THE JUDICIAL POWER OF THE AUSTRALIAN CAPITAL TERRITORY

David Mossop[*]

Whilst the nature and scope of Commonwealth judicial power has been much examined since federation, the nature of judicial power exercised in the Australian Capital Territory (ACT) or, indeed, the Commonwealth's territories more generally, has not. Usually the analysis of territory judicial power extends only to the conclusion that it does not form part of the judicial power of the Commonwealth and that it is territorially limited as a result of the operation of s 122 of the Constitution. This article examines in more detail the nature of judicial power in the ACT and identifies some of the significant limits upon, and uncertainties surrounding, that power. It examines the history of courts in the ACT, the relationship between Territory judicial power and the judicial power of the Commonwealth, the jurisdiction of ACT courts and some of the important limits on that jurisdiction.

HISTORY OF JUDICIAL POWER IN THE TERRITORY

Upon the surrender of the ACT by New South Wales, the laws that were in force in the Territory prior to surrender were, by virtue of s 6 of the Seat of Government Acceptance Act 1909 (Cth), continued in force in the Territory. Section 8 of that Act provided that, until the Parliament provided otherwise, the High Court could exercise in relation to the Territory the jurisdiction formerly belonging to the New South Wales Supreme Court. Such jurisdiction probably goes beyond the scope of s 76(ii) of the Constitution[1] and is consistent with the view that jurisdiction beyond the scope of Chapter III can be invested in federal courts pursuant to s 122.[2] In 1929 the jurisdiction of the High Court in relation to the Territory was expanded by s 4 of the Judiciary Act 1927 (Cth) so as to include such original jurisdiction as was conferred upon the Court by Ordinances made under the Seat of Government (Administration) Act 1910 (Cth).

It was only in 1933 that the Seat of Government Supreme Court Act 1933 (Cth) was passed which created the Supreme Court of the Australian Capital Territory.[3] This

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* BSc, LLB (UNSW), LLM (ANU). Barrister, Canberra.

1 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 586 per Dixon J.

2 *Porter v R; Ex parte Yee* (1926) 37 CLR 432.

3 Seat of Government Supreme Court Act 1933 (Cth), s 6. The Act was the first to use the name "Australian Capital Territory". The use of this name, which was in 1938 to become the official name of the Territory was quite fortuitous. Mr Latham, then Attorney-General of the Commonwealth, remarked that the creation of the Court required the creation of a new

provided an intermediate court between the inferior courts of the ACT and the High Court. The jurisdiction of the Court comprised three elements. First, the same original jurisdiction in civil and criminal matters as the New South Wales Supreme Court had prior to the surrender of the ACT. Secondly, such civil and criminal jurisdiction as was given to it by ordinances made under the Seat of Government (Administration) Act 1910 (Cth). Thirdly, such appellate jurisdiction as was conferred by ordinances in relation to appeals from inferior courts in the ACT.[4] Because there was initially only a single judge of the Supreme Court there could be no full court or court of appeal for the ACT and appeals continued to be to the High Court.[5] Upon the creation of the Federal Court in 1976, a full court of the Federal Court was made the intermediate court of appeal in relation to the ACT, with appeals from that Court going to the High Court.[6]

The inferior courts of New South Wales continued to have jurisdiction in the ACT until 1930.[7] In that year the Court of Petty Sessions Ordinance (No 2) 1930 (ACT) authorised the creation of a Court of Petty Sessions which had jurisdiction in the Territory.[8] This Court has continued in operation in the ACT since that time although in 1985 its name was changed to the Magistrates Court.[9]

Apart from their creation, the next most significant event in the history of the courts of the ACT was their transfer, following the grant of self-government, from the Commonwealth to the ACT government. Prior to the Australian Capital Territory (Self-Government) Bill reaching the Senate, it was proposed that the transfer of Courts to the Territory government occur at some unspecified time after self-government.[10] Hence, excluded from the Legislative Assembly's power to make laws was the power to make laws with respect to "the establishment of Courts".[11] Included in Schedule 3 of the Bill, which specified laws that were not to become Territory enactments, were a number of court-related ordinances[12] and there was no reference in Schedule 2 to the Australian Capital Territory Supreme Court Act 1933 (Cth) which would allow it to become an enactment. When the Bill reached the Senate, neither the Liberal/National Party opposition nor the Australian Democrats supported that approach. When no satisfactory justification for the indefinite postponement of the transfer was provided, they indicated their intention to oppose the relevant provisions.[13] Faced with this

seal. It was feared that the use of Federal Capital Territory would not clearly identify the country in which the Territory lay and hence would create difficulties of recognition in foreign countries. The name "Supreme Court of the Federal Capital Territory of the Commonwealth of Australia" was considered but this would have been impossible to fit on all but the most enormous seal. Consequently "Supreme Court of the Australian Capital Territory" was settled upon—see Cth Parl Deb 1933, Vol 143 at 5349.

4 Seat of Government Supreme Court Act 1933 (Cth), s 11.

5 Judiciary Act 1903 (Cth), s 34A.

6 Federal Court of Australia Act 1976 (Cth), ss 24, 25 and 33.

7 Seat of Government (Administration) Act 1910 (Cth), s 11.

8 An earlier Ordinance, the Court of Petty Sessions Ordinance 1930 (No 10 of 1930), was made but it appears that no action was taken under it to establish the Court.

9 Magistrates Court Act 1985 (ACT), ss 3-4.

10 H Reps Deb 1988, Vol 163 at 1924.

11 Australian Capital Territory (Self Government) Bill, cl 22(1)(b).

12 Most significantly the Coroners Ordinance 1956 (ACT), Magistrates Court Ordinance 1930 (ACT), Magistrates Court (Civil Jurisdiction) Ordinance 1982 (ACT).

13 Sen Deb 1988, Vol 130 at 2596 and 2731-2733.

opposition the government moved amendments to the Australian Capital Territory (Self-Government) Bill and the Australian Capital Territory Self-Government (Consequential Provisions) Bill which had the effect that the prohibition on the establishment of magistrates and coroners courts was lifted from 1 July 1990 and the limits on legislative power relating to courts ceased to have effect altogether by 1 July 1992 at the latest.[14] A power to transfer responsibility for the court related ordinances that were previously not to be transferred was also included.

As a result of the late night amendments to the self-government legislation, the judicial system was swept up in the transfer of powers to the ACT government, even if it was to be slightly delayed. Had the self-government bills not been amended at 12.13 am on 25 November 1988 there was no certainty that judicial power would have been transferred or, if it was, the form that the transfer would take. Thus these last minute changes significantly altered the scope of self-government granted to the Territory.

Consequently, the Magistrates Court and Coroners Court were transferred by the operation of the Australian Capital Territory (Self-Government) Act 1988 (Cth) (the Self-Government Act) on 1 July 1990 and the Supreme Court on 1 July 1992. Prior to the transfer of the Supreme Court, the Commonwealth Parliament passed the ACT Supreme Court (Transfer) Act 1992 (Cth) which, most significantly, amended the Self-Government Act so as to define the position of the judiciary in the ACT. The 1992 Act inserted a new Part VA into the Self-Government Act entitled "The Judiciary" which specified the jurisdiction of the Supreme Court and set out the conditions which must be satisfied by any enactment providing for the removal of judicial officers. Significantly, although an earlier draft of the legislation had provided that "the judicial power of the Territory is vested in the Supreme Court and any other courts created by the Assembly",[15] the provision enacted was a statement of jurisdiction more like those found in State Supreme Court legislation.

RELATIONSHIP TO JUDICIAL POWER OF THE COMMONWEALTH

The judicial power in the ACT is distinct from that of either the States or the Commonwealth. Section 71 of the Constitution vests the judicial power of the Commonwealth in "the High Court of Australia ... and such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". The decisions of the High Court in *Spratt v Hermes*[16] and *Capital TV and Appliances Pty Ltd v Falconer*[17] held that, not only were the courts in the ACT not "federal courts" within the meaning of s 71, but they were not courts invested with federal jurisdiction within the meaning of that section. These conclusions were largely the product of the traditional "separationist" approach to the territories power which sees the power in s 122 as a "disparate and non-federal matter".[18]

Instead, courts in the ACT lie outside the scheme of Chapter III of the Constitution and are in a similar position to the courts of States between the creation of the

14 Sen Deb 1988, Vol 130 at 2847-2848 and 2850-2852.
15 J Miles, "The State of the Judicature in the Australian Capital Territory" (1994) 68 *ALJ* 14 at 16.
16 (1965) 114 CLR 226.
17 (1971) 125 CLR 591.
18 *Attorney-General of the Commonwealth of Australia v R* (1957) 95 CLR 529 at 545.

Commonwealth and the enactment of the Judiciary Act in 1903. That is, their jurisdiction is territorially limited and depends more on the service of process than on subject matter. To put this in a different way, because Territory courts have been seen as existing outside the scope of Part III of the Constitution, s 71 has no operation in relation to them. Thus no distinction for constitutional purposes is created between federal and non-federal jurisdiction and, subject to the statutory definition of their powers and territorial limits on their jurisdiction, they may exercise federal and non-federal jurisdiction without restraint.[19] This contrasts with the position of State courts which fit within the scheme of Chapter III. Although those courts exercise federal jurisdiction they no longer do so as a result of their "belonging"[20] jurisdiction but rather as a result of investiture by the Commonwealth of federal jurisdiction by the operation of s 39 of the Judiciary Act 1903 (Cth).[21]

In reliance upon the view that Territory courts do not come within Chapter III of the Constitution, the requirements of s 72 of the Constitution have not been met in the legislation empowering ACT courts. However the view that Chapter III does not apply is now under challenge. In *Kruger v Commonwealth*[22] three of the six judges, Toohey, Gaudron and Gummow JJ, expressed the view that the requirements of Chapter III should qualify the power to create courts pursuant to s 122. In *Newcrest Mining (WA) Ltd v Commonwealth*[23] Kirby J suggested that some reconsideration of the earlier separationist decisions of the Court might be necessary "[e]specially in relation to the application of Ch III of the Constitution to the territories".

If a majority of the Court as currently constituted were to find that s 71 incorporated the judicial power exercised by Territory courts and that the requirements of s 72 applied to those courts the results for the ACT would be significant. It would mean, for example, that (1) all Acting Judges of the Supreme Court would have been invalidly appointed[24] and that decisions of the Court since the transfer of responsibility to the Territory in 1992 would be invalid;[25] (2) decisions of the Magistrates Court between 1930 and 1977 as well as since self-government would

19 *R v Donyadideh* (1993) 115 ACTR 1 at 8-9. This power includes power to review Commonwealth administration which is otherwise the exclusive domain of the Federal Court: *Kelson v Forward* (1996) 39 ALD 303 at 321.

20 "Belonging" is used in the sense referred to in s 77(ii) of the Constitution to describe that jurisdiction which is inherent in a superior court of record for a particular jurisdiction: see *Lorenzo v Carey* (1921) 29 CLR 243 at 251 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

21 *Felton v Mulligan* (1971) 124 CLR 367 at 373 per Barwick CJ, 393 per Windeyer J, 412 per Walsh J; *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457 at 471 per Gibbs J; see also Z Cowen and L Zines, *Federal Jurisdiction in Australia* (2nd ed 1978) at 224-228 where it is pointed out that whilst the approach in *Felton v Mulligan* is "intellectually unsatisfying" the alternative is "absurd".

22 (1997) 190 CLR 1.

23 Ibid 513 at 656 footnote 484.

24 The appointment of Acting Judges was possible between 1933 and 1957 and has been again since 1993. The appointment of such judges would breach the tenure requirements of s 72 of the Constitution: see the comments of Walsh J in *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 618.

25 This is because the appointment and removal provisions provide for action by the Territory Executive and the Legislative Assembly rather than the Governor-General and the Parliament as required by the Constitution, s 72(ii).

be invalid,[26] as would be the appointments of Special Magistrates;[27] (3) exercises of judicial power by non-court bodies such as the Tenancy Tribunal and Residential Tenancies Tribunal would also be invalid.[28] Furthermore, the implied separation of powers found to exist in the *Boilermakers'* case[29] would apply to judicial power in the Territory. This would mean that it would be very hard constitutionally to validate decisions made contrary to the requirements of Chapter III. That is because such validation would be, in effect, legislative exercises of judicial power.[30]

However if earlier decisions of the Court in relation to the Territories are reconsidered, there is also the possibility that the Court would return to a "pure separationist" view of the relationship between territory and federal judicial power. This would also have significant consequences for judicial power in the ACT. *Porter v R; Ex parte Yee*[31] and *Spratt v Hermes*[32] recognised the possibility that, although Territory judicial power was not part of the judicial power of the Commonwealth, Chapter III courts could exercise judicial power that was invested in them pursuant to s 122. It was by this expedient that the full rigours of the separationist position were mitigated. This approach allowed, for example, appeals from Territory courts to Chapter III courts. It meant that Territory courts had access to the mainstream appellate structure including the High Court and did not need to have a self-contained judicial hierarchy. However, although convenient, it is very difficult to reconcile this approach with the decision in *In re Judiciary and Navigation Acts*[33] which held that Chapter III courts could not exercise non-Chapter III judicial power. Power invested pursuant to s 122 is plainly non-Chapter III power.

This issue has recently arisen in relation to the cross-vesting legislation in *Gould v Brown*.[34] In that case McHugh J[35] expressed the view that the majority decision in *Porter* was wrong and hence that Chapter III courts could not exercise Territory judicial power. Because the Court was split 3-3 in *Gould v Brown* and because of the more

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26 Between 1930 and 1977 the removal provisions did not comply with the Constitution, s 72(ii) and since transfer in 1990 have referred to action by the Executive and Legislative Assembly rather than the Governor-General and the Parliament.

27 Special Magistrates have never enjoyed the tenure required by the Constitution, s 72, holding office either during pleasure or for a fixed period.

28 Tenancy Tribunal Act 1994 (ACT); Residential Tenancies Act 1997 (ACT).

29 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General of the Commonwealth of Australia v R* (1957) 95 CLR 529.

30 Legislation passed in the wake of *R v Davison* (1954) 90 CLR 353 was probably valid as a result of the breadth of the Commonwealth's bankruptcy power: see Bankruptcy Act 1954 (Cth) s 13, *R v Davison* (1954) 90 CLR 353 at 365-366 per Dixon CJ and McTiernan J and at 376 per Fullagar J. However, the validity of legislation passed after the *Boilermakers'* case (1956) 94 CLR 254 purporting to validate judicial decisions of the Commonwealth Court of Conciliation and Arbitration is less certain, although the question was never litigated—see T Blackshield, G Williams and B Fitzgerald, *Australian Constitutional Law and Theory* (1996) at 876.

31 (1926) 37 CLR 432.

32 (1965) 114 CLR 226.

33 (1921) 29 CLR 257.

34 (1998) 151 ALR 395.

35 Ibid at 443. McHugh was one of the dissenting judges.

recent challenges to the validity of the scheme,[36] the general issue of the investiture of non-Chapter III jurisdiction in Chapter III courts remains a live one. If the majority view in *Porter* is no longer followed, then the provisions allowing appeals from ACT courts to the Federal Court and High Court will be invalid. Whilst legislation validating appellate decisions would be possible, a new appellate structure for ACT courts would need to be put in place.

JURISDICTION OF ACT COURTS

Section 48A of the Self-Government Act provides:

> 48A Jurisdiction and powers of the Supreme Court
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> (1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.
>
> (2) In addition, the Supreme Court may have such further jurisdiction as is conferred on it by any Act, enactment or Ordinance, or any law made under any Act, enactment or Ordinance.
>
> (3) The Supreme Court is not bound to exercise any powers where it has concurrent jurisdiction with another court or tribunal.

This provision is now mirrored by s 20 of the Supreme Court Act 1933 (ACT) which states the jurisdiction of the Supreme Court.[37]

The first limb of the statement of jurisdiction in s 48A is similar to that in s 23 of the Supreme Court Act 1970 (NSW). Being a superior court of general jurisdiction in relation to the Territory, the words of the Viscount Haldane in *Board v Board*[38] are relevant to describe the scope of its power:

> If [a] right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

Yet, as the words of s 48A(3) make clear, the fact that jurisdiction exists in another court or tribunal will not necessarily limit the jurisdiction of the Supreme Court unless the jurisdiction vested in the other court or tribunal is of such a nature that it can be made exclusive of a court of general jurisdiction.[39]

The second limb of the statement of jurisdiction allows the investiture of additional jurisdiction. Some of the fundamental limitations on both the general and the invested jurisdiction of the Court will be examined below.

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36 Further challenges to the validity to the cross-vesting scheme were heard by the High Court in December 1998: *Re Wakim; Ex parte McNally* (s 74 of 1998); *Re Wakim*; (s 118 of 1998); *Spinks v Prentice* (S 170 of 1998) (an appeal from the decision in *Sprinks v Prentice* (1978) 157 ALR 555).

37 In addition to s 20 of the Supreme Court Act, jurisdiction is conferred upon the courts of the ACT in relation to the Australian Antarctic Territory, Heard and McDonald Islands and Jervis Bay Territory: Australian Antarctic Territory Act 1954 (Cth), s 10, Heard Island and McDonald Islands Act 1953 (Cth), s 9; Jervis Bay Territory Acceptance Act 1915 (Cth), s 4D.

38 [1919] AC 956 at 962-963.

39 *Re Totalisator Administration Board of Queensland* (1980) 80 ALR 73 at 77-78 per McPherson J.

LIMITS ON JURISDICTION

Territorial limits

The investiture of jurisdiction in the Supreme Court by s 48A of the Self-Government Act and by s 20 of the Supreme Court Act 1933 (ACT) does not expressly limit that jurisdiction territorially. Considering the requirement of s 122 of the Constitution that there be some nexus between a Commonwealth law and a Territory, it is worth examining whether, in the light of two pieces of legislation, this requirement for a territorial nexus applies to the jurisdiction of the Supreme Court and hence the cases heard by it. The two relevant statutes are the Service and Execution of Process Act 1992 (Cth) and the Jurisdiction of Courts (Cross-Vesting) Act 1993 (ACT).

The starting point for this discussion is the position of the Supreme Court in the absence of such legislation. The jurisdiction of a superior court over persons outside the physical limits of its territory is dependent upon statutory authority for the service of process outside those limits. Thus the general rule is that ambit of service determines jurisdiction. In *Laurie v Carroll*[40] Dixon CJ, Williams and Webb JJ cited with approval Dicey's statement that:

> The service of a writ, or something equivalent thereto, is absolutely essential as the foundation of the court's jurisdiction. Where a writ cannot legally be served upon a defendant the court can exercise no jurisdiction over him. In an action in personam the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the court, on service being effected, has jurisdiction to entertain an action against him. Hence, in an action in personam, the rules as to the legal service of a writ define the limits of the court's jurisdiction.

In *Cotter v Workman*[41] the validity of Order 12 rule 1 of the ACT Supreme Court Rules was in issue. That rule purported to allow service of process of the Supreme Court throughout the Commonwealth. If valid, it would, by allowing service without any reference to a connection between the process and the ACT, have given jurisdiction to the Court to hear and determine matters which had no connection with the ACT other than that proceedings were commenced in the Supreme Court. Even though laws made under s 122 could have extra-territorial operation where a relevant connection to the Territory was demonstrated,[42] a law such as Order 12 rule 1, which allowed the Court to exercise jurisdiction where such a connection did not exist, was held by Fox J to go beyond s 122 and was hence invalid.[43] The sorts of matters considered by Fox J to be relevant in determining whether such a connection did exist were the subject of the dispute and the persons or property in relation to which jurisdiction is to be exercised.[44]

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40 (1958) 98 CLR 310 at 323 quoting A Dicey, *The Conflict of Laws* (6th ed 1949) at 172.

41 (1972) 20 FLR 318.

42 See, for example, *Traut v Rogers* (1984) 27 NTR 29.

43 It is not clear why Fox J held O 12 r 1 invalid rather than simply confining the power to make rules in s 28(2)(b) of the Australian Capital Territory Supreme Court Act 1933 (Cth) to those matters where a territorial nexus was demonstrated as would appear to have been required by the Acts Interpretation Act 1901(Cth), s 15A.

44 (1972) 20 FLR 318 at 327. As to the position where the Commonwealth is sued in the Territory pursuant to s 56 of the Judiciary Act 1903 (Cth) see *Coe v Queensland Mines* (1974) 5 ACTR 53.

However, the Service and Execution of Process Act 1992 (Cth) provides authority for the service of process throughout the Commonwealth. The Act provides for service of process issued by a court of one State (which is defined so as to include the ACT) in another State.[45] Such service is deemed to be service within the jurisdiction of the issuing court[46] and the Act overrides any State law relating to the locality in which process may be served.[47] In contrast to the Service and Execution of Process Act 1901 (Cth) there is no requirement to obtain the leave of the Court to proceed with the action if the defendant does not appear[48] and hence no requirement for a nexus with the issuing jurisdiction. This law is based on s 51(xxiv) of the Constitution which provides for the making of laws with respect to "The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States". It is clear that both the words "process" and "judgments" are qualified by being those "of the courts of the States". In *Lamshed v Lake*[49] Dixon CJ said:

> I am disposed to think that the provisions of the Service and Execution of Process Act 1901-50 relating to the process of the territories must be justified under s 122. At all events s 51(xxiv) does not extend to the service in the States of process issuing from the Territories.

Thus, even on the assumption that the internal Territories form part of "the Commonwealth" this provision provides only for the service and execution of the process of the courts of the States and not for the service of process of the courts of the Territories. The power extends to authorising the service of process of State courts within the ACT but does not extend to authorising the service of process of ACT courts within the States. If authority is to be found for such service it must be in s 122 which, as illustrated in *Cotter v Workman*, has territorial limitations.[50]

These limitations are not avoided through the operation of the cross-vesting scheme created by the Jurisdiction of Courts (Cross-Vesting) Act 1993 (ACT) and related legislation.[51] The scheme invests jurisdiction of State and Territory Supreme Courts in federal courts, of federal courts in State and Territory Supreme Courts and of State and Territory Supreme Courts in each other. It also provides for the transfer of proceedings commenced in one of those courts to another where the latter is the more appropriate forum.[52] It has been held that the existence of cross-vested jurisdiction only confers "subject matter" jurisdiction on the ACT Supreme Court. It does not avoid the need to rely upon the Service and Execution of Process Act to obtain "territorial jurisdiction" over persons outside the ACT.[53] Even if it purported to do so, it is hard to see how the jurisdiction of the ACT Supreme Court could avoid the significant nexus limitations imposed by the Constitution, s 122. Assuming that the States have power to invest

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45 Service and Execution of Process Act 1992 (Cth), s 15.
46 Ibid, s 11.
47 Ibid, s 130.
48 Service and Execution of Process Act 1901 (Cth), s 11.
49 (1958) 99 CLR 132 at 145-146.
50 See also Australian Law Reform Commission, *Service and Execution of Process* (Report No 40, 1987) at 36.
51 Jurisdiction of Courts (Cross-Vesting) Act 1987 of the Commonwealth, all States and the Northern Territory.
52 Jurisdiction of Courts (Cross-Vesting) Act 1993 (ACT), s 5 and equivalent provisions.
53 *David Syme & Co Ltd v Grey* (1992) 38 FCR 303 at 331-332 per Gummow J (Neaves J agreeing at 310). Higgins J to the contrary at 348.

their jurisdiction in the ACT Supreme Court, the exercise of that jurisdiction requires that there be a relevant nexus with the Territory. One argument put in *Gould v Brown*[54] in relation to the Corporations Law cross-vesting scheme was that the reciprocal investiture of jurisdiction under the scheme created a benefit for the Territory, namely a uniform corporations law enforceable throughout Australia. The existence of this benefit provided sufficient nexus to allow support for the scheme under s 122. As a constitutional proposition this must mean that a law that provides, even indirectly, benefits to a territory is a law for the government of the territory. None of the judges dealt with this argument in their reasons although, if it were accepted, it would considerably expand the scope not only of the judicial power of the ACT but of powers under s 122 generally.

However, even if the cross-vesting legislation was held to invest territorial jurisdiction in the ACT Supreme Court, the validity of that scheme remains under a cloud. The validity of that scheme which was, by a statutory majority, upheld in *Gould v Brown*,[55] has been challenged again in the more recent cross-vesting scheme cases.[56] With the change in the composition of the Court and a bench of seven judges hearing the case, there is the real prospect that the scheme will be held to be unconstitutional.

In summary, the position is that despite the operation of the Service and Execution of Process Act 1992 (Cth) and the cross-vesting scheme, the jurisdiction of the Supreme Court is limited territorially by the scope of s 122 to those proceedings which have a sufficient connection with the ACT to be within that power.[57]

Separation of powers

The orthodox position is that the judicial power of the ACT is not the judicial power of the Commonwealth, or at least not subject to the same restraints as the judicial power of the Commonwealth. As pointed out above, that position is under challenge. However, as the authorities stand the starting point must be that there is no separation of powers arising from the Commonwealth Constitution that applies to Territory courts.

Following the transfer of the Magistrates and Supreme Court to the Territory in 1990 and 1992, respectively, and the removal of Chapter VI from the Self-Government Act in 1994, the Self-Government Act now contains in its structure a division between legislative, executive and judicial power in Parts IV, V and VA, respectively. However, it is clear that despite this structure there is no strict separation of powers in the ACT as there is at the Commonwealth level. There are a number of reasons for this.

(1) There is no express vesting of legislative, executive and judicial power in the different branches of government in the Self-Government Act as there is in ss 1, 61 and 71 of the Commonwealth Constitution. In particular the provisions of the Self-Government Act do not vest judicial power in Territory courts. Instead s 48A is merely a statement of the jurisdiction of the Supreme Court. In a draft of the Bill which became the ACT Supreme Court (Transfer) Act 1992 (Cth), there was a vesting of the judicial power of the Territory in the Supreme Court and such other courts as were created by

54 *Gould v Brown*, Transcript of Argument, 9 April 1997 at 166.
55 (1998) 151 ALR 395.
56 Above n 36.
57 For this reason the concerns about forum shopping expressed by Master Hogan in *Kontis v Barlin* (1993) 115 ACTR 11 at 18 seem to be unfounded.

the Legislative Assembly.[58] The fact that the Bill was changed from the vesting of judicial power to simply stating a jurisdiction is consistent with the intention not to provide a strict separation of powers.

(2) There is no antecedent law that would suggest the vesting of judicial power in Territory courts. In *Liyanage v R*,[59] a strict separation of judicial from legislative and executive power was found despite the fact that there was no express vesting of judicial power in the courts in the Ceylon Constitution. That was because there was a prior vesting of judicial power exclusively in the courts by the Charter of Justice of 1833. That vesting was not affected by the enactment of the Constitution, with the additional provisions of the Constitution relating to appointment and tenure of judges only reinforcing the independence created by the vesting of judicial power.[60] In the ACT there was no equivalent vesting of judicial power prior to the enactment of either the Self-Government Act or Part VA. The jurisdictions of the High Court, the inferior courts of New South Wales, the Court of Petty Sessions and the Supreme Court of the Australian Capital Territory have all resulted from legislative statements of jurisdiction rather than vesting of judicial power.[61] Even if, for the purpose of ascertaining the position of the High Court (between 1911 and 1933) and the Supreme Court of the Australian Capital Territory (between 1933 and 1992) when it exercised the same jurisdiction as the New South Wales Supreme Court, one traces the jurisdiction of the Supreme Court back to the Third Charter of Justice there is no vesting of judicial power to be found there, only a statement of jurisdiction.[62]

(3) Finally, courts of the ACT have for many years exercised non-judicial power, the most obvious example of which is the power of the Supreme Court to vary lease purpose clauses under the City Area Leases Ordinance 1936 (ACT).[63] Hence a very strong case would need to be made if this situation were to be altered by implication. In the absence of express words it should be presumed that the scope of the jurisdiction of the Supreme Court was not narrowed in this manner.

The assumed absence of a separation of powers has been acted upon by the ACT legislature which has invested judicial powers in quasi-judicial bodies such as the Tenancy Tribunal,[64] Residential Tenancies Tribunal[65] and the Discrimination

58 See J Miles, above n 15 at 16.

59 [1967] 1 AC 259.

60 Ibid at 286-289.

61 Seat of Government Acceptance Act 1909 (Cth), s 8; Seat of Government (Administration) Act 1910 (Cth), s 11; Court of Petty Sessions Ordinance (No 2) 1930 (ACT), ss 19-20; Seat of Government Supreme Court Act 1933 (Cth), s 11.

62 *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 400-401 per Kirby P and at 411 per Mahoney JA. Cf at 419 per Priestley JA. See R Else-Mitchell and JM Bennett, "The Charter of Justice of New South Wales—Its Significance in 1974" (1974) 48 *ALJ* 262 at 264.

63 The City Area Leases Ordinance 1936 (ACT) conferred power on the Supreme Court to determine, upon application by a lessee, whether a lease purpose clause could be varied. This non-judicial function has been performed by the Supreme Court since 1936 and, in relation to areas of National Land in the ACT, still exists: see National Land Ordinance 1989, s 5(1).

64 Tenancy Tribunal Act 1994 (ACT).

65 Residential Tenancies Act 1997 (ACT).

Tribunal.[66] Obviously, if there were a strict separation of powers in the Territory, such bodies would be held to be unconstitutionally exercising judicial power.

However, even if there is no strict separation of judicial power in the ACT, that does not mean that there are no implications to be drawn from the existence of Chapter VA in the Self-Government Act. For example Chapter VA implies that there is and will continue to be a Supreme Court.[67] Thus the Supreme Court is protected from abolition by the Assembly although there is no reason why its jurisdiction might not be vested concurrently in other bodies.[68]

Limits arising from the relationship to federal jurisdiction

Because the courts of the ACT are not federal courts they are not subject to the limitations that arise from Chapter III of the Constitution that would prevent them from being invested with non-judicial functions. However, not only are they not federal courts but they are not courts exercising federal jurisdiction within the meaning of ss 71, 73 or 77 of the Constitution. As a result, the reasoning of the majority of the High Court in *Kable v Director of Public Prosecutions*[69] cannot apply to the courts of the Territory. Thus there is no limitation resulting from Chapter III of the Constitution that would prevent ACT courts from being invested with jurisdiction that would detract from their independence or perceived independence from the legislature or executive.

However, judges of the Supreme Court of the ACT have, until recently, always held concurrent commissions as judges of federal courts. In the Seat of Government Supreme Court Act 1933 (Cth), s 8(2) it was mandated that a judge of the Supreme Court be a Judge of the Federal Court of Bankruptcy or a Judge of the Commonwealth Court of Conciliation and Arbitration. Since then the practice of granting concurrent commissions has continued despite the increase in the size and workload of the Court. Because of this, despite the fact that ACT judicial power is separate from the judicial power of the Commonwealth outlined in Chapter III of the Constitution, the judiciary has been effectively a federal one. The only judge not appointed to the federal judiciary is Justice Crispin (appointed in 1997) who is the first resident judge to be appointed after the transfer of the Court to the ACT in 1992. Whatever the position in relation to the fourth resident judge, the fact that three resident judges and all the additional judges of the Court retain federal judicial commissions has implications for the powers that may be invested in the Supreme Court.

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[70] a constitutional doctrine of incompatibility in relation to federal judges was articulated. The doctrine has the effect of limiting legislative or executive action which is inconsistent with the independence of federal judges mandated by Chapter III of the Constitution. This prevents the investiture in persons holding federal judicial commissions of powers incompatible with that independence whether the federal commission was granted before or after the inconsistent commission.[71]

66 Discrimination Act 1991 (ACT).
67 Compare J Miles, above n 15 at 16.
68 See Self-Government Act, s 48A(3).
69 (1996) 189 CLR 51.
70 (1996) 189 CLR 1.
71 Ibid at 16.

The test set out in *Wilson* requires answers to three questions:[72]

(1) Is the function an integral part of, or closely connected with, the functions of the legislature or executive government?

(2) Is the function required to be performed independently of any instruction, advice or wish of the legislature or executive government, other than a law or an instrument made under a law?

(3) If the function is to be performed independently, is any discretion required to be exercised on political grounds, that is, on grounds not confined by factors expressly or impliedly prescribed by law?

Incompatibility will exist where either (1) and (2) or (1) and (3) are satisfied. In *Wilson* the doctrine was held to preclude the appointment of a federal judge to prepare a report for the Minister under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), s 10(1)(c). In *Grollo v Palmer*,[73] an earlier case which upheld the validity of Federal Court judges issuing telecommunications interception warrants as *persona designata*, the majority decision can be rationalised on the basis that, although question (1) would have been affirmatively answered, both questions (2) and (3) would have been answered in the negative.

Because of the coincidence of judges holding both Federal Court and Supreme Court commissions, there are a number of ways in which the application of the doctrine in *Wilson* could affect the power of the Supreme Court. In each case the application of the *Wilson* doctrine arises because the commission as a judge of the Federal Court might be inconsistent with the concurrent holding of a commission as a Supreme Court judge. First, it might provide a limit on the powers that can be invested in the Supreme Court. Secondly, it might provide a limit on the matters in which the jurisdiction of the Court may be exercised by the judges of the Court who also hold Federal Court commissions. Thirdly, it might invalidate the commissions of judges of the Supreme Court where they also receive commissions as judges of the Federal Court. Finally, it might provide a limit on the power of the legislature or executive to invest those Supreme Court judges who hold Federal Court commissions with functions as *persona designata*. Given the gravity of these possible effects it is worth examining each to see whether it could arise and, if so, in what circumstances.

The first two possible limits on power are related and raise the issue whether the holding of federal commissions by a large number of the judges renders an investiture of incompatible functions in the Supreme Court invalid or whether it simply renders the exercise of that jurisdiction by a judge with a federal commission invalid. The latter position would appear to be correct because the judges of the Court and the Court itself are not one and the same. A judge merely exercises the jurisdiction of the Court and even if that jurisdiction cannot be validly exercised by one judge it may still be able to be exercised by another. There is no necessary connection between the holding of a commission as a judge of the Supreme Court and holding a commission as a judge of the Federal Court. Resident judges need not hold federal commissions and additional judges need not be drawn from the federal judiciary.[74] If all such judges did

72 Ibid at 17.

73 (1995) 184 CLR 348.

74 The Supreme Court Act 1933 (ACT), s 4(3) provides that additional judges must be judges of a superior court of record of the Commonwealth, a State or another Territory.

hold federal commissions, the jurisdiction of the Court could still be exercised by the Master and acting Judges if necessary. Thus, subject to the qualification outlined below, there is no reason why jurisdiction could not be invested in the Supreme Court that was incompatible with the exercise of federal judicial power in the sense discussed in *Wilson*. The effect of the *Wilson* doctrine would not be to invalidate the investiture of *jurisdiction* in the Court but to invalidate the *exercise* of that jurisdiction in particular circumstances. If the types of matters in which such inconsistency would arise were identifiable then the problem could be avoided by arrangements made by the Chief Justice pursuant to the Supreme Court Act, s 7 for the assignment of the business of the Court.

The qualification mentioned above relates to the third possibility, that of inconsistent jurisdiction in the Supreme Court invalidating a commission as a judge of the Supreme Court. This possibility might arise in two ways. First, it arises if one considers that in order validly to accept a commission, or continue to hold a commission, a judge must have the constitutional capacity to exercise all aspects of the Court's jurisdiction. Despite the general obligation on judicial officers to perform all the duties of the office, the obligations of such officers are not so rigid as to require, as a condition of the validity of the commission, the capacity to exercise every aspect of jurisdiction. Thus so long as most of the jurisdiction of the Supreme Court remains consistent with the holding of a federal judicial commission, the Supreme Court commission will not be affected by the existence of incompatible jurisdiction. Secondly, invalidity might occur if the mere holding of a commission in the Supreme Court, rather than the exercise of jurisdiction, compromised the public confidence in the federal judiciary. Such a situation could only arise in the most extreme circumstances and goes far beyond the types of incompatible functions in contemplation in *Wilson*. For this reason it is likely that other constraints on the power of the ACT to invest such jurisdiction, such as intervention by the Commonwealth legislature or executive, would operate before a court was required to determine the validity of a Supreme Court commission on this basis.

The fourth limitation is the same as that which was examined in *Wilson*, namely the power to use persons holding federal commissions as *persona designata* to perform non-judicial functions. In its application to the judges of the Supreme Court, it means that this limitation also applies to legislative and executive action of the ACT government as well as the Commonwealth government.

CONCLUSION

ACT judicial power is the element of self-government which is most uncertain. Not only is there the real prospect that the High Court will revisit the relationship between Chapter III and s 122 of the Constitution but there remains uncertainty, following the decision in *Gould v Brown* and the renewed challenges to the scheme, over the success of the cross-vesting scheme in relation to the ACT. Add to this the relatively little explored territorial limits on the jurisdiction of the Supreme Court and limits possibly arising from the unique relationship between the judicial power invested in the Supreme Court and the judicial power of the Commonwealth and it is clear that there is plenty of scope for uncertainty.

Because much of the uncertainty is constitutional in nature, there is little that can be done within the present framework of self-government to avoid it. Nevertheless,

recognition of the present constitutional position would give the Legislative Assembly good grounds to proceed cautiously with further tribunalisation of judicial proceedings or the further investiture of non-judicial powers in the Supreme Court.