Aickin J. related A.S.I.O.'s untrammelled capacity to its non-corporate status. In *R. v. Criminal Injuries Compensation Board, ex parte Lain*[24] however, Parker L.C.J. allowed for judicial review in 'every case in which a body of persons of a public as opposed to a purely private or domestic character had to determine matters affecting subjects . . .'.[25]

A final point of interest is the similarity of the fact situations in the two *Scientology cases* to that in *Pullan v. McLellan*[26] before the Supreme Court of British Columbia. That plaintiff contended that under the relevant statute, documents relating to criminal records could only be distributed to persons engaged in the administration of the law, and that in fact such documents had gone to a person not so engaged. The court found such activity not unlawful, but based its reasoning[27] on *Atkinson v. Newcastle Waterworks Co.*,[28] which concerned the non-provision of a service prescribed by statute. Plainly, this was irrelevant to the problem in *Pullan*, and provides no succour to the respondents in the forthcoming appeal to the Full High Court from the decision of Wilson J.

M. J. Tooley wrote:

> . . . no one in the middle ages asked 'What is a state and how is it constructed?' but only 'Who are the rulers and what are their powers?'.[29]

It would seem that our public law has, not merely in crucial aspects, not advanced since the middle ages, but, if our courts are not prepared to identify and demarcate executive powers, our law is retrograde.

STEVEN CHURCHES*

NGATAYI v. R.[1]

Conviction for wilful murder — Ability of the accused to comprehend the trial process — Question as to whether tribal aboriginals ought to be tried under a system of law alien to their understanding.

Ngatayi was a full blooded tribal aborigine who had been living at the La Grange Mission in north-west Western Australia for some time when the offence occurred. On May 9 1979, another mission resident named Kumbarley White was stabbed four times and killed by Ngatayi for motives which never fully emerged, although it seemed that the accused blamed White for the recent death of his niece. Ngatayi stated that he had consumed six bottles of beer before attacking White, and was apparently drunk at the time of the offence.

He was charged with the wilful murder of White before the Supreme Court of Western Australia,[2] and, through an interpreter, pleaded 'guilty'. Counsel for the defence submitted that his client's plea should not be accepted at its face value

[24] [1967] 2 Q.B. 864, 882.
[25] Yardley *supra* 573.
[26] [1946] 1 W.W.R. 130.
[27] *Ibid.* 132.
[28] (1877) 2 Ex.D. 441.
[29] Editing Bodin J., Six *Books of the Commonwealth*, xiv.

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[1] (1980) 30 A.L.R. 27. High Court of Australia: Barwick C.J., Gibbs, Mason, Murphy and Wilson JJ. Case decided July 3, 1980 in Canberra.
[2] Then sitting in Broome.

because Ngatayi simply did not understand either the concept of guilt or non-guilt, or the legal consequences of his intoxication at the time of the act. Counsel explained:

> . . . In his law a man who kills is always guilty and there is no amelioration. He just cannot understand that in our law if a man is drunk and kills we have gradations of wilful murder, murder, manslaughter. This concept he cannot understand. . . .[3]

As a consequence of the accused's ignorance, his counsel asked that a jury be empanelled pursuant to the provisions of s. 631 of the Criminal Code (W.A.)[4] to make a pre-trial finding as to whether Ngatayi could sufficiently understand trial proceedings to be able to adequately defend himself. Counsel told the trial court that he was making this request because he could not make his client understand that his drunken state may have prevented the formation of the requisite intention to kill that constituted the *'mens rea'* for wilful murder. The learned trial judge was unmoved by this request and refused to apply the s. 631 procedure.

Ngatayi was requested to plead for the second time and once again pleaded 'guilty', whereupon the trial judge rejected the plea and had a plea of 'not guilty' entered for the accused. Such an action was an attempt by the trial judge to apply s. 49(1) of the Aboriginal Planning Authority Act 1972 (W.A.), which provided that where any serious offence was charged:[5]

> . . . the court hearing the charge shall refuse to accept or admit a plea of guilt at trial . . . in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission of guilt or confession.[6]

On this footing the original trial proceeded and Ngatayi was called to give evidence through his interpreter. The accused refused in the first instance to speak at all, and his counsel attempted once again to persuade the trial judge to apply s. 631. When this application was refused, the accused agreed to give evidence. Despite Ngatayi's attempts to explain why he had killed White, and the learned trial judge's direction to the jury that the accused had been drunk at the time of the offence and thus might not have formed an intent to kill White, the jury found the accused guilty of wilful murder. The court sentenced Ngatayi to death for the crime in question. An appeal to the Western Australia Court of Criminal Appeal against conviction and sentence was subsequently dismissed.

An application was then made to the High Court of Australia for special leave to appeal on the sole ground that the trial judge had erred in not following the procedure provided by s. 631. The grounding of the applicant's appeal on just a single procedural element of the original trial proceedings forced the High Court to examine the relevant section in some depth. In particular, the historical background and application of provisions similar in language to s. 631 of the Criminal Code (W.A.)[7] were examined carefully by Gibbs, Mason and Wilson JJ. in their joint judgment.

[3] Extracted in the judgment of Gibbs, Mason and Wilson JJ. in *Ngatayi v. R.* (1980) 30 A.L.R. 27, 29.

[4] Which provides that where a jury of twelve called pursuant to that section finds that a person would be incapable of understanding the trial proceedings, 'the finding is to be recorded, and the Court may order the accused to be discharged or . . . to be kept in custody in such place and in such manner as the Court thinks fit, until he can be dealt with according to law . . .'. Extracted in the judgment of Murphy J. (1980) 30 A.L.R. 27, 35.

[5] '[P]unishable in the first instance by a term of imprisonment for a period of six months or more . . .'.

[6] Extracted in the judgment of Gibbs, Mason and Wilson JJ., (1980) 30 A.L.R. 27, 30.

[7] Compare, for example, s. 613 of the Criminal Code of Queensland.

They initially considered the leading source for all provisions similar in nature to s. 631, namely, the celebrated judgment of Alderson B., in *R. v. Pritchard*,[8] in which the learned judge had to direct a jury as to the competence of a deaf and dumb defendant to stand trial:

> . . . There are three points to be inquired into:—First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence.[9]

His Honour later put it to the jury that if they considered the accused unable to comprehend the ordinary court procedure and evidence or to adequately defend himself, they ought to find him 'insane' within the terms of s. 2 of the Criminal Lunatics Act 1800 (39 and 40 Geo. III, c. 94).[10] The issue raised by the third point of Alderson B.'s inquiry has been approved in numerous subsequent decisions,[11] and given further interpretation in *R. v. Podola*.[12] The last mentioned case involved a defendant who claimed that amnesia had robbed him of any recall of the events preceding the day after his arrest. Lord Parker C.J. (delivering judgment for the Court of Appeal), in applying the Alderson test, interpreted 'comprehend' as meaning simply understanding. He further directed that the defendant was fit to stand trial if he could 'plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds'.[13]

The various State criminal codes have not adopted the words of Alderson B. verbatim, because that would limit incapacity to stand trial solely to defendants suffering from severe mental or physical defects. The phrase 'for any reason' which appears in s. 631[14] clearly allows for the widest possible range of incapacitating circumstances, including those where the defendant cannot speak the language used in the trial court. Even allowing for this broad perspective, there was almost no case-law which the High Court could look to for guidance which specifically involved aboriginals communicating with the court through interpreters.[15] Gibbs, Mason and Wilson JJ. include only one case in their judgment, *R. v. Grant*,[16] which deals specifically with a tribal aboriginal and s. 631 of the Criminal Code (W.A.). In this instance, the trial judge, Wickham J. applied the section and concluded:

> The issue then of the capacity of the accused to plead and to be tried must first itself be tried as a separate issue by a jury empanelled for that purpose.[17]

On the facts alone, s. 631 was clearly also relevant to the situation of the accused in *Ngatayi v. R.* He was not in any sense insane,[18] but clearly without any outside help would be in difficulties if put on his trial. However, Gibbs, Mason and Wilson JJ.

[8] (1836) 7 C. & P. 303; 173 E.R. 135.

[9] *Ibid.* E.R. 135.

[10] '. . . [I]f you think that there is no certain mode of communicating the details of trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind . . .'. *Ibid.*

[11] For example *Rex v. Governor of Stafford Prison; Ex parte Emery* [1909] 2 K.B. 81.

[12] [1960] 1 Q.B. 325.

[13] [1960] 1 Q.B. 325, 354.

[14] '. . . [I]t appears to be uncertain, *for any reason*, whether [the defendant] is capable of understanding the proceedings at the trial . . .'. (Emphasis added.) S. 631 is fully set out in the judgment of Gibbs, Mason and Wilson JJ., (1980) 30 A.L.R. 27, 31.

[15] See *R. v. Willie* (1885) 7 Q.L.J. (N.C.) 108; *R. v. Grant* [1975] W.A.R. 163.

[16] [1975] W.A.R. 163.

[17] *Ibid.* 166.

[18] For a good discussion of the issue of insanity, see Freiburg A., 'Out of Mind, Out of Sight . . .' (1976) 3 *Monash University Law Review* 134.

pointed out that s. 631 'does not mean that an accused can only be tried if he is capable unaided, of understanding the proceedings so as to make a proper defence'.[19] There never was any question of the accused having to defend himself without the aid of an interpreter and counsel.[20] Their Honours clearly thought that the presence of these persons in the courtroom to aid Ngatayi could negate the linguistic and conceptual difficulties that might otherwise amount to incapacity.

Barwick C.J., the only judge who felt sufficiently confident that no injustice had occurred that he would refuse special leave to appeal outright, said that provisions like s. 631 'were not intended to ensure that an accused person understands the law applicable in his trial'.[21] The only issue which the Chief Justice believed to be at stake was the applicant's capacity to understand the trial proceedings once a plea had been entered on his behalf, and his Honour concluded that '[t]here was in this case no material . . . upon which it could be concluded that the applicant lacked that capacity'.[22] As no objection had been raised regarding the actual conduct of the trial proper, Barwick C.J. felt that High Court interference would be inappropriate.

Gibbs, Mason and Wilson JJ. allowed special leave to appeal to the High Court but dismissed the appeal itself, because they felt that the trial judge had correctly applied the legislative provisions that were relevant to the facts.[23] They endorsed the line of English authority[24] which had held that mere lack of capability on the part of the accused to 'act on his own best interests' at the trial is insufficient ground on its own to return a finding of incapacity. Partly on this basis, their Honours refused to entertain the submission of counsel for the defence that his client had been prejudiced by pleading 'guilty' before the jury, because 'no request was made on behalf of the applicant for any departure from the normal practice in that regard'.[25] The judgment was rounded out with what, with respect, appears to be a conscience-salving moral justification for upholding the lower court decision:

> It may be added that this is not a case in which an aboriginal is accused of doing something that was not forbidden by his tribal law. What the applicant did in the present case appears to have been wrongful by tribal law as well as by the law of Western Australia. . . .[26]

Clearly Gibbs, Mason and Wilson JJ. felt that a justification like the above was needed, because of the delicacy of the public policy considerations the case raised. The whole question of whether it was appropriate to try a tribal aboriginal under 'white man's' law at all[27] was resolved to their Honours' satisfaction in this particular instance, but they clearly felt some uneasiness about even having to deal with matters of this kind. Speaking of tribal aboriginals generally they said:

> His obvious lack of sophistication, the gap between his manner of thinking and that of the European, and his inability to understand the legal principles involved are matters that will be relevant to the consideration which the executive of Western Australia will be called upon to give to this case.[28]

[19] (1980) 30 A.L.R. 27, 33.
[20] '[N]o unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand the law. With the assistance of counsel he will usually be able to make a proper defence.' *Ibid.*
[21] *Ibid.* 28-9.
[22] *Ibid.* 29.
[23] The trial judge had 'committed no error of law or procedure . . .'. *Ibid.* 35.
[24] See in particular: *R. v. Robertson* [1968] 3 All E.R. 557 and *R. v. Berry* (1977) 66 Cr. App. R. 156, 158.
[25] (1980) 30 A.L.R. 27, 35.
[26] *Ibid.* 34.
[27] In the earlier case of *R. v. Grant* [1975] W.A.R. 163 the aboriginal involved there testified that he had already been punished by his tribe. Query whether this should be regarded as sufficient punishment in itself?
[28] (1980) 30 A.L.R. 27, 34.

Murphy J. delivered the sole dissenting judgment, allowing the appeal on the grounds that the 'statutory procedure intended for the applicant's protection has not been followed'.[29] In his opinion, a jury should have been called upon to decide Ngatayi's capacity to stand trial, and the trial judge had erred in entering a plea of 'not guilty' for the accused. The danger he saw in the latter practice was that, although the outward appearance of justice was maintained, it might wrongly subject the defendant to a 'trial of a charge, the nature of which is beyond his understanding . . .'.[30] His Honour went on to consider the policy problems associated with the co-existence of our prevailing legal system and traditional aboriginal tribal law, suggesting that:

> when a person from another culture is charged with a breach of the laws of the dominant culture (particularly when a very serious crime is involved), it may be expedient but in some ways unsatisfactory to defer the trial until the accused is able to understand the charge and the proceedings, if ever. . . .[31]

This conclusion, with respect, does not appear to have satisfied even his Honour's own conscience, although it did accentuate the problematic nature of a cultural conflict that defies a truly equitable solution.

MARK DARIAN-SMITH*

PHILIP MORRIS INCORPORATED AND ANOTHER v. ADAM P. BROWN MALE FASHIONS PTY LTD[1]

Constitutional Law (Cth) — Federal Court of Australia — Jurisdiction — Implied Incidental power — Claim normally within jurisdiction of State Court — Trade Practices — Associated matters — Constitution (Cth) ss. 51(xxxix), 76 — Federal Court of Australia Act ss. 22, 32 — U.S. doctrine of pendent jurisdiction.

I INTRODUCTION

Arguments have recently been advanced that with the creation of the Family Court and the Federal Court,[2] there is emerging within Australia a dual competitive system of State and Federal courts.[3] The central questions arising out of such a development — whether we should have a single Australian court system, or, in its absence, how far the new Federal courts can and/or should adjudicate in matters traditionally dealt with by State courts — are part of the broader fundamental issue

[29] *Ibid.* 37.
[30] *Ibid.* 36.
[31] *Ibid.* 37.

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[1] Unreported decision of the High Court, February 10, 1981. The High Court delivered a joint judgment in this case and in the case of *United States Surgical Corporation v. Hospital Products International Pty Ltd & Others.* Because this case note analyses the judgment solely from the constitutional perspective, it will be convenient to discuss only the *Philip Morris* case. The constitutional principles applicable were identical for both cases.

[2] See Family Law Act 1975 (Cth) s. 21 and Federal Court of Australia Act 1976 (Cth) s. 5. Both courts were established by the Commonwealth pursuant to ss. 71 and 77 of the Australian Constitution.

[3] *Cf.* the views of The Honourable Sir Laurence Street, 'The Consequences of a Dual System of State and Federal Courts' (1978) 52 *Australian Law Journal* 434, and The Right Honourable Sir Garfield Barwick, 'The State of the Australian Judicature' (1979) 53 *Australian Law Journal* 487, 488-9.