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THE TERRITORIES AND CONSTITUTIONAL CHANGE

ABSTRACT

The relationship between Ch III of the *Constitution* and s 122 – the Territories power – is, as Gleeson CJ, McHugh and Callinan JJ observed in *Re Governor Goulburn Correctional Centre; Ex parte Eastman*[1] 'a problem of interpretation … which has vexed judges and commentators since the earliest days of Federation'. This article explains the recent jurisprudence leading to an acceptance by the High Court that Territory courts can be fitted within Ch III as one of the 'other courts' the Parliament invests with federal jurisdiction. It is further argued that, because s 73 is concerned not with 'matters' as provided in ss 75 and 76, but with 'judgments, decrees, orders and sentences', an appeal lies from Territory Supreme Courts to the High Court on effectively the same basis as appeals from State Supreme Courts. In this way, self-governing Territories are integrated into Ch III.

NOTORIOUS DIFFICULTIES

In the introduction to the third edition of Cowen and Zines's *Federal Jurisdiction in Australia*, published in 2002, Leslie Zines wrote:

> The problems associated with jurisdiction in the Territories are as difficult as ever. While the Court has affirmed earlier decisions that s 72 of the *Constitution* does not apply to Territorial courts, it is divided on whether a Territorial court can exercise federal jurisdiction and, if so, whether a law made by the legislature of a self-governing Territory arises under a Commonwealth Act creating the legislature and conferring its power.[2]

In the second edition of this work, Cowen and Zines referred to '[t]he baroque complexities and many uncertainties associated with courts and jurisdiction in the Territories' and they observed that this situation '[came] about partly as a result of conflicting theories and partly by a desire of the judges not to disturb earlier decisions.'[3] This statement was quoted by Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*.[4] Aitkin and Orr in the third edition of Sawer's *The Australian Constitution* state that 'the law regarding the relationship between section 122 and

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1 (1999) 200 CLR 322, 331.

2 Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) xii.

3 Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (2nd ed, 1978) 172.

4 (1999) 198 CLR 511, 594.

other provisions of the Constitution remains confused and complicated.'[5] It may be recalled that in *Spratt v Hermes*,[6] Windeyer J, speaking of Ch III, described it as 'a notoriously technical and difficult branch of Australian constitutional law' and that Gleeson CJ, McHugh and Callinan JJ, speaking of the relationship between Ch III and section 122, said in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* ('*Eastman*')[7] that it is 'a problem of interpretation … which has vexed judges and commentators since the earliest days of Federation.'

In this article, we seek to demonstrate that the High Court has reached a pragmatic resolution of these difficult 'problems' such that the courts of self-governing territories now take their place in Ch III of the *Constitution* alongside the courts of the States.

THE COURTS OF SELF-GOVERNING TERRITORIES AND CH III

In *Eastman*, Gummow and Hayne JJ set out a way in which the provisions of Ch III could encompass the courts of self-governing territories, as follows:

> The preferable construction is that a court created by the Parliament for the government of a territory is not a federal court created under ss 71 and 72 but may answer the description of one of the 'other courts' which are invested by laws made by the Parliament with federal jurisdiction within the meaning of s 71 and thus are recipients of the judicial power of the Commonwealth. The investment of federal jurisdiction in such a non-federal Territory court would be by a law supported not by s 77 but by s 122.[8]

It is this construction of the provisions of Ch III which we explore in this article and, ultimately, endorse in respect of courts created by the legislatures of self-governing territories. On this construction of the provisions of Ch III, previous authority establishing the 'disparate view', (ie that Ch III has no application to a court created by an exercise of legislative power under s 122) would need to be re-considered, but not overruled. It would need to be re-considered not as to what was actually held, but in light of the creation of a new category of courts, namely courts created by self-governing territories and which are invested with federal jurisdiction, these courts being ones to which the provisions of Ch III can apply.

THE 'DISPARATE VIEW'

By way of review, we begin with the early authorities on the interaction between Chapter III and territories. They established that territories (as then existing) had no place in Chapter III.

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5 Guy Aitken and Robert Orr, *Sawer's: The Australian Constitution* (3rd ed, 2002) 128.
6 (1965) 114 CLR 226, 274.
7 (1999) 200 CLR 322, 331.
8 Ibid 348.

In *The King v Bernasconi*,[9] the Court rejected the proposition that s 80 of the *Constitution* required trial by jury of a person of European descent charged in Papua with an assault occasioning bodily harm. Griffith CJ said emphatically:

> In my judgment, Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories. Sec. 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as 'laws of the Commonwealth.' The same term is used in that sense in sec. 5 [covering clause 5] of the *Constitution Act* itself, and in secs. 41, 61 and 109 of the Constitution. In the last mentioned section it is used in contradistinction to the law of a State. I do not think that in this respect the law of a territory can be put on any different footing from that of a law of a State.
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> The power conferred by sec. 122, although conferred by the same instrument, stands on a different footing. [10]

Gavan Duffy and Rich JJ concurred with these views.[11]

Interestingly, Isaacs J referred to the grant of power in s 122 implying that a 'territory' is 'not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers', being in 'a state of dependency or tutelage' with the regulations proper for its government being left to the discretion of the Commonwealth Parliament, 'until, if ever, it shall be admitted as a member of the family of States.'[12] His Honour expressed the view that the s 80 requirement would, in the vast majority of instances, be an 'entirely inappropriate requirement of the British jury system' to newly conquered territories, whether with German or Polynesian populations and said that 'Parliament's sense of justice and fair dealing is sufficient to protect them.'[13]

Porter v The King; Ex Parte Yee ('*Porter*')[14] involved an alleged contempt of court by the editor of the *Northern Territory Times and Gazette* in an article about fake Chinese birth certificates. Porter was fined in the Northern Territory Supreme Court. The Ordinance that created the Court under the authority of the *Northern Territory (Administration) Act 1910* (Cth) conferred on the High Court jurisdiction

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9 (1915) 19 CLR 629 ('*Bernasconi*').
10 Ibid 635.
11 Ibid 640.
12 Ibid 637–8.
13 P Hanks, P Keyzer & J Clarke, *Australian Constitutional Law: Materials & Commentary*, (7th ed, 2004), at [12.3.5] ff, discuss the differential treatment of territories with low European populations at a time when racial issues had a prominent place in public discourse.
14 (1926) 37 CLR 432.

to entertain an appeal. A preliminary objection was taken by Owen Dixon KC, relying on the reasoning in *Bernasconi* that enactments made under s 122 are not governed nor affected by the provisions of Chapter III. That being so, he argued, no appeal would lie to the High Court under s 73 of the *Constitution*, because the Supreme Court is not a federal court, the Judge not having a life tenure. He relied upon *In re Judiciary and Navigation Acts*[15] for the proposition that Ch III exhaustively states the appellate jurisdiction which is or may be conferred upon the High Court.

For Porter, Robert Menzies argued that under s 122 of the *Constitution*, the Parliament of the Commonwealth may set up in a territory any court, give its judges any tenure and provide that an appeal lies from it to the High Court notwithstanding any of the provisions of ss 71 and 73. Even if Ch III was exhaustive and s. 73 exclusive, the High Court has jurisdiction because territories brought into existence are part of the Commonwealth. For the Commonwealth it was argued that the Northern Territory Supreme Court was a court exercising federal jurisdiction, as well as a 'federal court', within the meaning of ss 71 and 73. No mention was made by counsel of the fact that the Territory judge did not enjoy s 72 tenure.

Knox CJ and Gavan Duffy J (in dissent) held[16] that *In re Judiciary and Navigation Acts* determined the matter. The High Court's jurisdiction, whether original or appellate, is to be sought wholly within Ch III and the Parliament could not, by an exercise of power under s 122 or elsewhere, add to or alter that jurisdiction. Their Honours held the appeal to be incompetent. Isaacs, Higgins, Rich and Starke JJ[17] held the appeal competent, confining the decision in *In re Judiciary and Navigation Acts* to (per Isaacs and Rich JJ) 'the Commonwealth proper', being the area included within States,[18] or (per Higgins J) to the original jurisdiction, not the appellate jurisdiction, of the High Court, or (per Starke J) to the judicial power defined in Chapter III, not s 122.

We pause here to note that McHugh J described the majority views in this case as 'constitutional heresies'.[19] The *obiter* comments of some of their Honours regarding the arguments about whether the Northern Territory Supreme Court is a 'federal court' or a 'court exercising federal jurisdiction' are addressed below.

In *Attorney-General (Commonwealth) v The Queen*,[20] the Privy Council upheld the decision of the High Court in *R v Kirby; Ex parte Boilermakers' Society of*

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15 (1921) 29 CLR 257.

16 *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432, 438.

17 Ibid 441 (Isaacs J), 447 (Higgins J), 448 (Rich J), 450 (Starke J).

18 A view expressly rejected by Gummow and Hayne JJ in *Eastman* (1999) 200 CLR 322, 344–5.

19 See *Gould v Brown* (1998) 193 CLR 346, 426–8.

20 (1957) 95 CLR 529.

Australia,[21] affirming the decision in *Porter* by concluding that Chapter III exhaustively describes:

> the federal judicature and its functions in reference only to the federal system of which the Territories do not form part. There appears to be no reason why the Parliament having plenary power under s 122 should not invest the High Court or any other court with appellate jurisdiction from the courts of the Territories. The legislative power in respect of the Territories is a disparate and non-federal matter.[22]

These cases encapsulate the starting point in the relationship between territories and Chapter III. This 'disparate view', that territories are outside Chapter III and the federation, which consists of the Commonwealth and the States, was founded, we suggest, on the then characteristics of territories highlighted by Isaacs J in *Bernasconi*. For the three self-governing territories (particularly the Northern Territory and the Australian Capital Territory), that dependency and tutelage is no longer characteristic of those Territories vis-à-vis the States. As these Territories approached self-government, and then achieved it, the High Court incrementally moved away from the 'disparate view' to where it has now, practically, accepted the view that these Territories have achieved an integration into the federation comparable in many respects to that of the States.

What follows is an examination of how these self-governing territories fit within the provisions of Chapter III with consideration of the relevant authorities.

SECTION 71 – JUDICIAL POWER AND COURTS

Section 71 provides that the judicial power of the Commonwealth shall be vested in the High Court of Australia, 'in such other federal courts as the Parliament creates', and 'in such other courts as it invests with federal jurisdiction'.

In *Porter*,[23] it was held that the Northern Territory Supreme Court was not a 'federal court' within s. 71, nor a court 'exercising federal jurisdiction' within s 73(ii), on the view that territory courts were outside the provisions of Chapter III. We suggest that it is enough to dispose of this *obiter* by distinguishing the dependent territory then under consideration from today's self-governing territories.

This was done impliedly in *North Australian Aboriginal Legal Aid Service Inc v Bradley* ('*Bradley*'),[24] where McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ accepted and endorsed the principle that a court of the Northern Territory may exercise the judicial power of the Commonwealth pursuant to

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21 (1956) 94 CLR 254.

22 *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529, 545.

23 (1926) 37 CLR 432, 438 (Knox CJ and Gavan Duffy J), 440 (Isaacs J).

24 (2004) 218 CLR 146, 162–3.

investment by laws made by the Parliament. Their Honours stated that this proposition was supported by the authorities cited by Gaudron J in *Ebner v Official Trustee in Bankruptcy*,[25] where her Honour concluded that courts created pursuant to s 122 may be invested with the judicial power of the Commonwealth. Those authorities were *Northern Territory v GPAO* ('*GPAO*'),[26] and *Eastman*[27] (which are discussed further below). It must be noted that the court presided over by magistrates considered in *Bradley* was a court created by the legislature of the Northern Territory.

If a court of the Northern Territory may exercise the judicial power of the Commonwealth, it must be either a 'federal court' created by the Parliament or a court invested with federal jurisdiction within s 71. We say that the courts of self-governing territories are the latter, because they have been invested with federal jurisdiction by s 67C (which confers certain federal jurisdiction on the Supreme Court of the Northern Territory) or 68(2) (which confers federal criminal jurisdiction on State and Territory courts) of the *Judiciary Act 1903* (Cth), and they are not 'courts as the Parliament creates' within s 71.

The Supreme Court of the Northern Territory, as presently constituted, was established by s 10 of the *Supreme Court Act 1979* (NT).[28] The Supreme Court of the Australian Capital Territory, as presently constituted, was established by s 3 of the *Supreme Court Act 1933* (ACT), which began life as the *Seat of Government Supreme Court Act 1933* (Cth). After being renamed twice, the Act was converted, in 1992, to an Act of the Australian Capital Territory, by bringing it within s 34(2) of the *Australian Capital Territory (Self-Government) Act 1988* (ACT).[29]

Thus, we say that the Supreme Courts of the Northern Territory and the Australian Capital Territory (despite some confusion as to the latter in *Eastman*[30]) may now be

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25 (2000) 205 CLR 337, 363.

26 (1999) 196 CLR 553, 603–4 (Gaudron J).

27 *Eastman* (1999) 200 CLR 322, 336–40 (Gaudron J), 348 (Gummow and Hayne JJ), cf 354–6 (Kirby J).

28 The Northern Territory Supreme Court, which had been established by the *Northern Territory Supreme Court Act 1961* (Cth), was replaced by the Supreme Court of the Northern Territory when the *Supreme Court Act 1979* (NT) was passed. The former Commonwealth Act was repealed by the *Northern Territory Supreme Court (Repeal) Act 1979* (Cth). Section 5 of the Repeal Act provided that the Supreme Court established by the Territory Act is to be deemed to be a continuation in existence 'without any change in identity' of the earlier Supreme Court.

29 See the *ACT Supreme Court (Transfer) Act 1992* (Cth).

30 While Gummow and Hayne JJ considered (at 353) that, since 1992 the Supreme Court had been substantially reconstituted in relevant respects by enactments of the ACT legislature, Gaudron J did not go that far, being prepared to assume (at 336) that the Supreme Court was a court created by the Parliament pursuant to s 122 and concluding (at 341) that the Supreme Court's existence was 'ultimately sustained by' a law under s 122. Gleeson CJ, McHugh and Callinan JJ did not find it necessary to

considered as erected by laws of the territory legislatures. It is axiomatic, in our view, following the Court's decision in *Capital Duplicators Pty Ltd v Australian Capital Territory* ('*Capital Duplicators*')[31] that a law made by the legislature of a self-governing territory cannot be a law made by the Commonwealth Parliament.

In *Newcrest Mining (WA) Ltd v The Commonwealth*,[32] Brennan CJ expressed the view that territory courts were 'created by the Parliament'. His Honour was alone in expressing that view in that case, and his adherence to the 'disparate non-federal' character of the territories power, which led to his conclusion that a law made 'mediately or immediately' under s 122 was not qualified by the constitutional guarantee of just terms in s 51(xxxi), was the minority view.

The conclusion that the courts of the self-governing territories are not 'such other federal courts as the Parliament creates' is borne out by the decisions regarding the phrase 'the other courts created by the Parliament' in s 72, which are considered below.

As to Zines's suggestion that all the jurisdiction which a Territory court possesses is federal jurisdiction,[33] we explain below why this is not so and why it is not necessary.

SECTION 72 – JUDGES' APPOINTMENTS, TENURE AND REMUNERATION

Section 72 of the *Constitution* provides, inter alia, that the Justices of the High Court and 'of the other courts created by the Parliament' shall be appointed by the Governor-General in Council, contains certain tenure and removal provisions, and provides that the maximum age for Justices of 'any court created by the Parliament' is 70 years.

In *Spratt v Hermes*,[34] the High Court unanimously held that s 72 did not apply to the appointment of a stipendiary magistrate of the ACT Court of Petty Sessions where the magistrate was hearing a charge under the Commonwealth *Post and Telegraph Act 1901-1961* (Cth). It was argued that the magistrate was without jurisdiction because the trial involved an exercise of the judicial power of the Commonwealth within Chapter III, but the magistrate was not appointed as required by s 72. Barwick CJ, expressing the view that Chapter III was not wholly

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determine the issue. Kirby J (at 379–80) concluded that the Supreme Court had been created by the Parliament under s 122 and 'has done nothing since to abolish its creation'.

31 (1992) 177 CLR 248.

32 (1996–97) 190 CLR 513, 538.

33 See Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 187–8.

34 (1965) 114 CLR 226.

inapplicable to territories,[35] held[36] that the expression 'the other courts created by the Parliament' in s 72 refers back to 'the other courts to which reference is made in s 71, namely, such other *federal* courts as the Parliament creates, courts created by laws made in pursuance of the "federal" legislative powers contained in s 51 of the Constitution'.[37] The unanimous affirmation of this decision in *Capital TV and Appliances Pty Ltd v Falconer*[38] and the application of it to the ACT Supreme Court is dealt with in relation to s 73 below.

In *Eastman*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that s 72 had no application to a judge appointed to the Supreme Court of the ACT. Gleeson CJ, McHugh and Callinan JJ held that the view that courts created 'pursuant to s 122' were not 'the other courts created by the Parliament' in s 72 was:

> open on the language, and produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of territories. It takes account of the consideration that, as the legislative background to the present case illustrates, at any given time some territories may enjoy self-government and some will not.[39]

This reasoning is germane to our argument that the nature of s 122 has not changed, but the nature of territories has.

Gaudron J, while not concluding that the Supreme Court of the ACT was a court created by the Parliament pursuant to s 122,[40] but willing to make that assumption because the Court was 'ultimately sustained by' s 122,[41] stated[42] that, if the Supreme Court 'is now a creature of the body politic of the Australian Capital Territory and not a court created by the Parliament under s 122' then s 72 could have no application to that court. Her Honour made specific mention of the 'dichotomy' in s 71 between 'other federal courts [that] the Parliament creates' and 'other courts [that] it invests with federal jurisdiction' and said:

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35 Ibid 248.

36 Ibid 242–3.

37 See also Kitto J at 251; Taylor J at 261; Menzies J at 266; Windeyer J at 274. In *Eastman*, Gaudron J (at 338-339) emphasised the presence of the word 'federal' in s 71 as indicating that the courts which the Parliament may create under that section are not simply courts upon which the Parliament may confer federal jurisdiction, but courts which the Parliament may confer jurisdiction to be exercised throughout the Commonwealth in all or any of the matters specified in ss 75 and 76 of the *Constitution*.

38 (1971) 125 CLR 591.

39 (1999) 200 CLR 322, 332.

40 *Eastman* (1999) 200 CLR 322, 341.

41 Ibid 334-6, 341.

42 Ibid 335.

> In that context, it is possible to read s 72, in so far as it is concerned with 'other courts created by the Parliament', as referring to federal courts created by the Parliament pursuant to s 71, in contradistinction to those that may be invested with federal jurisdiction.[43]

Because of those contextual considerations, and because of the decisions in *Spratt v Hermes* and *Capital TV*, her Honour held that s 72 should continue to be read as referring only to the 'other *federal* courts [that] the Parliament creates' in s 71.

After propounding their 'preferred construction' of the provisions of Chapter III as set out above, Gummow and Hayne JJ held[44] that the s 72 reference to a court 'created by the Parliament' is to a court constituted and sustained by an exercise of legislative power of the Parliament, which, by the time of the appointment of the judge concerned, the Supreme Court of the ACT was not. Their Honours noted that:

> In *Kruger v The Commonwealth*,[45] Gaudron J observed that, whatever view be taken of the decisions in *Spratt v Hermes* and *Capital TV*, it may be that different considerations apply to laws enacted by the legislature of a self-governing territory. The present case bears out the point.[46]

In *Bradley*, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ held[47] that *Eastman* 'established that s 72 of the Constitution had no application' to the Supreme Court of the ACT because that Court was not a court 'created by the Parliament' within s 72 of the Constitution.[48]

While the above decisions establish beyond doubt that courts created by the legislatures of self-governing territories are not courts 'created by the Parliament' within s 72, we would add that the view accords entirely with the decision in *Capital Duplicators* summarised by Mason CJ, Deane, Dawson and McHugh JJ in *Svikart v Stewart* as follows:

> The view was taken that a legislature created to confer self-government upon a Territory – in that case the Australian Capital Territory – must be regarded as a body separate from the Commonwealth Parliament, so that the exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power.[49]

All of the justices in *Capital Duplicators* agreed that the ACT legislature was not a delegate of the Parliament, but a 'new legislative power' and that its legislation

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43 Ibid 340.
44 Ibid 353.
45 (1996–97) 190 CLR 1, 109 ('*Kruger*').
46 *Eastman* (1999) 200 CLR 322, 349.
47 *Bradley* (2004) 218 CLR 146, 163.
48 See also ibid 152–3 (Gleeson CJ).
49 (1993–94) 181 CLR 548, 562. See also Toohey J at 574.

cannot be regarded as an exercise of the legislative power of the Commonwealth.[50] This was not a novel conclusion in relation to the conferral of legislative power upon self-governing polities.[51] The difference of opinion between the majority and minority in that case was as to the meaning of 'exclusive' within s 90 of the *Constitution*. That difference is irrelevant to the present discussion.

From the discourse so far, it should be apparent, and incontrovertible, that: (a) territory courts can and do exercise federal jurisdiction; and (b) not being any of 'the other courts created by the Parliament' within s 72, they can only be of the third class of institutions defined by s 71 which may exercise federal jurisdiction, namely 'other courts' which the Parliament has invested with federal jurisdiction.[52]

SECTION 73 – APPELLATE JURISDICTION OF HIGH COURT

Section 73 gives the High Court jurisdiction to hear and determine appeals from all judgments, decrees, orders, and sentences, inter alia: (i) of any Justice or Justices exercising the original jurisdiction of the High Court; (ii) of 'any other federal court, or court exercising federal jurisdiction', or of the Supreme Court of any State.

The desirability of fitting territory courts within s 73 arises because of: (a) the exclusive and exhaustive nature of the provisions of Chapter III, most recently confirmed in *Re Wakim; Ex parte McNally*;[53] and (b) the place of the High Court within the Australian judicial structure, as to which Gummow J said in *Kruger*:

> [I]t is fundamental that the Constitution creates an 'integrated system of law', and a 'single system of jurisprudence'. The entrusting by Ch III, in particular by s 73, to this Court of the superintendence of the whole of the Australian judicial structure, its position as ultimate interpreter of the common law of Australia and as guardian of the Constitution are undermined, if not contradicted, by acceptance, as mandated by the Constitution, of the proposition that it is wholly within the power of the Parliament to grant or withhold any right of appeal from a territorial court to this Court.[54]

In *Capital TV & Appliances v Falconer*, decided in 1971, the High Court unanimously held that the Supreme Court of the ACT was neither a 'federal court' nor a 'court exercising federal jurisdiction' within s 73(ii), with the effect that the High Court had no jurisdiction to hear the appeal brought to it from that court.

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50 *Capital Duplicators* (1992) 177 CLR 248, 265–6 (Mason CJ, Dawson and McHugh JJ), 282 (Brennan, Deane and Toohey JJ), 284 (Gaudron J).

51 See *The Queen v Burah* (1878) 3 App Cas 889, *Hodge v The Queen* (1883) 9 App Cas 117 and *Powell v Appollo Candle Co* (1885) 10 App Cas 282, all referred to in *Capital Duplicators*.

52 See *Eastman* (1999) 200 CLR 322, 347 (Gummow and Hayne JJ).

53 (1999) 198 CLR 511.

54 (1996–97) 190 CLR 1, 175.

Relying on what Isaacs J said in *Porter*, Barwick CJ held[55] that the other courts invested with federal jurisdiction referred to in s 71 are the courts set up by the States and invested with federal jurisdiction, but not courts created by the Commonwealth. Similarly, McTiernan J held that:

> As the words 'federal court' in s 73(ii) look forward to a court whose jurisdiction is defined by the Parliament pursuant to s 77(i), so the words 'court exercising federal jurisdiction' in s 73(ii) look forward to a State court invested with federal jurisdiction by the Parliament pursuant to s 77(iii).[56]

Thus, their Honours only contemplated (because that was all that then existed) two kinds of courts which might be invested with federal jurisdiction, being those created by the States or those created by the Commonwealth for a territory. But today, there is a third kind of court which can be invested with federal jurisdiction, and that is a court created by the legislature of a self-governing territory. In relation to those kinds of courts, the decision in *Capital TV & Appliances v Falconer* has nothing to say. Hence, it is not necessary to overrule that decision to reach the position we put forward; it may simply be distinguished. The *Constitution* is thus viewed in its contemporary setting. We return to this theme later.

On the approach to Ch III which we advocate, the phrase 'court exercising federal jurisdiction' in s 73(ii) encapsulates any court created by a self-governing territory upon which some measure of federal jurisdiction has been conferred (leaving aside, for the moment, the means of its conferral). Thus, the phrase in s 73(ii) refers back to those courts as described in s 71.

As with the other categories of courts referred to in s 73(ii), appeals will lie to the High Court from *any* decision of those territory courts, not just those which involve an exercise of federal jurisdiction. As a matter of language, the word 'exercising' is capable of meaning 'exercising from time to time' so as to refer to a court which exercises, or may exercise, the jurisdiction. Further, it is more contextually consistent to construe the word this way, than to construe it as meaning 'actually exercising in the matter in which an appeal is sought', in the sense that s 73(ii) is describing courts of particular kinds, not the kinds of matters from which an appeal may be brought. In addition, s 73 refers to 'all' judgments, decrees, orders and sentences of the courts described, and not to just those in particular matters.

In this way, the courts of self-governing territories would stand in a similar position to the courts of a State. We note, at this point, that this approach is contrary the view of Zines, where he says:

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55 *Capital TV & Appliances v Falconer* (1971) 125 CLR 591, 599. See also Menzies J at 606; Owen J at 613; Walsh J at 622–3.

56 Ibid 602. See also Gibbs J at 627, to similar effect.

> [T]here is no way that a Supreme Court of a self-governing Territory can be put constitutionally in the same position as the Supreme Court of a State in relation to High Court appeals. If *matters* arising under an enactment of a Territorial legislature do not come within s 76(ii) because they do not arise under laws made by the Parliament, those *matters* are not, as such, determined in federal jurisdiction and, therefore, s 73 does not guarantee an appeal. On the other hand, s 73 expressly provides for appeals from all judgments of the Supreme Courts of the States.[57]

Thus, Zines reads the phrase 'courts exercising federal jurisdiction' as describing the type of matter in which an appeal will lie, not the type of court which may be appealed from. He is not alone in reading s 73(ii) in this way.[58]

However, we say there is no warrant for reading the words this way. More importantly, to do so is to strain the ordinary meaning of words which must, when compared with the approach taken in the United States Constitution,[59] be considered to have been deliberately chosen. The interpretation we put forward was that espoused in *Cockle v Isaksen*, by Dixon CJ, McTiernan and Kitto JJ as follows:

> The appellate power conferred by s 73 is not concerned with 'matters' but with judgments decrees orders and sentences of the courts and the commission which it identifies.
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> …
> Section 73 defines the appellate jurisdiction of this Court by reference to the judgments decrees orders and sentences from which there are to be appeals. In every case the judgments decrees orders and sentences are defined by reference to the courts or tribunals by which they are given made or pronounced. In the case of each description of court or tribunal the intention of s. 73 doubtless is that the general rule shall be that the High Court has jurisdiction to hear and determine appeals from its judgments decrees orders or sentences.[60]

Contrary to the view taken by Zines, the approach we put forward places territory courts in much closer alignment to the courts of States than the approach which he suggests, being that which had been rather wistfully expressed by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia*:

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57 Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 182 [emphasis added].

58 See *Eastman* (1999) 200 CLR 322, 341 (Gaudron J), 377 (Kirby J) and *Kruger* (1996–97) 190 CLR 1, 174 (Gummow J).

59 Article III, Section 2 confers jurisdiction on the US federal courts (including the Supreme Court) in respect of 'cases' and 'controversies'.

60 (1957) 99 CLR 155 at 163–5. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar, Kitto JJ).

> It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. … But an entirely different interpretation has been adopted, one which brings it own difficulties.[61]

In *Kruger*, Gummow J[62] also lamented the failure to do that which was expressed in *Boilermakers*. His Honour acknowledged[63] that it would be necessary to re-open the decisions of *Spratt v Hermes* and *Capital TV & Appliances v Falconer* if Ch III were to be given the operation which *Boilermakers* described. His Honour made reference[64] to ss 78A, 78B and 40 of the *Judiciary Act 1903* (Cth) as avenues for access to the High Court from territory courts and stated that, save for the possible availability of review under s 75(v) of the Constitution on the footing that a judge of a territorial court is an 'officer of the Commonwealth' (something that could not be said of the courts of self-governing territories), there is no constitutionally entrenched avenue for access to the High Court in matters which are within the original jurisdiction of the Court. On the approach which we propound, the access to the High Court from territory courts exists in all matters heard by territory courts and is dependent only upon the continued conferral, from time to time, by the Parliament of federal jurisdiction, ie *any* federal jurisdiction, upon the courts of the territories. Such conferral, such as that made by s 68(2) of the *Judiciary Act1903* (Cth), then renders that court a 'court exercising federal jurisdiction' within s 73(ii).

While that access to the High Court is not 'constitutionally entrenched', in that it could theoretically be taken away by the Parliament, it is, we consider, virtually guaranteed, given the place of territories today in the distribution of federal judicial power famously described as the 'autochthonous expedient'.[65] And, in light of the fact that, ultimately, the Parliament could do away with territory courts, or even the body politic, altogether if it so chose, this is as close to 'constitutional entrenchment' as territory courts can come.

Since Zines is of the view that the 'integrated system of law' will not be achieved unless matters arising under laws of a Territory legislature are regarded as also arising under the Commonwealth law that confers legislative power on the territory legislature, so as to be included in s 76(ii) of the Constitution,[66] he suggests that the

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61 (1956) 94 CLR 254, 290, quoted by Zines at the commencement of his Chapter 4, 'The Territorial Courts and Jurisdiction with Respect to the Territories' of Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 156.

62 *Kruger* (1996–97) 190 CLR 1,168.

63 Ibid 170.

64 Ibid 174.

65 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

66 Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 182, 185, 188.

preferred construction is that all the jurisdiction which a Territorial court possesses is federal jurisdiction.[67]

We address s 76 and its relevance, if any, to territory courts below. As to the notion that the courts of self-governing territories always exercise federal jurisdiction, because the laws of the legislatures are, ultimately, laws of the Parliament, it would follow, as a matter of language, that those courts are 'federal courts [that] the Parliament creates' within s 71 and, more importantly, 'courts created by the Parliament' within s 72.[68] That conclusion would raise questions as to the validity of the appointment, and the lawfulness of past decisions of, judicial officers in any territory who were appointed by a local Executive acting on the advice of local ministers, or who did not have the tenure required by s 72, the consequences recognised by Gleeson CJ, McHugh and Callinan JJ in *Eastman*.[69]

Furthermore, at least in relation to the Northern Territory, the jurisdiction conferred upon the Supreme Court of the Northern Territory includes that which was conferred upon the Supreme Court of South Australia prior to the Territory's annexation to the Commonwealth in 1911,[70] which included, but was not limited to, federal jurisdiction. Thus, the Territory Supreme Court has a mix of both local and federal jurisdiction.

In our view, to suggest that territory courts are courts which always and only exercise federal jurisdiction is: (a) to ignore the clear conclusion of *Capital Duplicators* that territory legislatures do not exercise the legislative power of the Parliament; and (b) to drag self-governing territories, and their courts, back into the *Boilermakers case* era, a time when self-governing territories had not yet been conceived.

SECTION 74 – APPEAL TO QUEEN IN COUNSEL

For the sake of completeness, we mention s 74, which preserved appeals from the High Court to the Privy Council on questions as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State/s, or as to the limits inter se of the Constitutional powers of any two or more States. While there

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67 Ibid, 188, 193.

68 Cf *Eastman* (1999) 200 CLR 322, 341 per Gaudron J who expressed the same view as Zines, because the rights or duties which territory courts enforce are 'ultimately sustained by' a law under s 122.

69 (1999) 200 CLR 322, 330.

70 See s 14(1)(b) of the *Supreme Court Act 1979* (NT) and s 67C(c) of the *Judiciary Act 1903* (Cth), which refers to matters in which the Supreme Court of the Territory would have had by virtue of s 15(2) of the *Northern Territory Supreme Court Act 1961* (Cth), but for its repeal. Section 15(2) provided that the original jurisdiction of the Supreme Court of South Australia which was conferred on the Territory Court included jurisdiction which the South Australian Court had as federal jurisdiction.

has been some theoretical debate about whether the section preserved an appeal in relation to an exercise of Commonwealth power under s 122,[71] appeals to the Privy Council from the Supreme Courts of territories were precluded by s 4 of the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and from the High Court by s 3 of the *Privy Council (Appeals from the High Court) Act 1975* (Cth), with effect from a time before the grant of self-government to any territory.[72] Thus, no issue can arise regarding the application of s 74 to questions as to the limits inter se of the Constitutional powers of the Commonwealth, the States and the self-governing territories. We note however that, as a matter of language, s 74 would have no application to questions arising as to the limits inter se of the powers of territories and the Commonwealth or territories and States.

SECTIONS 75 AND 76 – ORIGINAL AND ADDITIONAL ORIGINAL JURISDICTION OF THE HIGH COURT

Section 75 of the *Constitution* confers original jurisdiction on the High Court in certain matters, such as those arising under any treaty, those in which the Commonwealth is a party, or those between States or residents of different States. Section 76 permits the Parliament to make laws conferring additional original jurisdiction on the High Court in certain other matters, including those arising under the *Constitution* and under any laws made by the Parliament.

In *Waters v Commonwealth*,[73] Fullagar J, sitting alone, struck out an action brought in the Court's original jurisdiction seeking an injunction against the Director of Native Affairs (a Commonwealth officer) on the basis that he was bound by *Bernasconi* to conclude that Chapter III has no application to territories. Consequently, notwithstanding that what was sought fell within the terms of s 75(iii) and 75(v) of the *Constitution*, the Court had no jurisdiction to hear the matter.

This decision was effectively overruled by the Court in *Spratt v Hermes*,[74] where the Court held that as the question raised by the case involved the interpretation of the Constitution in relation to a matter within s 76(i) of the *Constitution*, the Court had jurisdiction under that section to entertain the issue. Barwick CJ held[75] that the High Court has jurisdiction in respect of occurrences within a territory. His Honour said that:

> In my opinion, s 75 of the Constitution extends to give the Court original jurisdiction in all matters there described wherever the acts or omissions

71 See, for example, *Spratt v Hermes* (1965) 114 CLR 226 at 245 per Barwick CJ.

72 Any possibility of an appeal from the High Court to the Privy Council was terminated by s 11 of the *Australia Act 1986* (Imp) and the *Australia Act 1986* (Cth).

73 (1951) 82 CLR 188.

74 (1965) 114 CLR 226.

75 Ibid 241.

> which form the basis of the approach to the Court have or should have occurred and whatever the nature of the cause of action which the moving party may seek to pursue. In my view, it is clear, for example, that this Court could entertain an action between a resident of Western Australia against a resident of Queensland for a wrongful act done by the one to the other in a territory of the Commonwealth; it can grant mandamus to an officer of the Commonwealth to perform a duty which is to be performed in a territory; and do so, though the Commonwealth officer is located in a territory. Equally, it may prohibit an act of an officer of the Commonwealth to be done, or in the course of being done, in a territory. The decision in *Waters v The Commonwealth*, which would appear to decide to the contrary is, in my respectful opinion, insupportable and should be overruled.[76]

Hence, no issue was raised as to the jurisdiction of the High Court to hear the applications for relief brought in the original jurisdiction of the Court in *Kruger*,[77] involving things done in the Northern Territory by Commonwealth officers pursuant to Commonwealth Ordinances.

Thus, except in two respects, the High Court has original jurisdiction (or may have original jurisdiction conferred upon it) equally in relation to self-governing territories as to States. The two respects are that there is no original jurisdiction in matters arising between a territory and a State, or between residents thereof, or between a State/territory and a resident of a territory/State within s 75(iv) and there is no additional original jurisdiction in matters relating to the same subject-matter claimed under the laws of a State and a territory within s 76(iv).[78] In our view, these differences are not of any great moment.

It is uncontroversial that ss 75 and 76 define 'the judicial power of the Commonwealth' and the 'federal jurisdiction' referred to in s 71 of the *Constitution*.[79] Section 76(ii) is what Gaudron J referred to in *GPAO* as perhaps the most frequently invoked area of federal jurisdiction, namely, jurisdiction with respect to matters 'arising under any laws made by the Parliament'.[80]

In *GPAO*, Gleeson CJ, Gummow, Hayne and Gaudron JJ held that, by a law made under s 77(i), the Parliament may confer upon a federal court jurisdiction in relation to matters arising under a law of the Parliament within s 76(ii), which can include

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76 Ibid 241. See, to similar effect, Kitto J at 253, Taylor J at 264, Menzies J at 265–6, Windeyer J at 277 and Owen J at 280.

77 (1996–97) 190 CLR 1.

78 As to the latter, this provision owes its origin to Article III, Section 2 of the United States *Constitution*, which was concerned with some uncertainty about the location of State boundaries. As this is not an issue which is prevalent in Australia, we say the absence of jurisdiction in this area, at least, is not significant in the issue of the integration of self-governing territories in Chapter III.

79 See *Eastman* (1999) 200 CLR 322, 338 (Gaudron J).

80 (1999) 196 CLR 553, 597.

those arising under a law made under s 122. The law in question was those provisions of the *Family Law Act 1975* (Cth) which were supported by s 122 in their operation in territories. Thus, this case is not determinative of any question as to whether laws made by self-governing territories fall within s 76(ii).

As regards Zines's suggestion that matters in territory courts are matters arising under laws made by the Parliament within s 76(ii), such a view is entirely inconsistent with the decision of the High Court in *Capital Duplicators* that the exercise of legislative power of a self-governing territory is not an exercise of the Parliament's legislative power. It may be noted that in *Capital TV & Appliances v Falconer*, Walsh J[81] rejected the notion that any jurisdiction derived from any law made (directly or indirectly) by the Commonwealth Parliament is federal jurisdiction, because that would mean that the whole of the jurisdiction exercised by the Supreme Court of a territory or indeed by any court in a territory must be classed as federal jurisdiction within ss 71 and 73. His Honour preferred the view[82] that jurisdiction which is exercised by virtue of authority conferred by a law not made under Chapter III is not federal jurisdiction, or alternatively, that some of the jurisdiction of courts in territories is federal jurisdiction because of the subject matter of the grant of jurisdiction, such as bankruptcy or matrimonial causes. His Honour considered this to be preferred to a view that all the jurisdiction exercised by all the courts of the territories is federal jurisdiction for the reason that it is derived from a law made by the Commonwealth Parliament. With this alternative suggestion, we agree, ie territory courts exercise both local and federal jurisdiction.

In light of the decision in *Capital Duplicators*, which had the Court's clear endorsement in *Svikart v Stewart*, to suggest that a law made by a territory legislature is a law 'made by the Parliament' is to strain the language of s 76(ii) to breaking point. And, in terms of the original jurisdiction of the High Court, would have the result that the High Court could have original jurisdiction in relation to any and all matters involving rights and liabilities derived from laws made by the territory.

If one takes this approach, further difficulties arise in relation to matters arising under the common law in a territory. Zines records those difficulties and seeks to resolve them by suggesting[83] that it is possible to conclude that a matter arising under the common law operating in a territory also arises under a law made by the Parliament within s 76(ii), namely the provision made by the Parliament to establish

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81 *Capital TV & Appliances v Falconer* (1971) 125 CLR 591, 623.

82 Ibid 623–4.

83 See Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 183–5. Gummow J expressed similar views in *Kruger* (1996–97) 190 CLR 1, 168-9.

a body of law in the territory.[84] Such a conclusion appears to us to be rather fanciful and is, for the reasons we set out above in relation to s 73, unnecessary.

EQUIVALENTS TO SECTIONS 77(III) AND SECTION 78 – SECTION 122

Section 77 provides (relevantly) that, with respect to any of the matters mentioned in ss 75 and 76, the Parliament may make laws: (i) defining the jurisdiction of any federal court other than the High Court; and (ii) investing any court of a State with federal jurisdiction.

As has already been said, in *Bradley*,[85] six members of the High Court accepted the proposition that a court of the Northern Territory may exercise the judicial power of the Commonwealth 'pursuant to investment by laws made by the Parliament'. This proposition was said to be supported by the citations of authority made by Gaudron J in *Ebner*, which included various statements by Gaudron J in *GPAO* and *Eastman* and the paragraph in which Gummow and Hayne JJ set out their preferred construction of Chapter III quoted early in this article. In that paragraph, their Honours stated that the investment of federal jurisdiction in a territory court would be by a law supported not by s 77, but by s 122. As there are only those two avenues for the investment of federal jurisdiction in a territory court, and s 77 refers only to investment of jurisdiction in State courts, it must follow that the High Court accepted, in *Bradley*, that federal jurisdiction may be invested in a territory court by a law made under s 122.

Whatever confusion might have arisen in relation to the ACT Supreme Court,[86] it is quite clear that the courts of the Northern Territory were erected by enactments of the Territory legislature and could not, on the authority of *Capital Duplicators*, be considered to be courts created pursuant to s 122.

The enactment by the Parliament of those provisions of the *Judiciary Act* which confer federal jurisdiction on courts of the self-governing territories (ss 67C and 68(2)) is, we say, supported by s 122.

SECTION 79 – NUMBER OF JUDGES

Section 79 provides that the federal jurisdiction of 'any court' may be exercised by such number of judges as the Parliament prescribes. By reference back to s 71,

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84 Such as s 7(1) of the *Northern Territory Acceptance Act 1910* (Cth), which provided that all laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth.

85 *Bradley* (2004) 218 CLR 146, 163.

86 Because of the 'transmogrification' effected by transforming the Commonwealth Act which established the Court into an Act of the ACT legislature. See footnote 37 above.

which provides that the High Court shall consist of a Chief Justice and at least two other justices, it is clear that 'any court' means the 'other federal courts as the Parliament creates' and the 'other courts as it invests with federal jurisdiction'. Thus, s 78 presents no difficulty for the courts of self-governing territories. Indeed, by the 'autochthonous expedient', the Parliament has so prescribed by s 68(1) of the *Judiciary Act 1903* (Cth), which picks up and applies the laws of a State or Territory to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the courts of that State or Territory by s 68(2).[87]

SECTION 80 – TRIAL BY JURY

Section 80 provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place/s as the Parliament prescribes.

As we have already discussed, it was decided in *Bernasconi* that s 80 did not apply to trials on indictment in territories. And as we have attempted to demonstrate thus far, the broad statement of Griffith CJ that Ch III has no application to territories cannot now be understood as applying to the self-governing territories of the Northern Territory and the ACT. In the ways already identified, the High Court has held that Ch III does apply to self-governing territories and their courts. Similarly, we say that s 80 can and should apply to trials on indictment of offences against laws of the Commonwealth. In the Northern Territory, such trials are held before a jury and their verdicts are required,[88] in accordance with *Cheatle v The Queen*,[89] to be unanimous.

Again, such an approach would not require the actual decision in *Bernasconi* to be overruled, since that decision did not involve a court established by a self-governing territory, but a court established by the Commonwealth Parliament pursuant to an exercise of legislative power under s 122.

And, as required by s 80, s 70A of the *Judiciary Act 1903* (Cth) permits the holding in any Territory of the trial on indictment of an offence against a law of the Commonwealth which was not committed within any State. Thus, as s 80 requires, the Parliament has prescribed the place at which the trial may be held where the offence is committed within a territory.

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87 See also s 68(3) of the *Judiciary Act 1903* (Cth).

88 This requirement is not a statutory one, but a matter of judicial practice where judges hearing such trials do not give the 'majority direction' and a 'hung' jury is considered incapable of giving a verdict.

89 (1993) 177 CLR 541, 548.

In *Fittock v The Queen*,[90] the applicant sought to re-open the decision in *Bernasconi*, claiming that his convictions for murder and unlawful killing, offences under the Territory's *Criminal Code*, by the Supreme Court of the Northern Territory were invalid because the jury which convicted him contained reserve jurors. The High Court found it unnecessary to consider either the correctness of *Bernasconi* or the question of whether the *Criminal Code* (NT) is a 'law of the Commonwealth'[91], concluding[92] that there is no implication in s 80 that a trial by jury cannot involve reserve jurors selected in addition to 12 jurors.

Despite the reservations expressed by Kirby J in that case,[93] we suggest, again because of the decision in *Capital Duplicators* and its endorsement in *Svikart v Stewart*, that laws made by a self-governing territory do not fall within the phrase 'any law of the Commonwealth' within s 80.[94] If they did, all the majority verdicts which have been given in the Northern Territory in trials on indictment for offences against territory laws would be invalid.[95]

This potentially disastrous outcome is another reason why we say that Zines's view that territory courts always exercise federal jurisdiction because territory laws are 'laws made by the Parliament' within s. 76(ii), cannot be right. If that phrase in s 76(ii) refers to all laws made by the self-governing territories, then those laws must similarly fall within the phrase 'any law of the Commonwealth' within s 80. To retreat behind the defence of *Bernasconi* and say that s 80 does not apply to trials in

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90 (2003) 217 CLR 508.

91 Oddly, McHugh J (at 514) queried whether the reserve juror provisions of the *Juries Act* (NT) are 'a law of the Commonwealth', when his Honour should have been considering whether the law creating the crimes of murder and unlawful killing in the Northern Territory was such a law for the purposes of s. 80.

92 Ibid, 513 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), 514-5 (McHugh J), 519-20 (Kirby J).

93 Ibid, 517. His Honour described the idea that a self-governing Territory, without accomplishing the journey to Statehood provided by the Constitution, can make laws that are not 'law[s] of the Commonwealth' as 'unattractive'.

94 We would similarly suggest that laws made by self-governing territories do not fall within the phrase 'law of the Commonwealth' in s 109 of the *Constitution*. Again, such a conclusion would not require the decision in *Lamshed v Lake* (1958) 99 CLR 132 to be overturned, simply to be reconsidered in light of the legislation there considered, namely legislation made by the Parliament in the exercise of power under s 122 and not by a self-governing legislature.

95 Section 368 of the *Criminal Code 1983* (NT), which permits majority verdicts in trials, has been in force since 1983. Justice Evatt, in a paper entitled 'The Jury System in Australia' (1936) 10 *Supplement to Australian Law Journal* 49, 65 points out that a 1933 NT Ordinance provided that a verdict of 9 of the 12 jurors shall be taken as the verdict in trials on indictment against laws of the Commonwealth. Except in capital cases, there was no such provision for jurors in trials on indictment of 'offences against the laws of the Territory itself'. Majority verdicts are not permitted in the Australian Capital Territory.

territory courts is, to use Gaudron J's phrase in *GPAO*,[96] intellectually unsatisfying and runs counter to the fundamental requirement of an 'integrated system of law'.

SELF-GOVERNING TERRITORIES ARE DIFFERENT FROM DEPENDENT TERRITORIES

In *Berwick v Gray*, Mason J said:

> The power conferred by s 122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions or a separate fiscus; yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus.[97]

It may be seen from the Preamble of the *Northern Territory (Self-Government) Act 1978* (Cth) that the conferral of self-government upon the Northern Territory expressly recognised that, by reason of the political and economic development of the Territory, it was considered desirable to confer self-government on the Territory and for that purpose to provide for the establishment of separate political, representative and administrative institutions in the Territory and to give the Territory control over its own treasury.

After a consideration of *Eastman*, Zines writes that '[s]o far as the Court as a whole is concerned…there is no decision as to whether, for the purposes of Chapter III generally and other restrictions on Commonwealth power, a differentiation between dependent Territories and self-governing Territories should be made.'[98] Zines refers to the judgment of Gleeson CJ, McHugh and Callinan JJ[99] in *Eastman* where their Honours adopted a construction of s 72 which 'pays due regard to the practical considerations arising from the varied nature and circumstances of territories' and that 'at any given time some territories may enjoy self-government and some will not'. In particular, their Honours noted that whether a court in a self-governing territory satisfied the description of a court in s 72 might depend upon whether the territory legislature had legislated concerning the territory's courts and the form of such legislation. Zines also refers to the decision[100] of Gummow and Hayne JJ that s 72 would not apply to a court created by the legislature of a self-governing territory. Coupled with their Honours' 'preferred construction' set out at the beginning of this

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96 (1999) 196 CLR 553, 598.

97 (1976) 133 CLR 604, 607. Barwick CJ, McTiernan and Murphy JJ agreed with Mason J's judgment.

98 Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 181.

99 (1999) 200 CLR 322, 332–3.

100 Ibid 353.

article, there is little doubt that Gummow and Hayne JJ were of the view that self-governing territories are different to dependent territories and can, therefore, take a place within Chapter III.

These passages demonstrate, therefore, that five of the seven members of the Court in *Eastman* expressed the view that a differentiation can be made between self-governing territories and dependent territories for the purposes of Chapter III. In terms of the doctrine of precedent, that is enough for the proposition to be accepted. However, Zines goes on to refer to the dissenting judgment of McHugh and Callinan JJ in *GPAO* and to McHugh J's decision in *Newcrest* (both of which pre-date *Eastman*) and suggests that the opinions earlier expressed colour and limit the clear statement by their Honours in *Eastman*. In doing so, Zines fails to take into account the acceptance expressed in *Re Wakim; Ex parte McNally*[101], by both McHugh J[102] and Callinan J,[103] of the decision of the majority in *GPAO*. In our view, after steadfastly asserting the 'disparate view', but coming out in dissent, their Honours thereafter accepted the views of the majority in *Eastman* as endorsing the 'integrationist approach' as it relates to self-governing territories.

THE *CONSTITUTION* SHOULD SPEAK CONTINUOUSLY IN THE PRESENT

In *The Queen v Ireland*, Lord Steyn said:

> Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking'…In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety.[104]

We say that these words must apply with the utmost force to the *Constitution*, lest it become a 'silent and lifeless document'.[105] In that respect, we take a similar approach to that of Kirby J, whose opinion is that the *Constitution* is to be read according to contemporary understandings of its meaning, to meet, so far as the text

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101 (1999) 198 CLR 511, 594.
102 Ibid 565.
103 Ibid 636.
104 [1997] 4 All ER 225, 233.
105 A Inglis Clarke, *Studies in Australian Constitutional Law* (1901) 21-2, quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171-2 (Deane J).

allows, the governmental needs of the Australian people.[106] Windeyer J's observations in *Victoria v The Commonwealth* are to the same effect:

> I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the *Engineers' Case* as the correction of antecedent errors or as the uprooting of heresy…[I]n 1920 the Constitution was read in a new light, a light that reflected from events that had, over twenty years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs.[107]

When one looks at the *Constitution* with today's eyes, one finds that the language of Ch III is apt to include self-governing territories and their courts, and the decisions of *Porter*, *Bernasconi* and *Attorney–General (Commonwealth) v The Queen* are not relevant to the self-governing territories that exist today because those territories are so vastly different from the newly created and dependent territories that then existed.

CONCLUSION

In *Bradley*, after endorsing the proposition that a court of the Northern Territory may exercise the judicial power of the Commonwealth, the High Court expressly accepted[108] the proposition that it is implicit in the terms of Chapter III, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal. By its decision in *Bradley*, the High Court has demonstrated that the integration of self-governing territories into Chapter III of the *Constitution* is as complete as it can be.

This has been done, in a culmination of 'snaking through' the now undermined earlier decisions,[109] without an express identification, in a single decision, of the route through Chapter III which has been taken to arrive at that conclusion. That is what we have put forward in this paper via an examination of the terms of the provisions of Chapter III and the decisions of the High Court in relation thereto. It is, we consider, an approach which is open on the language, produces a sensible result (which includes the "integrated legal system") and pays due regard to the practical considerations arising from the nature and circumstances of self-governing territories. To paraphrase Menzies J in *Spratt v Hermes*, we consider that it is

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106 See *Eastman v The Queen* (2000) 203 CLR 1, 79–80.

107 (1971) 122 CLR 353, 396.

108 (2004) 218 CLR 146, 163.

109 To adopt the evocative phrase used by McHugh J in the course of argument in *GPAO*: see T Pauling, 'The Constitutional Differences Between Territories and States' (2000) 20 *Australian Bar Review* 187, 189 and P McNab, 'Snaking Through: Territories and Chapter III of the *Constitution*' (2000) 20 *Australian Bar Review* 293.

inescapable that self-governing territories are parts of the Commonwealth of Australia and, being so, are part of the 'federal system'.

While we have had, in this paper, the misfortune to respectfully disagree with Leslie Zines, his preferred approach, echoing the High Court in *Boilermakers*, could not now give rise to a coherent doctrine conformable with the territories' place in the federal system and, to borrow again from Gaudron J,[110] could create more problems than it solves.

We began this paper with a quote from the third edition of *Federal Jurisdiction in Australia* in which Leslie Zines said that the High Court is divided on whether a Territorial court can exercise federal jurisdiction and, if so, whether a law made by a self-governing territory's legislature arises under a Commonwealth Act. May we suggest that the next edition of the work read:

> Whilst at the time of the third edition it seemed that the Court was divided on whether Territorial courts can exercise federal jurisdiction and, if so, whether a law made by the legislature of a self-governing Territory arises under a Commonwealth Act creating the legislature and conferring its power, the acceptance by the whole Court in *Re Wakim; Ex parte McNally* of the majority view in *Northern Territory v GPAO*, and the decision in *North Australian Aboriginal Legal Aid Service Inc v Bradley* appear to have settled those issues. Territory courts can and do exercise federal jurisdiction and the laws of the legislatures of self-governing territories do not arise under a Commonwealth Act creating its power. The integration of self-governing territories into the federation seems to have reached its potential end.

110 *GPAO* (1999) 196 CLR 553, 602; *Eastman* (1999) 200 CLR 322, 337.