DISPUTED RETURNS AND PARLIAMENTARY QUALIFICATIONS: IS THE HIGH COURT'S JURISDICTION CONSTITUTIONAL?

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The High Court's power to determine disputed election returns and parliamentary qualifications under the *Electoral Act* 1918 (Cth) potentially conflicts with the separation of powers doctrine in the *Constitution*. It is argued that the power to determine disputed returns and election qualifications is a valid judicial power that can be exercised by the High Court. An implication of this contention is that the exercise of the disputed returns and election qualifications jurisdiction by State Supreme Courts ought to be subject to appellate review by the High Court.

I. INTRODUCTION

The High Court has, for many years and generally without challenge, sat as the Court of Disputed Returns with respect to Commonwealth elections and the qualification of persons to sit in Parliament.[1] However, there are authorities that suggest that the power to determine disputed elections and qualifications is one that is non-judicial in nature.[2] If this is indeed the case, the separation of powers would suggest such a function cannot be exercised by the High Court or any other federal court. This article examines the question whether the vesting in the High Court of Australia of the power to determine disputed returns and parliamentary qualifications by the *Electoral Act* 1918 (Cth) (*Commonwealth Electoral Act*) is contrary to the separation of powers between the executive, legislature and judiciary contained in the *Constitution*. This question was raised

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1 See, for example, *Snowden v Dondas [No 2]* (1996) 70 ALJR 908; *Free v Kelly* (1996) 70 ALJR 809; *Sykes v Cleary [No 2]* (1992) 176 CLR 77; *In Re Wood* (1988) 167 CLR 145, *In Re Webster* (1975) 132 CLR 270, *Kane v McClelland* (1962) 111 CLR 518; *Crouch v Ozanne* (1910) 12 CLR 539, *Cameron v Fysh* (1904) 1 CLR 314.

2 See *Holmes v Angwin* (1906) 4 CLR 297; *Webb v Hanlon* (1939) 61 CLR 313, discussed *infra*.

in *Re Brennan; Ex parte Muldowney*,[3] where Mason CJ described it as "interesting and important", but found it unnecessary to resolve.[4]

II. THE EXISTING CASE-LAW ON DISPUTED ELECTIONS

It is worth beginning with a discussion of the cases that suggest that the power to determine disputed elections is a non-judicial power: *Holmes v Angwin*[5] and *Webb v Hanlon*.[6] *Holmes* concerned the question whether a decision of a State Supreme Court judge, sitting as the Court of Disputed Returns in relation to a State election, was subject to an appeal to the High Court under s 73 of the *Constitution*. The Court held that no appeal lay because, in exercising its power in relation to disputed elections, the judge was not the "Supreme Court" within the meaning of s 73.

The *Electoral Act* 1904 (WA) conferred the power to determine disputed elections upon the Supreme Court of Western Australia. That Act relevantly provided:

> 159 The validity of any election or return may be disputed by petition addressed to the Supreme Court, and not otherwise, and the Supreme Court shall have jurisdiction to hear and determine the same.
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> 163 The Court shall be constituted by a Judge sitting in open Court ...
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> 165 The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities.

The powers conferred on the Court by the Act included a power to declare a person returned as elected not duly elected[7] and a power to declare an election void.[8] Section 171 provided for effect to be given to the Court's decision. A decision of the Court was to be final and not subject to appeal.[9]

Griffith CJ took the view that the Act, rather than reposing the power to determine disputed elections in the Supreme Court of Western Australia, created a new tribunal, consisting of a judge of the Court as *persona designata*, "to whose arbitrament the necessary questions of fact are to be referred for the assistance of the House of Parliament".[10] He noted that the power was "a matter very different from the kind of matters which the Supreme Courts of this and other States were primarily constituted to deal with".[11] Barton J stressed the legislative nature of the power, observing that the power to enforce a decision of the judge remained with the House concerned.[12] In his view:

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3 (1993) 116 ALR 619.
4 *Ibid* at 622.
5 Note 2 *supra*.
6 Note 2 *supra*. The majority in this case following *Holmes*
7 Section 163(1).
8 Section 163(3).
9 Section 167.
10 Note 2 *supra* at 306-7.
11 *Ibid* at 305.
12 *Ibid* at 308. As to enforcement, see also at 306, per Griffith CJ; and at 311, per Higgins J.

> [T]he character of the jurisdiction which has been exercised by Parliaments as to election petitions is purely incidental to the legislative power; it has nothing to do with the ordinary determination of the rights of parties who are litigants. It is that domestic jurisdiction which in this State has been transferred first to the Court of Disputed Returns, afterwards to the Supreme Court, but in the latter case with the retention of provisions which of themselves show that the character of the tribunal and the method of procedure did not characterise the ordinary tribunals of justice.

Both Griffith CJ and Barton J also noted the fact that the power was to be exercised according to conscience rather than law,[13] another indication that the power was non-judicial in nature. Of course, at the State level the fact that the power was non-judicial would not necessarily have required that the power be conferred upon judges as designated persons, rather than on a Court, as there is no absolute barrier to the State Parliament conferring non-judicial functions on the State Supreme Court.[14]

Webb also concerned the nature of the power to determine disputed returns, but in the context of whether an appeal lay from the decision of the Full Court of the Supreme Court of Queensland, which had an appellate jurisdiction over disputed returns. The question was whether an exercise of that appellate jurisdiction was subject to an appeal to the High Court under s 73. A number of judges decided the case on procedural grounds,[15] but a number of judges also made comments concerning the nature of the power of the Election Tribunal to determine disputed returns. The legislation in question, the *Elections Act* 1915 (Qld), was framed in somewhat different terms from that in issue in *Holmes*:

> 101 (1) *Constitution of Elections Tribunal*
> There shall be an Elections Tribunal, which shall be constituted by a Judge of the Supreme Court. The Elections Tribunal shall be a Court of Record.
>
> (2) *General Powers of Tribunal*
> Such Tribunal shall have power to inquire into and determine-
> (a) Election petitions; and
> (b) All questions which may be referred to it by the Assembly respecting the validity of any election or return of any member to serve in the Assembly ...; and
> (c) Concerning the qualification or disqualification of any person who has been returned as a member of the Assembly.
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> ...
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> (4) *Power of Judge*
> Subject to this Act, on the trial of an election petition or reference the Judge shall have all the powers, jurisdiction, and authority of a Judge of the Supreme Court of Queensland.

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13 Section 165; see *ibid* at 306, per Griffith CJ, at 309, per Barton J

14 See *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814; *McCawley v R* (1920) 28 CLR 106

15 Namely that there was no appeal as of right because the decision was interlocutory or because the decision did not concern a right of sufficient value. see *Webb* note 2 *supra* at 322, per Rich J; at 325, per Dixon J, at 332, per Evatt J. These judges also thought that it would be inappropriate or even impermissible to grant special leave to appeal The reasons for this are connected to the nature of the disputed returns jurisdiction and will be dealt with *infra*

> 102 *Chief Justice to notify name of Elections Judge to Speaker annually*
> In or about the month of January in each year the Chief Justice shall notify to the Speaker the name of one of the Judges of the Supreme Court at Brisbane who will be the Judge to preside at sittings of the Elections Tribunal for that year.
>
> It shall be the duty of the Judge so named to hear and determine election petitions and other questions referred to the Tribunal during that year.
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> ...
>
> 111 *Principles of trial*
> Upon the trial of an election petition or reference the Tribunal shall be guided by the real justice and good conscience of the case, without regard to legal forms and solemnities, and shall direct itself by the best evidence it can procure, or which is laid before it, whether the same is such evidence as the law would require or admit in other cases or not.

Further sections provided for the carrying out of the report of the Tribunal by the Assembly[16] and for an appeal to the Full Court on a question of law.[17] In some instances, a special case could be stated by the Tribunal to be heard by the Full Court.[18]

A majority of the High Court followed the decision in *Holmes* and held that a decision of a Supreme Court judge sitting as the Election Tribunal was not a judgment or order of a Supreme Court within s 73 of the *Constitution*.[19] And a majority agreed, again following *Holmes*, that the power was non-judicial in nature and was conferred upon the Judge who constitutes the Election Tribunal as *persona designata*.[20] Starke J stated that:

> The whole inquiry, whether before the Elections Tribunal or the Full Court is an inquiry merely incidental to, and for the purposes of determining the right of some person to sit in Parliament: see *Holmes v Angwin.*
>
> The provisions are all part of the electoral machinery and have nothing to do with the ordinary rights of parties who are litigants... They give jurisdiction to an independent and impartial tribunal to determine questions once determined by the legislature itself. And *Holmes v Angwin* is ... decisive that the legislature can designate its courts or judiciary for this special purpose without involving the consequence that its determinations are subject to the review of this court. It would be surprising if such determinations came under the review of this court, for rights and privileges of the kind in question here have been jealously "maintained and guarded" and regarded as pertaining to the legislative body or its substitute.[21]

Evatt J, in contrast to pronouncements of the function as legislative, described the nature of an election tribunal as administrative, rather than judicial.[22]

A majority of the Court indicated that an appeal may lie from a decision of the Full Court of the Supreme Court acting in its appellate capacity under s 21 of the Queensland legislation, as in such a case it was the Supreme Court that was

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16 Section 123
17 Section 118.
18 Section 119.
19 *Webb* note 2 *supra* at 319, per Latham CJ, at 323, per Starke J, at 327-8, per Dixon J; at 330, per Evatt J; at 334-5, per McTiernan J
20 *Ibid* at 322-3, per Rich J, at 324, per Starke J; at 328, per Dixon J; at 330, per Evatt J.
21 *Ibid* at 324 (footnotes omitted).
22 *Ibid* at 330.

acting, in contrast to the decisions of the Elections Tribunal.[23] Three judges, however, refused special leave to appeal from the Full Court's decision, influenced at least in part by the special nature of the disputed returns jurisdiction.[24] Two judges considered the appeal incompetent and only Latham CJ would have granted special leave.

Before undertaking an analysis of the *Commonwealth Electoral Act* and the impact of *Holmes* and *Webb*, it is convenient to consider the way in which the separation of powers doctrine operates.

III. THE SEPARATION OF POWERS

The separation of powers has been analysed and explained in detail elsewhere[25] and no purpose is served by repeating those analyses here. It is well established that, under the second limb of the *Boilermakers'* principle, a Chapter III court cannot exercise non-judicial power unless the power is incidental to a judicial function.[26]

A consideration of whether the separation of powers doctrine has been violated in any given case necessitates in the first instance a consideration of the nature of the power in issue. The High Court has commented on more than one occasion that the phrase "judicial power" is insusceptible of comprehensive definition.[27] The most oft-quoted definition of judicial power is that proffered by Griffith CJ in *Huddart, Parker & Co v Moorehead*,[28] where his Honour commented that:

> ... the words "judicial power" as used in s 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects.
>
> The exercise of this power does not begin until some tribunal which has power to give a binding and determinative decision (whether subject to appeal or not) is called upon to take action.[29]

In subsequent cases, it has been stressed that the concept of judicial power must include the power to enforce any decision given.[30] It is clear, however, that there are powers not falling within Chief Justice Griffith's 'definition' which are

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23 *Ibid* at 319-20, per Latham CJ; at 322-3, per Rich J, at 328, per Dixon J; at 330-1, per Evatt J. *Cf* at 324, per Starke J, at 335, per McTiernan J

24 *Ibid* at 322-3, per Rich J, at 328, per Dixon J, at 333, per Evatt J.

25 See, for example, WA Wynes, *Legislative, Executive and Judicial Powers in Australia*, Law Book Co (5th ed, 1976), L Zines, *The High Court and the Constitution*, Butterworths (4th ed, 1996); J Crawford, *Australian Courts of Law*, Oxford University Press (3rd ed, 1993); P Hanks, *Constitutional Law in Australia*, Butterworths (2nd ed, 1996).

26 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296, per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See also *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 539.

27 *R v Davison* (1954) 90 CLR 353 at 366; *Love v Attorney General (NSW)* (1990) 169 CLR 307 at 319; *Harris v Caladine* (1991) 172 CLR 84 at 93, per Mason CJ and Deane J, at 122, per Dawson J, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 532, per Mason CJ; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373

28 (1909) 8 CLR 330

29 *Ibid* at 357

30 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176 See also *Rola Co v Commonwealth* (1944) 69 CLR 185 at 199, 203.

nonetheless considered to be judicial in nature.

There are a number of powers that cannot be described as essentially or peculiarly judicial, administrative or legislative and which can validly be reposed by Parliament in the judicature or in some other body.[31] In *Boilermakers'*, the majority stated that:

> Judicial power ... is not to be defined or limited in any narrow or pedantic manner ... [A]ttempts have been made in judgments of this Court to make it clear that a function which, considered independently, might seem of its own nature to belong to another division of power, yet, in the place it takes in connection with the judicature, falls within the judicial power or what is incidental to it ... There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any precept arising from Chap III. It may be too that the manner in which they have been traditionally treated or in which the legislature deals with them in the particular case will be decisive.[32]

And, in *Munro*, Isaacs J stated that:

> Some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another... Other matters may be subject to no *à priori* exclusive delineation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, *the determination of the validity of Parliamentary elections*, or claims to register trade marks would be instances of this class. [These] are capable of being viewed in different aspects, as incidental to legislation, or to administration, or to judicial action, according to circumstances.[33]

That is, while some powers are essentially judicial, legislative or executive, others are indeterminate in nature and may be conferred upon different branches from time to time, taking their nature from the body upon which they are conferred.

There are a number of factors that have been used to determine the nature of a particular power. A number of cases have recognised that the nature of the body on which a power is conferred is a significant factor in determining the nature of the power,[34] particularly where the power does not have a nature "essentially" judicial, legislative or executive.[35] The historical treatment of the function is often significant, although not determinative.[36] Other relevant, but not necessarily determinative, factors include: whether the body may exercise the

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31 *Boilermakers'* note 26 *supra* at 278; *Tasmanian Breweries* note 27 *supra* at 373, *R v Davison* note 27 *supra* at 368-70

32 Note 26 *supra* at 278 (references and footnotes omitted)

33 Note 30 *supra* at 178 (emphasis added). Justice Isaacs' judgment was affirmed by the Privy Council in *Shell Co Of Australia v Federal Commissioner of Taxation* [1931] AC 231 at 298 and cited with approval by Latham CJ in *Rola Co* note 30 *supra* at 200-1

34 See, for example, *Munro* note 30 *supra* at 177; *Love* note 27 *supra* at 320, *R v Joske* (1976) 135 CLR 194 at 216, per Mason and Murphy JJ; *Harris v Caladine* note 27 *supra* at 122.

35 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 567.

36 See, for example, *R v Hegarty: Ex parte The Corporation of the City of Salisbury* (1981) 147 CLR 617 at 627, per Mason J (Gibbs CJ, Stephen and Wilson JJ concurring), *Commos v Commos* (1972) 127 CLR 588 at 605, per Stephen J; 608, per Mason J; *Boilermakers'* note 26 *supra* at 278, per Dixon CJ, McTiernan, Fullagar and Kitto JJ The cases concerning the power of the defence forces to conduct courts martial are a particularly good indication of the importance history can play in the area of judicial power See, for example, *R v Cox. Ex parte Smith* (1945) 71 CLR 1 at 23, per Dixon J; *Re Tracey, Ex parte Ryan* (1989) 166 CLR 518

power of its own motion;[37] whether an adjudication between parties is involved;[38] whether the function involves the declaration of existing rights rather than the creation of new rights;[39] the purpose for which the power is to be exercised;[40] the nature of the discretion, if any, conferred upon the body;[41] and whether the body's decision is binding and enforceable.[42]

IV. THE NATURE OF THE POWER TO DETERMINE DISPUTED ELECTIONS

Historically in the UK, the power to determine disputed elections was reposed in the House to which the election pertained,[43] until legislation was passed in 1868 conferring jurisdiction on two judges of the Queen's Bench.[44] The jurisdiction to determine the validity of elections is considered to be a unique jurisdiction, because "it concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded in complete independence of the Crown".[45]

The historical position in Australia was the same: the power to determine disputed elections was exercised by the relevant House, rather than by the courts. However, at the State level, at varying times (as late as 1969 in South Australia), the power has been transferred from the legislature to the courts.[46]

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37 See, for example, *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 287, per Dixon CJ; *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 93-4, per Barwick CJ (Mason and Stephen JJ concurring); *Tasmanian Breweries* note 27 *supra* at 375, per Kitto J.

38 See, for example, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Tasmanian Breweries* note 27 *supra* at 374, per Kitto J, *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149, per Simonds LJ However, this is certainly not an essential feature of the judicial power and there are established exceptions to it, for example, the power to administer trusts or make orders relating to the guardianship of infants: see *R v Davison* note 26 *supra* at 368, per Dixon CJ and McTiernan J

39 See, for example, *Precision Data* (1991) 173 CLR 167 at 188-9, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463, per Isaacs and Rich JJ, *Tasmanian Breweries* note 27 *supra* at 374, per Kitto J, *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 663-4

40 See, for example, *Ranger Uranium* note 39 *supra* at 666; *Davison* note 27 *supra* at 370, per Dixon CJ and McTiernan J; *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 at 227, per Holmes J, L Zines, note 25 *supra*, p 175

41 *Spicer* note 37 *supra* at 290, per Dixon CJ, *Tasmanian Breweries* note 27 *supra* at 376-7, per Kitto J; *Precision Data* note 38 *supra* at 190; L Zines, note 25 *supra*, pp 192-6.

42 *Waterside Workers* note 39 *supra*, per Isaacs and Rich JJ; *Munro* note 30 *supra* at 175, per Isaacs J, at 202, per Higgins J; *Davison* note 27 *supra* at 368, per Dixon CJ and McTiernan J, L Zines note 25 *supra*, p 184

43 See May, *The Law, Privileges, Proceedings and Usage of Parliament*, (May's *Parliamentary Practice*), Butterworths (21st ed, 1989) p 36; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books (1976 reprint) p 96.

44 The *Parliamentary Elections Act* 1868 (UK).

45 *Strickland v Grima* [1930] AC 285 at 296. See also *Theberge v Laudry* [1876] 2 AC 102.

46 *Parliamentary Electorates and Elections (Amendment) Act* 1928 (NSW), ss 31-3; *Elections Act* 1915 (Qld), s 101, *Electoral Act Amendment Act* 1969 (SA), s 43; *Electoral Act* 1907 (Tas), s 165; *Electoral Act* 1934 (Vic), ss 5-6; *Electoral Act* 1899 (WA), ss 142-3. Queensland and South Australia initially

However, the historical treatment of the power does not require a conclusion that the conferral of such jurisdiction on the High Court violates the doctrine of separation of powers. While the power is clearly not essentially judicial, in that it has previously been exercised by the legislature, it may be a power indeterminate in nature and hence judicial when exercised by a court. Certainly Justice Isaacs' obiter comment in *Munro* suggests as much.

Section 47 of the *Constitution* leaves the power to determine election disputes and qualifications with the relevant House until the Parliament provides otherwise. Thus, it was clearly contemplated that this power need not be exercised by the legislature, if Parliament so decided. In fact, the Convention Debates reveal that it was contemplated that the power in relation to disputed elections be conferred upon the High Court by the *Constitution*.[47] Ultimately, the view that this matter should be left for the Parliament to determine prevailed, but the framers clearly considered that the conferral of the power on the federal courts was a possibility.[48] While the intentions of the framers are not determinative, they can be used in elucidating the meaning of the *Constitution*.[49] This view of the disputed returns jurisdiction is also reflected in the obiter comments of the High Court in 1907 in *R v Governor of the State of South Australia*.[50]

V. THE COMMONWEALTH LEGISLATIVE REGIME

Jurisdiction to determine disputed elections is conferred upon the High Court by the *Commonwealth Electoral Act*, enacted pursuant to s 47 of the *Constitution*.[51] The relevant sections of that Act provide:

> 354 (1) The High Court shall be the Court of Disputed Returns and shall have jurisdiction either to try the petition or to refer it for trial to the Supreme Court of the State or Territory in which the election was held or return made.
> ...

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transferred the power to a judge and four members of the legislature: *Elections Tribunal Act* 1886 (Qld), s 11; *Electoral Code* 1896 (SA), ss 171-3. These bodies were described as "courts", although they clearly breached current notions of separation of powers (such breach was, of course, quite permissible) The initial transfer of power in Victoria applied only to the Legislative Assembly, not the Council

47 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide (1897) pp 680-2, 1150.

48 See, for example, *ibid* at 682 Harrison Moore, a participant in the Conventions and a leading constitutional law scholar in the early days of the Federation, clearly considered the conferral of the jurisdiction on the High Court permissible: H Moore, *The Constitution of the Commonwealth of Australia*, Legal Books (1997 reprint) pp 136-7.

49 *Cole v Whitfield* (1991) 165 CLR 360 at 365

50 (1907) 4 CLR 1497 at 1513.

51 Section 47 provides that "Until Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises".
Initially, each House had a Committee of Elections and Qualifications, however legislation providing for a Court of Disputed Returns was enacted in 1902: see *Electoral Act* 1902 (Cth) For a history of the debate surrounding its passage, see GS Reid and M Forrest, *Australia's Commonwealth Parliament 1901-1988*, Melbourne University Press (1989) pp 106-9

(3) The jurisdiction of the High Court or of the Supreme Court of a State or Territory sitting as a Court of Disputed Returns, or in the exercise of powers conferred by this section, may be exercised by a single Justice or Judge.

364 The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

The Court is empowered to declare that any person who was returned as elected was not duly elected, to declare any candidate duly elected who was not returned as elected or to declare an election void.[52] Provision is made for effect to be given to such declarations.[53] Decisions of the Court of Disputed Returns are final and conclusive and not subject to appeal.[54]

Jurisdiction to determine the qualification of persons to sit in Parliament is conferred by s 376, which provides that:

376 Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

The Court has the same powers as it has for disputed returns and, in addition, may declare that a person was qualified to be Senator or Member of the House of Representatives, not capable of being chosen as a Senator or Member of the House of Representatives, or that there is a vacancy in either House.[55]

When analysing the regime established by the *Commonwealth Electoral Act*, it is necessary to deal separately with the power to determine disputed elections and the power to determine the qualification of a person to sit in Parliament, as the two are dealt with somewhat differently by the legislation.

A. The Power to Determine Disputed Returns

Although the power to determine the validity of parliamentary elections is an "extremely special"[56] and even "peculiar" jurisdiction,[57] it nonetheless has various hallmarks of the judicial power. The Court's power is invoked by a petitioner, not by the Court's own motion.[58] In this sense, it involves a dispute between parties, namely the petitioner (a voter or candidate for election) and the elected candidate.[59] The power is conferred upon the High Court *as a court*, rather than upon individual Justices.[60] The power is one to declare existing rights and to determine the validity of an election already held, not one to lay down rules of conduct to be observed in the future. Furthermore, the Court is given a

52 Section 360(v), (vi) and (vii).
53 Section 374.
54 Section 368
55 Section 379
56 *Strickland* note 45 *supra* at 296.
57 *Webb* note 6 *supra* at 333, per McTiernan J
58 Section 353
59 Section 355(c)
60 Section 354 (although the jurisdiction may be exercised by a single Justice s 354(3)) The possibility that the power is conferred upon the Justices of the High Court as designated persons is considered in Part VI, *infra*.

number of powers generally associated with the judicial function,[61] such as the power to compel attendance of witnesses and production of documents, to examine witnesses on oath, to award costs and to punish contempt of its authority.[62] In particular, the Court is given power to declare that any candidate returned as elected was not duly elected,[63] to declare any candidate duly elected who was not returned as elected,[64] or to declare any election void,[65] and the Court's determination is to be final and conclusive.[66] And, finally, the power is one that has been exercised by the courts since last century.

There are, however, a number of features of the legislative regime that suggest that the power is non-judicial. First, the Court has no power of enforcement under the Act. According to *Holmes*, the power of enforcement remains with the legislature, and this was considered significant.[67] In response to this, however, two answers may be given. The first is the fact that a court makes only a declaration does not mean that the court is not exercising judicial power within the meaning of that phrase in s 71.[68] The second is that s 374 provides that:

> 374 Effect shall be given to any decision of the Court as follows:
>
> (i) If any person returned is declared not to have been duly elected, the person shall cease to be a Senator or Member of the House of Representatives;
>
> (ii) If any person not returned is declared to have been duly elected, the person may take his or her seat accordingly;
>
> (iii) If any election is declared absolutely void a new election shall be held.

This indicates that the Court's decision is to be carried out - indeed, Harrison Moore described the decision as "self-executing".[69] Further, in *In re Wood,*[70] Mason CJ held that a "necessary incident" of the Court's declaratory power was the power to:

> give appropriate directions with respect to the counting or recounting of ballot papers at an election ...[to] facilitate the exercise of the power conferred by s 360 (1) (vi) and [to] enable the vacancy to be filled as soon as possible.[71]

Thus there is arguably an implied power of enforcement in the Act.[72] Enid Campbell suggests that mandamus would lie to the Speaker of the relevant House in relation to any action the House might choose to take concerning a person

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61 See *Waterside Workers* note 39 *supra* at 442, 457

62 Section 360(1)(ii), (iv), (ix), (x).

63 Section 360(1)(v).

64 Section 360(1)(vi).

65 Section 360(1)(vii).

66 Section 368

67 Note 12 *supra*, and accompanying text.

68 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2, 596-7.

69 H Moore, note 48 *supra*, p 136

70 (1988) 167 CLR 145

71 *Ibid* at 172.

72 Although such a power would not extend to mandamus to compel a State Governor, charged with the duty of issuing a writ for the election of Senators for that State, to issue a writ, as he or she is not an "officer of the Commonwealth" within the meaning of s 75(v). *R v Governor of the State of South Australia* note 50 *supra* at 1511, 1513. A further ground for denying mandamus was that such a writ "will not lie to the Governor of a State to compel him [sic] to do an act in his capacity as Governor": *ibid* at 1512.

whose election was contested, that an injunction would lie against a person declared by the Court not duly elected, and that an injunction would lie to restrain the holding of an election if the Court had determined that the election challenged was not void.[73]

The second feature of the regime that might suggest a non-judicial power is the requirement that the Court decide disputed returns according to "good conscience" rather than law. Again, this was considered significant in *Holmes*.[74] In the middle of this century, the High Court held that an unfettered discretion which is to be exercised in the absence of objective criteria is non-judicial and inappropriate for conferral upon a Chapter III Court.[75] However, no conferral of power on a court has been invalidated on this ground since 1957, and the High Court has held that a discretion to do what is "just and equitable" does not render the power non-judicial.[76] Indeed, a power to decide according to conscience is arguably analogous to the function performed by courts of equity. Furthermore, the fact that a power is to be exercised without regard for the rules of evidence and procedure does not necessarily mean that the power is non-judicial.[77]

The third feature of the *Commonwealth Electoral Act* that suggests that the power is non-judicial is the requirement in s 363 that, "when the Court of Disputed Returns finds that any person has committed an illegal practice", this is to be reported to the Minister by the Chief Executive and Principal Registrar of the High Court. This looks suspiciously like the involvement of the Court in the process of criminal investigation and the decision whether to charge a person with an offence, two functions that are essentially non-judicial in nature[78] and cannot be conferred upon a Chapter III court. Moreover, the High Court has recently held that the function of reporting to a Minister for the purpose of the executive decision-making process in a quasi-advisory capacity is incompatible with the judicial process and cannot be exercised by a federal judge as *persona designata*.[79] Thus to the extent that s 363 involves a similar function, it cannot be

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73 E Campbell, *Parliamentary Privilege in Australia*. Melbourne University Press (1965) pp 106-7.

74 Note 13 *supra*, and accompanying text

75 *Spicer* note 37 *supra*; *R v Spicer, Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312.

76 *Cominos* note 36 *supra* at 594, per Walsh J, at 603, per Stephen J; *Talga Ltd v MBC International Ltd* (1976) 133 CLR 622 at 635, per Stephen, Mason and Jacobs JJ, *Harris v Caladine* note 34 *supra* at 133, per Toohey J Indeed, in *The British Imperial Oil Co Ltd v The Federal Commissioner of Taxation* (1925) 35 CLR 422, the Privy Council held that the fact that a Taxation Board of Appeal was to be "guided by good conscience and the facts of the case" did not mean that it was exercising non-judicial power

77 *Peacock v Newtown Marrickville & General Co-operative Building Society Ltd (No 4)* (1943) 67 CLR 25 at 35-6, per Latham CJ (McTiernan J concurring), *The Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson* (1924) 34 CLR 482 at 554, per Starke J But *cf Webb* note 2 *supra* at 330, per Evatt J.

78 As to the nature of the process of criminal investigation, see *Grollo v Palmer* (1995) 69 ALJR 724 at 732, per Brennan CJ, Deane, Dawson and Toohey JJ. As to the nature of a decision to prosecute a person for an offence, see *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 39, per Brennan J; *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 119-20, per Latham CJ.

79 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743. Of course, it could be argued that the reporting function in *Wilson* was different from that in issue with respect to parliamentary qualifications, in that the former involves political issues, while the latter involves simply

validly reposed in the High Court. This particular feature of the regime seems more difficult to justify than the other features mentioned above, and it may be that this section is invalid. However, this would not render the entire jurisdiction invalid.

B. The Power to Determine Qualifications to Sit in Parliament

The power to determine a person's qualifications to sit in Parliament is not invoked by petition to the Court, as is the power to determine disputed returns. Rather, it is exercisable only where a question is referred to the Court by either the Senate or the House of Representatives. There is, in that sense, no dispute between parties, although the Court may allow interested persons to appear and be heard on the reference.[80] Like the power to determine disputed returns, the power on a reference is to be exercised according to "good conscience" and there is no power of enforcement expressly provided for in the Act.[81] The way in which the power is activated suggests that the conferral of the power upon the Court might well violate the separation of powers, at least in so far as it resembles an advisory opinion. It has been accepted since 1921 that Parliament may not confer an advisory jurisdiction upon a Chapter III court.[82] The question, then, is whether the reference jurisdiction is in substance an advisory jurisdiction. It could be argued that it is not, in that it does not deal with hypothetical matters, but concrete fact situations, which involve the determination of the rights and duties of individuals.[83] However, the function of answering a question referred by the legislature is one that seems more akin to providing advice, a non-judicial function, than to determining the rights and duties of parties in a binding manner, a judicial function. It has been stated that, where the purpose of a power is merely to make a non-binding recommendation to an administrative body, the power is non-judicial;[84] logically, the same reasoning should apply with respect to the provision of advice to a legislative body. However, the power may be saved by the fact that s 368 provides that all decisions of the Court of Disputed Returns are to be final and conclusive and that s 374 provides that effect is to be given to the Court's decisions. Campbell again suggests that the Court's decisions on qualifications are enforceable by way of the prerogative writs.[85] And, as noted above, the fact that the court makes only a declaration does not

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reporting a legal and factual conclusion. However, in my view, the reporting function in *Wilson* also involved questions of fact and law; and, further, the majority in *Wilson* placed considerable emphasis simply on the fact that the judge reported to the Minister (at 752)

80 Section 378.

81 See notes 67 and 74, *supra*, and accompanying text. See also notes 12 and 13, *supra*.

82 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, *North Ganalanja Aboriginal Corporation v Queensland* (1996) 70 ALJR 344 at 350, per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

83 See, for example, *In re Judiciary and Navigation Acts* note 82 *supra* at 267; *Ainsworth* note 68 *supra* at 582, per Mason CJ, Dawson, Toohey and Gaudron JJ.

84 *Victoria v The Australian Building and Construction Employees' & Builders' Labourers' Federation [No 2]* (1982) 152 CLR 179 at 183, per Gibbs CJ (Mason and Wilson JJ concurring); *R v Ludeke, Ex parte The Australian Building Construction Employees' & Builders' Labourers' Federation* (1985) 159 CLR 636 at 654, *R v MacFarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 527, per Knox CJ, at 537, per Isaacs J

85 E Campbell, note 73 *supra* p 108.

necessarily render the power non-judicial.[86] Nonetheless, there must be some doubt as to the constitutionality of the reference jurisdiction.

VI. *HOLMES* AND *WEBB* RECONSIDERED

To return, then, to *Holmes* and *Webb*. In my view, to the extent that those cases decide that the power to determine disputed elections and qualifications is a non-judicial power, they should be overruled. True it may be that, when being exercised by the legislature the power is legislative in nature or incidental to the legislative power. But that is not because the power to determine disputed elections is *essentially* legislative; rather, the power is one incapable of being designated *à priori* as legislative, executive or judicial, as Isaacs J indicated in *Munro*.[87] It is a power which may, pursuant to s 47 of the *Constitution*, be conferred upon the High Court without offending against Chapter III and the doctrine of separation of powers. *Holmes* itself has been the subject of judicial criticism,[88] and both cases are ripe for reconsideration.

If *Holmes* and *Webb* were overruled, this would have implications for the appellate jurisdiction of the High Court - that is, it would mean that an appeal would lie (with special leave) from a decision of a State Supreme Court on a question of disputed returns or parliamentary qualifications to the High Court under s 73 of the *Constitution*.[89] This is a potentially significant change. It would not be possible for the State Parliaments to exclude this avenue of appeal under s 73,[90] although it is, of course, permissible for a State Parliament to

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86 Note 68 *supra*.

87 (1926) 38 CLR 153 at 178 See also *R v The Governor of the State of South Australia* note 50 *supra* at 1513 for support for the argument that the disputed returns jurisdiction can be conferred upon the High Court

88 *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 97, per Dixon J, *Hilton v Wells* (1985) 157 CLR 57 at 80, per Mason and Deane JJ

89 It could possibly be argued that a State court of disputed returns, while a court exercising judicial power, is not the Supreme Court and hence no appeal lies. However, the effect of the various current legislative regimes, in my view, does not establish a separate court to deal with disputed returns, but rather confers the disputed returns jurisdiction on the existing Supreme Court, thus opening up the appeal avenue The wording of most of the State legislative regimes is to the effect that "[t]he Supreme Court shall be the Court of Disputed Returns" or similar wording, indicating that the power is conferred on the existing Supreme Courts as an additional jurisdiction. See *Parliamentary Electorates and Elections Act* 1912 (NSW), s 156; *Electoral Act* 1992 (Qld), s 127; *Electoral Act* 1985 (SA), s 103, *Constitution Act Amendment Act* 1958 (Vic), s 280 Such a construction of the legislation is supported by Harrison Moore's interpretation of the *Electoral Act* 1902 (Cth): note 48 *supra*, p 217; but *contra Ellis v Atkinson* (unreported, Supreme Court of Victoria, Vincent J, 3 July 1997 In the Tasmanian legislation, the position is even clearer, as the legislation provides simply that "[t]he Supreme Court shall have jurisdiction to hear and determine an election application". *Electoral Act* 1985 (Tas), s 215. The potential exception to this reasoning is Western Australia, which appears to constitute a Court of Disputed Returns separately from the Supreme Court although constituted by a single judge of the Supreme Court. *Electoral Act* 1907 (WA), s 157

90 Notably, most States have privative clauses in their disputed returns regimes. These would be ineffective to exclude s 73 appeals to the High Court. See *Parliamentary Electorates and Elections Act* 1912 (NSW), s 169; *Electoral Act* 1992 (Qld), s 141; *Electoral Act* 1985 (SA), s 108, *Constitution Act Amendment Act* 1958 (Vic), s 292; *Electoral Act* 1907 (WA), s 167 *Cf* Tasmania, where an appeal to

establish a new court or tribunal to hear and determine election petitions which would not be subject to a s 73 appeal. Furthermore, it would be possible for the Commonwealth Parliament to preclude appeals in such circumstances. Section 73 permits the Commonwealth to make exceptions to the Court's appellate jurisdiction so long as it does not exclude jurisdiction over appeals from State courts with respect to matters which, at the establishment of the *Constitution*, lay to the Queen-in-Council. As at 1900, the disputed returns jurisdiction lay with the Parliaments in New South Wales, Victoria and Tasmania and so no such appeal lay. Queensland and South Australia vested such jurisdiction in a mixed body and thus it is unlikely that an appeal lay to the Queen-in-Council.[91] Western Australia is the only exception to this pattern; in 1899 jurisdiction over disputed returns was vested in a Court of Disputed Returns constituted by two judges of the Supreme Court. However, it seems that no appeal lay to the Queen-in-Council, as the Privy Council itself had indicated that it would not accept appeals concerning electoral issues in *Theberge v Laudry*.[92] Thus, the proviso to the Commonwealth's power to exclude the High Court's appellate jurisdiction does not apply.

VII. *PERSONA DESIGNATA* AND THE *COMMONWEALTH ELECTORAL ACT*

One further possible argument remains to be addressed with respect to the *Commonwealth Electoral Act*. That is that the power to determine disputed returns is, contrary to my argument, non-judicial but is conferred upon the individual judges of the High Court as designated persons and so the legislation is saved from invalidity (that is, that we can apply the reasoning in *Holmes* to the Commonwealth legislation). However, the language of the Act leaves little room for this argument. Section 354 specifically confers the power on the Court, not on the judges, and the Court has accepted that where a power is conferred in terms upon a court there is a strong presumption that it is the court as an institution that is intended as the repository of the power, rather than the judges of the court as designated persons.[93] While such a presumption is rebuttable, other features of the legislative regime support the presumption. First, there is no opportunity for judges to consent or decline to accept the power, an issue that has come to be accepted as central to the validity of a *persona designata* regime.[94] And, second, the power may be exercised by the Full Court, a provision which would be incongruous, to say the least, if the regime intended to confer the power upon the judges as designated persons. To accept that the power was conferred

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the Full Court of the Supreme Court is provided for *Electoral Act* 1985 (Tas), s 228

91 If, however, it was considered that the mixed body was in substance a court, it remains unlikely that an appeal lay to the Queen-in-Council, for the reasons discussed with respect to Western Australia: see note 92 *infra* and accompanying text

92 [1876] 2 App Cas 102 at 107-8.

93 See, for example, *Hilton v Wells* note 88 *supra*; *Grollo v Palmer* note 78 *supra*.

94 *Ibid.*

upon all seven judges of the High Court, collectively, as designated persons would be a triumph of form over substance. Further support for rejecting the *persona designata* argument can be found in the writing of Harrison Moore, who considered that the *Commonwealth Electoral Act* conferred the power to determine disputed returns on the High Court as an additional jurisdiction, rather than on a separate tribunal.[95]

To the extent that *Holmes* and *Webb* suggest otherwise, it is my view that they are incorrect in light of the High Court's recent pronouncements on the *persona designata* doctrine.[96] Thus the *persona designata* argument must be rejected in so far as the *Commonwealth Electoral Act* is concerned.

VIII. CONCLUSION

Although the separation of powers has recently been revitalised by the High Court[97] and extended to the State courts to a limited extent by *Kable v Director of Public Prosecutions (NSW)*,[98] it is my view that it is unlikely that the Court would strike down its jurisdiction to hear disputed elections under the *Commonwealth Electoral Act*. The fact that the power to decide electoral disputes was exercised by the legislature in Britain until 1868 and that, under the *Constitution*, the power was to be exercised by the House in question until Parliament otherwise provided, is not sufficient to render the power essentially legislative and hence incapable of being conferred upon the High Court. There are a number of features of the power that indicate it is judicial in nature, and those features which might indicate a non-judicial power are not determinative of the issue. Indeed, the primary reason to doubt the validity of the jurisdiction is the existence of *Holmes* and *Webb*; however these cases should, in my view, be overruled. The better view is that the power to determine disputed elections is one of those powers of an indeterminate nature that may be exercised by either the judiciary or the legislature.

The power to determine qualifications to sit in Parliament, on the other hand, is in some doubt because it is exercised on the reference of a question from the relevant House, rather than on petition to the court. This power resembles the giving of advice to the legislature, a non-judicial function, but there are also arguments that it involves the determination and declaration of the rights and

95 H Moore, note 48 *supra* p 217

96 *Hilton v Wells* note 88 *supra*; *Grollo v Palmer* note 78 *supra*; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* note 79 *supra*.

97 See, for example, *Lim v Minister for Immigration* (1992) 176 CLR 1; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Wilson* note 79 *supra*. See also F Wheeler, "Original Intent and the Doctrine of the Separation of Powers in Australia" (1996) 7 *Public Law Review* 96.

98 *Kable* note 14 *supra*.

duties of individuals and so is within the scope of the judicial power when being exercised by a court.

Ultimately, it is my view that the power to determine disputed returns and parliamentary qualifications is one that is best exercised by a court so as to minimise the impact of party-politics on decisions concerning elections and qualifications.[99] Indeed, this is precisely why the power was initially removed from the legislature in the UK and in Australia.[100] The Convention Debates and the debate in Parliament on the *Electoral Act* 1902 (Cth) reveal a certain distrust of Parliament, at least in the realm of disputed returns,[101] although less so in the area of qualifications which have been more "jealously guarded".[102] No doubt this is the reason for the different treatment of the two powers. In any event, to the extent that the Debates reveal an intention that the federal courts be able to exercise jurisdiction over elections and qualifications, they provide further

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99 It might be noted, however, that there has been some criticism of at least one of the High Court's decisions in relation to disputed parliamentary qualifications. In 1975 Barwick CJ sat on a reference from the Senate concerning the parliamentary qualifications of Senator Webster, a Country Party Senator. Senator Webster's qualification to be chosen or to sit was challenged under s 44(v) of the *Constitution*, relating to pecuniary interests in agreements with the Public Service of the Commonwealth. The Chief Justice allocated the case to himself, notwithstanding that it was then his practice not to sit at first instance (see GJ Barwick, *A Radical Tory*, The Federation Press (1995) p 221). He declined to refer the matter to the Full Court as, in his view, it raised no "constitutional matters of great moment" (see D Marr, *Barwick*, George Allen & Unwin (1980) pp 280-1) - a startling conclusion Barwick CJ decided that Senator Webster was qualified to be chosen and to sit as a Senator. The reasoning employed in his decision involved a narrow and strained interpretation of s 44(v), which has subsequently been criticised: see, for example, G Evans, "Pecuniary Interests of Members of Parliament under the Australian Constitution" (1975) 49 *ALJ* 464 at 476-7, P Hanks, "Parliamentarians and the Electorate" in G Evans (ed), *Labour and the Constitution 1972-1975*, Heineman Educational Australia (1977) 166 at 195-8. Marr, in his biography of Barwick, described the decision as extraordinary and noted that Barwick's decision not to refer the matter to the Full Court was taken without consulting the other members of the bench *Barwick*, pp 280-1. The Joint Committee on Pecuniary Interests of Members of Parliament considered that, in light of Chief Justice Barwick's judgment, the ability of s 44(v) to prevent conflicts of interest was "illusory" *Declaration of Interests*, AGPS (1975) at 7 In my view, there is an appearance of bias where a Justice who was previously a Member of Parliament sits in judgment on the parliamentary qualifications of a member of the Justice's former party or a party in coalition with the Justice's former party Generally, however, appropriate judicial practice can avoid such problems Furthermore, party-political influence remains possible with respect to the parliamentary qualifications issue so long as the Court's jurisdiction can only be exercised on reference from the relevant house. This was illustrated quite dramatically in the recent Victorian case, *Ellis v Atkinson* (unreported, Supreme Court of Victoria, Vincent J, 3 July 1997). There, although serious allegations of disqualification were made against a sitting member of the government, those questions could not be dealt with by the Court of Disputed Return as there was no reference from the relevant House and the Court had no other jurisdiction to deal with the issue (even where there was a petition from a losing candidate for the member's seat)

100 See, for example, May's *Parliamentary Practice*, Butterworths (19th ed, 1976), p 32, which describes the practice of leaving election disputes with the parliament as "a notorious perversion of justice". See also *Convention Debates* Adelaide (1897) p 681, GS Reid and M Forrest, note 51 *supra*, p 106

101 See *Convention Debates*, Adelaide (1897) pp 681-2, where Barton referred to the Committee of a House of Parliament as a "fallacious tribunal", Quick and Garran, note 43 *supra*, p 496, GS Reid and M Forrest, note 51 *supra*, pp 106-10.

102 See *Convention Debates ibid*; Quick and Garran *ibid*

support for the conclusion that the power may properly be conferred upon the High Court.

Of course, if the power conferred upon the High Court is judicial in nature and therefore constitutional, it would suggest that *Holmes* and *Webb* are wrong. If that were the case, then it would be possible to pursue an appeal from a decision of a State Court of Disputed Returns to the High Court under s 73 notwithstanding any finality clause in the relevant legislative regime, as the State Parliaments cannot alter or remove the High Court's jurisdiction under s 73 of the *Constitution*. There seems to be no pressing reason why such a result should not be accepted, given the High Court's role at the apex of the Australian judicial system.[103] It would, however, disturb the current approach to appellate supervision of State elections.

What the foregoing discussion indicates is that, whichever way the question concerning the nature of the power is answered, there are ramifications for the present arrangements. Either the jurisdiction conferred upon the High Court is unconstitutional; or, more probably, the old authorities are incorrect and appeals will lie to the High Court from a State Supreme Court sitting as a Court of Disputed Returns, at least until the Commonwealth Parliament otherwise provides.

103 *Kable* note 14 *supra* at 845, per McHugh J.