"Adversarial in character, Accusatorial by nature"[1]

Russell Goldflam,
President,
CLANT

With the marvellous benefit of hindsight, the occasion of CLANT Patron Justice Virginia Bell's recent visit to Darwin to deliver the third Tony Fitzgerald Memorial Lecture[2] can be seen as a portent of the handing down, precisely three weeks later, of the High Court's decision in the only Northern Territory case to be determined by the full bench in recent times: *Attorney-General (NT) v Emmerson*.[3]

In her lecture, Justice Bell lucidly reminded us that Australian jurisprudence in relation to the separation of powers, founded as it is on Chapter III of the Constitution, has forged a path which diverges from English law:

> The strictness with which Australian law treats the separation of judicial and prosecutorial functions informs recent decisions of the High Court touching on trial procedure and sentencing.

Emmerson can now be added to the list of recent decisions which embody this strict approach: the plurality judgment (in which Bell J joined) rejected the proposition that the operation of the criminal property forfeiture provisions for declared drug traffickers either impermissibly invests the executive with judicial power, or deprives courts of judicial power. In reaching this conclusion, the High Court in effect endorsed the dissenting judgment of Riley CJ in the intermediate court.[4]

> **The High charts its course with the Chief,**
> **And casts off the Kable,[5] in brief.**
> **So state coffers are swellin'**
> **With assets ex-felon**
> **(Attorneys-G sigh with relief).[6]**

On one view, this strictness is a sign of creeping conservatism, a continuation of the Brennan and Gleeson courts' retreat from the heady activist days of the Mason court. Hands are wrung each time the High Court rebuffs an attempt to strike down an allegedly "strong and drastic"[7] statute which imposes "harsh and draconian punishment",[8] or to reign in purported executive excess. However, in her Tony Fitzgerald lecture, Justice Bell forcefully defended the French court's approach by reference to matters of fundamental principle. The line marking the limits of judicial power, she argued, must be clearly drawn and firmly held. Otherwise, citing Gaudron and Gummow JJ in *Maxwell*:[9]

> The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised…

The Australian criminal justice system is accusatorial (as former CLANT Patron Michael Kirby was wont to point out), but it is also adversarial, an aspect which Bell J emphasised:

> It is of the first importance to appreciate that under our adversarial system of criminal justice it is the parties who define the issues.

Thus, courts can not review decisions by the executive: to prosecute (or not); to cease to prosecute; to proceed ex officio; to adduce evidence (or not); who to prosecute; or which charges to lay.[10] Similarly, as the High Court recently held in *James v The Queen*,[11] a judge may not have regard to the public interest when considering whether to leave to the jury an alternative count that has not been proposed by the parties. To do so, the court held, would be incompatible with the separation of the prosecutorial and judicial functions.[12] Instead, the issue of whether to leave the alternative verdict should be determined having regard to what justice to the accused requires in the circumstances of the case.[13] This is as an incident of the right to a fair trial, which in turn stems from the accusatorial nature of criminal proceedings.[14]

Justice Bell's review of the limits of judicial power also included an examination of recent High Court cases involving sentencing. In *Elias v The Queen*,[15] the court held that sentence can not be mitigated because a lesser charge could have been (or even, in the eyes of the sentencer, should have been) laid. Although the circumstances and issues in *Maxwell* were dissimilar,[16] the underlying principle is the same: once a plea has been entered and accepted,

the question of which offence was committed is no longer a live issue between the parties, and can not be adjudicated by the court.

Justice Bell then proceeded to discuss the recent case of *Maganing v The Queen*,[17] in which the High Court affirmed that prosecutorial decision-making (in that case, whether or not to lay a charge to which mandatory imprisonment applied) does not amount to the exercise of judicial power. In *Emmerson*, the Court, referring to *Maganing*, held that similarly, the decision by a prosecutor to apply that a person be declared a drug trafficker:

> is not an adjudication of rights and liabilities and therefore not an exercise of judicial power… The role of the DPP in the statutory scheme reflects no more than procedural necessity in the adversarial system.[18]

Taken together, the decisions discussed by Justice Bell, together with the plurality decision in which she joined in *Emmerson*, present an imposing edifice: to transgress the defined boundaries within which judicial power is exercised would threaten community confidence in the independence, impartiality and integrity of the judiciary.

And yet, if not our courts, then on whom can our community rely to confront strong and drastic laws which mete out harsh and draconian punishments?

Justice Gageler, the lone dissenting judge in *Emmerson*, observed that the Northern Territory provisions in question were "almost unprecedented", and that none of the authorities relied on by the plurality to dispose, as they did, of the proposition that the statute was a law with respect to the acquisition of property (and hence subject to a "just terms" limitation), involved a similar scheme.[19]

The green light given by *Emmerson* to legislatures to enact laws which make prescribed categories of offender liable to the confiscation of all their property, whether crime-derived, crime-used, unexplained, unjustly acquired or not, may well encourage the establishment of similar schemes elsewhere. It may also lead to the extension of the scheme in this jurisdiction, to embrace not just "drug traffickers", but others. Property offenders? Traffic offenders? Violent offenders? All offenders? After all, not so very long ago, until the statutory reforms of the nineteenth century, English common law required that all the real and personal property of every felon be automatically forfeited.[20]

But there is something unique about this new species of forfeiture. The critical difference between felony forfeiture and the "drug trafficker" forfeiture scheme in *Emmerson* is that the former applied by rule of law to all, following a trial as to whether a felony in fact had been committed; whereas in the latter, there is no trial as to whether the respondent is in fact a "drug trafficker" and, further, no penalty is imposed on "drug traffickers" as such – rather, as Gageler J noted:

> The penalty or sanction imposed by the legislative scheme, such as it is, lies in the threat of statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any) property at the discretion of the DPP.[21]

In *Maganing*, it was a mandatory sentencing scheme for one of the two alternative, applicable offences which gave the DPP the practical power to determine which offenders had to be sentenced by a judge to a minimum term of imprisonment for five years with a minimum non-parole period of three years and which did not. In *Emmerson*, it was the obligation on the court to declare a respondent to be a "drug trafficker" without making any inquiry into the fact of drug-trafficking which gave the DPP the practical power to determine which repeat drug offenders (some of whom may not be "drug traffickers") forfeited all or some of their assets (as selected by the DPP) and which did not.

Which leads to this question. In our age of increasingly intrusive legislative and executive action, is the real threat to community confidence in the independence, impartiality and integrity of the courts that judges are seen to go too far, or is it that judges are seen not to go far enough? ●

(Endnotes)

1. *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [63] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ
2. The lecture is accessible on the CLANT website at: **http://www.clant.org.au/index.php/publications/tony-fitzgerald-memorial-lecture**
3. [2014] HCA 13
4. *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1
5. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51
6. Five Attorneys-General intervened in the proceedings, all in support of the successful appellant.
7. *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [15] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ
8. Ibid at [85]
9. *Maxwell v The Queen* (1996) 184 CLR 501 at 514.
10. Ibid at 534; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 280 [37]
11. [2014] HCA 6
12. Ibid at [37] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ
13. Ibid at [38] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ
14. *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [63] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ
15. (2013) 248 CLR 483
16. In *Maxwell v The Queen* (1996) 184 CLR 501, the judge at first instance had rejected a plea of guilty to manslaughter because he was not satisfied that the responsibility of the accused was in fact diminished.
17. (2013) 87 ALJR 1060
18. *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [61] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ
19. Ibid at [123] to [129] per Gageler J
20. Ibid at [103] per Gageler J.
21. Ibid at [135]