

THE HON T F BATHURST AC
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‘THE MYSTERIES OF JUDICIAL POWER: DEFINING THE RELATIONSHIP
BETWEEN LAW AND POWER IN THE MODERN STATE’
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INTRODUCTION

1. Before commencing my address this evening, I would like to echo the sentiments expressed by Dr Winterton and acknowledge the contribution which Professor George Winterton has made to our understanding of constitutional law. Even today, just over ten years after his passing, his writing still commands respect from both practising lawyers and academics for its incisive commentary and perceptive analysis. While the topic on which I will be addressing you tonight is, perhaps, not one of those for which he is now best-remembered,¹ it nevertheless did not escape his attention.² His observations played an important role in informing the development of the ideas in this address this evening.
2. I would also like to acknowledge the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. We should not

* I express my thanks to my Research Director, Mr Damian Morris, for his assistance in the preparation of this address.

¹ See, eg, George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983).

² See, eg, George Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 185.

forget their long stewardship of this country and especially the land upon which we walk today.

3. Now, it is a well-known fact that areas of the law can occasionally fall victim to uncertainty and confusion, or indeed, can be inherently uncertain in their application. Sometimes, this uncertainty is temporary. Perhaps recent appellate authority has disturbed the foundations upon which a well-established doctrine was thought to rest, or a recent statute has entered into force and altered the long-standing operation of the common law or a legislative scheme. In these circumstances, such uncertainty as has arisen will usually last only so long as the time required for a new case to be brought forward for judicial consideration. Unhappily, however, uncertainty can also be more persistent.
4. One area of law for which uncertainty has become a recurring companion is the definition of “judicial power” for the purpose of Chapter III of the *Constitution*. Some definitions have been found to be workable under certain circumstances, but many judges have noted that it has not been possible to find a definition that is both “exclusive and exhaustive”,³ and some have said that the concept seems to “defy”, or, perhaps, “transcend ... purely abstract conceptual analysis”.⁴ As a result, courts have resorted to emphasising the many differing “dimensions”⁵ or “factors”⁶ involved in identifying an exercise of judicial power, in lieu of a more prescriptive definition.
5. There are good reasons for this approach. Deciding whether judicial power has been exercised can raise novel and complex legal questions. In such circumstances, it is the traditional approach of the common law to develop on an incremental, case-by-case basis in order to avoid

³ *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J).

⁴ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J).

⁵ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 553 [27] (French CJ and Gageler J).

⁶ *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 15 (Aickin J).

committing itself to a broad definition which might not be appropriate for every case. An approach which emphasises that it is necessary to consider a variety of “dimensions” or “factors” in identifying whether there has been an exercise of judicial power is an example of this strategy under a slightly different guise. Where each decision depends upon a fine balancing of these factors in the particular circumstances, it has been thought better to avoid formulating an inflexible dogma.

6. While this philosophy has much to commend it, it is not without its difficulties. Over time, persistent legal uncertainty encouraged by well-intentioned judicial restraint can create, not a coherent set of principles as the basis upon which cases can be decided, but a series of ad hoc decisions, each of which further confusing, rather than clarifying, the law. In essence, it describes a situation where there is a general pessimistic feeling that difficult doctrinal questions might never be satisfactorily resolved.
7. The clearest example of the development of such a mindset can be seen in the history of the interpretation of section 92 of the *Constitution*. After the deterioration of the fragile consensus which emerged in the early 1950s,⁷ the state of the law could perhaps most charitably be described as being untidy, and at worst, as being in disarray.⁸ The doctrinal detritus which had built up over the preceding decades had come to wholly obscure the seemingly common-sense overarching principle upon which section 92 was based. Resolution was only achieved after the situation was finally and expressly recognised by the judges of the High Court as untenable.⁹

⁷ *Cole v Whitfield* (1988) 165 CLR 360, 384 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ).

⁸ See Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983) ch 1.

⁹ See *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 618 (Deane J); *Cole v Whitfield* (1988) 165 CLR 360, 392 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

8. Now, I do not mean to suggest that the state of the law in relation to the meaning of “judicial power” is anywhere near as confused as the interpretation of section 92 had become prior to 1988. In fact, there appears to have been a high degree of agreement among the judges of the High Court in recent years on the core question of what constitutes an exercise of judicial power,¹⁰ although there appears to be less agreement on some of the related issues which arise under Chapter III of the *Constitution*. Nevertheless, I think that there is an important lesson that can be learned from the example of section 92: persistent uncertainty can lead to a loss of focus on underlying principle.
9. This matters, not because the course of decisions on the definition of “judicial power” is unsatisfactory, as happened with section 92, but for a different reason. The concept of “judicial power” is foundational to our system of government, and we cannot critically examine whether it achieves its underlying goal in a rapidly changing modern world unless we have a clear understanding of the principles upon which our structures of government are based. Thus, even while the current state of authority is sufficient for the purpose of resolving contested litigation, there is still reason to go further and attempt to identify a touchstone of principle which enables us to understand and assess the role that “judicial power” plays in our system of government.
10. In my address tonight, I will outline, somewhat apprehensively, one perspective on how such a principle might be identified. It proposes that the purpose of Chapter III of the *Constitution* is to ensure that action taken by the state which intrudes on the liberty of the individual, which, at least, includes action by the state or another individual which infringes on what have been described as “basic legal rights” and interests,¹¹ is

¹⁰ For example, *Palmer v Ayres* (2017) 259 CLR 478; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350.

¹¹ *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 12 (Jacobs J).

authorised according to law. It achieves this by exclusively vesting the power to determine whether action is authorised according to law to bodies which are required to comply with a high standard of fairness and integrity – in other words, courts. On this interpretation of the purpose of Chapter III, the power to determine whether action which intrudes on the liberty of the individual or those basic legal rights and interests is authorised according to law constitutes the essence of “judicial power”.

11. I do not think that this perspective is revolutionary. Indeed, broadly speaking, it accords well with the current and historical state of authority on the nature of “judicial power”. Rather, I think that its importance lies in the fact that it provides a way of clearly stating the relationship between the modern state and the individual under Chapter III of the *Constitution* by distilling the principle which informs the different “dimensions” and “factors” upon which the High Court relies in determining whether a particular body exercises judicial power. It is not intended to be a replacement for the current approach to this question, but to enable a better understanding of how that approach fits into the structure of government established by the *Constitution*.
12. Recent developments lend an added significance to this task. Not only is there an ever increasing tendency for legislatures to enact regulatory measures administered by bodies other than courts which affect the rights of citizens, the potential means available to the modern state to intrude into the liberty of its citizens have been growing rapidly in recent decades due to developments in technology which were once thought to lie within the realm of fiction.¹² Physical force is no longer the only tool available to the modern state to sanction an individual. Continuous monitoring, surveillance and data collection may be used to influence their behaviour and coerce them without any overt action.¹³ An

¹² See, eg, George Orwell, *Nineteen Eighty-Four* (Secker & Warburg, 1949).

¹³ See, eg, Vicky Xiuzhong Xu and Bang Xiao, ‘China’s Social Credit System seeks to assign citizens scores, engineer social behaviour’, *ABC News* (online), 2 April 2018 <<https://www.abc.net.au/news/2018-03-31/chinas-social-credit-system-punishes-untrustworthy-citizens/9596204>>.

understanding of how the *Constitution* has operated to protect individual liberty in the past is essential to appreciating whether this constitutional structure can respond to the challenges posed by these developments in the future.

THE PURPOSE OF CHAPTER III

13. I will now turn to discuss the perspective which I have identified on the purpose of Chapter III of the *Constitution* in a little more detail. To reiterate, this perspective views the purpose of Chapter III as being to ensure that action which intrudes on the liberty and basic rights and interests of the individual is authorised according to law.
14. Now, this purpose is expressed at quite a high level of generality, and involves a number of concepts. It will be necessary to revisit some basic propositions concerning our legal system to explain the significance of these concepts. In doing so, I am keenly aware of the dangers of judges pretending to be amateur philosophers, but I have nevertheless decided to ascend the ivory tower and try my chances. To avoid being unforgivably abstract, I have decided to approach these preliminary issues through something of an anecdote about the experience of being a judge.
15. In the popular imagination, and sometimes even within the legal profession, judges are often seen as possessing an almost supernatural power to decide cases and resolve disputes. It will not surprise you to learn that this belief does not really reflect reality. Despite the importance which is accorded to our actions and opinions by “the law”, judges are, at the end of the day, simply people who have been appointed to a position which requires them to exercise their judgment in cases which are brought before them. We retain this character when we sit as a court. Whatever the scholarly and academic merits of the reasoning upon which we rely, our actions and opinions do not come into effect of their own force. Delivering judgment is, in some ways, a rather anti-climactic affair, which belies its significant consequences for the

parties. You simply come on to the bench, utter a few words, hand down some pieces of paper, and then continue on with other business.

16. Rather, the significance of our decisions comes from what they are able to authorise a person to do, or prevent a person from doing, and not from the fact of the decision itself. For example, the conviction and sentencing of an offender has practical significance because it authorises their imprisonment for the period of time contained in the sentence.¹⁴ Similarly, the imposition of a fine on an offender permits a property seizure order to be made which authorises execution against the property of an offender.¹⁵ The award of a judgment debt or issue of an injunction against a party also permits enforcement action to be taken, although the procedures for execution against the property of a debtor and for conviction for contempt are more intricate.¹⁶ However, it should be clear that the common element to each of these practical consequences to a decision is that they restrain the freedom of action of a party to the decision, either by detaining them or removing their control over property.
17. I have discussed this example because I think that it illustrates the basic propositions which are essential to understanding the purpose of Chapter III, and the nature of “judicial power”. As lawyers, who deal with “the law” in our working lives day in and day out, there is a tendency to treat “the law” as something real, and almost tangible, in everyday life. Abstract ideas such as “obligations”, “liabilities” or “equities” can begin to take on a life of their own. However, “the law” is in itself only an intellectual abstraction; it can only intervene in our lives to the extent that a decision which applies legal reasoning has practical

¹⁴ *Williamson v Inspector-General of Penal Establishments* [1958] VR 330, 334 (Smith J); see also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 62.

¹⁵ *Fines Act 1996* (NSW) s 72.

¹⁶ See *Civil Procedure Act 2005* (NSW) s 103; *Uniform Civil Procedure Rules 2005* (NSW) pt 39; *Supreme Court Rules 1970* (NSW) pt 55 div 3.

consequences for a party in the “real world”.¹⁷ It is these consequences with which the parties to any prosecution or litigation are ultimately concerned, and generally not the particular method of legal reasoning used to reach a conclusion in and of itself.

18. We must then consider the nature of “judicial power” in light of this understanding. One way of approaching this issue would be to consider the example of a court which delivered a decision with one of the practical consequences which I outlined earlier, that is, imprisonment or some deprivation of property. As a matter of authority and history, it would almost indisputably be thought to have been exercising “judicial power”.¹⁸ However, if it were necessary to identify *why* it would be said that “judicial power” had been exercised, as a matter of intuition, I would think it most sensible to say that it was the fact that a decision had been made which authorised the imprisonment or deprivation of property. It would seem odd to point to anything else as being the relevant exercise of “power” since it is these practical consequences of the decision which give it its significance.
19. In particular, I would hesitate to describe the question of whether there was a relevant exercise of judicial power as one necessarily turning on the question of whether the decision “determined” *existing* rights, duties or liabilities or “created” *new* rights, duties or liabilities. A “determination” supposedly bespeaks an exercise of judicial power, but a “creation” does not. While this dichotomy is one which has found some favour in the authorities in this area,¹⁹ I do not find it to be of very much assistance in resolving the question under consideration, since the

¹⁷ Cf Hans Kelsen, *Pure Theory of Law*, tr Max Knight (University of California Press, 1967) 30-44.

¹⁸ See, eg, *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1, 9 (Latham CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26-28 (Brennan, Deane and Dawson JJ); see also *R v Davison* (1954) 90 CLR 353, 382 (Kitto J), discussed in *Palmer v Ayres* (2017) 259 CLR 478, 502 [61] (Gageler J).

¹⁹ See, eg, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 190-91 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); see also the cases discussed in James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015) 261 ff.

distinction between a right, duty or liability which is “determined” as opposed to one which is “created” is not always clear.

20. As a matter of ordinary language, the words “determined” and “created” could be thought to be almost interchangeable. If a person is convicted of an offence and sentenced to a term of imprisonment, I think that it could be argued to be as correct to say that the decision “created” their liability to imprisonment as it is to say that it “determined” it. In both cases, what has really happened is that a court has authorised the state to imprison the offender for the term of the sentence. If there is to be a meaningful distinction between the two labels for the purpose of legal analysis, it requires explanation beyond their ordinary meanings.
21. In my opinion, the distinction that the dichotomy seems to be trying to evoke is between a decision which authorises the taking of some action which has some *immediate* practical consequence for one of the parties and a decision which does not. Admittedly, this still sounds like a rather nebulous distinction to draw. To develop and explain it further, I will use an example from an area of law which has been litigated in the High Court on “judicial power” grounds not once, but twice: corporate takeovers.
22. In both *Precision Data Holdings Ltd v Wills*,²⁰ decided in 1991, and *Attorney-General (Cth) v Alinta Ltd*,²¹ decided in 2008, the High Court was required to decide whether the Takeovers Panel and its predecessor, the Corporations and Securities Panel, were exercising judicial power in making certain declarations in relation to a takeover or in making orders consequential to such a declaration. Between the decisions in the two cases, the statutory scheme governing such declarations had been amended, but remained broadly similar.
23. In both cases, the Panel was given power to make certain declarations: a declaration that there had been an “unacceptable acquisition” or

²⁰ (1991) 173 CLR 167.

²¹ (2008) 233 CLR 542.

“unacceptable conduct” in relation to a takeover in *Precision Data Holdings*, and a declaration of “unacceptable circumstances” in *Alinta*.²² If a declaration were made, then the Panel was able to make various orders, which were broadly for the purpose of “protecting the rights or interests of any person affected by the acquisition or conduct”, and could include orders directing the making of payments or the disposal of shares, or orders preventing the exercise of voting rights.²³ If a person contravened an order, then, again upon application by the authority, a court could make orders to secure compliance with the Panel’s order.²⁴ However, in *Alinta*, but not in *Precision Data Holdings*, contravening an order was also made a criminal offence.²⁵

24. In both cases, the High Court rejected the challenge to the power of the Panel, and, in part, relied upon the distinction between decisions which “determined” and those which “created” rights, duties and liabilities. It was said that the decisions of the Panel in making a declaration or consequential orders merely “created” new rights, duties and liabilities, and did not “determine” existing ones. Broadly speaking, there were two reasons put forward for this conclusion: first, in making a decision, the Panel was required to consider factors, such as the “public interest”, which were distinct from the strict legal rights and obligations of the parties at the time of the relevant events;²⁶ and second, once a decision of the Panel had been made, it did not have any immediate practical

²² *Corporations Law* s 733(2), cited in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 184-5; *Corporations Act 2001* (Cth) s 657C(2).

²³ *Corporations Law* s 734(2) cited in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 185-6; *Corporations Act 2001* (Cth) s 657D(2).

²⁴ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 187; *Corporations Act 2001* (Cth) 657G.

²⁵ *Corporations Act 2001* (Cth) 657F.

²⁶ *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 550 [2] (Gleeson CJ), 592-93 [153]-[154] (Crennan and Kiefel JJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189-90.

consequences for the parties; rather, it required an “independent exercise of judicial power” to bring them into effect.²⁷

25. It is the second of these two reasons which I think is more fundamental: consider the position if the Panel were required to come to a decision on the strict legal obligations of the parties under the takeover provisions in Chapter 6 of the *Corporations Act 2001* (Cth) or its earlier equivalents at the relevant time, yet such a decision still lacked any immediate practical consequences without an “independent exercise of judicial power”.²⁸ I would still find it difficult to see why in such circumstances the Panel would be found to be exercising judicial power. The decision of the Panel would, in effect, simply be an expression of opinion as to the legal obligations of the parties which, at most, would constitute a condition for the making of an application to the court to determine the consequences of such an opinion for itself. What remains important in these circumstances is the absence of any immediate practical consequences and the necessity of a further “independent exercise of judicial power”.
26. If the distinction between the “creation” and “determination” of rights, duties and liabilities ultimately amounts to nothing more than this, then it covers the same ground as the intuitive explanation for the nature of “judicial power” which I offered earlier: that is, judicial power is often said to have been exercised because the decision authorises the taking of some action which results in immediate practical consequences for one of the parties, such as imprisonment or the deprivation of property. Understood in this way, the basis for the distinction between the “creation” and “determination” of rights, duties and liabilities begins to make more sense, and the intuitive explanation which I offered earlier

²⁷ *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 550 [1] (Gleeson CJ), 552 [9] (Gummow J), 578-79 [96]-[98] (Hayne J), 580 [105] (Heydon J), referring to *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301, 322-26 [82]-[89] (Finkelstein J). See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 191-92.

²⁸ Cf *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352,376 [51] ff.

appears to have an analogue in the “dimensions” and “factors” relevant to the identification of judicial power which are applied by the authorities.

27. Now, before continuing, I would like to briefly pause to summarise the no doubt somewhat meandering path of inquiry which I have just outlined. We start with the idea that the significance of most decisions which we would readily recognise as exercises of judicial power lies in the practical consequences which they have in restraining the freedom of action of a party, rather than the process of legal reasoning upon which they rely. It is then a small step to propose an intuitive explanation of when a decision constitutes an exercise of judicial power: that is, when it authorises the taking of some action which restrains the freedom of action of one of the parties. Finally, a comparison between this intuitive explanation and the traditional distinction drawn between the “determination” and “creation” of rights, duties and liabilities points to the “immediacy” of the practical consequences as relevant in characterising a decision as an exercise of judicial power.
28. On this view, therefore, there is an exercise of judicial power when a decision authorises the taking of an action which has immediate practical legal consequences for one of the parties, at least to the extent that it affects their liberty or basic rights and interests. It does not rely on characterising the process of reasoning which led to the decision as being a “determination” of existing rights, duties, or liabilities or a “creation” of new ones. Rather, it focuses on the nature of the practical consequences which follow from the action authorised by the decision.
29. It is this focus which lends this explanation of the concept of “judicial power” its intuitive appeal. As I have outlined earlier, the “practical consequences” to which I am referring are those which impose a restraint on the freedom of one of the parties, and their “immediacy” is a matter of degree. It may be thought that ascribing such importance to what is a fairly open-ended definition of the relevant “practical consequences” does little to explain the concept of “judicial power” in a way which avoids the vagueness which might be perceived under the current approach taken by the authorities. However, I think that it has

an important benefit: it focuses attention on the real interests of the parties which may be at stake in the making of a decision.

30. For example, consider again the circumstances which were before the High Court in *Precision Data Holdings* and *Alinta*. In *Precision Data Holdings*, the immediate consequence of the Panel making a declaration of an “unacceptable acquisition” or “unacceptable conduct” was that the Panel could then make further orders. While these orders might have directed the parties to take certain actions, a failure to comply with these orders did not in itself give rise to any “immediate practical consequences”. Instead, the relevant regulatory authority was required to approach a court and seek additional orders to secure compliance with the orders of the Panel.
31. It is only at this point that we encounter “practical consequences” of the kind which are relevant to determining whether judicial power has been exercised. A person who fails to comply with a curial order is subject to proceedings for contempt for breach of those orders, and not for the failure to comply with the orders made by the Panel. A finding of contempt could result in either imprisonment or the deprivation of property in the form of a fine, both of which are clearly “practical consequences” of the kind under discussion. Nevertheless, it should be apparent that there is some distance between the initial declaration and orders made by the Panel and these consequences which deprive them of the “immediacy” with which we are concerned.
32. By contrast, in *Alinta*, the intervening legislative amendments had narrowed the steps between the making of the initial declaration and orders by the Panel and their practical consequences. A failure to comply with the orders of the Panel was made an offence by the legislation directly, although curial orders securing compliance with the orders of the Panel were still able to be sought. Unlike in *Precision Data Holdings*, the fact that a prosecution might be brought immediately upon the contravention of an order of the Panel meant that there were fewer steps between the order and the practical consequences which would flow from a finding of guilt and the imposition of a sentence. The

distance between the orders and their practical consequences is perceptibly narrower.

33. The point of difference between the two legislative schemes is ultimately only a matter of degree. The practical consequences for a party who contravened an order of the Panel were further removed from the initial declaration and orders in *Precision Data Holdings* than they were in *Alinta*. On this view, the question of whether the making of a declaration and orders by the Panel is an exercise of judicial power or not in either case is simply a value judgment to be made based on the relationship between the declaration and orders and the ultimate practical consequences by which a party might be affected. Clearly, this question is not susceptible of being expressed as a “bright line” rule.
34. I think that this is why the intuitive explanation of the concept of “judicial power” which I have outlined is somewhat attractive. It clearly presents the issue which is required to be decided, but it does so without claiming to simplify the considerations which might be relevant to reaching a conclusion. A decision is able to have a variety of different legal relationships with the ultimate practical consequences which may affect a party. Identifying which relationships are sufficient to mark a decision as an exercise of judicial power will turn on an assessment of the features of the relationship compared against what has traditionally been recognised as judicial power.
35. Further, this intuitive explanation of the concept of “judicial power” fits well within the structure of Chapter III and the *Constitution* as a whole. It has been accepted, since the decision of the High Court in *Waterside Workers’ Federation of Australia v JW Alexander Ltd*,²⁹ that Chapter III provides that the judicial power of the Commonwealth may only be exercised by certain courts. In other words, adopting the perspective on the concept of “judicial power” which I have outlined, Chapter III provides that a decision which authorises the taking of an action which

²⁹ (1918) 25 CLR 434.

has an immediate practical consequence for one of the parties may only be made by certain bodies which are required to comply with minimum standards of fairness and integrity.³⁰

36. From this understanding of Chapter III, it is possible to identify how it operates, in particular, to protect the liberty of the individual. Traditionally, the separation of judicial power to which Chapter III gives effect has been understood as protective of a concept of liberty on the basis that dividing power between different branches of government makes liberty more difficult to infringe.³¹ I have always had some difficulty with this argument, since, to my mind, it isn't necessarily the case that a division of power in itself would always have this result. Rather, it is necessary to be more specific, and I think that the easiest way to do this is to rely on the understanding of Chapter III which I outlined earlier.
37. As I have said, this understanding views Chapter III as providing that a decision which authorises the taking of an action which has an immediate practical consequence for one of the parties may only be made by certain bodies which are required to comply with minimum standards of fairness and integrity. The assumption upon which this understanding proceeds is that something which will have a practical consequence for one of the parties, or in other words, impose a restraint on their freedom of action, ought to require some form of "authorisation". Now, I think that this implies something fairly fundamental: if a legal system requires restraints imposed on the freedom of action of an individual to be "authorised", then it must take as its starting point the belief that each individual has an inherent freedom of action, or "liberty".

³⁰ See, eg, *Attorney-General (NSW) v Gatsby* [2018] NSWCA 254, [174]–[190] (Bathurst CJ).

³¹ See George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 185; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 392-93 (Windeyer J).

38. Viewed in this manner, the purpose of Chapter III is to protect the liberty of the individual by requiring actions which otherwise would infringe it to be “authorised” by a body which is charged with applying the law and which complies with minimum standards of fairness and integrity. It is in this way, I think, by which our *Constitution* may be said to adopt the “rule of law” as an assumption.³² Any action which infringes the liberty of an individual must be authorised according to law.³³ If an action which infringes the liberty of an individual is not authorised, then it is unlawful, and will usually mean that some form of compensation may be sought by the individual affected. Thus, the purpose of Chapter III is to ensure that a state, or, for that matter, any other individual, must obtain authorisation according to law from an independent body in order to intrude on the liberty of the individual or their basic legal rights and interests.
39. Ultimately, I do not think that this is a radical interpretation of Chapter III. Indeed, I would go so far as to say that it is not even novel. Its fundamental principles may be found even in one of the earliest definitions of the concept of “judicial power”, provided by the first Chief Justice of the High Court, Sir Samuel Griffith, in *Huddart, Parker & Co Pty Ltd v Moorehead*.³⁴ His Honour’s express reference to rights relating to “life, liberty or property” when discussing the types of controversies resolved by an exercise of judicial power, and his emphasis on the necessity for a “binding and authoritative decision” are reflected in the understanding which I have outlined in this address.³⁵
40. I am certainly not suggesting we should jettison the past 110 years of judicial development of the concept of “judicial power” from this starting point; far from it. I only wish to highlight one perspective on the first

³² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

³³ Cf A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 5th ed, 1897) 193-94.

³⁴ (1908) 8 CLR 330.

³⁵ (1908) 8 CLR 330, 357 (Griffith CJ).

principles upon which this development has taken place. I also think that such a perspective is able to shed some light on demystifying some difficult questions which are often raised in discussions about the nature of “judicial power”. As an example, I would like to discuss how it could help clarify the so-called “chameleon doctrine”.

41. Much like its namesake, the nature of the alleged doctrine can be difficult to identify. Perhaps the most succinct explanation can be found in *R v Quinn; Ex parte Consolidated Food Corporation*,³⁶ where Aickin J stated that “some functions may, chameleon like, take their colour from their legislative surroundings or their recipient”. In order to understand what this rather Delphic phrase might mean, it is instructive to look at it against the background of the understanding of the concept of “judicial power” which I have outlined above.
42. The decision in *Quinn* is best considered alongside the earlier related decision of the High Court in *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd*.³⁷ In the latter case, section 44 of the *Trade Marks Act 1905* (Cth) conferred a power on the High Court to hear and determine an application for the registration of a trademark, which effectively required it to carry out the same task as the Registrar of Trade Marks. Although the hearing was described as an “appeal” from an earlier decision on the same question, it had previously been held that section 44 effectively required the Court to redetermine the question de novo.³⁸
43. The problem which arises in these circumstances was well-described by Dixon CJ in *Farbenfabriken*: since the same type of power was conferred on both Registrar of Trade Marks and the Court, if the power was “judicial”, then it would be invalidly conferred upon the Registrar, but if it was “administrative”, then it would be invalidly conferred upon

³⁶ (1977) 138 CLR 1.

³⁷ (1959) 101 CLR 652.

³⁸ See *Jafferjee v Scarlett* (1937) 57 CLR 115, 119 (Latham CJ), 126 (Dixon J).

the Court.³⁹ On either alternative, this analysis would result in the provision being invalid, at least in part. However, Dixon CJ, speaking for the Court, found such an analysis to be flawed. Rather than focusing on the fact that power was conferred on the Registrar and the High Court in the same terms, his Honour emphasised the fact that a decision of the Court was conclusive upon the Registrar, who was then obliged to register the trademark.⁴⁰

44. Now, it seems to me that the understanding of the concept of “judicial power” which I have outlined in this address is entirely consistent with this analysis. It was the “practical consequences” of the decision which determined the question of judicial power. Upon a decision being made, the Registrar of Trade Marks became bound to register the trademark.⁴¹ A failure to do so would have rendered the Registrar liable to a writ of mandamus to enforce that duty.⁴² Ultimately, upon a continued failure to register, there could have been imprisonment for contempt.⁴³ The fact that it is unlikely that there would have been a failure to register such that these steps would have been necessary cannot be allowed to disguise the fact that these consequences did exist.
45. The contrast between the consequences of a determination by the High Court and a determination of the Registrar is readily apparent. There were no immediate “practical consequences” to the decision of the Registrar to register or not to register a trademark in the same way that there were after a determination of the same issue by the Court. While

³⁹ (1959) 101 CLR 652, 658-59 (Dixon CJ).

⁴⁰ (1959) 101 CLR 652, 659 (Dixon CJ).

⁴¹ *Trade Marks Act 1905* (Cth) s 47.

⁴² See, eg, *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179, 197 [69] (Crennan, Bell, Gageler and Keane JJ); *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231, 247-49 [39]-[45] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

⁴³ *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 256, 259, 263; see also Sir David Eady and A T H Smith, *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 4th ed, 2011) 1045 [12-126].

Dixon CJ did not expressly advert to this distinction, I think that it is plausible to say that it must implicitly underlie his Honour's analysis. There would be no point in highlighting the consequences of the decision of the Court as a discrimen if those same features were present for decisions of the Registrar. In the end, it was these "contextual" features of the power which were determinative in identifying an exercise of judicial power, and not the terms in which the power was conferred.

46. *Quinn* approached the same problem, but from a different angle. Rather than a challenge to the conferral of allegedly "administrative" power on the High Court, it concerned the conferral of supposedly "judicial" power on the Registrar of Trade Marks under the *Trade Marks Act 1955* (Cth), which had replaced the earlier legislation considered in *Farbenfabriken*. Section 23(1) conferred a power on both the Registrar of Trade Marks and the High Court to "order a trademark to be removed from the Register [of Trade Marks]" on either of two grounds. It was contended that this conferred judicial power on the Registrar.
47. The reasoning of the majority in *Quinn* takes something of a different approach to that of Dixon CJ in *Farbenfabriken*. Their Honours focused on demonstrating that the power conferred by section 23(1) did not fall *exclusively* within the judicial power. Their Honours based this conclusion on an examination of the nature of the "rights" of a proprietor of a registered trademark which would be affected by a decision to deregister that trademark.⁴⁴ In the end, they found that there was nothing in the nature of the rights themselves which suggested that judicial power was being exercised, particularly when compared to those rights which were "traditionally regarded as basic legal rights" as a matter of history.⁴⁵ Therefore, section 23(1) was valid.

⁴⁴ (1977) 138 CLR 1, 9 (Jacobs J).

⁴⁵ (1977) 138 CLR 1, 12 (Jacobs J).

48. Again, I think that this reasoning is entirely unexceptionable from the point of view of an understanding of the concept of “judicial power” which focuses on the “immediate practical consequences” or the effect on basic legal rights and interests which might be authorised by the decision. It is equivalent to saying that the effect on the rights of a registered proprietor, while being “immediate”, is not such a “practical consequence” in the sense that I have outlined earlier because it does not accord with what has been recognised as lying within the traditional conception of the “basic legal rights” which will be affected by an exercise of judicial power. This is consistent with the many judicial observations that considerations of history are a relevant, although not determinative, factor to this analysis.⁴⁶
49. Viewed in this way, from the perspective on the concept of “judicial power” which I have outlined, it is not necessary to describe the reasoning in *Farbenfabriken* or *Quinn* using the “chameleon doctrine” moniker, for the simple reason that, while both decisions emphasised the potentially chameleon-like nature of many powers which could be conferred on both courts and other bodies, neither really establishes any independent and distinct “doctrine”. It seems to be more appropriate to understand the reasoning as relying on the presence or absence of “immediate practical consequences” which are authorised by the decision which is made.
50. Of course, there is a small caveat to the utility of focusing on the “immediate practical consequences” which are authorised by a decision. When a power has a long historical pedigree, there can be no doubt that historical considerations will play a role in determining whether an exercise of the power constitutes an exercise of judicial power. In these cases, focusing on the “immediate practical consequences” of an exercise of the power will likely not add much to this inquiry, since, as I

⁴⁶ See *R v Davison* (1954) 90 CLR 353, 367 (Dixon CJ and McTiernan J), 382 (Kitto J); *Palmer v Ayres* (2017) 259 CLR 478, 494 [37] (Kiefel, Keane, Nettle and Gordon JJ), 504 [69] (Gageler J).

have outlined earlier, much of what has traditionally been regarded as an exercise of judicial power indisputably has practical consequences of the kind required. Conversely, there is more utility in this understanding of the concept of “judicial power” where an entirely novel power is in question.

51. There are also other caveats to how this understanding might be applied. For example, under the *Boilermakers* principle,⁴⁷ an exercise of power might fail to constitute an exercise of judicial power, not because it lacks “immediate practical consequences”, but because the nature of the power to be exercised is “non-judicial”, such as occurred in *Queen Victoria Memorial Hospital v Thornton*⁴⁸ or *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation*.⁴⁹ In these cases, it seems to me that the vice lies in the absence of any firm criteria by which a decision could be said to “authorise” the taking of an action which has certain consequences “according to law”. In light of the recent course of authority,⁵⁰ giving the *Boilermakers* principle a fairly restrictive application, I have not gone into it in detail. However, it is worth noting that the understanding of the concept of “judicial power” which I have outlined can be interpreted consistently with what might be required under the *Boilermakers* principle.
52. In any case, my purpose in outlining this understanding in this address was not to specify in exhaustive detail how it might be reconciled with each aspect of current doctrine on the nature of “judicial power”. Rather, I have done so because I think that having a clear touchstone of principle is essential if we want to be aware of how emerging changes in society could affect the principles underpinning the structures of government which have been established by our *Constitution*. In my

⁴⁷ See *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

⁴⁸ (1953) 87 CLR 144.

⁴⁹ (1957) 100 CLR 277.

⁵⁰ See *Thomas v Mowbray* (2007) 233 CLR 307.

view, these changes deserve discussion in light of their implications for the fundamental principles underpinning our structures of government and society more broadly.

CONCLUSION

53. At the outset of this address, I mentioned two such changes which I think might have an effect on the relationship between the modern state and the individual which I think we, as a society, ought to give careful consideration. These changes are, to a large degree, interlinked. The first was the increasing tendency for legislatures to enact regulatory measures administered by bodies other than courts which have the capacity to affect the rights of its citizens. The second was the growth in the potential means available to the modern state to intrude into the liberty of its citizens in light of the increased capabilities of modern surveillance and data analysis technology.
54. It may seem odd to have raised these issues in the course of a discussion about the purpose of Chapter III of the *Constitution*. But I think that there is a connection of some significance. As I have spent some time discussing tonight, one perspective on the purpose of Chapter III within our constitutional arrangements is that it exists to ensure that action which intrudes on the liberty and basic rights of the individual is authorised according to law. If one accepts this perspective, then there is a real threat posed by these changes which I have mentioned.
55. I am not going to pretend to be capable of offering a solution to the problems which these changes pose. But we must ask ourselves what kind of intrusions into individual liberty we are willing to accept in exchange for permitting the state to pursue its policy objectives, and consider how we can reconcile these changes with the principles which underlie our structure of government under the *Constitution*. It is my hope that, through continued discussion of these principles and the changes which might threaten them, we will ensure that we are able to meet these challenges.