

## THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2008 TERM

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### I INTRODUCTION

When the United States Supreme Court delivers judgment, it allows the judges in the minority to deliver an oral dissent. Dissents from the bench, as they are known, can be intense and dramatic. Take the 21-minute oral dissent delivered by Breyer J on the last day of the first full Term of John Roberts CJ.<sup>1</sup> Justice Breyer began with the crisp statement opposing his Chief Justice: ‘The majority is wrong’.<sup>2</sup> He spoke in defence of the constitutionality of a voluntary plan for school boards to be allowed to consider race as a factor in assigning students to schools to achieve racial integration.<sup>3</sup> He accused the five Republican appointees of dictating their own policy preferences in the name of the law. He was clearly outraged that ‘his colleagues turned *Brown v Board [of Education]*<sup>4</sup> on its head’.<sup>5</sup> He observed regretfully that: ‘It is not often in the law that so few have so quickly changed so much’.<sup>6</sup>

Justice Breyer’s regret was not repeated with the same force in his written opinion. The published version is measured, historical, and full of analytical legal reasoning extending over 77 ‘heavily footnoted pages’<sup>7</sup> of the type with which we readers of Australian High Court judgments are all too familiar.

It is the democratic reach of oral dissents, and the contrast in language and approach of oral and written reasons, that is the subject of the *Harvard Law Review*’s analysis of the Supreme Court’s most recent Constitutional Term.<sup>8</sup> That

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1 28 June 2007 (the last day of the 2006 Term).

2 Oral Opinion of Breyer J, *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701 (2001) in Lani Guinier, ‘The Supreme Court 2007 Term – Foreword: Demosprudence through Dissent’ (2008) 122(1) *Harvard Law Review* 4, 8 fn 5.

3 *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701 (2007).

4 347 US 483 (1954).

5 See Guinier, above n 2, 10 fn 21.

6 Oral Opinion of Breyer J in Guinier, above n 2, 8 fn 13.

7 Guinier, above n 2, 9.

8 Guinier, above n 2, 14.

Term, the 2007 Term, ran from October 2007 to June 2008.<sup>9</sup> As is the practice, cases were heard and determined within that single defined term.

Unfortunately for the author of the prestigious Foreword to the *Harvard Law Review*, oral dissents had diminished to two in the 2007 Term, having previously spiked at seven the Term before, including that of Breyer J.<sup>10</sup> Assuming some liberty, the Foreword takes a longer period than the strict Term to analyse the democratic accountability of the Court.<sup>11</sup>

The Foreword to the *Harvard Law Review* is the model for this series.<sup>12</sup> There remains the problem, noted by Stephen Gageler in the first lecture of this series, of translating that tradition to the Australian High Court, a court without a defined Term. I intend to exercise some of the liberty displayed by the prototype by including within my ken constitutional cases that were either determined or only heard during the 2008 calendar year. This allows for comments to be made about *K-Generation Pty Ltd v Liquor Licensing Court*,<sup>13</sup> having been heard in November 2008, despite its delivery in February 2009.

*K-Generation* is important because it is the twin decision to *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*,<sup>14</sup> delivered in February 2008, and it reaffirms the High Court's commitment to exhausting questions of statutory construction before validity. It makes important observations about the integrated system of courts within the federal system, a repeated central principle of the Court's approach to Chapter III of the *Commonwealth Constitution*. Those observations, particularly with respect to the range of State courts governed by the principle in *Kable v Director of Public Prosecutions (NSW)*,<sup>15</sup> were prompted by submissions made by State interveners. The role of interveners is one of the matters I wish to address today.

More generally, I want to pick up on some of the themes of the 2008 Term. The first is the rich question of the nature of judicial process. Early in the Term, the related question of the nature of judicial power emerged in *Attorney-General (Cth) v Alinta Ltd*.<sup>16</sup> The question was whether an administrative body, the Takeovers Panel, impermissibly exercised federal judicial power. The High Court held that it did not.

The broader question, raised in both *Gypsy Jokers* and *K-Generation*, was whether Chapter III impliedly guarantees a right of due process, including a right of access by a party to all adverse material taken into account by a court. Insofar as the question has been resolved, it has been resolved on the ground that what

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9 This is the period in which the Court actually sits, including for the delivery of judgments. It then goes into recess. Strictly speaking, the Term of the Supreme Court runs continuously from the start of October until September 30 the following year, the work being, as with the Australian High Court, unceasing.

10 Guinier, above n 2, 15.

11 Guinier, above n 2, 16.

12 See Stephen Gageler SC, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25(1) *University of New South Wales Law Journal* 194.

13 (2009) 252 ALR 471 ('*K-Generation*').

14 (2008) 234 CLR 532 ('*Gypsy Jokers*').

15 (1996) 189 CLR 51 ('*Kable*').

16 (2008) 233 CLR 542 ('*Alinta*').

matters most is that the procedures remain within the discretionary control of the Court.

The second theme of the Term was that of national unity. This was most apparent in *Betfair Pty Ltd v Western Australia*<sup>17</sup> and the importance it placed on the recognition of national markets. Quite what ‘national unity’ means is something I wish to explore. That case also squarely raised the related issue of inconsistency between the laws of different States and the principle that might be invoked to resolve such inconsistency, in the absence of any equivalent to section 109 of the *Constitution*. The theme of national unity also played a part in the decision in *Wurridjal v Commonwealth*.<sup>18</sup>

Amongst the individually significant constitutional cases, the Court dismissed a challenge to the validity of the Medicare scheme in the matter of *Wong v Commonwealth; Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309*<sup>19</sup> as not amounting to a form of civil conscription. However, there was a significant dissent by Heydon J, on the ground that the legislation imposed a detailed regime of control by the Commonwealth that rendered it not possible in a practical sense for a practitioner to operate outside the Medicare scheme.

The Court also unanimously rejected a challenge by Telstra to a change in the regulatory regime governing its services. It held that a requirement for Telstra to share its services with other telecommunication service providers by physically disconnecting its ‘local loops’ and connecting them to a competitor’s equipment did not amount to an acquisition of property.<sup>20</sup>

In *MZXOT v Minister for Immigration and Citizenship*,<sup>21</sup> the Court rejected the submission that it had an implied power under Chapter III to remit matters in its original jurisdiction to the Federal Magistrates’ Court, when the Parliament had not chosen to invest that Court with relevant jurisdiction. The power to invest the original jurisdiction of the High Court in another court was held to be entirely a matter for the Commonwealth Parliament.

In *O’Donoghue v Ireland; Zentai v Republic of Hungary; Williams v USA*,<sup>22</sup> the Court rejected a challenge to the use of State magistrates to perform functions under the Commonwealth *Extradition Act 1988* (Cth), on the ground that the magistrates were not obliged to perform those functions, acting, as they were, in their personal capacity.

The remaining constitutional cases were ones in which the constitutional issues were slight, or, in Justice Kirby’s words, ‘barely arguable’, as was the complaint in *R v Tang*<sup>23</sup> that the offence of intentionally possessing or exercising power over a slave was unsupported by the external affairs power as not

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17 (2008) 234 CLR 418 (*‘Betfair’*).

18 (2009) 252 ALR 232 (*‘Wurridjal’*).

19 (2009) 252 ALR 400.

20 *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210.

21 (2008) 233 CLR 601.

22 (2008) 234 CLR 599.

23 (2008) 249 ALR 200, 228 [84].

reasonably appropriate and adapted to giving effect to Australia's obligations under the Slavery Convention.

In *Cesan v The Queen; Mas Rivadavia v The Queen*,<sup>24</sup> the Court dealt with the problem of the inadequate superintendence of a sleeping judge over a jury trial under the orthodox criminal appeal legislation (including the proviso) without the need to determine the elements of the guarantee of trial by jury under section 80 of the *Constitution* or a submission based on Chapter III. And, finally, in a case involving the Commissioner of Taxation, the Court concluded that errors of process in assessment such as double counting do not go to jurisdiction and thus do not attract the remedy of a constitutional writ under section 75(v).<sup>25</sup> The result would be different if there was conscious maladministration of the assessment process.

Let me return then to those cases which are illustrative of the broader themes, and let me grapple first with the issue of judicial process.

## II JUDICIAL PROCESS

### A K-Generation

In *K-Generation*, the South Australian Liquor and Gambling Commissioner had refused an application for an entertainment venue licence. He did so because of information supplied to him by the Commissioner of Police. The information had been classified by the Commissioner of Police as 'criminal intelligence'; that is, information relating to actual or suspected criminal activity, the disclosure of which 'could reasonably be expected' to prejudice criminal investigations, or to enable the discovery of the identity of an informant.<sup>26</sup>

The refusal was reviewable on the merits by a body known as the Licensing Court of South Australia. That Court was comprised of a Licensing Court judge who was otherwise a judge of the South Australian District Court. He affirmed the decision of the Liquor Commissioner to refuse the entertainment venue licence on the basis of the criminal intelligence information. The applicant sought judicial review in the Supreme Court.

The complaint in the Supreme Court was that a section of the South Australian *Liquor Licensing Act 1997* (SA) was invalid because it contained a direction to the Licensing Court that it 'must ... take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties ... and their representatives'.<sup>27</sup> This was argued to be contrary to the principle in *Kable* as the conferral of a power which 'depart[ed] to a significant degree from the methods

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24 (2008) 250 ALR 192.

25 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 247 ALR 605, 611 [24], 615 [45].

26 (2009) 252 ALR 471, 492 [106], 497–8 [135].

27 *Ibid* 498–9 [139] (emphasis added).

and standards which have characterised judicial activities'.<sup>28</sup> In response to a comment from Kirby J that the States were unwilling to recognise that the *Kable* principle might extend to another case, French CJ wryly remarked, 'I suppose our concern is whether it is *this* case'.<sup>29</sup>

The appellants relied on a passage in the judgment of Gaudron J in *Nicholas v The Queen*.<sup>30</sup> Let me remind you of what her Honour said:

Judicial power is not adequately defined solely in terms of the nature and subject matter of determinations made in exercise of that power. It must also be defined in terms that recognise it is a power exercised by courts and *exercised by them in accordance with the judicial process*.<sup>31</sup>

Her Honour went on to build upon what had been said by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,<sup>32</sup> by identifying the defining characteristics of the judicial process. She stated:

consistency with the essential character of a court ... necessitates that a court *not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, [and] the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained*.<sup>33</sup>

This was endorsed by Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Bass v Permanent Trustee Co Ltd*,<sup>34</sup> when they said that the judicial process 'requires that the parties be given an opportunity to present their evidence *and to challenge the evidence led against them*'.<sup>35</sup>

If these passages mean what they say, no doubt the direction contained in South Australia's *Liquor Licensing Act 1997* appeared, at least prima facie, to thwart one of the defining characteristics of the judicial process. The challenge to validity was at least not unfounded. Before revealing precisely the reasoning of the majority upholding the validity of the law, let me mention some of the range of submissions that were made.

Both the SA Commissioner of Police and the Commonwealth submitted, in effect, that the Licensing Court had to be satisfied that the classification of information as 'criminal intelligence' was objectively correct. For this purpose it could call on the material on which the classification was based to determine if,

28 To use the language adopted by Gummow and Crennan JJ in *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111].

29 Transcript of Proceedings, *K-Generation* (High Court of Australia, French CJ, 4 November 2008) (emphasis added).

30 (1998) 193 CLR 173, 208–9 [73]–[74] ('*Nicholas*'). *Nicholas* concerned s 15X of the *Customs Act 1901* (Cth), which provided that a court should disregard certain offences by law enforcement officers in the exercise of its discretion to exclude evidence. The validity of s 15X was upheld.

31 *Ibid* 208 [73] (emphasis added).

32 (1992) 176 CLR 1, 27.

33 (1998) 193 CLR 173, 209 [74] (emphasis added).

34 (1999) 198 CLR 334 ('*Bass*').

35 *Ibid* 359 [56] (emphasis added).

objectively, the risk of prejudice could be reasonably expected.<sup>36</sup> It followed that the classification by the Police Commissioner could not be seen as either conclusive or dictatorial of the Court's functions.<sup>37</sup> All members of the High Court ultimately accepted this.<sup>38</sup>

Queensland argued that the Licensing Court was not a 'court of a State', despite its name, on the grounds that its principal functions were administrative, the Licensing Court Judge had no security of tenure, and the institution had no contempt power.<sup>39</sup> If it was not a court of a State, the principle in *Kable* could have no application to it.

Western Australia joined with Queensland in arguing more boldly that *Kable* was restricted in its application to the Supreme Court of a State, the continued existence of which is recognised by section 73 of the *Constitution*. Such recognition indicates that the Supreme Court must always fall within the meaning of the expression 'any court of a State', as it appears in section 77(iii), as a suitable repository of federal jurisdiction. However, no other particular State court is recognised by the *Constitution*, and the States have varied on whether or not they have established District or other inferior courts and at times have abolished them.<sup>40</sup> Without a constitutional requirement to maintain inferior courts, including licensing courts, how could there be, Western Australia asked rhetorically, an implied requirement that where a State chooses to establish an inferior court, the court *must* exhibit the characteristics of institutional independence and integrity comparable to those exhibited by a State Supreme Court?

We, that is, Victoria, took a different tack. We submitted that the case could be resolved by focusing upon the nature of the specific power at issue, which we argued was administrative, rather than on the nature of the institution. It is an accepted proposition that State courts can and do exercise non-judicial power.<sup>41</sup> Here the power being exercised was the power to grant or refuse an entertainment venue licence – this was not a determination of criminal culpability or civil liability; it was the determination of an application of a licence to operate a karaoke bar – God save us.

What's more, the determination of whether the applicant might enjoy certain new rights in the future was to be based upon an assessment, most peculiarly suited to administrative assessment, of whether the applicant was a 'fit and proper person' to be the licensee. Even more significantly, the criteria to be

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36 *K-Generation* (2009) 252 ALR 471, 498 [136]. See Submissions of the South Australian Commissioner of Police at [5(6)]; Submissions of the Attorney-General of the Commonwealth (Intervening) at [2.1], [6].

37 Submissions of the Attorney-General of the Commonwealth (Intervening) at [11].

38 *K-Generation* (2009) 252 ALR 471, 484 [62], 486 [75] (French CJ), 499–500 [143]–[144] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) ('Joint reasons'), 528–31 [257] (Kirby J).

39 *Ibid* 480 [43]. See submissions of the Attorney-General for Queensland (Intervening) at [19]–[25]; Transcript of Proceedings, *K-Generation* (High Court of Australia, 5 November 2008), especially at 125.

40 *K-Generation* (2009) 252 ALR 471, [152], [204]–[206]. Submissions for the Attorney-General for Western Australia (Intervening) at [7]. For example, in Queensland the District Court was abolished in 1921 and was not re-established until 1958, and Tasmania has never established an intermediate court of general jurisdiction.

41 This was reaffirmed in the judgment: *ibid* 501 [153] (Joint reasons).

applied in that assessment lacked any objectively ascertainable standard – rather, the assessment was to be made in the exercise of a wholly broad and unqualified discretion by reference to nothing more than the Licensing Court’s assessment of the public interest. It was empowered by the statute to decide the issue ‘on any ground, or for any reason, the licensing authority considers sufficient’.<sup>42</sup>

Particular policy considerations may, of course, govern the exercise of a judicial discretion. But where the standard to be applied is free of fixed content so as to permit a decision-maker to supply his or her own subjective criterion, guided only by the subject-matter, scope and purpose of the legislation, it is unusual at best to regard the power conferred as judicial.<sup>43</sup> Indeed, this was the ground on which Crennan and Kiefel JJ had found, in *Alinta*, that the Takeovers Panel lawfully exercised only administrative power.<sup>44</sup>

We argued that the nature of the power was significant because, if it was administrative, the obligation to accord procedural fairness could be modified or excluded by unequivocally plain statutory language. This was so on orthodox principles of administrative law and in accordance with a long line of authority.

The High Court found it unnecessary to decide the issue. As to the section which imposed directions on the Court, all members of the Court favoured a construction (in which we were complicit) which revealed that the direction was only as to the outcome to be achieved, the maintenance of confidentiality. The language in the direction to ‘take steps’ was not rigid or prescriptive and, the direction not being absolute, the particular steps taken to achieve that outcome remained in the discretion of the Court.<sup>45</sup> While the steps the Licensing Court might take could go so far as receiving evidence in the absence of a party, no step was mandated. The Court could itself question any evidence of the Police Commissioner, perhaps in closed session, or could be disinclined to place weight upon the evidence in the absence of cross-examination.<sup>46</sup> It followed, the Court held, that the Licensing Court was thus not denied the constitutional character of an independent and impartial tribunal.<sup>47</sup>

So too, the High Court had held in *Gypsy Jokers* that the legislation was valid because it allowed the Supreme Court to determine for itself, upon evidence, that the disclosure of information might prejudice police operations.<sup>48</sup>

It is axiomatic (and enshrined in statute)<sup>49</sup> that a construction that is open on the language ought to be adopted if it will preserve validity. The construction adopted here achieved that objective. What is absent is any link between, on the

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42 *Liquor Licensing Act 1997* (SA) s 53(1).

43 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 376–7.

44 (2008) 233 CLR 542, 597 [168]. See also Hayne J at 569 [71] referring to *Precision Data Holding v Wills* (1991) 173 CLR 167. We also argued that the chameleon doctrine could not save the nature of the power because, for that doctrine to apply, the power needs to be innominate, or inhabiting the borderland between administrative and judicial powers, and this power was not so.

45 *K-Generation* (2009) 252 ALR 471, 485–7 [67]–[79] (French CJ), 500 [146]–[147] (Joint reasons), 528–31 [257] (Kirby J).

46 *Ibid* 487 [77] (French CJ), 500 [148] (Joint reasons), 528–31 [257] (Kirby J).

47 *Ibid* 491 [99] (French CJ), 500 [149] (Joint reasons), 531–2 [258] (Kirby J).

48 (2008) 234 CLR 532.

49 *Acts Interpretation Act 1901* (Cth) s 15A. See also *Interpretation of Legislation Act 1984* (Vic) s 6.

one hand, the capacity of a court to control its own procedures, including the testing of the reliability of evidence, if necessary in closed session, and, on the other hand, the guarantees gestured at in *Nicholas* and *Bass*, of the right of a party to meet the case against him or her. That link remains unstated. This omission cannot be sheeted home to the High Court, however, for it was invited to hold, on the strength of *Kable*, that the legislation rendered the Licensing Court an instrument of the Executive. On the favoured construction, this it did not do.

It is telling, perhaps, that neither the judgment of Gaudron J in *Nicholas* nor the guarantee described by the Court in *Bass*, if it is a guarantee, was formulated by reference to the principle in *Kable*. This leaves open the question of whether, independently of *Kable*, there is some other principle of due process which comes more directly from Chapter III. This is a question for determination in a future Term.

The Court also rejected the submission that *Kable* applied only to State Supreme Courts. While a State might have the freedom to establish or abolish any particular inferior court, if it is to establish an institution as a *court* in that State it must satisfy whatever requirements are necessary to be invested with federal jurisdiction. The scope of those requirements is a matter for debate, but they are requirements on which the High Court has the last word.<sup>50</sup> On the current last word, the States have the freedom to create non-curial institutions of whatever variety but those institutions cannot purport to be *courts* unless they exhibit the minimum conditions of impartiality and independence. Implicitly, the High Court has rejected the proposition that there could be other *courts* within a State which were not ‘courts of a State’ within the constitutional meaning, with all the attendant requirements that this currently implies.

Further, the High Court found that the Licensing Court *was* a ‘court of a State’. The Licensing Court judge had security of tenure by reason of the primary appointment as a District Court Judge. (The fact that there was a possibility that *former* District Court judges could also be appointed was seen as irrelevant.) The history of inferior courts extended back to before Federation,<sup>51</sup> where such courts may have lacked powers of contempt and this must have been within the contemplation of the framers of the *Constitution* when formulating section 77(iii).

### III THE RIGHT OF INTERVENTION

All of these observations made by the High Court are important. They contribute to our understanding of the doctrine, developed through *North Australian Aboriginal Legal Aid Service Inc v Bradley*<sup>52</sup> and *Forge v Australian*

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50 *K-Generation* (2009) 252 ALR 471, 501 [153] (Joint reasons).

51 See, in another context, Kenny J in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85, 141.

52 (2004) 218 CLR 146.



*Securities and Investments Commission*,<sup>53</sup> of the integrated system of courts. They would not have been made had there not been intervention and intervention of a proper contradictor variety.

The joint reasons in *K-Generation* hint at a desire to constrain the right to intervene under section 78A of the *Judiciary Act 1903* (Cth) to an amplification of submissions put by the principal parties, at pain of filing a Notice of Contention.<sup>54</sup> There are problems with such a rule. It might have precluded the acceptance of the contemporary formulation of the *Melbourne Corporation* principle as established in *Re Australian Education Union; Ex parte Victoria*.<sup>55</sup> South Australia intervened in support of those seeking prerogative relief, but John Doyle put an alternative submission. The prosecutors' arguments were rejected. The alternative submission was accepted.<sup>56</sup> And there was not a Notice of Contention or equivalent in sight.

A 'No Ingenuity Rule' might also have precluded the submissions of Sir Daryl Dawson on section 64 of the *Judiciary Act 1903* (Cth) in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*, the submissions for Victoria being those to which Sir Maurice Byer's reply was expressly addressed.<sup>57</sup> The rule might also have confined Mary Gaudron's submissions in *Stack v Coast Securities (No 9) Pty Ltd*.<sup>58</sup>

This is not to say that the statutory right of intervention in constitutional cases is at large. Rather, those who enjoy the privilege of such intervention must be guided by something similar to what Bell J spoke of in her recent Welcome to the High Court, when explaining the misnomers associated with labelling a judge as conservative or progressive or radical, as each individual judge's duty of 'conscientiousness' to the law.<sup>59</sup> Sometimes the duty of conscientiousness will compel a submission against the prevailing orthodoxy.

Let me turn now to the second major theme of the 2008 Term, that of national unity.

#### IV NATIONAL UNITY

This theme was most apparent in the interpretation the Court embraced of section 92 in *Betfair*.<sup>60</sup> There, the Court invalidated Western Australian legislation which created the statutory offence of betting through the use of a betting exchange.<sup>61</sup> The prohibition applied to inter-State wagering operators but also to Western Australian operators. The Court also invalidated the related

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53 (2006) 228 CLR 45.

54 (2009) 252 ALR 471, [155] (Joint reasons).

55 (1995) 184 CLR 188.

56 *Ibid* 197, 231–3.

57 (1979) 145 CLR 330, 335.

58 (1983) 154 CLR 261, 269–70.

59 Transcript, *Ceremonial Sitting – Swearing-in of Justice Bell* (High Court of Australia, 3 February 2009) 19.

60 (2008) 234 CLR 418.

61 *Betting Control Act 1954* (WA) s 24(1aa).

prohibition on the publication of Western Australian racefields without approval.<sup>62</sup>

A betting exchange can be described as a means by which ‘parties stake money on opposing outcomes of a future event’.<sup>63</sup> For example, a bet to win on a horse in a race is matched by a bet made by another consumer on the same horse to lose. Betfair operated an internet-based betting exchange from a server in Hobart pursuant to a licence granted by Tasmania and its customers were located throughout Australia. The inter-State element was evident.

The extent to which the prohibitions infringed the guarantee of freedom of interstate trade under section 92 became most apparent in answers to questions posed by Gleeson CJ. It became clear that the effect of the legislation would prevent someone in Western Australia from placing a bet with Betfair on the outcome of the New South Wales rugby league competition,<sup>64</sup> or on the outcome of the New South Wales Open Tennis Championships,<sup>65</sup> or, heaven forbid, on the Melbourne Cup,<sup>66</sup> even if he or she was only passing through Western Australia<sup>67</sup> or staying there temporarily as a lawyer from another State might do for a court appearance.

The curiosity of this inhibition added to a sense that the legislation did not pass the sniff test. This was because, the Court said, the legislation discounted the significance of movement of persons across Australia as well as that of instantaneous commercial communication.<sup>68</sup> It was held that these various forms of movement unsettled the conception of section 92 as understood in both *Cole v Whitfield*<sup>69</sup> and *Castlemaine Tooheys Ltd v South Australia*<sup>70</sup> in at least three ways.

First, less emphasis is to be placed on section 92 as a mechanism to outlaw the protection of ‘domestic industry’ as the very notion that the geographic boundaries of a State define an ‘economic centre’ fails to match the realities of internet commerce.<sup>71</sup> The relevant protection, and the relevant vice, was the preclusion of competition, an activity that occurs in a market for goods or services.<sup>72</sup> Second, the fundamental consideration in *Castlemaine Tooheys*, that ‘each State legislature has power “to enact legislation for the well-being of the people of that State”’,<sup>73</sup> must be revisited because the notion of ‘the people of’ a State and ‘its’ well-being misleadingly ‘look back to a time of physically distinct communities located within colonial borders and separated by the tyranny of

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62 *Betting Control Act 1954* (WA) s 27D(1).

63 *Befair* (2008) 234 CLR 418, 450, [8] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (‘Joint reasons’).

64 Transcript of Proceedings, *Befair* (High Court of Australia, 8 November 2007) 126.

65 *Ibid*.

66 *Ibid* 106 (Stephen Gageler SC).

67 *Ibid* 126 (Neil Young QC).

68 *Befair* (2008) 234 CLR 418, 453 [18] (Joint reasons).

69 (1988) 165 CLR 360.

70 (1990) 169 CLR 436 (‘*Castlemaine Tooheys*’).

71 *Befair* (2008) 234 CLR 418, 453, 452 [15], 453 [18], 475–6 [97] (Joint reasons).

72 *Ibid*, 452 [15] (Joint reasons).

73 *Ibid*, 473–4 [86]. See also 474 [89]–[91] (Joint reasons).

distance'.<sup>74</sup> Third, consumers ought be seen, the Court told us, not as 'people of a State', but as persons who are 'from time to time ... placed on the supply side or the demand side of commerce and who are present in a given State at any particular time'.<sup>75</sup>

This is not to say that the Court jettisoned the test from *Cole v Whitfield*, for it did not. It retained the test of infringement as one arising from the imposition of a 'discriminatory burden on interstate trade of a protectionist kind'.<sup>76</sup> It is the application of the test which appears to have shifted. The Court held that the legislation infringed section 92 because it inhibited the supply side of commerce *outside* of Western Australia from satisfying the demand of someone present *within* Western Australia while leaving the in-State operators free to do so with substitutable services.<sup>77</sup> Therein lay the differential operation.

The practical effect was that local suppliers were protected from the rivalry they would otherwise face from the introduction of novel substitutable gambling services.<sup>78</sup>

Perhaps the greatest departure was from *Castlemaine Tooheys* and the conclusion that a 'reasonable necessity' test now applies to determine proportionality.<sup>79</sup> Here, it was held, the means adopted were not reasonably necessary to any non-protectionist object,<sup>80</sup> such as the integrity of the industry, if there was such an object.<sup>81</sup>

Where, you might ask, does the concept of 'national unity' come into all this?

The notions of competitive rivalry and substitutable products were pivotal to the conclusion. These could only perform the function they needed to perform for the analysis of section 92 if the market was conceived as national. If section 92 was to be seen as violated because of protection of local suppliers from competitive rivalry, the competition and the demand must be seen as national. The effect is that any trader anywhere in Australia must have the opportunity to satisfy a demand anywhere else in Australia.

As the joint reasons of Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ put it: 'The creation and fostering of national markets ... further the plan of the Constitution for the creation of a new federal nation and [are] expressive of national unity'.<sup>82</sup> And again: '*Free commercial intercourse ... seems one of the most distinctive marks of national unity. It ... gives at once a sense of mutual interest and mutual benefit*'.<sup>83</sup>

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74 Ibid, 453 [18] (Joint reasons).

75 Ibid, 453 [18] (Joint reasons).

76 Ibid, 481 [121] (Joint reasons).

77 Ibid, 481–2 [122] (Joint reasons).

78 Ibid, 483 [133] (Heydon J).

79 Ibid, 477 [102]–[103] (Joint reasons).

80 Ibid, 480 [112] (Joint reasons).

81 In a separate judgment, Heydon J held that there was no object that was compatible with s 92: *ibid* 483–4 [134], with respect to s 24(1aa): 'the only purpose is protectionist'.

82 *Ibid* 452 [12].

83 *Ibid* 455 [23], quoting from Sir Robert Inglis Palgrave (ed), *Dictionary of Political Economy* (1896) vol 2, 45–6 (original emphasis).

The national unity spoken of is thus not a million miles from the conception of a national economy freed from ‘markets constrained by legislation based upon the geographical limits of the States’.<sup>84</sup> One suspects that State legislation that interferes with that national economy will now be more difficult to justify.

The sleeper in the case was the apparent inconsistency between, on the one hand, the Western Australian prohibition on the publication of Western Australian race fields and, on the other hand, the Tasmanian law which had the effect of authorising the publication of any race fields in Australia in the course of betting operations it licensed.<sup>85</sup> This raised the question of whether it was an implication of federalism that a person cannot be subject to inconsistent legal rights or duties and that State laws ought to be construed to avoid any such inconsistency. The problem was, if there was an inconsistency, which State law should be paramount? The law of the State in which the conduct occurs; that is, the State with the closest territorial connection?<sup>86</sup> Should the extra-territorial operation of a State law be circumscribed in its operation in the face of a local law which contradicts it? Is it a matter of which State has the greatest degree of ‘governmental interest’ with the matter regulated, and how is that to be measured? As the Western Australia law was held to be invalid, these questions did not need to be resolved. They will also wait for another day.

A different sense of national unity was apparent in *Wurridjal*,<sup>87</sup> in the long-awaited extension of the guarantee of just terms, under section 51(xxxi), to the acquisition of property by the Commonwealth under the territories power, section 122. The judgment of the Court that had inhibited this extension, in *Teori Tau v Commonwealth*,<sup>88</sup> was overruled, section 122 becoming seen as ‘but one of several heads of legislative power given to the national legislature of Australia’,<sup>89</sup> and thus on a par with those individual heads of power conferred under section 51 which are subject to the just terms guarantee. For Gummow and Hayne JJ, it was clear that there was to be no more of the ‘disjunction’ *Teori Tau* drew between the territories power and ‘the remainder of the structure of government established and maintained by the Constitution’.<sup>90</sup>

On this aspect of the case, there was no dissent, written or oral. Perhaps, indeed, the extension of the guarantee of just terms is the best expression of national unity?

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84 Ibid 459 [33] (Joint reasons) referring to decisions of the United States Supreme Court.

85 *Gaming Control Act 1993* (Tas) ss 76A, 76VA.

86 *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* (1989) 168 CLR 340, 374.

87 (2009) 252 ALR 232.

88 (1969) 119 CLR 564 (*Teori Tau*).

89 *Wurridjal* (2009) 252 ALR 232, 281 [184] (Gummow and Hayne JJ).

90 Ibid 281–2 [188] (Gummow and Hayne JJ).