HIGH COURT OF AUSTRALIA

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

Matter No P40/2007

VINCENT THOMAS O'DONOGHUE — APPELLANT

AND

IRELAND & ANOR — RESPONDENTS

Matter No P41/2007

CHARLES ZENTAI — APPELLANT

AND

REPUBLIC OF HUNGARY & ORS — RESPONDENTS

Matter No S410/2007

LARRY RICHARD WILLIAMS — APPLICANT

AND

UNITED STATES OF AMERICA & ANOR — RESPONDENTS

O'Donoghue v Ireland
Zentai v Republic of Hungary
Williams v United States of America
[2008] HCA 14
23 April 2008
P40/2007, P41/2007 & S410/2007

ORDER

Matter No P40/2007 and Matter No P41/2007

Appeals dismissed with costs.

Matter No S410/2007

1. *Special leave to appeal granted.*

2. *Appeal treated as instituted, heard instanter and dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

Matter No P40/2007

S J Gageler SC for the appellant (instructed by Freehills)

H C Burmester QC for the first respondent (instructed by Commonwealth Director of Public Prosecutions)

Submitting appearance for the second respondent

Matter No P41/2007

S J Gageler SC with P W Johnston and V M Priskich for the appellant (instructed by Fiocco's Lawyers)

H C Burmester QC for the first respondent (instructed by Commonwealth Director of Public Prosecutions)

Submitting appearance for the second and third respondents

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and G A Hill for the fourth respondent (instructed by Australian Government Solicitor)

Matter No S410/2007

S J Gageler SC with R P L Lancaster for the applicant (instructed by Watson Solicitors)

H C Burmester QC for the first respondent (instructed by Commonwealth Director of Public Prosecutions)

Submitting appearance for the second respondent

Interveners

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and G A Hill intervening on behalf of the Attorney-General of the Commonwealth in P40/2007 and S410/2007 (instructed by Australian Government Solicitor)

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

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

C J Kourakis QC, Solicitor-General for the State of South Australia with M J Wait and J P McIntyre intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

P M Tate SC, Solicitor-General for the State of Victoria with R J Orr intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

O'Donoghue v Ireland
Zentai v Republic of Hungary
Williams v United States of America

Extradition – Function of State magistrates under s 19 of *Extradition Act* 1988 (Cth) ("Extradition Act") and application of s 4AAA of *Crimes Act* 1914 (Cth) ("Crimes Act") – Arrangements between Governor-General and State Governors under s 46 of Extradition Act – Whether power exercised by State magistrates under s 19(1) of Extradition Act conferred under Commonwealth law relating to criminal matters – Whether intention appears in Extradition Act not to apply rule set out in s 4AAA of Crimes Act that State magistrates need not accept power conferred by Commonwealth law – Whether State magistrates obliged to accept performance of functions under Extradition Act – Whether acceptance of power conferred by s 19(1) of Extradition Act may be inferred by course of conduct of State magistrates – Whether State legislation approved exercise by State magistrates of functions and powers under s 19 of Extradition Act.

Constitutional law (Cth) – Relationship between Commonwealth and States – Whether Commonwealth may unilaterally impose functions on State magistrates – Whether on true construction Extradition Act imposes functions on State magistrates – Whether such functions involve imposition of legal duties on State magistrates – Application of s 4AAA of Crimes Act – Whether State legislation approved exercise by State magistrates of functions and powers under s 19 of Extradition Act – Whether consent of State executive government sufficient to authorise imposition of functions on State magistrates.

Words and phrases – "duty or power", "extradition", "magistrates".

Crimes Act 1914 (Cth), s 4AAA.
Extradition Act 1988 (Cth), ss 19, 46.
Magistrates Courts Act 2004 (WA), s 6.
Local Courts Act 1982 (NSW), s 23.

1 GLEESON CJ. Part II of the *Extradition Act* 1988 (Cth) ("the Extradition Act"), which provides legislative authority for the extradition of persons from Australia to extradition countries (a defined term that includes the first respondent in each of these matters), was enacted pursuant to the power conferred by s 51(xxix) of the Constitution (the external affairs power). Extradition of alleged or convicted offenders to and from Australia is a matter which closely affects Australia's foreign relations. It commonly involves considerations of reciprocity. Australia's foreign relations are conducted by the Commonwealth, but State judicial officers are involved in the administration of extradition law. Part II of the Extradition Act establishes the procedures to be followed where a request for extradition of a person is made to Australia by an extradition country. The ultimate decision to surrender, where made, is a discretionary decision by the Attorney-General of the Commonwealth (s 22). Prior to that, however, questions of eligibility for surrender arise. These are dealt with administratively by a judicial officer acting as persona designata, subject to the possibility of judicial review[1]. Section 19 relates to determinations of eligibility for surrender. The question raised by each of these matters concerns the constitutional validity of s 19.

2 Section 19 provides, in sub-s (1), that, where an application is made to a magistrate for proceedings to be conducted in relation to a person, "the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country." It is unnecessary for present purposes to go into the detail of what is involved in the concept of eligibility for surrender, or the nature of the matters to be decided in determining such eligibility. The term "magistrate" is defined, in s 5 of the Extradition Act, to include "a magistrate of a State … being a magistrate in respect of whom an arrangement is in force under section 46." Section 46 of the Extradition Act provides that the Governor-General may arrange with the Governor of a State for the performance, by all or any of the persons who from time to time hold office as magistrates of that State, of the functions of a magistrate under the Extradition Act.

3 It may be noted in passing that the reference in s 5 to an "arrangement ... in force" under s 46 is a reference to a lawful arrangement. If, for some reason, a purported arrangement in relation to a certain magistrate, or group of magistrates, were invalid, then the judicial officer or officers concerned would not satisfy the definition of "magistrate" for the purposes of s 5. One such reason might be that a Governor of a State lacked the power to enter into the relevant arrangement because the arrangement was inconsistent with State legislation. In none of the

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1 *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 622-627 [16]-[28]; [2006] HCA 40.

present matters is there a challenge to the validity of an arrangement, or purported arrangement, under s 46. In each case it is assumed that the judicial officer making the relevant determination of eligibility satisfied the definition of "magistrate" in s 5, there being in force an arrangement between the Governor-General and the Governors of Western Australia and New South Wales respectively covering that judicial officer. That, in turn, appears to accept that, under State law, the Governors had power to enter into such arrangements. If it were otherwise, there would have been an issue as to whether, even if s 19 were valid, it was effective in its application to these cases. No such issue was raised.

4 The first two matters, which come before this Court as appeals from the Full Court of the Federal Court (Moore, Tamberlin and Gyles JJ)[2], arise out of unsuccessful attempts to obtain an order in the nature of prohibition directed to two Western Australian magistrates dealing, under s 19 of the Extradition Act, with the determination of the respective appellants' eligibility for surrender. The third matter is an application for special leave to appeal from the Full Court of the Federal Court (Branson, Tamberlin and Allsop JJ), which dismissed proceedings seeking to prohibit New South Wales magistrates from conducting s 19 proceedings in relation to the applicant[3]. The matters were argued together. There is a difference between the Western Australian legislation and the New South Wales legislation concerning the functions of magistrates. That difference affects only the third of three propositions which the appellants and the applicant must establish in order to succeed.

The legislation

5 Reference has been made already to ss 5, 19 and 46 of the Extradition Act, enacted in 1988.

6 Also relevant is s 4AAA of the *Crimes Act* 1914 (Cth), enacted in 2001. That section sets out the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on one or more of a class of persons including, relevantly, a State magistrate (s 4AAA(1)(b)). Section 4AAA(2) provides that the function or power is conferred on the person only in a personal capacity. Section 4AAA(3) provides that the person need not accept the function or power conferred. Section 4AAA applies to Commonwealth laws enacted before 2001, such as the Extradition Act (s 4AAA(6)).

7 The *Magistrates Court Act* 2004 (WA) includes s 6, which provides:

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2 *Zentai v Republic of Hungary* (2007) 157 FCR 585.

3 *Williams v United States of America* (2007) 161 FCR 220.

"**6 Magistrates, functions of**

(1) A magistrate has the functions imposed or conferred on a magistrate by laws that apply in Western Australia, including this Act and other written laws.

(2) A magistrate has and may perform any function of a registrar.

(3) With the Governor's approval, a magistrate –

(a) may hold concurrently another public or judicial office or appointment, including an office or appointment made under the law of another place; and

(b) may perform other public functions concurrently with those of a magistrate.

(4) A magistrate must not be appointed to an office that does not include any judicial functions without his or her consent.

(5) The Governor may extend the operation of section 37 to the performance by a magistrate of other functions, or the functions of another office or appointment, approved under subsection (3)."

8 The *Local Courts Act* 1982 (NSW) includes s 23, which provides:

"**23 Employment of Magistrates in other offices etc**

(1) Except as provided by this section, a Magistrate shall devote the whole of the Magistrate's time to the duties of the Magistrate's office.

(2) A person may, with the approval of the Governor (which approval the Governor is hereby authorised to grant), hold and exercise the functions of the office of Magistrate and another office or appointment.

(3) A Magistrate may not, however, practise as an Australian legal practitioner for fee, gain or reward, and no approval under subsection (2) may be granted to permit it.

(4) Subsection (1) does not prevent a person from holding office as and exercising the functions of a Magistrate on a part-time basis, but such a person must not, while so holding office:

(a) accept or continue to hold or discharge the duties of or be employed in any paid office in connection with any commercial business, or

(b) engage in or undertake any such business, whether as principal or agent, or

(c) engage in or continue in the private practice of any profession, occupation or trade, or enter into any employment, whether remunerated or not, with any person so engaged.

(5) To the extent specified in the commission by which the Magistrate was appointed, subsections (1) and (3) do not apply to a Magistrate who has limited tenure."

Historical context

9 The above legislation was enacted in an historical context that is of importance in resolving certain questions that were raised in argument[4]. It will be necessary to return to those questions, but first the history should be noted. It was referred to by Tamberlin J in his reasons in the third matter[5].

10 Before 1966, Australia's extradition procedures were governed by the domestic law and international treaties of the United Kingdom. The United Kingdom legislation included the *Fugitive Offenders Act* 1881 (Imp), in relation to extradition to one of Her Majesty's dominions, and the *Extradition Act* 1870 (Imp), in relation to extradition to foreign States. Western Australian and New South Wales magistrates exercised functions under that legislation. In 1966, countries of the British Commonwealth adopted the "London scheme", under which each Commonwealth country was to enact domestic legislation to govern extradition within the Commonwealth. The *Extradition (Commonwealth Countries) Act* 1966 (Cth) gave effect to the scheme in Australia. Parliament also enacted the *Extradition (Foreign States) Act* 1966 (Cth) to establish a similar scheme in relation to non-Commonwealth countries. As Tamberlin J observed, an aspect of both schemes was the provision for arrangements to be concluded between the Governor-General of the Commonwealth and Governors of the States for the appointment of State magistrates to exercise certain functions.

11 When the Extradition Act was enacted in 1988, s 46 reflected a system that had been operating under the previous Commonwealth legislation. As to the Western Australian legislation of 2004, magistrates in Western Australia have exercised functions conferred by the laws of other polities, being functions the same as or similar to those presently in question, under the following legislation:

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4 *Singh v The Commonwealth* (2004) 222 CLR 322 at 331-337 [8]-[20]; [2004] HCA 43.

5 (2007) 161 FCR 220 at 228-229 [39]-[42].

(a) *Fugitive Offenders Act* 1881 (Imp);

(b) *Extradition Act* 1870 (Imp) and *Extradition Act* 1903 (Cth);

(c) *Service and Execution of Process Act* 1901 (Cth) and *Service and Execution of Process Act* 1992 (Cth) (in relation to the execution of warrants for apprehension in Australia);

(d) *Extradition (Foreign States) Act* 1966 (Cth) and *Extradition (Commonwealth Countries) Act* 1966 (Cth);

(e) *Extradition Act* 1988 (Cth);

(f) *International War Crimes Tribunals Act* 1995 (Cth).

A similar position applies in relation to New South Wales magistrates.

Three propositions

12 The asserted ground of invalidity of s 19 of the Extradition Act is that it involves a constitutionally impermissible attempt by the Parliament of the Commonwealth unilaterally to impose a duty upon a holder of a State statutory office. This attempt is said to contravene an implication from the federal structure of the Constitution, and to involve a "per se breach" of the principle of federalism enunciated in *Melbourne Corporation v The Commonwealth*[6], and most recently applied by this Court in *Austin v The Commonwealth*[7]. In the United States, the 1997 decision of the Supreme Court in *Printz v United States*[8] provides an example of what was held to be an invalid federal attempt to impose duties on State officials.

13 Senior counsel for the appellants (in the third matter, the applicant) said that the success of his argument depended upon acceptance of each of the following propositions:

1. It is an implication from the federal structure of the Constitution that the Commonwealth Parliament cannot impose an administrative duty on the holder of a State statutory office without State legislative approval.

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6 (1947) 74 CLR 31; [1947] HCA 26.

7 (2003) 215 CLR 185; [2003] HCA 3.

8 521 US 898 (1997).

2. Section 19 of the Extradition Act imposes an administrative duty on a magistrate as the holder of a State statutory office.

3. The imposition of that duty is not approved by any legislation of the Parliament of Western Australia or, in the third case, the Parliament of New South Wales.

14 The first proposition is one of constitutional law. The second and third propositions depend upon the correct interpretation of Commonwealth and State legislation. For the reasons that follow, each of the second and third propositions should be rejected. That being so, it is unnecessary, and therefore inappropriate[9], to decide whether the first proposition is correct. It is, however, convenient to refer to aspects of the argument about the first proposition in order to explain the context in which the other questions arise.

The first proposition

15 In oral argument, counsel refined the first proposition as follows: unless there is something in the subject matter, content or context of a particular head of Commonwealth legislative power to indicate to the contrary, the Commonwealth Parliament has no power without State legislative approval to impose an administrative duty on the holder of a State statutory office, the functions and incidents of whose office are exhaustively defined by State legislation.

16 The opening words of that formulation contain a qualification which is necessary in order to accommodate the "autochthonous expedient of conferring federal jurisdiction on State courts"[10], which is sustained by a specific grant of legislative power. The qualification was expressed by Dixon J in the *Melbourne Corporation Case*[11]. The qualification is also necessary in order to accommodate the decision (concerning the defence power) in *South Australia v The Commonwealth* (*The First Uniform Tax Case*)[12]. Subject to that qualification, the capacity of the Commonwealth Parliament to enact laws which impose duties on officers of a State is a matter that has far-reaching consequences for Federal-State relations. Some of the arguments from both the Commonwealth and the States appeared to have a prophylactic purpose not directly related to the issues that have to be decided in the present cases.

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9 *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58]; [2000] HCA 53.

10 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268; [1956] HCA 10.

11 (1947) 74 CLR 31 at 83.

12 (1942) 65 CLR 373; [1942] HCA 14.

17 The concluding words of the formulation raise a question noted earlier in these reasons. To say that the functions of the holder of a State office are exhaustively defined by State legislation appears to mean that State law, expressly or by implication, prohibits the extension of those functions by administrative decision. In such a case, it is not clear how a State Governor could lawfully enter into an arrangement, with the Governor-General or anyone else, to extend such functions. Yet the potential application of s 19 of the Extradition Act in the present cases depends upon the assumption that the magistrates in question are magistrates as defined by s 5, and therefore the subject of a valid arrangement under s 46. If there were no such valid arrangement, the issues with which we are concerned would not arise. If State legislation exhaustively defined the functions of State magistrates in a manner that excluded the possibility of their exercising administrative functions under the Extradition Act (which, as will appear, it does not), then it might be thought that there would be a challenge to the power of the State Governor to make an arrangement under s 46 of the Extradition Act. If, on the other hand, State legislation does not define the functions of State magistrates in a manner that excludes the possibility of their exercising administrative functions under the Extradition Act, then the definition of functions is not exhaustive, and the proposition as formulated would not apply.

18 The deployment of State officials, and the making of administrative arrangements concerning their accommodation, remuneration and like matters, is a typical responsibility of the executive government; a responsibility that, of course, is exercised subject to any relevant statutory constraints. Whether a function is a duty or a power, and whether it is exercised by virtue of an office or as persona designata, administrative arrangements of the kind mentioned have to be made if the exercise is to be practically effective. In fact, State magistrates exercise a variety of functions, and may hold a variety of offices, other than those of a magistrate. We were informed, for example, that administrative functions undertaken by Western Australian magistrates include acting as a mining warden under the *Mining Act* 1978 (WA), acting as a member of the Police Appeal Board under the *Police Act* 1892 (WA), acting as a coroner under the *Coroners Act* 1996 (WA), acting as an industrial magistrate under the *Industrial Relations Act* 1979 (WA), issuing licences under the *Auction Sales Act* 1973 (WA), and acting as a visiting justice for prisons under the *Prisons Act* 1981 (WA). The variety of administrative functions undertaken by State magistrates is one of the best-known features of Australian legal history[13].

19 To return to the first proposition as originally expressed, the argument that (subject to the qualification noted) the Commonwealth Parliament cannot impose an administrative duty on a holder of a State statutory office without State

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13 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 153 [4]; [2004] HCA 31.

legislative approval raises at least two questions. Would the argument be different if, for the words "the holder of a State statutory office", there were substituted the words "a State officer"? What is the reason for referring to "State legislative approval" rather than "State agreement"? The re-formulation suggests that the two questions may be related; that the hypothesis is that there is State legislation which operates as an impediment to lawful and effective State agreement by executive rather than legislative action. In the absence of such legislation, if it be accepted that the federal structure of the Constitution requires an implication (subject to the qualification noted) that, without State agreement, the Commonwealth Parliament cannot impose an administrative duty on a State officer, or on State officers above a certain level, then there arises the question of the kind of action, legislative or executive, by which a State might lawfully and effectively agree. If there is a State legislative impediment to effective executive agreement, that is one thing. If there is no such legislative impediment, then it is not easy to see why the making of such an agreement would not fall within the ordinary executive power of deployment of State officials; a power which lies at the very centre of executive authority.

20 It is unnecessary to pursue these questions because here, far from there being a State legislative impediment to the arrangements that have been made, there is State legislative authority and, furthermore, the Commonwealth law does not impose administrative duties.

The second proposition

21 The foundation for the argument that s 19 of the Extradition Act imposes an administrative duty on a magistrate as the holder of a State statutory office is the provision in s 19 that, in stated circumstances, "the magistrate *shall* conduct proceedings to determine whether [a] person is eligible for surrender" (emphasis added). A problem for the argument is s 4AAA of the *Crimes Act* 1914 (Cth) which sets out the rules that apply if, under a law of the Commonwealth relating to criminal matters, a non-judicial function or power is conferred on a State magistrate. One of those rules is that the function or power is conferred on the person only in a personal capacity (s 4AAA(2)). Another is that the person need not accept the power or function conferred (s 4AAA(3)).

22 The importance of the contention that what is involved is the imposition of a duty rather than the conferral of a power follows from the decision of this Court in *Aston v Irvine*[14]. In this constitutional context, it is the creation by federal statute of an obligation to execute federal law that is the essence of the supposed duty.

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14 (1955) 92 CLR 353; [1955] HCA 53. See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231; [1973] HCA 63.

23 As noted earlier, s 4AAA was enacted against an historical background that included the involvement of State magistrates in extradition proceedings since the time of Federation, and colonial magistrates before that time. In its application to State magistrates, extradition proceedings would appear to be a paradigm case within the contemplation of s 4AAA. The expression "a law of the Commonwealth relating to criminal matters" is wide enough to embrace the Extradition Act. Part II of that Act is not concerned with offences against the Australian criminal law, or with the trial and punishment in Australia of criminal offences. By hypothesis, an offender is alleged to have violated a law of another country, and the intention is to try that person, not in Australia, but elsewhere. Nevertheless, the subject matter of extradition, to and from Australia, in which reciprocity plays an important part, concerns "criminal matters", and the Extradition Act is a law "relating" to such matters. Extradition is such an obvious and important topic, the role of State magistrates in extradition proceedings is of such long standing, and the matters dealt with by s 4AAA are of such clear potential relevance to extradition proceedings, as to support strongly a conclusion that s 4AAA was intended to cover the role of State magistrates under s 19 of the Extradition Act[15].

24 It may be accepted that an individual State magistrate who accepted the function and embarked upon s 19 proceedings in a particular case could be compelled to complete the task. However, as Branson J said in the matter of *Williams*[16]:

> "Understood in the context provided by Pt II of the [Extradition Act], s 19 is concerned to identify the role which is to be performed by a magistrate under the [Extradition Act]. It is not concerned to identify who is to exercise that role in a particular case. The identification of an appropriately qualified person to perform the role required of a magistrate under s 19 will be undertaken by those responsible for allocating duties to the magistrates of the State concerned. No person whose extradition is sought, nor any extradition country, could, whether by seeking a writ of *mandamus* or otherwise, compel a particular magistrate to whom the task had not been allocated to entertain an application under s 19."

25 The second proposition should be rejected.

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15 cf *Acts Interpretation Act* 1901 (Cth), s 21(1)(b).

16 (2007) 161 FCR 220 at 222-223 [7].

The third proposition

26 The failure of the third proposition was the ground, or the principal ground, of the decisions of each Full Court of the Federal Court in these matters. Those decisions should be upheld.

27 As to the first two matters, the question turns on the meaning of s 6 of the *Magistrates Court Act* 2004 (WA) and, in particular, s 6(3)(b), which provides that, with the Governor's approval, a magistrate may perform other public functions concurrently with those of a magistrate. This is to be read in its immediate statutory context, s 6(3)(a) providing that, with the Governor's approval, a magistrate may hold concurrently another public or judicial office or appointment including an office or appointment made under the law of another place. This indicates that the reference to "other public functions" in s 6(3)(b) is not confined to public functions conferred by Western Australian legislation. The Commonwealth is not "another place", but par (a) throws light on the meaning of par (b).

28 Apart from the immediate statutory context, and of paramount importance, is the historical context earlier described. Here again, the long-standing involvement of Western Australian magistrates in extradition proceedings, and the national and international importance of the topic of extradition, make it very difficult to accept that the topic was not in contemplation when the legislature, in s 6, dealt with the functions of Western Australian magistrates. This is such a well-known and significant function of State magistrates that it is impossible to imagine that it was overlooked, or that it was not included in the general terms used in the provision. To treat it as not included among the "other public functions" referred to would be to give that expression a narrow and unreasonable interpretation.

29 The considerations mentioned in the preceding paragraph apply with equal force to s 23 of the New South Wales legislation, which provides that a person may, with the approval of the Governor, hold and exercise the functions of the office of magistrate and another office or appointment. It is true that the *Interpretation Act* 1987 (NSW), in s 12, requires that, in the absence of a contrary intention, a reference to a jurisdiction or other matter or thing implies a reference to a jurisdiction or matter or thing in New South Wales, but the subject matter with which s 23 is concerned, understood in the context of the functions historically performed by State magistrates, requires the conclusion that the general words used manifest a contrary intention. Extradition is a topic of direct relevance to the State of New South Wales. The arrangements made by the Commonwealth with other countries, and legislation in the exercise of the external affairs power concerning the matter of extradition to and from Australia, bear upon the efficacy of the State's system of criminal justice. That, no doubt, is why the Australian States permit their magistrates to participate in the administration of extradition law. It is the Commonwealth that conducts

Australia's foreign relations, but in the matter of extradition of fugitive offenders, those foreign relations have an important bearing on the practical enforcement of State laws. The language of s 23(2) of the *Local Courts Act* 1982 (NSW) is wide enough to cover the function in question, and it was such an obvious matter for legislative consideration that it would be unreasonable to treat the language as not covering the function.

30 The third proposition should be rejected.

Conclusion

31 In the first two matters, the appeals should be dismissed with costs. In the third matter special leave to appeal should be granted, and the appeal should be treated as heard instanter and dismissed with costs.

32 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. These proceedings concern the operation of the federal system in a situation which is the converse to that considered in *R v Hughes*[17]. There the Court held that the Commonwealth Director of Public Prosecutions had power to institute and carry on prosecutions for certain indictable offences against State law. This was because federal law (supported by an adequate head of federal legislative power) provided for the exercise of functions and powers expressed by State law to be conferred upon the Director. It was accepted in *Hughes* that by force only of its own legislation a State could not unilaterally invest functions thereunder in an officer of the Commonwealth. An important difference between *Hughes* and the present proceedings is that here the officers in question are those of a State, not the Commonwealth, and the conferral of authority is by a law of the Commonwealth, the *Extradition Act* 1988 (Cth) ("the Act").

33 The Act deals with extradition from Australia (Pt II) and extradition to Australia (Pt IV) and makes special provision for extradition to New Zealand (Pt III). These proceedings arise from three extradition applications under Pt II.

The proceedings

34 These three matters were heard together. The first two are appeals from decisions of the Full Court of the Federal Court of Australia (Moore, Tamberlin and Gyles JJ)[18] dismissing appeals from a judge of that Court (Siopis J)[19]. His Honour had heard together applications by Mr Zentai and Mr O'Donoghue to restrain the further pursuit of extradition proceedings instituted against them respectively by the Republic of Hungary and Ireland. In each case before Siopis J the second respondent was a magistrate holding that office under the law of the State of Western Australia.

35 The third matter in this Court is an application by Mr Williams for special leave to appeal against a decision of the Full Court of the Federal Court (Branson, Tamberlin and Allsop JJ)[20]. Their Honours were exercising the original jurisdiction of the Federal Court upon an application to restrain the

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17 (2000) 202 CLR 535; [2000] HCA 22.

18 *Zentai v Republic of Hungary* (2007) 157 FCR 585.

19 *Zentai v Republic of Hungary* (2006) 153 FCR 104.

20 *Williams v United States of America* (2007) 161 FCR 220.

taking of further steps under the Act for the surrender of Mr Williams to the United States of America. The second respondent in these proceedings is identified as "Magistrates Appointed by Commission under the Public Seal of NSW".

36 In all three proceedings the jurisdiction of the Federal Court was conferred by s 39B(1A) of the *Judiciary Act* 1903 (Cth) in respect of a matter arising under the Constitution or involving its interpretation. The contention by the applicant in each case was that the conduct of the extradition proceedings against him should not proceed because of the invalidity of ss 19(1) and 46(1)(a) of the Act.

37 In this Court the respondent magistrates filed submitting appearances. Counsel for Ireland, the Republic of Hungary and the United States of America adopted the submissions made by the Commonwealth Solicitor-General. Submissions also were made, as interveners, by the Attorneys-General of Western Australia, New South Wales, South Australia and Victoria. The State Attorneys-General presented submissions adverse to the interests of the appellants and the applicant for special leave.

Part II of the Act

38 Part II (ss 12-27) of the Act is headed "Extradition From Australia to Extradition Countries". The structure of Pt II was analysed most recently by Gleeson CJ in *Vasiljkovic v The Commonwealth*[21] and need not be repeated here. The Chief Justice, with reference to what had been said in *Harris v Attorney-General (Cth)*[22], said that Pt II provided for four stages in extradition proceedings, namely[23]:

> "commencement, remand, determination by a magistrate of eligibility for surrender and executive determination (subject to legislative constraints) that a person is to be surrendered".

39 Section 19(1), the validity of which is impeached, is engaged at the third stage, namely the determination by a magistrate of eligibility for surrender. The

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21 (2006) 227 CLR 614 at 622-628 [16]-[29]; [2006] HCA 40.

22 (1994) 52 FCR 386 at 389.

23 (2006) 227 CLR 614 at 628 [29].

sub-section states that where the preceding steps in the process have been taken and the magistrate considers there has been a reasonable time to prepare, then:

> "the magistrate *shall* conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country". (emphasis added)

Where the determination is of ineligibility for surrender, then the magistrate "shall ... order that the person be released" (s 19(10)); where there is a determination of eligibility, "the magistrate shall ... order that the person be committed to prison to await surrender ..." (s 19(9)).

40 It is settled by authority including *Pasini v United Mexican States*[24] and *Vasiljkovic*[25] that the determination under s 19(1) of eligibility to surrender and the making of consequential orders under ss 19(9) and 19(10) involves the exercise of administrative functions and not the exercise of the judicial power of the Commonwealth. Accordingly, s 19 is not the product of an exercise by the Parliament of its power conferred by s 77(iii) of the Constitution to make laws investing State courts with federal jurisdiction.

41 The term "magistrate" is defined in par (b) of the definition in s 5 of the Act so as to include "a magistrate of a State ... being a magistrate in respect of whom an arrangement is in force under section 46". Paragraph (a) of s 46(1) of the Act states that the Governor-General may:

> "arrange with the Governor of a State for the performance, by all or any of the persons who from time to time hold office as magistrates of that State, of the functions of a magistrate under this Act".

42 Section 15(1) requires that a person arrested under a provisional warrant issued after application on behalf of an extradition country "shall be brought as soon as practicable before a magistrate in the State ... in which the person is arrested". It is not disputed that on their face the subsequent proceedings under s 19(1) to determine eligibility for surrender have been conducted by magistrates under arrangements made in respect of Western Australia and New South Wales and complying with s 46(1)(a). However, counsel for the two appellants and the

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24 (2002) 209 CLR 246; [2002] HCA 3.

25 (2006) 227 CLR 614.

applicant (whom we will describe collectively as "the appellants") point to the presence in s 19(1) of the phrase "the magistrate *shall* conduct proceedings ..." and from that basis found submissions respecting invalidity.

The appellants' principal submissions

43 The submissions begin with the propositions that when the magistrate embarks upon the exercise of the power conferred by s 19(1) the magistrate is obliged to proceed to determine eligibility to surrender and to make appropriate consequential orders and that the making of the determination may be compelled by a remedy of mandamus from a court of competent jurisdiction.

44 The next step in the submissions is that the Parliament of the Commonwealth lacks the power, without State legislative approval, to impose upon the holder of a State statutory office an administrative duty enforceable by legal remedy where the functions and incidents of that office are "exhaustively" defined by State legislation.

45 This absence of legislative power in the Parliament is said not to apply to all heads of power conferred by s 51 of the Constitution. The appellants concede that with respect to a particular head of power there may be something in the subject matter or context which indicates that the power may be exercised to compel the performance of duties under federal law even without State legislative approval. This qualification is made in apparent response to the decision in 1942 in the *First Uniform Tax Case*[26]. The provisions of federal legislation, the validity of which was upheld in that case, included those made in the *Income Tax (War-time Arrangements) Act* 1942 (Cth) which enabled the Commonwealth to take over from the States their officers, premises and equipment concerned with the assessment and collection of income tax; that statute was to continue in operation until the last day of the first financial year after what was then the war being waged by Australia. However, as noted below, the statute with which the present case is concerned is supported by the external affairs power. The appellants contend that no qualification applies in respect of that power such as may be found with the defence power.

46 The requirement (which is disputed by the active respondents and the interveners) for the giving of consent by State legislation, rather than by the State executive government, appears to be placed by the appellants upon two related

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26 *South Australia v The Commonwealth* (1942) 65 CLR 373.

bases. The first is that a State executive has no power to add to the functions of an office created by a statute of that polity any more than it can alter the content of any other law made by the State legislature. The second is that the executive cannot dispense with or suspend the operation of those laws. In the latter regard reference was made to the decision of Wild CJ in the New Zealand Supreme Court in *Fitzgerald v Muldoon*[27]. The Chief Justice made a declaration that a public announcement by the Prime Minister of New Zealand that the operation of a statutory superannuation scheme was to cease forthwith, was "illegal as being in breach of s 1 of the Bill of Rights [of 1688]"[28].

47 As will appear, these proceedings may be resolved without a determination of whether that requirement for State legislative, rather than executive, approval is sound doctrine. This is because of what follows from the distinction drawn by the appellants between the conferral by federal law of a power and the imposition of a duty. The appellants concede that their case must fail in any event if s 19(1) of the Act confers a power but does not impose a duty.

Power and duty

48 The limitation contained in the submissions by the appellants with respect to the imposition by the federal law of a duty rather than merely the conferral of a power reflects the reasoning evident in the joint judgment of the Court in *Aston v Irvine*[29]. The provisions of the *Service and Execution of Process Act* 1901 (Cth) which were held valid in that case conferred *powers* upon State magistrates or other officers in respect of interstate service of process, and did not impose duties upon them. The Court said that to give the magistrates and other State officers mentioned in the federal law the powers in question involved no interference with the executive governments of the States[30].

49 The legislation upheld in *Aston v Irvine* relied upon the power of the Parliament with respect to service and execution of process conferred by s 51(xxiv). The provisions of the Act dealing with extradition from this country

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27 [1976] 2 NZLR 615.

28 [1976] 2 NZLR 615 at 623.

29 (1955) 92 CLR 353.

30 (1955) 92 CLR 353 at 364.

rely upon the external affairs power conferred by s 51(xxix)[31]. The appellants correctly take no point seeking to distinguish *Aston v Irvine* by reason of the differences in these heads of legislative power conferred by s 51 of the Constitution. Nor, subject to what appears below under the heading "The *Melbourne Corporation Case*", do the appellants seek to revisit the *Engineers' Case*[32] and revive any theory of State reserved legislative powers allegedly supported by ss 106, 107 and 108 of the Constitution[33].

50 In *Aston v Irvine* the Court did refer[34] to the then current authority in the United States Supreme Court. This included *Robertson v Baldwin*[35] and *Holmgren v United States*[36], cases which indicated that federal law might authorise State magistrates to exercise powers conferred by that law, at least if those State magistrates chose to do so. In the more recent decision in *Printz v United States*[37], favourable reference was made by the majority to *Holmgren* as a case of State consent to the exercise of federal authority.

51 This Court in *Aston v Irvine* also referred[38] with apparent approval to the following passage in the treatise by Willoughby[39]:

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31 *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 618 [6], 643 [87], 676-677 [222].

32 (1920) 28 CLR 1.

33 See *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 73-74 [54], 119-120 [192]-[194]; [2006] HCA 52.

34 (1955) 92 CLR 353 at 364.

35 165 US 275 at 280 (1897).

36 217 US 509 at 517-518 (1910).

37 521 US 898 at 906 (1997).

38 (1955) 92 CLR 353 at 364.

39 Willoughby, *The Constitutional Law of the United States*, 2nd ed (1929), vol 1 at 120.

> "In general, however, the Federal and State Governments act independently of each other, as regards their executive or administrative services, and the principle is well established that the Federal Government may not impose upon State officials the imperative obligation and burden of executing Federal laws, nor, *a fortiori*, may the States obligate Federal officials to execute State laws[40]. However, it is equally well established that there is no constitutional objection to the granting by the Federal Government to State officials of authority to execute Federal functions, if they, or rather their respective State governments, are willing that they should do so[41]."

The *Melbourne Corporation Case*

52 Counsel for the appellants submitted that the constitutional requirement for State legislative approval for the imposition upon a State officer of an administrative duty is "a particular per se application" of the implication drawn from the federal structure in *Melbourne Corporation v The Commonwealth*[42] and subsequent authorities including *Re Australian Education Union; Ex parte Victoria*[43] and *Austin v The Commonwealth*[44]. In *Austin*[45] the majority applied the proposition drawn from *Australian Education Union*[46] that it is critical to the capacity of a State to function as a government that it retain the ability to

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40 *Kentucky v Dennison* 65 US 66 (1860).

41 Some of the States, by express constitutional provisions, forbid their officials from accepting, while in office, Federal appointments. These prohibitions, however, in general, if not in all cases, are declared to apply only to certain of the higher grades of officers. A violation of these prohibitions operates, *ipso facto*, as a resignation of the State offices. It would seem to be clear that the States cannot prevent anyone, not even their own officers, from accepting a Federal appointment: the most that they can do is to declare that such an acceptance will operate to vacate a State office held by the one accepting the Federal office.

42 (1947) 74 CLR 31.

43 (1995) 184 CLR 188.

44 (2003) 215 CLR 185; [2003] HCA 3.

45 (2003) 215 CLR 185 at 218 [25], 260-261 [152], 282-283 [227].

46 (1995) 184 CLR 188 at 233.

determine the terms and conditions of engagement of employees and officers at the higher levels of government.

53 However, in *Austin* the Court left for another day consideration of a larger proposition than that previously accepted as required by the *Melbourne Corporation* doctrine. The proposition put to one side was that it is critical to the constitutional integrity of the States that they alone have the capacity to give directions to their officials and determine what duties they perform[47]. Acceptance of such a proposition could lead to the invalidity of federal laws which merely affected the ease with which the States exercised their constitutional functions, rather than impaired the exercise of those functions[48].

54 In making that reservation in *Austin* reference was made[49] by Gaudron, Gummow and Hayne JJ to recent decisions, including *Printz*[50], supporting an implication in the Constitution of the United States which restrains the unilateral imposition by federal law upon State officials of functions under that federal law.

Printz v United States

55 *Printz* concerned the validity of a federal gun control law which commanded the "chief law enforcement officer" of each local State jurisdiction to check the background of prospective purchasers of handguns and to perform related tasks. One ground of the majority decision was that the federal law effectively, but invalidly, transferred to State officers the responsibility of the President to administer the laws enacted by Congress[51]. Another ground, an aspect of "dual sovereignty", was that the scheme of the Constitution was that the government of each State be accountable to its own citizens for the conduct of its officers[52]. In the present cases the appellants disclaimed any translation of the

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47 (2003) 215 CLR 185 at 269 [181].

48 cf *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 481.

49 (2003) 215 CLR 185 at 268 [178].

50 521 US 898 (1997).

51 521 US 898 at 922-923 (1997).

52 521 US 898 at 918-922 (1997).

reasoning in *Printz* in so far as it relied upon "dual sovereignty" as that doctrine has been understood from time to time in the United States.

56 The majority in *Printz* put aside, as not controlling the outcome their Honours reached, those Supreme Court authorities dealing with the applications to the States of federal laws which, whilst of general application, "excessively interfered with the functioning of state governments"[53]. It is those authorities which march with the *Melbourne Corporation* doctrine. Counsel for the appellants did refer to the reliance in *Melbourne Corporation* and the later cases, particularly *Austin*, upon that line of United States authority. This, however, was said to support the use of the decision in *Printz* to lay the ground for a further development of the *Melbourne Corporation* doctrine.

57 It is unnecessary on this occasion to determine whether the *Melbourne Corporation* doctrine should be developed in such a fashion as the appellants suggest and to produce the result that the Parliament lacks power, without State legislative approval, to impose upon the holder of a State statutory office a duty, rather than merely a power of an administrative nature. This is because, as Counsel opposed to the appellants submitted, the Act does not impose a duty of the postulated character.

58 It is to that aspect of the argument that we return.

Section 4AAA of the Crimes Act

59 Section 19, and the other provisions of the Act which involve the exercise of functions by magistrates, must be read with s 4AAA of the *Crimes Act* 1914 (Cth) ("the Crimes Act"). Section 4AAA was added to the Crimes Act by the *Crimes Amendment (Forensic Procedures) Act* 2001 (Cth) and amended by the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act* 2005 (Cth).

60 The Commonwealth in its written submissions to this Court relied upon s 4AAA and in oral submissions the appellants accepted that if that provision operated as the Commonwealth contended then their case must fail. We turn to consider s 4AAA.

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53 521 US 898 at 932 (1997).

61 Section 4AAA operates in the circumstances detailed in sub-s (1). First, there must be "a law of the Commonwealth relating to criminal matters"; that expression includes a reference to the Crimes Act itself (s 4AAA(7)). Secondly, that law must confer "a function or power" which is not judicial, nor must the function or power be "incidental to a judicial function or power"[54]; that requirement is satisfied by s 19(1) of the Act. Thirdly, the law in question may have been made before or after the commencement of s 4AAA (s 4AAA(6)); accordingly, while the legislation in question here was enacted in 1988, s 4AAA nevertheless may apply to it.

62 Next, to attract s 4AAA, a function or power having the requisite character must be conferred on one or more persons including "a magistrate"; that term is defined in s 16C of the *Acts Interpretation Act* 1901 (Cth) as including any magistrate in respect of whose office an annual salary is payable, but as not including a Federal Magistrate. The respondent magistrates in these appeals answer the definition. However, an issue arises as to whether the function or power they exercise under s 19 is conferred "under a law of the Commonwealth relating to criminal matters" within the meaning of s 4AAA. That question may be put aside for the present.

63 Where s 4AAA is engaged, then by force of sub-s (2) the function or power is conferred upon a magistrate "only in a personal capacity"; it is not conferred upon the magistrate as a member of a court.

64 Section 4AAA(3) is important for these cases and is relied upon by those parties opposed to the appellants. The sub-section states that "[t]he person need not accept the function or power conferred". That proposition is one of "the rules" which s 4AAA establishes.

65 It should be held that acceptance, rather than "non-acceptance", may be inferred from a course of conduct, in particular by exercise of the power or function in question. That is what has occurred in the extradition proceedings with which the present litigation is concerned.

66 However, no "rule" which otherwise operates by reason of the impact of s 4AAA upon a law of the Commonwealth relating to criminal matters will apply if in that law there appears the "contrary intention". This qualification to the operation of s 4AAA is imposed by s 4AAA(6A). The appellants submit that

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54 cf *R v Murphy* (1985) 158 CLR 596 at 616.

such a contrary intention does appear from the Act, in particular from the use of the term "shall" in s 19(1).

The appellants' submissions respecting s 4AAA

67 The appellants put their submissions against the adverse consequence which would flow for their case if s 4AAA(3) of the Crimes Act applied and a power rather than a duty was imposed, by relying upon two grounds. First, as noted above, is that the Act is not a law of the Commonwealth "relating to criminal matters". The second ground is that there appears in the Act a contrary intention to the proposition in s 4AAA(3) that the magistrate "need not accept the function or power conferred".

68 For the reasons which follow neither submission by the appellants should be accepted. The consequence is that the constitutional inhibition for which the appellants contend, even if otherwise accepted, would not apply. This is the consequence of the presence of a power and the absence of a duty imposed by the arrangement made under s 46(1)(a) of the Act with respect to the performance by State magistrates of the functions of a magistrate under that law.

"Under a law of the Commonwealth relating to criminal matters"

69 Part IV of the Act (ss 40-44) is concerned with requests by Australia for surrender of persons convicted of an offence against a law of Australia or accused of such an offence and with the consequences of this surrender to Australia. Here there readily may be found a relationship with "criminal matters", namely conviction or accusation of guilt under domestic criminal law. However, the present appellants resist extradition from Australia which is sought under Pt II. The "criminal matters" directly concerned here are offences against the laws of the extradition countries.

70 Two points should be made here. The first is that consideration of Australian criminal law is engaged by Pt II through the "double criminality" ground of extradition objection provided by par (d) of s 7 (which is to be read with the interpretative provision in s 10(3)). The present appellants will only be eligible for surrender by Australia if the magistrate has the satisfaction required by par (c) of s 19(2), namely:

> "that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that

conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia".

In answering that question, any difference between the denomination or categorisation of offences under the domestic and foreign law are to be disregarded (s 10(3)(b)). This issue of "double criminality" stamps the Act with the character of a federal law relating to subject matter which necessarily involves consideration of the operation of domestic criminal law as a step in the magistrate's eligibility determination under s 19. That is sufficient to attract s 4AAA of the Crimes Act.

71 The second point was urged particularly by the Commonwealth Solicitor-General. It is that given the anterior enactment of the Act in 1988, the long-standing involvement of State magistrates in extradition matters, and the need for reciprocity as a means of assisting enforcement of Australian criminal law in proceedings by Australia under Pt IV, it would be an unduly narrow construction of s 4AAA to exclude its operation where what was involved was extradition in aid of the laws of the extradition country. The second point also should be accepted.

Contrary intention

72 The arrangement between the Governor-General and the Governor of a State for which par (a) of s 46(1) provides is "*for the performance*, by all or any of the persons who from time to time hold office as magistrates of that State, *of the functions of a magistrate under this Act*" (emphasis added). Those functions are variously identified throughout Pts II, III and IV of the Act. Reference may now be made to some of them.

73 Reference may first be made to some of the provisions in Pt II. The requirement under s 19(1) to conduct proceedings to determine eligibility for surrender should not be considered in isolation from what goes before s 19 in the administration of Pt II. The magistrate shall issue a provisional arrest warrant, upon application on behalf of an extradition country, if the magistrate "is satisfied" on the basis of information on affidavit, that the person in question "is an extraditable person in relation to the extradition country" (s 12(1)(b)). After arrest the person must be brought before a magistrate and ordinarily "shall be remanded by a magistrate in custody" (s 15(2)) and "shall not" be remanded on bail in the absence of "special circumstances" (s 15(6)). If the Attorney-General exercises power conferred by s 16(1) the magistrate may be directed by the Attorney-General to order release from custody (s 17(1)(c)).

74 With respect to proceedings under Pt II and extradition to New Zealand under Pt III provision is made for the issue of search and seizure warrants (ss 14, 31). The magistrate "may issue" such a warrant upon provision of adequate material on affidavit. Part IV provides for the taking of evidence in Australia where "the Attorney-General suspects that a person is an extraditable person in relation to Australia" (s 43(1)). A magistrate then "may take" the evidence from witnesses and then "shall" cause it to be reduced to writing and, with a certificate, to be sent to the Attorney-General (s 43(2)).

75 Paragraph (a) of s 46(1) does not isolate or differentiate between performance of the range of functions of a magistrate under the Act. The arrangement applies to all of them. The significance of s 4AAA is that it supplements the operation of par (a) of s 46(1) and focuses upon each magistrate who from time to time holds office and is a subject of the inter-governmental arrangement. Each magistrate, as a matter of federal law, is not obliged to accept the performance of the functions of a magistrate under the Act.

76 The circumstance that those functions under the Act may be so formulated, as to any one or more of them, in terms which require the taking of steps by the magistrate if conditions precedent or jurisdictional facts be satisfied does not supply a "contrary intention" for the purposes of s 4AAA(6A). Section 46(1) speaks in terms of inter-governmental arrangement, and not, for example, in the peremptory terms of the law upheld in the *First Uniform Tax Case*[55], to which reference has been made. Any operative "contrary intention" here would need to spell out that a State magistrate is obliged to accept the obligation to perform the functions of a magistrate under the Act.

77 The submissions by the appellants respecting the imposition of a duty rather than a power should not be accepted.

Conclusions and orders

78 Much attention in submissions was devoted to examination of the legislation of Western Australia and New South Wales under which magistrates are appointed[56]. It was said by the appellants that this showed an absence of the necessary legislative consent to the imposition of duties upon the State

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55 (1942) 65 CLR 373.

56 *Local Courts Act* 1982 (NSW); *Magistrates Court Act* 2004 (WA).

magistrates by federal law, and that the statement in the State legislation of the duties of these office holders was exhaustive and thus not to be supplemented by federal-State executive arrangements.

79 It is unnecessary to resolve these issues here. This is because the appellants' case fails at the earlier stage indicated in these reasons, the federal law operating to confer powers rather than impose duties.

80 The appeals should be dismissed with costs. The application for special leave should be granted, and the appeal treated as heard instanter and dismissed with costs.

81 KIRBY J. In the opening words of the reasons of Gummow, Hayne, Heydon, Crennan and Kiefel JJ ("the joint reasons")[57], it is recognised that these proceedings concern the operation of the Australian federal system of government.

82 The point upon which I differ from the other members of the Court derives from the federal idea. It is not consistent with that idea, as expressed in the Australian Constitution, for the Federal Parliament, still less the federal Government, to impose federal administrative functions on State magistrates, distinct from the functions provided for by State law. As senior State office-holders, such magistrates cannot have duties imposed on them unilaterally by federal legislation. Any resulting gap in their legal authority cannot be filled by State Government consent. At least, that cannot be done unless the State Parliament so provides with sufficient clarity.

83 These reasons will seek to demonstrate that the attempt in these cases to impose federal administrative duties on State magistrates lacks the essential authority of the State Parliaments concerned. It is therefore invalid.

84 To meet this argument, the majority embrace a statutory fiction that State magistrates are mere volunteers, free to perform or refuse the tasks assigned by federal law. For me this is wholly unconvincing. It is not the first time in recent years that such a legislative sleight of hand has succeeded.

85 In the argument of the *Communist Party Case*[58] before this Court, the Commonwealth urged the "limited nature"[59] of the impugned federal Act and advanced a submission that the Governor-General's determinations under the Act could be examined one way or another thereby meeting a major challenge to the validity of the law[60]. In those more robust and realistic times the majority of this Court saw through this device. They flatly rejected the disingenuous argument[61]. They upheld the challenge to validity. We should be no less insistent. A "minimalist approach" to constitutional adjudication has the "perverse effect of … imperiling fundamental values"[62]. The challengers should succeed.

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57 Joint reasons at [32].

58 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; [1951] HCA 5.

59 Argument of Mr G E Barwick KC: (1951) 83 CLR 1 at 18.

60 (1951) 83 CLR 1 at 100-101, 106-108, 113-114.

61 (1951) 83 CLR 1 at 179-180 per Dixon J, 257-258 per Fullagar J.

62 Fiss, "Law Is Everywhere", (2007) 117 *Yale Law Journal* 257 at 268.

The Constitution and this Court's central function

86 No higher duty is imposed on this Court than that of ensuring that the Commonwealth and the States conform to the Constitution in their relations with each other[63]. This high duty found recognition in the framers' insistence (against the wishes of the Imperial power) that decisions "upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States" should be reserved to this Court and not subject to appeal to the Privy Council, save in the exceptional circumstances of a certificate, granted but once[64]. It explains the need for "legalism" in declaring and upholding the constitutional requirements governing the constituent parts of the federation. Other nations manage without such irksome rules. But they lie at the heart's core of our system of government.

87 As it has evolved in Australia, federalism has tended to favour, and enhance, the law-making powers of the Commonwealth at the expense of the States. However, the governmental arrangements expressed in the Constitution remain inescapably those of a dualist federal polity. So much is clear from the provisions of the Constitution, and in particular Ch V ("the States"). Section 107, in that Part, provides:

> "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth …".

88 This Court must defend the powers of the Parliaments of the States of which this provision speaks. Save where a law-making power is exclusively vested in the Federal Parliament or where, otherwise, the Federal Parliament is authorised to act under the Constitution, this Court must defend the residual powers of the State Parliaments. It must do so, no matter what might have been done in Imperial and colonial times, before the Constitution came into force. It must do so however well-intentioned the federal intrusion might appear to be. It must even do so where the governments of the States concerned (as here) intervene in support of the federal law. Governments are constituted by transient electoral majorities. Parliaments, on the other hand, represent *all* of the people. They have a separate existence, dignity and role under the Constitution.

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63 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 244-245 [611]-[612]; [2006] HCA 52; *Attorney-General (Vic) v Andrews* (2007) 81 ALJR 729 at 745 [92]; 233 ALR 389 at 409; [2007] HCA 9.

64 Constitution, s 74.

89 Lest this view of the Constitution seem unduly old-fashioned and traditional, it is necessary to say that it derives from the prescriptions and implications of the written text. The text is the source of this Court's powers and legitimacy. As well, the federal division of powers and responsibilities, although sometimes inconvenient and inefficient, affords important protections for the people of the Commonwealth. It ensures that, to the stated extent, government is decentralised and more responsive to electors than it would be in a unitary state, operating in a country of continental size. In addition, it tends to protect the liberties of the people by dividing governmental power. History, and not just ancient history, demonstrates that centralisation of governmental power can operate inimically to freedom. Modern technology has a tendency to centralise power. The federal form of government is a beneficial antidote[65].

90 There are, of course, arguments for different systems of government and different federal arrangements (for example, the abolition of the States and their replacement by enhanced local government). However, these do not reflect the provisions of the Constitution. Whilst it endures in its present terms, this Court's duty is to give effect to its meaning faithfully. Our constitutional system of checks and balances does not work according to its intended design unless this Court plays its proper part.

91 In these proceedings, the moving parties challenge what they portray as an attempt by the Federal Parliament, unilaterally, to impose administrative duties or functions upon magistrates of two Australian States. It is common ground that, in this instance, no "mirror"[66] or express State law has been enacted by the States concerned to authorise the federal legislative imposition.

92 When the constitutional point was taken in these cases, it resulted in a scramble by the federal and State authorities to justify the law in question. In the courts below[67], that attempt was almost entirely confined to an endeavour to squeeze out of ambiguous and opaque State laws an indication that the relevant State Parliaments had indeed given their express approval for the deployment of

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65 *Work Choices Case* (2006) 229 CLR 1 at 229 [558], 245 [612].

66 Numerous examples of "mirror" or counterpart federal and State legislation may be found in Twomey, *The Constitution of New South Wales*, (2004) at 840-843. See also *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Victoria)* (2004) 220 CLR 388; [2004] HCA 53 referring to *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth).

67 *Zentai v Republic of Hungary* (2006) 153 FCR 104 (Siopis J); *Zentai v Republic of Hungary* (2007) 157 FCR 585 (Full Court); *Williams v USA* (2007) 161 FCR 220.

State magistrates in the manner apparently contemplated by the federal law. Although such arguments succeeded below, so fragile and contestable was the reasoning supporting them that by the time these proceedings reached this Court, the arguments (at least of some of the interveners) had changed.

93 Some of the respondent parties and interveners now contend that executive government agreement alone was sufficient to permit the deployment of the magistrates, despite the fact that the office of "magistrate" in each of the States concerned was created by State legislation and did not arise out of delegated, implied or prerogative executive power. In addition, a new argument – and one that hardly featured in the courts below[68], and was not the subject of any notice of contention in this Court – sought cleverly to escape from the problem altogether. It relied upon the federal legislative sleight of hand to which I have referred[69]. It was contended that individual State magistrates "need not accept the function or power conferred" by the contested provisions of federal law[70]. So, it was submitted, whatever a State magistrate did under the federal law was done personally and voluntarily, rather than as a magistrate.

94 Both the reasons of Gleeson CJ and the joint reasons now embrace this apparent forensic afterthought[71]. It has the immediate attractiveness of absolving this Court of any obligation to decide the important and serious federal questions that comprised the greater part of the arguments of the parties. It would have the happy consequence of circumventing the inconvenient (if, in all likelihood, temporary) outcome of frustrating the extradition of three persons to friendly requesting countries. Not for the first time in recent years, an important problem arising under the Constitution is escaped by adopting a construction of the challenged legislation that has not featured, significantly or at all, until the case has reached this Court[72]. The parties who invoke the Constitution come to this

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68 The point was mentioned but not decided by Branson J in *Williams* (2007) 161 FCR 220 at 225 [21].

69 *Crimes Amendment (Forensic Procedures) Act* 2001 (Cth), Sched 1 inserting s 4AAA into the *Crimes Act* 1914 (Cth) ("the Crimes Act"). Later amendments to s 4AAA were made by the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act* 2005 (Cth).

70 Crimes Act, s 4AAA(3).

71 Reasons of Gleeson CJ at [21]-[25], joint reasons at [59]-[77].

72 See *Combet v The Commonwealth* (2005) 224 CLR 494 at 534 [43], 611-612 [281]-[282]; [2005] HCA 61; *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 82 ALJR 454 at 472 [82], 477 [111]; 242 ALR 191 at 212, 219; [2008] HCA 4; cf *New South Wales v Amery* (2006) 230 CLR 174 at 210 [120]; [2006] HCA 14.

Court in the faith that we will uphold the basic law. They find that the Court is not really there. It sends them away saying that their problem does not really exist. I have no sympathy with such a view of the Constitution and of this Court's function under it.

95 I do not agree that the problem presented by these cases can be circumvented in the manner suggested by my colleagues. I deprecate the avoidance of important constitutional questions by defining them out of existence. That is not the function of a constitutional court.

96 I must therefore explain my reasons for rejecting the approach of the other judges of this Court. My conclusion, in that regard, obliges me to grapple with the constitutional and statutory issues that have hitherto engaged the courts below and otherwise engaged this Court.

97 When those issues are correctly addressed, the submissions of Messrs O'Donoghue, Zentai and Williams ("the appellants")[73] must be accepted. Because of the absence of State laws signalling clear consent to the purported conferral of federal functions on State magistrates by the *Extradition Act* 1988 (Cth) ("the Act"), that Act is, in this respect, invalid under the Constitution. The Federal Parliament cannot impose such functions in a unilateral manner. Nor can it do so by invoking executive arrangements.

The facts

98 For the purposes of resolving the constitutional question, it is unnecessary to explain, in detail, the facts surrounding the attempted extradition of the appellants. It is sufficient to note that Ireland is seeking the extradition of Mr O'Donoghue in respect of charges involving alleged fraud on his part. The Republic of Hungary is seeking the extradition of Mr Zentai in respect of an alleged war crime. The United States of America is seeking the extradition of Mr Williams in respect of multiple allegations of wilful attempts to avoid federal income tax[74].

99 In each case, the appellant was brought before a State magistrate for the performance of functions (I use a neutral word) under the Act, anterior to extradition to the respective "extradition country". In accordance with s 12 of the Act, those countries had earlier engaged the first of four stages set out in the Act, prerequisite to the serious step of the extradition of a person from Australia. The step is serious because it impinges upon the liberty of a person within Australia,

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73 cf joint reasons at [42].

74 See *Williams v Minister for Justice and Customs* (2007) 157 FCR 286.

protected by Australian law. It involves a surrender by Australia to an extradition country of an attribute of this nation's sovereignty. Conventionally, extradition law is strictly interpreted and applied because of these and other features[75].

The scheme of the Act

100 An extradition country having applied to a "magistrate", as defined in the Act[76], for the arrest of each of the appellants, it was for the "magistrate", in the first stage of the process, to be "satisfied" that the person was an "extraditable person"[77]. The Act provides that, if he or she is so satisfied, the magistrate "shall issue a warrant" for the arrest of that person[78]. It was pursuant to such a warrant that each of the appellants was arrested under order of the State magistrate concerned.

101 In the second stage of the extradition process, the arrested person is brought before a magistrate to be remanded in custody or on bail pending the conduct of proceedings under, relevantly, s 19 of the Act[79]. Once again, it is clear from the scheme of the Act that the "magistrate" has, and retains, authority over the liberty of the arrested person.

102 The third stage of the extradition process involves the magistrate conducting proceedings under s 19 of the Act to determine whether the person is "eligible for surrender in relation to the extradition offence or … offences for which surrender of the person is sought"[80]. It is a prerequisite to s 19 proceedings that the federal Attorney-General has issued a notice under s 16(1) of the Act, notifying the magistrate that he or she has received an extradition request from an extradition country in relation to that person.

103 If, in accordance with s 19 of the Act, the magistrate decides that the person is eligible for surrender, the fourth stage of the extradition process is reached. It is then for the Attorney-General, under s 22 of the Act, to determine

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75 *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 666 [177]-[178]; [2006] HCA 40; cf *Re Hilali* [2008] UKHL 3 at [30].

76 The Act, s 5.

77 See the Act, s 6.

78 The Act, s 12.

79 The Act, s 15.

80 The Act, s 19(1).

whether the eligible person *should* be surrendered. The magistrate has no part in the decision made at the fourth stage. However, self-evidently, his or her decisions at the earlier stages are preconditions to the ultimate removal of the person from Australia to an extradition country.

104 Under s 5 of the Act, the word "magistrate" is defined to mean, relevantly, "a magistrate of a State … being a magistrate in respect of whom an arrangement is in force under section 46".

105 By s 46 of the Act, relevantly, it is provided that the Governor-General may:

> "arrange with the Governor of a State for the performance, by all or any of the persons who from time to time hold office as magistrates of that State, of the functions of a magistrate under this Act".

The appellants' challenges

106 The challenges that are now before this Court were raised by the appellants at the third stage of the extradition process. Each of them sought (pursuant to s 39B of the *Judiciary Act* 1903 (Cth)) to prohibit or restrain the respective State magistrates from conducting proceedings to determine their eligibility for surrender to the extradition country.

107 The appellants also sought a declaration that ss 19 and 46 of the Act were invalid under the Constitution, in so far as those provisions purported to authorise, or permit, proceedings before State magistrates. In the proceedings of Messrs O'Donoghue and Zentai, the second respondents were individual magistrates of the Magistrates Court of Western Australia. Mr Williams's process named, as the second respondent, "Magistrates appointed by commission under the public seal of New South Wales".

108 It was not contested that, on 24 November 1988, the Governor-General had, by instrument and in stated compliance with s 46 of the Act, arranged relevantly with the Governors of Western Australia and New South Wales for "all or any of the persons who from time to time hold office as Magistrates of [each] State" to perform the functions "of a Magistrate under the Act"[81]. The record shows that in the cases of Messrs O'Donoghue and Zentai, the arrest warrants issued under s 12(1) of the Act were authorised by magistrates of the State of Western Australia other than those who later had before them the third ("eligibility") stage, at which point the constitutional relief was claimed.

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81 The relevant instruments were gazetted in the *Commonwealth of Australia Gazette*, S366, 30 November 1988.

109 It was accepted for the appellants that no attempt had been made in the courts below to establish the precise factual situation governing the assignment of particular magistrates to the performance of functions under the Act which they severally discharged. As a matter of evidence, there is no indication of the existence, or absence, of any internal arrangements within the Magistrates Court of Western Australia or the Local Court of New South Wales by which particular magistrates were, or are, afforded the opportunity to participate in (or to object to or decline to perform) the functions described in the Act. It was common ground that those functions are administrative and not judicial in character[82].

110 Neither the character of the powers conferred by the Act, nor the language in which those powers are expressed, is apt to engage the judicial functions of a State court as contemplated by s 77(iii) of the Constitution. By that unique provision, the Federal Parliament may make laws "investing any court of a State with federal jurisdiction" in respect of any matter arising under any law made by that Parliament. Section 19 of the Act is not, and does not purport to be, a law investing a State court with federal jurisdiction. Instead, it is a law designating members of a nominated class (State "magistrates") as persons authorised to perform what s 46(1)(a) of the Act itself describes as "functions … under this Act".

The decisional history

111 *O'Donoghue and Zentai appeals*: The challenges of Messrs O'Donoghue and Zentai were heard together by Siopis J in the Federal Court of Australia. His Honour rejected two arguments then advanced for the appellants which have not been pursued in this Court[83]. However, most of his attention was addressed to what remained the principal focus of debate in all of the proceedings in the courts below. This was the suggested need for State legislative approval of the imposition of federal "functions" on a "magistrate" of the State[84]. Siopis J did not consider that there was such a need[85]. His Honour also accepted the submission that, in any event, "consent and approval" for the performance of the

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82 See *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 539; [1995] HCA 35; *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [11]-[13]; [2002] HCA 3.

83 *Zentai* (2006) 153 FCR 104 at 114-118 [41]-[61].

84 (2006) 153 FCR 104 at 109-114 [14]-[40].

85 (2006) 153 FCR 104 at 111 [24]-[25].

functions could be found in s 6(3)(b) of the *Magistrates Court Act* 2004 (WA) ("the WA Act")[86].

112 There is no record in his Honour's reasons of any reliance on s 4AAA of the *Crimes Act* 1914 (Cth) ("the Crimes Act") or principles of the common law that now prove determinative in this Court. Nor were those matters referred to by the Full Court of the Federal Court in dismissing an appeal from the orders of Siopis J. To the contrary, that Court confined its attention to the question whether s 6(3)(b) of the WA Act amounted to a State legislative provision authorising "the imposition of functions and duties on State magistrates under s 19 of the Act"[87]. Repeatedly, the Full Court characterised the "function" imposed on the State magistrates under the federal Act as a "duty"[88]. The Full Court simply concluded that "the State has approved the performance of *duties* under s 19 of the Act by persons holding office under the *Magistrates Court Act*"[89].

113 *Mr Williams's application*: When Mr Williams initiated his challenge in the Federal Court, the proceeding was referred to a Full Court. Despite the somewhat different legislation governing magistrates in New South Wales, the judges in the Full Court followed the general approach that had earlier been adopted in respect of Messrs O'Donoghue and Zentai. Specifically, their Honours concluded that s 23(2) of the *Local Courts Act* 1982 (NSW) ("the NSW Act"), on its proper construction, was "sufficiently extensive to enable the Governor [of New South Wales] to make an arrangement in relation to any function, including the imposition of a *duty* by the Commonwealth, as occurs in s 19 of the [Act]"[90].

114 In her separate reasons, Branson J mentioned in passing s 4AAA of the Crimes Act[91]. However, her Honour concluded that it was unnecessary to decide the applicability of that section to the circumstances of the case. She too regarded the federal deployment of State magistrates as sufficiently authorised by s 23(2) of the NSW Act[92].

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86 (2006) 153 FCR 104 at 112 [32].

87 *Zentai* (2007) 157 FCR 585 at 590 [32].

88 See eg (2007) 157 FCR 585 at 588 [15]-[16].

89 (2007) 157 FCR 585 at 589 [25] per Tamberlin J (emphasis added). See also at 586 [1] per Moore J, 591 [35] per Gyles J.

90 *Williams* (2007) 161 FCR 220 at 234 [63].

91 (2007) 161 FCR 220 at 225 [21].

92 See (2007) 161 FCR 220 at 224 [14].

115 *Common arguments below*: This summation demonstrates what is clear from the record. Until this matter arrived at this Court, no one seriously considered (and certainly no one decided) that the functions imposed on magistrates by the Act were not *duties*, such that the constitutional and statutory problems raised could be side-stepped.

116 In my respectful opinion, the general approach of the earlier judges was correct but their ultimate conclusions were wrong. The approach taken in this Court is wrong, as is its conclusion. I will demonstrate why that is so.

The issues

117 Three issues are presented for decision by this Court. Re-arranging them somewhat to accord with the new basis upon which the majority of this Court decides that the deeper questions may be ignored, the issues are:

(1) *The construction issue*: Does s 19 impose legal "duties" on State magistrates? Or is s 4AAA of the Crimes Act effective to deprive it of a compulsory character?

(2) *The constitutional issue*: If s 19 does impose duties, is it an implication from the federal structure of the Constitution that the Federal Parliament cannot impose such duties on the holder of the office of "magistrate", established under State law, without State legislative approval?

(3) *The States' supposed approval issue*: If State approval is required, is it afforded in these proceedings (a) in the cases of Messrs O'Donoghue and Zentai, by ss 6(1) or 6(3) of the WA Act; and (b) in the case of Mr Williams, by s 23(2) of the NSW Act?

The construction issue: an administrative duty?

118 *Nature of the argument*: The postulate underpinning the argument of the respondents and interveners on the first issue is that, because the Act does not purport to impose affirmative legal *duties* on State magistrates, no problem of a constitutional kind arises. Upon this view, it is for the State magistrates concerned to decide for themselves whether to perform the functions to which s 19 of the Act refers. In that sense, the magistrate is no more than a type of volunteer, performing functions as an individual who, although otherwise a State magistrate, in effect elects to undertake needlessly additional duties independent of the requirements of their office.

119 One need do no more than set out the chain of reasoning to demonstrate what an unconvincing argument is advanced. Yet the argument is now accepted by all of my colleagues. It is said to derive support from the decision of this

Court in *Aston v Irvine*[93] and now s 4AAA of the Crimes Act[94]. It is therefore necessary to indicate, with a little care, why it should be rejected.

120 Before doing so, however, it is appropriate to pause for a moment and to reflect a little further on what, with respect, is the unreality of the submission now embraced. Although State "magistrates" are singled out by express reference *to their office*, the suggestion is made not only that they perform functions under the Act as *personae designatae*[95] but that, when doing so, they are somehow to be treated as disjoined from the very office that is a prerequisite to their selection to perform such functions. Each magistrate is to be "detached from the court to which he [or she] belongs and used for particular purposes"[96].

121 There is nothing in the Act that warrants such a conclusion. There is much that speaks against it.

122 *Decision in Aston*: The foundation for the argument that now finds favour in this Court is the earlier holding of the Court in *Aston*[97]. That case concerned the constitutional validity of s 18 of the *Service and Execution of Process Act* 1901 (Cth) ("the 1901 Act"). Section 18 conferred functions on, *inter alios*, a Stipendiary or Special Magistrate, a Justice of the Peace or an officer of a court having the power to issue a warrant for the apprehension of a person under the law of one State to make an indorsement on a warrant issued in another Australian jurisdiction authorising the execution of that warrant in that State.

123 In *Aston*, this Court unanimously rejected an argument that, since the persons named in the federal law as having the power to indorse warrants exercised that power under the authority of that law (and not as agents deriving authority from the executive governments of the States concerned), it was not a valid exercise of federal constitutional power. The suggestion is now made that, by analogy, the same result follows for s 19 of the Act in question in these proceedings. The analogy is unsound.

124 *Distinguishing Aston*: There are several reasons why it is unsound. First, and most importantly, the gravamen of the decision in *Aston* was a consideration

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93 (1955) 92 CLR 353; [1955] HCA 53. See joint reasons at [48]-[51].

94 Joint reasons at [59]-[77].

95 *Vasiljkovic* (2006) 227 CLR 614 at 627 [28].

96 cf *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 152; [1953] HCA 11.

97 (1955) 92 CLR 353.

of the ambit, and interpretation of the power to legislate expressly afforded to the Federal Parliament by s 51(xxiv) of the Constitution[98]. This confers power to make laws with respect to "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States". There is no equivalent provision pursuant to which the Federal Parliament is empowered to make laws with respect to extradition. Its powers in that respect derive (for the most part) from the federal legislative power with respect to "external affairs"[99]. That power, like all others in ss 51 and 52, is granted to the Federal Parliament "subject to this Constitution". This qualification imports the express provisions protective of the constitutional power of State Parliaments[100]. It also imports any implied limitations deriving from the federal character of the Constitution and the role of the States in such a federal polity.

125 The decision reached in *Aston* was supported by the express and unambiguous terms in which the power to make federal laws with respect to the service and execution of criminal process throughout the Commonwealth was granted. Measured against the particularity of par (xxiv) of s 51, other provisions of, or implications in, the Constitution could not prevail. The decision in *Aston* is therefore no more than what it purports to be: a construction of the provisions of s 51(xxiv). On this basis, that decision can quite easily be distinguished from the present proceedings.

126 Section 18 of the 1901 Act had a firm foundation in an explicit grant of legislative power. There is no equivalent foundation for s 19 of the Act in question here. The general source of power is susceptible to the attack on its deployment, made by the appellants. The decision in *Aston* does not repel that attack. On the contrary, by contrasting the respective legislative sources, the susceptibility to a collateral constitutional attack of the source founded, for example, in the external affairs power is made plain.

127 There is a second response to the invocation of *Aston*. It relates to the nature of the functions conferred by s 18 of the 1901 Act when compared to those purportedly authorised by s 19 of the Act under present scrutiny. It was possible, in *Aston*, for this Court to conclude that the 1901 Act had done no more than enhance, pursuant to s 51(xxiv), powers already enjoyed by State magistrates to issue warrants under State law. This was seen as permissible

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98 (1955) 92 CLR 353 at 364.

99 Constitution, s 51(xxix) (external affairs). See also ss 51(xxvii) (immigration and emigration), 51(xxviii) (the influx of criminals).

100 Constitution, s 107. See also ss 106, 108.

because it involved "no interference with the functions of the executive government of the State"[101]. By way of contrast, the challenge in the present case is expressed much more broadly. It is not founded on suggested federal interference with the executive government of the State but rather with the *office* of magistrate and with the *powers* of the Parliament of the State concerned, having established that office, to provide exclusively for the deployment of holders of that office.

128 Nothing in *Aston* contradicts the argument advanced by the appellants in these proceedings. The decision is founded in the express language of s 51(xxiv) of the Constitution. Neither the holding nor the reasoning answers the appellants' submissions or justifies the conclusion that the constitutional issues here presented are avoidable. The Act under consideration, as will be plain, does much more than confer *powers* upon magistrates. It imposes *functions* and *duties*. Indeed, it is clear that "magistrates" have been chosen to exercise the federal functions for the very reason that they hold offices making them apt repositories of the powers and duties which the Federal Parliament has purportedly assigned to them.

129 *Statutory language signifies duty*: Many indications in the language, subject matter and structure of the Act confirm that, in enacting s 19 of the Act, the Federal Parliament intended to impose *duties* upon State "magistrates":

(1) The Act provides that where an application is made under s 19, "[a] magistrate *shall* conduct proceedings to determine whether [a] person is eligible for surrender". By definition the "magistrate" concerned must be "a magistrate of a State". The Act thus purports to impose a duty on a State magistrate, its character being signified by the imperative verb "shall". This is the language of duty. It is a language well understood, as such, by office-holders such as magistrates;

(2) The choice of State magistrates as the repositories of power under the Act also indicates that s 19 was drafted upon the expectation that persons of such a designation would be both competent and appropriate to perform the functions conferred (and invariably willing and able to do so) simply by reason of their office. That office involves numerous coercive functions, with which the functions purportedly imposed by the Act are, in many respects, analogous. Specifically, it is not uncommon for State magistrates to make decisions directly affecting the liberty of individuals, such as are required to be made under s 19 of the Act (and also, for example, s 12);

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101 (1955) 92 CLR 353 at 364.

(3) There is no evidence in the Act or otherwise to suggest the existence, and exercise, by State magistrates, of an entitlement to refuse, or decline, to perform functions under the Act. Indeed, there are several indications in applicable State law that argue against an entitlement to do so. From the flimsiest of evidentiary foundations, the joint reasons appear prepared to infer that the State magistrates, who have performed functions under the Act affecting the appellants, have done so merely on the basis of their personal "acceptance" of the function or power concerned[102]. In the absence of direct evidence one way or the other (taking into account history, experience and common practice), the better inference to draw is that the State magistrates have each performed the federal functions pursuant to regular official assignment to those functions in the manner provided for under State law. In Western Australia, s 25 of the WA Act permits the Chief Magistrate, "by directions given from time to time to a person who is a magistrate", to "specify which administrative duties the person is to perform for the time being" and to "specify where, when and at what times to … perform those … duties". In New South Wales, a similar provision allows the Chief Magistrate to allocate particular functions to particular magistrates[103]. If, as appears to have been the case, the Federal Parliament (and Government) and the State Governments all assumed that functions under s 19 of the Act might lawfully be conferred by means of mutual executive arrangements, it is stretching the judicial imagination even of this Court to suppose that the State magistrates, at any stage in these proceedings, conceived of themselves, or acted, as if performing anything other than statutory duties *binding* upon them. All available indications point in the opposite direction. A factual inference that State magistrates were not obliged to perform s 19 functions should not be drawn by this Court, in effect for the first time, in the exercise of the Court's appellate jurisdiction. If such were to be established, the evidentiary or forensic burden of proving that the magistrates were volunteers rested on the governments concerned, each having the requisite knowledge, resources and motivation to provide such proof. None was forthcoming; and

(4) Against this background, the notion that a State magistrate to whom an application was made under s 19 of the Act could treat the exercise of the resulting functions as purely personal and voluntary to him or her is impossible to reconcile with the scheme and purpose of the Act. It would not be open to such a magistrate to "simply abnegate his authority"[104].

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102 Joint reasons at [65].

103 NSW Act, s 14.

104 *Ffrost v Stevenson* (1937) 58 CLR 528 at 572; [1937] HCA 41.

Should a State magistrate fail (actually or constructively) to perform functions imposed by the Act, performance of those functions would doubtless be compellable by *mandamus*, assuming their constitutional validity. Alternatively, a declaration might be made, to which it would be expected that an office-holder such as a magistrate would conform without question. In essence, that is a consequence inherent in the choice of "magistrates" as the class of persons in whom the relevant powers are reposed. In establishing the nature of the functions imposed under a statute, and in particular the degree to which they are compulsory, it is appropriate to have regard to the character and functions of the donee of the power. As Earle Cairns LC observed in *Julius v Lord Bishop of Oxford*[105]:

> "[T]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

130 In the same reasons, his Lordship explained[106]:

> "[W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

131 The power reposed by the Act in State "magistrates" is to be used for the benefit of the extradition country but also, in a sense, of the person subject to the application. The selection by the Act of a State "magistrate" to exercise the functions and powers indicates, clearly enough, that they are so reposed as duties and not "voluntary" or purely personal or "optional" activities. They are, and are intended to be, serious public powers. They impinge immediately on the rights of those seeking their exercise and the liberties of those potentially affected. It follows that, when the federal Act was enacted, it was never intended that anything less than a compulsory *duty* to exercise those powers should be imposed upon State magistrates. The contrary has not been demonstrated.

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105 (1880) 5 App Cas 214 at 222-223.

106 (1880) 5 App Cas 214 at 225.

132 *Section 4AAA of the Crimes Act*: But has the subsequent enactment of s 4AAA altered this situation in a material way? Does that section render non-compulsory the functions which the Federal Parliament, by the Act, initially imposed upon State magistrates assigned to consider applications at successive stages of the extradition process, effectively as part of their official duties?

133 Reliance was placed on s 4AAA(3) by the first respondent in Mr Williams's case. At no stage was it relied on by any of the respondents in the earlier proceedings of Messrs O'Donoghue and Zentai. I shall overlook any difficulties that might be presented in this regard by the course of the proceedings, the state of the record and the absence from any of the proceedings of any relevant notice of contention. I can safely do this because of the conclusion that I reach adverse to the substance of the contention.

The construction issue: s 4AAA of the Crimes Act

134 Provisions of s 4AAA: The enactment of s 4AAA of the Crimes Act represents an attempt, in effect, to repair a perceived defect in pre-existing (and later enacted) federal law.

135 Relevantly, s 4AAA states:

"*Application*

(1) This section sets out the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on one or more of the following persons:

(aa) …

(ab) …

(a) a State or Territory judge;

(b) a magistrate;

(c) a Justice of the Peace or other person:

(i) employed in a State or Territory court; and

(ii) authorised to issue search warrants, or warrants of arrest.

Functions and powers conferred personally

(2) The function or power is conferred on the person only in a personal capacity and not, in the case of a … State or Territory judge or magistrate, as a court or a member of a court.

Function or power need not be accepted

(3) The person need not accept the function or power conferred.

Protection and immunity provided

(3A) …

(4) A State or Territory judge or magistrate performing a conferred function, or exercising a conferred power, has the same protection and immunity as if he or she were performing that function, or exercising that power, as, or as a member of, a court (being the court of which the judge or magistrate is a member).

(5) …

This section applies regardless of when Commonwealth law made

(6) This section applies whether the law conferring a function or power was made before, on or after, the commencement of this section.

Contrary intention

(6A) Despite subsection (1), a rule set out in this section does not apply if the contrary intention appears.

A law of the Commonwealth relating to criminal matters

(7) In this section a reference to a law of the Commonwealth relating to criminal matters includes a reference to this Act."

136 There follows s 4AAB which provides for the Governor-General to make arrangements with the Governor of a State for the conferral of non-judicial functions and powers on, amongst others, a State magistrate. This section does not advance the matter as it operates on the same basis as s 46 of the Act in contest here.

137 Section 4AAA(1) contains a marginal note indicating that the word "magistrate" is defined in s 16C of the *Acts Interpretation Act* 1901 (Cth). That section provides that the word "magistrate" does not include a federal magistrate but does include a reference, unless the contrary intention appears, to a "Chief, Police, Stipendiary, Resident or Special Magistrate" or "any other Magistrate in

respect of whose office an annual salary is payable". The context makes it plain that this extends to State magistrates of the kind respondent to these appeals.

138 There are three reasons why s 4AAA of the Crimes Act does not perform the function attributed to it by the majority in this Court.

139 *Existence of a contrary intention*: The first reason is that s 4AAA is inapplicable according to its own terms because "the contrary intention appears" in s 19 of the Act. There is nothing specific in s 4AAA to indicate that, in enacting the provision, the Federal Parliament gave any particular attention to the case of that Act. The reasons previously collected to indicate why the language, structure and context of s 19 are impossible to reconcile with a notion that the "functions" imposed on State magistrates are "voluntary" or "optional" sufficiently indicate why the general provisions of s 4AAA are inapplicable because "the contrary intention appears". It is unnecessary to repeat these reasons. It would require language of far greater specificity and clarity than appears in s 4AAA to have the effect of converting the manifestly obligatory administrative functions envisaged under s 19 of the Act into voluntary or optional functions.

140 *No law relating to criminal matters*: The second reason for holding s 4AAA inapplicable to the functions contemplated by s 19 of the Act rests on the requirement in s 4AAA(1) that the federal law operated upon must be one "relating to criminal matters".

141 The fact that s 4AAA is addressed to federal laws appears in terms. It is concerned with rules applicable "under a law of the Commonwealth". It would be normal to read the following phrase "relating to criminal matters" as confined to "criminal matters" provided for under the federal law of Australia. This is because the reader expects federal law to be addressed to the proper subject matters of federal law, in this case Australian federal criminal matters. If some other, further or different subject matter were intended, it is reasonable to presume that an expansive definition of "criminal matters" would have been adopted. In sub-s (7) of s 4AAA, the phrase "a law of the Commonwealth relating to criminal matters" is stated to encompass the Crimes Act itself, without doubt a federal law providing for federal criminal matters. Why, then, should "criminal matters" be read, exceptionally, to extend to foreign criminal matters? Or to the "criminal matters" of a foreign "extradition country"? The statutory context and the general canons of construction argue for the narrower meaning.

142 Whereas legislation dealing with extradition *to* Australia for an offence against a law of the Commonwealth might attract a provision such as s 4AAA, each of the appellants here is the subject of an application by a foreign "extradition country". Section 19 of the Act deals with "extradition offences" committed against the laws of such countries, and therefore with those countries' "criminal matters".

143 Whilst this point of construction is more disputable than the "contrary intention" point, an appropriately strict reading of s 4AAA demonstrates that the section is not applicable here.

144 *Federal statutory sleight of hand*: I reach the third reason. I have earlier referred to the argument based on s 4AAA as an instance of attempted federal sleight of hand. By this I mean that it reflects an endeavour of the Federal Parliament, by the enactment of generally expressed provisions, to avoid serious constitutional problems by stating its commands in conflicting terms. Thus, whilst s 19 of the Act selects State "magistrates" *eo nomine* to perform magistrate-like functions affecting the liberty of persons subject to extradition orders, s 4AAA allegedly seeks to propound the notion that the dutiful office-holders so selected for such functions "need not accept the function or power conferred"[107]. They can, in effect, treat them as optional, voluntary, non-compulsory: as functions which they may or may not care to do.

145 The argument that s 4AAA of the Crimes Act applies to s 19 defies the obvious scheme, purpose and intended operation of the Act. In the present context, it also reflects an unacceptable attempt by the Federal Parliament, wholly by the terms of its own legislation, unilaterally to escape the constitutional requirement of Commonwealth/State legislative mutuality. If it were to succeed, it would mean that, by introducing a *fiction* of voluntary or optional service, whilst relying on the *actuality* of dutiful performance of legal functions, the Federal Parliament could not only bypass the State Parliaments concerned. It could also, as a matter of law, bypass even executive "arrangements" between the Governor-General and the Governors. Such unilateralism is alien to the notion of federal governance implied in the Australian Constitution.

146 This conclusion affords an additional reason for regarding s 4AAA as inapplicable in respect of the State judicial officers ("magistrates") in whom the Act reposes federal "functions" which those officers "shall" perform, if the Act is to be effective according to its tenor.

147 A suggestion is made that any coercion that is imposed by s 19 of the Act is limited to coercion upon those magistrates who voluntarily and optionally accept the functions or powers conferred by that section. This is not an answer to the third point. Such persons are still (as they are required by the Act to be) "magistrates". Necessarily, they serve as such as part of the judiciary of the State concerned. There thus remains on the face of the federal statute an attempt by

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107 Crimes Act, s 4AAA(3).

federal law to impose on such high State office-holders federal "functions" assigned (as the appellants assert) without the authority of enacted State law.

148 If State legislative consent is constitutionally required for such a deployment of State magistrates, it cannot be avoided or circumvented by the unilateral federal device attempted in s 4AAA. If the section directly endeavoured to remove altogether the need for State law authorising such a deployment (voluntary or obligatory), it would be contrary to the Constitution. The section would be read down to avoid such an operation[108]. So confined, the section does not perform the task assigned to it by the majority in this Court. We should flatly reject such a disingenuous argument[109].

149 *Constitutional issues remain*: It follows that it is necessary for me to consider the remaining issues argued by the appellants.

The constitutional issues: requirement of State legislative approval

150 *Dualist federalism*: The starting point for an appreciation of the need for State legislative approval of the vesting by the law of another polity (the Commonwealth) of "functions" to be exercised by State statutory office-holders ("magistrates") is a recognition that the Australian Constitution creates a "federation of a dualist kind"[110].

151 The Commonwealth of Australia is a federation comprising, relevantly, "a central government and a number of State governments separately organized"[111]. This feature of the nation's political arrangements is at once familiar, self-evident and vital. It must be given effect by this Court.

152 In *Re Wakim; Ex parte McNally*[112], Gummow and Hayne JJ acknowledged the part that cooperation between the component parts of the federation can play. But they emphasised, correctly, that[113]:

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108 *Acts Interpretation Act* 1901 (Cth), s 15A.

109 cf above these reasons at [85].

110 Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", (2000) 28 *Federal Law Review* 263 at 290 cited *Re Australian Securities and Investments Commission; Ex parte Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 572 [12]; [2001] HCA 1.

111 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82; [1947] HCA 26; cf *Austin v The Commonwealth* (2003) 215 CLR 185 at 246 [115]; [2003] HCA 3.

112 (1999) 198 CLR 511; [1999] HCA 27.

> "[N]o amount of co-operation can supply power where none exists. To hold to the contrary would be to hold that the Parliaments of the Commonwealth and the States could, by co-operative legislation, effectively amend the Constitution by giving to the Commonwealth power that the Constitution does not give it."

153 *A consistent line of decisions*: Throughout the history of the Commonwealth, in a series of well-known cases, this Court has upheld a limitation on the power of the Federal Parliament to impose administrative "functions" on State office-holders unilaterally. Thus, in *The Commonwealth v New South Wales*[114], the Court invalidated a provision of federal law that had purported to impose on a State Registrar of Titles a duty to register land compulsorily acquired by the Commonwealth. In his reasons, Isaacs J, by reference to general principles of the Constitution, explained why such a provision was ultra vires the federal power[115]:

> "[The section] is a command to a State official as such in the performance of his State functions to disregard the conditions of his statutory authority and to act in accordance with Commonwealth directions. His action is a State service, not an individual service. [The section] attempts to create, not a new individual duty on the part of an inhabitant of the Commonwealth, but a new State governmental duty towards the Commonwealth. In the circumstances here appearing, that is not warranted by any provision of the Constitution, and the attempt fails."

154 At the height of the Second World War, this Court upheld as valid the *Income Tax (War-time Arrangements) Act* 1942 (Cth), which authorised the Federal Treasurer, by notice to the State Treasurer, to "bring about the temporary transfer to the Public Service of the Commonwealth of any specified officers of the State service who have been engaged in duties [of collecting taxes]"[116]. A majority, drawing on the defence power in the Constitution[117], emphasised the

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113 (1999) 198 CLR 511 at 577 [113].

114 (1923) 33 CLR 1; [1923] HCA 34.

115 (1923) 33 CLR 1 at 54.

116 *South Australia v The Commonwealth (Uniform Tax Case No 1)* (1942) 65 CLR 373 at 406; [1942] HCA 14.

117 Constitution, s 51(vi).

particular needs of national defence at that time[118]. Latham CJ, who dissented, observed[119]:

> "Apart from the defence power it would hardly be argued that the Commonwealth could, as it were, forcibly seize a State department, its personnel, accommodation and equipment, under a law specifically directed to this object."

155 The federal law concerned went far beyond giving effect to a cooperative arrangement between officers of the executive government. It involved the imposition of a federal statutory duty on a State employee without counterpart State legal authority. Only the defence power, and then only for the wartime period, was held sufficient to sustain the constitutional validity of such an imposition.

156 In *Melbourne Corporation v The Commonwealth*[120], Dixon J explained the limitations inherent in the Constitution that restrict unilateral federal attempts to impose "a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers"[121]. With the type of problem later to emerge in *Aston* in mind, Dixon J said[122]:

> "[T]he efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority."

157 The extension of this principle to State judicial office-holders was recognised in *Queen Victoria Memorial Hospital v Thornton*[123]. Drawing a negative inference from the explicit power in s 77(iii) of the Constitution, by which the Federal Parliament may "[invest] any court of a State with federal jurisdiction", this Court made it plain that it was not competent for a federal law,

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118 (1942) 65 CLR 373 at 437, 458-459, 468-469.

119 (1942) 65 CLR 373 at 431.

120 (1947) 74 CLR 31.

121 (1947) 74 CLR 31 at 79.

122 (1947) 74 CLR 31 at 83.

123 (1953) 87 CLR 144.

of itself, to call upon a State court "to perform a function which … is of a non-judicial character"[124].

158 In *Queensland Electricity Commission v The Commonwealth*[125], Gibbs CJ made clear what was implicit in the foregoing decisional authority, pointing out that[126]:

> "[T]here is no reason to limit the doctrine to laws which interfere only with the executive power of a State. A Commonwealth law which is directed at the exercise by a State of any of its governmental powers – legislative, executive or judicial – will fall within the ban."

159 In the same case, Brennan J explained the "ban" by reference to the text of the Constitution[127]:

> "The independence of the States in exercising their powers, implicit in s 106 of the Constitution, and the binding effect of Commonwealth law upon them is thus reconciled".

160 The role of the canons of constitutional interpretation in evaluating intrusions of powers within a federation was recognised by Brennan J in *The Queen v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[128]:

> "[A]n attempt by a State Act to vest similar State powers in the same [federal] tribunal would fail – not because of a constitutional incapacity in a Commonwealth tribunal to have and to exercise State power, but because the Commonwealth Act would be construed as requiring the tribunal to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in it."

161 This principle was, in turn, applied in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*[129]. That was a decision concerning the Coal Industry Tribunal created by "mirror" or counterpart federal and State legislation.

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124 (1953) 87 CLR 144 at 151.

125 (1985) 159 CLR 192; [1985] HCA 56.

126 (1985) 159 CLR 192 at 207.

127 (1985) 159 CLR 192 at 235.

128 (1983) 158 CLR 535 at 579; [1983] HCA 29.

129 (1987) 163 CLR 117; [1987] HCA 28.

Crucial to the validity of such a legislative endeavour was the avoidance of unilateral imposition of functions and the enactment of complementary laws. In words directly applicable to the present proceedings, the entire Court, referring to the passage from *Duncan* quoted above, said[130]:

> "While it is unnecessary to investigate the matter here, it may well be, of course, that precisely the same comments could be made, mutatis mutandis, in relation to an attempt by a Commonwealth Act to confer federal duties upon a State-constituted non-judicial tribunal, which was not expressly or impliedly authorized to exercise them by State law."

162 Analogous principles have been recognised in several more recent decisions including *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[131] and *R v Hughes*[132]. In *Hughes*, the joint reasons expressed succinctly the proposition for the counterpart of which the appellants contended in these proceedings[133]:

> "[A] State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth".

163 In the same case, I remarked[134]:

> "An officer or authority of the Commonwealth (such as the Commonwealth DPP) would ordinarily be immune from the imposition, by a law of a State or Territory, of functions and powers distinct from, or additional to, those imposed by federal law. Effective immunity from such imposition arises from several sources. These include the provisions of the Constitution itself; the implication derived from the Constitution that the laws of the States and self-governing Territories may not impermissibly restrict or modify the capability of the Commonwealth to perform its functions as such; and the principle of statutory construction that the functions of a donee of legislative power will ordinarily be taken as confined to those relevant to the polity within which the officer or authority concerned operates."

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130 (1987) 163 CLR 117 at 128.

131 (1997) 190 CLR 410 at 443, 507-508; [1997] HCA 36.

132 (2000) 202 CLR 535; [2000] HCA 22.

133 (2000) 202 CLR 535 at 553 [31].

134 (2000) 202 CLR 535 at 569 [75] (footnotes omitted).

164 Over the history of the Commonwealth, and of this Court, there have been many variations on the same theme. They have been addressed, for example, to the invalidity of federal laws that discriminate against the States or single them out to "curtail their freedom in the execution of their constitutional powers"[135].

165 In the United States of America, in recent years, a principle forbidding "conscription" of State officers and employees has been developed by the Supreme Court. That principle was expressed in *Printz v United States*[136], which was referred to in both the majority and minority reasons in *Austin v The Commonwealth*[137]. It is unnecessary to consider *Austin* here because it was not part of the appellants' case either that particular States had been "singled out" for discriminatory federal imposition or that the federal Act in question here amounted to "conscription" of State officials[138].

166 The appellants' objection to the Act in these appeals was simple. It was that the Act, as a federal law, purported to impose "functions" on State office-holders (so named as "magistrates") without the approval of the State Parliament that created their offices and provided for the functions and duties of office. Without "mirror" or counterpart State laws, the imposition of such "functions" by federal law alone could not be valid.

167 In light of the long series of decisions of this Court that I have collected, the constitutional proposition advanced by the appellants is plainly right. Performing its functions, protective of the constitutional design and purpose, it is the simple duty of this Court to uphold their submission.

168 *Particular constitutional powers*: In *Melbourne Corporation*, Dixon J acknowledged that, occasionally, a particular head of federal legislative power might, of its nature, be sufficient to sustain a unilateral imposition of federal functions on State office-holders, or some of them[139]. This explains the apparently exceptional use of the defence power in wartime[140], and the supplementation of the powers of State court officers under service and execution

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135 *Austin* (2003) 215 CLR 185 at 251 [130].

136 521 US 898 (1997). See Jackson, "Federalism and the Uses and Limits of Law: *Printz* and Principle?", (1998) 111 *Harvard Law Review* 2180.

137 (2003) 215 CLR 185 at 212 [17], 219 [27], 268 [178], 298 [273].

138 cf *Austin* (2003) 215 CLR 185 at 298 [273]. See also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233.

139 (1947) 74 CLR 31 at 81.

140 *Uniform Tax Case (No 1)* (1942) 65 CLR 373.

of process laws[141]. It also explains why, in some cases, a federal law of general application may be held to stand outside the constitutional conception[142].

169 Such was the view I accepted concerning the federal taxation law burdening judicial pensions which the Court invalidated in *Austin*[143]. My opinion did not prevail. Every other member of the Court in *Austin* held that the federal law was invalid. How much stronger is the present case, where the office-holders, who are members of the State judiciaries, are not simply swept up in a federal taxing law of general application but are named *by their office* in the federal Act and then have additional and federal administrative functions imposed on them *eo nomine*? A consistent application of the majority approach in *Austin* requires a resistance to the unilateral federal imposition of specific functions attempted in these appeals.

170 Whatever might conceivably be the position in respect of minor State employees deployed on integrated and cooperative federal functions by consent of the executive government of the State concerned, the position of State magistrates is surely different. Magistrates are necessarily members of the judicial arm of a State government. Even when performing administrative functions, or functions as *personae designatae*, where they are chosen to do so as "magistrates" they inescapably retain the general character of their offices as such. Inferentially, they perform their functions in State facilities, using State resources, assisted by State officials, performing their functions in State time, by inference paid for in this respect by salaries and allowances drawn on the State Treasury.

171 The constitutional requirement that the legal supplementation of the duties of State magistrates be authorised by State law is therefore unsurprising. In every sense, magistrates are in fact amongst the most senior office-holders of the State. Their deployment, as such, is provided for by State law enacted by the State Parliament enjoying the relevant State constitutional authority to do so[144].

172 *Negative implication of s 77(iii)*: A final reinforcement of the foregoing conclusions may be found in the express provision in s 77(iii) of the Constitution for the compulsory imposition on State magistrates, as members of State courts, of federal jurisdiction as expressed in laws enacted solely by the Federal

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141 *Aston v Irvine* (1955) 92 CLR 353.

142 See eg *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 477-478; [1995] HCA 47.

143 (2003) 215 CLR 185 at 307-308 [300].

144 The Constitution, s 107.

Parliament. The fact that, in this particular respect, the Constitution acknowledges expressly a federal power of imposition of functions gives rise to a negative implication where the federal law in question involves the imposition of administrative functions on the very same person, even if in a different capacity.

173 It is true (as I have often acknowledged) that care needs to be exercised in applying the *expressio unius* principle to the elucidation of the meaning of the sparse language of the federal Constitution[145]. However, one of the steps in the reasoning that led to the majority conclusion in *Re Wakim*[146] was the negative implication arising from the express words of s 77(iii). That paragraph of the Constitution had no counterpart authorising the conferral of State jurisdiction on federal courts. Consistency by this Court in the deployment of the negative implication to which this gave rise in the present proceedings favours the conclusion for which the appellants argue.

174 *Government agreement insufficient*: All this aside, is it sufficient that agreement in the present case was "arranged" between the Governor-General and the State Governors concerned, acting on the advice of the respective executive governments of the Commonwealth and the States of Western Australia and New South Wales?

175 The sufficiency of the executive agreement was strongly defended by the Commonwealth. Plainly, s 46 of the Act was drafted on the assumption of such sufficiency. Given this, it is unsurprising that explicit attention does not appear to have been given to the enactment of counterpart State law by the organ of the State empowered to make such law, namely the State Parliament as envisaged by s 107 of the Constitution. Only when the present challenge was brought was the search for a State legislative approval joined in an energetic way.

176 It would be contrary to fundamental principle for the State executive government to presume to a power, under its own authority, to vary or alter, in a material way, the "functions" of State magistrates, as established by the State Parliament. Yet that is what s 46 of the Act seems to envisage in this context.

177 *Insufficiency of "regal authority"*: The principle that the executive government cannot unilaterally vary provisions enacted by the State Parliament is part of the basic historical underpinning of our Constitution. It was inherited

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145 eg *Ruhani v Director of Police* (2005) 222 CLR 489 at 546-547 [180]; [2005] HCA 42 citing *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; [1982] HCA 2.

146 (1999) 198 CLR 511 at 540 [2] per Gleeson CJ, 557 [56] per McHugh J, 581 [123]-[124] per Gummow and Hayne JJ.

from Great Britain when our Constitution was adopted. The use of "regal authority", so far as it pretended to a power of suspending or dispensing with enacted laws, or the execution of those laws, without consent of Parliament, was declared illegal in the first section of the original Bill of Rights[147].

178 In contemporary Australian circumstances, "regal authority" is equivalent to executive power[148]. It was the claim of James II to an "uncertain power of dispensation"[149] that led to the *Trial of the Seven Bishops* in England in 1688[150]. The verdicts of the jury in that trial, acquitting the bishops, have been taken to endorse the view of the Constitution expressed by the judges who summed up against the propositions of the Crown. Within months of the verdicts, there followed the flight of the King, a legal revolution, the passing of the British Crown to King William III and Queen Mary II and the new constitutional settlement expressed by Parliament in the Bill of Rights, accepted in the United Kingdom by the new monarchs and by their successors.

179 Since that time it has been clear doctrine in countries of our constitutional tradition that the executive may not, without authority of Parliament, revoke, ignore or purport to vary an enactment of Parliament. This rule has a textual foundation in the Australian Constitution, being its provisions establishing the Federal and State Parliaments which, by the language and postulates of the Constitution, are accountable to the electors.

180 In so far as, by any agreement between the Governor-General and a Governor of a State, the executive government of a State pretends to a power to ignore, vary or modify an enactment of the State Parliament governing State magistrates, a fundamental postulate of the Constitution is offended. No agreement between the executive government of the Commonwealth and of a State would be valid if it purported to ignore, vary or modify a State law duly enacted.

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147 *The Bill of Rights of 1689* (1 W and M sess 2 c 2). See *Halsbury's Laws of England*, 4th ed (1974), vol 8 at 597 [923]; cf *Mann v O'Neill* (1997) 191 CLR 204 at 266. The Bill of Rights is expressly adopted in New South Wales under s 6 of the *Imperial Acts Application Act* 1969 (NSW). For the position in Western Australia, see Law Reform Commission of Western Australia, *United Kingdom Statutes In Force in Western Australia*, Report No 75, (1994) at 56-57.

148 cf *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622.

149 Maitland, *The Constitutional History of England*, (1955) at 303.

150 *The King v Sancroft (Trial of the Seven Bishops)* (1688) 12 St Tr 183. See also (1688) 3 Mod 212 [87 ER 136].

181 In these proceedings, both Western Australia and New South Wales relied on particular State laws as authorising the executive government of the State to agree to the "arrangement" contemplated by s 46 of the Act. Western Australia specifically accepted the submission of the appellants that the State approval in question had to be legislative, as the State executive government had no power of itself to alter or detract from enacted State legislation. Indeed, Western Australia acknowledged that "the correctness of that proposition cannot be doubted"[151]. In this, its submission was accurate.

182 *Conclusion: parliamentary consent?* The result of this analysis is to sustain the constitutional proposition advanced by the appellants.

183 Neither federal legislation on its own nor the "arrangement" agreed between the executive governments of the Commonwealth and the States could be effective to ignore, vary or modify the functions conferred on State magistrates by State statute law establishing the State office of "magistrate" and providing for the duties and functions of that office. To be effective, any variation, modification or supplementation had also to be authorised by, or under, enacted State law.

184 This conclusion leads to the remaining issue, being whether the laws of Western Australia and New South Wales said to signal such State parliamentary consent do in fact so provide with sufficient clarity.

The State statutory consent issue

185 *Western Australia: statutory provisions*: In Western Australia, "magistrates" are members of the Magistrates Court of Western Australia, established by the WA Act. The Court is a court of record[152]. It may be constituted by one magistrate[153]. The functions of magistrates are provided for in s 6 of the WA Act. That section reads, relevantly:

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151 Western Australia's submissions stated that Parliament might, by its laws, empower the executive to alter such laws, for example by a "Henry VIII clause" allowing amendment by delegated legislation (citing *Permanent Trustee* (2004) 220 CLR 388 at 420-421 [75]-[78]). They also noted that it was necessary in each case, by examination of State law, to ascertain whether that law forbade the alleged variation or modification of the State law.

152 WA Act, s 4(2).

153 WA Act, s 7(1).

> "(1) A magistrate has the functions imposed or conferred on a magistrate by laws that apply in Western Australia, including this Act and other written laws.
>
> (2) …
>
> (3) With the Governor's approval, a magistrate –
>
> (a) may hold concurrently another public or judicial office or appointment, including an office or appointment made under the law of another place; and
>
> (b) may perform other public functions concurrently with those of a magistrate.
>
> (4) A magistrate must not be appointed to an office that does not include any judicial functions without his or her consent."

186 Section 25 of the WA Act empowers the Chief Magistrate to specify which administrative duties a magistrate is to perform and where, when and at what times he or she is to do so. A magistrate is required to ("must") comply with the Chief Magistrate's directions in this regard[154].

187 *WA reliance on s 6(3)(b)*: No explicit approval is given in the WA Act for acceptance by magistrates of Western Australia of the "functions" purportedly conferred on them by ss 12 and 19 of the Act. To find such authority, it is necessary to perform upon the language of s 6 of the WA Act a highly creative act of interpretation. This is precisely what the primary judge and the Full Federal Court did, considering s 6(3)(b) to afford the requisite approval[155]. In my view that was an erroneous holding:

(1) The reference to the performance of "other public functions", in a statute of the Parliament of Western Australia is, on the face of things, a reference only to "other public functions" of that State and not to those of another polity[156]. This interpretation follows from the general principle that one does not expect to see one Parliament providing for the performance of functions by its office holders other than those the subject of its own laws;

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154 WA Act, s 25(3).

155 *Zentai* (2006) 153 FCR 104 at 112-114 [32]-[39]; *Zentai* (2007) 157 FCR 585 at 586 [1], 589-590 [24]-[32], 591 [35].

156 *Hughes* (2000) 202 CLR 535 at 569 [75].

(2) The fact that par (b) refers to Western Australian "public functions" is also confirmed by the Explanatory Memorandum circulated with the Bill. It explained that s 6(3)(b) of the WA Act was similar in intent to s 34 of the *Justices Act* 1902 (WA), which the WA Act replaced. By s 34 of that earlier Act, it had been provided that a magistrate "may discharge the duties of clerk of petty sessions". Obviously, that was a State "public function";

(3) In any case, s 19 of the Act does not purport to confer federal functions on a State magistrate to be performed "concurrently with those of a magistrate". The function imposed by the Act is evidently separate and different from State functions and not, as such, conferred on the court of which the magistrate is a member. It is not, therefore, a public function to be performed "concurrently with [the functions] of a magistrate". It is an additional and distinct function. It follows that s 6(3)(b) does not address the imposition of functions on a magistrate by s 19; and

(4) The comprehensiveness of the statement of functions of a magistrate under the WA Act is confirmed not only by commonsense and the detailed provisions of that Act but also by the universal and unqualified entitlement of the Chief Magistrate, under s 25(1), to assign duties to each magistrate by giving directions with which the magistrate must comply. There is no mention in s 25, or anywhere else in the WA Act, of the performance by a magistrate of additional, distinct and different federal administrative "functions". The notion that a "magistrate" may perform those functions as a volunteer, personally and optionally, does not fit comfortably with the explicit identification of the duties of a "magistrate" of the State and the provisions enacted for the deployment of magistrates upon such duties by the Chief Magistrate.

188 *WA reliance on s 6(1)*: Although not earlier relied on, Western Australia placed much emphasis in this Court on the suggested function of s 6(1) of the WA Act as a source of State legislative consent to the Governor's "arrangement" with the Governor-General under s 46 of the federal Act. The State argued that the reference to "other written laws" in s 6(1) included a reference to written laws of the Commonwealth and hence to s 19 of the Act. This belated argument should also be rejected:

(1) The reference to "other written laws", given the context, is a reference to Imperial enactments still applicable in Western Australia. So understood, s 6(1) has clear work to perform without the need to import federal functions for that purpose;

(2) This approach to the meaning of "written laws" is confirmed by the *Interpretation Act* 1984 (WA). Under s 5, "written law" is stated to

encompass "all Acts for the time being in force". "Act" refers to laws of Western Australia, or laws made "by any Council previously having authority or power to pass laws" in that State. The term "Commonwealth Act" is separately defined to mean "an Act passed by the Parliament of the Commonwealth". Given this, it seems clear that the general term "written law", used in s 6(1) of the WA Act, was not intended to refer to "Commonwealth Acts" applicable in Western Australia. Had this been intended, a mode of expression conformable with the *Interpretation Act* would have been used;

(3) It would be extremely surprising if a reference to laws that apply in Western Australia were intended to pick up, without qualification, the laws of another polity, in particular given the explicit recognition in s 6(3) of the WA Act of the need for the State Governor's approval for a magistrate to hold a concurrent public or judicial office or appointment under the law of another place. It is necessary to read s 6(1) alongside s 6(3) so as to ascertain the separate purposes for which each has been enacted; and

(4) The reliance on s 6(1) of the WA Act is misconceived. This conclusion will cause no real surprise because it is obvious that the Commonwealth and the State proceeded on the assumption, expressly affirmed in s 46 of the federal Act, that agreement between the executive government was all that was legally required to vary, modify or supplement the State law. That assumption was constitutionally incorrect.

189 *Reliance on s 6(3)(a)*: Although Western Australia itself disclaimed the argument, the Commonwealth (by this time clutching at straws) indicated its reliance, if need be, on s 6(3)(a) of the WA Act to authorise the Governor's "arrangement" with the Governor-General and to sustain the imposition of extraneous non-State duties on a State magistrate. It is sufficient to say, in answer to this proposition, that a law of the Commonwealth is not, in relation to Western Australia, a "law of another place". The Commonwealth is not "another place". It exists throughout Western Australia and is not "other" in relation to the States.

190 *Conclusion: no WA approval*: The result is that neither in s 6(3)(b), relied on by the Full Court, nor in any other provision of the WA Act or any other law of the Parliament of Western Australia to which reference was made, was approval given by the State legislature to vary, modify or supplement the duties of persons holding office as "magistrates" under and in accordance with the WA Act.

191 In the absence of such approval, it was not competent for the executive government to advise the Governor to execute the arrangement with the Governor-General. No such arrangement could be lawfully made to vary,

modify or supplement the State law. In accordance with the constitutional principle previously explained[157], such State approval was a precondition to the imposition upon State magistrates of federal functions, such as those stated in s 19 of the Act.

192 It follows that the second respondents in the proceedings of Messrs O'Donoghue and Zentai had no lawful power or authority to perform the federal "functions" purportedly conferred on them by s 19 of the Act. Those appellants are therefore entitled to the relief they seek.

193 *New South Wales: statutory provisions*: The provision of New South Wales law relied on to afford legislative approval for the inter-governmental agreement and the performance by State magistrates in that State of federal functions under the Act, was s 23 of the NSW Act. Relevantly, that section provides:

> "(1) Except as provided by this section, a Magistrate shall devote the whole of the Magistrate's time to the duties of the Magistrate's office.
>
> (2) A person may, with the approval of the Governor (which approval the Governor is hereby authorised to grant), hold and exercise the functions of the office of Magistrate and another office or appointment.
>
> (3) …
>
> (4) Subsection (1) does not prevent a person from holding office as and exercising the functions of a Magistrate on a part-time basis, but such a person must not, while so holding office:
>
> (a) accept or continue to hold or discharge the duties of or be employed in any paid office in connection with any commercial business, or
>
> (b) …
>
> (c) engage in or continue in the private practice of any profession, occupation or trade, or enter into any employment, whether remunerated or not, with any person so engaged."

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157 See above at [183].

194 In New South Wales, magistrates are members of the Local Court of the State, established by the NSW Act[158]. Under s 8, a court shall be constituted by a magistrate sitting alone. A magistrate holds public office of the State and is appointed by the Governor by commission under the public seal of the State[159]. A person's appointment as a magistrate "is taken to be an appointment on a full-time basis unless the appointment is expressed, in the commission by which the person was appointed, to be on a part-time basis"[160].

195 By s 52 of the *Constitution Act* 1902 (NSW), the office of magistrate of the Local Court is amongst those defined as a "judicial office" for the purposes of Pt 9 of that Act. By s 53, within Pt 9, no holder of a judicial office may be removed from the office except by the constitutional procedure of an address from both Houses of Parliament seeking removal on the ground of proved misbehaviour or incapacity. Holders of judicial office in New South Wales have protection against the abolition by legislation of their office[161]. Whether or not such provisions are "entrenched" and require approval at referendum for their alteration or repeal[162] does not need to be determined here. Clearly, in New South Wales the office of "magistrate" is one of very high constitutional importance in terms of the government of the State. For the deployment of such "magistrates" upon duties of office, including administrative, a requirement for the consent of the State Parliament would not be surprising. Indifference or lack of involvement would be astonishing.

196 *Supposed NSW State approval*: The only legislation identified in the Full Court as constituting approval by the New South Wales Parliament of the inter-governmental "arrangement" for the deployment of State magistrates on "functions" provided for in s 19 of the Act was s 23(2) of the NSW Act. Tamberlin J held that the expression there appearing, "another office or appointment", was "broad enough to cover the functions provided for in s 19(1) [of the Act]"[163]. In my view, with respect, this conclusion was wrong:

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158 NSW Act, s 6.

159 NSW Act, s 12(1).

160 NSW Act, s 12(5).

161 *Constitution Act* 1902 (NSW), s 56.

162 *Bruce v Cole* (1998) 45 NSWLR 163 at 166, 203; cf Twomey, *The Constitution of New South Wales*, (2004) at 736-737.

163 (2007) 161 FCR 220 at 234 [62].

(1) First, the reference to "another office or appointment" is, in accordance with established canons of construction, to another office or appointment in and of New South Wales. This conclusion finds support in s 12(1) of the *Interpretation Act* 1987 (NSW) (a reinforcing provision not present in the statute law of Western Australia). The effect of that provision is that a reference, in a State law, to an "office" or "officer", is presumed to mean an office or officer "in and for" the State[164]. Whilst the presumption may be displaced by a "contrary intention"[165], there must be some "positive reason which supports"[166] such a result. There is no such reason here. Given that the office of magistrate is specially a constitutionally protected "judicial office" in New South Wales, it is entirely unsurprising that the State Parliament would exhibit an intention to confine the exercise of the functions and powers of a magistrate only to those expressly provided for by State law. The reservation of such matters to State law involves nothing more than affording appropriate constitutional respect to the State Parliament concerned;

(2) The reference in s 23(2) of the NSW Act to the ability to "hold" another "office or appointment" confirms what is otherwise evident. Thus, a magistrate might be "appointed" to another State tribunal[167]. On the face of things, this is the kind of separate "office or appointment" contemplated by s 23(2). It is distinguishable from the performance of federal "functions" under s 19 of the Act;

(3) The reference to a person holding the functions of the office of magistrate and another office suggests the contemplation of a different office from that of "magistrate". Yet the whole point of s 19 of the Act is to enlist State office-holders who are "magistrates", inferentially because of the very integrity, experience and skills inherent in their office; and

(4) The inaptness of s 23(2) of the NSW Act to perform the functions propounded for it should cause no surprise. Clearly enough, those who

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164 See *Grannall v C Geo Kellaway and Sons Pty Ltd* (1955) 93 CLR 36 at 52-53; [1955] HCA 5; *Tobacco Leaf Marketing Board of NSW v Corte* [1983] 3 NSWLR 10 at 13.

165 *Interpretation Act* 1987 (NSW), s 5(2).

166 *Birmingham University and Epsom College v Federal Commissioner of Taxation* (1938) 60 CLR 572 at 576; [1938] HCA 57.

167 As for example under s 13 of the *Administrative Decisions Tribunal Act* 1997 (NSW), or s 7 of the *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW).

drafted s 46 of the Act thought that State legislation was unnecessary. For the reasons already given, that assumption was constitutionally erroneous.

197 *Conclusions: no NSW approval*: It follows that, as in Western Australia, no approval on the part of the New South Wales Parliament for the variation, modification or supplementation of the duties of magistrates under the NSW Act has been shown. There is therefore no consent by State law for the performance of those duties. It was not competent to the executive government to vary the duties stated in the NSW Act. Nor was it competent to the Federal Parliament unilaterally to impose those duties without "mirror" or "counterpart" legislation of the State Parliament giving approval to that course.

198 It follows that the applicant, Mr Williams, has made good his attack on the validity of the purported performance by a New South Wales magistrate of the functions provided under s 19 of the Act. He too is entitled to the relief sought.

Towards sensible constitutional outcomes

199 *A critique of criticisms*: It might be said that the points raised by the appellants are technical, having nothing to do with the factual merits of the several claims of the extradition countries for their extradition. However, where "technical" objections raise important constitutional principles, they must be resolved conformably with the Constitution. At stake is observance of the rule of law and obedience of all affected office-holders to the requirements of the Constitution. If this Court does not uphold the basic principles of the Constitution, to whom can the people of the Commonwealth look for the discharge of that function?

200 It might further be said that the Act and the impugned inter-governmental arrangements are an example of sensible cooperation within the Australian federation, and should be upheld for that reason. However, no amount of cooperation between governments can cure a demonstrated defect in obedience to constitutional requirements[168]. The true "cooperation" required in this case was a form of intergovernmental cooperation involving the respective parliaments of the States concerned.

201 To the argument that, for more than a century, State magistrates have been involved in extradition hearings, and that this sensible arrangement should not be disturbed, there are several answers. For most of the 20th century, such magistrates performed their functions under an Imperial statute[169] or a federal Act

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168 *Re Wakim* (1999) 198 CLR 511 at 576-577 [113].

169 *Extradition Act* 1870 (UK); *Extradition Act* 1895 (UK).

giving it effect in Australia[170]. In recent years, the federal law has changed, as has the role of magistrates under that law[171]. When a specific challenge to the operation of present law is brought, this Court cannot disclaim its functions because the challenge was not raised earlier. Nor do federal constitutional requirements meekly observe earlier Imperial assumptions, which characteristically were untroubled by the features of federal governance here in question.

202 Any suggestion that the need to enact "mirror" or "counterpart" legislation is an unnecessary burden on inter-federal cooperation must be firmly rejected. There are countless examples of such legislation[172]. When needed, such legislation can be quickly proposed to the State Parliament concerned and generally enacted without delay. That process observes the dignity and respect due to the State Parliaments under the Constitution. Even more importantly, it respects the federal character of Australia's constitutional arrangements and the accountability of the Parliaments concerned to the electors both in the Commonwealth and the States. This Court should uphold the status and role of State Parliaments in our constitutional arrangements. It should not sanction laws that ignore them.

203 *A sensible outcome*: Had the Western Australian and New South Wales Governments proposed amendments to the WA Act and the NSW Act to permit State magistrates to perform federal functions, it is extremely doubtful that such amendments would have been rejected. However that may be, approval or disapproval was a matter for the Parliaments concerned.

204 Those Parliaments should not have been bypassed leading to the unedifying attempt to squeeze the requisite State permission out of statutory language intended for other purposes, or, when this proved unsustainable, to resort to the unconvincing statutory fiction that the magistrates were no more than personal volunteers, although deploying powers that impinged directly on

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170 *Extradition Act* 1903 (Cth). See also *Extradition Act* 1933 (Cth).

171 See *Extradition (Foreign States) Act* 1966 (Cth); *Extradition (Commonwealth Countries) Act* 1966 (Cth); *Extradition (Repeal and Consequential Provisions) Act* 1988 (Cth).

172 Twomey, *The Constitution of New South Wales*, (2004) at 840-843, referring to, for example, *Air Navigation Act* 1938 (NSW), *Competition Policy Reform (New South Wales) Act* 1995 (NSW), *Australian Crime Commission (New South Wales) Act* 2003 (NSW) and so forth.

the liberties of people such as the appellants. As the majority reasons of four Justices said in *Ha v New South Wales*[173]:

> "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices."

205 Inter-governmental and inter-jurisdictional cooperation is often desirable. However, such cooperation must be attained within the framework of the Constitution, under which the Parliaments of the States (representing all of the State electors) enjoy functions and powers that cannot be exercised solely by executive agreements without specific legislative authority[174]. An insistence on this attribute of federal "dualism" is not only necessary because of the terms of the constitutional text. It is also more likely to achieve the dual objectives of federation: cooperation upon agreed matters under appropriate terms and conditions and diversity, disagreement and experimentation where that is lawful and appropriate[175].

206 In the present cases, it can hardly be said that making the required amendments to the WA Act and the NSW Act would have been a great burden. However, had it been done, it would have meant that the State Parliament, which created the office of magistrate, would have had the opportunity and duty to address its attention to, and give its assent for, the imposition of federal

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173 (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ; [1997] HCA 34.

174 Saunders, "A New Direction for Intergovernmental Arrangements", (2001) 12 *Public Law Review* 274 at 279-281; Saunders, "Intergovernmental agreements and the executive power", (2005) 16 *Public Law Review* 294 at 310. See also Saunders, "The Impact of Intergovernmental Arrangements on Parliaments", (1984) 9 *Legislative Studies Newsletter* 22; Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", (2000) 28 *Federal Law Review* 263 at 290; Hill, "*R v Hughes* and the Future of Co-Operative Legislative Schemes", (2000) 24 *Melbourne University Law Review* 478 at 493.

175 See eg Twomey, *The Constitution of New South Wales*, (2004) at 842, referring to Federal and State legislation concerning the practice of human cloning and the use of human embryos for research. Differing legislation was enacted in the States, following which, after further debate, the federal legislation was amended. See *Prohibition of Human Cloning Act* 2002 (Cth) (as enacted); *Research Involving Human Embryos Act* 2002 (Cth); *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act* 2006 (Cth).

functions. Perhaps doing so would have called specific notice to the need for appropriate financial or other contributions to be made by the Commonwealth in respect of the federal component of the work of the State magistrates concerned. Moreover, one could theoretically envisage the attempted imposition of some federal administrative functions upon State magistrates which, either because of their character or their burdens, the State Parliament might prefer not to accept.

207 *Upholding the Constitution consistently*: This is the way, in such important matters, that the federal system of government operates in Australia. The appellants were correct to assert that clear State legislation was required for the imposition of the functions set out in s 19 of the Act. None was enacted. I can only repeat what Gummow and Hayne JJ said in this respect in *Re Wakim*[176]:

> "A federal structure of government involves the demarcation of powers and … this has been understood as placing upon a court such as this Court responsibility to construe the Constitution and to determine where the line falls in particular instances. The Court is entrusted with the preservation and application of constitutional distinctions. Were the Court to discard those distinctions, on the ground that at a particular time and to some minds they appear inconvenient or otherwise unsatisfactory, the Court not only would fail in its task but would exceed its authority."

Orders

208 The following orders should be made:

209 In the appeal by Mr O'Donoghue and the appeal by Mr Zentai, order that each appeal be allowed; that, in each case, the order of the Full Court of the Federal Court of Australia be set aside; that in place of such order the appeal to the Federal Court be allowed; the order of the primary judge (Siopis J) be set aside; and in place of that order this Court should order that the second respondent in each proceeding be prohibited from conducting proceedings to determine whether the applicant is eligible for surrender for extradition pursuant to s 19 of the *Extradition Act* 1988 (Cth). The first respondent should pay the appellants' costs of the appeal to this Court and of the proceedings in the Federal Court.

210 In the application by Mr Williams, special leave should be granted; the appeal should be treated as instituted, heard instanter and allowed and the orders of the Full Court of the Federal Court of Australia should be set aside. In place of those orders, this Court should order that the second respondents be restrained from hearing and determining any proceedings under s 19 of the *Extradition Act*

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176 (1999) 198 CLR 511 at 569 [94].

1988 (Cth) to decide whether Mr Williams is eligible for surrender to the United States of America. The first respondent should pay the costs of Mr Williams in this Court and in the Federal Court.