THE STATE JUDICIAL POWER

THE HONOURABLE MR JUSTICE DAVID MALCOLM*

In a paper celebrating the centenary of responsible government in Western Australia, the Chief Justice traces the development of the judicial power and its relationship with the Executive and the Parliament. In his opinion, the courts are the guardians of principles which are essential to the maintenance of democracy and the rule of law, and the preservation of judicial independence is necessary to ensure their continued existence.

Any examination of the judicial power under the State Constitution is fraught with difficulty. The first thing that strikes one is the absence of any definitive work of scholarship on the subject. Dr James Thomson, in *State Constitutional Law: Gathering the Fragments*, lamented the lack of attention to State constitutional law generally.[1] The subject of the State judicial power appears to be the poor relation, even in this neglected field.

The existence of the judicial power was assumed in the Western Australian Constitution Act 1889 ("Constitution Act 1889") rather than conferred or otherwise provided for. The three great arms of government are traditionally referred to as the legislature, the executive and the judiciary. Section 2(1) of the Constitution Act 1889 provided for a Legislative Council and a Legislative Assembly "in place of the Legislative Council now subsisting". The newly constituted Parliament was given powers to make laws for "the peace, order and good Government of the Colony ... and ... subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative Council." Sections 50 and 51 made provision for the Governor. Section 74 provided for certain powers of appointment to be vested in the Governor in Council, with the exception of "the appointments of officers

* Chief Justice of Western Australia. This article is based upon a Paper delivered at Parliament House, Perth, November 1990 as part of the 100th Anniversary of Responsible Government in Western Australia.

1. (1985) 16 UWAL Rev 90. For subsequent developments see id "State Constitutional Law: The Quiet Revolution" (1990) 20 UWAL Rev 311.

liable to retire from office on political grounds" which was vested in the Governor alone. This is a reflection of the Cabinet system of government under which the Executive is constituted by persons selected from among those whose party has a majority in the Legislative Assembly. The Western Australian Constitution Acts Amendment Act 1899 ("Constitution Acts Amendment Act 1899") did not refer to the Cabinet as such, but it clearly envisaged that there would be a Cabinet system of Executive Government responsible to the Parliament. Initially, there were to be fifteen Ministers and the offices they were to hold were to be declared by the Governor.[2] At least one responsible Minister was required to be a member of the Legislative Council.[3] Section 75 of the Constitution Act 1889 made it clear that the Governor in Council meant the Governor acting with the advice of the Executive Council.

Following the Commonwealth Australia Act 1986 and the United Kingdom Australia Act 1986 ("the Australia Acts") the position, role and powers of the Governor were clarified in section 7 of the United Kingdom Act and in new Letters Patent. These specifically provide that the Governor shall preside over meetings of the Executive Council, the members of which are to be appointed during the Governor's pleasure.

By contrast Part IV of the Constitution Act 1889 under the heading "JUDICIAL" contains two provisions only, namely:

> 54. The Commissions of the present Judges of the Supreme Court and of all future Judges thereof shall be, continue, and remain in full force during their good behaviour, notwithstanding the demise of Her Majesty (whom may God long preserve), and law, usage, or practice to the contrary notwithstanding.
>
> 55. It shall be lawful nevertheless for Her Majesty to remove any such Judge upon the Address of both Houses of the Legislature of the Colony.

Part V of the Constitution Act 1889 headed "LEGAL" contains two provisions relevant to the judicial power. Section 57 provides for the saving of all existing statutes and ordinances, which were to continue in force and effect except in so far as the same are repugnant to this Act (in which case they are to that extent hereby amended and repealed as necessary). Section 58 provided for the continuation of the existing courts as follows:

> All Courts of Civil and Criminal Jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, or ministerial, within the Colony at the commencement of this Act shall except in so far as they are abolished, altered,

2. Constitution Act 1889 (WA) ss 43(1)-43(2).
3. Ibid, s 43(3).

> or varied by this or any future Act of the Legislature of the Colony or other competent authority, continue to subsist in the same form and with the same effect as if this Act had not been passed.

These provisions reflected the historical fact that by section 4 of the Western Australian Supreme Court Ordinance 1861 ("the Ordinance") the Supreme Court had been established and invested with the same jurisdiction as the English courts at Westminster. Section 26 of the Ordinance provided that all jurisdiction vested by any Ordinance of the Legislative Council in the former Civil Court was vested in the Supreme Court. In the first instance the jurisdiction was to be exercised by the Chief Justice of Western Australia.[4] As there was then only one judge, provision was made for an appeal to a Court of Appeal from a judgment involving £500 or more, in cases where there was no appeal to the Privy Council from such judgment.[5] Provision was made for appeals to the Privy Council under the United Kingdom Judicial Committee Act 1833.[6]

The Court of Appeal provided for in sections 29 and 30 of the Ordinance was an anomalous body in that it was constituted by the Governor in Council with power to hear and determine the relevant appeals. The Court of Appeal was entitled in its discretion to be assisted in the hearing and determination of such appeals by the Chief Justice. This pragmatic solution would have offended those who both acknowledge and require the strict observance of the separation of powers. The provisions are a reflection of the size of the population and the paucity of judicial resources in 1861. Under the Western Australian Supreme Court Act 1880 ("the Supreme Court Act 1880") provision was made for one or more puisne judges and for the Chief Justice and other judges to constitute a Full Court.[7] The Full Court was not given the status of a court of appeal, but by section 16 any judge could refer a point of law to the Full Court for decision. The same section provided that motions for a new trial were also to be heard by the Full Court. By section 19 the decision of the Chief Justice was to prevail in the event of equality. From 1883 onwards this provision was very unsatisfactory because there were only two judges.

In 1886, the Full Court was made a Court of Appeal.[8] Rules adopted in 1888 provided for appeals from local or inferior courts as well as from a single

4. Supreme Court Ordinance 1861 (WA) s 4.
5. Ibid, s 29.
6. Judicial Committee Act 1833 (UK) s 3.
7. Supreme Court Act 1880 (WA) s 15.
8. Act to amend the Supreme Court Act 1880 (WA) s 1.

judge to be heard by the Full Court. In 1889 the Ordinance was again amended in anticipation of the appointment of a third judge.[9] Section 19 of the Supreme Court Act 1880 was repealed and in its place it was provided that the decision of a majority should prevail[10] and that, in the event of equality, the decision appealed from should stand. By an amendment to section 667 of the Western Australian Criminal Code 1900 provision was made for appeals to the Full Court in criminal cases.[11] In 1911 the appellate jurisdiction in criminal cases was vested in the Full Court sitting as a Court of Criminal Appeal.[12] These provisions were carried forward into the Western Australian Criminal Code 1913.[13]

I. THE SUPREME COURT AND PARLIAMENT

The Constitution Act 1889 was enacted by the Western Australian Legislative Council and assented to by Queen Victoria.[14] By section 73 it was provided that the State Parliament had full power to repeal or alter the provisions of the Act, provided that it was not lawful to present to the Governor for Royal assent any Bill "by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority" of each House, although certain other Bills including amendments to specified financial provisions were reserved to the King or Queen in London. That reservation no longer applies and this was confirmed in 1986 by the Australia Acts.

One consequence of the fact that the Legislature and the Executive are made subject to the provisions of a written Constitution is that the Supreme Court, being a court of general jurisdiction, including the interpretation of statutes, has jurisdiction to interpret and apply the Constitution of the State. Lumb is of the opinion that

> [a]n examination of the historical development of the colonial constitutions shows that the judges of the Supreme Courts were intended even in the era before responsible government to exercise the power of judicial review of legislative acts. That they continued to exercise such a jurisdiction (although not specifically granted by the Constitution Acts) after the advent of responsible government, which brought with it

9. Supreme Court Amendment Act 1880 (WA).
10. Ibid, s 10.
11. Criminal Code Amendment Act 1906 (WA) s 13.
12. Criminal Code Amendment Act 1911 (WA) s 10.
13. Criminal Code 1913 (WA) s 687.
14. An Act to enable Her Majesty to assent to a Bill conferring a Constitution on Western Australia 1890 (UK).

> a greater security of tenure, is clear. Such a jurisdiction is necessarily inherent in the courts of a system which has a controlled constitution. The Supreme Courts of the States would be not merely fulfilling a historic function but also a function in accord with comparative constitutional practice (cf. the Supreme Courts of the American States), by participating in judicial exegesis and application of constitutional rules. The provisions of the Constitution Acts governing the appointment and dismissal of Supreme Court judges confer on them a security of tenure which is essential for the performance of their duties, and which protects them from executive interference. They would therefore have a status which would enable them to assume an effective role as guardians of a State Constitution which imposes fetters on the exercise of legislative and executive power.[15]

One of the first important cases involving the interpretation and application of the Constitution Act 1889 was *Clydesdale v Hughes* ("*Clydesdale*")[16] in which the High Court reversed the decision of the Full Court of Western Australia.[17] The case concerned sections 38 and 39 of the Constitution Acts Amendment Act 1899. Section 38 provided for the seat of any member of the Legislative Council to become vacant should he accept any office of profit from the Crown after his election. Section 39 provided for any person whose seat became vacant, but who presumed to sit or vote as a member of the Council, to forfeit the sum of £200 to be recovered by any person who sued for it in the Supreme Court.

Clydesdale was a member of the Legislative Council who became a member of the Lotteries Commission. Subsequently, he sat and voted in the Council. Hughes sued Clydesdale claiming a forfeiture of £200 under section 39. While the action was pending Parliament enacted the Western Australian Constitution Acts Amendment Act 1933 ("the Constitution Acts Amendment Act 1933"), section 2 of which provided that, notwithstanding sections 38 and 39 of the Constitution Acts Amendment Act 1899, no disability, disqualification or penalty should be incurred by a person then both a member of Parliament and a member of the Lotteries Commission by reason of having accepted or continuing to hold, before or after the commencement of the Constitution Acts Amendment Act 1933 the office of a member of the Commission.

15. R D Lumb *The Constitutions of the Australian States* 4th edn (St Lucia: University of Queensland Press, 1977) 113 (footnotes omitted). The reference in the passage quoted to the jurisdiction of the State Supreme Courts to interpret and apply the relevant Constitution Acts as "inherent in the courts of a system which has a controlled constitution" uses the term "controlled constitution" in the sense only of a State Constitution which imposes fetters on the exercise of legislative and executive power. This is a different sense from that in which the expression was used by Lord Birkenhead LC in *McCawley v R* (1920) 28 CLR 109, 114-117, and 119-120. Infra n 64.
16. (1934) 51 CLR 518.
17. *Clydesdale v Hughes* [1934] WALR 73.

Chief Justice Northmore at trial and Justices Draper and Dwyer on appeal had held that Clydesdale was disqualified by section 38 of the Constitution Acts Amendment Act 1899 and that the language of section 2 of the Constitution Acts Amendment Act 1933 was insufficient to give the Act a retrospective operation. Consequently, Hughes was entitled to judgment for the £200. It was also held that the Constitution Acts Amendment Act 1933 was passed in accordance with section 73 of the Constitution Act 1889 and the Standing Orders and Rules of Parliament and that it was not a Bill which was required to be reserved for the assent of the King under the Constitution Act Amendment Act 1899 or the United Kingdom Australian States Constitution Act 1907 ("the Australian States Constitution Act").

The High Court (comprising Justices Rich, Dixon and McTiernan) reversed the decision of the Full Court on the retrospective operation of the Act. It was held that the Constitution Acts Amendment Act 1933 sufficiently expressed an intention to exclude the liability of a person who was already subject to the penalty before the commencement of the Act.

The High Court also held that the Bill for the Constitution Acts Amendment Act 1933 did not require reservation for the Royal assent and that it did not amount to an alteration or change in the constitution of the Legislative Council so as to require an absolute majority in each House under section 73 of the Constitution Act 1889. In fact the requisite majorities were obtained. However, as their Honours said:

> [I]t appears that the enacting provisions of the original Bill were recast in the Council after it had left the Assembly, which thereupon accepted the amendments made by the Council. It was suggested that the Bill thus lost its identity, so that to comply with section 73 it needed a new introduction into the Assembly, and passage at its second and third readings by an absolute majority. We do not think that section 73 requires a Court to consider how far amendments allowed under Parliamentary procedure affect the substantial identity of the measure. The section relates to and speaks in terms of legislative procedure. It must be taken to recognise the possibility of substantial amendment in the other House after the passage of the Bill by the requisite majorities through the House where it originates. The exact requirements prescribed by the section were complied with. The Bill was not, in our opinion, one which needed reservation under the Australian States Constitution Act 1907, as was contended, and notwithstanding its retrospective operation, it is plainly within the legislative competence of the State Parliament.[18]

18. Supra n 16, 528-529.

The significance of this case was that the Supreme Court and, on appeal, the High Court were prepared to determine whether the procedures followed satisfied the manner and form requirements of section 73 of the Constitution Act 1889. This involved the interpretation and application of the Constitution Act 1889.

A similar issue arose in *Wilsmore v State of Western Australia*[19]. Wilsmore had been acquitted of a charge of wilful murder in 1979 by reason of unsoundness of mind. He was ordered to be kept in strict custody at the Governor's pleasure. In June 1974 he was enrolled as an elector for the relevant district and province for the Legislative Assembly and the Legislative Council. By section 7 of the Western Australian Electoral Act Amendment Act (No 2) 1979 ("the Electoral Act Amendment Act (No 2)") an accused person so acquitted was disqualified from eligibility for enrolment as an elector. The legislation had been passed by a simple majority on the third reading in the Legislative Assembly. The Royal assent had been granted in October 1979. Wilsmore brought an action for a declaration that the presentation of the Bill for the Royal assent was unlawful and that the Act (or alternatively that section 7) was void. He contended that section 7 effected a change in the constitution of either House and that accordingly the requirements of section 73 of the Constitution Act 1889 had not been complied with.

Wilsmore's action was dismissed at first instance but an appeal to the Full Court was allowed by a majority. Justices Wickham and Smith held that a change in qualification or disqualification for electors or for membership of either House was a change affecting the constitution of the House. *McDonald v Cain*[20] was applied and the decision of the High Court in *Clydesdale*[21] was not followed. Justice Wickham was of the view that section 7 had the effect of amending section 15 of the Constitution Acts Amendment Act 1899 which provided that

> Subject to the disqualification prescribed by section eighteen of the Electoral Act 1907, the qualification of electors of members of the Legislative Council is that which is prescribed by section seventeen of that Act as the qualification for electors of members of the Legislative Assembly.

19. [1981] WAR 159.
20. [1953] VLR 411.
21. Supra n 16.

Justice Wallace, dissenting, held that "constitution" in section 73 of the Constitution Act 1889 meant the charter and rules by which either House exists as an entity and is regulated and did not mean the composition of either House.

The decision of the majority was reversed on appeal to the High Court.[22] Justice Wilson, with whom Chief Justice Gibbs and Justices Stephen and Mason agreed, said that compliance with the first proviso to section 73, where it applies, "is an essential condition precedent to the validity of the law in question."[23] For these purposes it was irrelevant whether the proviso was binding because of section 5 of the United Kingdom Colonial Laws Validity Act 1865 ("the Colonial Laws Validity Act"), section 5 of the United Kingdom Western Australian Constitution Act 1890, section 106 of the Australian Constitution, or simply because on such authority as may be gleaned from *Bribery Commissioner v Ranasinghe* it finds a place in the Constitution Act 1889 itself.[24]

Justice Wilson held that the Electoral Act Amendment Act (No 2) did not come within section 73 at all, but was passed in exercise of the general power of amendment conferred by section 2 of the Constitution Act 1889 as a law for the peace, order and good government of Western Australia. Section 73 operated only to qualify the power of the legislature in relation to the repeal or amendment of the Constitution Act 1889 itself. The 1979 amending Act was not such an Act. Justice Wilson expressed the view (with which Chief Justice Gibbs and Justice Mason agreed) that the operation of the manner and form requirements of section 73 could be varied, by direct amendment of section 73 itself, or by removing from the Constitution Act 1889 matters touching the constitution of either House.[25] Justice Wilson also considered that legislation amending the Constitution Acts Amendment Act 1899 was not subject to the manner and form requirements of section 73 of the Constitution Act 1889.[26]

It followed that it was not necessary for Justice Wilson to decide what was meant by the "constitution" of the Legislative Council and the Legislative

22. *State of Western Australia v Wilsmore* (1981) 149 CLR 79.
23. Ibid, 96 citing *McCawley v R* (1920) 28 CLR 106 (HC), [1920] AC 691 (PC) *Attorney-General for the State of New South Wales v Trethowan* (1931) 44 CLR 394 (HC), (1932) 47 CLR 97 (PC); *Clayton v Heffron* (1960) 105 CLR 214; *Bribery Commissioner v Ranasinghe* [1965] AC 172.
24. Supra n 22, Wilson J, 96.
25. Ibid, Wilson J, 100; Gibbs J, 83-85; Mason J concurred with Wilson J.
26. Ibid, 99-100.

Assembly in section 73. Justice Wilson, however, expressed his opinion on *Clydesdale*[27] as follows:

> In my opinion, the judgment of this Court in *Clydesdale v Hughes* is clear authority, unless and until it is reversed or departed from by this Court, for the proposition that a law which merely changes the qualifications of members of the Legislative Council does not effect a change in the constitution of that body within the meaning of section 73 of the 1889 Act. When such an authority has guided the law-making procedures of the Parliament for almost fifty years then any departure from it would require very serious consideration.[28]

In consequence the dissenting opinion of Justice Wallace in the Full Court of Western Australia rather than that of the majority should be regarded as correct.

In *State of Western Australia v Wilsmore*,[29] the Full Court held that it was not competent for the State to appeal to the Privy Council from the decision because, if section 7 of the Electoral Act Amendment Act (No 2) offended section 73 of the Constitution Act 1889, it would also offend against section 106 of the Commonwealth Constitution. Consequently, the question of the validity of section 7 of the 1979 Act was "a matter arising under the Constitution" within the meaning of section 30(2)(a) of the Commonwealth Judiciary Act 1903.[30]

Section 106 of the Commonwealth Constitution provides that:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Thus by section 106 a State Constitution can be amended only in accordance with that Constitution. This incorporates the manner and form requirements as a part of the Commonwealth Constitution. It had been argued that the effect of section 106 was wider and that it formed a new basis for the source of State power. Chief Justice Burt (with whom Senior Puisne Justice Lavan and Justice Jones agreed) held, however, that

> [t]he States as they now are were colonies before Federation and remained colonies thereafter and that the sole source of authority for their Constitutions is the Imperial Act or Acts which created them.[31]

27. Supra n 16.
28. Supra n 22, 102-103.
29. Supra n 19.
30. *Clayton v Heffron* supra n 23; *Southern Centre of Theosophy Incorporate v State of South Australia* (1979) 145 CLR 246.
31. Supra n 19, 183.

At the same time, however, it was held that to alter the State Constitution other than in accordance with that Constitution would offend against section 106.

Given that the United Kingdom Western Australian Constitution Act 1890 no longer has any application by virtue of the Australia Acts 1986 it is now the case that the only external control over the manner and form of the amendment of the State Constitution is in section 106 of the Commonwealth Constitution. Does this mean that section 106 of the Commonwealth Constitution is now a source of the legal authority of the Constitution Act 1889?

II. THE SUPREME COURT AND THE EXECUTIVE

Almost ten years before *Clydesdale*[32] the question of the extent to which the Executive in the form of the Governor in Council was subject to the jurisdiction of the Court was also considered by both the Supreme Court and the High Court. In *Laffer v Minister for Justice*[33] Mrs Laffer sought a declaration that she had a right to be granted superannuation under the Western Australian Superannuation Act 1871 ("Superannuation Act"). Section 1 of the Superannuation Act provided that subject to the exceptions and provisions of the Act, the superannuation allowance to be granted to persons who had served in an established capacity in the permanent civil service should be that set forth in the Act. It was also provided that if any question should arise as to the claim of any person for superannuation under section 1, "it shall be referred to the Governor in Executive Council whose decision shall be final." Section 12 provided that:

> NOTHING in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services or to any Superannuation or retiring Allowance under this Act.

By the Western Australian Public Service Appeal Board Act 1920 the Board was given jurisdiction to hear and determine appeals from the Public Service Commissioner and the Minister of Education in respect of a number of matters, including the salary or allowances of public servants.[34] Section 6(4) of that Act provided that:

> If any question shall arise ... in any department ... as to the qualification of any person claiming a superannuation allowance under section one of the Superannuation Act, or the length of such service of such person,... it shall be referred to the Board, whose decision shall be final.

32. Supra n 16.
33. (1923) 26 WALR 83.
34. S 6(1)(a).

Section 10 provided that:

> The decision of the Board or of a majority of the members of the Board shall in each case be reported in writing by the Board to the Governor, and shall be final; and effect shall be given to such a decision.

In Mrs Laffer's case the Board determined that her qualifications and length of service satisfied the requirements of section 1 of the Superannuation Act. The question was whether Mrs Laffer had a right to a grant of superannuation, in the sense that the Governor in Executive Council was bound to give effect to that decision by granting Mrs Laffer her superannuation, or whether there was a residual discretion to refuse the grant.

Justice Northmore resolved the question against Mrs Laffer who then appealed directly to the High Court.[35] Justices Gavan Duffy and Starke affirmed the decision of Justice Northmore. They were of the opinion that no right to superannuation was established by the decision of the Board. The finding of the Board was merely that Mrs Laffer was qualified to be a recipient of a grant so as to establish the power of the Crown to make a grant in the exercise of discretion, taking account of such matters as the diligence and fidelity of the claimant under section 7 of the Act. Their Honours said:

> It is not for us, however, to say how or in what manner or on what conditions the discretion of the Crown should be exercised. But we observe in this case that the Governor in Council was wrongly advised, in our opinion, that the provisions of the *Public Service Act 1904*, section 83, precluded Mrs Laffer from the grant of an allowance under the Superannuation Act.[36]

The case is noteworthy for the powerful dissent by Acting Chief Justice Isaacs who said:

> The Legislature, while leaving the Crown under the Act of 1871 without curial control, did not leave it without parliamentary direction or a standard of legal rights. The Crown was left to ascertain, examine, acknowledge and admit those rights if they existed, and the Crown admission was the exclusive evidence of the existence of the right in a specific case. Then, and then only, was the right one fully clothed as an absolute right. But that is very different from saying the Legislature created no rights but mere discretion and sanctioned arbitrary and differential treatment at the mere caprice of the Executive Government. When that position is properly grasped, it deprives the argument derived from section 12 of the Act of 1871, limiting section 10 of the Act of 1920, of most of its support, because the step from the proviso in the earlier Act to the concluding words of section 10 is very short.[37]

35. *Laffer v Minister for Justice (Western Australia)* (1924) 35 CLR 325.
36. Ibid, 348.
37. Ibid, 344-345.

This is of importance. First, Acting Chief Justice Isaacs did not shrink from the notion that a decision of the Governor in Council based on wrong advice could be declared null and void by the Court. Secondly, by declaring that proper steps should be taken to give effect to the decision of the Board he was implying that there was a duty to advise the Governor correctly in accordance with law. In other words, by those means the Court could ensure that the Executive made their decisions in accordance with law.

The decision of the Governor in Council was one which purported to resolve questions concerning a claim by a person for superannuation. As such, it was a decision affecting rights and had the characteristics of a quasi-judicial decision. In *FAI Insurances Limited v Winneke*, ("*Winneke*")[38] the High Court held that, in deciding whether to renew an approval of an insurance company previously given under the Victorian Workers Compensation Act 1958, the Governor in Council was subject to the requirements of natural justice, and should have given the applicant company an opportunity to be heard before a decision was made. A decision not to renew without affording such an opportunity was declared void. Chief Justice Gibbs and Justices Stephen, Mason, Aickin, Wilson and Brennan held that the hearing need not be afforded by the Governor in Council as a body, but by the relevant Minister who in fact made the decision. Chief Justice Gibbs and Justice Stephen thought that the department head or officer responsible in fact for making the decision would also be appropriate. Justice Mason pointed out that the rule, that a statutory authority having power to affect the rights of a person was bound to hear that person before exercising the power, extended to cases where the power affected an interest or a privilege.[39] It also applied where a person would be deprived of a "legitimate expectation" in circumstances where it would be unfair to do so without a hearing.[40]

In *Laffer v Minister for Justice (Western Australia)* Acting Chief Justice Isaacs said of the Order in Council disallowing her claim:

> Mrs Laffer was not heard on that occasion, and the Order in Council cannot be regarded as of any force under the proviso to section 1 of the Act of 1871.[41]

38. (1982) 151 CLR 342.
39. Ibid, 360 citing *Banks v Transport Regulation Board (Victoria)* (1968) 119 CLR 222.
40. Ibid, citing *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170; *Salemi v Mackellar* (No 2) (1977) 137 CLR 396, 419.
41. Supra n 35, 331.

In my view, if a case such as *Laffer v Minister of Justice (Western Australia)* arose today, the Court would not hesitate to declare a decision of the Governor in Council to be void if it was wrong in law as being based on wrong advice or if, being a decision of a kind contemplated by Justice Mason in *Winneke*, there was a denial of natural justice.[42]

The decision in *Winneke*[43] illustrates the principle that where the Governor has exercised the powers of his office as representative of the Crown no action lies to challenge his decision or actions. This difficulty was faced and overcome in *Tonkin v Brand*[44] where it was held that the Court had jurisdiction to declare that those Ministers who were members of the Legislative Council were under a legal duty to advise the Governor in Executive Council to issue a proclamation under the provisions of sections 3, 10, 11 and 12 of the Western Australian Electoral Districts Act 1947.[45] Chief Justice Wolff said:

> The duty of the Governor is to act with the advice and consent of his responsible Ministers. There is ample authority for the proposition that, when the Ministers are about to advise the Governor, or have advised the Governor, to assent to some act which is illegal or unconstitutional the courts may step between the Ministry and the Governor and declare the law and issue coercive process to prevent the Ministers from doing an illegal act....[46]

Chief Justice Wolff did not consider that there was any relevant distinction between preventing the Ministers tendering advice which was not in accordance with the law and declaring that there was a duty to tender certain advice. Justice Hale said:

> It is axiomatic that a statute can impose a duty on the Crown: this is implicit in the maxim that the Crown is not bound unless such an intention is found to be expressly stated or to arise by necessary implication. It is a constitutional convention that in matters of this nature the Governor will act only on the advice of a responsible Minister and this convention is given statutory recognition by section 23 of the Interpretation

42. For an illustration of the circumstances under which the rules of natural justice would and would not apply to a decision of the Governor in Council, see *FAI Insurances Ltd v Winneke* supra n 38, Wilson J, 398-399.
43. Supra n 38.
44. [1962] WAR 1.
45. The jurisdiction to make the declaration was conferred by Supreme Court Act 1935 (WA) s 25(6) which, when read with Supreme Court Rules (WA) 025/5, empowered the court to give a declaratory judgment and make a declaration of right whether consequential was, or could be claimed, or not.
46. Supra n 44, 15 citing *Trethowan v Peden* (1930) 31 SR (NSW) 183, on appeal to High Court and Privy Council sub nom *Attorney General for the State of New South Wales v Trethowan* (1931) supra n 23; *Federated Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201.

> Act 1918-1957.... [A] statute which requires the Governor to do a specified act requires him to seek advice from the Executive Council and also requires the members of the Executive Council to tender to the Governor appropriate advice to enable him to comply with the statutory requirement. Now it is true that the Court cannot compel the Governor to do any act nor can the Court compel Ministers to tender any particular advice to the Governor, but the fact that a duty is not enforceable by legal process does not result in there being no legal duty: the question is whether the law recognizes the duty. If one disregards cases where some special formality is demanded by statute as a condition of enforcement it may be proper to say that at common law there is no legal duty if there is no means of enforcing the duty, but I cannot see how it can be successfully maintained that a duty imposed by statute can be other than a duty recognized by the law: to deny this is in truth to say that the Court, when ascertaining the law, is at liberty to refuse to recognize the statute itself. In my opinion, section 12 does impose on the members of the Executive Council a duty to advise the Governor in the manner contended for by the plaintiffs.[47]

Justice Hale said further:

> Mr Wilson, for the defendants, argued that to make a declaration in this case would be for the Court to interfere with the duty owed by Ministers to the Sovereign, but in my opinion this is not so. To adapt to this case the language used by Burnside J., in *Re Sooka Nand Verma* (1905) 7 WALR 225, at page 232, where the duty is one which the Minister owes to the Sovereign and not to the public, the Court cannot interfere, but where the duty is owed to the public by reason of a statutory duty imposed on the Minister the Court can interfere. In this case, the Court is not asked to order the defendants to proffer any advice to the Governor, or to declare that the defendants should advise the Governor that the State should be redivided wholly rather than partially, or if partially as to what parts, or to order that the Governor in Council do anything. I am unable to follow the argument that to declare the true meaning of a statute is to interfere with a duty owed by a Minister to the Crown.[48]

The judgment of the Full Court was delivered on 25 May 1961. On 16 June 1961 the Governor in Council issued a proclamation under section 12 of the Western Australian Electoral Districts Act 1947. In the meantime the defendants had applied to the High Court for special leave to appeal. This was refused substantially on the ground that the proclamation had rendered the issues in the case merely hypothetical. The case was essentially one between the government of the day and the opposition. The defendants accepted that they were under a political obligation to effect a redistribution before the 1962 election. The question was whether they were under a legal obligation to do so.[49]

47. Supra n 44, 20.
48. Ibid, 21-22.
49. For a detailed analysis of the events leading up to *Tonkin v Brand* supra n 44, see F R Beasley "A Constitutional Extravaganza" (1962) 5 UWAL Rev 591.

Tonkin v Brand was decided against the background of such decisions as *Duncan v Theodore*[50] and *Australian Communist Party v The Commonwealth.*[51] In the latter case, Justice Dixon observed that a decision of the Governor-General in Council in the exercise of a statutory power cannot be invalidated for want of good faith resulting in *ultra vires.*[52] These observations were followed in relation to the Governor in Council in Queensland.[53] In *Reg v Toohey, Ex parte Northern Land Council*[54] the High Court declined to follow these earlier cases. It was held that the exercise of a statutory discretion by the Administrator in Council in the Northern Territory was reviewable for ultra vires and improper purpose. The High Court "refused to apply to the exercise of a statutory discretion the old common law rule that the acts of the Crown and its agents are immune from challenge."[55] In *Winneke*, Justice Mason said:

> The principle that in general the Governor defers to, or acts upon, the advice of his Ministers, though it forms a vital element in the concept of responsible government, is not in itself an instance of the doctrine of ministerial responsibility. It is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government.... Conformably with this principle there is a convention that in general the Governor-General or the Governor of a State acts in accordance with the advice tendered to him by his Ministers and not otherwise.... He does this by acting in conformity with the advice given by the Executive Council on consideration of the recommendation by the responsible Minister which may in some cases reflect Government policy as settled by Cabinet or determined by policy as settled by Cabinet or determined by the Minister. The Royal Instructions to the Governor of Victoria expressly allow him to disregard advice (clause VI). This does not affect the convention that he will act on advice. But it is not to be thought that the Queen, the Governor-General or a Governor is bound to accept without question the advice proffered. History and practice provide many instances in which the Queen or her Australian representatives have called in question the advice which has been tendered, have suggested modifications to it and have asked the Ministry to reconsider it even though in the last resort the advice tendered must be accepted....[56]

The point is that as the Governor ultimately acts in accordance with advice tendered to him, the final decision is not one for which he has to account. The effective decision is that of the Executive Council or the

50. (1917) 23 CLR 510, 544.
51. (1951) 83 CLR 1.
52. Ibid, 179.
53. *McGowan v Bundaberg Harbour Board* [1960] Qd R 5.
54. (1981) 151 CLR 170.
55. *FAI Insurances Limited v Winneke* supra n 38, Mason J, 364.
56. Ibid, 364-365.

Minister. It is the Government and the Minister who are responsible for that decision to the Parliament and to the electorate.

In the context of compliance with the manner and form requirements of the Constitution Act 1889 certain types of Bills were reserved for the assent of the Crown in England. Certain specific Bills were reserved by the Australian States Constitution Act including those which altered the constitution of the legislature of the State or either House or those which affected the salary of the Governor.[57] However section 1(1) provided that the Governor may assent to such Bills where the Bill is of a temporary nature because of some "public and pressing emergency" or where the monarch had previously approved of assent being given.[58]

The function of the courts in passing judgment on the exercise of the powers of the Executive is part of the function of the courts in ensuring the observance of "the rule of law". It has been suggested that in extreme circumstances the Governor of a State might decline to act on ministerial advice. Lumb suggests that

> [t]he Governor may resort to the ultimate remedy of dismissing the ministry or dissolving Parliament. The extreme circumstances which would justify the exercise of such powers cannot be exhaustively enumerated.[59]

In circumstances where the government is set on a policy of subverting the constitutional structure, Lumb suggests that the extreme remedy of dismissal of the government would be available on the basis that the rule of law is itself a part of the constitutional law of the State and is the ultimate sanction.[60] Whether this is so or whether in the end the Governor is bound to act only on advice is a very interesting question. Lumb also suggests that:

> No doubt this solution leaves the nature of the reserve powers in a undefined state and withdraws from the courts' (which of course can only enforce the law derived from formal sources) jurisdiction over the matter. Some writers, such as Evatt, have argued in favour of a formal statutory statement or restatement of the conventional practice governing the relationship between Crown, ministers, and Parliament, which would make this relationship justiciable.[61]

57. Australian States Constitution Act 1907 (UK) s 1(1).
58. In *Burt v R* (1935) 37 WALR 68 Dwyer J in a suit against the Crown was prepared to examine the circumstances to determine whether there was such a state of emergency as would justify the Governor assenting to a Bill that should otherwise have been reserved under Constitution Act 1889 (WA) s 73. The reservation of Bills no longer applies since the passing of the Australia Acts 1986.
59. Lumb supra n 15, 78-79 (footnotes omitted).
60. Ibid, 80.
61. Ibid. See H V Evatt *The King and His Dominion Governors* 2nd edn (London: Frank Cass and Company Limited, 1967) 289.

The suggestion is that the legislature of a State could pass an enactment declaring the rules which are to regulate the powers of the Governor in respect of the appointment and dismissal of ministers and the dissolution of Parliament. Since the Australia Acts, any doubts concerning the validity of such legislation have been removed. Whether the inflexibility achieved by certainty would be a satisfactory price to pay is an open question. Whether it would be proper for a Governor to force a dissolution where a parliamentary majority was pursuing a course of subverting the constitutional structure is likewise an interesting question.

There is also a question as to how far the Court can go in the exercise of the judicial power to protect the rule of law. In *Nicholas v State of Western Australia*[62] after an action against the State was commenced Parliament passed an Act which amended the Western Australian Mining Act 1904 by adding a new section 277A, the effect of which was to extinguish the rights claimed by the appellants in the action.[63] It was contended that the amendment was beyond the legislative competence of the State Parliament because it necessarily involved an interference with the judicial function of the Supreme Court. Chief Justice Jackson (with whom Senior Puisne Judge Virtue agreed) said of this contention:

> As I understood his argument, counsel contended that the Parliament of Western Australia has no power to abolish the Supreme Court (except to reconstitute it) nor to interfere with the proper functioning of the judiciary (for this it was claimed is entrenched in the doctrine of separation of power); and from this it follows that Parliament cannot change the law in respect to a pending action so as to deprive a litigant of his cause of action. It is unnecessary to say much in rejecting this contention. Clearly enough, Western Australia has an "uncontrolled" constitution (in the sense in which that phrase is used by Lord Birkenhead in *McCawley v R* (1920) 28 CLR 106)[64] and a sovereign Parliament with plenary powers limited only by the requirement that its Acts must not be repugnant to Imperial statutes extending to this State (sections 2 and 3 of the Colonial Laws Validity Act 1865) and to the limitations imposed by the

62. [1972] WAR 168.
63. Mining Act Amendment Act 1971 (WA).
64. The reference here is specifically to an "uncontrolled constitution" in the sense in which that term was used by Lord Birkenhead LC in *McCawley v R* supra n 15, at 114-117, 119-120. In that sense an "uncontrolled constitution" is one which can be amended or repealed with no other formality than is necessary in the case of other legislation. A "controlled constitution" is one which can only be amended or repealed by compliance with some special formality, or by a specially convened assembly. Their Lordships did not regard the manner and form proviso in s 5 of the Colonial Laws Validity Act or any other fetter on the powers of the State legislature contained in the Constitution as having the effect that the Queensland Constitution was controlled so far as the constitution of the Supreme Court and the appointment of Judges was concerned. It was acknowledged that there were other areas in respect of which the powers of the legislature were restricted: ibid, 125.

> Commonwealth Constitution. The Parliament, therefore, is in no way fettered in the manner asserted by counsel. Moreover even if some limitation such as was suggested could be read into section 5 of the Colonial Laws Validity Act (and I do not for one moment agree with that), it would not affect the enactment of section 277A of the Mining Act which in no way impinges on the rights, authority or jurisdiction of this Court, but at most seeks to put an end to any supposed rights which the plaintiffs claimed to be entitled to assert in this action. I am clearly of opinion that this is within the plenary powers of a sovereign Parliament.[65]

As a result of the passage of the Australia Acts the limitations imposed by the Colonial Laws Validity Act no longer apply. Justice Burt rejected the contention that the judicial power could not be usurped or infringed by the legislative or the executive:

> There is no such restriction upon the legislative power of the Parliament of this State....[66]

III. INDEPENDENCE OF THE JUDICIARY

As we have seen, it has been asserted by Lumb that the provisions of the State Constitutions governing the appointment and dismissal of Supreme Court judges "confer on them a security of tenure which is essential for the performance of their duties, and which protects them from executive interference."[67] Nearly 25 years ago Nettheim said:

> The principle that the judiciary should be separate from other arms of government and independent of them has a long history in English law. Of all aspects of the doctrine of "separation of powers", this is the one which has been taken as most important.[68]

The doctrine of the separation of powers into the legislative, executive and judicial has long been regarded by many as part of British Constitutional law.[69] The doctrine is, however, neither dogmatic nor inflexible. As Wade and Bradley observe:

> In the absence of a written constitution there is no formal separation of powers in the United Kingdom. No Act of Parliament may be held unconstitutional on the ground that it seeks to confer powers in breach of the doctrine.[70]

65. Supra n 62, 173.
66. Ibid, 175 citing *Clyne v East* [1967] 2 NSWR 483.
67. Lumb supra n 15, 113.
68. G Nettheim "Legislative Interference with the Judiciary" (1966) 40 ALJ 221.
69. I Jennings *The Law and the Constitution* 5th edn (London: Hodder and Stoughton, 1979) 18-28.
70. E C S Wade and A W Bradley *Constitutional and Administrative Law* 10th edn (London: Longman, 1985) 58.

The point is also made that in a system of government based on the rule of law:

> [I]t remains important to distinguish in constitutional structure between the primary functions of law-making, law-executing and law-adjudicating. If these distinctions are abandoned, the concept of law itself can scarcely survive.[71]

In the United Kingdom Parliament is supreme. Subject to the power of the Supreme Court to determine the legality and validity of the actions of the Executive and the validity of Acts of Parliament, the State Parliament in Western Australia is limited only by the power to legislate for "the peace, order and good government" of the State, by the manner and form provisions in section 73 of the Constitution Act 1889 and by the Commonwealth Constitution. Subject to these matters judges must apply the law and are bound to follow the decisions of the Legislature as expressed in legislation. It follows that Parliament is supreme and that the formal doctrine of separation of powers has not been incorporated into the State Constitution. This is the position which applies in all of the Australian States.[72]

In relation to the executive government, the main constitutional function of the Supreme Court is to ensure that government is conducted according to law. If this function is to be performed it is essential that judicial independence must be maintained. One of the hallmarks of a democracy is the independence of the judiciary. A judiciary which exists merely to do the Government's bidding or to implement Government policy provides no guarantee of liberty. As Wade and Bradley observe:

> Clearly it must be possible for a judge to decide a case without fear of reprisals, whether from the executive, a wealthy corporation, a powerful trade union, or a group of terrorists. But there is no reason why judges should be totally immune from public opinion and the free discussion of current issues in the media. Judicial independence does not mean isolation of the judge from the society in which he exercises his office.[73]

While the Constitution Act 1889 recognises that there are three sources of power, it does not provide for the establishment of either the Executive or the Supreme Court. These matters are dealt with by separate legislation. This has led the current Clerk of the Legislative Council to conclude

> [t]hat the constitutional framework derived from Britain by Western Australia was not concerned with any notion of separation of powers but was based squarely on parliamentary supremacy. The colonial legislature, in addition to making law, was

71. Ibid, 59.
72. *Clyne v East* supra n 66.
73. Supra n 70, 332.

expressly empowered, subject to manner and form relating to the position of the Crown and the constitution of the legislature, to repeal or alter the Constitution Act by section 73.[74]

The Clerk of the Legislative Council acknowledges that if his argument regarding the absence of any separation of powers under the State Constitution and the supremacy of Parliament is correct, it is "a view that, if accepted by an unscrupulous government, could lead to a dismantling of the State Constitution as we instinctively know it to be."[75] This would include power to legislate so as to abolish the Supreme Court or deprive it of any jurisdiction. The exercise of either of these powers would not necessarily involve amendment of any provision of the Constitution Act 1889. However, it would represent a fundamental change in the constitutional arrangements of the State as represented by the aggregate of the legislation, common law, custom and convention which together establish and recognise the legal existence of the State of Western Australia and the organs of government and their respective powers, duties and functions and regulate their exercise.

The abolition of the Supreme Court or the removal of all or a significant part of its jurisdiction would be a revolutionary step involving the abandonment or substantial impairment of the rule of law as the foundation of democracy. It must be recognised, however, that section 58 of the Constitution Act 1889 expressly contemplated that the courts then existing (which included the Supreme Court) would continue "except in so far as they are abolished, altered, or varied by this or any future Act of the Legislature".

There would appear to be an established practice in Western Australia, if not a convention, that the Executive will consult the Judiciary and invite comment on any legislative proposal which would affect the jurisdiction or operation of the courts and, in particular, the Supreme Court. This practice is appropriate and provides a means by which the views of the Judiciary, as one of the arms of government, may be communicated to the Executive as one of the other arms. Where the Judiciary have objections to legislation on the grounds that the legislation would conflict with or impair observance of the rule of law, they are entitled to have their view communicated to Parliament so that they may be taken into account when the proposed legislation is being considered.

74. L B Marquet "The Separation of Powers Doctrine and the Constitution of Western Australia" (1990) 20 UWAL Rev 445.

75. Ibid.

The conventional channel of communication between the judges and the Executive Government is through the Attorney-General. There are precedents which suggest that it is appropriate for the judges to request that the Executive Government inform Parliament of the views of the judges on a matter which affects them or the administration of justice in the community. It would seem appropriate that such requests be made either through the Attorney-General or the Premier or both. As Cowen and Derham have said:

> [I]f the judges desire collectively to have certain information which in their view affects the administration of the law in the community laid before parliament and request the Premier to communicate it to the legislature, it is proper that he should do so, and improper that he should refuse.[76]

The Chief Justice of Tasmania, Sir Guy Green, agreed with the conclusions expressed by Cowen and Derham, although he did not agree that it is necessary to search for "precedent and authority" governing communications between the Judiciary and the Legislature.[77] Sir Guy said:

> [T]he judges do not have to point to any positive law or precedent authorising them to speak: as an independent arm of government they may speak to any person or institution they wish upon any matter which affects them.[78]

I agree, subject to the qualification that conventional and established channels of communication should be followed unless and until there is some reason for adopting another course, such as that adopted by the Victorian Supreme Court judges in 1954 when a statement was made by the Chief Justice in open court. Short of that I consider it would be preferable and proper to communicate directly with the Speaker of the Legislative Assembly and the President of the Legislative Council if requests that the Attorney-General or Premier make the necessary communication were refused or ignored.

There is a question whether the Constitution Act 1889 should be amended to entrench or protect from arbitrary change by a simple majority consitutional arrangements which are so fundamental. For present purposes I will assume that the constitutional role and responsibility of the Supreme Court, as I have already described it, will continue. In order to fulfil that role and responsibility it is essential that the judiciary be independent.

76. Z Cowen and D P Derham "The Constitutional Position of the Judges" (1956) 29 ALJ 705, 713.
77. G Green "The Rationale and Some Aspects of Judicial Independence" (1985) 59 ALJ 135, 142-143.
78. Ibid, 143.

What do we mean by "independence of the judiciary"? Sir Guy Green, has defined it as

> [t]he capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.[79]

Public confidence in the impartiality of judges is essential to public acceptance of the law and the legal system. A loss of that public confidence can lead to instability and even a threat to the very existence of society. In the late seventeenth century in England the politicisation of the judiciary and its subservience to the Crown was a material factor in the Revolution of 1688. One of the complaints against George III recited in the American Declaration of Independence was that

> [h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.[80]

There are many occasions when a judge is required to decide what is just, what is fair or what is reasonable. In cases of that kind the judge necessarily seeks to apply basic values representative of community values. In doing so he does not merely reflect public opinion. He must objectively determine what is just, fair or reasonable so that while he reflects the basic values of the community he does not allow himself to be influenced merely by temporary shifts in public opinion, or by prejudice, emotion or sentiment. The judicial oath requires every judge to administer justice according to law, without fear or favour, affection or ill-will.

Parliamentary democracy and the rule of law are dependent for their existence on an independent judiciary. The partisan administration of the law is a denial of the rule of law. The starting point is the uniqueness of each individual who is entitled to the protection of the law and subject to its enforcement. As Lord Justice Shaw said:

> The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as the result of some punitive or other process.[81]

79. Ibid, 135.
80. "A DECLARATION By the Representatives of the United States of America in General Congress Assembled July 4, 1776" in E Conrad Smith and H J Spaeth (eds) *The Constitution of the United States* 12th edn (New York: Barnes & Noble Books, 1987) 28.
81. *R v Board of Visitors of Hull Prison; ex parte St Germain* [1979] 1 QB 425.

Independence, integrity, courage and devotion to duty are all required to be mustered with great strength of will when a judge is called upon to preside over a trial involving some horrific crime or members of some highly unpopular minority group.

The recognition of the principle of the independence of the judiciary does not make them immune from criticism. Only in very exceptional cases will charges of contempt be brought in respect of criticism of the judiciary. Any member of the public has the right to criticise in good faith both publicly or privately any decision by the court or a judge. Provided there is no imputation of improper motives or any attempt to impair the administration of justice, anyone is entitled to make fair comment, even outspoken comment, on matters of public interest.

A potential threat to the independence of the judiciary is in the financing of the work of the courts. It must be accepted that Parliament is responsible for the appropriation of funds to operate the Courts in the same way as for any other arm of government. The constitutional position in relation to money bills, however, gives effective control over the appropriation of funds for the court to the Government. Hence the Judiciary is financially dependent on the Government. In the United States it is regarded as

> [a]xiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts. It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty and property of every citizen, while at the same time denying to the judges authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel....[82]

The preparation of judicial estimates by anyone not acting under the direction of the judiciary and the exercise of control by the Government over the way in which the courts expend the funds granted to them necessarily poses a potential threat to judicial independence.

In order for the judiciary to discharge their functions they require two particular categories of administrative services. The first relates to the reception, filing, and organisation of the documents and legal processes relating to any legal proceedings, the management and listing for hearing of the cases to be heard, and the recording, processing and implementation of the orders and judgments made by the courts, together with the processing of appeals. These services are provided by the staff of the Registry of the Court.

82. *O'Coin's Inv v Treasurer of the County of Worcester* quoted in Stein "The Judiciary is failing to Protect the Courts" (1979) 18 The Judges' Journal 16, 18.

The other category comprises the services of those persons who provide direct support to the judges such as their personal staff, including associates, secretaries and ushers as well as court reporters and librarians. The extent of control by the judiciary over both these areas of administrative services is a measure of judicial independence. Where the staff of the court are members of the public service, it is essential that they are responsible to the court and not to the executive for all matters pertaining to the business of the court.

Six years ago the Chief Justice of South Australia, Justice King said:

> A court should be in a position to command out of its own resources the personnel and the physical necessities to carry on its work without reference to the executive branch. So far this has proved to be unattainable, except in the case of the High Court of Australia.... The best which we have been able to achieve is the convention that it is the responsibility of the executive government to provide unconditionally the necessary resources for the administration of justice and to respect without question the integrity and independence of the judiciary.[83]

The Federal Court of Australia has since been placed on the same footing as the High Court. In Western Australia the courts have yet to match the South Australian achievement in relation to the unconditional provision of the necessary resources for the administration of justice and control over their expenditure, although the integrity and independence of the judiciary have not been questioned.

It is obvious that modern court systems must be operated with public funds. These can be raised and appropriated only by Parliament. Someone must account to Parliament for the way in which the money is spent. Under the Westminster system there must always be a Minister who has this responsibility. Hence, there cannot be total independence of the judiciary in the sense of an absence of accountability. It remains, however, the duty of Parliament and the Executive to provide adequate financial resources for the due administration of justice.

It is accepted that, in times of economic difficulty and general budget restraints, the administration of justice may be affected in that some plans and programmes may have to be deferred or even abandoned. The administration of justice, must, however, continue. The prosecution and trial of persons accused of criminal offences is not a government programme which can be cut or expanded dependent upon the availability of funds. It is essential that those who have been charged with offences are brought to trial without delay. The function of the judiciary to preside over and decide the cases brought

83. L J King "Minimum Standards of Judicial Independence" (1984) 58 ALJ 340, 342.

before the courts, whether by criminal prosecutions, by civil litigants or by appeals is likewise not a government programme which can be cut or expanded depending on the general availability of funds. The functions performed by the courts and the services rendered to the community by the judiciary are both essential and independent. Access to the courts is a critical aspect of the rule of law. It follows that the obligation of Parliament and the executive is to provide the necessary resources to enable the judiciary and those who assist them to manage the flow of trials, appeals and other proceedings within the courts without undue delay.

The Chief Justice of South Australia has made the following points regarding the independence of the judiciary.

(a) It is essential that control of court buildings and facilities be vested exclusively in the judiciary, including the power to determine the purposes to which parts of the buildings are to be put and the right to maintain and make alterations to the building.

(b) Such security measures as are necessary must be firmly under the control of the judiciary. The determination whether any particular threat to security is such as to justify the presence of armed police or other security officers in and around the courts or the identification, screening or searching of visitors should be the responsibility of the judges. The executive is, of course, responsible for ensuring that the security and protection which is necessary for the free and effective discharge of judicial functions is provided.

(c) There must be personal independence as well as substantive independence, which means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control. It follows that arrangements should be made to ensure that judicial salaries, allowances and other provisions, including pensions are determined independently of the executive.[84]

It follows from the last of the points that in this State it is essential that the Salaries and Allowances Tribunal should not only be independent but must manifestly be seen to be independent in the same way as the judiciary itself.

Security of tenure of office is an important guarantee of judicial independence. Since the United Kingdom Act of Settlement 1701 the judges have held office during good behaviour, subject to a power of removal upon an

84. Ibid, 342-343.

address by both Houses of Parliament. This requires both Houses to resolve upon the removal. These provisions are reflected in sections 54 and 55 of the Constitution Act 1889. Similar provisions are to be found in other States of Australia and in the Commonwealth Constitution. Recourse to the power of removal on these grounds has been rare. Sadly, for the good name and standing of the Judiciary in this country we have seen a recent instance of it in Australia. I say "sadly" because there are between 300 and 400 superior court Judges in Australia who loyally adhere to accepted standards of judicial conduct, but whose standing and reputation is necessarily affected by adverse findings made against one of their number.

The Chief Justice of Tasmania, dealt with the power of removal on an address of both Houses of Parliament.[85] Prior to the Australia Acts 1986 it may have been arguable, as Sir Guy Green noted, that judges could also be removed pursuant to the United Kingdom Colonial Leave of Absence Act 1782, known as Burke's Act. This empowered the Governor to "amove" judges for absence, neglect of duty or misbehaviour. The Act also provided an appeal to the Council. In the last century two judges, Justices Willis and Montagu, were removed under Burke's Act. Justice Willis successfully appealed, although the Privy council confirmed the existence of the power.[86] An appeal by Justice Montagu was unsuccessful.[87]

In Western Australia the provisions of sections 54 and 55 of the Constitution Act 1889 must be read with section 9(1) of the Western Australian Supreme Court Act 1935 which provides that:

> All the judges of the Supreme Court shall hold their offices during good behaviour, subject to a power of removal by Her Majesty upon the address of both Houses of Parliament.

There has been some controversy concerning the precise effect of these provisions, but the generally accepted view is that which was expressed by Justices Isaacs and Rich in *McCawley v R* concerning the similar provisions of the Act of Settlement namely

> [t]hat the Crown could only interfere with a judge either - (1) for misbehaviour, or (2) if the House of Parliament desired it.[88]

85. Supra n 77, 139-140.
86. *Willis v Gipps* (1846) 5 Moo PC 379; 13 ER 536.
87. *Montagu v Lieutenant-Governor, and Executive Council, of Van Dieman's Land* (1849) 6 Moo PC 489; 13 ER 773. See P A Howell "The Van Dieman's Land Judge Storm" (1960) 2 Univ Tas Rev 253.
88. Supra n 15, 59.

Limitations of space in the present article prevent any detailed consideration of what constitutes misbehaviour and the procedures to be followed to establish misbehaviour and consequent removal.[89] Suffice it to say that while misbehaviour has since been clarified to a significant extent by the various proceedings relating to Justices Murphy and Vasta, there are doubts which remain unresolved. There are even greater doubts unresolved in relation to matters of procedure. In particular, the procedure to be followed in ascertaining the facts to enable the question of an address of both Houses of Parliament to be considered remains unresolved. One can do no more than agree with Wheeler's conclusion that

> [t]he questions which could be raised in this area in Western Australia are not only legally complex, but could also be potentially embarrassing both to the judges and those who might, if an appropriate situation ever arose, seek to remove them.

CONCLUSION

The judicial power of the State, which is primarily exercised by the Supreme Court, involves much more than deciding individual cases in accordance with law. The judiciary as the repository of the judicial power is one of the three great arms of government. The court is a guardian of principles which are essential to the maintenance of democracy and the rule of law. In the contexts of constitutional law, criminal law and administrative law the court is a forum for the protection and expression of the basic values which are the fabric by which the population is held together as a community.

The constitutional arrangements which the Constitution Act 1889 established, assumed or continued and which have been expounded to a greater or lesser extent by judges, authors and others rest on a slim framework of legislation supplemented by the common law, convention and custom. Under these arrangements Parliament is supreme and makes the law. The function of the judiciary is to administer justice according to law. This involves both saying what legislation enacted by Parliament means and stating what the common law is in those areas where Parliament has not made law. To the extent that there are limitations upon the powers of Parliament,

89. For a discussion of these matters see C Wheeler "The Removal of Judges from Office in Western Australia" (1980) 14 UWAL Rev 305.

the judiciary is there to determine whether or not the limitations have been exceeded. The rule of law requires that the executive must act in accordance with law and that the court has the power to determine the scope of the prerogative power and to review administrative decisions which affect rights. The Court also has the power to restrain illegal acts or to declare the existence of a duty by Ministers to tender advice to the Governor.

Neither parliamentary democracy nor the rule of law can exist without the independence of the judiciary. Such independence is a necessary guarantee that they will be free from extraneous pressures and independent of any authority but that of the law itself. The rule of law is at the basis of the whole of the constitutional, political and legal tradition which has been established in this State. The principles which form the content of the rule of law, such as the requirements of natural justice, are part of the body of principles which the courts of the State are obliged to uphold.