Kingdom was urged as a reason why the smaller number of Australian acting State judges should cause no constitutional offence.

188 It is understandable that such an argument should be mounted. There are indeed many similarities between the judiciary in Australia and that of the United Kingdom. However, there is a fundamental difference. Australian courts have special responsibilities in deciding federal questions. Inevitably, such questions concern governmental issues. They involve issues that are political in the broad

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[162] Constitution, s 77(iii). See also s 77(ii).

[163] Provisions existed for special appointments of acting judges in England prior to Australian Federation but always on a limited, special and *ad hoc* basis, or subject to specific requirements: see 13 & 14 Vict c 25; *Supreme Court of Judicature Act* 1884 (UK), s 7; *County Courts Act* 1888 (UK), s 18.

[164] *Starrs* 2000 JC 208.

[165] *Clancy v Caird* 2000 SC 441; *Kearney* 2006 SC (PC) 1.

sense of that word[166]. So much is inescapable in judicial review in a federation in those courts that are entrusted with that responsibility.

189 It is therefore a fundamental mistake to attach large significance to the arrangements for temporary judicial appointments in non-federal countries, including the United Kingdom, New Zealand and South Africa[167]. The legal texts are distinguishable. The constitutional obligations are different. The traditions that have grown around those obligations are peculiar. One illustration will suffice. The combination in the United Kingdom, until recently, in one person, the Lord Chancellor, of legislative, executive and judicial functions, is inconceivable in an Australian constitutional context[168].

190 The absence, until the European Convention recently forced the issue on courts in the United Kingdom, of any consideration of the possible deficiencies in the large cohort of temporary judges is another reason for considerable reserve in considering the plaintiffs' present challenge in conventional terms, according to the United Kingdom's legal institutions and traditions. Similarly, pre-Federation, colonial debates and assumptions in Australia[169] are, with respect, of very limited utility in judging what the federal Constitution requires, and permits, in contemporary Australia.

191 As it happens, the pre-Federation practice in Australia (in part because of the small size and high status of courts in colonial times) was uniformly to limit acting judicial appointments to special *ad hoc* circumstances. Generally speaking, Canada has followed a similar convention. In the context of very different constitutional provisions for the appointment of provincial judges in

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[166] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82 per Dixon J; cf *Combet v Commonwealth* (2005) 80 ALJR 247 at 306 [271]; 221 ALR 621 at 695-696.

[167] See, for example, the approach of the Constitutional Court of South Africa in *Van Rooyen v The State* 2002 (5) SA 246 at 326-327 [241]-[243]. As Chaskalson CJ states at 327 [244]-[245], s 175 of the Constitution of South Africa expressly permits the appointment of acting judges on the recommendation of the Minister acting with the concurrence of the Chief Justice of the Constitutional Court or the senior judge of the court concerned. See also *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744.

[168] See *Boilermakers* (1956) 94 CLR 254 at 276.

[169] Reviewed by Heydon J at [256]-[267].

Canada[170] and despite a decision upholding part-time inferior court appointments in Quebec[171], such appointments have not proliferated. This may have been because the Supreme Court of Canada recognised, and stated, that the appointment of such part-time judges was not "ideal"[172].

192 *Advent of the Kable principle*: With Australian Federation in 1901, the peculiar arrangements for the exercise of federal jurisdiction by State (and eventually Territory) courts commenced. There is no equivalent constitutional arrangement in the United States or Canadian Constitutions. It was a sensible expedient in Australia given the small population; the limited amount of litigation; the high standing of the State (previously colonial) courts; and economic considerations. However, necessarily involved in the vesting of federal jurisdiction in State courts was an assumption which it took nearly a century for this Court to express. In *Kable*, this Court spelt out what had earlier been assumed. This was that, in order to be courts suitable for the exercise of federal jurisdiction under the Constitution, State courts (and by analogy Territory courts[173]) were required to exhibit certain basic qualities as "courts" (or specifically as a "State Supreme Court"[174]) named as such in the Constitution.

193 From this relatively simple, one might almost say self-evident, implication, drawn from the language and structure of Ch III of the Constitution (and specifically ss 73 and 77), have flowed the decision in *Kable* and a large body of judicial *dicta*; but not yet certainty about the scope of the doctrine or clarity about the occasions for its application[175]. It is true that, in the past, the appointment of acting judges has been noted by this Court, without criticism[176]. However, the basis and number of such appointments was then quite different from that lately evident in New South Wales. If the criterion is whether there has

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[170] It appears to have been accepted that acting or part-time federal judges would "of course" strike constitutional problems in Canada: see Friedland, *A place apart: judicial independence and accountability in Canada*, (1995) at 260.

[171] *Constitution Act* 1867 (Can), s 96; *R v Lippé* [1991] 2 SCR 114.

[172] *Lippé* [1991] 2 SCR 114 at 142 per Lamer CJ.

[173] *Bradley* (2004) 218 CLR 146.

[174] *Fardon* (2004) 78 ALJR 1519 at 1545 [136]; 210 ALR 50 at 86.

[175] Wheeler, "The *Kable* Doctrine and State Legislative Power Over State Courts", (2005) 20(2) *Australasian Parliamentary Review* 15 at 30.

[176] *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 10; *Spratt v Hermes* (1965) 114 CLR 226 at 271-272; *Eastman* (1999) 200 CLR 322 at 332 [8].

now been "a series of acting rather than full [judicial] appointments which is so extensive as to distort the character of the court concerned"[177], that criterion is, in my view, now fulfilled in the case of the Supreme Court of New South Wales.

194 It has been said that the circumstances that must be proved to invoke the principle of repugnance expressed in *Kable* must be "extraordinary"[178]. Being an implication derived from the Constitution, it cannot, of its nature, be confined to individual factual circumstances. It will attach wherever incompatibility is shown between a State law and the fundamental assumptions inherent in the exercise of federal jurisdiction. The criterion of "public confidence" is conclusory, sometimes inappropriate and usually unhelpful[179]. However, a more useful test, suggested in a number of the cases, involves consideration of whether, if enacted by the Federal Parliament, the impugned provision would be impermissible for a federal court[180]. This cannot be an exclusive test of validity[181]. Yet it is often a useful check because of the fundamental assumption that the Constitution did not intend to adopt basically different standards of justice in federal and State courts[182]. It is uncontested that the federal Constitution imposes a complete prohibition on acting appointments to federal judicial office in Australia.

195 Even if such an absolute prohibition is not implied in the case of State courts (including a State Supreme Court) by the repugnancy principle in *Kable*, that principle is engaged, at least, when an attempt is made by State law and practice to alter the institutional arrangements of a State court in ways that threaten the real and apparent independence and impartiality of that court and of the State judicial officers serving in it. If the institutional alterations result in a "court" that is qualitatively changed (so that, in the case of a Supreme Court, it does not answer to its constitutional description as such) the *Kable* rule is engaged. Self-evidently, matters of judgment and basic constitutional values

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[177] *Fardon* (2004) 78 ALJR 1519 at 1540 [104]; 210 ALR 50 at 79.

[178] *Kable* (1996) 189 CLR 51 at 98, 134.

[179] The criterion is stated in *Kable* (1996) 189 CLR 51 at 108 per Gaudron J, 118-119 per McHugh J, 133 per Gummow J. But see *Fardon* (2004) 78 ALJR 1519 at 1546 [144.3]; 210 ALR 50 at 88-89.

[180] In *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14].

[181] *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 192-193 [32]; *Fardon* (2004) 78 ALJR 1519 at 1547 [144.4], 1562 [219]; 210 ALR 50 at 89, 110.

[182] *Fardon* (2004) 78 ALJR 1519 at 1547 [144.5]; 210 ALR 50 at 89.

inform such assessments. These, in turn, are influenced by considerations of the history and functions of acting commissions and the context in which they apply.

196 Neither the federal Constitution nor *Kable* assimilates State courts or their judges and officers, with federal courts, their judges and officers[183]. Thus, *Kable* does not require the elimination of variations in the organisation and operation of State courts, enacted according to perceived local needs and requirements from time to time[184]. Those who are not ordinarily enthusiastic for the federal character of our Constitution can sometimes become highly defensive of State experimentation when it comes to imposing new institutional arrangements on State courts[185]. However, consistently with the *Kable* principle, there is certainly a limit. That limit is fixed by the standards of independence and impartiality that are demanded of State courts for their exercise of federal jurisdiction. Those features find a reflection in the general character of the federal judiciary even when they do not oblige observance of precisely the same requirements.

197 It must be doubted today whether the remarks of Gibbs CJ, to the effect that a State court composed of laymen, with no security of tenure, might effectively be invested with federal jurisdiction[186], survive the insight which this Court's decision in *Kable* provided. When *Kable* was expressed, its insight was new. This Court is still discovering *Kable*'s applications. They are beneficial and protective of judicial institutions throughout Australia. They exist not for the advantage of judges themselves but for the courts and all persons dependent on the protection of the law. The *Kable* principle thus lies in the bedrock of Australia's constitutional assumptions. In this respect, it is a practical and necessary counterpart to that other fundamental principle, stated by Dixon J in *Australian Communist Party v The Commonwealth*[187], that "the rule of law forms an assumption" upon the acceptance of which the Australian Constitution is framed.

198 Numerous decisions of this Court contain remarks to the effect that the Federal Parliament must, when investing State courts with federal jurisdiction, take those courts as it finds them "with all [their] limitations as to jurisdiction,

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183 *Fardon* (2004) 78 ALJR 1519 at 1528 [36] per McHugh J; 210 ALR 50 at 62.

184 *Kotsis v Kotsis* (1970) 122 CLR 69 at 110 per Gibbs J.

185 As in *Baker v The Queen* (2004) 78 ALJR 1483; 210 ALR 1 and *Fardon* (2004) 78 ALJR 1519; 210 ALR 50.

186 In *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 57.

187 (1951) 83 CLR 1 at 193.

unless otherwise expressly declared"[188]. However, virtually all of these words were written before the *Kable* enlightenment. They now need to be reconsidered in the light of the important general principle of constitutional law expressed in *Kable*.

199 The legal mind clings to oft-repeated *formulae*. But when a new constitutional truth is perceived, it is necessary to reconsider past observations. It is not now the constitutional law of Australia that the Federal Parliament must accept *all* State courts as it finds them when investing federal jurisdiction in such courts. So far as the State Supreme Courts are concerned, with their guaranteed constitutional status, it is inherent in their existence and the necessity that they should receive and exercise federal jurisdiction, that they will not depart from a capacity to do so in a way appropriate to such jurisdiction. If they did so depart, this Court would not be without remedy. As to other State courts, such as a District Court, if they were to depart from *Kable* requirements, it would be open to the Federal Parliament to limit their exercise of federal jurisdiction to such courts as particularly constituted. In the practical circumstances of federation, it may be expected that repugnance and incompatibility will generally be avoided so as to maintain this beneficial feature of the Constitution. But, if they are not, *Kable* affords a judicial remedy.

200 Decisions of this Court, since *Kable*, have contained remarks that can be read as favourable to experimentation in features of Territory judicial appointments[189]. Some such remarks, in *obiter* comments, have suggested the validity of part-time or temporary judicial commissions[190]. However, such observations present no difficulty for the plaintiffs' challenge in these proceedings.

201 First, there is no earlier occasion when this Court has been asked specifically to rule on the validity of the appointment of an acting judge of a State Supreme Court. Secondly, the constitutional position of the courts of the Territories, in respect of which such remarks have been made, is separate, and different, from that of State courts[191] and especially State Supreme Courts[192].

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[188] *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313. See also *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37; *Kotsis* (1970) 122 CLR 69 at 107; *Knight v Knight* (1971) 122 CLR 114 at 137.

[189] See, eg, *Bradley* (2004) 218 CLR 146 at 152-153 [3].

[190] *Bradley* (2004) 218 CLR 146 at 164 [32].

[191] Constitution, s 77(ii) and (iii).

The constitutional status of Territory courts considered in *Eastman* and *Bradley* (Territory courts not being specifically named in Ch III as such) is still in a process of evolution[193]. Thirdly, the plaintiffs did not contest the permissibility of *ad hoc*, individual, special arrangements, including for temporary or acting judges in State (or Territory) courts, as such. What they challenged were appointments as instances of substantial institutional alteration.

202 Far-fetched requirements for multiple appointments of acting judges, including the sudden death of many judges in a terrorist attack or an influenza pandemic, were advanced by the defendants in support of the unrestricted appointment of acting judges. Such emergencies constitute an entirely different circumstance from that disclosed by the record showing what has actually occurred in New South Wales in recent years. In fact, they highlight the arguably valid and proper use of a special statutory power to appoint acting State judges. They differentiate that use from the purposes of fulfilling the basic institutional needs of the State courts, evident in New South Wales since 1989.

203 Finally, it is true that, so far, the *Kable* doctrine, although often invoked, has not resulted in the invalidation of many State laws. Apart from in *Kable* itself, the only other instance in which the principle has been applied was in Queensland in *Re Criminal Proceeds Confiscation Act 2002*[194]. This is why the *Kable* doctrine has been described as one that is "under-performing"[195]. In this Court, there have been many rejections[196]. But these facts are immaterial. The circumstances of the other cases were different. No one in these proceedings challenged the authority or correctness of the *Kable* principle. There are some indications that the principle may be operating prophylactically[197]. Thus, since *Kable* was decided by this Court, only retired judges have been appointed to acting positions in the Supreme Court of New South Wales. This was a prudent

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[192] Constitution, s 73(ii).

[193] *Eastman* (1999) 200 CLR 322 at 371-372 [127]; cf *Ruhani* (2005) 79 ALJR 1431 at 1465-1466 [189]-[191]; 219 ALR 199 at 244.

[194] [2004] 1 Qd R 40.

[195] Wheeler, "The *Kable* Doctrine and State Legislative Power Over State Courts", (2005) 20(2) *Australasian Parliamentary Review* 15 at 30.

[196] Including *Nicholas v The Queen* (1998) 193 CLR 173; *H A Bachrach* (1998) 195 CLR 547; *McGarry v The Queen* (2001) 207 CLR 121; *Bradley* (2004) 218 CLR 146; *Silbert* (2004) 217 CLR 181; *Baker* (2004) 78 ALJR 1483; 210 ALR 1; *Fardon* (2004) 78 ALJR 1519; 210 ALR 50.

[197] Wheeler, "The *Kable* Doctrine and State Legislative Power Over State Courts", (2005) 20(2) *Australasian Parliamentary Review* 15.

step to reduce the risks of *Kable* invalidity. However, the invalidity is fundamentally concerned with institutional considerations touching the integrity of State courts[198]. That is the specific defect which the plaintiffs allege has happened here. It is the feature of the proceedings that makes the decision in *Kable* specially applicable.

204 *Context: international human rights*: There is a third consideration. Legal interpretation involves the derivation of meaning from words, understood in context. That context includes the sentence in which the words appear[199], the parts of the legal document that throw light on the meaning, considerations of legal history and background legal materials. However, it also includes admissible social facts and the national and international circumstances in which the legal document in question is intended to operate. It is this modern understanding of the process of interpretation that leads, in constitutional construction, to the examination of the context of international human rights law as it operates in the contemporary world[200].

205 It is futile to suggest that a contemporary lawyer ignores this international context when ascertaining the meaning of relevant provisions of the Australian Constitution. An instance of the process (not always acknowledged or perhaps perceived) is the recent decision of this Court in *Koroitamana v Commonwealth*[201]. The issue there was whether a child, born in Australia, answered to the description of "alien" in s 51(xix) of the Constitution. In answering this question, four members of this Court, including myself, treated it as relevant to examine the provisions of international law contained in the Convention on the Reduction of Statelessness[202]. Such provisions of international law cast light on the meaning of alienage for the purposes of the Constitution, as understood in contemporary circumstances.

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198 *Fardon* (2004) 78 ALJR 1519 at 1523 [15] per Gleeson CJ, 1528 [37] per McHugh J, 1539 [101] per Gummow J, 1562 [219] per Callinan and Heydon JJ; 210 ALR 50 at 56, 62-63, 78, 110.

199 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397.

200 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622-624 [169]-[176]; cf at 589-595 [63]-[73].

201 (2006) 80 ALJR 1146 at 1154 [44] per Gummow, Hayne and Crennan JJ, my own reasons at 1158 [69]; 227 ALR 406 at 415-416, 420-421.

202 [1975] *Australian Treaty Series* 46. In my reasons in *Koroitamana* (2006) 80 ALJR 1146 at 1157-1158 [66]-[68]; 227 ALR 406 at 420, I also referred to the provisions of the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the Convention on the Rights of the Child.

206 The Supreme Court of the United States has also adopted this approach, in the interpretation of the United States Constitution, paying due regard to international law and practice[203]. This is a natural and inevitable development in the law. Contemporary judges and lawyers can hardly leave their knowledge about the developments of the world and of international law at the courtroom door when they enter to perform their duties. With respect, I do not accept the view that the meaning of the Australian Constitution is to be ascertained solely or mainly by reference to what the words are taken to have meant in 1900[204]. That approach is fundamentally inconsistent with the character of the Constitution as an instrument of government intended to be of indefinite duration.

207 The use of international law is a further advance in the approach to interpretation that has occurred in this Court, and elsewhere, since the early decisions about the features of State courts that would be compatible with the implications of Ch III of the federal Constitution and specifically the vesting of federal jurisdiction in State courts[205]. The process will continue to gather pace, stimulated by access to, and knowledge about, the decisions of national and transnational tribunals applying international human rights law.

208 The International Covenant on Civil and Political Rights ("the ICCPR") provides, relevantly, in Art 14(1), that:

> "[a]ll persons shall be equal before the courts and tribunals. In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

This provision supplements Art 10 of the Universal Declaration of Human Rights. There are analogous provisions in each of the regional human rights instruments[206].

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[203] *Trop v Dulles* 356 US 86 at 102-103 (1958); cf *Roper v Simmons* 73 USLW 4153 at 4160-4161 (2005); *Hamdan v Rumsfeld* Slip Opinion at 49-72 (2006) per Stevens J.

[204] cf *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1069-1070 [153]; 227 ALR 495 at 536-537; reasons of Heydon J at [266].

[205] The process was stimulated by *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

[206] American Declaration of the Rights and Duties of Man, Art 26; American Convention on Human Rights, Art 8(1); European Convention, Art 6(1); African Charter on Human and Peoples' Rights, Arts 7(1), 26.

209 In order to decide whether a court or tribunal may be considered "independent" for these purposes, regard is usually had (amongst other things) to the manner of the appointment of its members; their terms of office; the existence of effective guarantees against outside pressure; and the question whether the body presents an appearance of independence and impartiality[207]. Courts have identified various "essential conditions" for judicial independence, having regard to their own traditions and legal systems. These include security of tenure; financial security; and institutional independence[208]. Depending on the circumstances, and measured against such standards, the appointment of acting judges has enlivened concern in several countries. Sometimes, the appointments have been held to fall short of the requirement of manifest independence and integrity[209]. On other occasions, the appointments have been held compatible with such fundamental standards[210].

210 The ICCPR is not, as such, part of Australia's municipal law. Still less are its provisions repeated in the federal or State Constitutions. Where municipal law is clear, including in the Constitution, it is the duty of Australian courts to give effect to it[211]. However, where, as here, the applicable law is in a state of development, especially since *Kable*, and is inescapably concerned with general principles[212], it is helpful to examine the way in which the rules governing

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[207] *Langborger v Sweden* (1989) 12 EHRR 416; *Bryan v United Kingdom* (1995) 21 EHRR 342.

[208] *Valente v The Queen* [1985] 2 SCR 673 at 687. See also Richardson, "Defining judicial independence: A judicial and administrative tribunal member perspective", (2006) 15 *Journal of Judicial Administration* 206 at 206-207.

[209] *R v Liyanage* (1962) 64 NLR 313 (ministerial control); *Law Society of Lesotho v Prime Minister of Lesotho* [1986] LRC (Const) 481 (acting judges from office of public prosecutions); *Starrs* 2000 JC 208 (temporary sheriffs in Scotland); *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 (supernumerary provincial judges).

[210] *Lippé* [1991] 2 SCR 114 (part-time municipal court judges).

[211] See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 424-426 [169]-[173].

[212] Such as whether the Supreme Court of New South Wales, when it includes a large and effectively permanent cohort of acting judges, answers the description of a "Supreme Court of any State" in s 73(ii) of the federal Constitution; whether "State courts", so constituted, answer the description of "courts of the States" or "any court of a State" in s 77(ii) and (iii) of the Constitution; and whether such courts are appropriately constituted to exercise federal jurisdiction as contemplated by s 77 of the Constitution.

judicial independence and impartiality have been elaborated, both under the ICCPR and elsewhere. In the submissions of the parties and the interveners in these proceedings, that elaboration was undertaken – itself a sign of changing practices in legal argument in Australia.

211 The United Nations Human Rights Committee, which decides communications alleging non-compliance by states parties with the ICCPR, has strongly endorsed the importance of judicial tenure as an essential prerequisite for an independent judiciary[213]. In general observations on judicial arrangements in one country, the Committee expressed its concern about the lack of tenure as an impediment to the independence of the judiciary[214]. The Committee, like the European Court of Human Rights in upholding Art 6(1) of the European Convention, has drawn distinctions between:

- The standards applicable to administrative as distinct from judicial tribunals[215];
- The standards stated in the legal text and the requisite appearance of independence and "objective impartiality" in practice[216]; and
- Individual infractions and institutional defects[217], the latter ordinarily being more serious because they are likely to repeat their consequences in many decisions made by the flawed institution.

212 The application of the European Convention to the municipal law of the United Kingdom[218] has required the courts of that country to consider directly the necessities of independence and impartiality of its courts in accordance with the jurisprudence that has grown around these basic concepts. In Australia, we cannot use the same legal material in an identical way in elaborating the

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[213] Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2004) at 405 [14.30].

[214] United Nations Human Rights Committee, Concluding Observations on Slovakia, UN Doc CCPR/C/79/Add.79, (1997) at [18].

[215] cf *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165; Lester and Pannick (eds), *Human Rights Law and Practice*, 2nd ed (2004) at 237 [4.6.55].

[216] *Findlay v United Kingdom* (1997) 24 EHRR 221 at 244-245 [73]; *Stafford v United Kingdom* (2002) 35 EHRR 32 at 1143 [78]; *Clark v Kelly* [2004] 1 AC 681.

[217] *Valente* [1985] 2 SCR 673; *Beaumartin v France* (1994) 19 EHRR 485.

[218] By the *Human Rights Act* 1998 (UK), s 1, 3 and 4 and, in Scotland, by s 57(2) of the *Scotland Act* 1998 (UK).

requirements of our own Constitution and laws. Nevertheless, the many recent judicial decisions in the United Kingdom and elsewhere concerning acting and temporary judges, collected in the reasons of Lord Justice-Clerk Cullen in *Starrs*[219], bear out the conclusion in 1998 of the then United Nations Special Rapporteur on the Independence of the Judiciary (Dato' Param Cumaraswamy). This was that the growing understanding of the needs for the protection of judicial independence "send alarm bells to some jurisdictions where temporary judges are appointed as a matter of course without regard to the grave constitutional flaw in such appointment"[220].

213 It was considerations such as these that resulted in the conclusion of the High Court of Justiciary in Scotland that the institutional arrangements for the temporary sheriffs in that country (which had been in place for many years) should be declared incompatible with the right to trial by "an independent and impartial tribunal". In *Starrs*, that conclusion invalidated the conviction of the applicant by such a sheriff[221]. As Lord Reed observed[222]:

> "[T]he United Kingdom practice of appointing temporary judges appears to be unusual within a European context: it appears that in almost all the other systems surveyed the appointment of a temporary judge by the executive for a period of one year, renewable at the discretion of the executive, would be regarded as unconstitutional".

214 In the elaboration of the Australian Constitution, this Court should maintain an awareness of international expositions of the requirements of judicial independence and impartiality, including in respect of judicial tenure. Each complaint of individual and institutional infractions must be judged on its own merits and in an Australian context. Considerations of practicality, economy and post-service desire for further judicial service may be given weight. Constitutional provisions, treaty obligations and institutional arrangements will inevitably vary as between different countries. However, the significance of the elaboration of international human rights standards in the context of acting and part-time judges is now clear. Increasingly, the defects of such appointments, when measured against the requirements of fundamental human rights, have been

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[219] 2000 JC 208 at 220-226. See also at 241-249 per Lord Reed.

[220] Report to the Seminar of the Commonwealth Magistrates and Judges' Association, Larnaca, October 1998 cited in *Starrs* 2000 JC 208 at 223.

[221] See also the reference in *Starrs* 2000 JC 208 at 242 by Lord Reed to the Universal Declaration on the Independence of Justice (June 1983), Annex IV, par 2.20: "The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence."

[222] *Starrs* 2000 JC 208 at 242-243 (citations omitted).

identified and given effect by courts and tribunals of high authority in many countries.

215 This Court should approach the resolution of the plaintiffs' challenge in the present proceedings with such worldwide developments in mind. The fact that they represent new criticisms of local judicial arrangements which may have lasted for some time is not a reason to reject them. The law is full of new insights. *Kable* itself was one of them. And in any case, the plaintiffs' institutional criticism concerns developments in the Australian judiciary, specifically the Supreme Court of New South Wales, that the evidence shows are less than twenty years old.

216 *Other contextual considerations*: The three remaining steps in the plaintiffs' submissions can be dealt with more briefly. They require a recognition of other contextual features that lend colour to the alteration of the judicial institution of which the plaintiffs complain; the accumulation of changes so that they may be perceived as an attempted institutional modification, specifically of the State Supreme Court; and a recognition of the obligation of this Court, as the defender of the Constitution (and specifically of its judicial Chapter), to be vigilant against such alterations[223].

217 The materials before this Court lend support to the plaintiffs' submissions. Of greatest importance was the factual material concerning the incidence of the acting appointments described. The shift in practice is arguably important because of the essential fragility of judicial power and authority; and also because of the special importance it enjoys in a federation[224]. Inevitably, the role of the judiciary in federations occasions criticism, and sometimes attack, from members of the other branches of government. Such attacks have increased in recent years[225], not only in Australia[226].

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[223] Willheim, "Review of Australian Public Law Developments", (2006) 30 *Melbourne University Law Review* 269 at 294-295.

[224] Drummond, "Towards a More Compliant Judiciary? – Part II", (2001) 75 *Australian Law Journal* 356 at 374-377.

[225] Kirby, "Attacks on Judges – A Universal Phenomenon", (1998) 72 *Australian Law Journal* 599.

[226] Ginsburg, "Judicial Independence", (1998) 72 *Australian Law Journal* 611; "Justice O'Connor Speaks Out on Inter-Branch Relations, Civic Education, and the State of the Federal Judiciary", (2006) 38(5) *The Third Branch* 6 at 6: "There is more intense criticism and concern about judges in the country than at any earlier time during my life."

218 In such circumstances, this Court should be specially protective of the Judicature from intrusions by the other branches of government upon judicial independence and impartiality. If the Court fails to discharge this constitutional function, it cannot be assumed that others will fill the gap. This institutional point was made by Phillips JA in remarks on his retirement from the Court of Appeal of Victoria. The plaintiffs included those remarks in their materials. By reference to proposed legislation in Victoria, designed to facilitate an institutional increase in the use of acting judges in that State, his Honour said, in words applicable here[227]:

> "It is one thing to tolerate the occasional acting appointment to this court for a limited time or purpose; it is altogether different to institutionalise such temporary appointments at the discretion of the executive."

219 These remarks must be clearly understood against the background of recent experience in Australia. In New South Wales, the appointment of acting judges in large numbers was first justified to remove a specific backlog. However, the temporary expedient soon became a permanent feature of the affected courts[228]. The objections to such an institutional change are many, quite apart from the fact that they were accomplished without specific debate in, or new laws enacted by, the State Parliament. To the extent that practising lawyers are temporarily appointed, later or meantime returning to their individual practices, the defects in manifest independence and impartiality are obvious. They were noticed in *Starrs*[229] where Lord Reed cited some extra-curial remarks of Brennan CJ[230], as well as the following remarks of my own[231]:

> "But what of the lawyer who would welcome a permanent appointment? What of the problem of such a lawyer faced with a decision which might be very upsetting to government, unpopular with the media or disturbing to some powerful body with influence? Anecdotal stories soon spread about the 'form' of acting judges which may harm their chances of permanent appointment in a way that is unjust. Such psychological pressures, however subtle, should not be imposed on decision-makers."

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[227] Phillips, "The corporatising of our courts", *The Age*, 24 March 2005.

[228] Sackville, "Acting Judges and Judicial Independence", *The Age*, 28 February 2005.

[229] 2000 JC 208 at 243.

[230] "The State of the Judicature", (1998) 72 *Australian Law Journal* 33 at 34.

[231] Kirby, "Independence of the Judiciary – Basic Principle, New Challenges", address to the International Bar Association Conference, Hong Kong, 12 June 1998 at 12.

220 At a time of increased media and other attacks on judges in Australia, an institutional change that shifts a significant cohort of the State judiciary from permanent tenured judges to part-time judges is seriously threatening to the independence and impartiality of that judiciary. In the nature of such threats, their impact is difficult to prove. But they are not theoretical. Governments are excused from appointing adequate numbers of permanent judges (with implications for staff, facilities and pensions). Litigants are subject to the risk of judges of short tenure and with inappropriate distractions. The tenured judiciary is undermined by such an alteration in its basic composition. The part-time and acting judges inevitably ride on the reputation earned by the tenured judiciary[232]. And although during service the acting judge is immune from day-to-day executive interference, their desire for reappointment as an acting judge (or confirmation as a permanent judge) renders the temporary appointee dependent on a decision by the Executive. This is not a feature of the tenure of permanent judges. Such judges, once appointed, are not beholden to the Executive for any wished-for continuation in office. Typically, they serve for a long interval, terminating on a specified birthday known in advance or upon earlier death or upon resignation decided by the judge. In Australia, the changed practice, instanced in these proceedings, endangers the separation of the senior judiciary from the Executive won in the *Act of Settlement* 1700[233]. It should be nipped in the bud, although by now the bud is in full flower.

221 It is fair to say that the worst features of the short-term appointments of practising lawyers to the Supreme Court of New South Wales have given way, in more recent years, to the exclusive appointment of retired judges as acting judges of the Supreme Court. I accept that this reduces the institutional affront[234]. However, it does not remove it. If it is decided that the years of service of permanent judges should be extended, the course consistent with manifest independence and impartiality of the judiciary of the State is to extend (or remove) the age of mandatory retirement. Such an extension occurred when that age was altered in New South Wales from seventy years to seventy-two[235].

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[232] Kirby, "Acting Judges – A Non-theoretical Danger", (1998) 8 *Journal of Judicial Administration* 69 at 74.

[233] 12 and 13 Wm III c 2.

[234] Young, "Acting judges", (1998) 72 *Australian Law Journal* 653 at 653-654. The same may be said of the occasional deployment of visiting judges from other courts in Australia who hold permanent judicial commissions or the use of permanent trial judges in the appellate court of the same court: see French, "Judicial exchange: Debalkanising the courts", (2006) 15 *Journal of Judicial Administration* 142 at 155-156, 158-159.

[235] *Judicial Officers Act* 1986 (NSW), s 44. This section was relevantly amended by the *Judicial Officers Legislation (Amendment) Act* 1990 (NSW), s 3, Sched 1, Pt 1.

222 The objections of principle to the present arrangements for extension of such appointments include:

(1) That each extension is dependent in every case on the will of the Executive;

(2) That some retired judges clearly desire continuation in office and are thus beholden for this purpose, at regular and short-term rests, sometimes repeatedly, to the will of the Executive;

(3) That some acting judges mix intervals of judicial service with private professional activities on their own behalf, thereby breaking down the judicial culture of an exclusive, dedicated, tenured service that previously existed; and

(4) That acting judges lack the staffing, personal benefits and institutional resources of permanent judges and, as has been observed, in appellate courts, typically (but not always) appear to play a more limited role when compared with permanent appellate judges.

223 To suggest that an acting judge, desirous of reappointment, confirmation as a permanent judge or promotion in appointment would be wholly uninfluenced, on the basis of a possible reappointment, by the risk of upsetting government with a decision, may be correct in the individual case. But it makes a considerable demand on human nature. Not all reasonable observers will be persuaded that it is so[236].

224 What is at stake in these proceedings, as the plaintiffs submitted, is not the accretion of flexibility and post-judicial retirement activities congenial to some former judges. Doubtless arguments can be advanced on both sides on these grounds. The danger of the institutional shift that has occurred, including in the Supreme Court of New South Wales, is that the State judicial institution is thereby weakened by an alteration of its membership to include a significant number, in stable proportion, of persons intermittently reliant upon government for renewal, at relatively short intervals. It is a development fundamentally wrong in principle. It is alien to the previous arrangements for judicial appointments to superior courts that obtained in Australia since colonial days. It is inconsistent with the constitutional character of the Supreme Court of a State

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[236] Crock, "Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions", (2000) 24 *Melbourne University Law Review* 190 at 216.

of the Commonwealth as existing at the time of Federation and for nearly ninety years thereafter[237].

225 In the nature of the accretions of executive power, once the process begins, it is likely to extend to other States[238]. Although the defendants argued that the law of disqualification for apparent bias was an adequate protection for judicial independence and integrity, that submission is unsound. That law exists to repair individual infractions in particular cases. The plaintiffs' challenge was more fundamental in character and concerned the validity of institutional arrangements. In *Fardon v Attorney-General (Qld)*, McHugh J acknowledged that the *Kable* principle was more likely to be applied in the future "in respect of the terms, conditions and manner of appointment of State judges … rather than in the context of *Kable*-type legislation"[239]. So, in my opinion, it has proved in these proceedings.

226 To conform to the federal Constitution, the previous condition of things must be restored. This Court should hold that, in respect of the Supreme Court of New South Wales, the repeated appointment of acting judges in recent years, in the numbers and under the arrangements shown in the record, is constitutionally impermissible. With respect, it is not sufficient to hint that in some future, unidentified and uncertain time, such a ruling might be made[240].

227 There comes a time when the number of acting judges appointed, and appointed persistently, works an identifiable institutional alteration to the courts affected. Defining when that moment arrives may be difficult. But it invites the discharge of the most important function entrusted to this Court by the Constitution. When the test of principle arises, this Court must respond. Who can seriously doubt that the power provided by s 37 of the Supreme Court Act is now being used in an utterly different way than was formerly the case and than

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[237] See the remarks of Alfred Deakin cited by Gleeson CJ on the centenary of the Court, (2003) 218 CLR v at vii: "Whatever is supreme in the State … ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the State"; cf *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 265 [298]-[299].

[238] As evident in the introduction of the *Courts Legislation (Judicial Appointments and Other Amendments) Act* 2005 (Vic) inserting s 80D into the *Constitution Act* 1975 (Vic) to provide for appointment to a pool of acting judicial officers.

[239] *Fardon* (2004) 78 ALJR 1519 at 1530 [43]; 210 ALR 50 at 65. It is institutional integrity that is important for *Kable*: see *Kable* (1996) 189 CLR 51 at 103; cf *Fardon* (2004) 78 ALJR 1519 at 1529-1530 [41]-[42]; 210 ALR 50 at 64-65.

[240] Joint reasons at [97].

was expected when the facility of acting appointments was enacted? The institutional change undermines the integrity and independence of the Supreme Court in a manner that occasional, special, *ad hoc* acting appointments never did. This Court should say so. It should fashion orders to give effect to that constitutional conclusion.

228 When *Austin v The Commonwealth*[241] came before this Court, it was astute to find a constitutional implication protective of what the majority saw as the necessity of the State judiciary (specifically the State Supreme Court) to be free of a disability or burden on its judicial activities by reason of the operation upon the remuneration of State judicial officers of a federal law of income taxation of general application. I dissented in the result, although I recognised the protection afforded by the federal Constitution for "the very frame of the Constitution" as stated in *Melbourne Corporation v The Commonwealth*[242] and hence, to some degree, of the integrity and independence of the State judiciary[243]. With respect to those of a different view, I regard any attitude of "Dammit, let 'em do it"[244] as alien to this Court's proper constitutional function. To the extent that this philosophy is "coming along nicely"[245], it is time for this Court to change direction.

229 I also regard it as unfortunate, in these proceedings, where the threat to the integrity and independence of the State courts is much more direct, endemic and dangerous than in *Austin*, and where the interests of litigants and the public generally are involved, not just judicial remuneration, that a similar vigilance to the application of the implied principles of the Constitution has not attracted the support of the majority of this Court.

Conclusions and orders

230 *Outcome of proceedings*: By the foregoing analysis, Foster AJ had no legal authority to serve as an acting judge of the Supreme Court of New South Wales. To the extent that s 37 of the Supreme Court Act appeared to afford him such authority, and to sustain the commission that he received from the State

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[241] (2003) 215 CLR 185.

[242] (1947) 74 CLR 31 at 83 per Dixon J. See *Austin* (2003) 215 CLR 185 at 299 [275].

[243] *Austin* (2003) 215 CLR 185 at 293 [257], 302 [284].

[244] Bennett, "'Dammit, Let 'em do it!' The High Court and Constitutional Law: The 2005 Term", (2006) 29 *University of New South Wales Law Journal* 167.

[245] Bennett, "'Dammit, Let 'em do it!' The High Court and Constitutional Law: The 2005 Term", (2006) 29 *University of New South Wales Law Journal* 167 at 181.

Governor, it was invalid under the federal Constitution. The section should be read down so as to conform to the federal constitutional prerequisites.

231 Those constitutional prerequisites permit exceptional and occasional appointments of acting State judges, including to the Supreme Court. However, they do not permit appointments, *en bloc*, of such a number of acting judges, for such durations as would have the effect of altering the character of the Supreme Court as an institution suitable for the vesting of federal jurisdiction under the Constitution. In the result, the purported commission as an acting judge given to Foster AJ was invalid. It was of no legal effect. It follows that Foster AJ's purported orders imposed on the plaintiffs are of no legal validity. No argument of waiver or acquiescence stands in the way of giving effect to this conclusion. Nor, in the face of the Constitution, does the supposed *de facto* officers doctrine.

232 *Orders*: There are three proceedings in this Court: (1) an application commenced by writ in the original jurisdiction of this Court; (2) a cause removed from the Supreme Court; and (3) an application for special leave to appeal to this Court. I would dispose of the three proceedings in the following way:

233 The questions reserved for the opinion of the Full Court should be answered as follows:

1. All of the successive appointments of the Honourable Michael Leader Foster to act as a Judge of the Supreme Court of New South Wales were invalid; and

2. The proceedings commenced in the Supreme Court of New South Wales by the Australian Securities and Investments Commission against William Arthur Forge and others on 26 April 2001 and tried before Foster AJ constituted a matter arising under a law made by the Parliament within the meaning of s 76(ii) of the Constitution.

234 In the proceedings commenced by writ in this Court, the demurrers should be overruled. Judgment should be entered for the plaintiffs. The proceedings should be returned to a single Justice to be disposed of consistently with these reasons.

235 In the application for special leave to appeal from the judgment of the Court of Appeal of the Supreme Court of New South Wales, the necessary extension of time should be provided for the bringing of the application out of time; special leave should be granted; the appeal should be allowed; the judgment of the Court of Appeal should be set aside; in place of that judgment it should be ordered that the appeal to the Court of Appeal be allowed and the judgment purportedly made by Foster AJ on 28 August 2002 be set aside. The matter should be remitted to the Supreme Court of New South Wales for retrial. There should be no order for the costs of the proceedings in the Supreme Court.

236 The plaintiffs' costs should be paid by the unsuccessful parties in each proceeding.

237 CALLINAN J. I agree with the reasons for judgment of Gummow, Hayne and Crennan JJ with respect to the application of the relevant transitional provisions to these matters.

238 As to the validity of s 37 of the *Supreme Court Act* 1970 (NSW), the appointment of Foster AJ pursuant to it, and, in consequence, the validity of the proceedings before him, I would only wish to add a few observations to the reasons for judgment of Gleeson CJ, with which I agree. Before making those observations I should acknowledge my debt to Heydon J for his valuable history of acting judicial appointments in the colonies before federation.

239 As the Chief Justice points out, there are likely to be differing views held by judges about judicial appointments. Some of these are canvassed in his Honour's reasons and in the joint judgment. In 1997 however, the eight Chief Justices of the States and Territories agreed upon the principles which should apply to judicial appointments, and the exercise of judicial power by judges appointed to non-federal courts[246]:

> "(1) Persons appointed as Judges of those Courts should be duly appointed to judicial office with security of tenure until the statutory age of retirement. However, there is no objection in principle to:
>
> (a) the allocation of judicial duties to a retired judge if made by the judicial head of the relevant court in exercise of a statutory power; or
>
> (b) the appointment of an acting judge, whether a retired judge or not, provided that the appointment of an acting judge is made with the approval of the judicial head of the court to which the judge is appointed and provided that the appointment is made only in special circumstances which render it necessary.
>
> (2) The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.
>
> (3) The holder of a judicial office should not, during the term of that office, be dependent upon the Executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office.

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[246] Declaration of Principles on Judicial Independence Issued by the Chief Justices of the Australian States and Territories, reproduced in "Independence of the Judiciary", (1996-1997) 15 *Australian Bar Review* 175 at 177.

(4) There is no objection in principle to the Executive Government appointing a judge, who holds a judicial office on terms consistent with principle (1), to exercise a particular jurisdiction associated with the judge's office, or to an additional judicial office, in either case for a limited term provided that:

(a) the judge consents;

(b) the appointment is made with the consent of the judicial head of the Court from which the judge is chosen;

(c) the appointment is for a substantial term, and is not renewable;

(d) the appointment is not terminable or revocable during its term by the Executive Government unless:

(I) the judge is removed from the first mentioned judicial office; or

(II) the particular jurisdiction or additional judicial office is abolished.

(5) It should not be within the power of Executive Government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of the office.

(6) There is no objection in principle to the appointment of judges to positions of administrative responsibility within Courts for limited terms provided that such appointments are made by the Court concerned or by the judicial head of the court concerned."

240 That agreement about those principles was reached by persons of such eminence and experience necessarily means that they should be accorded respect by those responsible for judicial appointments.

241 There are, of course, other matters to be weighed. Even though the population may be ageing, institutions, including courts, are likely to benefit from the infusion of younger appointees bringing with them enthusiasm and vigour, allied of course with suitable experience and qualifications. It would be unfortunate if any practice were to be adopted of obstructing that infusion by the

widespread appointment of retired judges for long and repeated periods. There is also this consideration. The appointment of suitably qualified acting judges to the mainstream courts is likely to produce a better system of justice than the establishment of special tribunals outside that mainstream with restricted appeals from them, staffed by persons for relatively short terms, whether renewable or not, and therefore lacking the institutional history, traditions and protections found in the courts.

242 I too would join in the orders proposed in the joint judgment.

243 HEYDON J. The relevant circumstances and the key statutory provisions are set out in other judgments.

Acting judges

244 In *Kable v Director of Public Prosecutions (NSW)*[247] this Court invalidated a State law because it conferred a function on a State court which was inconsistent with the institutional integrity of that court as a repository of federal jurisdiction. The applicants seek to extend the principles stated in that case so as to invalidate a law on the ground that it creates in a State court a particular characteristic – acting judges as members.

245 *Assumptions in the applicants' argument.* Certain legal assumptions underlay, or were clustered about, the applicants' arguments. Some were supported by authority; some have been raised in the past, but only as possibilities. Among them were the following:

(a) the States must preserve a system of State courts to act as repositories of the judicial power of the Commonwealth[248];

(b) it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description "Supreme Court"[249];

(c) State legislation will be invalid where it compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction impartially and competently[250];

(d) it is necessary that a State court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal[251];

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[247] (1996) 189 CLR 51.

[248] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 139-140 per Gummow J.

[249] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 111 per McHugh J.

[250] *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1528 [37] per McHugh J; 210 ALR 50 at 62-63.

[251] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

(e) the actuality and appearance of impartiality would be impaired if a Supreme Court were predominantly or chiefly constituted by acting judges;

(f) the actuality and appearance of impartiality would be impaired if a series of acting, rather than full-time, appointments were made in such numbers as to distort the character of a Supreme Court[252];

(g) if State legislation takes such a form as to make the State Supreme Court an unfit repository of federal jurisdiction, it is that legislation which is invalid rather than the Commonwealth legislation which confers federal jurisdiction on the unfit repository[253].

246 The competing arguments in these proceedings did not centre on attempts to demonstrate the correctness or falsity of these propositions, but tended rather to assume their correctness. It is not necessary, for the purpose of deciding the present controversy, to reaffirm any of those propositions so far as they are supported by authority, or to reach any conclusion as to their correctness so far as they are not supported by authority. The arguments in these proceedings proceeded on the basis that even if those propositions were assumed to be correct, the applicants could not succeed without establishing something more.

247 *Concessions by the defendants and the interveners.* The defendants and some of the interveners from time to time conceded that, accepting some or all of the assumptions of the applicants' arguments, there were some kinds of State legislation which might be invalid. Thus the Australian Securities and Investments Commission accepted "the possibility ... that the institutional integrity of a court as an independent and impartial tribunal might be undermined in practice by the manner or extent of the appointment of acting judges". New South Wales conceded that "a Supreme Court consisting entirely of acting judges, each appointed only for individual cases, would probably infringe the *Kable* principle." The Commonwealth made a similar concession. South Australia conceded that a court could not be composed entirely of acting judges but on the basis of construing s 37 of the *Supreme Court Act* 1970 (NSW) in the light of the power to appoint permanent judges in s 26.

248 While many allowances must be made for the tact, and the tactics, of advocates, it was not necessary to make these concessions. They were not in any

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[252] This was a question posed, but a question which it was not necessary to discuss, in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 164 [32] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

[253] This was assumed in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103 per Gaudron J.

way tested in argument because no counsel advanced argument against them. It is possible that they are sound, but it should not be assumed that they are sound, and the decision whether they are sound must abide some case the facts of which make it necessary to resolve those questions one way or the other.

249 *Construction of s 37.* It would be possible to undercut significant parts of the applicants' submissions by adopting a particular construction of s 37 as permitting the appointment of only limited classes of acting judge. But apart from South Australia, no party or intervener attempted to do this. It is better to proceed on the basis that s 37 is capable of being construed broadly without finally deciding what its true construction is.

250 *Foreign law.* Considerable reliance was placed on cases on the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 6; the Canadian Charter of Rights and Freedoms, s 11(d) and the Bill of Rights of the Constitution of the Republic of South Africa, s 34. These documents all post-dated Ch III. They did not lead to Ch III and they were not based on Ch III. Accordingly, no assistance is to be obtained from cases on these documents in construing Ch III and evaluating its impact on State laws.

251 *Desirability of acting judges.* I agree with the Chief Justice that it is important to distinguish between, on the one hand, one's personal view of the merits of appointing acting judges at all, or of appointing particular categories of persons as acting judges, and, on the other hand, those aspects of the phenomenon of acting judges which are relevant to the constitutional validity of the legislation providing for their appointment[254].

The applicants' submissions

252 The primary position of the applicants was that any legislation permitting the appointment of part-time judges to Supreme Courts was invalid. An alternative and more qualified position which they advanced was that an acting judge sitting for a short period to clear up a list or meet some emergency in the court system might pass muster because the reason for the appointment would be explicable to a member of the public knowing the facts. But the circumstances in which this would be permissible were said to be "very special" or "very, very limited".

253 The applicants submitted that references to "courts" in Ch III of the Constitution were references to courts that are manned by a full-time permanent judiciary whose tenure is fully secure and whose remuneration is secure. They submitted that by the time the present proceedings were dealt with by the trial judge, the appointment of acting judges as a part of the Supreme Court of New

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[254] At [20].

South Wales had become so extensive and so institutionalised that it had impaired the integrity of that Court or distorted its character. This had come about because the proportion of acting judges was so great that the Court's independence and impartiality "was placed under threat, if not in fact, then as a matter of perception." That was "a view traditionally held among lawyers, politicians and others" and any "ordinary member of the public informed of the relevant facts would justifiably perceive [the appointments of acting judges] as a threat to the independence and impartiality of the courts." The appointment of acting judges offends "the principle that there are not to be two qualities or grades of justice in relation to the exercise of the judicial power". The applicants also submitted that s 72 of the Constitution "is an affirmation ... that acting justices should not exercise the Judicial Power [of the Commonwealth]." The applicants submitted:

> "acting judges must of their very nature be seen as impermanent, possibly not qualified to be full time judges and not part of a stable structure ... They could ... also be perceived variously as fill-ins or appointed to save costs or supernumeraries or not committed fully to the task because of their potential to have other interests. ... [T]he existence or the perception of two classes of judges evincing two grades of justice is antipathetic to the Constitution".

254 The applicants further submitted that the appointment of acting judges would carry the risk that they would be perceived to be likely to curry favour with the executive and not to be free of influence from the executive.

The applicability of s 72

255 There is ample authority against the s 72 argument. It is clear that s 72 does not in terms require State judges to conform to its criteria. Chapter III refers several times to State courts, but s 72 is limited to federal courts[255]. Section 72 cannot be construed as requiring for State courts by implication what it does not require expressly. An acting judge in a Territory court may exercise the judicial power of the Commonwealth under s 71 of the Constitution while not being subject to the requirements of s 72, and in particular the proscription by s 72 of acting judges[256]. If so, given that a State court is as much one of the

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[255] *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 63 per Mason J; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 80-81 per Dawson J, 101-102 per Gaudron J, 115 per McHugh J.

[256] *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163-164 [31] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

"other courts" mentioned in s 71 as a Territory court, the proscription by s 72 of acting judges does not apply to State courts either. This conclusion leaves open the question whether the quantity and character of the acting judges appointed under State legislation can cause it to be invalid.

Acting judges before federation

256 The arguments of the applicants turn on the meaning of the expression "such other courts" in s 71 and "any court of a State" in s 77(iii) of the Constitution. Those words now bear the meaning "they bore in the circumstances of their enactment by the Imperial Parliament in 1900."[257] In 1901 the expression "court" in those provisions must have meant those courts which had been Colonial Supreme Courts and had just become State Supreme Courts in the sense referred to in s 73. The expression "Colonial Supreme Court" referred to courts which had for a long time had provision for the appointment of acting judges: for six of the Colonies legislation had been enacted permitting this, and it was still in force in all six of them in 1901[258]. That well-informed lawyers would have regarded the expressions "such other courts" and "any court of a State" as bearing the meaning of a court with the potential to contain acting judges is supported by the fact that it was Edmund Barton – a man deeply involved in the drafting of the Constitution and in the process by which it obtained popular acceptance – who as Attorney-General introduced into the New South Wales Legislative Assembly the Bill which became the *Judicial Offices Act* 1892. Indeed, both Edmund Barton[259] and Richard O'Connor[260], who played

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[257] *King v Jones* (1972) 128 CLR 221 at 229 per Barwick CJ.

[258] For New South Wales, see *Charter of Justice* 1823 (Imp) (4 Geo IV c 96), s 1; *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83), s 1; *District Courts Act* 1858 (22 Vic No 18), s 26; *Judicial Offices Act* 1892 (55 Vic No 26), s 3; *Supreme Court and Circuit Courts Act* 1900, s 13. For Victoria, see *An Act to make provision for the better Administration of Justice in the Colony of Victoria* 1852 (15 Vic No 10), s 5; *Supreme Court Amending Act* 1885 (49 Vic No 834), s 3; *Supreme Court Act* 1890, s 14. For Queensland, see *Supreme Court Act* 1867 (31 Vic No 23), s 33; *Acting Judges Act* 1873 (37 Vic No 5), s 1; *District Courts Act* 1891 (55 Vic No 33), s 19; *Supreme Court Act* 1892 (55 Vic No 37), s 12; *Supreme Court Act (No 2)* 1892 (56 Vic No 10), s 2. For Western Australia, see *Supreme Court Ordinance* 1861 (24 Vic No 15), s 11; *Supreme Court Act* 1880 (44 Vic No 10), s 12. For South Australia, see *An Act for the Establishment of a Court to be Called the Supreme Court of the Province of South Australia* 1837 (7 Wm IV No 5), s 5 and *Supreme Court Act* 1856 (Act No 31 of 1855-6), s 5. In Tasmania, the *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83), s 1, was applicable. See also *An Act for the effectual Administration of Justice in the Supreme Court of Van Diemen's Land* 1831 (2 Wm IV No 1), s 3.

[259] Bolton, *Edmund Barton*, (2000) at 131-132.

a comparable role in developing the Constitution and having it adopted, had served as acting judges of the Supreme Court of New South Wales before federation. There were other well-known appointments of acting Supreme Court judges before federation in New South Wales, for example Sir William Manning in 1848-1849[261]. Three Queensland illustrations are Sheppard DCJ[262], Ratcliffe Pring, a former Attorney-General[263], and Windeyer J, from the Supreme Court of New South Wales[264]. In Victoria, Sir Henry Wrenfordsley, who had been Chief Justice of Western Australia in 1880-1883[265], was appointed an acting Supreme Court judge in 1888[266] and Edward Hodges, "a leader of the Bar", in 1889[267]. In Western Australia, Edward Stone acted as Chief Justice in 1881 and as an acting puisne Supreme Court judge in 1883-1884[268] and Sir Henry Wrenfordsley was sworn in as Acting Chief Justice in 1890[269]. In Tasmania, Sir James Dowling, Chief Justice of New South Wales, was an acting judge in 1845[270], J W Rogers

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[260] Rutledge, "Richard Edward O'Connor", (1988) 11 *Australian Dictionary of Biography* 56 at 57.

[261] McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, (1989) at 55.

[262] McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, (1989) at 55-56.

[263] McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, (1989) at 56 and 184-185.

[264] McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, (1989) at 204; Windeyer, "A Presage of Federation", (1976) 61 *Journal of the Royal Australian Historical Society* 311 at 318-319.

[265] Louch, "Sir Henry Thomas Wrenfordsley", (1976) 6 *Australian Dictionary of Biography* 440 at 441.

[266] Bennett, *Lives of the Australian Chief Justices: Sir Henry Wrenfordsley*, (2004) at 94-98.

[267] Bennett, *Lives of the Australian Chief Justices: Sir Henry Wrenfordsley*, (2004) at 98.

[268] Castles, *An Australian Legal History*, (1982) at 343-344.

[269] Bennett, *Lives of the Australian Chief Justices: Sir Henry Wrenfordsley*, (2004) at 102.

[270] Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania, Its First Century 1824-1924*, (1995) at 180.

was an acting judge in 1884-1885[271] and Sir Henry Wrenfordsley was an acting judge in 1885-1887[272]. In South Australia, Henry Jickling, a barrister, served as an acting judge of the Supreme Court in 1837-1839[273]. Gresson J and Martin J were appointed temporary judges of the Supreme Court of New Zealand before they were appointed permanently, and four other temporary judges were appointed before federation (one after resignation as a permanent puisne judge)[274].

257 These appointments are not the only examples of temporary appointments to the Supreme Courts of the Australasian Colonies prior to federation. Nor were all of them obscure events. Many of them were controversial and of wide interest.

258 In Victoria, Sir Henry Wrenfordsley's appointment in 1888 attracted conflicting but well-publicised responses. The *Argus* said he was "held in high esteem in this colony", but at a meeting of the Bar held to protest about the appointment he was described as a "journeyman judge, who went about with robes in his carpet bag"[275].

259 In South Australia, Jickling J's appointment was controversial, and on one occasion he was hissed off the bench by the Bar and the public[276].

260 In Queensland, the appointments of Sheppard DCJ and Ratcliffe Pring were challenged in litigation[277].

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[271] Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania, Its First Century 1824-1924*, (1995) at 134.

[272] Bennett, *Lives of the Australian Chief Justices: Sir Henry Wrenfordsley*, (2004) at 79; Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania, Its First Century 1824-1924*, (1995) at 181.

[273] Whitfeld, *Founders of the Law in Australia*, (1971) at 142.

[274] Cooke (ed), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society*, (1969) at 420-422.

[275] Bennett, *Lives of the Australian Chief Justices: Sir Henry Wrenfordsley*, (2004) at 94.

[276] Hague, *Hague's History of the Law in South Australia 1837-1867*, (2005), vol 1 at 112; Whitfeld, *Founders of the Law in Australia*, (1971) at 142.

[277] McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, (1989) at 55-56.

261 The appointment of Windeyer J was necessitated by *Queensland Investment and Land Mortgage Co Ltd v Grimley*. Four of the five defendants were "leading members of Queensland society" and were sued for misconduct as directors of the plaintiff. One defendant, Sir Arthur Palmer, was a former Premier and Leader of the Opposition; at the time of the proceedings he was President of the Legislative Council and Administrator of the Colony. Another, Sir Thomas McIlwraith, had also been Premier and Leader of the Opposition, and at the time of the proceedings he was Colonial Treasurer. A third, E R Drury, was General Manager of the Queensland National Bank, which had a monopoly of banking business in the Colony. A fourth, F H Hart, was a leading businessman and a member of the Legislative Council[278]. The trial began on 5 November 1891 before Lilley CJ and a jury. Lilley CJ was another former Premier, had been a vigorous political opponent of Palmer and McIlwraith, and was on bad terms with them. The Chief Justice's son appeared as counsel for the plaintiff before him as in the past he often had, with considerable success.

262 For some time trial judges on the Supreme Court had participated in appeals from their own judgments. To prevent this happening, and while the trial was still proceeding, Sir Samuel Griffith, the Premier and Attorney-General, procured the passing of the *Supreme Court Act* 1892. Section 4 prevented Lilley CJ from sitting on the appeal. Since two of the other four Supreme Court judges disqualified themselves, and since an appeal could only be heard by three judges, a temporary appointment was called for.

263 The *Acting Judges Act* 1873, s 1, permitted a temporary appointment when a judge was absent on leave, but no judge was absent on leave. For that reason s 12 of the 1892 Act provided that if the Chief Justice certified that from any cause whatsoever a sufficient number of judges of the court competent to sit upon the hearing of any matter or proceeding in the Full Court could not be secured, or could not be secured without detriment to the ordinary business of the court, the Governor-in-Council could appoint a District Court judge or any person qualified to be a judge of the court to act as a judge of the court for the hearing of that matter.

264 The jury verdict was given on 21 May 1892 favourably to the defendants, but on 16 August 1892 Lilley CJ, after argument, made orders which disregarded and contradicted many of the answers which the jury gave. An appeal was then brought. Lilley CJ gave a certificate under s 12 on 23 August 1892. Sir Samuel Griffith decided to appoint Windeyer J, of the Supreme Court of New South

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[278] Gibbs, "A Nineteenth Century Cause Célèbre: Queensland Investment and Land Mortgage Company Ltd v Grimley", (1987) 13 *Royal Historical Society of Queensland Journal* 73 at 74-76.

Wales, and negotiated with Edmund Barton, Acting Premier[279] and Attorney-General for New South Wales, to this end[280]. A doubt then arose as to whether a judge of the Supreme Court of New South Wales was "qualified to be a Judge of" the Supreme Court of Queensland within the meaning of s 12, not being a barrister of the Supreme Court of Queensland, or of New South Wales or of Victoria or England or Ireland or an advocate of Scotland[281]. Barton told Griffith that it was essential that all doubts be removed. On 8 September 1892 the Supreme Court Bill No 2 was introduced by Griffith into the Legislative Assembly. Griffith said that the Bill dealt with the matter in "what I think I may call a federal spirit, by providing that a judge of any of the Australian colonies shall be qualified to sit as acting judge in the Supreme Court of Queensland to constitute the appellate court." The Bill passed the Legislative Assembly without opposition. By 9 September 1892, Windeyer J had indicated willingness to act. The Bill passed the Legislative Council, and received Royal Assent on 13 September 1892. Windeyer J was appointed an acting judge, and presented his commission on 14 September 1892 in a crowded courtroom. Griffith welcomed Windeyer J as one of the original members of the Queensland Bar, who had appeared in the Supreme Court of Moreton Bay before Queensland separated from New South Wales. The appeal was then heard over some days. On 12 October 1892 the appeal was allowed in a judgment read for two hours by Windeyer J to another crowded courtroom, and reported the next day at length in the *Brisbane Courier*[282].

265 Sir Thomas McIlwraith then initiated steps to have Lilley CJ removed from office on the grounds of bias in his conduct of the trial, and within a

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[279] Rutledge, "Sir Edmund Barton", (1979) 7 *Australian Dictionary of Biography* 194 at 196.

[280] See Windeyer, "A Presage of Federation", (1976) 61 *Journal of the Royal Australian Historical Society* 311 at 315-316. (Sir Victor inserted a corrigendum into the copy in the Joint Law Courts Library, Sydney, changing "Martin" to "Barton" in his transcription of Griffith's letter of 4 September 1892 to Windeyer J.)

[281] See *Supreme Court Act* 1867 (Q) (31 Vic No 23), s 8.

[282] *Queensland Investment and Land Mortgage Co Ltd v Grimley* (1892) 4 QLJ Supp 1. The proceedings before Lilley CJ were reported at 4 QLJ 224, and the argument before the Full Court is reported at 4 QLJ 243. See generally McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, (1989) at 203-205; Windeyer, "A Presage of Federation", (1976) 61 *Journal of the Royal Australian Historical Society* 311 at 313-314, 319-321; Gibbs, "A Nineteenth Century Cause Célèbre: Queensland Investment and Land Mortgage Company Ltd v Grimley", (1987) 13 *Royal Historical Society of Queensland Journal* 73.

fortnight the Chief Justice "bowed to the storm" and announced his intention to retire. Lilley CJ, after retiring the following year, and thus clearing the way for Sir Samuel Griffith's appointment as Chief Justice, stood for Parliament against McIlwraith but was defeated[283].

266 These extraordinary happenings – Sir Harry Gibbs called the case a "cause célèbre" and described it as a "rather sad story"[284] – cannot have been forgotten by Barton, Griffith, or anyone else involved in drafting Ch III. Indeed, Griffith CJ recalled these events, no doubt among others, during the course of argument in *Stockwell v Ryder*[285]. The *Brisbane Courier* on 2 October 1906 contained the following passage:

> "'I wonder', remarked Sir Samuel, 'whether it has ever occurred to any one to doubt whether under the Constitution any one can be appointed temporarily a Judge of the Supreme Court? I know it has been done for a great many years, and I wonder whether it has occurred to any one to doubt whether it can be done.' His Honour, then recollecting his own political days, added: 'I admit I have done it myself, but I have made mistakes just the same as other people.'"

It is not clear which Constitution Griffith CJ had in mind.

267 The applicants downplayed this background by saying that they accepted that at the time of federation it was well understood that the full-time judges in the Supreme Courts of the Colonies were "sometimes assisted by an acting judge or judges to meet special circumstances". The possibility that State legislation could achieve the same result now without invalidity was one which the applicants' primary submission eschewed, although its fallback position accommodated it. In the very vague terms in which it is put, the exception cannot be correct. The question remains whether s 37 by itself, or s 37 in the light of the appointments made under it, is open to the criticisms advanced by the applicants.

Safeguards in the New South Wales legislation

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[283] Gibbs, "A Nineteenth Century Cause Célèbre: Queensland Investment and Land Mortgage Company Ltd v Grimley", (1987) 13 *Royal Historical Society of Queensland Journal* 73 at 81-82.

[284] Gibbs, "A Nineteenth Century Cause Célèbre: Queensland Investment and Land Mortgage Company Ltd v Grimley", (1987) 13 *Royal Historical Society of Queensland Journal* 73 at 82.

[285] (1906) 4 CLR 469.

268 The arguments of the applicants did not deal effectively with the similarities between permanent and acting judges of the Supreme Court of New South Wales, particularly the similarities between the safeguards affecting the two classes.

269 Like permanent judges, acting judges of the Supreme Court of New South Wales are appointed by the Governor on ministerial advice by commission under the public seal of the State[286]. Like permanent judges, acting judges are qualified for appointment if they are legal practitioners of at least seven years' standing, or if they hold or have held a judicial office of New South Wales or of the Commonwealth, or of another State or a Territory[287]. Like permanent judges, acting judges are obliged to take not only the oath of allegiance but also the judicial oath (to "do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will")[288]. These oaths are not seen as mere words. Acting judges have "all the powers, authorities, privileges and immunities and fulfil all the duties of" permanent judges[289]. Among those immunities is immunity from suit, and among those privileges is the protection afforded by the law relating to contempt of court. The protection and immunity of both permanent and acting Supreme Court judges performing duties as judges extends to judges when performing ministerial duties as judges[290]. The remuneration of acting judges, like that of permanent judges, is, subject to parliamentary disallowance[291], determined from time to time by the Statutory and Other Offices Remuneration Tribunal[292], is directly appropriated from the Consolidated Fund[293], is a statutory entitlement[294] and cannot be reduced during the term of the respective officers[295]. Both acting and permanent judges

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[286] *Supreme Court Act* 1970 (NSW), s 37(1).

[287] *Supreme Court Act* 1970 (NSW), ss 26(2) and 37(2).

[288] *Oaths Act* 1900 (NSW), s 8 and Fourth Schedule.

[289] *Supreme Court Act* 1970 (NSW), s 37(3).

[290] *Judicial Officers Act* 1986 (NSW), s 44A (which did not commence operation until 7 July 2003, after Foster AJ began hearing the relevant proceedings in 2002, but which is illustrative of the regime of safeguards in place).

[291] *Statutory and Other Offices Remuneration Act* 1975 (NSW), s 19A.

[292] *Statutory and Other Offices Remuneration Act* 1975 (NSW), ss 13 and 20.

[293] *Statutory and Other Offices Remuneration Act* 1975 (NSW), s 11(3).

[294] *Supreme Court Act* 1970 (NSW), ss 29(1) and 37(3B).

[295] *Statutory and Other Offices Remuneration Act* 1975 (NSW), s 21(1) and Sched 1.

are only removable from office by the Governor after the Governor has received, first, a report of the Conduct Division of the Judicial Commission of New South Wales setting out its opinion that the matters referred to in the report could justify parliamentary consideration of the removal on the ground of proved misbehaviour or incapacity[296] and, secondly, an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity[297]. Both acting and permanent judges are subject to the same system of complaints and discipline administered by the Judicial Commission of New South Wales[298] and to the same capacity for scrutiny by the Independent Commission Against Corruption[299]. The intra-curial arrangements for the transaction of the business of the Court of Appeal apply indifferently as between permanent Judges of Appeal and acting Judges of Appeal, and the intra-curial arrangements for the transaction of the business of a Division apply indifferently as between permanent judges appointed or nominated to that Division and acting judges so appointed or nominated[300]. Hence the same practices in relation to the court administration apply – assignment of judges, sittings of the court and allocation of courtrooms.

270 Apart from those statutory provisions treating permanent and acting Supreme Court judges indifferently, both permanent and acting judges are subject indifferently to the general law and subject to the same duty to apply it. They are subject to the same possibilities and procedures of appeal and the same requirements of impartiality and of apparent impartiality. They must treat all parties equally, and protect the right of the parties to meet the case each is making against the other. They are bound by the same rules of natural justice. They are bound by the same duties to hear cases fairly, find facts accurately, and apply the law, correctly ascertained, to the facts found.

271 In addition, since the work of both permanent and acting judges takes place in public, and since the reasons for judgment of both permanent and acting judges are publicly available, acting judges are equally open to the same scrutiny by their peers, the profession and the public as permanent judges. Both acting and permanent judges share the same professional ethos, tradition and culture. They share the same concern for professional reputation. There is no legislative provision permitting interference by the executive or the legislature in the work

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[296] *Judicial Officers Act* 1986 (NSW), s 41.

[297] *Constitution Act* 1902 (NSW), s 53.

[298] *Judicial Officers Act* 1986 (NSW), s 3(3).

[299] *Independent Commission Against Corruption Act* 1988 (NSW), s 3 (definition of "public official").

[300] *Supreme Court Act* 1970 (NSW), s 39.

of acting judges any more than there is in relation to permanent judges, and there are equally well-established customs precluding interference. It was not suggested by the applicants that the actual process and techniques by which acting judges tackle the issues thrown up for their decision differ from those employed by permanent judges.

Consequences of the statutory and other safeguards

272 From the considerations just outlined it follows that it is necessary to reject the following submissions made by the applicants:

(a) that "there is a vast difference both conceptually and as a matter of perception between a court ... constituted by a full time judge and one constituted by an acting judge appointed for a short term";

(b) that "[t]here is clearly a vast difference between a court constituted by full time Judges and one constituted by full time Judges and a substantial number of acting judges";

(c) that "acting judges must ... be seen as impermanent, possibly not qualified to be full time judges and not part of a stable structure";

(d) that acting judges "could ... be perceived variously as fill-ins or appointed to save costs or supernumeraries or not committed fully to the task because of their potential to have other interests"; and

(e) that the appointment of acting judges gives rise to "the existence or the perception of two classes of judges evincing two grades of justice".

Threats to actual and perceived independence and impartiality

273 So far as the applicants contended that the proportion of acting judges appointed to the Supreme Court of New South Wales placed the independence and impartiality of that Court under threat either as a matter of fact or as a matter of perception, there was no actual evidence of that fact or that perception. It may be a view that some lawyers, politicians and others hold, but it has not been shown that many other persons hold that view. In the absence of evidence, it is necessary to resort to estimations of how reasonable bystanders would probably view matters.

274 To start with, it must be remembered that a perceived tendency to undermine public confidence in the impartiality of a Supreme Court is not by itself a touchstone of invalidity[301].

275 The applicants submitted that acting judges are perceived to lack independence, because of a desire for further appointment, because of work done for the executive in the past by the appointee or the hope of offers of work from the executive in the future, and because they "can become beholden to other interests". The argument based on these amorphously expressed concerns proves too much: permanent judges too can hope for promotion to a higher court or a higher judicial office; they too can receive acting appointments in those courts or those offices (as has happened since the first half of the 19th century); they too can hope for work at the hands of the executive; they too may have done work for the executive in the past; and they too can become beholden to other interests in hoping for work, whether from the government or from private interests, on leaving the bench. There are institutional, professional and ethical checks against these risks, and there are obstacles raised by personal integrity, but all these checks and obstacles operate as fully for acting judges as for permanent ones. Any specific suspicions of actual or apprehended bias can be dealt with by ad hoc applications which can be considered on their merits in the ordinary way[302].

276 The acting Supreme Court judges during the relevant period comprised ex-Federal Court judges whose career on that Court had been terminated on attainment of the retirement age of 70, other ex-Federal Court or Supreme Court judges, Masters and District Court judges. To the extent that estimations of likely public perceptions are relevant, an objective observer would be likely to see the acting appointments as, in the case of ex-judges, a continuation for a short time of an existing judicial career, and in the case of Masters and District Court judges, as service in a judicial role, different, but not radically different, from that in which they were already engaged; and would be likely to see the acting judges appointed as suitable and qualified persons whose circumstances and independence were indistinguishable from those of the permanent judges.

277 In short, the history of acting judges in the Colonies before federation points to the conclusion that Ch III contemplates the validity of State legislation permitting the appointment of acting judges. The arguments of the applicants concentrated on the numbers of acting judges as a proportion of the whole. Those are misleading figures, for not all acting judges work full-time during the

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[301] *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1525 [23] per Gleeson CJ, 1539 [102] per Gummow J, 1546 [144] per Kirby J; 210 ALR 50 at 58, 78, 88.

[302] *Barton v Walker* [1979] 2 NSWLR 740 at 757-758 per Samuels JA (Reynolds and Glass JJA concurring).

period in which they are acting. To compare them with appointments of a single acting judge to a Colonial Supreme Court ignores the possible impact of even a single appointment of that kind on courts with the very low memberships of those days. But even apart from those qualifications, if the relevant criterion is the protection of judicial independence and impartiality, the conclusion of Gummow, Hayne and Crennan JJ[303] that the numbers of judges appointed alone cannot be decisive and that it is necessary to consider why they have been appointed and what safeguards are in place to protect judicial independence and impartiality must, with respect, be correct. There is no evidence as to why the acting judges were appointed. There are ample safeguards to protect judicial independence and impartiality. Section 37 of the *Supreme Court Act* 1970 (NSW) is not invalid.

Corporations Act 2001 (Cth) – Ch 10

278 I agree with the reasoning of Gummow, Hayne and Crennan JJ.

Orders

279 I agree with the orders proposed in relation to each of the proceedings by Gummow, Hayne and Crennan JJ.

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[303] At [90].