THE SEPARATION OF POWERS — A COMPARISON

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It is a great privilege for me to be here today at this College, which had become distinguished as a seat of learning long before my own country had first been settled by English-speaking people. The occasion for my presence is to deliver one of a series of lectures given in honour of Sir Robert Gordon Menzies, who was Prime Minister of Australia from 1949 to 1966 and who, more relevantly for today's occasion, was both a distinguished constitutional lawyer and a lover of Virginia.

The theory of Montesquieu, that to secure liberty it is necessary to separate the three main functions of the state — the legislative, the executive and the judicial — has had a profound and lasting influence on political thought. James Madison, who expounded the theory with such effect in No. 47 of *The Federalist* papers, regarded the separation of powers as the most sacred principle of the United States Constitution. As he recognised, the principle is a political maxim rather than a technical rule of law,[1] and it is a maxim which, in its practical application, can lead to very different results in different constitutional settings. In France, for instance, the judiciary has no power to interfere with the work of the legislature, and so cannot challenge the constitutional validity of a statute, and the ordinary courts cannot review administrative action, although administrative tribunals have been developed to fulfil that function.[2] The purpose of this address is to compare the working of the principle in two federal constitutions — those of the United States and Australia.

The Constitution of the Commonwealth of Australia was framed in the last decade of the nineteenth century by men who had before them, as an inspiration and a model, the Constitution of the United States. The provisions of the Australian Constitution which deal with the division of the functions of government and the investiture of power to exercise those functions closely follow the form of the American model. In Chapter I it is provided that the legislative power of the Commonwealth shall be vested in a federal parliament, whose powers are defined. Chapter II provides that the executive power is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. Chapter III provides that the judicial power of the Commonwealth shall be vested in a federal supreme court, to be called the High Court of Australia, and in such other federal courts as the parliament creates, and in such other courts as it invests with federal jurisdiction. It goes on to protect the tenure of the Justices and to define the jurisdiction of the federal courts. These provisions differ significantly from those of the United States Constitution in two important respects — first, the Australian Commonwealth remains under the Crown, with the Queen as the titular head of the executive, and secondly, the

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[1] Cited in L Tribe, *Constitutional Choices* (1985) 309.

[2] Cummins, "The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France" (1986) 35 ICLQ 594–628.

federal judicial power may be invested in State courts as well as conferred on federal courts. There are other differences some of which I shall later mention. Nevertheless, the manner in which the Australian Constitution separately vests the legislative, executive and judicial powers of government in distinct organs in itself suggests that the Constitution embodies the principle of the separation of powers. That conclusion is supported by the fact that the framers of the Australian Constitution had earnestly studied the United States Constitution and were familiar with the interpretations that had been placed on its provisions by the courts and with the commentaries of the textwriters. They were not unaware that the provisions upon which they based their own draft had been designed to give effect to the principle of the separation of powes and it can hardly be doubted that they intended that the Australian Constitution should have a similar effect.

However, the framers of the Australian Constitution were also influenced by English experience and English precedent. Their principal aim was to unite the six British colonies already established in Australia into one nation with a federal form of government. They were not dissatisifed with the constitutional arrangements which they had inherited from Great Britain. They were inclined to believe that the common law afforded sufficient protection for individual liberties. They had no great desire for constitutional change except so far as was necessary to accomplish federation. It seems that they accepted the form of the United States provisions which invested the three powers of government in separate persons or bodies rather as a matter of course, as apparently appropriate for a federation, without deep consideration of the way in which the principle of the separation of powers would affect the working of a constitution which would not be presidential but which would incorporate the British system of parliamentary government.

Whether or not Montesquieu was mistaken in his views as to the nature of the English constitution in the first part of the eighteenth century — whether his theory that England owed its freedom to the fact that its constitution was based on a separation of powers was "a fiction invented by him", as Holmes J thought, or rather an exaggeration of the sharpness of a division of powers which existed in fact[3] — there is no doubt that by the end of the nineteenth century the theory did not coincide with the facts of government in England. It is true that the powers of government were, and are, conveniently divided, and for the most part entrusted to different persons, but there was no constitutional impediment to the exercise by one branch of government of the powers of another. No statute can be held invalid because it confers powers of one kind on an instrumentality of another kind. The principal officers of the executive — the cabinet ministers — must be members of, and responsible to, the legislature. The executive and the legislature are closely connected; on the one hand, the ministers retain office only so long as they have the confidence of a majority of the House of Commons, while on the other hand the cabinet will normally control the workings of the legislature by means of the majority which it commands. Similary, in the Australian colonies in the 1890s there was no rigid or formal separation of

[3] *The Queen* v *Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 392.

powers. It was only in relation to the judiciary that the principle of the separation of powers may have seemed to be applicable. In the United Kingdom and in Australia the independence of the judiciary was and is maintained by powerful tradition, and the judges are not subject to control by the legislature or the executive in the exercise of their functions. Legislation of the United Kingdom which infringed or usurped the judicial power would nevertheless be valid. The Parliament could pass a statute which deprived a citizen of a right confirmed by a decision of the highest court, and has in fact done so in exceptional circumstances.[4] It could, no doubt, pass special legislation to deal *ex post facto* with the trial of particular offenders, affecting the mode of trial and the sentences that might be imposed.[5] It entrusts the resolution of many disputes to administrative tribunals, and when it does so the legislation is valid whether or not the power conferred proves, on analysis, to be judicial in nature.

It is a little surprising, in these circumstances, that the Judicial Committee of the Privy Council should have suggested, as recently as 1975, that "the basic concept of separation of legislative, executive and judicial power" had been "developed in the unwritten constitution of the United Kingdom". The case[6] concerned a law of Jamaica which had established a new court, the Gun court, to try firearms offences. The law prescribed a mandatory sentence of detention during the Governor-General's pleasure, determinable only by the Governor-General on the advice of a review board, which consisted of five members of whom only one was a member of the judiciary. A majority of the Judicial Committee held that the constitutions for the newly independent British colonies, which were drafted at Westminster, were negotiated and drafted by persons "familiar with the basic concept of separation of legislative, executive and judicial power as it had been developed in the United Kingdom" and that the basic principle of the separation of powers was implicit in those constitutions, and in particular in that of Jamaica. It was further held that, consistently with that principle, the Parliament of Jamaica had no power to transfer from the judiciary to an executive body, not appointed in the manner prescribed by the Constitution for the appointment of persons entitled to exercise judicial powers, a discretion to determine the severity of the punishment to be inflicted on an individual member of a class of offenders. A minority of the Judicial Committee agreed with this result on the grounds that the written terms of the Constitution themselves gave effect to the principle of the separation of powers. Whatever may be said of the decision that the power exercised by the review board was judicial, one is inclined, with the greatest respect, to share the view of a learned commentator[7] that the belief that the British constitution has developed a basic concept of the separation of powers is a constitutional myth. The case shows the continuing power of the ideas of Montesquieu and may make it easier to understand how the framers of the Australian Constitution saw no apparent difficulty in combining the principle of cabinet responsibility with that of the separation of powers. Section 64 of the Australian Constitution requires the Ministers of State to be members of the legislature; this provision, in sharp contrast to Art I, sec 6, cl 2

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[4] War Damage Act 1965 overruling *Burmah Oil Co Ltd* v *Lord Advocate* [1965] AC 195.
[5] *Cf Liyanage* v *The Queen* [1967] 1 AC 259.
[6] *Hinds* v *The Queen* [1977] AC 195.
[7] O Hood Phillips "A Constitutional Myth: Separation of Powers" (1977) 93 LQR 11.

of the United States Constitution, is a clear indication that responsible government, as it is called, is a central feature of the Australian Constitution.[8] The expression "responsible government" may give a false impression to those not acquainted with British constitutional practice; it connotes that the executive is responsible to the legislature, and says nothing regarding responsibility to the people.

It might have been held that the fact that the Constitution gave Australians a system of responsible government on the British model provided a sufficient indication of an intention to reject altogether the principle of the separation of powers, notwithstanding the close resemblance between the relevant provisions of the Australian Constitution and those of the United States Constitution. However the High Court of Australia has accepted that the Constitution has successfully combined the two, and has frequently asserted that the Constitution is based upon a separation of the functions of government.[9] In spite of those assertions, the Court has paid no more than lip service to that principle when it has come to consider the separation between legislative and executive power. Once it was recognised that the Constitution was intended to embody the principle of the separation of powers, the fact that it also embodied a system of responsible government would not necessarily have prevented a separation of legislative and executive powers except to the extent that the working of that system required the powers to be exercised by the same persons; in other words the system of responsible government could have been regarded as defining the full extent to which the legislative and executive functions were to be mixed.[10] A substantial separation of the two functions could have been maintained even though some persons would have taken part in the performance of both. In fact the High Court has approached the matter quite differently. The Court has had to consider the important practical question whether the legislature can authorize the executive to make subordinate legislation and, if so, within what limits. In Australia no assistance can be gained, in attempting to answer this question, by having recourse to the theory, based on the doctrines of Locke, that the power of the legislature is delegated to it by the people and cannot be further delegated, for that theory, which the framers of the United States Constitution accepted, does not form any part of English law. According to English authority, although a legislature may not abandon or abdicate its power, it can act through subordinate agencies or delegates provided that it retains its control over them and maintains its capacity to withdraw or alter the power which it has delegated.[11] The only possible limit on the power of the Australian Parliament to delegate its legislative function is to be found in the principle of the separation of powers. In the United States, that principle has not made it impossible for Congress to authorise administrative bodies to make rules and regulations provided, as I understand the position, that Congress itself has declared the policy of the law and prescribed principles and standards which fix the limits within which rules and regulations

[8] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147; *The Queen* v *Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275.

[9] *Eg The Queen* v *Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 273; *Attorney-General of the Commonwealth of Australia* v *The Queen* (1957) 95 CLR 529, 539–540.

[10] This was suggested by G Sawyer: "The Separation of Powers in Australian Federalism" (1961) 35 ALJ 177, 184.

[11] See *Cobb & Co Ltd* v *Kropp* [1967] AC 141 and cases there cited.

may be made.[12] It seems that in practice considerable latitude is allowed to Congress. However, the courts in Australia have accorded to the Parliament a virtually unfettered power to delegate to the executive the power to make laws, and have held that such a delegation will be valid even though the Parliament does not prescribe any principles or standards to govern the exercise of the power. The leading case on the subject was decided in 1931: *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes* v *Dignan*.[13] The statute under consideration in that case conferred a power upon the Governor-General to make regulations with respect to the employment of transport workers and regulations so made were to have the force of law notwithstanding anything in any other Act. Mr Justice Dixon in his judgment described the effect of the statute in the following words:

> It gives the Governor-General in Council a complete, although, of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as well as the means to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover, the power may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden.[14]

The provision was held to be valid. The case appears to decide that the Parliament has power to repose in the executive an authority of an essentially legislative character. Mr Justice Dixon recognised that this result appeared to involve an inconsistency, or at least an asymmetry, with the decisions on the subject of judicial power (to which I shall shortly refer), and explained this by saying that "the existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law".[15] He did suggest a qualification of the broad view that the legislature might delegate legislative power to the executive, namely that there might be such a width or uncertainty of the subject matter confided to the executive that the enactment conferring power would not be a law with respect to any of the heads of legislative power conferred by the Constitution. Decisions since that time have indicated that this qualification is of little or no practical significance. They have held valid a provision allowing the Governor-General in Council to prohibit by regulation the importation of all goods, and a war-time provision which conferred on the Governor-General in Council power to make regulations for securing the public safety and defence of the Commonwealth and its Territories and for prescribing all matters necessary or convenient to be prescribed for the more efficient prosecution of the war.[16] These delegations were expressed in the widest and most general terms and confided to the executive a subordinate legislative power which was quite

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[12] *US* v *Chicago Milwaukee St Paul & Pacific Railroad Co* 282 US 311, 324 (1931); *Panama Refining Co* v *Ryan* 293 US 388, 421 (1934); *Schechter Poultry Corporation* v *US* 295 US 495, 530 (1935).

[13] (1931) 46 CLR 73.

[14] *Ibid* 100.

[15] *Ibid* 101–102.

[16] *Radio Corporation Pty Ltd* v *The Commonwealth* (1938) 59 CLR 170; *Wishart* v *Fraser* (1941) 64 CLR 470.

uncontrolled by any principles or standards laid down by the legislature itself. It is indeed difficult to reconcile these decisions with an acceptance of the principle of the separation of powers.

It does not follow that because the legislature in Australia can delegate legislative power to the executive, the distinction between legislative and executive power is of no significance. If the government seeks to invoke the executive power conferred by the Constitution, and in so doing to act without any statutory authority, the question will of course arise whether what is done is in truth an exercise of legislative power and so invalid. There has been no full examination of the scope of executive power in Australia,[17] partly because, under the Australian parliamentary system, the government can more often than not procure the necessary grant of powers from the Parliament, but there seems little doubt that an executive order like that made by the President in the *Steel Seizure Case*[18] would similarly be held invalid. That would be so, not because the principle of the separation of powers would have been violated, but simply because the order would have been made without power.

Since the Australian courts have accorded to the legislature an almost unlimited capacity to delegate power to the executive, it is not surprising that there has been no challenge to the validity of a delegation of legislative power by the Parliament to one or other of its two Houses. By contrast in *Immigration and Naturalization Service* v *Chadha*[19] the Supreme Court held that an Act of Congress could not validly confer power on one House to disallow an exercise of a power delegated by that Act to an executive agency. A Congressional veto of this kind was held to be invalid, on the ground that the veto was legislative in character and therefore exercisable only by the passage of a bill through both Houses of the Congress and its presentation for signature to the President. In other words a legislative power could not be delegated to one House of Congress alone. In Australia for many years the law[20] has required that regulations made under an Act shall be laid before each House of the Parliament and either House has had power to pass a resolution disallowing any such regulation, with the consequence that any regulation so disallowed thereafter ceases to have effect. Although this procedure for disallowance has not received formal judicial approval, its validity has never been doubted; indeed it has been commended as a "safeguard against hasty and ill-considered regulations".[21] It would be surprising if a challenge to this well established procedure did succeed, but constitutional law is a fertile field of surprises, and *Chadha's* case itself seems to have been one of them.

Such is the theoretical dominance of the legislature in Australia — theoretical because in fact the executive often controls it — that it has never even been suggested that legislation might infringe the executive power. A case such as *Bowsher (Comptroller-General)* v *Mike Synar*,[22] where the Congress was held to

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[17] *Cf Victoria* v *The Commonwealth and Hayden* (1975) 134 CLR 338.

[18] *Youngstown Sheet & Tube Co* v *Sawyer* 343 US 579 (1952); *cf Dames & Moore* v *Regan* 453 US 654 (1981).

[19] 462 US 919 (1983); *Process Gas Consumer Group* v *Federal Energy Regulatory Commission* 463 US 1216 (1983).

[20] Acts Interpretation Act 1901 (as amended), s 48.

[21] *Huddart Parker Ltd* v *The Commonwealth* (1931) 44 CLR 492, 506.

[22] (1986) 54 US Law Week 5064.

have invalidly intruded into the executive function by placing the responsibility for the execution of a statute in the hands of an officer subject to removal only by itself and thus in effect retaining control of the execution of the Act, has never arisen in Australia. It would be very unlikely that an Act of the Australian Parliament would be held to be invalid on the ground that it usurped an executive function, unless the function was one which the Constitution expressly conferred on the Governor-General.

When the Australian courts came to consider the exercise of judicial power, they adopted a different approach. In this context, they took the separation of powers seriously, and, at least at first, gave that principle a strict application. The reason is historical and traditional; Australians can say, with the citizens of the United States, that ". . . we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive".[23] Early in the history of Australian federation it was established that federal judicial powers could be exercised only by the courts referred to in Chapter III of the Constitution.[24] Soon afterwards it was held that this meant that the judicial power could be conferred only on a court whose judges held their office on the tenure prescribed in Chapter III — at that time, it was for life.[25] That view, I understand, is entirely consistent with the United States authorities, such as *Northern Pipeline Construction Co* v *Marathon Pipe Line*,[26] which held invalid the provisions of the Bankruptcy Act which conferred Article III power on judges who lacked life tenure and lacked protection against diminution of their salaries during their term of office.

In 1956, in an important decision which was affirmed by the Privy Council, which until quite recently entertained appeals from Australia, the High Court went further. That case, the *Boilermakers'* case, as it is known in Australia,[27] concerned the Court of Conciliation and Arbitration, a body which, in one or another form and under one or another name, had occupied and still occupies a very important place in the regulation of the Australian economy. The Court's main function was to settle by arbitration industrial disputes and that function was clearly not judicial in character. It also had powers to enforce industrial awards, for example, by the imposition of penalties and the making of orders in the nature of injunctions and those powers were held to be judicial. The validity of the constitution of that Court had been considered in 1918, in what is known as *Alexander's* case.[28] At that time, the President of the Court was appointed to that office for a period of seven years, and not for life, and it followed that the powers to enforce awards, being judicial in nature, could not be vested in the Court; the provisions conferring those powers were held to be invalid but severable. Subsequently, in 1926, the Parliament appointed the members of the Court to be judges in accordance with Chapter III and gave them the life tenure

[23] *The Queen* v *Quinn; ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11.
[24] *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330; *New South Wales* v *The Commonwealth* (1915) 20 CLR 54.
[25] *Waterside Workers Federation of Australia* v *JW Alexander Ltd* (1918) 25 CLR 434.
[26] 458 US 50 (1982).
[27] (1956) 94 CLR 254.
[28] (1918) 25 CLR 434.

required by that chapter. This seemed to cure the defect revealed in *Alexander's* case, and the Court again exercised judicial as well as arbitral powers. However, in 1955 the question of the validity of the enforcement provisions of the statute again arose and in the *Boilermakers'* case[29] it was held that they were not valid. The argument advanced in support of the attack on the provisions, which was accepted by the Courts, was that it was not constitutionally possible to establish a tribunal which exercised both judicial and non-judicial power. It might have been enough to hold that it is not possible to confer judicial powers on a body whose primary function is non-judicial, but the Courts went further and held that the Constitution does not allow courts established under Chapter III to be used for the discharge of functions which are not themselves part of the judicial power and are not ancillary or incidental thereto. The second of these propositions was said to be the basis of the former; it was intended to be the ratio of the decision. The High Court said:

> . . . it is difficult to see what escape there can be from the conclusion that the Arbitration Court . . . is established as an arbitral tribunal which cannot constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of the Commonwealth. The basal reason why such a combination is constitutionally inadmissible is that Chap. III does not allow powers which are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Commonwealth.[30]

In both the High Court and the Privy Council it was affirmed that the Constitution was based on a separation of powers but it was made clear that it was not intended to cast any doubt on the authorities that had considered the union of legislative and executive powers; the judicial power occupied a different position. In consequence of the decision, the functions of the Court of Conciliation and Arbitration were divided between two different tribunals — one exercising the non-judicial power of making awards to settle industrial disputes, and the other exercising the judicial power of enforcing the awards.

For a time, this decision was loyally followed. Prohibition was issued to judicial tribunals to restrain them from exercising functions held to be non-judicial in character[31] and to non-judicial tribunals restraining them from exercising functions held to be judicial.[32] Then doubts began to be cast upon the correctness of the decision.[33] Those doubts have not been resolved since the occasion has not arisen for the High Court to reconsider the question. However, the force of the decision has been weakened in a number of ways. In the first place, the boundary between judicial and non-judicial functions has always been blurred. It has long been recognised that some functions may be regarded as either judicial or executive; in other words, the same function might either be

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[29] (1956) 94 CLR 254.

[30] *Ibid* 289.

[31] *The Queen* v *Spicer; ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277; *The Queen* v *Spicer; ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312.

[32] The Queen v *Gallagher; ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40; *The Queen* v *Austin; ex parte Farmers and Graziers Co-operative Company Ltd* (1964) 112 CLR 619; *The Queen* v *Gough; ex parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237.

[33] *Reg* v *Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1973) 130 CLR 87, 90, 102; *The Queen* v *Joske; ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194, 201–202, 222.

committed to a court, because it is an incident in the exercise of strictly judicial powers, or performed administratively.[34] Whether the power is judicial or administrative in nature may in some cases simply depend on whether it is conferred on a judicial or on an administrative body. It seems possible to discern a tendency on the part of the courts to take a liberal view in deciding whether a power entrusted to a court is judicial in nature. For example, if a body is given a discretion of an arbitrary kind, not governed or bounded by some ascertainable tests or standards, that will be an indication that the function conferred on it is not judicial, but more recently the courts have seemed ready to hold a power conferred on a court to be judicial notwithstanding the width of the discretion allowed.[35] On the other hand, the courts seem more reluctant to hold functions conferred upon an administrative body to be judicial; they have held valid statutory provisions which gave an administrative tribunal power to make an order restraining persons from engaging in a trade practice which the tribunal had determined, on the basis of certain statutory criteria, to be unlawful[36] and a statute which empowered the Registrar of Trade Marks to order a trade mark to be removed from the register on certain specified grounds.[37] Judicial and non-judicial functions overlap, and this mitigates the strictness of the principle separating the exercise of the two sorts of power.

Another way in which the courts have weakened the practical effect of the principle is by drawing a distinction between a court and the judges who compose it, and by holding that non-judicial functions may be conferred by statute upon a designated judge who consents to exercise them. There are some early decisions in the United States which appear to support the view that a Supreme Court Justice can voluntarily, and in a personal capacity, accept a non-judicial office.[38] Judges, both in the United States and Australia, have done so; Jackson J acted as prosecutor at a war crimes trial, and Latham CJ and Dixon J were war-time ambassadors. In Australia, federal judges have been appointed to be members of administrative tribunals, *eg* the Trade Practices Tribunal and the Administrative Appeals Tribunal. More recently, the High court upheld the validity of a statute which empowered a judge of a federal court to issue warrants authorising an approved person to intercept telephonic communications.[39] It was held that there was no constitutional objection to conferring a non-judicial power of that kind upon a judge individually as a designated person, although such a power could not have been validly conferred on the court to which he belonged.

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[34] *Federal Commissioner of Taxation* v *Munro* (1926) 38 CLR 153, 175–176; *Queen Victoria Memorial Hospital* v *Thornton* (1953) 87 CLR 144, 151; *The Queen* v *Davison* (1954) 90 CLR 353, 368–370.

[35] Compare the decision in *The Queen* v *Spicer; ex parte Australian Builders' Labourers' Federation* with those in *Reg* v *Joske; ex parte Australian Builders' Labourers' Federation* (1973) 130 CLR 87; *Mikasa (NSW) Pty Ltd* v *Festival Stores* (1972) 127 CLR 617 and *Talga Ltd* v *MBC International Ltd* (1976) 133 CLR 622.

[36] *The Queen* v *Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

[37] *The Queen* v *Quinn; ex parte Consolidated Foods Corporation* (1977) 138 CLR 1.

[38] *Hayburn's Case* 2 Dall 409 (1792); *Yale Todd* 13 How 52 (1794); *US* v *Ferreira* 13 How 40 (1851).

[39] *Hilton* v *Wells* (1985) 157 CLR 57; *Jones* v *The Commonwealth* (1987) 71 ALR 497, (1987) 61 ALJR 348.

The Court added a rider:

> If the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial functions, the principle underlying the *Boilermakers' Case* would doubtless render the legislation invalid.[40]

Any prediction of future constitutional development must be hazardous. It is apparent that it is thought by some that the rule that judicial and non-judicial functions may not be combined leads to inconvenience and to unnecessarily subtle distinctions. However, if that rule is held to be no part of Australian constitutional law, I should be surprised if the courts did not replace it with some more general safeguard, that would forbid non-judicial functions to be thrust on a court if they prejudiced its independence or impaired the proper performance of its functions. I should be even more surprised if there were a departure from the principle that judicial functions may be performed only by a court, even if the concept of judicial functions were narrowed to include only those traditionally performed by the judiciary.

There are some exceptions to the rule that only a judicial tribunal established in accordance with Chapter III of the Constitution can exercise judicial power. Legislation providing for the trial by court martial of members of the Defence Force has been held to be valid.[41] The same, I think, is true of the United States.[42] In Australia either House of Parliament has power to declare that a person is in contempt of Parliament and to punish that person accordingly.[43] These exceptions are based on history and tradition, rather than on logic. They make only small inroads on the principle requiring a separation of powers.

Australian courts have not strictly adhered to the principle of the separation of powers, although they profess to have found it embodied in the Constitution. It is only in relation to the judicial power that the doctrine has had any practical effect in Australia, and even in that respect there has been a disposition to confine it within fairly narrow bounds. The explanation for the failure to be alert to limit the legislative and the executive powers to their proper spheres is only partly to be found in the fact that the Constitution provides for responsible government. The doctrine has not fired the imagination of Australian lawyers; their inheritance of more recent British tradition has meant that they do not share the conviction of Locke, Blackstone and Montesquieu that where legislative and executive powers are united there will be no liberty. They are, however, convinced of the paramount importance of an independent judiciary, and for that reason have resisted attempts to confer judicial power on administrative bodies.

Madison himself clearly recognized that the principle of separation of powers did not mean that the three departments of government should be kept totally separate and distinct. He said that "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments . . . none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective

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[40] *Hilton* v *Wells* (1985) 157 CLR 57, 73–74.
[41] *The King* v *Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452.
[42] *Dynes* v *Hoover* 61 US 65 (1858).
[43] *The Queen* v *Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

powers . . ." That test seems to be met in practice in Australia, although the weakness with which the principle of separation of powers is applied removes one obstacle to the growth of executive power at the expense of the legislature. The strength of the judiciary remains in Australia the strongest barrier to the subversion of a free constitution, against which James Madison was so concerned to guard.