

REVIEW ESSAY

REVIEW OF AUSTRALIAN PUBLIC LAW DEVELOPMENTS

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I INTRODUCTION

This book of essays honours one of Australia’s foremost public law scholars, Professor Enid Campbell. I use the term ‘public law’ advisedly, for Professor

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Campbell's teaching,¹ publications and research spanned so many areas of public law. Her work was not merely confined to the traditional fields of constitutional and administrative law but covered the courts, the judiciary, public administration, groundbreaking work on parliamentary privilege, and that cutting edge publication (with Harry Whitmore), *Freedom in Australia*.² She was a member of two major Commissions: the Royal Commission on Australian Government Administration³ and the Constitutional Commission.⁴ Among her many notable personal achievements, she was the first woman in Australia to be appointed to a full chair in law and the first female Law Dean. For this collection,⁵ the editor has assembled a distinguished group of lawyers. Some readers may, however, be disappointed at the absence of contributions from the Parliament, the courts and public administration — areas where Professor Campbell herself made significant contributions. Unlike the era when Professor Campbell came to the law, there are now many eminent female academic and practising lawyers with expertise in public law. It is therefore disappointing that, apart from Professor Campbell herself, of twelve other contributors only one is a woman.

Inevitably in a collection of this kind there is no single theme, yet many of the contributions can conveniently be considered together. Some deal with constitutional issues such as the power of a state Parliament to bind its successors, the application of state laws to the Commonwealth and the implied freedom of political communication. Others deal with various aspects of public sector review, including the jurisdiction of the Commonwealth and state Ombudsmen, ministerial responsibility and review of ministerial decisions, as well as related legal principles such as legitimate expectation, estoppel in public law, nullity and polycentricity in administrative decision-making. Other contributions deal with the recognition and enforcement of judgments and vexatious litigants.

II CONSTITUTIONAL ISSUES

A *Can a State Parliament Bind its Successors?*

In what circumstances can a Parliament of a state bind its successors? Can a state Parliament entrench provisions relating to, for example, the judiciary, or high-level public officials such as the Auditor-General, or a Bill of Rights? Can such legislation be protected against hasty or inadvertent amendment by prescription of special procedures or forms? Alternatively, does any attempt to provide such protection constitute an impermissible fetter on the sovereignty of

¹ The author was a member of Dr Campbell's (as she then was) Legal History class at the University of Sydney 44 years ago. Lectures were on the eighth floor of the original Sydney Law School Building in Phillip Street. There were two tiny lifts. Notwithstanding these obvious disincentives and the potential dreariness of the subject, Dr Campbell's classes were always filled to overflowing.

² Enid Campbell and Harry Whitmore, *Freedom in Australia* (1st ed, 1966).

³ Commonwealth, Royal Commission on Australian Government Administration, *Final Report* (1976).

⁴ Australian Constitutional Commission, *Final Report* (1988).

⁵ Apparently only the second festschrift for a female legal academic in the Anglo-Australian common law world: see Michael Taggart and Jenny Klosser, 'Controlling Persistently Vexatious Litigants' in Matthew Groves (ed), *Law and Government in Australia* (2005) 272, 272 fn 1.

future Parliaments? Is some superior authority necessary to support an entrenchment provision? If so, must that be a written law or can it be found in constitutional principle? These are some of the questions raised in *Attorney-General (WA) v Marquet*⁶ and Jeffrey Goldsworthy's essay.⁷

Dicta in *Marquet* suggests that the High Court would take a narrow view of entrenchment provisions: the majority appears to see s 6 of the *Australia Act 1986* (Cth) ('*Australia Act*') as the sole source for enforcement of manner and form requirements. On that view, only laws 'respecting the constitution, powers or procedures of the Parliament' can be entrenched by manner and form provisions.⁸ It would seem to follow that entrenchment provisions in state constitutions that purport to protect, for example, Supreme Courts, the Auditor-General and provisions relating to financial legislation, may themselves validly be repealed by ordinary legislation.

Goldsworthy argues that it is in the public interest for constitutional provisions other than those dealing with the Parliament itself⁹ to be legally protected.¹⁰ He contends that, contrary to what was said in *Marquet*, entrenchment provisions are not only valid but also enforceable independently of *Australia Act* s 6. In his view, as part of the plenary power conferred by *Australia Act* s 2, a state Parliament has power to enact, and make judicially enforceable, requirements as to the procedure and form of future legislation. This power is independent of the 'manner and form' provisions of s 6 but is subject to a strict limit: such requirements must not destroy or in any way diminish Parliament's substantive power to legislate. Requirements that infringe that limit are invalid.¹¹

That the powers of a state Parliament are plenary is no longer in dispute. The contrary view of Street CJ of the Supreme Court of New South Wales, that the words 'the peace, welfare and good government of New South Wales'¹² were words of limitation,¹³ was decisively rejected by the High Court in *Union Steamship Co of Australia Pty Ltd v King*,¹⁴ although the Court left open the intriguing question whether 'the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law'.¹⁵ Does it necessarily follow, from the plenary nature of the powers of the Parliament, that a Parliament can bind its successor?

⁶ (2003) 217 CLR 545 ('*Marquet*').

⁷ Jeffrey Goldsworthy, 'Manner and Form Revisited: Reflections on *Marquet's* Case' in Matthew Groves (ed), *Law and Government in Australia* (2005) 18.

⁸ *Marquet* (2003) 217 CLR 545, 554 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁹ That is, other than those covered by the 'manner and form' provisions in *Australia Act* s 6.

¹⁰ Goldsworthy, above n 7, 19.

¹¹ *Ibid* 30.

¹² *Constitution Act 1902* (NSW) s 5.

¹³ *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 382.

¹⁴ (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

¹⁵ *Ibid*. See also *Kable v DPP (NSW)* (1996) 189 CLR 51; *Kruger v Commonwealth* (1997) 190 CLR 1; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. In *Durham Holdings Pty Ltd v New South Wales*, the High Court rejected argument that the right to receive 'just' or 'properly adequate' compensation in respect of an acquisition by the state was such a 'deeply rooted right' as to operate as a restraint upon the legislative power of the New South Wales Parliament: at 409–10 (Gaudron, McHugh, Gummow and Hayne JJ).

In what circumstances does the plenary power of the later Parliament enable it to undo the work of its predecessor? In particular, in what circumstances, if any, will the ordinary principle, that the later Act prevails, be displaced? Not everyone will be convinced that Goldsworthy has solved the conundrum.

Goldsworthy's analysis leads him to consider whether *Australia Act* s 6 is redundant. In his view, provisions such as standard quorum requirements and the common special provisions relating to financial bills are valid and judicially enforceable. On the other hand a referendum requirement diminishes Parliament's substantive power to legislate. It follows that such a provision is not supported by s 2 but can be binding by virtue of s 6. So a referendum requirement respecting the constitution, powers or procedures of Parliament is valid. A referendum requirement dealing with other subject matter is, in his view, invalid.¹⁶ Similarly, super majority requirements (for example, a requirement of a two-thirds majority) diminish Parliament's substantive power and should not be held binding independently of s 6.¹⁷

The issue is an important one, not only in relation to the effectiveness of existing entrenchment provisions but also in relation to future legislation falling outside the scope of s 6, such as a Bill of Rights. Can a state Parliament entrench a Bill of Rights so that it cannot be overridden by future legislation? Goldsworthy would presumably answer that question in the negative, for that would amount to a substantive fetter. Would he support the validity of a law that established special procedural requirements for any future law inconsistent with a Bill of Rights? It seems he would support what he describes as 'innocuous' requirements such as a requirement of an absolute majority, a requirement for an express rather than implied repeal, or a requirement for the giving of reasons but not more onerous requirements such as a two-thirds majority or a referendum.¹⁸

The remedy Goldsworthy suggests is expansion of *Australia Act* s 6, by formal amendment in accordance with s 15. Perhaps the growing interest in Bills of Rights in light of recent anti-terrorism legislation¹⁹ will provide the catalyst for further consideration of this issue. One aspect that would require further consideration than Goldsworthy has given it is whether any entrenching provision establishing a special procedure should itself need to be enacted in conformity with the special procedure. In this and other respects, Kirby J's forceful dissent in *Marquet* warrants close attention.²⁰

B *When Can State Laws Bind the Commonwealth?*

Another area of enduring constitutional difficulty is that of the relationship between the constituent parts of the Australian Federation. To what extent can

¹⁶ Goldsworthy, above n 7, 37.

¹⁷ *Ibid.*

¹⁸ *Ibid* 38–9.

¹⁹ See, eg, *Anti-Terrorism Act [No 2] 2005* (Cth).

²⁰ Kirby J draws to attention that the absolute majority provision considered in that case was enacted 'in the normal way': *Marquet* (2003) 217 CLR 545, 579. His Honour describes as absurd the postulate that would permit one Parliament, by a vote of a simple majority, to require that no damage to its constitutional powers might occur without a two-thirds, 80 per cent, 90 per cent or 99 per cent majority: at 609.

the laws of the Commonwealth bind the states? To what extent can the states bind the Commonwealth? A foreign observer must find it extraordinary that, a century after federation, the High Court has not yet developed a comprehensive theory, or principles, governing the application of state laws to the Commonwealth — that is, the circumstances in which the states can bind the Commonwealth and the circumstances in which the Commonwealth is free from state laws. There are no straightforward answers to these fundamental questions.

The initial approach of the High Court was that the Commonwealth and the states were each sovereign in their respective fields. Each was able to perform its functions without interference from the other, under the doctrine of the implied immunity of instrumentalities. It followed that state laws could not require Commonwealth public servants to affix state duty stamps to salary receipts²¹ or impose a tax on Commonwealth Public Service salaries.²² The implied immunities doctrine was however short-lived, being ‘exploded’ in one of the great landmark constitutional cases, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,²³ where the Court held that Commonwealth industrial laws applied to state employees. The reasoning was applied in *Pirrie v McFarlane*,²⁴ where the Court held that a serving Australian Defence Force member was bound by state traffic laws. In *West v Deputy Commissioner of Taxation (NSW)*,²⁵ the Court held that federal superannuation pensions were subject to state taxation. In *Essendon Corporation v Criterion Theatres Ltd*,²⁶ Dixon J began the elucidation of a new approach, beginning in this case with the proposition that the state could not levy a tax upon the Commonwealth in the exercise of its functions. This approach was developed in *Melbourne Corporation v Commonwealth*,²⁷ where Dixon J distinguished between a law of general application and a provision singling out governments; the Commonwealth could not make a law aimed at the restriction or control of the state in the exercise of its executive authority.²⁸ In *Re Foreman & Sons Ltd; Uther v Federal Commissioner of Taxation*²⁹ Dixon J, in dissent, held that the state could not take away the priority of the Commonwealth in debt. His Honour’s reasoning was that the state could not interfere with the relationship between the Commonwealth and its subjects.

Subsequently, a high point of Commonwealth immunity was reached in the judgment of Fullagar J in *Commonwealth v Bogle*,³⁰ that

the State Parliament has no power over the Commonwealth. The Commonwealth ... is not a juristic person which is subjected either by any State constitution or by the Commonwealth *Constitution* to the legislative power of any

²¹ *D’Emden v Pedder* (1904) 1 CLR 91.

²² *Deakin v Webb* (1904) 1 CLR 585.

²³ (1920) 28 CLR 129.

²⁴ (1925) 36 CLR 170.

²⁵ (1937) 56 CLR 657.

²⁶ (1947) 74 CLR 1.

²⁷ (1947) 74 CLR 31.

²⁸ *Ibid* 77–83.

²⁹ (1947) 74 CLR 508.

³⁰ (1953) 89 CLR 229 (*‘Bogle’*).

State Parliament. ... The Commonwealth may, of course, become affected by State laws ...³¹

A little later, in *Commonwealth v Cigamic Pty Ltd (in liq)*,³² the High Court held that a state Parliament had no power to abolish or control the Commonwealth's fiscal right to priority of debts (in a corporate insolvency governed by state law). The scope of these decisions left considerable uncertainty, particularly in the concept articulated by Fullagar J in *Bogle* that the Commonwealth may be 'affected by' state laws.³³

This was the scene prior to *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*,³⁴ the decision surveyed by Leslie Zines.³⁵ The issue was whether a Commonwealth authority, the Defence Housing Authority, was bound by the *Residential Tenancies Act 1987* (NSW). The Court held, with only Kirby J dissenting, that it was. The majority rejected the broad proposition in *Bogle* and substantially narrowed *Cigamic*. The circumstances in which, absent specific legislative provision, the Commonwealth and its agencies could claim immunity from state laws were very substantially narrowed.

In typical High Court fashion, there were five separate judgments. Dawson, Toohey and Gaudron JJ joined in a single judgment. Brennan CJ wrote a separate judgment, substantially concurring with the joint judgment but using different language. McHugh and Gummow JJ each wrote a separate judgment reaching the same result. Kirby J dissented.³⁶ The disparities in reasoning, and the obscurity of some of the concepts, particularly in the joint judgment, create serious uncertainty.

Dawson, Toohey and Gaudron JJ, in the joint judgment, distinguished between 'the capacities of the Crown on the one hand ... and the exercise of those capacities on the other.'³⁷ The purpose in drawing the distinction was to highlight the difference between legislation which purports to modify the nature of the executive power vested in the Crown (its capacities), and legislation which assumes those capacities and merely seeks to regulate activities through which the Crown may choose to exercise them. Brennan CJ drew a similar distinction between the capacities and functions of the Crown in right of the Commonwealth, which were protected by the immunity, and the transactions in which the Crown chose to engage in exercise of its capacities, which were not. Whether the subtle difference in terminology was intended to convey a substantive difference was not explained. McHugh J³⁸ and Gummow J³⁹ in separate judgments, rejected

³¹ Ibid 259–60. See also the concurring opinions: at 249 (Dixon CJ), 255 (Webb J), 274 (Kitto J).

³² (1962) 108 CLR 372 ('*Cigamic*').

³³ (1953) 89 CLR 229, 260.

³⁴ (1996) 190 CLR 410 ('*Henderson's Case*').

³⁵ Leslie Zines, 'The Binding Effect of State Law on the Commonwealth' in Matthew Groves (ed), *Law and Government in Australia* (2005) 1.

³⁶ Kirby J held that the matter came within the exclusive power of the Commonwealth under s 52(ii) of the *Constitution: Henderson's Case* (1996) 190 CLR 410, 487–91. This was a view rejected by the other members of the Court.

³⁷ Ibid 438.

³⁸ Ibid 454.

³⁹ Ibid 473.

the distinctions between the capacities of the Commonwealth and their exercise. Kirby J, in dissent, took a narrower view of Commonwealth immunity, based on application of the principles in *Melbourne Corporation v Commonwealth*⁴⁰ to the Commonwealth. In particular, that a state Parliament could not, by legislation, single out the Commonwealth for discriminatory treatment or impair the integrity or autonomy of the Commonwealth.⁴¹ His Honour argued that *Bogle* and *Cigamic* should ‘be reverently laid to rest.’⁴² In his view, it was

not a diminution of the sovereignty of the Commonwealth to accept that laws made by Australian citizens through their State Parliaments may, in defined circumstances, bind the Commonwealth. This is no more than the fulfilment of the integrated federal system of government established by the *Constitution*. It is also the assurance of the rule of law by which all those present in a State (or otherwise affected) are bound by valid legislation.⁴³

The distinction between the capacities of the Commonwealth, which were not subject to regulation by the states, and the exercise of those capacities, which was subject to regulation by the states, seems unhelpful, indeed a distinction without a difference. Zines correctly points out that the distinction provides no better understanding than the previous ‘affected by’ terminology.⁴⁴ Is the reference to the executive capacity of the Commonwealth intended to be to the capacities conferred by s 61 of the *Constitution*? How is that reference to be applied when the capacity is exercised? Does it mean that the Commonwealth must obtain a licence or other approval where that is ordinarily required by state law? Or would such a requirement negate the Commonwealth’s executive capacity rather than merely regulate its exercise? Certainly, the distinction provided little practical guidance to Commonwealth and state legal advisers.

Zines’ succinct observation that ‘the High Court has failed to elucidate the principles that are applicable’⁴⁵ is clearly right. Zines continues: ‘We have, if anything, been left with even more conceptual confusion, or at least ambiguity, than existed earlier.’⁴⁶ Not all will agree with his unqualified support for *Judiciary Act 1903* (Cth) s 64 as the means to resolve issues left unresolved by *Henderson’s Case*,⁴⁷ but many will agree with his view that Kirby J’s dissenting judgment provides a sounder basis for a coherent theory.⁴⁸

The decision represented a major shift in terms of legal precedent and legal technique, arguably much more radical than politically controversial decisions such as *Wik Peoples v Queensland*.⁴⁹ It is normally the conservative commentators who defend society’s core institutions such as the courts. In terms of legal reasoning, *Wik* was a thoroughly orthodox decision, yet it led to an unprece-

⁴⁰ (1947) 74 CLR 1.

⁴¹ *Henderson’s Case* (1996) 190 CLR 410, 507–8.

⁴² *Ibid* 509.

⁴³ *Ibid* 507 (citations omitted).

⁴⁴ Zines, above n 35, 6–7.

⁴⁵ *Ibid* 14.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* 16.

⁴⁹ (1996) 187 CLR 1 (*‘Wik’*).

dented tirade of intemperate abuse of the High Court. In *Henderson's Case*, the departure from precedent favoured the states. One cannot help but wonder whether that is why some of the more regular critics of the High Court refrained from attacking the Court on this occasion.

C *The Implied Freedom of Political Communication: Recent Developments*

A series of cases which did give rise to attacks on the Court were the 'free speech' or implied freedom of political communications cases in the early 1990s — a time of significant developments in Australian constitutional jurisprudence. This particular development was not entirely novel. Murphy J had made numerous references to what he saw as the constitutional implications of a free society,⁵⁰ including freedom of speech,⁵¹ but his Honour's views did not initially attract support. Ultimately, in *Nationwide News Pty Ltd v Wills*⁵² and *Australian Capital Television Pty Ltd v Commonwealth*⁵³ the Court found the implied freedom of political communication to be an indispensable element of the system of representative democracy established by the *Constitution*. Different formulations for assessment of infringement of the implied freedom were consolidated in the unanimous judgment of the Court in *Lange v Australian Broadcasting Corporation*,⁵⁴ generally seen as a cautious retreat. One issue that emerged in subsequent years, but which did not proceed beyond the Supreme Courts of the states, was whether parliamentary privilege legislation offended the implied freedom of political communication, in that it effectively prevented a party to defamation proceedings from relying on what a member said inside Parliament to establish the truth or falsity of what was said outside Parliament.⁵⁵ To what extent is the implied freedom of political communication subordinate to specific provisions of the *Constitution* such as s 49? Must freedom of speech in Parliament prevail? These issues await resolution by the High Court.

H P Lee⁵⁶ focuses on the application of the implied freedom of political communication cases more than a decade later, by a differently constituted Court, in *Coleman v Power*⁵⁷ and *Mulholland v Australian Electoral Commission*.⁵⁸

Coleman successfully challenged his conviction under Queensland law of, amongst other things, using insulting language in a public place (in alleging that the defendant, Power, was corrupt). The Court was divided 4:3. Lee refers to the

⁵⁰ See, eg, *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 388; *General Practitioners Society v Commonwealth* (1980) 145 CLR 532, 565.

⁵¹ *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581.

⁵² (1991) 177 CLR 1.

⁵³ (1992) 177 CLR 106.

⁵⁴ (1997) 189 CLR 520.

⁵⁵ *Rann v Olsen* (2000) 76 SASR 450, 478 (Doyle CJ); *Laurance v Katter* [2000] 1 Qd R 147. *Laurance v Katter* was argued in October 1995, the decision was not handed down until November 1996 and the case was not reported until 2000. The author, who appeared as counsel in the case, is intrigued by these unusual delays.

⁵⁶ H P Lee, 'The "Reasonably Appropriate and Adapted" Test and the Implied Freedom of Political Communication' in Matthew Groves (ed), *Law and Government in Australia* (2005) 59.

⁵⁷ (2004) 220 CLR 1 ('*Coleman*').

⁵⁸ (2004) 220 CLR 181 ('*Mulholland*').

‘cries for appointment of “capital C” conservative judges’.⁵⁹ It is inevitable, he notes, that the views of the Justices appointed since the early free speech cases would be analysed closely. From this perspective, the division in *Coleman* comes as no surprise. Gleeson CJ, Callinan and Heydon JJ, in dissent, would all have dismissed the appeal.

In light of concessions made by the parties,⁶⁰ the significance of the case may be limited. Of the majority, Gummow and Hayne JJ construed the legislation narrowly and therefore found it unnecessary to make any finding on constitutional validity. Kirby J also construed the legislation narrowly but went on to hold that, so construed, the legislation was valid. Alone among the majority, McHugh J found the legislation, an unqualified prohibition against insulting words, failed the constitutional test. In contrast, Callinan and Heydon JJ, in dissent, rejected the narrow construction but found the legislation reasonable.

*Mulholland*⁶¹ was an unsuccessful challenge to the validity of electoral legislation which limited registration of political parties to those with a minimum of 500 members. Only registered political parties could have their party name ‘above the line’ on ballot papers. The Court rejected the argument that the ‘500 rule’ burdened the constitutional freedom of communication.⁶² Central to much of the reasoning was a freedom–right dichotomy. Aside from Kirby J, the members of the Court agreed that the *Constitution* does not establish a right to expression — that right must be found elsewhere. Once it is established, the *Constitution* protects infringement of the right. In this case, because there was no pre-existing right to have the party name printed above the line on the ballot paper, the legislation did not burden any implied freedom. The nature of the necessary pre-existing right is not clear. What is clear from the majority’s reasoning is that the implied freedom principle does not establish a right of free speech as such. It establishes limited protection against infringements. As Lee observes, the freedom–right dichotomy, discussed by the majority in *Mulholland*, may serve in the future to reduce considerably the scope of the implied freedom principle.⁶³

*Coleman*⁶⁴ shows that application of the ‘appropriate and adapted’ test remains a matter of judgement on which views will differ — a situation some conservative commentators find uncomfortable. Kirby J prefers the ‘proportionality’ formulation, which he believes may avoid some notions of political degree that

⁵⁹ Lee, above n 56, 60.

⁶⁰ In particular, that the validity of the challenged provision was to be determined by reference to the test in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. What is the effect of such a concession? McHugh J held that the concessions were properly made: *Coleman* (2004) 220 CLR 1, 45–6. His Honour also said that parties can concede issues including legal issues — the Court has no business in determining issues upon which the parties agree: at 44. Kirby J strongly disagreed, seeing that view as inconsistent with the Court’s duty to the *Constitution*: ‘McHugh J’s views would allow parties to control the exercise of a portion of the judicial power.’: at 89.

⁶¹ (2004) 220 CLR 181.

⁶² *Ibid* 223 (McHugh J), 247–9 (Gummow and Hayne JJ), 297 (Callinan J), 303 (Heydon J).

⁶³ Lee, above n 56, 80.

⁶⁴ (2004) 220 CLR 1.

belong to legislators.⁶⁵ Interestingly, Gleeson CJ would accept either formulation.⁶⁶ Lee suggests the two expressions have been used interchangeably. Neither test is precise. Critics who argue that the tests involve ad hoc balancing without clear measurement criteria⁶⁷ may well be accurate. But Lee is surely right when he responds: ‘so, what is new?’⁶⁸ The tests are no more imprecise than long-standing common law tests such as reasonableness and foreseeability. Courts regularly apply tests of this kind, just as courts in other common law jurisdictions with Bills of Rights provisions regularly apply tests such as proportionality. The difficulty in Australia is that the test must be applied without the usual Bill of Rights framework applicable in other common law jurisdictions. Absent such a framework, the Court is forced to grapple with freedom of political discourse in the somewhat arid context of implications said to be drawn from the text and structure of the *Constitution*. Yet that context provides no real guidance. Hence, no doubt, the frustration of critics who see value-laden judgements against a dry constitutional text. When Victoria and other states follow the lead of the Australian Capital Territory and adopt their own Bills of Rights regimes, Australian courts will become accustomed to applying this kind of protection. Ultimately it needs to be accepted that, where a constitution gives rise to an implied freedom of political communication, the test will inevitably be value-laden.

III PUBLIC SECTOR REVIEW AND EXECUTIVE ACCOUNTABILITY

A Commonwealth and State Ombudsmen

The function exercised by the Ombudsman in reviewing public administration is often underrated by academic commentators. In practice, far more grievances are redressed through intervention by the Ombudsman than through judicial review. The contribution by Dennis Pearce,⁶⁹ himself a former Commonwealth Ombudsman, is therefore especially welcome. Pearce provides a comprehensive review of the jurisdiction of all Australian Ombudsmen — Commonwealth, state and territory. His perception of the office is generally positive, although he is justifiably critical of early Victorian judicial decisions which took an excessively narrow view of ‘administrative action’,⁷⁰ the foundation for the Ombudsman’s jurisdiction.⁷¹

⁶⁵ *Mulholland* (2004) 220 CLR 181, 266.

⁶⁶ *Ibid* 197.

⁶⁷ See, eg, Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668.

⁶⁸ Lee, above n 56, 75.

⁶⁹ Dennis Pearce, ‘The Jurisdiction of Australian Government Ombudsmen’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 110.

⁷⁰ See, eg, *Booth v Dillon [No 1]* [1976] VR 291; *Booth v Dillon [No 2]* [1976] VR 434; *Booth v Dillon [No 3]* [1977] VR 143; *Glenister v Dillon* [1976] VR 550; *Glenister v Dillon [No 2]* [1977] VR 151; the Victorian view was followed in South Australia in *City of Salisbury v Biganovsky* (1990) 54 SASR 117 but a wider view of the Ombudsman’s jurisdiction has been taken in New South Wales in *Botany Council v Ombudsman* (1995) 37 NSWLR 357 and in Tasmania in *Anti-Discrimination Commissioner v Acting Ombudsman* (2003) 11 Tas R 343.

⁷¹ Pearce, ‘The Jurisdiction of Australian Government Ombudsmen’, above n 69, 121–4.

Ombudsman's offices in Australia have been remarkably stable. The office is seen as both prestigious and uncontroversial. The Ombudsman model has been copied in the private sector. It is therefore a little ironic that it is a change in the public-private balance, the contracting out to the private sector of the delivery of many government services, that has severely weakened the Ombudsman's role. Here the breadth of Pearce's analysis is especially useful. He identifies legislation in some states and territories that makes provision for review of decisions of private sector entities acting on behalf of government agencies — a development Pearce rightly supports. In this context, a very recent proposal 'to extend the jurisdiction of the [Commonwealth] Ombudsman ... to cover the actions of certain Australian Government contractors',⁷² is very much to be welcomed.⁷³

Having regard to Pearce's own 'inside' knowledge as a former Commonwealth Ombudsman, the inclusion of his assessment of the influence of the office over the years would have been interesting. What significance would Pearce attach to, for example, his immediate predecessor's concern that the government had declined to take any action on the Ombudsman's reports to the Prime Minister under s 16 of the *Ombudsman Act 1976* (Cth)⁷⁴ — a procedure not utilised by later Ombudsmen, apparently because of the perception that, in light of the lack of government response, this procedure was futile? Has the influence of the Ombudsman within government slowly declined? It seems, for example, that the Commonwealth Ombudsman no longer enjoys the same ready access to the Prime Minister as that enjoyed by the first Commonwealth Ombudsman, Professor Jack Richardson, to Prime Minister Malcolm Fraser.⁷⁵ To what extent does such lack of high-level access diminish the influence of the office? Is the position similar in the states and territories? Would the position be different if the Ombudsman were to be made an officer of the Parliament?⁷⁶

What judgements are to be made generally about the current effectiveness of the Ombudsman? In this context, it may be noted that it is not long since the Commonwealth Ombudsman reported that the majority of investigations into visa processing 'do not identify any problem in the decision-making'.⁷⁷ Notwithstanding widespread community concern about administrative practices in the Immigration portfolio, no relevant 'own motion' Ombudsman investigation was established. Ultimately, serious and systemic maladministration, including the improper detention of Ms Cornelia Rau, a person suffering from mental illness,

⁷² Commonwealth Ombudsman, *Annual Report: 2004–2005* (2005) 5.

⁷³ The proposal is timely. As long ago as 1998, the Administrative Review Council recommended that '[t]he Ombudsman should be able to investigate complaints against government contractors': Administrative Review Council, 'The Contracting Out of Government Services' (Report No 42, 1998) 45.

⁷⁴ Commonwealth and Defence Force Ombudsman, *Annual Report: 1986–1987* (1987) 16.

⁷⁵ This observation is based, in part, on the author's discussions with Professor Jack Richardson and later Commonwealth Ombudsmen.

⁷⁶ A suggestion previously put forward by Pearce: see Dennis Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (1998) 54. However this was not supported by the Senate Standing Committee on Finance and Government Administration, Parliament of Australia, *Review of the Office of the Commonwealth Ombudsman* (1991).

⁷⁷ Commonwealth Ombudsman, *Annual Report: 2002–2003* (2003) 59.

and the improper deportation of Ms Vivian Alvarez, an Australian citizen suffering severe physical disabilities, was uncovered by separate inquiries established by the Minister for Immigration and Multicultural and Indigenous Affairs following media revelations, rather than by the Ombudsman. Does the Ombudsman's initial failure to identify these serious and systemic failures weaken public confidence in the office? Alternatively, is the government's subsequent decision, to confer on the Commonwealth Ombudsman a new statutory monitoring function in relation to detainees in immigration detention centres and to designate the office as the Immigration Ombudsman,⁷⁸ a public endorsement of the office? These are live issues.

B *Executive Power and Accountability*

Matthew Groves writes about the growth of executive power and the changing nature of ministerial accountability and responsibility.⁷⁹ He explores some of the complexities of accountability, including the changing relationships between officials and Ministers, the now common refusal of Ministers to resign in the face of scandal within their portfolios and the creation and growth of extra-parliamentary forms of control over administrative action since the 1970s. Groves refers, in particular, to the increasing personal accountability of officials in light of administrative law developments, including freedom of information legislation, the duty to give reasons, merits and judicial review, and the jurisdiction of the Ombudsman. 'Administrative responsibility' is seen as a supplement to ministerial responsibility.

Many of those developments were influenced by the Royal Commission on Australian Government Administration,⁸⁰ of which Professor Campbell was a member. One example is the Commission's analysis of the direct public accountability of public servants. The Commission recognised that the Westminster model in its purest form was not an accurate image of Australian government.⁸¹ While s 64 of the *Constitution* enshrined the principle of ministerial responsibility, Ministers did not accept, nor did the public expect them to accept, blanket responsibility for all the acts of their officials.⁸² At the same time, officials were seen to be anonymous.⁸³ The Commission squarely raised the problem of holding an anonymous bureaucracy accountable for the powers it exercises.⁸⁴

Some may see it as ironic that, since the time of the Commission, ministerial control of public service departments has actually increased. The original *Public Service Act 1902* (Cth), and *Public Service Act 1922* (Cth) s 25(2) as in force in 1976 at the time the Commission reported, relevantly provided:

⁷⁸ Commonwealth Ombudsman, *Annual Report: 2004–2005*, above n 72, 5.

⁷⁹ Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (2005) 82.

⁸⁰ Royal Commission on Australian Government Administration, above n 3.

⁸¹ *Ibid* 11.

⁸² *Ibid* 12, 60.

⁸³ *Ibid* 12, 16.

⁸⁴ *Ibid* 13.

The Permanent Head of a Department shall be responsible for its general working and for all the business thereof, and shall advise the Minister in all matters relating to the Department ...

The Commission accepted that s 25(2) must be read subject to the Minister's responsibility under s 64 of the *Constitution* for the administration of the Department.⁸⁵ That constitutional responsibility is now reflected in *Public Service Act 1999* (Cth) s 57, which relevantly provides:

The Secretary of a Department, under the Agency Minister, is responsible for managing the Department and must advise the Agency Minister in matters relating to the Department. The Secretary of a Department must assist the Agency Minister to fulfil the Agency Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department.

Accountability of officials now has legislative recognition. Section 10(e) of the *Public Service Act 1999* (Cth), which is also reflected in the Australian Public Service Commission's publication, *APS Values and Code of Conduct in Practice*, relevantly provides that '[t]he APS is openly accountable for its actions, within the framework of ministerial responsibility to the government, the Parliament and the Australian public.'⁸⁶

C *The 'Children Overboard Affair'— Gaps in Accountability Exposed*

The 'children overboard affair' and its parliamentary aftermath exposed significant remaining gaps in ministerial accountability, gaps that are particularly relevant to Professor Campbell's pioneering work in relation to parliamentary privilege. On 7 October 2001, the Minister for Immigration and Multicultural Affairs announced to the media that 'a number of children had been thrown overboard' from a vessel suspected of being an 'illegal entry vessel' just intercepted by the Australian Defence Force.⁸⁷ The 'children overboard' story was repeated by senior government Ministers and photographs were released as evidence of children having been thrown overboard.

The 'children overboard' story was untrue. Moreover, the Chief of the Defence Force briefed the Minister for Defence that the photographs were of the wrong event.⁸⁸ The Acting Chief of the Defence Force briefed the Minister for Defence that 'there was nothing to suggest women and children had been thrown into the water'.⁸⁹ Notwithstanding the high-level official briefing provided to the Minister, the public record was not corrected.

⁸⁵ Ibid 63.

⁸⁶ Australian Public Service Commission, *APS Values and Code of Conduct in Practice — A Guide to Official Conduct for APS Employees and Agency Heads* (revised ed, 2005) 40 ('APS Values') <<http://www.apsc.gov.au/values/conductguidelines.pdf>>.

⁸⁷ See Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Inquiry into a Certain Maritime Incident* (2002) xxi.

⁸⁸ Ibid 83; Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 12 April 2002, 742 (Christopher Alexander Barrie).

⁸⁹ Senate Select Committee on a Certain Maritime Incident, above n 87, 117; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 20 February 2002, 104 (Angus Houston).

A Senate Committee appointed to investigate why the claim was made and why it was not corrected delivered a devastating indictment of the government, of ministerial advisers and of the administration of a public service task force, the People Smuggling Taskforce. The Committee found that the former Minister for Defence ‘stands condemned for his deliberate misleading of the public, his persistent failure to correct the record, and his refusal to cooperate with the Senate inquiry’.⁹⁰ The Committee was also highly critical of the role of ministerial staff, who had clearly played a key role in relation to the failure to correct the public record in the ‘children overboard affair’. The inquiry revealed ‘behaviour by advisers in their interactions with departments which is inappropriate at best, and grossly improper at worst’.⁹¹ The Committee found that there now exists a group of people on the public payroll — ministerial advisers — who seem willing and able, on their own initiative, to intervene in public administration. This group is able to take decisions affecting the performance of agencies, without there being a corresponding requirement that they publicly account for those interventions, decisions and actions.⁹²

The Senate Committee identified ‘a major constitutional issue: the extent to which the Parliament is able to effectively scrutinise the actions of the Executive’.⁹³ It highlighted a serious accountability vacuum at the level of ministerial offices, including the evolution of the role of advisers to a point where they enjoy a level of autonomous executive authority.⁹⁴ Ministerial staff were not subject to any equivalent of the *Australian Public Service Code of Conduct*⁹⁵ that governs public servants under the *Public Service Act 1999* (Cth), or the *Parliamentary Service Code of Conduct*⁹⁶ governing parliamentary employees under the *Parliamentary Service Act 1999* (Cth).⁹⁷ Concern was expressed about a Cabinet decision that ministerial advisers were not to appear before the Committee and the Committee recommended that ministerial advisers be subject to parliamentary scrutiny in a similar manner to public servants.⁹⁸ Serious questions emerged concerning the accountability, if any, of a former Minister who may have lied, of a Minister in one House to a committee of the other House, and of ministerial advisers. These issues were not, however, formally tested — the Committee did not attempt to compel, by subpoena, the attendance of those unwilling to appear.

To its credit, the Australian Public Service Commission has responded to some of the concerns. In its publication *APS Values*, the Commission now says: ‘Ministerial employees provide important guidance about the Minister’s policy and requirements and, by so doing, help APS employees to be responsive.

⁹⁰ Senate Select Committee on a Certain Maritime Incident, above n 87, 190.

⁹¹ *Ibid* 186.

⁹² *Ibid* 174.

⁹³ *Ibid* xvii.

⁹⁴ *Ibid* xxix, xxxiii, 173.

⁹⁵ Contained in *Public Service Act 1999* (Cth) s 13.

⁹⁶ Contained in *Parliamentary Service Act 1999* (Cth) s 13.

⁹⁷ Senate Select Committee on a Certain Maritime Incident, above n 87, 183–4.

⁹⁸ *Ibid* 187.

However, they cannot direct APS employees.⁹⁹ The same publication states that public servants

are different from other employees providing services in the marketplace, in that [they] exercise authority on behalf of the Government and the Parliament, acting for the public. The public rightly expects high performance and standards of personal behaviour.¹⁰⁰

Nevertheless, the accountability gap in respect of ministerial staff remains.

D *Justiciability of Cabinet Decisions*

Groves deals also with the justiciability of Cabinet decisions,¹⁰¹ including one of the well-known cases, *Minister for the Arts, Heritage and the Environment v Peko-Wallsend Ltd*.¹⁰² There the applicant, Peko-Wallsend Ltd, had challenged an Australian government decision to nominate a site known as Stage Two of the Kakadu National Park¹⁰³ to the World Heritage Committee, for inclusion in the World Heritage List.¹⁰⁴ Peko-Wallsend claimed its mining interests would be adversely affected and that it had been denied natural justice. The Australian nomination was to be dealt with by the World Heritage Committee at its annual session in Paris in the week commencing 24 November 1986. On that day, a Federal Court judge, Beaumont J, granted interim relief, restraining the government from proceeding with its nomination and directing the government to inform the World Heritage Committee of the Federal Court proceedings and

that with a view to preserving the status quo until judgment in the proceedings ... the Federal Court of Australia has directed the respondents ... to request the World Heritage Committee to defer until further notice its consideration ... of the application ...¹⁰⁵

Special leave to appeal against the interim relief and an application for a stay were refused.¹⁰⁶

It fell to the author¹⁰⁷ to convey the terms of the Federal Court's order, by telephone, to the leader of the Australian delegation to the World Heritage Committee in Paris. The colourful language of his response cannot be repeated here. Suffice it to say that the order caused much consternation in the World Heritage Committee and undoubtedly diminished Australia's standing in that Committee. Beaumont J subsequently declared the government's decision to

⁹⁹ Australian Public Service Commission, above n 86, 25 (emphasis added).

¹⁰⁰ Ibid 7.

¹⁰¹ Groves, above n 79, 91–4.

¹⁰² (1987) 15 FCR 274.

¹⁰³ Stage One having already been included on the World Heritage List.

¹⁰⁴ Established under the *Convention concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

¹⁰⁵ The full text of the order is in *Cohen v Peko-Wallsend Ltd* (1986) 68 ALR 394, 395–6 (Gibbs CJ, Mason and Wilson JJ).

¹⁰⁶ Ibid.

¹⁰⁷ As Head of the General Counsel Division, Commonwealth Attorney-General's Department.

nominate Stage Two invalid as a decision made in denial of natural justice.¹⁰⁸ His Honour's decision was set aside on appeal, in large part on the basis that the government's decision was non-justiciable because of its subject matter, involving complex policy questions.¹⁰⁹

The case raised some fundamental questions concerning judicial review. Groves sees the decision as 'a clear acknowledgment by the courts of the role of Cabinet'.¹¹⁰ In the author's view, the status of the decision-maker, in this case the Cabinet, should not be the relevant criterion. Political accountability is an important element of our system of government. It does not displace the requirement that decisions must be made lawfully. The opportunity to seek judicial scrutiny of executive action, including government decisions at the highest levels, is surely a fundamental aspect of the rule of law.¹¹¹ In this case, it was the subject matter and the legal effect of the decision, rather than the status of the decision-maker, that rendered judicial review inappropriate. Judicial restraint is, in the author's view, appropriate in relation to executive decisions relating to, for example, the conduct of foreign affairs,¹¹² where the American 'political questions' doctrine¹¹³ or the 'act of state' doctrine¹¹⁴ have their place. Restraint may also be appropriate in relation to high-level policy decisions such as the nomination of Stage Two, as distinct from decisions relating directly to the rights of particular individuals. The real reason for such restraint is surely that natural justice or procedural fairness principles have little or no relevance to decisions taken on wide public interest grounds that do not directly affect the legal rights or interests of individuals.

Indeed, that seems to be the conclusion reached by Groves in a separate essay, co-authored with Professor Campbell, on polycentricity in decision-making.¹¹⁵ In that essay the two authors appear to accept that the Cabinet's discretion was so open-ended that the decision lacked the requisite qualities to render it justiciable.¹¹⁶

¹⁰⁸ *Peko-Wallsend Ltd v Minister for Arts, Heritage and Environment* (1986) 13 FCR 19, 44–5.

¹⁰⁹ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 279 (Bowen CJ), 283 (Wilcox J). Relief at first instance had been granted on the basis of 'the usual undertaking as to damages'. The Commonwealth never sought to enforce that undertaking. Measurement of damages, had the Commonwealth sought to enforce the undertaking, would have raised some interesting and novel questions.

¹¹⁰ Groves, above n 79, 94.

¹¹¹ Cf *Ruddock v Vadarlis* (2001) 110 FCR 491, in particular the final 'postscript' in the judgment of French J (at 548–9).

¹¹² See, eg, *Horta v Commonwealth* (1994) 181 CLR 183, 195–6 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) where the Court was to consider 'the propriety of the recognition by the Commonwealth Executive of the sovereignty of a foreign nation over foreign territory'; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J) regarding 'the judgement of the Executive and the Parliament that entry into a treaty and its implementation was for Australia's benefit'.

¹¹³ *Baker v Carr*, 369 US 186 (1962).

¹¹⁴ *Banco Nacional de Cuba v Sabbitino*, 376 US 398, 416 (Harlan J) (1964); *First National City Bank v Banco Nacional de Cuba*, 406 US 759 (1972); *Alfred Dunhill of London Inc v Republic of China*, 425 US 682 (1976).

¹¹⁵ Enid Campbell and Matthew Groves, 'Polycentricity in Administrative Decision-Making' in Matthew Groves (ed), *Law and Government in Australia* (2005) 213.

¹¹⁶ *Ibid* 226.

E *Review of Polycentric Decisions*

Groves and Campbell tackle wider issues raised by polycentric decisions, that is, decisions affecting not merely an individual or body but a greater range of parties and involving interrelated issues. Examples include decisions involving allocation of limited resources, such as a licensing or quota scheme in respect of a limited natural resource, or a scheme for financial grants out of a finite fund. A decision to issue a licence or to make a financial grant to any one applicant has implications for other applicants. Assume an unsuccessful applicant could demonstrate error in the processing of their application but all the available licences had already been issued or all the available funds had already been granted. This is a consequence a tribunal or court is unable to manage. Does it follow that these kinds of decisions are unsuitable for merits review or judicial review? Campbell and Groves argue that polycentricity is not itself a sufficient reason to deny review. They distinguish between decisions involving allocation of scarce resources and decisions based on policy or political considerations, where they point to other means of accountability.¹¹⁷ The distinction is legitimate. Applicants for licences or grants involving scarce resources should not be denied the ordinary standards of administrative decision-making. Issues relating to judicial review of decisions involving allocation of scarce resources may receive further attention in Australian jurisprudence, if current proposals for inclusion of provisions in Bills of Rights relating to economic, social and cultural rights come to fruition.¹¹⁸

IV JUDICIAL REVIEW DEVELOPMENTS

A *Three Recent High Court Decisions — Some Unfortunate Regressions?*

Recent High Court decisions have exposed three other important areas where, regrettably, judicial review may not be available: namely where public functions are exercised by private corporations, where public funds are expended in a manner not anticipated at the time of parliamentary appropriation and where, as a result of action taken by the executive, the subject matter has been moved beyond territorial boundaries.

In *Neat Domestic Trading Pty Ltd v AWB Ltd*,¹¹⁹ the High Court, by majority, rejected a challenge to a decision by a private sector company incorporated under the *Corporations Law* of Victoria to withhold consent to export wheat in bulk. Without such consent, the applicant was unable to enter the bulk export market. Thus a private sector company exercised an important function in a public regulatory scheme. It remains to be seen whether the decision turned on the rather complex facts or whether, in light of this decision, it is now open to the

¹¹⁷ See *ibid* 223–31.

¹¹⁸ Cf the media release by the Chief Minister and Attorney-General of the Australian Capital Territory: Jon Stanhope, ‘Review of First Twelve Months of *Human Rights Act*’ (Press Release, 6 April 2006), announcing that a review of the first 12 months of operation of the *Human Rights Act 2004* (ACT) will examine whether rights under the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) should also be incorporated.

¹¹⁹ (2003) 216 CLR 277 (*‘Neat’*).

Parliament to confer public powers or functions on private corporations without their exercise being subject to administrative law constraints, including of course the constitutional writs. Kirby J, in a forceful and significant dissent, considered that, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law.¹²⁰ In his view, the majority had taken ‘a wrong turning’¹²¹ — a view many will share.

*Combet v Commonwealth*¹²² was a challenge to the validity of expenditure on a government advertising campaign in support of proposed new industrial relations laws. All governments expend public moneys on advertising government programmes. The distinguishing feature which made expenditure of public moneys on this advertising campaign politically controversial was that the advertising related to proposed laws, not laws already enacted by the Parliament. Opponents therefore contended that the campaign was political and an improper use of public funds. Sections 81 and 83 of the *Constitution* provide for appropriation of funds for the purposes of the Commonwealth and prohibit drawing of Treasury moneys without an appropriation. The legal issue turned on construction of a broadly expressed appropriation for ‘departmental expenditure’ in the *Appropriation Act [No 1] 2005–2006* (Cth)¹²³ and ‘Outcome 2’ of the appropriation for the Employment and Workplace Relations portfolio of ‘[h]igher productivity, higher pay workplaces’.¹²⁴

The majority held that the Act did not require departmental expenditure to be applied to activities in respect of the outcomes specified in the schedule.¹²⁵ The means of limiting public expenditure was the specification of the amount that may be spent, rather than defining the purposes or activities for which it may be spent.¹²⁶ McHugh J, in dissent, held that there was no rational connection between the government’s advertisements and the ‘outcome’ specified in the appropriation legislation.¹²⁷ Kirby J, also in dissent, expressed a similar view.¹²⁸ Moreover, as there was no distinct authorisation, the appropriation did not support the withdrawal.¹²⁹ McHugh and Kirby JJ, in their separate judgments, both contended that the effect of the majority judgment was to leave departmental expenditure ‘at large’¹³⁰ as a ‘virtually unconstrained concept’.¹³¹ A department could expend its appropriation for any purpose it liked, provided the money was spent for a purpose of the Commonwealth.¹³² On this basis, the constitu-

¹²⁰ Ibid 309–11.

¹²¹ Ibid 300.

¹²² (2005) 221 ALR 621 (*‘Combet’*).

¹²³ See *Appropriation Act [No 1] 2005–2006* (Cth) ss 3, 4, 7, 8, 15.

¹²⁴ *Appropriation Act [No 1] 2005–2006* (Cth) sch 1.

¹²⁵ *Combet* (2005) 221 ALR 621, 660–1 (Gummow, Hayne, Callinan and Heydon JJ).

¹²⁶ Ibid 669 (Gummow, Hayne, Callinan and Heydon JJ).

¹²⁷ Ibid 649–50.

¹²⁸ Ibid 694, 696.

¹²⁹ Ibid 672, 692.

¹³⁰ Ibid 646 (McHugh J).

¹³¹ Ibid 698 (Kirby J).

¹³² Ibid 646 (McHugh J).

tional validity of the appropriation was open to doubt.¹³³ There is much force in these views. The majority's approach appears to weaken substantially parliamentary control over expenditure by the executive government.

Important questions concerning the jurisdiction of courts to grant relief in respect of matters beyond their territorial boundaries have arisen in a number of common law jurisdictions. In *Rasul v Bush*,¹³⁴ the United States Supreme Court rejected the government's submissions that the Court did not have jurisdiction to grant habeas corpus relief to prisoners being detained outside the United States at Guantánamo Bay. In *S v Makwanyane*,¹³⁵ the Constitutional Court of South Africa held in respect of a man who had been deported to the United States and was on trial in that country (and was therefore physically outside the jurisdiction of the South African Court), that the deportation was unlawful under South African law because no assurance that the death penalty would not be applied had been obtained. The man was beyond the power of the South African Court to order effective protection but a declaration was made that his constitutional rights in South Africa had been infringed.

These decisions may be contrasted with the decision of the Australian High Court in *Vadarlis v Minister for Immigration and Multicultural Affairs* to refuse special leave to appeal,¹³⁶ on the basis that at the time special leave was sought, the asylum seekers whose detention was being challenged were being detained in foreign countries — New Zealand and Nauru — and were subject to the laws of those countries. Relief by way of declaration was refused because that would have amounted to an advisory opinion.¹³⁷ It seems the Australian High Court may be less concerned with guarding civil liberty in the face of executive excesses than other common law courts. Subsequent decisions which may add weight to that view include the Court's endorsement of indefinite detention of failed asylum seekers,¹³⁸ unlimited preventative detention of criminals under state laws,¹³⁹ and arguably also the expansion of the powers of military tribunals.¹⁴⁰

B Estoppel in Public Law

What, if any, are the legal consequences of representations made by public sector decision-makers? In relation to contracts, the Federal Court has held that representations by a government agency as to the conduct of a tender process have legal consequences.¹⁴¹ In relation to tort, the High Court has held that the Commonwealth is unable to rely on a defence that a claim was statute barred

¹³³ Ibid 648 (McHugh J), 700 (Kirby J).

¹³⁴ 542 US 1 (2004).

¹³⁵ 1995 (3) SA 391 (CC) (South Africa).

¹³⁶ (2001) 22(20) Leg Rep SL 1.

¹³⁷ Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, Gaudron, Gummow and Hayne JJ, 27 November 2001) 36–7.

¹³⁸ For example, aliens who fail to obtain a visa: see *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

¹³⁹ See *Baker v The Queen* (2004) 210 ALR 1; *Fardon v A-G (Qld)* (2004) 210 ALR 50.

¹⁴⁰ *Re Aird; Ex parte Alpert* (2004) 220 CLR 308.

¹⁴¹ See *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.

when it had earlier represented to the plaintiff that it would not rely on the defence.¹⁴² How do these principles play out in administrative law? Two essays address these issues.

Sir Anthony Mason surveys the role of estoppel in public law.¹⁴³ Principles of estoppel have evolved primarily in the area of private law. Mason contends that the elements of public law estoppel do not differ from the elements of private law estoppel. A critical difference, however, is the statutory overlay. Estoppel cannot be invoked to prevent a public law entity from exercising its statutory powers. In public law, a key question is whether holding the repository of a statutory discretion to estoppel would impair the exercise of a discretion according to law. He refers to his suggestion, in *Commonwealth v Verwayen*,¹⁴⁴ that a unified doctrine of estoppel was emerging from the morass of categories of estoppel — a view he now admits is unlikely to be accepted. It may be that there remains scope for further development of a principle of estoppel in public law but large questions arise, including its relationship with the statutory and common law grounds for judicial review and the scope for substantive relief.

Mason surveys English decisions purportedly based on estoppel which he contends were not estoppel cases at all but procedural fairness or legitimate expectation cases, leading ultimately to substantive fairness — a path not followed in Australia. This will be further discussed below. The distinction between estoppel and legitimate expectation or procedural fairness will not always be easy. Here again, English and Australian law may diverge. Mason contends that since estoppel is a substantive rule of law, the case for equating legitimate expectation to estoppel is stronger in England.¹⁴⁵ This is because the English cases recognise substantive protection of a legitimate expectation, as opposed to Australia, where legitimate expectation sounds only in a duty to accord procedural fairness.

C *Is Legitimate Expectation Dead?*

Whether by accident or design, the next essay, by Bruce Dyer,¹⁴⁶ analyses the place and content of legitimate expectations as a ground of review after *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.¹⁴⁷ *Lam* was a case brought in the original jurisdiction of the High Court in circumstances where the applicant fell outside ‘the immovable time barrier’

¹⁴² *Commonwealth v Verwayen* (1990) 170 CLR 394. Some members of the Court relied on estoppel: at 446–51 (Deane J), 455–63 (Dawson J). Others relied on waiver: at 471–7 (Toohey J), 477–87 (Gaudron J).

¹⁴³ Sir Anthony Mason, ‘The Place of Estoppel in Public Law’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 160.

¹⁴⁴ (1990) 170 CLR 394, 410; see also at 433–4 (Deane J).

¹⁴⁵ Mason, above n 143, 175–80.

¹⁴⁶ Bruce Dyer, ‘Legitimate Expectations in Procedural Fairness after *Lam*’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 184.

¹⁴⁷ (2003) 214 CLR 1 (‘*Lam*’), not *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, as incorrectly cited in: Mark Aronson, ‘Nullity’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 139, 146 fn 55; Mason, above n 143, 176 fn 94, 177 fn 97. Note however that the citations in the text and footnote are correct in Dyer, above n 146, 184.

which stood in the path of exercise of the Federal Court's jurisdiction.¹⁴⁸ The High Court was able to exercise original jurisdiction under s 75(v) of the *Constitution* on the basis that denial of natural justice may attract a remedy for excess of jurisdiction.¹⁴⁹ Four members of the Court, to varying degrees, threw doubt on legitimate expectation as a separate freestanding ground of review, preferring to see the concept subsumed within the wider concept of procedural fairness. Callinan J took the strongest view, preferring an actual expectation. McHugh and Gummow JJ were more prepared to attribute or infer states of mind.¹⁵⁰

Critical to the decision in *Lam* was the fact that Lam did not rely to his detriment on the relevant representation, or perhaps more relevantly, that he did not lose an opportunity to present his case.¹⁵¹

McHugh and Gummow JJ put the departure from the Court's earlier decision in *Minister for Immigration and Ethnic Affairs v Teoh*¹⁵² in a constitutional context, writing 'that the role or function of Chapter III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.'¹⁵³ Callinan J put the issue even more forcefully in *Lam*: 'the view is open that for the Court to give the effect to the Convention that it did, was to elevate the Executive above the parliament.'¹⁵⁴ Thus in rejecting *Teoh*, McHugh, Gummow and Callinan JJ raise fundamental constitutional considerations. It was not for the judicial branch to add to or vary the discretionary powers conferred on the executive under s 61 of the *Constitution* by taking a particular view of the conduct by the executive in relation to external affairs. It followed that it was inappropriate for Australian courts to engage in the same level of judicial intervention as English courts, where legitimate expectation or procedural fairness principles have been given substantive operation or, as one member of the High Court succinctly put it, to refer 'to what decision the decision-maker should reach'.¹⁵⁵ Where English courts have developed administrative law to embrace such broader concepts as substantive fairness, abuse of power and proportionality, the Australian constitutional context has been interpreted as requiring a narrower focus on legality.

That *Lam* represents a significant departure from *Teoh* is unlikely to be disputed. One feature of *Lam* not remarked upon by Dyer is that, notwithstanding the extensive and significant references to constitutional constraints on judicial review, it was decided by a five-member bench. In light of his Honour's comments in *Al-Kateb*,¹⁵⁶ it is likely that Heydon J would decline to attach much

¹⁴⁸ *Lam* (2003) 214 CLR 1, 14 (McHugh and Gummow JJ).

¹⁴⁹ *Ibid* 15 (McHugh and Gummow JJ).

¹⁵⁰ The fourth member was Gleeson CJ, who said '[t]he ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed.': *ibid* 13.

¹⁵¹ *Ibid* 8, 13–14 (Gleeson CJ). For this reason, there was no procedural unfairness: at 34–6, 38 (Hayne J), 48 (Callinan J).

¹⁵² (1995) 183 CLR 273 ('*Teoh*').

¹⁵³ *Lam* (2003) 214 CLR 1, 24–5; see also Gleeson CJ's judgment where his Honour notes the constitutional setting of s 75(v) but does not find it necessary to take the issue further: at 10.

¹⁵⁴ *Ibid* 48.

¹⁵⁵ *Ibid* 37 (Hayne J).

¹⁵⁶ (2004) 219 CLR 562, 662.

significance to unincorporated treaties. Kirby J may well prefer the Court's approach in *Teoh*. McHugh J has now been replaced by Crennan J, whose views are of course at present unknown.

D *A Significant Development — The New 'Constitutional Writs' Nomenclature*

The same constitutional setting, Chapter III, which in *Lam* served to lessen the scope for judicial review, has in other contexts served to enhance judicial review.

An important development, the full significance of which may not yet be fully apparent, is the High Court's adoption of the terminology 'constitutional writs' instead of prerogative writs.¹⁵⁷ In response to legislative attempts to restrict judicial review of immigration decisions through a privative clause, the High Court has unanimously emphasised the constitutional significance of the s 75(v) jurisdiction in maintaining the rule of law.¹⁵⁸ Because the power to determine conclusively jurisdictional limits involves an exercise of judicial power, the Parliament is unable to confer on an administrative tribunal the power to determine conclusively its own jurisdiction.¹⁵⁹ It was also established that the constitutional writs may issue for denial of procedural fairness as a component of jurisdictional error,¹⁶⁰ although not all will welcome the retention of the doctrine of 'jurisdictional error' in Australia.¹⁶¹

E *Nullity as a Constitutional Law Concept*

In this context Mark Aronson's essay on the continuing relevance of nullity is especially pertinent.¹⁶² Nullity may be a relative concept. In administrative law, statutory appeal rights may be available from null decisions.¹⁶³ Tort law damages may be available for imprisonment based on null decisions.¹⁶⁴ How does 'nullity' sit in the bureaucratic context? Can administrative decision-makers who recognise their decisions were flawed treat them as nullities and remake them? The answer seems to depend on the statutory context but it seems that concepts such as void, voidable, and nullity may have limited continuing relevance in

¹⁵⁷ *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 93 (Gaudron and Gummow JJ), 133–6 (Kirby J).

¹⁵⁸ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482, 483 (Gleeson CJ), 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'). A similar theme was expressed in unrelated litigation in *Marquet* (2003) 217 CLR 545, 570 (Gleeson CJ, Gummow, Hayne and Heydon JJ): 'constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements'.

¹⁵⁹ *Plaintiff S157* (2003) 211 CLR 476, 484 (Gleeson CJ), 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁶⁰ *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 89 (Gleeson CJ), 91, 101, 109 (Gaudron and Gummow JJ), 135 (Kirby J), 143 (Hayne J). See also *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

¹⁶¹ See, eg, *Craig v South Australia* (1994) 184 CLR 163, 177–9 (Brennan, Deane, Toohey, Gaudron, McHugh JJ); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611. Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 122–3 (Kirby J).

¹⁶² Aronson, above n 147.

¹⁶³ *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

¹⁶⁴ *Ruddock v Taylor* (2003) 58 NSWLR 269.

administrative law.¹⁶⁵ Aronson makes the important point that nullity serves rule of law goals in helping judges resist legislative attacks on judicial review. Thus in *Plaintiff S157*,¹⁶⁶ the privative clause protected ‘decision[s] ... made ... under this Act’¹⁶⁷ but did not protect purported decisions or nullities. The privative clause could not constitutionally preclude judicial review. Constitutional principles underpinned the reasoning and nullity was a critical tool. The Court made it clear that any Commonwealth legislation restricting judicial review of administrative acts which are nullities would be invalid.¹⁶⁸ Nullity therefore remains a powerful concept.

V THE EVOLVING ROLE OF THE GOVERNOR-GENERAL

George Winterton surveys the evolving role of the Governor-General, tracing its historical evolution from principal representative of the British Government to a position requiring public confidence as a practical prerequisite for security of tenure.¹⁶⁹ Winterton refers to the diverse views concerning the legality of executive action. He suggests that, while the Governor-General is entitled to seek the advice of the Solicitor-General and also to seek independent legal advice, the Governor-General should ultimately follow ministerial advice and record any doubts in the Executive Council Minutes.¹⁷⁰ Few will dispute the Governor-General’s entitlement to seek advice but the utility of recording doubts in this way is not immediately apparent. The controversy over the 1975 dismissal is mentioned but Winterton does not enter into the debate.

It is unfortunate that the pre-eminent legal scholar on the role of the Governor-General did not take the opportunity to rebut the curious but oft-repeated claims of one former official secretary to several Governors-General, Sir David Smith, that the Governor-General is the ‘constitutional’ Head of State.¹⁷¹ Perhaps Winterton sees the claims as so lacking in legal merit as not to call for a response. Nevertheless, an articulation of the relevant constitutional provisions, including the distinction between the constitutional identification of Australia’s Head of State and the exercise of particular powers under the *Constitution* would have added weight.

¹⁶⁵ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 (Gaudron and Gummow JJ).

¹⁶⁶ (2003) 211 CLR 476.

¹⁶⁷ *Migration Act 1958* (Cth) s 474(2).

¹⁶⁸ Aronson, above n 147, 154; *Plaintiff S157* (2003) 211 CLR, 505–8, 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁶⁹ George Winterton, ‘The Evolving Role of the Australian Governor-General’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 44.

¹⁷⁰ *Ibid* 53.

¹⁷¹ According to Smith, the Queen is the sovereign but not the Head of State: see, eg, Sir David Smith, *Head of State: The Governor-General, the Monarchy, the Republic and the Dismissal* (2005).

VI INTERNATIONAL PERSPECTIVES

A *International Recognition and Enforcement of Judgments*

Public international law was not one of Professor Campbell's areas of expertise. Perhaps that is why there is no treatment of the controversial question of whether it is appropriate to refer to principles of international law as an aid to constitutional interpretation — the issue that led to such a sharp divide between McHugh and Kirby JJ in *Al-Kateb*.¹⁷² International law scholars are well aware that the United States, which played such a major role in the establishment of global institutions and the rule of law after World War II, now refuses to comply with that same world order. Richard Garnett writes about recognition and enforcement of foreign judgments in private international law,¹⁷³ a field into which Professor Campbell did venture.¹⁷⁴ As in public international law, it is the United States which has held back multilateral agreement, in this case blocking the Draft Convention negotiated under the auspices of the Hague Conference on Private International Law in 1999.¹⁷⁵ Where does the failure of the Hague Conference draft leave Australia? Garnett canvasses the merits of joining the European system — the *Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*.¹⁷⁶ The current signatories to the *Lugano Convention* are the members of the European Union and the European Economic Area. Somewhat unusually, for a Convention negotiated in a regional context, art 62 provides that membership is open to other states with the unanimous agreement of all existing parties.

The issue is one of considerable practical importance having regard to the growth in international trade and the diversity of national laws relating to jurisdiction over foreign defendants and enforcement of foreign judgments. A potential problem in joining is the exposure of Australians to the exercise of 'exorbitant jurisdiction' by some European states. Thus a French court is able to exercise jurisdiction where the plaintiff is a French national, regardless of the nationality or location of the defendant or the connection between the action and France. The major benefits of entry into the *Lugano Convention* regime are that it would provide a more acceptable basis for the exercise of jurisdiction, together with liberal rules for the recognition and enforcement of judgments.

So far as jurisdiction is concerned, the emphasis in the *Lugano Convention* system is on jurisdictional certainty rather than judicial discretion. Once jurisdiction is established, there is little or no scope for application of judicial discretion pursuant to common law doctrines such as *forum non conveniens*. Garnett argues

¹⁷² (2004) 219 CLR 562; see also Ernst Willheim, 'Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation' (2005) 6 *Asia-Pacific Journal on Human Rights and the Law* 1.

¹⁷³ Richard Garnett, 'Reform of Australian Jurisdiction and Judgments Law by International Treaty: The *Lugano* Option' in Matthew Groves (ed), *Law and Government in Australia* (2005) 241.

¹⁷⁴ Enid Campbell, 'Res Judicata and Decisions of Foreign Tribunals' (1994) 16 *Sydney Law Review* 311.

¹⁷⁵ Garnett, above n 173, 243.

¹⁷⁶ Opened for signature 16 September 1988, 1659 UNTS 13 (entered into force 1 January 1992) ('*Lugano Convention*').

that, because the basic principle of jurisdiction under the *Lugano Convention* model is that the defendant must be sued at his or her place of domicile, the outcome is in substance similar to that under the common law rules. Not all will agree with his view that the practical operation of ‘temporary presence’ as a basis of jurisdiction in common law countries is limited.¹⁷⁷ Some will remember the time when directors of major Australian resource companies were unable to visit the United States for fear of being served with process under ‘long arm’ legislation in the United States.¹⁷⁸ Garnett argues that in most areas of contract and tort, the outcome will also be similar even where the technical bases for jurisdiction are differently expressed. The one significant exception relates to consumer contracts, where the *Lugano Convention* system gives greater jurisdictional choice to consumers. This is a potential benefit to Australian consumers but also provides a greater risk of exposure of Australian companies to suit abroad from foreign consumers.

Under the *Lugano Convention* system, the recognition and enforcement regimes are, however, significantly different from the common law rules. The *Lugano Convention* model reduces the defences to enforcement, advantaging successful plaintiffs but increasing the exposure of defendants. Accession by Australia would remove some safeguards currently available in respect of enforcement of foreign judgments in Australia but would allow for greater recognition of Australian judgments in *Lugano Convention* countries. Garnett’s assertion that no detailed analysis of the benefits of joining the European system has been undertaken may be something of an overstatement.¹⁷⁹ Some years ago the author¹⁸⁰ was personally involved in discussions at ministerial level on just this issue; discussions which came to nought, partly because of substantive reservations but primarily because of an apparent lack of interest from the legal profession. Perhaps the passage of time, together with Garnett’s welcome renewal of the debate, will stimulate greater interest in this subject.

B *Vexatious Litigants*

Control of persistently vexatious litigants is another subject that has attracted scant academic attention. In the concluding essay, Michael Taggart and Jenny Klosser provide a comprehensive historical survey of English and New Zealand experience.¹⁸¹ Some may question the inclusion of such a survey of foreign law in a publication entitled *Law and Government in Australia*. Nevertheless, this comprehensive survey of the issues that arise and of the New Zealand authorities will undoubtedly prove a useful resource in Australia. The obvious question is whether this subject requires legislative reform in Australia. Does the heading of

¹⁷⁷ Garnett, above n 173, 254.

¹⁷⁸ See, eg, in relation to anti-trust legislation, *Clayton Antitrust Act of 1914*, 15 USC § 12 (2005). The United States *Federal Rules of Civil Procedure* enables service to be effected under a state ‘long arm’ statute: *Federal Rules of Civil Procedure* r 4 (2006). (‘Long arm’ statutes give a court jurisdiction over a person even though the person does not reside in the territorial limits of the court).

¹⁷⁹ Garnett, above n 173, 244.

¹⁸⁰ As Division Head, Commonwealth Attorney-General’s Department.

¹⁸¹ Taggart and Klosser, above n 5.

their postscript, ‘Sledgehammer to “Nut-Cases”’,¹⁸² say it all? Past experience provides minimal support for concern about vexatious litigation as a serious practical problem. Yet, in an increasingly litigious community, the question may attract increasing prominence. Attention to date has focused primarily on obsessively litigious individuals. A not unrelated issue also deserving attention is the resort to the courts by large and powerful corporations to achieve some collateral commercial advantage rather than to resolve a genuine substantive dispute.¹⁸³

VII CONCLUDING OBSERVATIONS

Collections of essays, particularly those in honour of a retiring scholar, represent a challenge to both editor and reviewer. Unlike conference collections, there is no single theme. Perhaps that is why Groves does not provide any overview or draw any conclusions from his collection. Nevertheless, some general observations can be made.

One is the generally unsatisfactory nature of so many High Court decisions. Reflecting the individualist culture of the bar, High Court judgments are too often written in isolation from each other, without regard to their combined effect as judgments from Australia’s final court of appeal.¹⁸⁴ *Henderson’s Case*,¹⁸⁵ reviewed by Zines, is a prime example. Surely it would have been possible for Brennan CJ, Dawson, Toohey, and Gaudron JJ to give some indication whether the minor difference in terminology between the joint judgment and the separate concurring judgment of Brennan CJ reflected a substantive difference. Another, and perhaps more surprising, development is the apparent lack of respect for precedent on the part of members of the Court widely seen as conservative. McHugh J’s dissent in *Teoh*¹⁸⁶ became the majority view in *Lam*.¹⁸⁷ As the composition of the Court changes, so does the authority of past decisions. Kirby J put this rather bluntly in one case, referring to

the opinionative character of constitutional doctrine ... what matters in the end is the conclusion of a majority of this Court ... Reason, history, principles, words, adverse risks and legal precedent, all bend in the wind of transient majorities.¹⁸⁸

Another feature is the frequency of strongly argued, powerful dissenting judgments by Kirby J. Many will agree with my perception that, in an earlier Court, many of those dissenting judgments¹⁸⁹ would have been seen as mainstream, an indication of how far the Court has moved in the conservative direction. Other decisions of the Court, not analysed in the collection but briefly referred to in

¹⁸² Ibid 300.

¹⁸³ See, eg, *Gunns Ltd v Marr* [2005] VSC 251 (Unreported, Bongiorno J, 18 July 2005).

¹⁸⁴ See Ernst Wilhelm, ‘Collective Responsibility’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court* (2001) 109.

¹⁸⁵ (1996) 190 CLR 410.

¹⁸⁶ (1995) 183 CLR 273.

¹⁸⁷ (2003) 214 CLR 1.

¹⁸⁸ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 72.

¹⁸⁹ See, eg, *Neat* (2003) 216 CLR 277; *Combet* (2005) 221 ALR 621.

this review, serve to confirm this trend, including: *Al-Kateb*,¹⁹⁰ upholding the validity of indefinite detention of a failed applicant for refugee status who could not be deported; *Neat*,¹⁹¹ rejecting the availability of judicial review remedies where a public function was exercised by a private corporation; *Combet*,¹⁹² weakening the scope for scrutiny of expenditure by the executive government; the *Vadarlis v Minister for Immigration and Multicultural Affairs* decision,¹⁹³ refusing to exercise jurisdiction because the asylum seekers had been moved to Nauru and New Zealand; and *Baker v The Queen*¹⁹⁴ and *Fardon v Attorney-General (Qld)*,¹⁹⁵ upholding unlimited preventative detention of criminals under state laws. Another is the extraordinary isolation of the Court from international jurisprudence. Only Kirby J regularly refers to international law principles as an aid to constitutional interpretation,¹⁹⁶ while other members of the Court have questioned the propriety of doing so. Viewed against the government's rejection of multilateralism at the political level, the Court's failure to have regard to international norms is especially unfortunate.¹⁹⁷

Observers of the Court will watch with interest the more recently appointed members of the Court, those described by some as “capital C” conservatives’, in some of the matters expected to come before the Court in the near future. When the challenge by the states to recent federal industrial relations legislation¹⁹⁸ comes before the Court, will the more recently appointed and so-called conservative members of the Court adopt a conservative view and construe the corporations power narrowly? If the recent federal anti-terrorism legislation¹⁹⁹ is challenged, will the so-called conservative members of the Court take a strict or narrow view of Chapter III and reject preventative detention and control orders in respect of persons not charged with any offence?

Groves has assembled a distinguished group of contributors. The diversity of topics covered reflects the richness of Professor Campbell's own scholarship. I found it a personal pleasure to dip once again into the subject matter of each of the essays. I am confident others will find this distinguished collection equally rewarding.

¹⁹⁰ (2004) 219 CLR 562.

¹⁹¹ (2003) 216 CLR 277.

¹⁹² (2005) 221 ALR 621.

¹⁹³ (2001) 22(20) Leg Rep SL 1.

¹⁹⁴ (2004) 210 ALR 1.

¹⁹⁵ (2004) 210 ALR 50.

¹⁹⁶ See, eg, *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–19.

¹⁹⁷ See generally Willheim, ‘Globalisation, State Sovereignty and Domestic Law’, above n 172.

¹⁹⁸ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

¹⁹⁹ *Anti-Terrorism Act [No 2] 2005* (Cth).