THE INTEGRITY BRANCH OF GOVERNMENT AND THE SEPARATION OF JUDICIAL POWER

Joseph Wenta*

The influence of the separation of judicial power on the development of Australia's governmental institutions is widely recognised. The generally strict approach to the separation of federal judicial power has both facilitated and constrained the continued development of the institutions and processes of government and of administrative law. Institutions which test the boundaries of the *Constitution* continue to be designed; the various accountability mechanisms of the 'new' administrative law provide relevant examples.[1] The identification of a 'fourth' or 'integrity' branch of government represents one attempt to conceptualise and explain the wider range of accountability mechanisms comprising contemporary Australian government. This paper examines the relationship between the judicial branch and the 'fourth arm' of government, and explores the potential impact of established constitutional principles on the development and operation of the integrity branch.

This paper argues that the range of integrity functions performed by the judicial branch of government and its members extends beyond judicial review of governmental action. While judicial review of administrative action no doubt constitutes a significant proportion of the integrity activity of the judicial branch, members of the judiciary are often asked to engage in a wider range of integrity functions and processes. This activity often involves extra-judicial functions. However, the constitutionality of extra-judicial activity remains unclear, and the desirability of extra-judicial activity is contestable; this casts some doubt on the capacity of the judiciary and its members to participate in the further development and operation of the integrity branch of government.

The paper begins with an exploration of the concept of the integrity branch of government and established constitutional principles affecting the interaction of the integrity branch and the judiciary. Part I of the paper examines the nature of the integrity branch of government, and identifies as 'integrity functions' a number of activities and processes performed by members of the judiciary as extra-judicial activities. Part II outlines the development of the separation of judicial power in the Australian context, with an emphasis on the development and operation of the *persona designata* exception and the incompatibility condition. The paper suggests that any interference with the decisional independence of judicial officers performing functions as designated persons is likely to raise questions of incompatibility, and will potentially compromise extra-judicial participation in the integrity branch.

Part III considers the extent to which established principles of Australian constitutional law may permit members of the judiciary to perform a wider range of integrity functions. The paper argues that participation of judicial officers in the operation of the integrity branch is potentially accommodated by the *persona designata* exception to the strict separation of judicial power. Further, the paper suggests that integrity functions and processes are not necessarily incompatible with judicial office; careful attention must be paid to the nature and mode of performance of each integrity function in order to ensure that an assessment of

* *Joseph Wenta is Sessional Academic, Newcastle Law School, University of Newcastle, NSW.* *This paper was presented at the AIAL 2012 National Administrative Law Conference, Adelaide, 19 July 2012.*

incompatibility is accurate. Part IV of the paper evaluates briefly factors affecting the desirability of extra-judicial participation in the operation of the integrity branch. While many of the objections to extra-judicial activity have merit, this paper argues that extra-judicial involvement in the performance of integrity functions is, on balance, an acceptable element of modern government. While the separation of judicial power necessarily controls judicial participation in the development and operation of the integrity branch, the paper concludes that the separation of judicial power does not prohibit the participation of judicial officers in a range of integrity activities and processes.

Part 1 The integrity branch of government

The 'integrity branch' is the most recent manifestation of a 'fourth arm' of government,[2] intended to both interact with and supervise each of the legislative, executive and judicial branches of government. Chief Justice Spigelman (as he then was) identified the core responsibility of the integrity branch as 'ensur[ing] that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose'.[3] A wide range of institutions, including the executive, legislature and judiciary, the public service, the Auditor-General, ombudsmen, 'watchdog' agencies (such as the Independent Commission Against Corruption, the Police Integrity Commission and the Crime Commission in the New South Wales context), civil society, the media and international agencies have been included within the family of bodies that comprise the integrity branch.[4]

Early contributions to exploration of the integrity branch attributed a 'semi-constitutional' status to the fourth arm.[5] However, integrity branch scholarship has increasingly recognised the wider range of bodies and process that perform integrity functions. The integrity branch has more recently been characterised as an 'integrity system', '[consisting] of the broad range of institutions, processes, people and attitudes working to ensure integrity in the exercise of our society's many different forms of official power'.[6] The concept of an integrity system extends beyond institutions contemplated by the 'semi-constitutional' foundation to include private sector bodies.[7] The wide range of institutions, functions and process comprising the integrity system has seen the integrity branch described as a 'bird's nest',[8] in order to demonstrate that it is the combined effect of those institutions, functions and processes which comprise the integrity branch that is of greatest significance. While some institutions are no doubt quintessentially 'fourth arm', it is the totality of the integrity branch that is most important.

Although this paper may appear to favour the 'semi-constitutional' conception of the integrity branch by virtue of its subject-matter, the arguments canvassed are intended to apply equally to the wider notion of an integrity system.[9] Neither the 'semi-constitutional' nor the 'integrity system' account of the integrity branch is superior; each is developed with a foundation in the same principles and ideas. Both constructions accept the significance of a wider range of functions (extending beyond those performed by the traditional institutions of government) in the operation and maintenance of a democratic system of government which observes the rule of law. It is in this context that the arguments in this paper are developed.

Integrity functions and the judiciary

Integrity branch scholarship has long recognised that the judicial and integrity branches intersect.[10] However, the full range of integrity functions performed by the judiciary has not been explored in detail. This section of the paper considers the relationship between the integrity and judicial branches, both identifying the wider range of integrity functions performed by judicial officers, and exploring the extent to which judges are in fact involved in the performance of those functions.

The integrity functions performed by the judicial branch and its members can be divided into three categories. Judicial review of both legislative and administrative action forms the first and most widely recognised integrity function performed by the judiciary.[11] The availability of an independent judiciary with powers to examine the legality of legislative and executive activity is a core feature of the Australian integrity system. The second integrity function performed by the judicial arm of government is the supervision of the institutions and processes comprising the integrity system. An exercise of power to engage in judicial review for the purpose of monitoring the integrity branch is arguably of a unique character; the judiciary performs an essential integrity task by ensuring mutual accountability *within* the integrity system.[12]

The extra-judicial[13] performance of public functions by judicial officers should also be recognised as a third broad category of integrity function. Examples of these functions include participation in quasi-judicial review bodies; the conduct of quasi-judicial investigations; and supervision or oversight of executive activity.[14]

Quasi-judicial review bodies

Judges often participate in the operation of quasi-judicial review bodies. A body or function may be described as 'quasi-judicial' either where it is performed in a 'judicial' or 'judicial-like' manner or where it does not clearly involve the exercise of judicial power.[15] Merits review tribunals (such as the Administrative Appeals Tribunal (AAT)) are a prominent example of a quasi-judicial review body.[16] The task of a merits review tribunal is to 'stand in the shoes of the original decision maker'[17] and to identify the 'correct or preferable' exercise of administrative power.[18] The AAT is then empowered to affirm, vary, or set aside the decision under review.[19]

It is not immediately clear that the AAT performs an integrity function; the process of merits review need not involve consideration of any factors other than what is 'right' or 'fair' in the circumstances.[20] However, although the power of the AAT in relation to questions of law is limited, the Tribunal may be required to form an opinion on a point of law in order to complete the task of merits review.[21] Identification of the correct or preferable exercise of an administrative discretion will almost certainly necessitate some consideration of the legal boundaries placed upon a decision-maker; the Tribunal cannot make the 'correct or preferable' decision without some appreciation of the nature and extent of the power to be exercised. Review of legality, which would include the manner and purpose of the exercise of power, is inherent in the process of merits review.[22] It can be argued, therefore, that the AAT performs an integrity function.

The AAT is an excellent example of a quasi-judicial body which involves judicial officers in the extra-judicial performance of an integrity function. The President of the AAT must be a Judge of the Federal Court.[23] Additional Ch III judges[24] can be appointed as presidential members of the Tribunal.[25] It has long been accepted that judicial members are appointed to the AAT as *persona designata*.[26] These provisions have been accepted as compelling some adherence to the 'judicial model [of decision making], separate from, and independent of, the Executive'.[27] Members of the judicial branch remain available to participate in the operation of the Tribunal; the AAT reports that judicial officers comprised 20% of the membership of the Tribunal in the 2010-2011 reporting period.[28] However, former members of the AAT note that the involvement of judges in the activities of the Tribunal has declined in more recent years, particularly when compared with the operation of the Tribunal in its formative years.[29] These observations seem to be accurate; the AAT itself reports that judicial officers were engaged in less than 1% of all hearings conducted by the Tribunal in 2010/2011.[30] While judicial officers are involved in the activities of the AAT, it seems that the extent of that participation is not particularly extensive.

Quasi-judicial investigations

Judicial officers have historically undertaken quasi-judicial investigative tasks such as the conduct of Royal Commissions. A Royal Commission is an 'ad hoc advisory [body] appointed by governments to obtain information which is presented in the form of a report', and which can be deployed for an infinite variety of purposes.[31] Prasser has developed a typology for the classification of public inquiries, which allows broad categorisation of Royal Commissions based upon the function that they perform.[32] Royal Commissions may be classified as 'inquisitorial/investigative inquiries', which '[investigate] allegations [of] suspected impropriety or maladministration of individuals and organisations in both government and the private sector [or] find the cause of a particular catastrophic event'.[33] Inquisitorial/investigative Royal Commissions not only collect publicly available data and receive evidence from witnesses, but may also utilise a range of coercive powers to gather further information.[34] Many inquisitorial/investigative Royal Commissions are conducted by either active or former judicial officers,[35] and in a manner that is broadly analogous with judicial proceedings.[36] 'Public Advisory inquiries', on the other hand, 'are not concerned with investigating allegations [or] improprieties … instead, their aim is to inform, summarise and make suggestions to government on the possible solution to a particular policy problem'.[37]

Royal Commissions are widely identified as a component of the integrity branch of government.[38] However, it is submitted that only those inquisitorial/investigative Royal Commissions directed to the investigation of allegations of impropriety and maladministration truly perform an integrity function. Many Royal Commissions have been established in order to examine systematic misuse of public power;[39] the emerging trend seems to be to use Royal Commissions almost exclusively for this purpose.[40] Policy advisory Royal Commissions, which focus primarily on the provision of information to government, are far less likely to address questions of the use and misuse of public power.[41] Consequently, it is doubtful that policy advisory Royal Commissions are accurately described as an integrity activity.

Royal Commissions are often mischaracterised as judicial inquiries, when they are more appropriately regarded as manifestations of executive government;[42] it is well-established that the power to issue a Royal Commission stems from the prerogative.[43] This may simply be a by-product of the historical practice (in some jurisdictions) of conferring Royal Commissions upon judicial officers (in their personal capacity).[44] It is difficult to reach a general view as to the extent of judicial participation in Royal Commissions. However, Prasser's study of governmental inquiries allows identification of some significant features of the modern approach to the use of Royal Commissions and the selection of Royal Commissioners. The Commonwealth is most likely to initiate an inquisitorial/investigative Royal Commission; all Commonwealth Royal Commissions conducted after 1990 have been inquisitorial/investigative in nature.[45] Former judges are most likely to be tasked with the conduct of a Royal Commission; all but one of the Commonwealth Royal Commissions issued after 1990 have been conducted by a retired judge.[46]

Supervision of administrative activity

Judicial officers may also be involved (extra-judicially) in administrative processes which seek to supervise and/or control executive activity. In some instances, rather than undertaking an administrative task directly, judicial officers may supervise and either authorise or prevent, the exercise of executive power. Although strictly speaking an administrative task, this 'supervisory' process imposes a significant check on the activities of the executive, as a judicial officer mediates the application of executive power to the individual citizen. An example of this form of administrative function is the power to issue a warrant. As the majority of the High Court in *Kuru v New South Wales* observed:

> Although the grant of a warrant is an administrative act, it is performed by an office-holder who is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual … [The warrant is issued by] *an officer who is not immediately involved in the circumstances of the case and who may thus be able to approach those circumstances with appropriate dispassion and attention to the competing principles at stake*. …[47]

It is possible to characterise such a supervisory process as an integrity activity. The judicial officer is not directly involved in the performance of a 'primary' executive activity (that is, the judicial officer does not decide that particular action is necessary, and then proceed with that action); rather, the judicial officer examines executive activity with a view to ensuring that the activity is consistent with limits upon the power of the executive branch of government. It is the 'secondary' or 'supervisory' nature of this involvement that merits recognition as an integrity process. The purpose of involving a judicial officer in the warrant issuing process is to ensure that the significant powers conferred upon the executive are exercised for the purpose and in the manner intended by parliament.

Participation of judicial officers in processes of this nature has been the source of controversy.[48] Nevertheless, both the Commonwealth and New South Wales Parliaments have continued to involve judicial officers in the administrative process of issuing warrants.[49] In the Commonwealth jurisdiction, for example, eligible Ch III judges (being those judges who have consented to the conferral of power to issue warrants in their personal capacity) are empowered to issue telecommunications service warrants under s 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth).[50] Nominated AAT members have also been permitted to issue warrants under the same provision since 1997.[51] The character of the available issuing authorities[52] (and the real activities of those authorities) has been monitored since that time.[53] The data collected and published in accordance with statutory requirements provides some useful insight regarding the true extent of extra-judicial performance of the warrant issuing function.

Figure 1 (below) shows that Ch III judges have remained available to issue warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) s 46, and have formed approximately 60% of the officers available to issue warrants under the provision for the last 10 years.[54] Table 1 shows that the total number of officers available to issue warrants, and the number of warrants issued, have both essentially doubled since the 1999-2000 reporting period.[55] The proportion of Ch III judges available to issue warrants has, however, remained relatively stable at approximately 60% (Figure 1). Figure 2 shows that, while the proportion of warrants issued by federal judges under s 46 was relatively low, between 5% and 7% in the period 2001-2002 to 2005-2006; the proportion of warrants issued by federal judges has increased in the period 2006-2007 to 2010-2011, reaching a peak of approximately 21% in the reporting period 2009-2010.[56] Finally, Table 48 in the 2010/2011 Report itself shows that the identity of the issuing authority varies significantly between Australian jurisdictions.[57]

Collectively, this information demonstrates that judges both appear (and in fact continue) to perform the warrant issuing function under the *Telecommunications (Interception and Access) Act 1979* (Cth),[58] defying expectations that the function would be transferred to nominated AAT members in the period following the 1997 amendments.[59] If there is any identifiable trend, it is that judges continue to make themselves available to perform the warrant issuing function. It is not immediately apparent, however, that judicial involvement in these activities is preferred. As Table 48 in the 2010/2011 Report shows, the identity of the issuing officer differs significantly between jurisdictions. In many instances, this may be a product of practicality or administrative practice rather than any preference for the participation of judicial officers. However, it is clear that extra-judicial participation in this particular warrant issuing function persists, and it appears likely to continue.

Figure 1 - Availability of Eligible Judges and Nominated AAT Members to Issue Telecommunications Interception Warrants

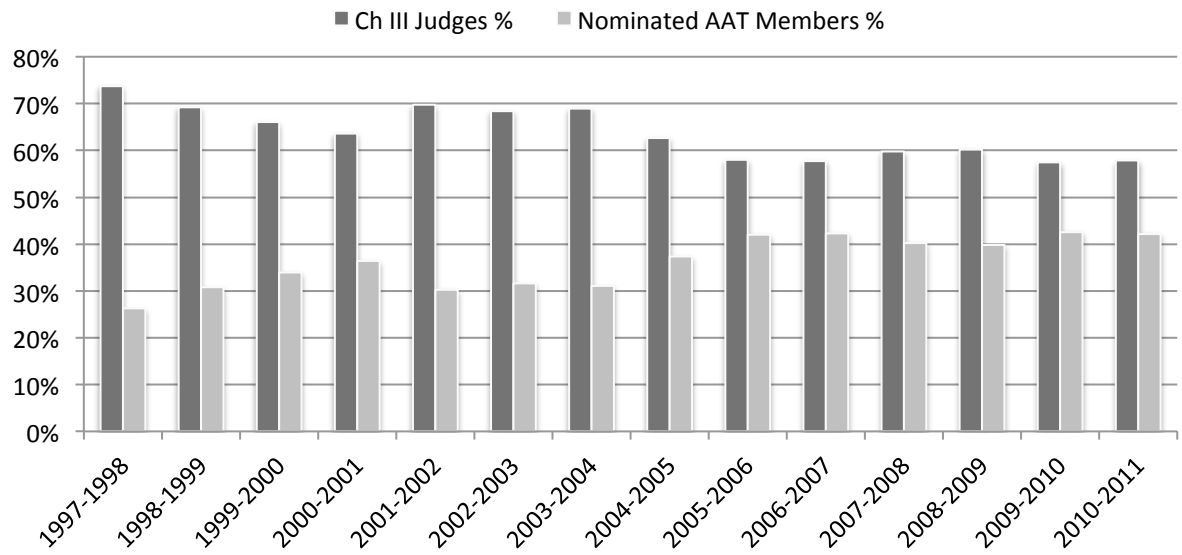
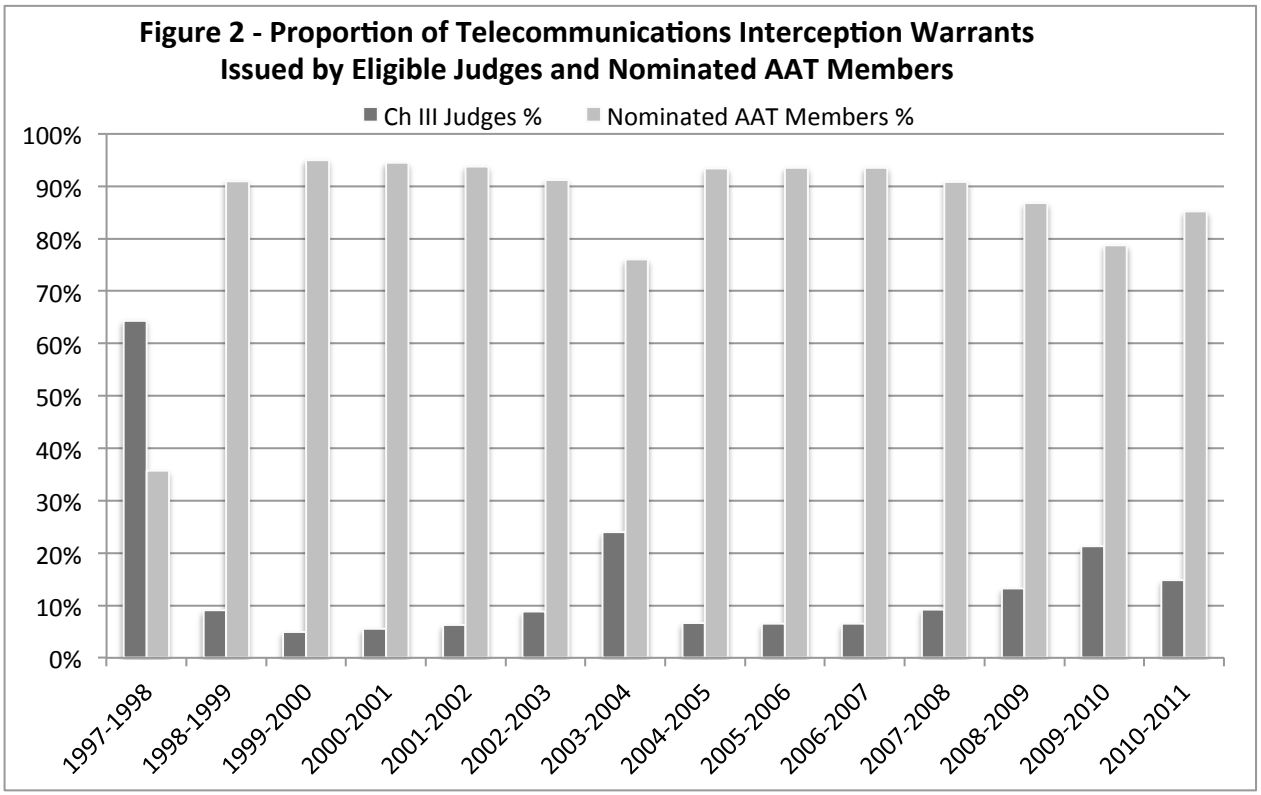


Table 1 - Number of Authorising Officers and Number of Warrants Issued

Year	Total Authorising Officers	Total Warrants Issued
1997-1998	61	675
1998-1999	52	1284
1999-2000	53	1689
2000-2001	55	2157
2001-2002	66	2512
2002-2003	57	3058
2003-2004	58	3028
2004-2005	75	2883
2005-2006	69	3011
2006-2007	90	3279
2007-2008	92	3244
2008-2009	93	3220
2009-2010	101	3584
2010-2011	109	3313



What is to be made (collectively) of these examples of judicial participation in the integrity system? The scale of judicial participation in these activities aside, judicial officers are at least prepared to give the appearance that they will undertake extra-judicial activities. A portion of these extra-judicial functions can be characterised as integrity functions; while the identification of activities of merits review tribunals and Royal Commissions as integrity functions is not necessarily controversial, the recognition of extra-judicial supervision of executive action as an integrity process potentially represents an expansion of the integrity branch concept. This is, however, consistent with the prevailing trend in integrity branch scholarship favouring the recognition of a wider range of activities and processes as integrity functions. Finally, we must note that these extra-judicial functions are performed by judges, not as judges, but in their personal capacity. The scope of permissible extra-judicial activity is a vexed issue in Australian public law. Two closely related questions arise; (i) Is the extra-judicial participation of judicial officers in the operation of the integrity branch of government constitutionally permissible? (ii) Is the extra-judicial performance of a wider range of integrity functions by judicial officers appropriate or desirable?

Part II The separation of judicial power

The Australian approach to the separation of federal judicial power takes, as its starting point, the constitutional expression 'judicial power of the Commonwealth'.[60] A power or function must be characterised as 'judicial' or 'non-judicial' before the principles affecting the separation of federal judicial power can be applied.[61] While the constitutional expression 'judicial power' is not easily defined, key features include the 'binding and authoritative'[62] determination of a controversy[63] by application of 'the law as it is'[64] to facts ascertained by the decision-making body[65]. No magical constellation of factors identifies any particular power as 'judicial' or 'non-judicial';[66] rather, an assessment of all relevant factors, including the context in which the power is to be exercised, is required before a particular power is characterised.[67]

The strict separation of federal judicial power rests on two propositions developed by the High Court in the first half of the 20th century, and ultimately affirmed in the *Boilermakers'* case.[68] The first proposition requires that the judicial power of the Commonwealth only be exercised by federal courts established in accordance with the provisions of Ch III *Constitution*.[69] The second requires that federal courts be permitted only to exercise the judicial power of the Commonwealth, or non-judicial functions that are incidental to the exercise of judicial power.[70] The first proposition has not been questioned.[71] The second proposition, however, has been the subject of some concern.[72] The identification of exceptions to the second element of the separation of federal judicial power has mitigated the effect of that proposition.[73] The *persona designata* exception is of particular importance where the constitutionality of extra-judicial activity is considered.[74]

The persona designata concept

The *persona designata* concept has an extended history in Australian public law. As Walker has noted, the concept appeared in the legal systems of the Australian colonies prior to federation, and was addressed by the early High Court without apparent disapproval.[75] At this point the *persona designata* concept operated simply as a principle of statutory interpretation;[76] Gordon outlined the operation of the concept in relatively clear terms:

> [The *persona designata* concept is applied] where a person is indicated in a statute … not by name, but by his name of office or as one of a class [that is, as a judge]. Then question arises whether he is meant in his [capacity as a judge], or whether the intention is to single him out … as an individual, the reference to [the holding of judicial office] being merely a descriptive means of identifying him.[77]

The *persona designata* concept also found life as an exception to the second element of the separation of federal judicial power in *Boilermakers'*.[78] In this context, the term '*persona designata*' is used 'as a shorthand expression of a limitation on the principle of *Boilermakers'*, acknowledging that there is no necessary inconsistency with the separation of powers mandated by Ch III of the *Constitution* if non-judicial power is vested in individual judges detached from the court they constitute'.[79] Although the potential for the *persona designata* concept to thwart high constitutional principle was immediately recognised,[80] the doctrine was not formally condemned.[81]

The High Court returned to the *persona designata* concept in *Hilton*, concluding that the conferral of power to issue telecommunications intercept warrants on 'Judges' did not violate Ch III of the *Constitution*.[82] The majority (Gibbs CJ, Deane and Dawson JJ) applied the *persona designata* concept in construing the relevant statute, concluding that the intention of Parliament in conferring power upon 'Judges' was to empower the class of person to perform the warrant issuing function in their personal capacity.[83] While Mason and Deane JJ accepted that the *persona designata* concept existed as a matter of 'settled principle',[84] their Honours maintained that 'a clear expression of legislative intention'[85] was required in order for a function to be conferred on a judicial officer as a designated person. In concluding that that the intention of Parliament to confer power upon Judges as designated persons was not clear in this instance, Mason and Deane JJ noted as factors affecting their decision the use of the descriptor 'Judge' to identify the class of person, the quasi-judicial nature of the power in question, the absence of protection for 'judges' exercising the warrant issuing power and the failure to seek consent of judges prior to conferral of the function.[86] The concerns of Mason and Deane JJ were largely addressed in a recasting of the statutory regime in 1987; the majority of the High Court in *Grollo* effectively endorsed *Telecommunications (Interception) Act 1979* (Cth) s 6D as providing a formula which could be utilised validly to confer a non-judicial function upon a judicial officer in their personal capacity.[87]

Although the *persona designata* concept was again subjected to criticism as an 'elaborate charade'[88] designed to subvert the separation of federal judicial power, it seems that the

concept remains of significance in Australian public law. Most significantly, the *Constitution* does not expressly prohibit the conferral of extra-judicial functions on judicial officers.[89] Second, the *persona designata* concept operates as an adjunct to the *Boilermakers'* doctrine (which is, at least presently, well established in Australian constitutional law), ameliorating the strict nature of the proposition established in that case. Further, the practice of conferring functions on judges as designated persons persists, and does not appear likely to cease in the near future. Although each piece of legislation must be construed independently, both the Commonwealth and New South Wales Parliaments seem inclined to utilise the statutory formula that was accepted in *Grollo*. [90] As a result, the *persona designata* concept seems to remain relevant both as a matter of constitutional principle and as a rule of statutory interpretation which is of significance beyond the scope of the *Boilermakers'* doctrine.

The incompatibility condition

Having recognised the capacity of the *persona designata* concept to effectively neutralise the separation of federal judicial power, both the majority and dissenting opinions in *Hilton* suggested that the operation of the concept should be limited.[91] The 'incompatibility condition'[92] was developed as a limit on the operation of the *persona designata* concept, with the purpose of ensuring that the principles underpinning the separation of federal judicial power were not compromised by the operation of the *persona designata* concept.[93] The incompatibility condition was explained in a trilogy of cases in the mid-1990s; in *Grollo* and *Wilson*[94] the High Court identified the scope and operation of the concept in relation to federal judges, while the landmark decision in *Kable* considered the application of the incompatibility principle to State courts forming part of the integrated federal judicature.

Development of the incompatibility condition

The decision of the High Court in *Grollo* cemented the incompatibility condition as a gloss on the *persona designata* concept. In *Grollo*, a majority of the High Court confirmed that the non-judicial function of issuing telecommunications intercept warrants was validly conferred upon federal judges as designated persons, that function not being incompatible with judicial office.[95] The conferral of non-judicial functions on judges as designated persons was subject to two conditions: the consent of the judge in question was required before a non-judicial function could be validly conferred upon them; and, in addition, the non-judicial function could not be 'incompatible either with the judge's performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.[96] The joint judgment in *Grollo* (Brennan CJ, Deane, Dawson and Toohey JJ) went on to outline three circumstances in which incompatibility might arise; the performance of non-judicial functions might require 'so permanent and complete a commitment' that the performance of 'substantial' judicial functions was impractical ('practical incompatibility'); the nature of the non-judicial functions might compromise or impair the ability of the judge to perform judicial functions with integrity ('judicial integrity incompatibility'); and finally, 'the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished'[97] ('public confidence incompatibility').[98]

The 'public confidence'[99] category of incompatibility was explored in greater detail in the High Court's later decision in *Wilson*. In *Wilson*, a majority of the High Court held that the preparation of a report for the purposes of s 10 of the *Aboriginal and Torres Strait Islander Heritage and Protection Act 1984* (Cth) was incompatible with federal judicial office as it would jeopardise public confidence in the independence and impartiality of the judiciary.[100] In order to determine whether public confidence incompatibility existed, the function under consideration must satisfy the detailed criteria set out in the joint judgment of Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ. First, the statute conferring a function on a judge as designated person must be examined; if the function is not 'an integral part of, or

closely connected with, the functions of the Legislature or the Executive Government', no incompatibility appears, and the inquiry ceases at this point (the 'close connection question'). If the function is part of or closely connected with the Legislature or the Executive Government, the mode of performance is considered in more detail; if the function is not performed 'independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under law', incompatibility exists (the 'decisional independence question'[101]). If the function must be performed independently, the basis on which any discretionary power is to be exercised must be explored; if a discretion is to be exercised on political grounds (that is, on 'grounds that are not confined by factors expressly or impliedly prescribed by law'), public confidence incompatibility may exist (the 'political grounds question'). Although 'a judicial manner of performance' does not guarantee that a discretion will not be exercised on political grounds, a failure to comply with the requirements of procedural fairness suggests that 'it is unlikely that the performance of the function will be … free of political influence or without the prospect of exercising a political discretion' (the 'judicial manner qualification').[102]

The close relationship of the incompatibility condition and the *persona designata* concept virtually guaranteed that the incompatibility condition would endure a level of criticism. Those concerned with the potential effect of the *persona designata* concept suggested that the incompatibility condition did not go far enough to adequately safeguard the independence of the federal judiciary.[103] The public confidence incompatibility test developed in *Wilson* has been impugned as inflexible,[104] and is said to rely upon vague and indeterminate criteria (the '*close*' connection and '*political*' grounds questions).[105] Despite recognising that the public confidence incompatibility test has 'not always been observed in practice',[106] the joint judgment does not seem to contemplate circumstances in which the question of compatibility (or constitutionality more broadly) requires some consideration of factors beyond those found in the public confidence test. The approach of Gaudron J, who acknowledged historical practice as permitting the performance of functions that might otherwise give rise to incompatibility, presents a noteworthy contrast.[107].

Incompatibility and persona designata in the States

It is widely acknowledged that the constitutional arrangements of the Australian States do not require the strict separation of the judicial arm of government required by the federal *Constitution*.[108] However, the High Court recognised in *Kable* that it is beyond the power of a State Parliament to confer upon State courts functions that are incompatible with the position of those courts as potential repositories of federal jurisdiction.[109] The High Court has also recognised that the federal *Constitution* requires that there exist bodies fitting the description of the 'Supreme Court of a State', with all the characteristics that the expression entails.[110] Despite initially appearing to be a concept of restricted application, the *Kable* principle has provided the basis for findings that legislation of State Parliaments impermissibly interfered with State courts on several occasions.[111]

Given the proximity of the decisions in *Kable* and *Wilson*, it is unsurprising that the *persona designata* concept was referred to in *Kable*. Perhaps most famously, McHugh J observed that the interplay of the *Kable* principle and the *persona designata* concept remained unexplored.[112] The potential application of the *persona designata* concept to State judges was not considered by the High Court until its decision in *Wainohu.*

Wainohu v New South Wales

The decision of the High Court in *Wainohu* addressed a number of important questions regarding the role of the *persona designata* concept at the State level[113] and the operation of the incompatibility condition.[114] These questions arose in relation to the power purportedly conferred upon judges of the Supreme Court of New South Wales to designate a particular

group as a 'declared organisation' for the purposes of the *Crimes (Criminal Organisation Control) Act 2009* (NSW) (CCOCA). The High Court found (by a 6:1 majority, Heydon J dissenting) that the CCOCA was invalid as it impaired the institutional integrity of the Supreme Court of New South Wales.[115] Despite being concerned with State courts and judges, *Wainohu* provides some insight as to the likely future application of the *persona designata* concept and the incompatibility condition.

Although the *persona designata* concept is treated with varying levels of enthusiasm in *Wainohu*, it seems that the concept remains relevant only as a factor in the process of determining whether the institutional integrity of a State court is compromised. For French CJ and Kiefel J the *persona designata* concept was simply an unwarranted complication in a State jurisdiction not directly affected by a constitutionally mandated separation of powers, and should not be elevated to the status of constitutional principle.[116] Nevertheless, their Honours noted that an attempt to confer a function on a judicial officer as a designated person should be considered in determining whether the institutional integrity of a State court was affected by a particular legislative scheme, but would 'generally not be determinative'.[117] The joint judgment of Gummow, Hayne, Crennan and Bell JJ seems equally reluctant to adopt the *persona designata* concept as a matter of constitutional principle in relation to State judges and courts.[118]

The future operation of the incompatibility condition (as it relates to functions conferred on judicial officers as designated persons) after *Wainohu* is also uncertain. Although both majority judgments in *Wainohu* refer to *Wilson*, neither clearly applies the 'public confidence incompatibility' test articulated in the joint judgment in *Wilson*. While Gummow, Hayne, Crennan and Bell JJ go so far as to rely upon the statement of principle found in Gaudron J's judgment in *Wilson*,[119] French CJ and Kiefel J do not expressly rely upon any statement of principle from *Wilson*.[120] In what may be a related observation, French CJ and Kiefel J suggest that precisely formulated tests are of little utility in attempting to engage in evaluative judgments such as that associated with the concept of incompatibility.[121] The implication seems to be that the evaluative judgment regarding incompatibility is best made without reliance upon a restrictive predetermined formula.

It is submitted that the reasoning in *Wainohu* indicates that emphasis should be placed upon the decisional independence of a judicial officer when assessing the question of compatibility of extra-judicial activities. The 'decisional independence question' and 'judicial manner qualification', both key elements of the public confidence incompatibility test, are effectively replicated in Gaudron J's reasoning in *Wilson.*[122] The approach adopted by Gaudron J has the advantage of avoiding the two more contentious issues identified by the joint judgment in *Wilson*,[123] and seems to be framed in more flexible terms. This proposition is a shift in emphasis; the absence of a strict separation of judicial power seems to diminish the relevance of certain elements of the *Wilson* public confidence incompatibility test in the context of State judges.[124] It seems that any definitive re-examination of the *Wilson* principles would be more appropriately undertaken in the context of extra-judicial activity undertaken by federal judges.

The previously undeveloped concept of 'practical incompatibility' received limited attention in *Waionhu*. Only French CJ and Kiefel J turn their attention directly to the quantity of extra-judicial activity, noting simply that the identification of declared organisations might well be 'burdensome'.[125] Although Gummow, Hayne, Crennan and Bell JJ suggest that the capacity of the Chief Justice of the Supreme Court to withdraw a judge from extra-judicial activity[126] might balance the risk of practical incompatibility,[127] their Honours do not explain the source of any such incompatibility in the case. The demands of the CCOCA were explored in oral argument in *Wainohu*, with the parties accepting that a designated judge might be required to spend months if not years undertaking extra-judicial activity under the CCOCA.[128] The plaintiffs contrasted this with the relatively minor time commitment associated with other

forms of extra-judicial activity, such as addressing applications for warrants.[129] Although *Wainohu* does not suggest that a quantitative measure can be used to determine the existence of practical incompatibility, it is suggested that the scale of the functions conferred upon a judge should not be overlooked when addressing the question of incompatibility.

Wainohu does not indicate clearly the significance of a determination that practical incompatibility exists. The High Court in *Grollo*[130] suggested that practical incompatibility goes directly to the *validity* of legislation conferring functions on judges as designated persons; this reasoning appeared to be accepted by Gummow, Hayne, Crennan and Bell JJ in *Wainohu*.[131] However, French CJ and Kiefel J imply that practical considerations are more directly related to the *desirability* of the conferral of extra-judicial functions.[132] Were it applied rigidly, the concept of practical incompatibility might cast some doubt upon the validity of many long-established forms of extra-judicial activity.[133] The approach of French CJ and Kiefel J is perhaps best viewed as a pragmatic compromise which aims to incorporate practical considerations in a wider evaluative assessment of incompatibility. This flexibility would potentially alter the range of extra-judicial activity that might avoid invalidity as a result of practical incompatibility.

The decision of the High Court in *Wainohu* leaves unanswered some significant questions of constitutional principle affecting the capacity of judicial officers to engage in extra-judicial activity. The High Court confirms that the *persona designata* concept cannot be used to avoid the operation of the *Kable* principle and recognises the relationship of the concept of incompatibility at both the federal and State levels. However, the High Court does little to clarify the operation of the incompatibility condition and the public confidence incompatibility test. Although the *Wainohu* majority seem to de-emphasise some of the more challenging elements of *Grollo* and *Wilson*, the fate of the concepts developed in those cases is ultimately unclear. While the decision in *Wainohu* relates specifically to State judges and courts, and comments relating specifically to extra-judicial activities of federal judges might best be regarded as obiter, the approach adopted by the High Court suggests that, in the future, the incompatibility condition and the public confidence incompatibility test may not be applied rigidly where incompatibility is assessed in relation to federal judges.

Persona designata, incompatibility and extra-judicial activities

Several important points emerge from the High Court's development of the *persona designata* concept and the incompatibility condition. The *persona designata* concept is presently entrenched in the federal jurisdiction as a matter of constitutional principle, and will likely inform (but not determine) any assessment of the effect of a legislative scheme on the institutional integrity of a State court. The conferral of a function on a judicial officer as designated person requires a clear expression of legislative intention. Factors to be considered in determining the effect of legislation purporting to confer functions on judicial officers as designated persons include the descriptor used to identify the designated person, the nature of the power purportedly conferred, the source from which any decision of the designated person derives its legal effect and the extent of the protection afforded the designated person. The legislative formulation refined in the wake of *Hilton*, and effectively endorsed by the High Court in *Grollo*, demonstrates clearly the legislative intention required to confer a non-judicial function upon a judicial officer in an individual capacity.

A function conferred on a judicial officer as a designated person (or simply undertaken by a judge in a personal capacity) must not be incompatible with judicial office. Incompatibility might be found to exist where extra-judicial activity diminishes public confidence in the capacity of an individual judge or the judiciary, as an institution, to perform judicial functions with integrity. 'Public confidence' may be diminished where the judicial officer does not retain decisional independence in the performance of an extra-judicial function, or where an extra-judicial function is to be exercised on political grounds. A judicial manner of performance of

the function in question influences the approach to issues of both decisional independence and political grounds. Incompatibility might also be found to exist where the performance of extra-judicial activity is practically incompatible with ongoing performance of judicial functions.

The participation of judicial officers in extra-judicial activities remains constitutionally permissible. However, the range of activities which might be validly conferred upon judicial officers in a personal capacity is narrowed by the operation of the incompatibility condition. The precise scope of extra-judicial activities that might be compatible with the retention of judicial office remains uncertain; the question of compatibility is one of substance rather than form, and cannot be resolved without reference to a particular function or activity.[134] This means that individual legislative schemes and functions must be assessed with reference to the criteria of compatibility established by the High Court.

Part III The judiciary and integrity functions: incompatible?

The question that remains is whether integrity functions (as a subset of extra-judicial activity) might be validly conferred on judicial officers as designated persons or undertaken by judicial officers in their individual capacity. Integrity functions that cannot be validly conferred upon a Ch III court might be validly conferred upon Ch III judges as designated persons (or exercised by judges in their individual capacity), subject to satisfaction of the incompatibility condition. As the validity of the conferral of a function on a judicial officer requires consideration of the substance of the statutory regime under which the function is conferred, it is again necessary to address each of the examples identified individually. The statutory scheme purportedly conferring extra-judicial power is assessed, and questions of decisional independence and practical incompatibility are considered in relation to each function or activity.

Quasi-judicial review bodies

The participation of judges as presidential members of the AAT has been the source of controversy since the inception of the Tribunal. In *Drake*, the Full Federal Court found that judges were validly appointed to the AAT as designated persons,[135] a conclusion which has subsequently been endorsed by the High Court.[136] More challenging questions arise when the compatibility of AAT membership with the retention of judicial office is assessed. While the question of public confidence incompatibility has been the source of some concern, the joint judgment in *Wilson* persuasively asserted that the AAT retains decisional independence in conducting merits review.[137] Applications for merits review are assessed in accordance with the procedure established by the *Administrative Appeals Tribunal Act 1975* (Cth).[138] Further, the AAT is free from direction in the form of governmental policy.[139] While the AAT has wide remedial powers, those powers are not exercised in accordance with executive direction; the AAT conducts a hearing *de novo* before determining the 'correct or preferable' outcome in any given matter.[140] When combined, these factors demonstrate the independence of the Tribunal in the performance of its functions. The fact that the AAT tends to undertake activities in a manner reflective of judicial method also supports this conclusion.

Questions regarding the extent to which the procedure of the AAT might be constrained without affecting the perception that the Tribunal is independent of the executive government remain. In *Hussain*, the Full Federal Court addressed (in *obiter*) the validity of ss 39A and 39B of the *Administrative Appeals Tribunal Act 1975* (Cth), which affect proceedings in the Security Appeals Division of the AAT.[141] Despite recognising the divergence of opinion regarding the desirability of the provisions, Weinberg, Bennett and Edmonds JJ concluded that the participation of a presidential member in the operation of the Security Appeals Division of the AAT was not incompatible with Ch III judicial office.[142] Although the statutory regime would potentially deprive an applicant of procedural fairness in the form of a fair

hearing, the Tribunal was said to retain its decisional independence; despite the modified procedure, the Tribunal retained power to vary or set aside the decision under review.[143] In this sense, the conclusion in *Hussain* appears to be consistent with the principles identified in *Wilson* and affirmed in *Wainohu*; ss 39A and 39B certificates do not limit the power of the AAT to examine in full the evidence considered by the original decision maker, and to determine the correct or preferable outcome in the circumstance.[144] Further, certificate(s) issued under ss 39A and/or 39B would seem to be 'an instrument made under law', which the *Wilson* joint judgment did not regard as interfering impermissibly with the decisional independence of the designated judge.[145] It would seem that the provisions do not, on their face, restrict the decisional independence of the Security Appeals Division of the AAT and the presidential members involved in its activities.

However, the challenge might be found in the departure from a judicial manner of performance required by the provisions. By depriving the person seeking review in the Security Appeals Division of the AAT of both the opportunity to know the material informing the decision maker and the chance to comment on that material, the fair procedure generally associated with the Tribunal's activities is removed.[146] It is well established that the requirements of procedural fairness are not static, and that the standard of conduct expected of on administrative decision-maker is not that required of a judicial officer.[147] Nevertheless, the fact that a judicial officer is involved in a process which does not require a fair hearing might suggest an absence of decisional independence (or at least create the appearance of the absence of decisional independence), and casts some doubt on the compatibility of the function with judicial office.

An assessment of practical incompatibility associated with membership of the AAT requires careful analysis. It seems clear that appointment as President of the Tribunal requires a substantial commitment of time, which would effectively prevent the performance of substantial judicial activities.[148] However, the mere fact that judicial officers are available to serve as members of the AAT in their extra-judicial capacity poses no immediate threat of practical incompatibility. The AAT itself reports that judicial officers participate in less than 1% of hearings conducted by the Tribunal.[149] It seems unlikely that any individual judicial member of the AAT, other than the President, is involved in the activities of the Tribunal to an extent which compromises their capacity to engage in judicial activities. Put simply, it is not clear that merely accepting appointment as a member of the AAT generates practical incompatibility.

Ultimately, it seems that the participation of judges in the activities of quasi-judicial review bodies such as the AAT is constitutionally permissible. Indeed, the example of the AAT demonstrates effectively the manner in which judicial officers (as designated persons) can be involved in a review process which ensures that they retain decisional independence, and avoids ongoing involvement in integrity functions to an extent which compromises ongoing performance of judicial functions. However, the example of the AAT also demonstrates the potential for any interference in the decision-making process (in which a judicial officer is involved) to cast immediate doubt upon the compatibility of a function with judicial office. The mere fact that a judicial officer has accepted an appointment to a quasi-judicial review body which performs integrity functions does not generate incompatibility.

Quasi-judicial investigations

Quasi-judicial investigative tasks may also be validly conferred upon Ch III judges in their personal capacity. In the Commonwealth jurisdiction, the *Royal Commissions Act 1902* (Cth) allows the Governor-General to issue a Royal Commission to 'a person or persons' of their choosing.[150] Although this provision does not evidence an intention to confer power upon a judicial officer as a designated person,[151] features of the legislative scheme indicate an awareness that the provision may be used to confer a Royal Commission on a judicial officer

in a personal capacity.[152] The widely held view that the power exercised by a Royal Commissioner is non-judicial supports this conclusion. Although the *Royal Commissions Act 1902* (Cth) does not attempt to confer a function on a judicial officer as a designated person, it contemplates that judicial officers will perform the function in their individual capacity.

The question that remains is whether the performance of a quasi-judicial investigative task such as a Royal Commission is compatible with the retention of judicial office. The 'person' conducting an inquisitorial/investigative Royal Commission concerned with the exercise of public power[153] is empowered to review and report upon the manner in which public power has been exercised, and may identify measures which might ensure that public power is utilised appropriately in the future. An inquiry of this nature is largely retrospective, focusing primarily on past conduct before addressing any future concerns. Although interaction with the legislative and executive arms of government may be necessary in exploring past conduct, the expectation is that the task will be performed free of executive direction. A judicial mode of performance, including public hearings and reporting, reinforces the conclusion that power is exercised free of influence.[154] The appointment of a judicial officer is often said to be an indication that independence from political influence exists.[155] However, an argument that decisional independence exists because a judicial officer is responsible for the conduct of a function, and that the function is therefore compatible with judicial office seems to be somewhat circular. Ultimately, it is difficult to conclude with certainty that decisional independence is retained by a judicial officer performing a quasi-judicial investigative activity such as a Royal Commission.

Quasi-judicial investigative tasks raise serious questions of practical incompatibility. The time commitment involved in the conduct of a Royal Commission is likely to be measured in months if not years. While seven Royal Commissions were issued by the Commonwealth government in the period between 1990 and 2006, on only one occasion was the final report presented within 12 months of the date of the letters patent.[156] Further, the conduct of a Royal Commission may require the judicial officer to withdraw completely from performance of judicial tasks. However, it seems that questions of practical incompatibility alone may not provide a sufficient basis for a conclusion that the incompatibility condition has been breached.[157] Much is to be said for an assessment of the *actual* practical incompatibility associated with a particular activity, in conjunction with other relevant factors, before reaching a conclusion that incompatibility exists.[158]

Significant questions remain as to the compatibility of extra-judicial investigative activities with judicial office. It is not clear that judicial officers would retain decisional independence, and the significant practical effects of such activities cannot be overlooked. While past practice might be considered as a source of guidance, the conduct of Royal Commissions has proven so controversial that no uniform historical practice can be identified in the Australian context.[159] However, those judicial officers who have accepted and conducted Royal Commissions have done so in their individual capacity.[160] It is difficult to reach a confident conclusion as to the validity of legislation purporting to confer these integrity functions on judicial officers in their individual capacity.

Supervision of executive activity

It is clear that the power to supervise administrative activity may be conferred upon judges in their individual capacity; the example of the warrant issuing function under s 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth), conferred upon eligible judges under s 6D of that Act, has been addressed by the High Court in *Grollo*.[161] Despite concluding (in *Grollo*) that the warrant issuing function was not incompatible with an eligible Judge's judicial office,[162] the High Court has not been required to apply the more detailed public confidence incompatibility test developed in *Wilson* in this particular context.[163]

The compatibility of the warrant issuing function with the retention of judicial office is uncertain. Judicial officers performing that function as designated persons may retain decisional independence; although judicial officers may receive information from the executive government,[164] and can even seek further information if required,[165] such material is received in accordance with law. The relevant legislation also identifies the standard an application must meet, reducing the appearance of subjective or politically motivated decision-making.[166] However, the warrant issuing process can be sharply contrasted with the regular manner of judicial activity. The warrant is (of necessity) issued ex parte, and the eligible Judge neither retains detailed records nor produces reasons for a decision.[167] As with the AAT, the absence of a fair hearing (when compared with the contested adversarial hearing that judges generally oversee) immediately generates concern. However, the integrity process would not, in this instance, involve any hearing (excepting the limited hearing available in the context of the AAT discussed above). This would seem even more likely to suggest an absence of decisional independence, and casts doubt on the compatibility of the warrant issuing process with the retention of judicial office.

It is not clear that the process of issuing warrants creates practical incompatibility. While Ch III judges remain available to issue warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) s 46, it does not appear that participation in that process compromises performance of judicial activities. If the assessment above is accurate, and the commitment of judicial officers to participation in the warrant issuing process can in fact be measured in minutes,[168] it does not seem likely that practical considerations will influence greatly a determination of compatibility in this instance.

The better conclusion may be that the warrant issuing function is prima facie incompatible, as a consequence of significant questions as to the decisional independence of the judicial officer engaged in the activity.[169] Historical practice may, however, allow the warrant issuing function to be performed by judges despite the appearance of incompatibility. Of particular relevance are the observations of Gaudron J in *Wilson*, which suggest that participation of judicial officers as individuals in the warrant issuing process might be constitutionally permissible; the weight of historical practice is said to ensure that judicial participation in the warrant issuing process does not generate incompatibility by jeopardising public confidence in the judiciary.[170]

The potential application of the incompatibility condition in these three contexts reinforces essential features and elements of the established legal principles. These examples demonstrate the capacity of the incompatibility condition to produce varied results in what might, at least superficially, appear to be similar circumstances. The significance of decisional independence is again highlighted; it seems that any measure which permits interference with the process in which a judicial officer participates as a designated person (or in an individual capacity) immediately generates doubt as to the decisional independence of a judicial officer. It seems that decisional independence is most effectively maintained where the judicial officer (as designated person) participates in the operation of an established body, and engages in an established procedure which shares a range of features with the judicial process.[171] Although *Wilson* suggests that directions made under law do not interfere with decisional independence, doubts must still exist where those directions permit (or require) a departure from the rules of procedural fairness.

The link between the focus on process when identifying integrity activities and the emphasis on an unimpaired process when assessing the potential validity of extra-judicial performance of those functions (in this Part) merits further exploration. The similarity may be purely coincidental. It may be that participation in a 'proper' process provides some reassurance that extra-judicial activity is 'safe' in the sense that judges are, and appear to be, free from interference which might compromise the neutrality of their activities. Concern with the

appearance of independence is central, not only to the validity of extra-judicial activity but also to the desirability of judicial participation in those functions and processes.

Part IV Judicial officers and integrity functions: the merits

The prudence of extra-judicial activity (in general terms, extending beyond integrity functions and processes) has proven a divisive topic in the Australian context. It is clear that maintenance of the independence and impartiality of the judiciary is the most critical factor in any assessment of the merits of extra-judicial activity.[172] Almost all contributions to discourse regarding the merits of extra-judicial activity cite the independence and impartiality of the judiciary as a critical factor influencing identification of the extra-judicial functions (if any) which should be undertaken by judicial officers. Those who support extra-judicial activity argue that judicial participation ensures the independence and integrity of functions conferred upon judges.[173] However, those who regard extra-judicial activity (or particular forms of extra-judicial activity) as inappropriate assert that judicial participation in functions associated with the executive or legislative arms of government potentially compromises the reputation of the judiciary for independence and impartiality,[174] particularly where those functions provide the potential for political controversy.[175] The ultimate extension of this argument is that judicial officers must avoid all extra-judicial activity, lest the reputation of the judiciary be compromised. The two positions generate a paradox; the reputation of the judiciary for independence and impartiality becomes the primary argument both in support of and against the conferral of extra-judicial functions.[176]

Attempts have been made to identify a compromise, which would allow allocation of a wider range of tasks to judges without generating the perception that the reputation of the judiciary has been sacrificed. Writing extra-judicially, Sir Gerard Brennan suggested that the conferral of a function upon a judge is defensible where 'indifference' as to outcome is the reason for selecting a judicial officer as the repository of power.[177] It is submitted that the integrity functions require dispassionate assessment of the manner and purpose of the exercise of power, with the result that extra-judicial performance of those functions might be more readily regarded as appropriate. Further, many of the integrity activities addressed above share a range of characteristics with the judicial method; this may enhance the appearance of neutrality. Further still, some integrity activities do not substantially affect the capacity of a judicial officer to perform judicial duties. It is submitted that the independence and impartiality of the judiciary is not necessarily compromised by extra-judicial performance of integrity functions.

The significance of judicial skill and experience is often cited as a factor motivating the conferral of extra-judicial functions on judicial officers. Judicial officers are skilled in conducting open public hearings, are readily able to interpret and apply relevant legal principles, are practised in the collection and analysis of large bodies of evidence[178] and are experienced in the production of written reasons explaining decisions.[179] Judicial experience in the conduct of a fair and unbiased hearing will also assist bodies in ensuring that the requirements of procedural fairness are observed. Each of these attributes is essential to the effective operation of the integrity branch. While neither the AAT nor a Royal Commissioner can resolve conclusively questions of law, any examination of the exercise of public power will of necessity require consideration of the nature and extent of that power. The activities of the AAT and Royal Commissions are generally conducted in public, and will often require attention to significant bodies of evidence and law. It would seem that judicial officers are particularly well-suited to these tasks.

Extra-judicial performance of integrity activities legitimises fourth arm institutions and practices. The participation of judicial officers can confer legitimacy upon institutions, functions and processes; the significance of judicial participation in the formative years of the AAT provides a notable example.[180] The involvement of judicial officers might also add

authority to the output of an integrity institution or process.[181] However, the capacity of the legitimising effect of judicial participation to threaten the reputation of judicial officers as neutral and nonpartisan arbiters of disputes must be recognised. This concern becomes particularly significant where a judicial officer is appointed for what appears to be a political purpose, in order to legitimise the substantive outcome of an activity. While it is appropriate to be wary of such developments, it is submitted that concern is limited when the legitimising effect of judicial participation is confined to an institution or process. Where a judicial officer is appointed to an institution or process independently of the subject-matter of integrity activity (an appointment to the AAT, for example), any legitimising effect of the appointment of a judicial officer is confined to that institution or process itself. Such a legitimising effect does not represent a threat to the reputation of the judiciary for independence and impartiality.

It could be argued that retired judges might more appropriately undertake integrity activities and functions.[182] Many retired judges have undertaken investigative tasks in the nature of a Royal Commission,[183] with some retired judges also accepting statutory office.[184] The contribution of retired judges to the operation and maintenance of the integrity system should certainly not be underestimated. There may be integrity functions which demand judicial skills and expertise but which are not compatible with the retention of judicial office; it is in relation to those activities and processes that retired judges may play an essential role in the operation of the integrity system. However, the availability of retired judges alone does not mean that 'active' judicial officers should be excluded entirely from participation in the integrity branch where the conferral of integrity functions is constitutionally permissible.

It is submitted that analysis of the merits of judicial participation in the integrity branch might best be focused on the nature and demands of particular integrity functions and processes. It seems inconceivable that any attempt would now be made to justify the participation of judicial officers at high levels of executive government.[185] It also seems unlikely that any superior court would now allow one in four of its members to become involved in extensive extra-judicial activities at any given time.[186] Although historical practices should not be forgotten or ignored, it is submitted that debate as to the merits of extra-judicial participation in the integrity branch might best be informed by contemporary attitudes. Not all integrity functions are performed in a manner averse to the judicial function; in many instances, the decisional independence of a judicial officer acting as a designated person is carefully protected. Not all the integrity activities in which judicial officers might participate require substantial commitments of time (and perhaps other resources). Each integrity function, activity or process is best examined on its own terms, in order to determine whether extra-judicial participation in the operation of the integrity branch is appropriate or desirable.

In 2007, the Australian Institute of Judicial Administration set out guidelines for decision-making in relation to the participation of judicial officers in extra-judicial activities:

> Principle and protocol require that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the head of the jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and approval to approach the judge in question. The head of the jurisdiction will consider the propriety of the judge accepting the appointment, with particular reference to the maintenance of the independence of the judiciary and to the needs of the court. The head of the jurisdiction will consult with other members of the jurisdiction as may seem appropriate. If there is no objection in principle, the head of the jurisdiction will consider whether the judge can be made available, and whether the first approach to the judge in question should be from the head of the jurisdiction or from a representative of the executive.[187]

This approach is particularly apposite in the context of integrity activities and functions. While there may be occasions where extra-judicial participation in the integrity branch is clearly inappropriate, this is not always the case. However, any decision as to the suitability of

judicial participation in the integrity branch ultimately remains a matter for the judicial branch, the head of jurisdiction and the individual judicial officer in question.

Conclusion

Members of the judicial branch of government contribute to the operation of the integrity branch. Judicial participation in the fourth arm extends beyond the core public law function of judicial review of governmental action to incorporate a wider range of integrity activities and processes. In an extra-judicial capacity, members of the judiciary participate in quasi-judicial merits review bodies such as the Administrative Appeals Tribunal, in quasi-judicial investigations such as Royal Commissions, and in supervisory administrative processes such as the issue of warrants. Each of these functions retains an integrity dimension. Although the scale of judicial participation in these activities is not immediately overwhelming, there is evidence which suggests that extra-judicial performance of these integrity functions is likely to continue.

A range of integrity functions may be validly conferred upon judges as designated persons or in their individual capacity, as those functions are compatible with judicial office. A detailed review of the incompatibility condition highlighted the increasing significance of decisional independence in the operation of the incompatibility condition. Even the slightest interference with the decisional independence of a judicial officer performing an extra-judicial function potentially compromises the constitutionality of that activity.

While it is recognised that arguments both for and against extra-judicial activity have merit, this paper suggests that, on balance, extra-judicial participation in the integrity branch is acceptable. The assessment of the merits of extra-judicial activity on a narrower basis (in the context of integrity functions) provided an opportunity to review traditional arguments both supporting and rejecting extra-judicial activity. Any re-examination of the merits of extra-judicial activity should consider both the context in which extra-judicial activity is contemplated, and the nature of the specific function in question. This conclusion is broadly consistent with the direction provided by the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* in relation to extra-judicial activity.

Chapter III of the *Constitution* has continuing influence on the development of Australia's institutions of government. While the strict separation of judicial power prevents the conferral of non-judicial functions upon Ch III courts, non-judicial functions may be validly conferred upon judges in their personal capacity, where these are not incompatible with judicial office. The judges of State courts are similarly able to undertake integrity functions which do not impair the institutional integrity of a State court. Although restricted, the range of extra-judicial activities undertaken by judicial officers in their personal capacity represents a significant check on the exercise of public power. In their individual capacity, judges make a significant contribution to the operation of the integrity branch. They do so in a manner, and for a purpose, which should be recognised and maintained.

Endnotes

1 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 123.
2 James J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, 725.
3 Spigelman, above n 2, 726. The concept of 'integrity' itself requires little explanation; see AJ Brown, Brian Head and Carmel Connors, 'Introduction: Integrity Systems and Democratic Accountability' in Brian Head, AJ Brown and Carmel Connors (eds) *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008) 4-5 for a comprehensive review of the meaning of the term. Spigelman uses the phrase 'institutional integrity' to demonstrate that the integrity branch is directly concerned with the manner in which the institutions of government perform their allotted functions, rather than the character of behaviour of the individuals that comprise those institutions; see Spigelman, above n 2, 725.
4 See AJ Brown, 'What is a National Integrity System? From Temple Blueprint to Hip-Pocket Guide' in Brian Head, AJ Brown and Carmel Connors (eds) *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008) 26-27, 42.

5 AJ Brown, 'Putting Administrative Law back into Integrity and Putting the Integrity back into Administrative Law' (2006) 53 *Australian Institute of Administrative Law Forum* 32, 34-35. Such a characterisation has been endorsed by Spigelman; see James J Spigelman, 'The Significance of the Integrity System' (2008) 4 *Original Law Review* 39, 41. The recognition of a 'fourth arm' of government is not inimical to core principles informing Australia's constitutional structure. The concept of the integrity branch is an extension of the political theory of the separation of powers, which suggests that the major functions of government should be divided and distributed amongst the range of institutions that comprise the system of government so as to preserve the liberty of the individual citizen: see Jeremy Pope, 'National Integrity Systems: The Key to Building Sustainable, Just and Honest Government' in Brian Head, AJ Brown and Carmel Connors (eds) *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008) 21. This generates a 'mutual accountability' amongst the institutions of government, which (in theory) reduces the opportunity for corruption or inappropriate performance of public functions: see Charles Sampford, Rodney Smith and AJ Brown, 'From Greek Temple to Bird's Nest: Towards A Theory of Coherence and Mutual Accountability for National Integrity Systems' (2005) 64 *Australian Journal of Public Administration* 96, 98.

6 AJ Brown and Brian Head, 'Assessing Integrity Systems: Introduction to the Symposium' (2005) 67 *Australian Journal of Public Administration* 42, 42. It is not universally agreed that the integrity branch should be treated in this fashion; see Cheryl Saunders, *The Constitution of Australia – A Contextual Analysis* (Hart Publishing, 2011) 175, where it is suggested that the fourth arm is 'not yet sufficiently coherent to enable the intellectual construct of a 'system' to be used to develop and protect it'.

7 Brown, above n 5, 35.

8 The 'bird's nest' metaphor is said to imply a more open and flexible system that can function effectively where few of the individual components are 'independently strong'; see Sampford et al, above n 5, 104-106.

9 Brown, above n 4, 41. Ultimately, it may be that Frank Costigan QC's 'integrity family' metaphor is the best and most accurate way to group those institutions that perform integrity functions; see Frank Costigan, 'Australia's National Integrity Systems: Introducing a New Blueprint' (2005) 64 *Australian Journal of Public Administration* 40.

10 See Spigelman, above n 2, 730-737.

11 See Spigelman, above n 2, 730.

12 The decision of the New South Wales Court of Appeal in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 is a useful example, highlighting the capacity of superior courts to ensure that integrity institutions operate within the limits of their powers. See also James Wood, 'Ensuring Integrity Agencies have Integrity' (2007) 53 *Australian Institute of Administrative Law Forum* 11.

13 This term is used simply to indicate the exercise of power that is 'not, strictly speaking, judicial in character': see Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 166.

14 These examples are treated in some detail in the literature relating to extra-judicial activities. See also Connor, 'The Use of Judges in Non-Judicial Roles' (1978) 52 *Australian Law Journal* 482, 482, where a similar characterisation is identified.

15 For a useful analysis of the manner in which the term 'quasi-judicial' is used in the Australia federal context, see Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2010) 84-86.

16 See, for example, Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd edition, 2009) 155. Care must be taken in extending this analysis of the AAT to the various State Administrative Tribunals, which are not affected by the constitutional separation of judicial power to the same extent as federal administrative tribunals.

17 See *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943 (Hall SM).

18 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).

19 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).

20 See Spigelman, above n 2, 730, where merits review does not seem to be treated as an integrity function; contrast John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 440 where administrative tribunals are included in the integrity branch.

21 See, for example, Allan Hall, 'Judicial Power, The Duality of Functions and the Administrative Appeals Tribunal' (1994) 22 *Federal Law Review* 13, 38-48; Peter Cane, 'Merits Review and Judicial Review – The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 215, 224-225, 227.

22 See Sir Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 331, 333, who suggests that the process of merits review and judicial review (review of legality) overlap, but are not co-extensive.

23 *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1).

24 The term Ch III judges is used in this paper to refer compendiously to Judges of the Federal Court, Judges of the Family Court and Federal Magistrates.

25 *Administrative Appeals Tribunal Act 1975* (Cth) s 6(1).

26 See Part III below.

27 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161 (Brennan J (President)). The limitations of the judicial model of decision-making have always been understood by those who first implemented them; see, for example, Sir Gerard Brennan, 'Twentieth Anniversary of the AAT: Opening Address' in John McMillan (ed) *The AAT: Twenty Years Forward* (Australian Institute of Administrative Law, 1998) 5.

28 See Administrative Appeals Tribunal, *Annual Report 2010-2011*, 9.

29 Brennan, above n 27, 13; see also Rosemary Balmford, 'Administrative Tribunals and Sir Gerard Brennan – Some Specific Topics' in Robin Creyke and Patrick Keyzer (eds), *The Brennan Legacy – Blowing the Winds of Legal Orthodoxy* (Federation Press, 2002) 107-108.

30 The Administrative Appeals Tribunal's *Annual Report 2010-2011* indicates that judicial involvement occurs in between 0.5% and 1% of the hearings conducted by the Tribunal, and has occurred at a similar rate over the previous two years; see Administrative Appeals Tribunal, *Annual Report 2010-2011*, 136.

31 Leonard Hallett, *Royal Commissions and Boards of Inquiry* (Law Book Co, 1982) 1.

32 Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 22-29; note that the Australian Law Reform Commission recently adopted Prasser's framework in Australian Law Reform Commission, *Making Inquiries – A New Statutory Framework*, Report No 111 (2009) 57.
33 Prasser, above n 32, 23.
34 Prasser, above n 32, 23; see also *Royal Commissions Act 1902* (Cth), ss 2, 6B, 6F.
35 For a detailed review of the history of judicial involvement in Royal Commissions, see Sir Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities' (1978) 52 *Australian Law Journal* 540; Sir Murray McInerney, Garrie Moloney and Douglas McGregor in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration Inc, 1986); Tom Sherman, 'Should Judges Conduct Royal Commissions' (1997) 8 *Public Law Review* 5; George Winterton, 'Judges as Royal Commissioners' (1987) 10 *University of New South Wales Law Journal* 108.
36 Hallett, above n 31, 10; Sherman, above n 35, 6.
37 Prasser, above n 32, 27.
38 See Spigelman, above n 2, 729.
39 The obvious example in the New South Wales context is the 'Wood' Royal Commission (New South Wales, Royal Commission into the New South Wales Police Service (1997)).
40 Prasser, above n 32, 49.
41 See Prasser, above n 32, 49, who refers to the 1974 Royal Commission into Human Relationships, which (at first glance) does not seem to be concerned with matters of propriety in the exercise of public power.
42 Sherman, above n 35, 6; contrast Spigelman, above n 2, 729, which addresses Royal Commissions as an aspect of executive government.
43 This power has been augmented by statute in the Commonwealth jurisdiction; see Australian Law Reform Commission, *Making Inquiries – A New Statutory Framework*, Report No 111 (2009) 65-67, and the authorities cited therein.
44 It is notoriously difficult to draw a broad conclusion regarding the conduct of Royal Commissions in the Australian context; see discussion of the Irvine Memorandum at n 159 below.
45 Prasser, above n 32, Appendix 1.
46 Ibid.
47 *Kuru v New South Wales* (2008) 236 CLR 1, 15 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (emphasis added).
48 See Part II below.
49 See, for example, *Wainohu v New South Wales* (2011) 243 CLR 181, 200 n 95 and 96 [26] (French CJ and Kiefel J) (*Wainohu*).
50 This particular enactment has been used as an example as it was (in earlier incarnations) the source of the disputes in *Hilton v Wells* (1985) 157 CLR 57 (*Hilton*) and *Grollo v Palmer* (1995) 184 CLR 348 (*Grollo*), discussed below.
51 The inclusion of nominated AAT members as authorising officers was effected by the *Telecommunications (Interception) and Listening Device Amendment Act 1997* (Cth); see now *Telecommunications (Interception and Access) Act 1979* (Cth), s 6DA. Nominated AAT members involved in this activity would also be characterised as performing an integrity function.
52 'Issuing authority' is the term used to refer compendiously to both eligible Judges and nominated AAT members for the purposes of the *Telecommunications (Interception and Access) Act 1979* (Cth).
53 See *Telecommunications (Interception and Access) Act 1979* (Cth) s 103(ab).
54 Figure 1 is generated from data obtained from Reports prepared by the Attorney-General's Department in accordance with the *Telecommunications (Interception and Access) Act 1979* (Cth). The raw data contained in these reports has been tabulated and the proportion of issuing authorities presented in graphical form. These reports (prepared annually) identify the number of Ch III judges and the number of nominated AAT members available to issue warrants under s 46 *Telecommunications (Interception and Access) Act 1979* (Cth) in the reporting period (the reporting period extends from 1 July to 30 June). The data utilised in the preparation of Figure 1 was first published in Attorney-General (Commonwealth), *Telecommunications (Interception) Act 1979 (Cth) – Report for the year ending 30 June 1998* (1998). Reports for the reporting periods ending 30 June 1996 to 30 June 1999 do not appear to be available in electronic form. Reports presented for the reporting periods ending 30 June 2000 to 30 June 2011 are available at http://www.ag.gov.au/Publications/Pages/PublicationsbyAtoZ.aspx#T. Note that the reports appears as Attorney-General (Commonwealth), *Telecommunications (Interception and Access) Act 1979 (Cth) – Report for the year ending 30 June 2006* (2006) in the years 2006 to 2011. Note that the range of agencies eligible to apply for telecommunications interception warrants under Part 2-5 *Telecommunications (Interception and Access) Act 1979* (Cth) has changed on several occasions throughout the period in which this data has been collected.
55 Table 1 is generated from data obtained from Reports prepared by the Attorney-General's Department in accordance with the requirements of the *Telecommunications (Interception and Access) Act 1979 (Cth)* in the years 1997-1998 to 2010-2011. The availability of that data is as outlined in n 54 above.
56 Figure 2 is generated from data obtained from Reports prepared by the Attorney-General's Department in accordance with the requirements of the *Telecommunications (Interception and Access) Act 1979 (Cth)* in the years 1997-1998 to 2010-2011. The availability of that data is as outlined in n 54 above; the qualifications expressed therein also apply. The relatively sharp increase in judicial participation in the warrant issuing function in the 2003-2004 reporting period is difficult to explain. A brief investigation reveals that applications of the New South Wales Police were directed almost exclusively to Federal Magistrates in the 2003-2004 reporting period, in stark contrast to the 2002-2003 and 2004-2005 reporting periods, where applications were directed almost exclusively to nominated AAT members. The relevant report (Attorney-General (Commonwealth), *Telecommunications (Interception and Access) Act 1979 (Cth) – Report for the year ending 30 June 2004* (2004) 44) contains no direct analysis or explanation of the seemingly anomalous result.

57 Attorney-General (Commonwealth), *Telecommunications (Interception and Access) Act 1979 (Cth) – Report for the year ending 30 June 2011* (2011) 51.
58 Note that it would seem inappropriate (in this author's view) to translate a conclusion relating to this particular example across judicial participation in the warrant issuing function more broadly. The information addressed in this paper relates *only* to the issuing of telecommunications service warrants. It is not clear that this data supports any conclusion beyond the context of this particular type of warrant under this particular statutory scheme.
59 Fiona Wheeler, 'Federal Judges as Holders of Non-judicial Office' in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (Melbourne University Press, 2000) 451.
60 *Constitution*, s 71.
61 The difficulties encountered in classifying governmental powers are reflected in the recognition of a category of innominate powers. Innominate powers are those which might be classified as being of either a 'judicial' or 'non-judicial' nature. The related concept of the 'chameleon principle' dictates that innominate powers take their character from the body in which they are reposed by the legislature; for discussion of the relationship between the concepts of 'innominate powers' and the 'chameleon doctrine' see James Stellios, *The Federal Judicature: Chapter III of the Constitution – Commentary and Cases* (LexisNexis Butterworths, 2010) 146.
62 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).
63 Ibid.
64 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J) (*Tasmanian Breweries*).
65 Ibid.
66 *Tasmanian Breweries* (1970) 123 CLR 361, 394 (Windeyer J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).
67 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 67 (McHugh J).
68 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 271-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*Boilermakers*').
69 *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, 89-90 (Isaacs J).
70 *Boilermakers'* (1956) 94 CLR 254, 271-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ)
71 See James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 114.
72 See, for example, Stellios, above n 71.
73 Some functions have been historically reposed in courts, and their continued exercise is justified on that basis; see, for example, Chief Justice Robert French, 'Executive Toys: Judges and Non-judicial Functions' (2009) 19 *Journal of Judicial Administration* 5, 14-16. The 'chameleon principle' might also be characterised as an exception to the second element of the separation of federal judicial power.
74 An examination of the 'formalist' and 'functionalist' approaches to the separation of judicial power is beyond the scope of this paper. For discussion of formalism and functionalism, see Sir Anthony Mason, 'A New Perspective on the Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; Walker, below n 75; Campbell, below n 99; Meyerson, below n 93.
75 Kristen Walker, 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 154.
76 As a principle of statutory interpretation, the persona designata concept has application in a range of contexts that do not involve judicial officers. Nevertheless, one of the most common contexts in which the doctrine was encountered was the 'conferring of judicial jurisdiction'; see D M Gordon, 'Persona Designata' (1927) 11 *Canadian Bar Review* 174, 174.
77 Gordon, above n 76, 174.
78 In dissent in *Boilermakers'*, Webb J observed that the majority position might be overcome by legislation which empowered judges to exercise arbitral powers as designated persons; see *Boilermakers'* (1956) 94 CLR 254, 329-330 (Webb J).
79 *Grollo* (1995) 184 CLR 348, 363 (Brennan CJ, Deane, Dawson and Toohey JJ).
80 *Boilermakers'* (1956) 94 CLR 254, 330 (Webb J). See also Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 180-182.
81 This may have more to do with a decline in the use of the concept as a drafting mechanism, and a more widespread failure to accept the second limb of *Boilermakers'* (which was the 'target' of the exception) than acceptance of the concept.
82 *Hilton* (1985) 157 CLR 57, 72-73 (Gibbs CJ, Wilson and Dawson JJ); cf 86 (Mason and Deane JJ).
83 Both the non-judicial nature of the warrant issuing power, and the fact that the warrant issuing power took effect as a result of the statutory scheme (rather than the inherent or implied powers of the Court of which the Judge was a member) were influential factors in the majority decision. Gibbs CJ, Wilson and Dawson JJ also noted that s 20 *Telecommunications (Interception) Act 1979* (Cth) required specific authorisation in relation to individual judges in the States and Territories; this inconsistency was said to suggest that the functions were conferred on all judges in their individual non-judicial capacity: *Hilton* (1985) 157 CLR 57, 72-73 (Gibbs CJ, Wilson and Dawson JJ).
84 *Hilton* (1985) 157 CLR 57, 80 (Mason and Deane JJ).
85 *Hilton* (1985) 157 CLR 57, 81 (Mason and Deane JJ).
86 Mason and Deane JJ regarded the conferral of functions on some judges in an individual extra-judicial capacity as an indication that Parliament intended to confer functions on judges otherwise treated in the statute in their judicial capacity: see *Hilton* (1985) 157 CLR 57, 85-86 (Mason and Deane JJ).
87 *Grollo* (1995) 184 CLR 348, 361-362 (Brennan CJ, Deane, Dawson and Toohey JJ)
88 *Hilton* (1985) 157 CLR 57, 84 (Mason and Deane JJ).
89 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 41 (Kirby J) ('*Wilson*'). See Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7

Public Law Review 96, 100-102 for analysis of the failed attempt to prohibit judicial officers from holding executive office.

90 See, for example, *Crimes (Criminal Organisation Control) Act 2012* (NSW) s 5; *Inspector of Transport Security Act 2006* (Cth) s 78.

91 The majority were concerned that the independence of individual judges might be compromised or that extra-judicial activities might compromise the capacity of individual judges to perform their judicial functions: see *Hilton* (1985) 157 CLR 57, 73-74 (Gibbs CJ, Wilson and Dawson JJ). Mason and Deane JJ seem to be more concerned with the relationship between the function conferred persona designata and the performance of the judicial function more broadly; see *Hilton* (1985) 157 CLR 57, 83 (Mason and Deane JJ). These differences reflect the alternate views of the judges as to the appropriate construction of the statute in question.

92 This term is adapted from the joint judgment in *Grollo*; see *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

93 Denise Meyerson, 'Extra-Judicial Service on the Part of Judges: Constitutional Impediments in Australia and South Africa' (2003) 3 *Oxford Commonwealth University Law Journal* 181, 188.

94 *Wilson* (1996) 189 CLR 1.

95 *Grollo* (1995) 184 CLR 348, 368-369 (Brennan CJ, Deane, Dawson and Toohey JJ), 398 (Gummow J); compare 378-384 (McHugh J).

96 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

97 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

98 The shorthand references to the 'species' of incompatibility are adapted from Walker, above n 75, 159.

99 Although the limitations of the concept of 'public confidence' in this area are recognised (see Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183), this label is retained for the sake of consistency with earlier analyses of the decisions in *Grollo* and *Wilson*. The public confidence referred to in this instance might be characterised as 'deemed' public confidence; see HP Lee and Patrick Emerton, 'Judges and non-judicial functions in Australia' in HP Lee (ed*) Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 411-412, citing Colin Campbell, 'An Examination of the Doctrine of Persona Designata in Australian Law' (2000) 7 *Australian Journal of Administrative Law* 109, 114, 120.

100 *Wilson* (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J); compare 47, 39-47 (Kirby J).

101 This label reflects the language employed by French CJ in *South Australia v Totani* (2010) 242 CLR 1, 43 [62], 48 [70], 51 [78], 52 [82] (French CJ) and in the joint judgment of French CJ and Kiefel J in *Wainohu v New South Wales* (2011) 243 CLR 181, 216 [61], 216 [62], 217 [64] (French CJ and Kiefel J). The term has been defined by Martin Redish as indicating 'free[dom] from external or extraneous influences and pressures that might reasonably be thought to affect a decision'; see Martin Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives' (1995) 46 *Mercer Law Review* 697, 707. See also Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing, 2009) 1.

102 For the genesis of this passage (and the quotations within), see *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

103 See, for example, Walker, above n 75, 163-164.

104 Wheeler, above n 59, 463-464.

105 Fiona Wheeler, 'The Use of Federal Judges to Discharge Executive Functions: The Justice Matthews Case' (1996) 11 *Australian Institute of Administrative Law Forum* 1, 5-6.

106 *Wilson* (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

107 *Wilson* (1996) 189 CLR 1, 26 (Gaudron J).

108 See Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 398 n 8 for relevant authorities.

109 *Kable* (1996) 189 CLR 51, 96, 98 (Toohey J), 102-103 (Gaudron J), 116-119 (McHugh J), 127-128 (Gummow J); see also *South Australia v Totani* (2010) 242 CLR 1, 47 [69] (French CJ).

110 *Constitution*, s 73(ii); see *Kirk v Industrial Court (New South Wales)* (2010) 239 CLR 531, 580-581 [96]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

111 The High Court has found that State legislation infringed the *Kable* principle on more than one occasion; see *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181. See also the decision in *Kirk v Industrial Court (New South Wales)* (2010) 239 CLR 531, which bears some relation to the *Kable* principle. See Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2001) 35 *University of Western Australia Law Review* 227, Ayowande McCunn, 'The Search for a Single Standard for the *Kable* Principle' (2012) 19 *Australian Journal of Administrative Law* 93 for further analysis of the development of the *Kable* principle. Will Bateman's observations regarding the accuracy of the '*Kable* principle' label are noted; see Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 434.

112 See *Kable* (1996) 189 CLR 51, 117-118 (McHugh J).

113 These principles would also presumably apply to the Territories in equal measure.

114 See Rebecca Welsh, '"Incompatibility" Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22 *Public Law Review* 259.

115 *Wainohu* (2011) 243 CLR 181, 219 [68], 220 [70] (French CJ and Kiefel J), 229-230 [109] (Gummow, Hayne, Crennan and Bell JJ).

116 *Wainohu* (2011) 243 CLR 181, 211 [49] (French CJ and Kiefel J).

117 *Wainohu* (2011) 243 CLR 181, 212 [50] (French CJ and Kiefel J).

118 *Wainohu* (2011) 243 CLR 181, 229 [106]-[107] (Gummow, Hayne, Crennan and Bell JJ). By way of contrast, Heydon J in his dissenting opinion expressed no doubt as to the operation and relevance of the

persona designata concept in determining that the relevant functions were conferred upon State judges as designated persons: see *Wainohu* (2011) 243 CLR 181, 245 [168] (Heydon J).

119 *Wainohu* (2011) 243 CLR 181, 225-226 [94] (Gummow, Hayne, Crennan and Kiefel JJ).

120 See *Wainohu* (2011) 243 CLR 181, 207 [41] (French CJ and Kiefel J) where their Honours discuss factors affecting the conclusion in *Wilson*.

121 See *Wainohu* (2011) 243 CLR 181, 201-202 [30] (French CJ and Kiefel J), where it is noted that 'questions of compatibility which require evaluative judgments are unlikely to be answered by the application of precisely stated verbal tests'.

122 *Wilson* (1996) 189 CLR 1, 25-26 (Gaudron J).

123 See footnotes 104 and 105 and accompanying text.

124 The 'close connection question' in particular would seem to be of reduced significance in the absence of a strict separation of judicial power in the States. The 'political grounds question' may also be of decreased significance in the State sphere, but does not appear to have been in issue in *Wainohu*.

125 *Wainohu* (2011) 243 CLR 181, 200 [27] (French CJ and Kiefel J). In argument, the plaintiff noted not only the demands placed upon the time of individual judges, but also stressed the reliance of a designated judge on court staff and court facilities (including a court room) in the performance of extra-judicial functions; see Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCA Trans 319 (2 December 2010), 533-574 (Kiefel J and M A Robinson), 1604-1606 (M A Robinson).

126 See s 5(6)(b) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

127 *Wainohu* (2011) 243 CLR 181, 225 [93] (Gummow, Hayne, Crennan and Kiefel JJ).

128 Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCA Trans 319 (2 December 2010), 533-574 (Kiefel J and M A Robinson), 3146-3154 (R J Meadows QC).

129 Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCA Trans 319 (2 December 2010), 533-538 (M A Robinson).

130 *Grollo* (1995) 184 CLR 348, 365, 368-369 (Brennan CJ, Deane, Dawson and Toohey JJ).

131 *Wainohu* (2011) 243 CLR 181, 225 [94] (Gummow, Hayne, Crennan and Kiefel JJ).

132 *Wainohu* (2011) 243 CLR 181, 200-201 [27], 201-202 [30] (French CJ and Kiefel J).

133 Walker, above n 75, 162.

134 *Wilson* (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

135 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 413 (Bowen CJ and Deane J), 423 (Smithers J) (*Drake*).

136 The question is discussed in *Hilton* (1985) 157 CLR 57, 69 (Gibbs CJ, Wilson and Dawson JJ) and *Wilson* (1996) 189 CLR 1, 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J). See also *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, 260-261 [64]-[67] (Weinberg, Bennett and Edmonds JJ) (*Hussain*). Nevertheless, it is submitted that the legislative intention informing the *Administrative Appeals Tribunal Act 1975* (Cth) is not unequivocal. The descriptor 'Judges' is used to identify persons eligible for appointment as members of the Tribunal: *Administrative Appeals Tribunal Act 1975* (Cth), ss 6(2), 7(1). The term 'Judges', in the statutory scheme, refers to 'a Judge of a court created by the [federal] Parliament' (see *Administrative Appeals Tribunal Act 1975* (Cth), s 3), without any express indication that the term refers simply to Judges as a class of person eligible for appointment to the Tribunal. A similar formulation had posed difficulties for the High Court in *Hilton*: see *Hilton* (1985) 157 CLR 57, 84 (Mason and Deane JJ).

However, several features of the *Administrative Appeals Tribunal Act 1975* (Cth) indicate a legislative intention to confer membership of the AAT on 'Judges' as designated persons. The AAT does not have power to enforce its decisions, which are treated as decisions of the person or office whose activities are under review: *Administrative Appeals Tribunal Act 1975* (Cth), s 43(6). In performing functions, members of the Tribunal receive the same protections and immunities as a judge of the High Court: *Administrative Appeals Tribunal Act 1975* (Cth), s 60. All members of the AAT may resign their commission at any time, effectively ensuring that participation in the Tribunal is consensual: *Administrative Appeals Tribunal Act 1975* (Cth), s 15. Further, and despite the AAT retaining some characteristics indicating that it exercises judicial power, the powers of the Tribunal are best classified as executive in nature: see Hall, above n 21, 54-55. These factors, absent in *Hilton*, support the prevailing assumption that membership of the AAT is conferred validly upon judicial officers as designated persons.

137 *Wilson* (1996) 189 CLR 1, 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

138 *Wilson* (1996) 189 CLR 1, 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

139 See *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636-646 (Brennan J).

140 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).

141 The Security Appeals Division is one of the divisions of the AAT; see *Administrative Appeals Tribunal Act 1975* (Cth), s 19(2)(baa). A presidential member must preside over a hearing in the Security Appeals Division of the Tribunal: see *Administrative Appeals Tribunal Act 1975* (Cth), s 21AA(2). Section 39A *Administrative Appeals Tribunal Act 1975* (Cth) empowers the relevant minister (the Minister responsible for administering the *Australian Security Intelligence Organisation Act 1979* (Cth)) to issue a security/defence certificate indicating that particular evidence affecting a security assessment is not to be disclosed to the person subject to the security assessment in the process of merits review; see *Administrative Appeals Tribunal Act 1975* (Cth), s 39A(8)-(9). Section 39B *Administrative Appeals Tribunal Act 1975* (Cth) empowers the Attorney-General to issue a certificate which effectively prevents the disclosure of the contents of particular documents in proceedings before the Security Appeals Division; see *Administrative Appeals Tribunal Act 1975* (Cth), s 39B(2).

142 *Hussain* (2008) 169 FCR 241, 277 [151], 280 [171] (Weinberg, Bennett and Edmonds JJ).

143 *Hussain* (2008) 169 FCR 241, 279-280 [166] (Weinberg, Bennett and Edmonds JJ).

144 See ss 39A(3), (5), (9), (10), (17) and ss 39B(3), (7) *Administrative Appeals Tribunal Act 1975* (Cth), which demonstrate that the provisions in question focus on the protection of information provided to the Tribunal in the course of a hearing, rather than authorising the withholding of information from the Tribunal.

145 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
146 The majority judgments in *Wilson* were particularly careful to emphasise judicial manner of performance as an indicator of decisional independence. See *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J).
147 See, for example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 [50] (Gaudron, Gummow and Hayne JJ). Although this observation is made in a case concerned with the apprehension of bias, there seems to be no reason why the observation cannot be transferred to the 'hearing rule'. See also *Hussain* (2008) 169 FCR 241, 279 [163] (Weinberg, Bennett and Edmonds JJ).
148 The Federal Court's Annual Report notes as much, reporting that three judges undertake work 'as members of other courts or tribunals [which occupies] all, or most, of their time'. However, the relevant judges and tribunals are not identified in the report; see Federal Court of Australia, *Annual Report 2010-2011* (2011) 3.
149 See n 29-30 and accompanying text above.
150 *Royal Commissions Act 1902* (Cth), s 1A.
151 In the sense that there is no indication of an intention to confer non-judicial power on a judicial officer by reference to the judicial officer in their individual or private capacity; see also *Wainohu* (2011) 243 CLR 181, 207 [40] (French CJ and Kiefel J).
152 The term *persona designata* would, in this context, be used as a shorthand expression of the exception to the second limb of the separation of federal judicial power which permits the conferral of non-judicial functions on judicial officers in their individual capacity. In particular, a 'person' conducting a Royal Commission receives the same protection and immunity as a Judge of the High Court,152 and a judicial officer holding a Royal Commission is empowered to punish for contempt: *Royal Commissions Act 1902* (Cth), s 6O(2). These provisions suggest an awareness that a 'judicial' Royal Commissioner does not retain inherent powers or protections when conducting the Commission, which is a task undertaken in an extra-judicial capacity.
153 This phrase is used to refer to the narrow subset of Royal Commissions identified as integrity functions in Part I of this paper.
154 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
155 Prasser, above n 32, 26; AJ Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 54-55.
156 Prasser, above n 32, Appendix 1.
157 See Part II above.
158 See Part IV below.
159 Judges of the Supreme Court of Victoria have been reluctant to conduct Royal Commissions, a position that can be traced to the Irvine Memorandum of 1923. On the other hand, Justices of the New South Wales Supreme Court have not (generally speaking) displayed a similar lack of enthusiasm for the task; see Winterton, above n 35, 110. For detailed analysis of historical (judicial) attitudes to Royal Commissions in the various Australian jurisdictions, see JD Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253, McInerney, above n 35, Hallett, above n 31, and McInerney et al, above n 35.
160 French, above n 73, 16.
161 *Grollo* (1995) 184 CLR 348, 361-362 (Brennan CJ, Deane, Dawson and Toohey JJ), 374-375 (McHugh J).
162 *Grollo* (1995) 184 CLR 348, 366-367 (Brennan CJ, Deane, Dawson and Toohey JJ).
163 It is not immediately clear that the warrant issuing function addressed in *Grollo* would necessarily 'pass' the *Wilson* inquiry with respect to public confidence incompatibility; see, for example, *Wilson* (1996) 189 CLR 1, 26 (Gaudron J) where her Honour suggests that extra-judicial participation in the warrant issuing process is valid as a result of historical practice, rather than the absence of incompatibility.
164 *Telecommunications (Interception and Access) Act 1979* (Cth), ss 42(2), 46(1).
165 *Telecommunications (Interception and Access) Act 1979* (Cth), ss 44, 46(1).
166 *Telecommunications (Interception and Access) Act 1979* (Cth), ss 46(2).
167 *Grollo* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ).
168 See n 129 above.
169 Such a conclusion would, of course, be contrary to the majority position in *Grollo*. The argument would, however, find support in the dissenting opinion of McHugh J in *Grollo* and the dissenting judgment of Kirby J in *Wilson*. See n 95 and 100 above respectively.
170 *Wilson* (1996) 189 CLR 1, 26 (Gaudron J).
171 Compare *Grollo* (1995) 184 CLR 348, 383 (McHugh J).
172 Jack Beatson, 'Should Judges Conduct Public Inquiries' (2005) 121 *Law Quarterly Review* 221, 222.
173 Ibid, 234-235.
174 See, for example, Winterton, above n 35, 118.
175 This seems to have been the primary concern of the Judges of Victorian Supreme Court in determining that it would be inappropriate for one of their number to conduct a Royal Commission in 1923. See n 159 above and the sources cited therein (particularly McInerney, above n 35, which contains a full reproduction of the Irvine Memorandum; see 541-542).
176 Beatson, above n 172, 234-235.
177 Justice Gerard Brennan, 'Limits on the Use of Judges' (1978) 9 *Federal Law Review* 1, 12. Although it is not clear that the comments of Brennan J (as he then was) were specifically directed to extra-judicial activities, the range of tasks considered in his analysis suggests that the analysis relates to those activities; see 11.
178 Beatson, above n 172, 230.
179 Murray Gleeson, 'The Judicial Method: Essentials and Inessentials' (2010) 9 *The Judicial Review* 377, 382. See also *Wilson* (1996) 189 CLR 1, 25-26 (Gaudron J).
180 Brennan, above n 27, 13. See also Justice Michael Barker, 'On Being a Ch III Judge' (2010) 35 *University of Western Australia Law Review* 1, 28.
181 Beatson, above n 172, 243.
182 See, for example, Walker, above n 75, 164; Winterton, above n 35, 113.
183 See Part I above.

184 See, for example, *Commonwealth Electoral Act 1918* (Cth) ss 5, 6 which permits either an active judge or a retired judge to serve as chairperson of the Australian Electoral Commission.
185 Beyond the historically entrenched practice of the Chief Justice serving as Lieutenant-Governor in some of the Australian States, including New South Wales: see *Wainohu* (2011) 243 CLR 181, 197 n 78 [22] (French CJ and Kiefel J).
186 See, for example, Winterton, above n 35, 110.
187 Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007) 21.