Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter III of the Constitution?

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The purpose of this article is to assess the independence of stipendiary magistrates in the Northern Territory, an issue which was the subject of a recent decision of the High Court in North Australian Aboriginal Legal Aid Service v Bradley.[1] *This case raises very important questions about the construction of the Commonwealth Constitution, the strength and ambit of constitutional guarantees of the independence of the judiciary, and the status of courts in the Commonwealth's Territories. Does Chapter III of the Constitution prohibit undisclosed, short term, privately negotiated remuneration arrangements with judges who may exercise the judicial power of the Commonwealth?*

DOES Chapter III of the Constitution provide a guarantee of an independent and impartial judiciary? If so, does the Chapter III guarantee apply in the Territories? Does Chapter III prohibit short-term remuneration arrangements for Territory judges? Can such appointments be negotiated directly between candidates for judicial office and the executive government? Is there any constitutional obligation to disclose these arrangements to the public? After reviewing the decision in *NAALAS v Bradley* and the conclusions reached by the High Court in respect of the issues raised, I will consider some of the threats to judicial independence that may remain.

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† Associate Professor of Law, University of Technology, Sydney; junior counsel for the appellant in the case that is the subject of this article. I apologise for indulging the temptation of seeking to vindicate points in commentary lost in argument. I am very grateful to the anonymous referee who suggested many improvements to this paper. All errors and omissions are my own.

1. *NAALAS v Bradley* (2004) 260 ALR 315. The arguments developed in this paper reflect the broad thrust of the appellant's submissions as they were developed at different stages in the hearings of this case in the Federal Court, Full Federal Court and the High Court. These submissions were made by a team of lawyers including B Walker SC, S Gageler SC, M Maurice QC, D Buchanan SC, A Moses, M Jones, G James and the author.

I. THE FACTUAL BACKGROUND

Mr Hugh Bradley was appointed to the office of Chief Magistrate of the Northern Territory on the recommendation of the then Chief Minister and Attorney-General Mr Shane Stone QC in 1998. Mr Bradley's appointment followed the resignation of the previous Chief Magistrate, Mr Ian Gray CSM. It has been ventured that Mr Gray resigned in protest at the Northern Territory's introduction of 'mandatory sentencing' legislation.[2] Mr Gray actually resigned for personal reasons, though it is understood that he had been critical of those laws. Now part of the Northern Territory's legal history, mandatory sentencing legislation had been enacted by the Country-Liberal Party government led by Mr Stone. The legislation overrode the important common law principle of proportionality in sentencing, which had previously been applied in Northern Territory criminal courts, including the Juvenile Court. Mandatory sentencing legislation had a disproportionate effect on the Northern Territory's indigenous community, resulting in significantly increased incarceration rates.[3] In one case, an Aboriginal teenager was imprisoned for one year for stealing a packet of biscuits and a bottle of cordial.[4]

Against this backdrop – but again, not *because of* mandatory sentencing – the *Bradley* case commenced when a solicitor for NAALAS, Mr Michael Jones, made an application to Mr Bradley that he excuse himself from hearing a case in the Darwin Juvenile Court, pursuant to the common law doctrine of reasonable apprehension of bias.[5]

An application was also made in the Supreme Court of the Northern Territory that Mr Bradley's appointment be declared invalid. The application was occasioned by the circumstances surrounding Mr Bradley's appointment to the office of Chief Magistrate. Mr Bradley had been appointed to age 65 by instrument signed by the Administrator of the Northern Territory. However, it later transpired that Mr Bradley was only appointed with a remuneration determination lasting for two years.[6] I use the expression 'later transpired' because the terms and conditions of the determination were not disclosed to the public at the time of the appointment. Furthermore, the Northern Territory resisted discovery of files that recorded the negotiations until ordered to do so by the Federal Court.[7] This heightened

2. *NAALAS v Bradley* (2001) 192 ALR 625, 628.
3. J Hardy 'Mandatory Sentencing in the Northern Territory: A Breach of Human Rights' (2000) 11 PLR 172, 173. See also C McCoy & T Krone 'Mandatory Sentencing: Lessons From The United States' (2002) 5(17) Indigenous Law Bulletin 19.
4. This case (*X v Australia*) was the subject of a communication by the NAALAS to the UN High Commission for Human Rights under the First Optional Protocol to the International Covenant on Civil and Political Rights (Communication No 937/2000): see Hardy above n 3, 176.
5. *The Police v Clancy* (Unreported) Court of Summary Jurisdiction, 14 Apr 2000, No 9908921.
6. *NAALAS v Bradley* above n 2, 661, 669, 670.
7. *NAALAS v Bradley* [2001] FCA 1080, Wilcox J.

apprehensions that the arrangements might be unusual – perhaps even ultra vires or unconstitutional.

Ordinarily, the remuneration arrangements of judicial appointees are established by an independent Remuneration Tribunal.[8] This is very important because it ensures a sensible, and arguably necessary, distance between the executive government and the judiciary.[9] However, the precise remuneration arrangements made at the time of the appointment of Mr Bradley by the Northern Territory were not developed by such a tribunal.[10]

When the government produced files, it transpired that the terms and conditions of the appointment were directly negotiated by Mr Bradley and the government. He received a luxury car rather than the standard car offered to other magistrates. In addition, he was offered a salary that was about 25 per cent higher than his predecessor. While there was no suggestion that these terms were necessarily inappropriate, they were certainly not usual.

The most unusual aspect of the appointment arrangement negotiated by the Northern Territory government and Mr Bradley was a salary supplement for two years, apparently calculated to account for forgone superannuation payments. It appears that this supplement (which was included in the 25 per cent pay increase) was agreed because neither the government nor Mr Bradley expected Mr Bradley to stay beyond two years.[11] Whatever other inferences might be drawn from this factual setting, it does appear that at the time the terms and conditions of Mr Bradley's appointment were negotiated, both the government and Mr Bradley expected that the appointment would in reality last for only two years. Several months later, Mr Bradley sent a letter to the government in which he expressed concern that his appointment be an 'ordinary' appointment.[12] However, the special pay arrangement remained in place until altered by the Burke government some years later. Mr Bradley's current arrangements have been approved by the Remuneration Tribunal.

Given that the initial remuneration arrangements had not been made public, and that the government resisted calls for the evidence relating to the appointment to be made public, NAALAS merely represented the concerns of a number of members of

8. Cf *NAALAS v Bradley* above n 2, 657.
9. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 89, Lamer CJ said: 'Under no circumstances is it permissible for the judiciary – not only collectively through representative organisations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence'.
10. Negotiations between judges and the executive are forbidden in Canada, except by representative bodies: see *Mackin v New Brunswick* [2002] 1 SCR 405, para 57.
11. *NAALAS v Bradley* above n 2, 655, 661, 669, 670.
12. Ibid, 655-656.

the public that something might have gone awry. Perceptions of the impartiality of the judiciary in the Northern Territory appear to have been adversely affected. The Federal Court noted that concern was expressed by members of the Supreme Court,[13] the President of the Law Society[14] and the Chairman of the Judicial Conference of Australia.[15] The Federal Court noted Mr Stone's description in evidence of Darwin as 'a small town', and that the matter of the appointment had been the subject of gossip within the legal fraternity.[16] Given that the appointment arrangements were not disclosed, these people represented the relevant 'public' perceiving a reasonable apprehension of bias.[17]

The negative perceptions of the arrangement were exacerbated by reports that Mr Stone had also favoured introducing fixed-term appointments for magistrates. The files discovered by the Northern Territory government did include files which indicated a contemporaneous intention (that was ultimately abandoned) to amend the Magistrates Act 1980 (NT) to achieve the objective of fixed-term appointments.

NAALAS presented an application in the Supreme Court of the Northern Territory that Mr Bradley's appointment was ultra vires the Magistrates Act, on the basis that the disjuncture between the appointment term (to age 65) and the limited remuneration arrangement (about two years) necessarily affected the independence of the magistrate. NAALAS argued that the arrangement negotiated by the government and Mr Bradley gave rise to a reasonable apprehension of bias because a magistrate whose remuneration was not guaranteed by way of an 'open' determination (that is, a remuneration arrangement with a starting date but no finishing date) would necessarily be placed in a position of dependence on the government.[18] On the basis of the common law doctrine of reasonable apprehension of bias, even the *appearance* of dependence on the executive government would be sufficient to render the appointment invalid.[19] NAALAS argued that if a magistrate was placed in a position where he or she would have to sue the executive to ensure continuation of his or her remuneration, this would create a relationship of dependence, not independence, and that this was unconscionable and unconstitutional. That would be avoided if the Magistrates Act was construed as allowing only 'open' determinations.[20]

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13. Ibid, 651-653.
14. Ibid, 655, 662.
15. Ibid, 655.
16. Ibid, 651.
17. This is a very important point, and one I will return to below.
18. See further *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 395; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 25; *Austin v Commonwealth* (2003) 215 CLR 185, 262-263, quoting *US v Hatter* (2001) 532 US 557, 569; cf *NAALAS v Bradley* above n 2, Weinberg J 699.
19. *Fingleton v Christian Ivanhoff Pty Ltd* (1976) 14 SASR 530, 548.
20. This argument is developed further at pp 11-12, below.

The invalidity application was struck out by the Supreme Court and NAALAS appealed. Before turning to the arguments pressed on appeal, it is useful to consider the growing body of general principle which confirms that there is a guarantee of an independent and impartial tribunal which is internationally recognised, has considerable judicial support within Australia and extends to every level of the court system, including the magistracy.

II. JUDICIAL INDEPENDENCE

The independence of magistrates and other judicial officers of inferior courts has been the subject of considerable academic and professional scholarship in the last few years.[21] In part, this has been the result of the growth of a strong body of principle justifying the assertion that magistrates are entitled to judicial independence. The *Bradley* decision adds High Court authority to that principle. At the international level, article 10 of the Universal Declaration of Human Rights enshrines the principle of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[22] The International Covenant on Economic, Social and Cultural Rights[23] and the International Covenant on Civil and Political Rights[24] both guarantee that right. The Beijing Statement of Principles Concerning the Independence of the Judiciary in the LAWASIA Region prescribes minimum standards for judicial independence. Articles 4, 31 and 38 of that Statement provide:

> 4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined *in the Constitution or the law.*[25]
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> 31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.[26]
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> 38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.[27]

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21. See in particular L Lowndes 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' (2000) 74 ALJ 509 & 592.
22. General Assembly res 217A(III) 10 Dec 1948.
23. [1976] ATS 5.
24. [1980] ATS 23 art 14(1).
25. 'Independence of the Judiciary: Declarations of Principles of Judicial Independence' (1997) 15 Aust Bar Rev 175, 181 (emphasis added).
26. Ibid, 183.
27. Ibid, 184.

These statements were referred to with approval by the Chief Justices of the Australian States and Territories on 10 April 1997, who then adopted a Declaration of Principles of Judicial Independence citing a number of principles relating to the appointment of judges of the courts of the States and Territories including, notably and presciently, that:

> It should not be within the power of the executive government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by the executive government.[28]

The body of general law supporting the principles of judicial independence can hardly be doubted. At common law and in constitutional law it has long been recognised that the rule of law depends on an independent judiciary.[29] As Sir Gerard Brennan once said: 'The characteristics of the judicature must reflect the function it is charged to perform. First, it must be a judicature that is and is seen to be impartial, independent of government and of any other centre of financial or social power'.[30] Such judicial independence 'involves the basic requirement that [in the exercise of his or her judicial function] the judicial officer must be free from interference by the executive or legislature, and must be free from any suspicion of such interference'.[31] Likewise, Sir Anthony Mason has noted: 'Financial security ... is an indispensable condition of a strong and independent judiciary.[32] Sir Gerard Brennan has also remarked that '[j]udicial independence is at risk when future appointment or security of tenure is within the gift of the executive'.[33] The entitlement to judicial salary must not be interfered with 'in a manner to affect the independence of the individual judge'.[34] Sir Anthony Mason has also noted that the 'foundation for any worthwhile discussion of the appointment and removal of judges must be the nature of the judicial function and the conditions essential to its effective performance'.[35]

The position of judicial officers in the inferior courts was traditionally less secure. However, in *Macrae v Attorney-General (NSW),*[36] Kirby P, construing New South Wales local courts legislation, said:

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28. Ibid, 177.
29. B Debelle 'Judicial Independence and the Rule of Law' (2001) 75 ALJ 556, 561.
30. G Brennan 'The State of the Judicature' (1998) 72 ALJ 33, 33.
31. C Briese 'Future Directions in Local Courts of New South Wales' (1987) 10 UNSWLJ 127, 131.
32. A Mason 'Judicial Independence and the Separation of Powers' (1990) 13 UNSWLJ 173, 179.
33. Brennan above n 30, 34.
34. *Valente v R* [1985] 2 SCR 673, Le Dain J 703, cited in G Winterton *Judicial Remuneration in Australia* (Melbourne: AIJA, 1995) 8.
35. A Mason 'The Appointment and Removal of Judges' in H Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Sydney: NSW Judicial Commission, 1997) 5.
36. (1987) 9 NSWLR 268.

> Suggestions that the State's magistrates were, under the former law, simply ordinary members of the public service, flies in the face of the status they had long enjoyed as independent judicial officers, performing responsible tasks of a judicial character and enjoying a place in society to which attached respect and standing in the community.[37]

The shift in mood has been reflected in the extra-curial remarks of many senior judges. As Gleeson CJ has remarked: 'Above all, criminal justice should be administered, not by so-called "police courts", but by judicial officers who are conspicuously separate from investigators and prosecutors, who have professional qualifications equal to those of the lawyers who appear before them, and who see themselves as part of the judicial branch of government'.[38] And as Sir Gerard Brennan has noted, magistrates are called upon to resolve the overwhelming majority of disputes which come before the courts.[39]

The history of the magistracy indicates a steady movement toward judicial independence.[40] In the case of the Northern Territory magistracy, this shift was reflected in the historical development of their status and tenure. When the Magistrates Act was introduced, the second reading debate was dominated by discussions relating to judicial independence, and it was concluded that efforts should be made to enhance the independence of magistrates. Indeed, the legislation was introduced as a result of the 1976 decision of the Supreme Court of South Australia in *Fingleton v Christian Ivanoff Ltd*, a case which determined that magistrates must be accorded the conditions of judicial independence.[41]

As a matter of constitutional law, independence is the hallmark of a court.[42] However, in the *Bradley* case, an argument that section 72 of the Commonwealth Constitution[43] required that Territory judges have secure remuneration was foreclosed by High Court authority.[44] Nevertheless, it seemed unthinkable that the Chief Magistrate of

37. Ibid, 278. See also Kirby P 273.
38. AM Gleeson 'The State of the Judicature' (2002) 76 ALJ 24, 25.
39. Brennan above n 30, 34.
40. H Golder *High and Responsible Office: A History of the NSW Magistracy* (Melbourne: OUP, 1991).
41. The Executive Secretary for Law indicated in her second reading speech on 17 November 1976 that the Bill had been introduced as a result of the South Australian case of *Fingleton v Christian Ivanhoff* above n 19, 548, in which the Full Court of the Supreme Court of South Australia underscored the absolute necessity that magistrates have security of tenure and remuneration.
42. *Harris v Caladine* (1991) 172 CLR 84, 95.
43. S 72 of the Constitution provides: 'The Justices of the High Court and of the other courts created by the Parliament: (i) shall be appointed by the Governor-General in Council; (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity; (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during the continuance in office.'
44. *Spratt v Hermes* (1965) 114 CLR 226; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 (*'Eastman No 1'*).

the Northern Territory could exercise judicial power of the Commonwealth without a constitutional guarantee that he would continue to be paid beyond a two-year period. On appeal from the Territory's successful strike-out application in the Supreme Court,[45] NAALAS developed an argument based on statements made in *Kable's* case,[46] that a court exercising Commonwealth jurisdiction[47] was entitled to certain minimum standards of independence so as to ensure its impartiality. The essential elements of the two principal arguments are set out below.

III. THE CONSTITUTIONAL ARGUMENT

The constitutional argument may be summarised in the following way. Any power to appoint a Chief Magistrate of the Northern Territory and vest that judicial officer with jurisdiction would have to be traced, ultimately, to the Commonwealth Constitution.[48] While it is true that the Commonwealth Territories' power was traditionally regarded as plenary, and that judical appointments to Territory courts do not need to be made in accordance with section 72 of the Constitution,[49] it would be incorrect to say that Chapter III is wholly inapplicable to the Territories.[50] The judicial power *of the Commonwealth* described in section 71 and the separation of judicial power of the Commonwealth entrenched by Chapter III of the Constitution apply in the Territories. To the extent that Commonwealth judicial power may be exercised or exercisable by Territory courts, the separation of judicial power that is effected by section 71 carries with it certain requirements. In other words, the principle in *Kable's* case, that State courts capable of exercising Chapter III powers must not be vested with powers that violate the principles that underlie that Chapter, applies equally to Territory courts.

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45. *NAALAS v Bradley* (2000) 136 NTR 1. A special bench of imported justices of appeal was convened by the (former) Chief Justice to ensure that there would be no apprehension of bias. The bench was convened by Priestley J (NSW App Ct), Doyle CJ (SA App Ct) and Brooking J (Vic App Ct).
46. *Kable v DPP (NSW)* (1996) 189 CLR 51.
47. As to which, see Judiciary Act 1903 (Cth) s 68.
48. Pursuant to ss 122 and 51(xxxix) of the Constitution, but subject to s 111 and Ch III of the Constitution. S 122 of the Constitution relevantly provides: 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth.' S 51(xxxix) provides that: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... matters incidental to the execution of any power vested by this Constitution in the Parliament'. S 111 provides that the territories are 'subject to the exclusive jurisdiction of the Commonwealth'.
49. *Eastman No 1* above n 44; *Spratt v Hermes* above n 44; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.
50. *Eastman No 1* above n 44, Gleeson CJ, McHugh & Callinan JJ 332-333, Gummow & Hayne JJ 349; *Northern Territory v GPAO* (1998) 196 CLR 553, Gaudron J 601, 603-604; *R v Porter; Ex parte Yee* (1926) 37 CLR 432, Knox CJ & Gavan Duffy J 439; *Spratt v Hermes* above n 44, 243; *Capital TV & Appliances v Falconer* ibid, Menzies J 605-606; *Gould v Brown* (1998) 193 CLR 346, McHugh J 426-427.

Further, the *separation* of judicial power of the Commonwealth from the legislative and executive power of any polity requires certain irreducible minimum requirements of judicial independence and impartiality in order to maintain that separation.[51] Judges who may exercise federal jurisdiction must be, and be perceived to be, independent of the legislature and the executive government.[52] Security of judicial remuneration is a necessary buttress to the separation of judicial power.[53] Security of judicial remuneration during continuation in office serves critical functions, protecting the integrity of the judicial branch and ensuring that the judicial power of the Commonwealth is, and is seen to be, exercised by people who may act without fear or favour, according to law. As Alexander Hamilton remarked in *The Federalist*:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.... We can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.[54]

In the present case, the Chief Magistrate of the Northern Territory was a person who was authorised to exercise the judicial power of the Commonwealth. The Northern Territory government contended that the Magistrates Act 1980 (NT) authorised it to make remuneration arrangements that would cease during the Chief Magistrate's tenure. NAALAS argued that this infringed Chapter III of the Constitution, by reposing or purporting to repose, the judicial power of the Commonwealth in a person whose appointment did not conform to the necessary degree of judicial independence required by the separation of judicial power of the Commonwealth.

The argument set out above was put in substantially the same terms to the Federal Court after NAALAS won their appeal from the initial strike-out.[55] The argument was later refined in the appeal to the Full Federal Court and in the appeal to the High Court, where the following propositions were accepted in the joint judgment of McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ:

> Counsel for the Legal Aid Service put an argument in three steps. The first is that a court of the Territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament. That proposition, to

51. *Ebner* above n 18.
52. *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11; *Harris v Caladine* (1991) 172 CLR 84, Toohey J 135, McHugh J 159; *Grollo v Palmer* (1995) 184 CLR 348, 365, 376-377, 392; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* above n 18; *Kable v DPP* above n 46, McHugh J 116-117.
53. *Austin v Commonwealth* above n 18.
54. A Hamilton 'No LXXIX: Judicial Independence Continued' in JE Cooke (ed) *The Federalist* (Middleton: Wesleyan UP, 1982) 531.
55. As to which, see *NAALAS v Bradley* above n 45.

> which there was no demurrer by the Territory or by the Attorney-General of the Commonwealth who intervened in this Court, is supported by the citations of authority by Gaudron J in the above passage from *Ebner*. It should be accepted.
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> The second step in the Legal Aid Service's argument is that it is implicit in the terms of Chapter III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal. That proposition, which again appears in the passage from *Ebner*, also should be accepted.
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> The difficulty arises with the third step. This requires discernment of the relevant minimum characteristic of an independent and impartial tribunal exercising the jurisdiction of the courts over which the Chief Magistrate presides. No exhaustive statement of what constitutes that minimum in all cases is possible. However, the Legal Aid Service refers in particular to the statement by McHugh J in *Kable* that the boundary of legislative power, in the present case that of the Territory:
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> > is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the [Territory] court as an institution was not free of government influence in administering the judicial functions invested in the court.[56]

The High Court concluded that the arrangement did not breach this test. I will analyse that result after setting out the elements of the statutory construction argument. Before doing that, it is instructive to consider the shifts in the constitutional jurisprudence of the different members of the Court that were required to reach a joint judgment.

First, the exceptionally broad dicta of the High Court in *R v Bernasconi* that Chapter III of the Constitution does not apply in the Territories have, thankfully, been purged.[57] It appears that McHugh and Callinan JJ stepped back from the position they took in their minority judgment in *Northern Territory v GPAO* on this point.[58] This is a good result for the citizens of the Commonwealth's Territories in the longer term, enhancing their prospects of enjoying independently administered justice. They are no longer in a constitutional 'Alsatia' nor are they likely to be subjected to justice meted out by 'legislative courts'.[59]

Secondly, the *Kable* principle, which has often been argued but rarely applied,[60] figured prominently in the judgment of six members of the Court. Although *Kable*

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56. *NAALAS v Bradley* above n 1, 326.
57. *R v Bernasconi* (1915) 19 CLR 629, 635, 637; see further P Keyzer 'The "Federal Compact", The Territories and Chapter III of the Constitution' (2001) 75 ALJ 124.
58. (1998) 196 CLR 553, 616-623.
59. See eg *American Insurance Co v Canter* 1 Pet 511 (1828).
60. See P Hanks, P Keyzer & J Clarke *Australian Constitutional Law: Commentary and Materials* (Sydney: Butterworths, 2004) 434-436.

was a majority decision of a bench of only six justices, and although it has been subject to wide-ranging criticism,[61] it now appears that at least some aspects of that decision are firmly established.[62]

Thirdly, the Court continues to elaborate on the principles that underlie Chapter III, on this occasion deciding that the common law principles of judicial independence and impartiality articulated by Gaudron J in *Ebner's* case[63] represent constitutional principle.[64]

Finally, after the High Court's decision in *Bradley*, there is now little doubt that Chapter III of the Constitution applies in the Northern Territory and, it is probably safe to say, throughout the Commonwealth. While this statement was not made expressly in the judgments, the application of *Kable* in the Northern Territory in *Bradley's* case suggests that conclusion, given that *Kable* was, quintessentially, a case about Chapter III of the Constitution.

IV. THE STATUTORY CONSTRUCTION ARGUMENT

The other principal argument was based on the proper construction of the statute. NAALAS argued that the appointment of Mr Bradley in the circumstances outlined above was repugnant to the Magistrates Act 1980. That Act was enacted for the purpose of providing a court comprised of independent judicial officers, and statutes should be construed by reference to their purpose. To that end, the Administrator's power to appoint magistrates and remunerate magistrates 'from time to time' *could not* authorise remuneration determinations that are limited as to time as that would be inconsistent with the purpose of the Magistrates Act as a whole and inconsistent with common law and international principles of judicial independence. Placing a judge in a position where he or she might have to petition the executive for continuation of his or her remuneration demonstrates unequivocally the *dependence* of that judge on the executive government, not his or her *independence*.

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61. For criticism, see R Orr '*Kable v DPP*: Taking Judicial Protection Too Far?' (1996) 11 AIAL Forum 11; E Handsley 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 Syd LR 183. For analysis of *Kable's* case, see P Johnston & R Hardcastle 'State Court Judges and *Kable* Limitations' (2002) 4 Constitutional Law & Policy Rev 1.
62. Kable has been significantly narrowed by the decision of the High Court in *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519. In that case the High Court upheld legislation that authorised a State Supreme Court to imprison a person on the basis of a prediction as to their dangerousness, as in *Kable's* case. The difference in *Fardon* was that the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) did not 'single out' any particular prisoner, but authorised applications to be made in respect of a *class* of prisoners.
63. *Ebner* above n 18.
64. *NAALAS v Bradley* (2004) 78 ALJR 977, 985.

NAALAS argued that the power to set remuneration for magistrates 'from time to time' under the Magistrates Act 1980 ought to be construed consistently with its purpose, thereby reinforcing judicial independence. It authorised the Second Respondent to appoint magistrates in the *ordinary* way: with open, public remuneration determinations (ie, 'from time to time' the executive can set the remuneration of judges, and 'from such and such a date, magistrates shall receive $Y'; not 'from X date to Y date the judge shall receive $Z'). The Magistrates Act required that a valid and subsisting remuneration determination ought to be in place at all times. As far as Mr Bradley's appointment was concerned, NAALAS argued that the disjuncture between the term of the appointment (ostensibly to retirement age) and the term of the remuneration determination (about two years), placed the appointee in the position that he might be required to sue the executive for continuation of his salary. This would not happen if the phrase 'from time to time' was interpreted as allowing 'open' remuneration determinations only. This was the approach that commended itself to Drummond J in his minority judgment in the Full Federal Court.[65]

The Northern Territory government argued that the phrase 'from time to time' authorised Mr Bradley's appointment arrangement as it stood.

V. THE HIGH COURT'S TREATMENT OF THE ULTRA VIRES ARGUMENT

The High Court held that the appointment was not ultra vires because the Northern Territory government had satisfied its legal obligation to ensure that the Chief Magistrate had continuing remuneration. McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ said that:

> The phrase 'from time to time' is not to be read as permitting the Administrator to fail to exercise the power under section 6 [of the Magistrates Act] where that failure would produce an hiatus where no determination was in operation. A construction which permitted such a state of affairs would place the officeholder wholly at the favour of the executive government respecting a basic attribute of the judicial independence the legislation was designed to promote. However, as already has been indicated, the 1999 Determinations preceded the end of the initial two year period covered by the 1998 Determination. There was no such hiatus. Upon the proper construction of section 6, none was contemplated or provided for by that section.[66]

The critical defect of this reasoning is that the Court focused on how the Northern Territory repaired the 1998 arrangement with the 1999 determination, rather than

65. *NAALAS v Bradley* (2002) 122 FCR 204, 261.
66. Ibid, 332.

focusing on the arrangement under challenge, the 1998 arrangement. To conclude that the Magistrates Act did not contemplate an arrangement such as the 1998 arrangement begs the question. It is true that there was no hiatus in the remuneration of the magistrate. But that, it is submitted, has nothing to do with the validity or legality of the arrangement made in 1998, to be tested at the time of the appointment. The 1998 remuneration arrangement placed Mr Bradley in a position of looming dependence. The suggestion that this could be resolved by the Chief Magistrate making an application to a court for an order of mandamus to continue being paid did not detract from but rather underscored the NAALAS argument that the appointment arrangement was defective in the first place. The High Court's conclusion is really the same as saying that a right of action is as good as money in the bank. It is not. The assurance that the High Court has now given that an action by a judicial officer placed in this regrettable position would almost certainly be successful in an action for mandamus (because of the (new) duty to ensure continuing or enhanced remuneration)[67] again does not really address the vice of the 1998 remuneration arrangement, but points to it. It may readily be conceded that the executive *tends* to continue paying its judges, and that in the instant case Mr Stone's successor as Chief Minister, Mr Denis Burke, *did* take steps to ensure that Mr Bradley's remuneration would continue to be paid. But this did not cure the vice of the 1998 arrangement, nor affect the clearly adverse perceptions of members of the public about it. Indeed, the compelling evidence regarding public perceptions of the appointment seems to have been ignored in the High Court's judgment.

What did the evidence show? Fundamentally, it showed that the Northern Territory government failed to disclose the details of the remuneration arrangement at the time of the appointment. This lack of open communication was, in and of itself, a sufficient factor to warrant the application of McHugh J's test in *Kable*[68] to strike down the appointment. As the Supreme Court of Canada observed in *Mackin v New Brunswick*:

> The general test for presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status ... Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the ... judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. *In order for such confidence to be established and maintained, it is important that the independence of the court be openly 'communicated' to the public.* Consequently, in order for independence in the constitutional sense to exist, as reasonable and well-informed person should not

67. Ibid, 332, 334.
68. See above p 39.

> only conclude that there is independence in fact, but also find the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.[69]

In the present circumstances, there had been no open communication of the independence of the remuneration arrangement at the time of the appointment. The appointment arrangements were not developed by the Remuneration Tribunal and they were not disclosed to the public. Indeed, the Northern Territory government took steps to prevent the negotiations from being disclosed on the basis that they were protected by Crown privilege.[70] Nothwithstanding this, many observers who were informed of the arrangement had a perception that the arrangement compromised judicial independence. The Chairman of the Judicial Conference of Australia, the judges of the Northern Territory Supreme Court, the President of the Northern Territory Law Society and members of the Darwin legal community expressed concern. It is surprising that the High Court made no reference to it.

VI. CONCLUSION

Returning to the questions posed at the outset of this article, some answers may now be suggested. The High Court has confirmed that the Northern Territory is not a constitutional blind spot where the protections of Chapter III do not apply.[71] However, it also appears that the High Court is unwilling to describe the irreducible minimum requirements of judicial independence. What is known is that a privately negotiated and undisclosed remuneration arrangement made between the government and a candidate for judicial office is not repugnant to Chapter III, even where both parties to that negotiation expect the appointee to remain in office for only two years. Further, judicial officers in Australia can be placed in a position where they may have to sue to ensure ongoing payment of their remuneration.

69. *Mackin v New Brunswick* above n 10, para 38 (emphasis added).
70. *NAALAS v Bradley* above n 7.
71. It may be observed that the Northern Territory only demurred on this point in the High Court. Cf *NAALAS v Bradley* above n 1, 326 with *NAALAS v Bradley* above n 65, 231.