THE SEPARATION OF POWERS
IN AUSTRALIA:
ISSUES FOR THE STATES

BY

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ABSTRACT

A study of the separation of powers (legislative, executive, and judicial) in Australia at the Commonwealth and the State level including three Australian States, Queensland, Victoria and New South Wales. The separation of powers (SOP) theory from Locke and Blackstone is used for the SOP theory in Australia. In practice, the English rather than the American system of government and SOP is the model used for the Australian Commonwealth Government and SOP. The Commonwealth SOP is used as a guide for the States SOP. Queensland, Victoria and New South Wales are case studies used to compare and contrast with the Commonwealth. The concept of the SOP in Australia is articulated by the High Court and is derived from the Blackstonian SOP theory rather than the Federalist SOP theory. The implementation of the SOP theory into practice is problematic. The SOP theory is used as a conceptual framework to understand current events. The advantages and disadvantages or problems of the Commonwealth model are presented as a guide for the States. The same structure is used for the study of the three States in the form of the advantages and disadvantages or problems of the SOP at the State level. The entrenchment of the SOP at the State level will help to partly overcome the problems highlighted in the case study chapters. The federal SOP situation is better than at the State level but the entrenchment of Bills of Rights at the Commonwealth and State levels would help to counter the trend in reduction of civil rights. The SOP is important in protecting citizens from the abuse of government power. The lack of separation of powers, especially separation of judicial power at State level, has meant the increasing abuse of powers by the executive and the executive dominating the other two branches of government.
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I also wish to thank my Associate Supervisor, Professor Clive Bean (Head of School of Humanities and Human Services, Queensland University of Technology [QUT] - Carseldine Campus). Professor Bean gave helpful advice and suggestions on current reading material particularly on the Australian system of government at the Commonwealth level and some of the relevant political theorists from the UK and Australia. Professor Bean also read and commented on various draft chapters.

The title was suggested by Professor Suri Ratnapala (at the time Senior Lecturer in Law, now full Professor, in the School of Law at the University of Queensland) after I completed his subject (LA213 Constitutional Law A), a second year law subject in the
LLB course. Professor Ratnapala completed his PhD in Law at UQ on the topic of the Separation of Powers at the Commonwealth level. As the separation of powers had been well covered at the Commonwealth level but the topic had not been touched at the State level in Australia therefore it would to be a good topic for original research.

Prior to writing this thesis I had the benefit of discussions with Dr David Gow (Senior Lecturer in Public Administration in the Department of Government, now the School of Management, at the University of Queensland [UQ]). He made valuable suggestions on the structure, theory and content in the early stages of development. More recently at QUT, various Lecturers have given me useful comments and advice on the SOP research topic including. These lecturers included: Professor Roger Scott (in the subject MGN425 The Context of Public Management); Dr Yunus Ali, Professor Boris Kabanoff, and Professor Bill Renforth (in the subject BSN503 Research Seminar); and Dr Kerrie Unsworth (in the subject BSN502 Research Methodology).

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Finally, thanks go to my examiners who provided me with helpful suggestions on improving the thesis. I am particularly indebted to the external examiner’s views about changing the structure and shape of the thesis.
Statement of Original Authorship

The work contained within this thesis has not been previously submitted for a degree or diploma at any other higher education institution. To the best of my knowledge and belief this thesis does not contain material previously published or written by another person, except where due reference is made.

Signature:

Date:
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CHAPTER 1

INTRODUCTION

The doctrine of the separation of powers is well-known at the federal government level but this doctrine has had little impact at the state government level in Australia. This thesis looks at three themes. The first theme is the theory (and practice) of the separation of powers. The second theme is the separation of powers at the Australian Commonwealth level. The third theme is the implications for the Australian states. This involves the historical record of the separation of powers in the Australian states, including the states of Queensland, Victoria and New South Wales.

First, the thesis provides a brief survey of the main writers and arguments on the theory of the separation of powers from ancient to modern times. The views of Plato, Aristotle, Polybius and Cicero on the mixed constitution as the best form of government are a few of the views of the ancient theorists who have contributed to the origins of the doctrine of the separation of powers. The views of Locke, Montesquieu and Madison on limited government and the separation of powers brought together some of the views of the modern theorists who have contributed to the modern doctrine of the separation of powers. There is a significant difference between the theory and the practice of separation of powers. Two models of the theory and practice of the separation of powers relevant to Australia are noted: the UK Westminster model; and the US Presidential model. The views of Harrington, Locke, Blackstone and later Montesquieu contributed to the theory of the separation
of powers in England and represent the UK Westminster model. The views of Hamilton, Madison and Jay from their major work the *Federalist* and particularly the views of Madison, contributed to the theory of the separation of powers in America and represent the US Presidential model.

Second, the thesis looks at the separation of powers at the Australian Commonwealth level. The views of Quick & Garran, Sawer, Crisp, Lane, Howard, Carney, Lumb & Moens, Evans, Galligan, Zines, Thompson, Ratnapala, and Patapan on the Australian Commonwealth separation of powers have been used to bring together some of the views of the Australian theorists who have contributed to the analysis of the doctrine of the separation of powers and its application in Australia. The Commonwealth Constitution outlines the separation of legislative, executive and judicial power. The original doctrine of the separation of powers has been modified by decisions of the Australian High Court and some of these cases are discussed.

The High Court decisions which affirms the paramount and independent position of the courts in the constitutional scheme were *Waterside Workers' Federation of Australia v J.W. Alexander Ltd (Alexander’s Case)* (1918) 25 CLR 434; and the *Attorney-General (Cth) v R; Ex parte Boilermakers’ Society of Australia (Boilermakers Case)* (1956) 94 CLR 254. In various constitutional cases the High Court has separated the judicial power from the other two powers but not separated the legislative and executive powers due to the nature of the Westminster system of “responsible government”. The High Court decision which affirms that the system of responsible government prevents the complete separation of legislative and executive powers was *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*
(Dignan’s Case) (1931) 46 CLR 76. The Dignan Case is also considered authority for the proposition that Parliament may delegate its power without significant restriction (see criticisms of Dignan in Sawer 1961 and Ratnapala 1990).

Third, the thesis considers the implications of the separation of powers doctrine for Australian State governments. The views of Hughes, Fitzgerald, Lumb, Coaldrake, Carney, and Lane have been used to bring together some of the views of political scientists and academic lawyers who have contributed to the analysis of the doctrine of the separation of powers in the State of Queensland. The views of Davies, Holmes, Lumb, Halligan, Hay, Kiss, Costar, Economou, Eckersley, and Zifcak have been used to bring together some of the views of political scientists and academic lawyers who have contributed to the analysis of the doctrine of the separation of powers in the State of Victoria. The views of Parker, Lumb, Hagan & Turner, Spindler, and Griffith & Srinivasan have been used to bring together some of the views of political scientists and academic lawyers who have contributed to the analysis of the doctrine of the separation of powers in the State of New South Wales.

Although there is no formal separation, there is an implied separation of powers at the State level in Australia. An account is made of the historical record of the separation of powers at the state level, in the States of Queensland, Victoria and New South Wales. In the account we show that the powers of the executive have encroached on the other two branches. These cases of abuse have arisen because the separation of powers doctrine has not been entrenched in state constitutions or even recognized by state governments. It is also suggested that Bills of Rights are either
legislated or constitutionally entrenched to counter the recent reduction of civil rights by various governments. These matters require urgent attention.

The aim of the thesis is to determine to what extent the theory of the separation of powers (legislative, executive, and judicial) is put into practice at the state level in Australia. The UK Westminster system does not separate the personnel of the legislature and the executive but the US presidential system does. The Australian political system is usually considered to be a Westminster derived system but this is less relevant since the passage of the *Australia Act* (1986). The *Australia Act* has essentially made Australia legally independent of the UK. Galligan (1995: 12) argues persuasively that Australia’s constitutional system is essentially that of a federal republic rather than a parliamentary monarchy. It has been argued, by Ratnapala (1995: 93), that Australia should become more like the US, by directly electing a president, and institutionalising a more rigorous separation of powers (Hughes 1998a: 308). However, in practice, there is a lack of constitutionally or legally recognised separation of powers and functions at the state level of government (Lane 1994: 220-21; Ratnapala 2002: 111-15) unlike at the Commonwealth level of government (Patapan 2000: 150, 158; Ratnapala 2002: 88-9).

Lane (1994: 220-21) argues that no doctrine of separation of powers binds the States or, if there is such a doctrine, the States can alter it. The New South Wales, Queensland or Victorian Constitutions do not separate judicial and legislative powers, the legislature in any of these States is able to “meddle with” the judicial process [*Building Construction Employees & BLF v Industrial Relations Minister* (1986) 7 NSWLR 372 (the BLF case); *Mabo v Queensland* (No. 1) (1988) 166 CLR...
186 (the *Mabo* case); and *City of Collingwood v Victoria* (No. 2) [1994] 1 VR 652 (the *Collingwood* case)]. The South Australian Constitution does not separate judicial powers and electoral powers (*Gilbertson v State of South Australia* [1978] AC 772; Ratnapala 2002: 111-15).

Patapan (2000: 150) argues that the doctrine of separation of powers in the Constitution is generally acknowledged and notes the Australian High Court’s pre-eminent role in interpreting the Australian Commonwealth Constitution and delineating the character of the separation of powers and democracy in Australia. In *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (*Dignan’s case*) (1931) 46 CLR 76, where the High Court ruled on the nature of the separation of powers between the legislature and the executive, that is, whether an American conception of separation of powers would be implemented in Australia, the Court held that Parliament could delegate law-making powers to the executive. In effect the American SOP was rejected in favour of the UK SOP and system of government.

Patapan (2000: 158) further argues that the High Court’s decision in *Dignan* suggests that the American doctrine of the separation of powers was not introduced into Australian constitutionalism by the Court because of the limitations, in Australia, of the adversarial method of adjudication. The Australian Constitution expressly locates legislative power in the Parliament (section 1), executive power in the Queen nominally (section 61) and judicial power in the High Court, as well as other federal courts and State courts in which Parliament vests such power (section 71). On November 6, 1999 at a federal referendum the Australian electors voted against Australia becoming a republic; the question of replacing the Governor-General with
an Australian President was defeated (the President was to be appointed by a two-thirds majority of the members of the Commonwealth Parliament). Ratnapala (2002: 88) notes that the doctrine of the separation of powers has been recognised judicially as part of the basic structure of the Commonwealth Constitution. Ratnapala (2002: 89) further argues that the High Court has regarded the separation of judicial and non-judicial powers as crucial to the ‘maintenance of the federal system’ and the ‘protection of liberty’.

This thesis outlines the structural problems of the separation of powers in Australia at the Commonwealth level and the State level. The thesis argues that there are structural problems for the system of government, as a result of the separation of powers, in various States with particular reference to Queensland with comparison to the Commonwealth, Victoria and New South Wales. Conflicts arise between distinct and independent institutions that use legislative, executive and judicial powers and various incidents of conflicts are highlighted to indicate infringements to the separation of powers doctrine. The situation in Queensland under the Bjelke-Petersen era is examined along with the revelations of systemic problems in the system of government in Queensland, flowing out of the Fitzgerald Inquiry (1989) into illegal activities and police misconduct and the post-Fitzgerald situation in Queensland.

Various examples are given about the lack of separation of powers at the state level. There is a theoretical separation of powers, which by convention is supported by the various actors (cabinet ministers, parliamentarians, and judges) within the institutions of governmental power (Cabinet - Executive Council, Parliament, and the Courts).
In practice there is only a partial separation of powers, that is the judiciary is independent and separated from the other two branches (the legislature and the executive) (Lumb 1983: 24). The executive (cabinet ministers) is formed from within the legislature (parliament); the personnel have a joint role as both members of the legislature and members of the executive (government). According to Hughes (1998a: 297) Australia has a political system that is suggested to be one that follows the Westminster parliamentary system and responsible government. However neither responsible government nor ministerial responsibility is mentioned in the Constitution. Parker (1980: 13) argues that responsibility has the meaning that ministers, the political leaders of the government, though legally appointed by the head of state, hold office by virtue of their parliamentary majority, as tested by significant votes in the legislature.

The objectives of the research and investigation

An objective here is to gather together in one place, information from various sources and fields of study, not normally combined and integrated, to more fully examine the component parts of the separation of powers at the state level. This topic is examined from a multi-disciplinary approach, basically as a historical sweep approach but also including philosophical, political, administrative, managerial, constitutional, and legal material to inform the component parts. A study of and a comparison between Australian States and between States and the Commonwealth will be included as well as a comparison between the UK Westminster system and the US Presidential system where appropriate. The term ‘Westminster Model’ does not have a long history, it was first used according to Reid (1984: 4-16) in the late
1950s. Soon after this de Smith (1961: 3) set out the Westminster model of government as a constitutional system. For a long time the US aspects of the Australian political system were ignored as commentators and political leaders only saw the parallels with the UK Parliament (Hughes 1998a: 307). In 1980, Elaine Thompson coined the term ‘Washminster mutation’ to describe the mixed parentage of Australia. Thompson (1980) pointed out that the American federal and constitutional aspects of Australian government had been ignored and the Westminster part over-emphasised. Various incidents throughout history will be chosen for more intensive examination and discussion to highlight significant points of interest that arise along the way, to differentiate the theory and the practice of the separation of powers at the State level in Australia.

An investigation into the “problems with the Australian Separation of Powers” at the State level would help to expose the extent that the Executive infringes on the other branches of government. Another objective is to show how stable or unstable is the “Rule of Law” and the independence or dependence of the Judiciary in relation to the Executive in the Australian political system at the State level. There is a lack of separation of powers at the State level and this situation differs dramatically to that at the Commonwealth or federal level of government, which retains a separation of powers particularly the separation of the Judicial branch.

The relation of the study to previous work in the same field

There has been much written about the Australian Constitution and the Separation of Powers at the Commonwealth level but very little has been written about the
Separation of Powers at the State level. This study looks at the Separation of Powers at the State level in Australia. The Commonwealth will be used as the model for comparison with the States, the case studies will be the States of Queensland, Victoria and New South Wales and references will be made to the literature encompassing the fields of political science, public administration, law and management.

There is a long history of the theory articulated by political philosophers who saw the importance of reducing the power of central authority and separating power in order to reduce the possibility of the rise of tyranny. Political scientists and lawyers have had differing views about the existence of the separation of powers. Lucy denies the existence of the separation of powers in Australia, regarding the model as ‘incoherent’ (1993: 321-4). Maddox, following Bagehot 1978 [1867], characterizes the Australian arrangement as a ‘fusion’ rather than separation of powers (1991: 176). For others, Australia represents a hybrid or mutation of British and American models (Wynes 1976: 2, 125-7; Emy and Hughes 1991: 265; Singleton et al 1996: 16). There has been significant variation in the theoretical approaches to be adopted (Sawer 1961; Vile 1967; Finnis 1967).

The High Court has defined and continues to shape and determine the SOP doctrine in Australia. The founders secured in the Constitution an amalgam of British responsible government and American federalism, which presents a difficulty discerning the founders’ conception of the separation of powers. The founders faced a choice between two major conceptions of separation of powers, one derived from the American Constitution and The Federalist (Hamilton, Madison and Jay 1982
[1788]), the other from British constitutionalism and Blackstone. The Convention Debates and the ambiguities of the terms settled upon and secured in the Constitution by the founders highlight this amalgam of British and American politics and values. The Australian High Court defined the separation of powers principally as a separation of judicial powers (Ratnapala 1990: 53), a formulation that had far-reaching influence on the development of Australian constitutionalism until the Court’s recent admission that it ‘makes’ the law (Mason 1990, 1994a, 1994b). This declaration has exposed the Court to much political and scholarly criticism and raised questions concerning the tension between a law-making or legislating judiciary and the doctrine of separation of powers.

Patapan (1999: 391) argues that there are compelling practical and theoretical reasons for reconsidering the nature of the separation of powers in Australia. There is an even greater need to reconsider the role and use of power and politics and the separation of powers at the State level. An attempt is made here to look at three States (Queensland, Victoria and New South Wales) as case studies for the separation of powers at the state level and for relevant incidents that highlight problems and issues relevant to the doctrine of the separation of powers.

**Justification of the research**

The Supreme Court of Queensland, or Supreme Courts from other States, in their decisions has not challenged State government executive control. At the state level, the separation of powers is not legally recognised (Clyne v East 1967; Gilbertson Case 1978; the BLF Case 1986; City of Collingwood Case 1994; see Ratnapala 2002: 111). At the Fitzgerald Inquiry in 1988, the former Queensland Premier Joh Bjelke-Petersen was asked an important question concerning the separation of
powers. The question was as follows: “What do you understand by the doctrine of the separation of powers?” (the Fitzgerald Inquiry 1987-89, *Fitzgerald Report* 1989, Appendix 16, Bjelke-Petersen commences his evidence on 1 December 1988 [p. 20784] & concludes his evidence on 9 December 1988 [p. 21463]). The former Queensland Premier couldn’t answer this question. Premier Bjelke-Petersen’s inability to answer the question offered a telling insight into his attitude to unfettered executive government control.

The Fitzgerald Inquiry (1987-9) into illegal activities and police misconduct exposed corruption and a lack of separation of powers in Queensland and contributed to the downfall of Premier Joh Bjelke-Petersen and the National Party’s control (Coaldrake 1989). The Fitzgerald Report pointed out that under a Westminster-based system, it is easy to blur the distinction between the government’s creation of policy in which political considerations are legitimate, and the Public Service’s implementation of that policy in a manner that is supposed to be apolitical (Coaldrake 1989: 55). After thirty-two years without a change of government, Queensland developed a cadre of senior administrators and policy advisers who were adept at giving what Commissioner Fitzgerald called ‘political palatable advice’, rather than the fearless impartial advice the Westminster system is meant to foster (Fitzgerald 1989, cited in Hede 1990: 222).

Russel Cooper (Queensland Premier for a short time after Ahern) of the National Party in 1989 was asked on ABC Television the same question as Bjelke-Petersen in 1988 was asked about the Separation of Powers - he failed the test, he also couldn’t answer the question. At a subsequent time, the Labor Premier Wayne Goss
(Queensland Premier after Russel Cooper) was asked the same question on Television - he answered the question correctly. It is unclear if Premier Goss’s knowledge of the Separation of Powers had been due to media reports and that the question had already been asked and Goss had researched an answer or because he was a lawyer (Brisbane Solicitor) and knew the answer due to his legal training. In almost a repeat of the answer given by former Premier Bjelke-Petersen in 1988, Frank Tanti, the Liberal candidate for the Mundingburra election in 1996, said he could not explain the principle, he also admitted he did not understand the Westminster system of Government (*The Courier-Mail* 19 January 1996). The author intends here to emphasise the importance of politicians or future politicians knowing and understanding the doctrine of the separation of powers, as an essential part (constitutional convention) of the workings of our system of government.

**Contribution – Importance**

The importance of the separation of power is essential to a check on the abuse of executive power and the goal of limited and accountable government (Locke 1690). John Locke, the English philosopher writing in 1690 stressed that the same person should not have the power to make laws and to exercise them. Locke was really arguing against concentrating power in the hands of one person – the Sovereign. The institutional equivalent today is the Government. The Government with concentrated powers is dangerous to civil rights, limited government needs to be the goal. The separation of political institutions (and their powers) was part of the *Fitzgerald Report* (1989) in Queensland.
The Fitzgerald Inquiry in Brisbane in 1988 exposed the lack of separation of powers in Queensland and in the Australian States in general. The former Queensland Premier Bjelke-Petersen did not understand the theory of the “separation of powers” (Fitzgerald Inquiry 1988 cited in Lovell et al 1995: 64) and his style was for unfettered executive government. Structural problems for good and accountable government result when there is violation of the doctrine of separation of powers, which result in the executive branch dominating the other two branches (the legislative and judicial branches).

**Why we need the separation of powers**

The doctrine of the separation of powers is fundamentally concerned with the maintenance of the ancient ideal of ‘the rule of law’ and the distinction it implied between the functions of legislating and governing; supplying mechanisms for meaningful ‘democracy’ as well as providing a modern ‘tripartite separation’ and the ‘system of checks and balances’ (Madison 1966 [1788] cited in Ratnapala 1990: 64). According to Thomas Jefferson, the concentrating of legislative, executive and judicial power in the same hands is precisely the definition of despotic government. James Madison’s view was the same, “no political truth is of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty” (Madison, cited in McMillan, Evans & Storey 1983: 293).

**Outline of the research**

An important question that needs to be asked is: What lessons may be learnt by the Australian System of Government from a study of the Separation of Powers in the
Australian States? To answer this question it will be necessary to look at the history, theory and practice as well as the available models of the separation of powers. The SOP models reviewed include United Kingdom, United States of America, and Australia (Commonwealth). These models help to inform and explain the situation in the Australian States.

Another important question that needs to be answered is: At the State level, has Executive power been expanded at the expense of a ‘balance’ in the powers of the Legislature and the Judiciary? It is argued here that in order to maintain a stable political system in Australia, public confidence in judicial review and the independence of the Judiciary is essential, not only at the Commonwealth level but at the State level. In Australia at the local Supreme Courts (and at one time prior to the Australia Acts 1986, the Judicial Committee of the Privy Council on appeal) could exercise a power of judicial review of acts of a Legislature on various grounds of repugnancy to Imperial Acts (Lumb 1983: 46). This power of judicial review was later taken up with a wider power of judicial review to be exercised by the High Court of Australia in reviewing Acts of Parliament, Commonwealth or State, on the ground of repugnancy to the Commonwealth Constitution. This power was similar (leaving aside a Bill of Rights) to the power which the US Supreme Court had exercised since the beginning of the nineteenth century (Lumb 1983: 47). In the US the federal division of power in addition to the Bill of Rights was to form the basis for the exercise of the power of judicial review (Lumb 1983: 35).

At the State level in Australia the judiciary has shown itself vulnerable to political interference. Coaldrake (1989: 88) notes that the judiciary in Queensland may have
contributed to its own apparent vulnerability to political interference by not distancing itself sufficiently from the political process. To establish fully and to maintain the separation of powers doctrine at the State level, the Australian States need to entrench the separation of powers in their State constitutions to overcome the flexible nature of their State constitutions (Ratnapala 2002: 299-300). The independent position of State Supreme Courts to review the constitutional status of State executive decisions and legislation needs to be doubly entrenched into state constitutions. In 1995 in New South Wales a referendum entrenched the Justices’ & Magistrates’ independence in the NSW Constitution.

State Government Executive Decisions have an effect on the doctrine or practice of the Separation of Powers. State Government Executive Decisions also have an effect on the independence of the Legislature. State Government Executive Decisions also have an effect on the independence of the Judiciary in the Australian States. State Government Executive Decisions also have an effect on the Government’s law-making and administering role and results in a limit to the interpretation of the law by the courts or Judicial law-making by the courts.

At the Australian Commonwealth level it appears that despite recent public criticisms of High Court Decisions, for example Wik People’s v Queensland (1996) ALR 129 (the Wik case) (1996) the High Court held, in a case concerning native title, the constitutional separation of judicial power at law remains intact. The Wik (1996) decision came under extraordinary and serious political attack, Queensland Premier Rob Borbidge describing it as ‘an embarrassment’. Prime Minister John Howard rejected a law-making role for the judiciary, while Deputy Prime Minister Tim Fisher
criticised the decision as an example of judicial activism (\textit{Courier-Mail}, 5 March 1997, 1; Patapan 2000: 141). However the convention of the separation of powers at the State level can be overridden by State government legislation and does not function effectively in practice. The doctrine of separation of powers at the state level operates as a constitutional convention rather than constitutional law (see \textit{BLF Case} 1986; Lumb 1991: 137).

At the State level, unlike at the Commonwealth level, there is no clear constitutionally entrenched separation of power (Lumb 1991: 132, 137). Also there is no constitutionally entrenched clause in State Constitutions requiring a referendum to change State Constitutions. The States amend their Constitutions relying on a general provision, the ordinary law-making power to make laws for the peace, welfare and good government of the State [\textit{Clayton v Heffron} (1960) 105 CLR 214; Lane 1994: 198]. At the Commonwealth and State levels of government, the Executive constantly infringes on the other two branches of government, that is the Legislative and Judicial branches. At the State level the Executive can infringe the authority of the other two branches with impunity without a constitutional court with judicial power such as the High Court. The State Supreme Courts can strike down State legislation but State Governments can legislate to overrule or sidestep State courts decisions or appeal to the High Court.

The research will be a study of the Separation of Powers (SOP) in three case studies - three Australian States: Queensland, and Victoria with relatively similar State Parliaments but with quite different political history and political environment/culture (see Queensland’s political style in Hughes 1980: 10-12). The separation of powers
theory sets out to divide and separate power in the organisational structure of
government in the form of three powers: the legislative power, the executive power,
and the judicial power. These powers are exercised by the institutions of
government. The separation of powers theory has a long history and states that the
Legislature (Parliament) makes the laws; the Executive (Government) administers the
laws; and the Judiciary (Courts) interprets the laws (Montesquieu 1966 [1748];
In practice of course, there are overlapping functions and personnel. There is no
country with a complete separation of these three powers, the closest to this pure
model is the United States of America. Australia has a mixture of the British and
American forms of government with a partial separation of these three powers at the
Commonwealth level but not at the State level (Lumb 1983: 24; Lumb 1991: 132,
137; Lane 1994: 220). There has been a growing recognition of the existence of the
SOP in practice at the State level and there is now a need to more formally recognise
the separation of powers.

**Sketch of Chapter Contents**

This thesis is divided into seven chapters. The Australian system of government
includes the theory and practice of the separation of powers which derives firstly
from the British system of government and secondly from the American system of
government. The partial separation of powers is well established and constitutionally
and judicially recognised at the Commonwealth level and needs the same at the State
level. There needs to be greater scrutiny of the executive at the Commonwealth level
and particularly at the State level. The excesses of Government power that are
exposed by legislative scrutiny or judicial review or through the media reveal the fact that checks and balances built into the system have not worked and need further reform and strengthening of relevant institutions. The intention here is to look back into history and review the origins and theory of the separation of powers then to look at the practice of the separation of powers at the Commonwealth level then at the State level. There does appear to be a greater lack of separation at the State level than the Commonwealth. The States of Queensland, Victoria, and New South Wales are used to demonstrate the differences between the States and with the Commonwealth.

Chapter 1 (Introduction) attempts to set the scene and gives some background information on reasons for the study. The chapter attempts to explain what are the different interpretations (models of separation; what is its role in a modern democracy; why the separation of powers is important. Following this there is an investigation of why the separation of powers is important at the State as well as the Commonwealth level. Then there is an outline of the argument: Is there a genuine separation of powers at the State Government level in Australia. The scope of the thesis is stated with an indication of the main points to follow.

Chapter 2 (Theory & Practice) will give the optimistic reading of separation of powers, derived from ancient and modern sources. The theory of the separation of powers has ancient (Plato, Aristotle) and modern (Locke, Blackstone, Montesquieu) origins. Ancient Greek political philosophy from the time of Aristotle first outlined a separation of powers with a mixed constitution and the need to restrain the use of power by tyrants. Modern political theory with Locke (1690) (from England) and
Montesquieu (1748) (from France) writing about the English political system, noted the importance of the separation of powers to prevent tyranny from an absolute monarch. The constitutional models and systems of government of Great Britain (Locke 1690, Blackstone 1765) and the United States of America (Madison [1787-88], The Federalist) were used by the founders for Australia. The Westminster system of government and parliamentary sovereignty along with the historical, cultural, constitutional conventions and the rule of law set the pattern for local adaption and reform. The American republican and presidential system of separation of powers, checks and balances and federalism provides a clearer system of separation of powers (legislative, executive and judicial) and institutions and lines of accountability with built in checks and balances. However recent events have shown that the executive is too powerful in both systems and needs further restraint.

Chapter 3 (Commonwealth: guide to the States) will show that the separation of powers in more detail at the Commonwealth level (see Ratnapala, Patapan). The Australian Commonwealth is the guide for the States. This model will reveal, for the separation of powers, the great reliance there is on the independence of the judiciary and the High Court (Galligan 1995, Solomon 1999). The wise contribution by the Australian founders of both the British Westminster system (Locke 1690, Blackstone 1765) and the American constitutional system (Madison [1787-88], The Federalist) with its separation of powers and checks and balances, added to and combined with the Australian system of government (Quick & Garran 1901, Lumb & Moens 1995, Singleton et al 2003) will be examined. I will show the extensive use of executive power by Government at the expense of Parliament’s legislative power. The main
checks on executive power at the Commonwealth level are the Senate (Evans 1999a, 1999b) and the High Court (Galligan 1995, Solomon 1999) and the media.

Chapter 4 (Queensland: case study) turns to the pessimistic argument that the State executives infringe on the legislatures. The example of Queensland is used to present the argument that a strong lower house (without an upper house or strong parliamentary committee system) (Kilmartin 1980, Hughes 1980, Coaldrake 1989) can lead to authoritarian government (Lunn 1987, Wells 1979, Whitton 1989, Wear 2002) without mechanisms for checking on accountability (Coaldrake 1989) (see Bjelke-Petersen Government in Queensland). The State Government can control the agenda and functions of parliament (Hughes 1980). There are overlapping functions as well as the party system, which allows the Executive Government to dominate the other branches. The pessimistic argument is presented that the Queensland State executive has infringed on the judiciary. The example of Queensland is used to present the argument that a strong Government can use its position to penetrate the judiciary in a political way (Fitzgerald Report 1989, Coaldrake, Whitton 1989, Wear 2002). Judicial power (Lumb 1983, Carney 1993) is to be kept separate from legislative and executive power. Judicial independence (de Jersey 2001a, & b; de Q. Walker 1988) is very important to our system of government and to maintain parliamentary democracy, the rule of law and basic freedoms. The judicial culture (Fitzgerald Report 1989, Fitzgerald 1990) is to keep the separation of the judiciary and to maintain judicial independence (Fitzgerald 1990 in Prasser et al 1990). The Hon Angelo Vasta J, the Queensland Supreme Court Judge, was dismissed after a process of investigation put in place by the Parliament (Fitzgerald Report 1989).
This case established the supremacy of the legislature (including the executive) over the judiciary.

Chapter 5 (Victoria: case study) investigates another State, Victoria, for comparison purposes (Holmes 1976). The chapter investigates several incidents from history and their associated issues that are raised as a result. The Victorian Constitution provides few restraints upon governments (Lumb 1991) attempting to undermine civil and political rights, weaken the Opposition, marginalise institutions and restrict information (Keon-Cohen 1991). Eckersley and Zifčak (2001) suggest a range of possible democratic reforms. The State of Victoria has maintained an upper house of review (Holmes et al 1986) and parliamentary committee system (Kiss 1997) compared to Queensland. The upper house provided a conservative influence but was not obstructive to the parliamentary process (Griffith & Srinivasan 2001).

Chapter 6 (New South Wales: case study) investigates another State, New South Wales for further comparison purposes (Parker 1978). The chapter investigates several historical incidents and the issues raised from these events. The State of New South Wales, like Victoria, has maintained an upper house of review but was unable to abolish the chamber as was done in Queensland (Lumb 1991). Several attempts were made by Labor Governments in New South Wales to abolish the upper house (Lumb 1991, Parker 1978); that is the executive attempting to abolish part of the legislature. It was the first attempt by the Lang Government which was the most determined attempt by the executive to abolish part of the legislature (Hawker 1963, Evatt 1967, Parker 1978, Lumb 1991). As a result of this attempt by Lang there was brought about constitutional reform (in 1929 s. 7A was added to the NSW
Constitution) which made the abolition of the upper house less likely and brought about greater democratisation of the legislature (Parker 1978). The Legislative scrutiny of the NSW Executive is demonstrated by the Egan cases (1996-99). Legislative scrutiny of the judiciary is demonstrated by the Bruce J case (1998). Judicial review of NSW executive legislation is demonstrated by the Kable case (1995-6).

Chapter 7 (Conclusion) provides a summary of what has been shown throughout the thesis. The chapter sums up the main points about the separation of powers and links back to the main thesis arguments regarding the necessity for constitutional reform and parliamentary reform. The entrenchment of separation of powers, checks and balances and judicial independence (Kirby 1983, 1990; de Jersey 2001a & b) into State Constitutions will help to provide a barrier to the misuse of executive power by Executive Government.
CHAPTER 2

THE THEORY AND PRACTICE OF

THE SEPARATION OF POWERS

Introduction

This chapter looks at the theoretical foundations of the separation of powers (SOP). The modern theory of the SOP is demonstrated by the writings of Locke (1690), Montesquieu (1748) and Madison (1788). The UK model is demonstrated by the theories of Locke, Montesquieu and Blackstone (1884). The US model is demonstrated by Madison (1788) and *The Federalist*. John Locke’s SOP theory demonstrated the early UK model and attempted to limit an absolute monarch’s powers by separating two powers (legislative and executive powers). Montesquieu’s SOP theory separated three powers (legislative, executive and judicial powers) and noted the importance of the independence of the judiciary. Montesquieu’s ideas derived heavily from ancient sources such as the works of Aristotle and Polybius however Montesquieu’s analysis of the English system of government was not accurate in practice. Blackstone’s SOP theory more accurately demonstrated the English or Westminster system of government. Blackstone concentrated on the separation of the judicial power and the importance of the common law to protect life, liberty and property. In Australia, the High Court, has accepted the UK model and the Blackstonian common law idea of the separation of judicial power in preference to the principles elaborated in *The Federalist* and the US model. The concept of the SOP has been accepted in Australia as well as the SOP’s importance in protecting
citizens from the abuse of government power. It will be demonstrated in later chapters that the Australian States show a limited effort to adhere to the doctrine of the SOP.

**Theoretical foundations of the Separation of Powers**

This chapter provides an analytical framework which helps to give structure to the material contained in subsequent chapters. The theory is used as a conceptual framework to understand current events. The chapter provides a survey of the main writers on the separation of powers. It is an historical overview of the key theoretical contributions in the field. The theory and history is used to establish a framework or lens through which empirical material can be analysed. The chapter demonstrates an understanding of the importance of the key analytical issues that emerge from the theory. Analytical insights derived from the theory are outlined which are pursued in subsequent chapters. The thesis is informed by understanding the significant events that happened during the life of a major SOP theorist, John Locke. It was Locke’s theory of the SOP that provided a solution to the ills of his time and to advocate the reduction of the power of a tyrannical king by separating power between institutions and increase the power of the Parliament and the rights of the people.

Locke distinguished between legislative power and executive power. His doctrine represented a twofold division of power, not the threefold separation familiar to modern constitutional thought. The doctrine received its most detailed assessment in the writings of Montesquieu and Blackstone. In the hands of these thinkers, it was presented not as a
doctrine of complete or absolute separation (which would lead to anarchy) but as a partial separation and partial sharing. Montesquieu in his work *On the Spirit of the Laws* identified the third power making up the new triad (as compared with the old dual structure of the legislative and executive power). It was the power of judging. That power was not part of the executive power as maintained by earlier writers. The power of judging was distinct from a power of putting the laws into effect. Thus, the doctrine received its classical formulation: the power of making laws was vested in the legislative branch; the power of executing the laws was vested in the executive arm; and the power of settling disputes was vested in the judicial branch (Lumb 1983: 24).

The theory of the separation of powers can be divided into ancient and modern times covering ancient Greece to the modern United States of America. The emphasis here in this thesis will be on the modern SOP theory and practice from the time of Locke and the SOP impact on Australia, particularly the States. The ancient theory can be traced back to ancient Greece and the philosophical writings of Plato, Aristotle and Polybius. These ancient philosophers and their writings have had a great influence on modern writers. The modern theory can be traced from the Glorious Revolution of 1688 in England. The English philosopher John Locke (1690), at the time, favoured limited government and defended the Glorious Revolution (1688) and the principle of government based on popular consent. Locke (1690) actually wrote the *Second Treatise of Civil Government* (ST) before the Glorious Revolution (1688) but it was published afterwards (Laslett 1970: 37).
Locke (1690) sought to formulate a theory of the free state, this influenced the thinking of his age and the future (Ratnapala 1990: 58). The idea that separating powers and creating a balance between them can create conditions in which liberty can flourish is a powerful one. The modern theory has been formulated mainly by the writings of Locke and Montesquieu. Two models (the UK model and the US model) are mentioned here but the UK model is used as a guide for Australia and the Australian Commonwealth model is used as a guide for the Australian States. The UK model is outlined by the works of Locke (1690), Montesquieu (1748) and Blackstone (1884). The US model is outlined in the *Federalist* (1788) (Madison, Hamilton and Jay 1788) particularly by the work of Madison (1788).

The Australian system of government combines and uses aspects of both the UK model and the US model of government and separation of powers. The Australian model is therefore a mixture of the English and American models. These models have important philosophical and theoretical origins based in significant historical events. The English SOP model based in the English Revolution of 1688 and the American SOP model based in the American Revolution of 1775 and the Declaration of Independence of 1776. There was not a similar revolution in Australia, instead it has been gradual peaceful social, political and constitutional reform (by the High Court). Thompson (1980) coined the term ‘Washminster mutation’ to describe the mixed parentage of Australia. The Australian political system is a hybrid of the Westminster system of government and the American federal and constitutional aspects of government. There is a significant
difference between the theory and practice of separation of powers in countries like the UK, the US and Australia.

MODERN THEORY - SEPARATION OF POWERS

The modern reinterpretation of the separation [of powers] doctrine as purely a system of checks and balances resulted from demonstrable misconstructions of the literature on the subject, particularly the work of Locke (1690), Montesquieu (1748) and Madison (1788). This reinterpretation also enabled the separation of powers (SOP) doctrine’s detractors to deny that it was ever a part of the English Constitution. It is important to note that the denial of the existence of the SOP doctrine had a disastrous effect on the operation of the doctrine in Australia, when the High Court (in the Dignan Case [1931] 46 CLR 43) elected to be guided by supposed British usage rather than constitutional theory (Ratnapala 1990: 23).

The scope of this thesis does not permit a full account of the history of the separation [of powers] doctrine (see Vile 1967). This thesis concentrates on SOP in the Australian Commonwealth and the Australian States. Any case for restoring the separation [of powers] doctrine in Australia as a means of revitalising the rule of law and democracy, must involve the task of rectifying the major misconceptions regarding the history and the literature pertaining to the doctrine. In order to do so, we need to take a brief look at the writings of the major contributors to the modern doctrine (Ratnapala 1990: 58). Later chapters will look in more detail at the SOP situation in the Australian Commonwealth and the Australian States in practice.
UK MODEL – SEPARATION OF POWERS

This section will look at the main separation of powers theories on the UK model, known as the Westminster system of government. These theories on the UK model will include Locke, Montesquieu and Blackstone. The English philosopher John Locke (1690) actually writing before the Glorious Revolution of 1688 in England, was critical of absolute monarchy and advocated constitutional monarchy, limited government and a doctrine of natural rights. The French philosopher Montesquieu (1748) developed the ideas of Locke and was also inspired by the works of Aristotle, Polybius and other classical writers. Montesquieu is credited with elaborating the modern separation of powers doctrine however his presentation of the English system of government was not completely accurate. The English lawyer Blackstone (1884) presented a more accurate presentation of the English system of government and a comprehensive picture of English law and the civil rights of Englishmen. Blackstone greatly influenced the Americans about civil rights and the English common law. The next section looks at John Locke in more detail and his contribution to the UK model of the separation of powers.

John Locke (1632-1704)

John Locke is a SOP theorist and his SOP theory demonstrates the early version of the modern UK SOP model. The English philosopher John Locke (1632-1704) lived through a very turbulent period in English history. Let us briefly mention some of the significant events that happened during the life of John Locke and would have impacted on his thinking and writing. King Charles I (1625-49) did not call the English Parliament into
session from 1629 to 1640. Charles I was an absolute monarch with absolute power including executive, legislative and judicial powers. When Parliament finally met in 1640, it refused to grant the King any funds unless he agreed to limit his powers, Charles I reacted angrily and resulted in civil war (1642-48). In 1701 the Act of Settlement, limited the royal prerogative. These were turbulent times and created the environment for Locke to write his radical theories including the necessity for the separation of powers between the monarch (executive power) and the Parliament (legislative power). This can be seen particularly in the classic work by Locke (1690) Two Treatises of Government and scholarly attention to its publication places the writing of the treatises ten years earlier than had been believed, thereby dating it before the revolution of 1688. Locke’s attack on the divine right of kings was therefore a call for what became the Glorious Revolution rather than a plea in its defence (Locke 1690 cited in Laslett 1963).

The necessity for limiting the monarch’s powers, particularly an absolute monarch at the time of Locke, may be used as a guide for necessity for limiting the powers of modern Australian Commonwealth and State governments. The SOP theory of Locke in opposing tyranny and abuse of despotic executive and legislative power can also be used as a guide for demonstrating the importance of the SOP in protecting citizens rights from the abuse of government power. The necessity to limit the power of the monarch and to distribute the monarch’s power to the Parliament was in the best interest of the people and for their freedom. It is necessary to distribute Parliament’s powers (previously the Monarch’s powers) into separate institutions. The separation of the Monarch’s powers (executive, legislative and judicial) into separate institutions (Government, Parliament and
the Courts) is taken up in later chapters in this thesis. The Australian Commonwealth Government is here used as a problematic guide for the Australian State Governments.

The Anglo-Saxon conception of the ‘rights to life, liberty and estate’ is traced to John Locke (1690). The political philosophy and constitutional ideas of Locke were influenced by events that occurred during his lifetime. Locke (1690) openly favoured limited government power (constitutional monarchy) (Strauss & Cropsey 1981: 472), unlike his predecessor Thomas Hobbes (1588-1679) who was an exponent of unlimited governmental power (absolute monarchy) where the sovereign was absolute which can be seen in his book *Leviathan* (1651) (written two years after the execution of Charles I). Locke says absolute monarchy is “no form of civil government at all” (Locke 1690; cited in Strauss & Cropsey 1981: 472). For Hobbes (1651), a person’s entire life was a “ceaseless search for power.” John Locke (1690) emphasized natural rights and believed that people should revolt against governments that violated those rights. Liberalism (a willingness to change ideas, proposals, and policies to meet current problems) later developed as a political philosophy largely from the theories of Locke. Locke (1690) favoured limited government with a division of powers between legislative and executive, which can be seen in his book *Two Treatises of Government* (1690) (Locke 1690; Strauss & Cropsey 1981: 472). Although probably first drafted between 1679 and 1683 Locke’s *Treatises* were first published in 1689 (1690 is usually given as the publication date) as a defence of the Glorious Revolution (1688) and the principle of government based on popular consent (Fitzgerald 1980: 117-8).
Locke (1690) openly favoured limited government and defended revolution such as the Glorious Revolution of 1688, which saw King James II (1685-88) (a Roman Catholic, who wanted to restore Catholicism and absolute monarchy in England) flee to France and give up his throne. The Glorious Revolution (1688) brought William and Mary to the throne as joint rulers of England after accepting what became known as the Bill of Rights (1689); they established the modern tradition of constitutional monarchy in England, a tradition that was later passed onto Australia. Constitutionalism developed during the mid-1600’s as a reaction to absolutism - that is the absolute rule by one person. The English Bill of Rights (1689) assured the English people certain basic rights, made it illegal for the monarch to keep a standing army, to levy taxes without Parliament’s approval, and prevented the monarch from being a Roman Catholic.

The English Bill of Rights was important for the protection of citizens from despotic power and the abuse of government power. English constitutional documents such as The Bill of Rights provided the people with fundamental human or civil rights, these were maintained by the Parliament and the courts. Later chapters in this thesis look at the protection of citizens in Australia (at the Commonwealth and State level) from the abuse of government power mainly by the separation of the Judicial power and independence of the courts provided by the Australian Constitution.

Locke’s (1690) doctrine of natural right later inspired Thomas Jefferson (1776) in writing the United States Declaration of Independence (1776) (which led to the founding of the United States as an autonomous and free republic) (Masters1980, in Fitzgerald 1980:}
Leo Strauss (1953) argues that, for Hobbes, as well as for Locke, political life can only be understood in terms of the ‘natural rights’ of all humans. For both thinkers, political communities are based on a social contract; Locke (1690) taught that all legitimate political institutions rest on the consent of the governed (Strauss 1953).

In the concluding paragraph of Locke’s chapter on the ‘Ends of Political Society and Government’, Locke recapitulates the terms of the social contract. The paragraph is so crucial to the understanding of Locke’s theory of the separation of powers that it must be quoted in full.

But though Men when they enter into Society, give up the Equality, Liberty and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself, his Liberty and Property; (For no rational creature can be supposed to change his condition with an intention to be worse) the power of the Society or Legislative constituted by them, can never be suppos’d to extend further than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned that made the State of nature so unsafe and uneasie. And so whoever has the Legislative or Supream Power of any Common-wealth is bound to govern by establish’d standing Laws, by promulgated and known to the People, and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, only in the execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other end, but the Peace, Safety, and publick good of the People (Locke 1690, cited in Laslett 1970: 371).

In the above paragraph, Locke (1690) brilliantly reconciles the elements of trust, supremacy and limitation of power. The individual powers of ordinary people are given to the society for a purpose, which is the preservation of lives, liberties and estates. This
is done because the condition that threatened lives, liberties and estates, namely the non-differentiation of law, adjudication and execution, needs to be remedied. The duty to effect this differentiation is the key term of the trust upon which power is surrendered to the community as a whole. This is the fundamental reason for men ‘quitting’ the state of nature. The very essence of the duty of the state is the establishment and maintenance of this differentiation (Ratnapala 1990: 60).

Suanzes (1999: 9) argues that Locke (1690) appears to admit in principle only to two powers the legislative and the executive powers. Locke ‘separated’ the legislative function from executive (which is combined with the judicial functions) by placing two limitations on legislative power. First, he stated that ‘The Legislative or Supreme Authority, cannot assume to itself a power to Rule by Extemporary Arbitrary Decrees but is bound to dispense Justice, and decide the Rights of the Subject by promulgated standing Laws and known Authoris’dJudges’ (Locke 1690, ST XI 136; Laslett 1970: 376). Second, Locke maintained that ‘The Legislative cannot transfer the Power of making Laws to any other hands’ (Locke 1690, ST XI 141; Laslett 1970: 380; Ratnapala 1990: 60-61). This differs to the modern SOP position in Australia. There are two important limitations on the legislature; it must maintain the rule of law and a separate judicial power. According to Vile (1967: 59), for Locke the main function of the State is essentially juridical, the State is the judge that is lacking in the State of Nature.

Despite some similarities to the modern doctrines, the truth is that Locke (1690) did not propose the constitutional mechanisms in exactly this way. Nevertheless Locke was
authoritative in his insistence that power should be separately exercised. Locke’s declared faith in depositing all powers in a supreme government was a concession to English history. In regard to English history and the struggle between King and Parliament, the ideals that Locke proposed could have been achieved only by establishing the supremacy of Parliament, that is the sovereignty of Parliament.

Maddox (1985: 164) argues that, in Britain, the Parliament is said to be ‘sovereign’; British theory accommodates the idea that government is still conducted in the name of the sovereign - the Queen - while the actual power rests with the people’s representatives. The sovereignty of the British Parliament means that it is ‘omnicompetent’ - it can pass any law, repeal any statute, and alter fundamentally the constitution. Locke’s (1690) theory clearly demanded that the supreme body preserve the distinctions among powers by the manner of their exercise. Another significant SOP theorist was Montesquieu who added the judicial power to the modern SOP theory.

**Montesquieu (1689-1755) - Ancient influences on Montesquieu**

The theory of the ancients influenced the political writings of the French philosopher Baron Charles Louis de Montesquieu (1748), who is credited as the person who elaborated (1) the modern doctrines of the separation of powers along with (2) the independence of the judiciary. Although the English philosopher John Locke had earlier argued that legislative power should be divided between king and Parliament. Montesquieu relied heavily on Polybius, according to Lloyd (1998: 7). Even those who cite Montesquieu as their source for the doctrine of separation of powers are indirectly
citing ancient authority. In fact, Montesquieu had not only read Polybius but also produced summaries of his work, as Shackleton (1961) attests:

It was his practice to make extracts or synopses of books which he had read, and the accident of mention in the Pensees or elsewhere discloses that he had made extracts from ... [among others] ... Polybius.

Hulliung (1976: 2) admits that “more than not, Montesquieu derived his inspiration from works of Aristotle, Polybius, or some other classical author.” Shackleton (1961: 158, 233-4) adds that the doctrine of separation of powers was “a theory of considerable antiquity ... Montesquieu made an attempt to bring it into line with the advances in the study of science.” Chinard (1993: 223) is more blunt, charging that Montesquieu “did nothing but generalize and modernize the lessons of ancient history.” Duff (1897: 1) ultimately wonders, “if Polybius had not led the way, ... [whether] Montesquieu’s study of the greatness and decadence of the Romans would ever have been written.” These powers are essentially the same as Aristotle’s three portions of the state: the deliberative, the executive, and the judicial (Aristotle, 1944: 1298a-b). However, as Gummere (1955: 75) notes, “the doctrines of Aristotle were well known to the American Colonials long before Montesquieu lifted the sixth book of the Politics into his Espirit de Lois ” (Lloyd 1998: 7).

Of course, one of the ancient texts Montesquieu read was Polybius’ Histories. For paraphrasing the ancient historian, Montesquieu describes the government of Rome in the time of the kings (Montesquieu 1748, Spirit 11.12; Polybius 6.11.11): the constitution was a mixture of monarchy, aristocracy and democracy; and such was the harmony of
power, that there was no instance of jealousy or dispute. When Montesquieu (Spirit 11.17) turns to describe the balance of power in Rome during the Republic, he explicitly cites Polybius’ Histories: so great was the share the senate took in the executive power, that, as Polybius (Book VI) informs us, foreign nations imagined that Rome was an aristocracy. The passage that Montesquieu (1748) cites falls in the middle of Chapter 11 of Spirit of the Laws, the same chapter that sets forth his principles of the separation of powers and the system of checks and balances. This indicates that when Montesquieu composed his theory of checks and balances he turned to the ancient historian, and also followed the Polybius’ theory of mixed constitution (Lloyd 1998: 8).

An alternative view, on Montesquieu’s importance to the SOP is expressed by Wright (1933). Wright (1933: 171) believed that “had Montesquieu never published his treatise, the [state] constitutions ... would not have been [different].” He argues that discussion on the separation of powers had been a long tradition among English political scientists – for example, Harrington, Locke, and Blackstone - well before Montesquieu. Harrington, a friend of King Charles I, had incorporated elements of checks and balances into his utopian work Oceana. This association may have led Charles I (some 50 years before Montesquieu was born) to claim that England enjoyed separation of powers. King Charles I (Answers to the XIX Propositions, 1642) declared:

The experience and wisdom of your Ancestors hath so moulded this government out of a mixture of these monarchy, aristocracy, and democracy, as to give this kingdom the conveniences of all three, without the inconveniences of any one so long as the balance hangs even between the three Estates, the King, the House of Lords, and the House of
Montesquieu studied the English model of government. He lived in England from 1729 to 1731 and came to admire the British political system. Due to the social, political and economic problems caused by the absolute monarchy in France, Montesquieu went in search of better states and especially the best state. He rejected the Thomistic natural law, and Lockean natural right as a guide to ordering political society. After studying the English political system, Montesquieu devised the separation of powers - legislative, executive, and judicial power in his book *The Spirit of the Laws* (1748). Montesquieu’s book is an analysis of the different things to which laws can be related. He advocated a form of government with liberty as its guiding principle; this can be seen in Books XI through XIII and the last chapter of Book XIX (Strauss & Cropsey 1981: 490-1).

After travelling to England and studying its government, Montesquieu noted that modern England is the one country whose laws have liberty as their direct object. Liberty, politically speaking, is the right to do what the laws permit. The English political system has two aspects: a balanced constitution and the citizen’s sense of legal security (with the former contributing to the latter). The form of government that Montesquieu proposed had, as its first requirement, the separation of the three powers of government - legislative, executive, and judicial. Each of these was to be in different hands. If any two, or all three, are held in the same hands, power will be too much concentrated (Strauss & Cropsey 1981: 496-7). It was very important for Montesquieu to formulate a form of government that had liberty as its goal. After studying England, Montesquieu
believed that the sovereignty of the people could be achieved through a sovereign Parliament rather than a sovereign monarch. Another significant SOP theorist was Blackstone who emphasised the importance of the English common law.

**William Blackstone (1723-80)**

Sir William Blackstone (1723-80) was not a political philosopher, but an English lawyer and judge, he was also an author and professor. Blackstone delivered lectures on English law at Oxford University; at the time Roman civil law (the law of continental Europe) was taught at Oxford. Blackstone became the first professor of English law in 1758. Blackstone also served as a Member of Parliament. He became Judge of the Common Pleas in 1770 and later served as a judge on the King’s Bench but soon returned to the Common Pleas. His major piece of writing is not a book on justice or even on law, but a set of commentaries on English common law called: *Commentaries on the Laws of England* (1884) (Strauss & Cropsey 1981: 594). This book presented a comprehensive picture of the English law at the time, and it became the most influential book in the history of English law. For many years it served as the basis of legal education in England and America for years. Blackstone’s book greatly influenced the American colonists, who used it as their chief source of information about English law.

In the first chapter of [Book I] ‘Rights of Persons’ in the *Commentaries*, Blackstone spends little time with the natural liberty of mankind, but moves quickly to the subject of civil rights and especially the rights of Englishmen, which are treated under the familiar Lockean headings of personal security, personal liberty, and private property
Patapan (1999: 394) argues that the discussion of the separation of powers by Blackstone in his *Commentaries* takes place in the context of the King’s prerogative, that is, the King as the fountain of justice and the conserver of the peace of the kingdom. Blackstone understood that the King was not the source of justice but its reservoir and distributor. The King, despite having the power of judicature, commits this power to selected magistrates; therefore, the entire jurisdiction of the courts derives from the Crown. The Crown delegates to the judges of several courts the power of judicature; this is described by Blackstone as the outcome of ‘long and uniform usage of many ages which the Crown cannot alter without an act of Parliament’. The judges’ security of tenure, fixed salaries, continuation of office during good behaviour, are all designed to maintain their dignity and independence. As Blackstone notes:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative (Blackstone 1884, Book I, ch. 7, 268).

Blackstone summarises his position in these terms: ‘Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state’ (Blackstone 1884, Book I, ch. 7, 269). The separation of powers, according to Blackstone, means primarily the separation of the judicial from other powers, a principle
that has developed over a long time. The separation of the judicial power ensures that
the executive power does not ‘overbalance’ the legislative; it also provides an
institutional check on the powers of the executive and the legislature. The core of the
argument seems to be that the separation of judicial power preserves the life, liberty and
property of subjects; it does so by providing for the independence and dignity of judges,
allowing them to determine the ‘fundamental principles of law’. The separation of the
judicial power makes possible what Blackstone described as the ‘artificial reason’ of the
common law, where law is the ‘perfection of reason’. To sum up, the separation of
powers protects the common law, which is the ultimate security of life, liberty and
property (Blackstone 1884, Introduction, Section 3, 69).

Separation of Powers - Theory and Practice

The philosophical development of the separation of powers has led to political and
constitutional theory. In practice there are various issues and problems that arise to
create difficulties for the theory. Let us now look at the history of the theory and
practice of the English model. In seventeenth-century England, the doctrine of the
Separation of Powers emerged for the first time as a coherent theory and central feature
of a system of limited government; it was explicitly set out as the ‘grand secret of liberty
and good government’ (cited in Vile 1967). In the upheaval of civil war the doctrine
emerged as a response to the need for a new constitutional theory; the system of
government based on a ‘mixture’ of King, Lords, and Commons seemed no longer
relevant. In the eighteenth-century the doctrine of the Separation of Powers became a
theory of the ‘balanced constitution’. Thus began the complex interaction between the
Separation of Powers and other constitutional theories that dominated the eighteenth century. The revolutionary potentialities of the doctrine of the Separation of Powers in the hands of the opponents of aristocratic privilege and monarchical power were fully realised in America and France. This once-revolutionary idea was transformed, in the course of time, into a bulwark of conservatism (Vile 1967: 2-7).

The ‘pure doctrine’ of the Separation of Powers has rarely been believed in its extreme form, and even more rarely been put into practice. Nevertheless, it does represent a ‘bench-mark’, or an ‘ideal-type’ against which we can document the evolution of the doctrine down to its present form in modern Australia. The Separation of Powers as a modern ‘pure doctrine’ had been formulated by M.J.C. Vile in his book Constitutionalism and the Separation of Powers in the following way:

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the state (Vile 1967: 13).

Under the separation of powers doctrine, there are three branches of government: the Executive, the Legislature and the Judiciary; so that each has separate personnel exercising specified autonomous powers. The modern ‘separation of powers’ doctrine,
first elaborated by Montesquieu, had an important feature - the independence of the judiciary. Montesquieu wrote, ‘There is not liberty yet, if the power to judge is not separated from the legislature and executive power’ (Montesquieu 1748, The Spirit of the Laws Bk 11 Ch 6 para 5, cited in Fried 1966: 46). He believed that such a condition existed in England, but he wrote in an era when monarchs were not only the main rule (or law) makers, but also commanders-in-chief and chief justices.

The following Tables (Tables 1: US Constitution and Table 2: UK Westminster system) indicate the separation of powers situation in theory and practice in the US and the UK. Australia, at the Commonwealth level (after federation) derives its constitutional Separation of Powers theory and practice from the US and the UK, in particular the constitutional practice from the UK. The Australian States derive their constitutional Separation of Powers theory and practice from the UK (the Westminster system of government and the partial separation of powers).
THE SEPARATION OF POWERS – THEORY & PRACTICE - (US & UK)

Table 1: The United States Constitution of 1787 incorporates the doctrine of separation of powers with a system of checks and balances as the following table illustrates (Carney 1993: 2).

Table 2: The Westminster system effects only a partial separation of powers (Carney 1993: 3).
The SOP theory and practice produces a clear understanding of (a) the concept of the SOP and (b) its importance in protecting citizens from the abuse of government power.

(a) The concept of the SOP

The concept of the SOP in theory involves the separation of the Legislative, Executive and the Judicial powers and the separation of the institutions of the Legislature, Executive and the Judiciary these are the basic organs of the state. The Legislature - Parliament (may also be called the Assembly or Congress) this is the law-making body in the Country. The Executive - Executive Prime Minister (or the Executive President) and the Ministers who are the political heads of their respective Ministries, together they form the Cabinet and usually the executive has the responsibility of initiating policies to be debated in Parliament. The Judiciary – Courts (justice is normally administered by judges, magistrates and other legally constructed bodies) is the institution for the administration of justice in the country at all levels (Waliggo 1991).

In the British constitutional tradition the doctrine of the separation of powers has a long history. It is not a strict doctrine (or theory) involving the allocation of specific powers to defined functionaries. Instead in practice the doctrine of the SOP constitutes a general framework within which it is appropriate that: (a) general powers of legislating should be exercised by the Legislature; (b) administration of the law and affairs of State should be by the Executive; and (c) interpretation of the law should be by the courts which should have an independent status. The Westminster system of government in the UK does not have a strict SOP, in fact the development of the doctrine of responsible government in
the 18\textsuperscript{th} and 19\textsuperscript{th} centuries involved a ‘fusion’ of personnel (that is the relationship between the Legislature and the Executive). In the UK, Members of the Government were required to hold seats in either House, with primary responsibility being to the popularly elected House (the Lower House – the House of Commons). This resulted in a system that delegated the law-making power to the Executive but was not regarded as being a breach of the doctrine of the SOP, provided that the general authority (supremacy) of the Legislature was not compromised in the sense that there was no abdication of power as such, or delegation on matters of substance. This is the situation with the SOP at the Commonwealth level in Australia. In this respect, the concept of the rule of law provides an important conventional basis for determining the types of activity appropriate to the Parliament and the Executive (Dicey 1939: 183-207; Lumb & Moens 1995: 23). Indeed, the rule of law, is one of the pillars of constitutional democracy, the Legislature must operate ‘not only through the law, but also under the law’ (de Q Walker 1988: 4).

In Australia there is a separation of powers and institutions entrenched in the Commonwealth Constitution not in the various State Constitutions. Also the Commonwealth Constitution requires a referendum to approve changes but State Constitutions do not, apart from specifically entrenched sections. Under the Australian Westminster system (like in the UK), the SOP is not complete, as the executive is part of, and responsible to, the legislature. In Australia, the constitutional separation of the three branches of government (the Executive, the Legislature and the Judiciary), involves each branch with its own separate personnel or staff exercising specified autonomous powers.
There is of course some duplication and overlap of functions and personnel particularly between the Legislature and the Executive. In theory and practice the doctrine of the SOP focuses on the limits of government. In the UK and Australia, in theory and practice public institutions are designed to balance tensions and set priorities. Limiting government power by dividing authority (or power) between different institutions has the attraction of making governments accountable to other political institutions such as the Upper House of Parliament, the Judiciary or the other tier of government (Ryan et al 1999: 88).

With the Government’s control over Parliament, the next most important institution to limit government power is the Courts (and the Judiciary). In Australia it is the High Court’s function to interpret the Commonwealth Constitution. The High Court has consistently held that the judicial power of the Commonwealth is exercisable only by the courts mentioned in s. 71. These are the High Court, other Federal courts and State courts invested with Federal jurisdiction. The result is that there is an asymmetry between the interpretation of the legislative and executive powers as compared with the judicial power – a fact which was recognised by Dixon J in Victorian Stevedoring and General Contracting Co v Dignan (1931) 46 CLR 73 at 101. The High Court’s stated justification for this strict separation of the judicial power from the other powers was explained by the Privy Council in Attorney-General (Commonwealth) v R; Ex parte Boilermakers’ Society of Australia (1957) 95 CLR 529 as being based on the ground that ‘in a Federal system, the absolute independence of the judiciary is the bulwark of the Constitution against encroachments whether by the Legislature or by the Executive’: at
This separation of judicial power is also required to be carried out at the State level but has only been so in a limited extent. This thesis looks at the lack of the separation of judicial power and judicial independence at the State level in Australia. The SOP theory and its constitutional recognition in practice contributes to protecting citizens from government power.

**Figure 1**

**The separation of powers (theory)**

![Diagram of separation of powers](diagram.png)


This diagram (Figure 1) indicates the separation of powers (in theory) by separating the institutions (and their functions) that exercise the powers. The Legislature: Makes the laws and exercises legislative power; the Executive (government): Administers the laws and exercises executive power; and the Judiciary: interprets the laws and exercises judicial power. This diagram sums up the theoretical separation of the branches of
government and the theoretical separation of powers. The excellent diagram or model above has to be kept in mind when looking at issues from a separation of powers perspective. The diagram (Figure 1) applies more readily to the US model (Presidential system of government) than the UK model (Westminster system of government) as practiced in Australia. In practice there obviously has to be some merging of functions and merging of powers when administering and implementing policies. In the Westminster system of government, personnel hold both legislative and executive positions, Government Cabinet Ministers (who sit in both the Parliament and in the Cabinet Room) hold legislative and executive positions and exercise legislative and executive power, the judiciary and judicial power has traditionally been kept separate.

(b) The SOP’s importance in protecting citizens from the abuse of government power

John Locke (1690), commenting on the English system of government, was the first to formulate a liberal constitutionalism founded on natural rights. To Locke, the ‘state of nature’ is a state of perfect freedom and equality. However in a state of nature, property is ‘very unsafe, very insecure’ because ‘the enjoyment of it is very uncertain, and constantly exposed to the invasion of others’. Therefore, according to Locke, people are willing to quit the state of nature and enter into political society ‘for the mutual Preservation of their Lives, Liberties and Estates [Property]’. To Locke, the perfect freedom and equality, and the insecurity of property, found in the state of nature justified a liberal constitutionalism characterised by the rule of law and representative government with legislative, executive and federative powers. Since the aim of civil society is peace,
safety and the public good of the people, if a government attempts to destroy the property of the people, or reduce them to slavery, the people have a right to resume and exercise their original liberty. Natural right and original freedom allow the people to dissolve governments; to Locke, political power is based on, and limited by, natural rights (Patapan 2000: 45-6).

Australia follows the foundation of English common law. English common law is the body of law that has evolved from ancient customary law through its application by the courts to changing social and economic conditions. In England, it is the original source of rights and liberties – including the rights and liberties of monarchs, parliaments, and courts – and until the seventeenth century, the powers of Crown and Parliament alike were thought to be subordinate to its fundamental principles. In 1607, in *Dr Bonham’s Case*, Chief Justice Sir Edward Coke was able to make his memorable stand against Parliament’s attempt to make the president and the censors of the College of Physicians judges in their own cause. Coke CJ declared that ‘when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void’. In the constitutional struggles of the seventeenth century, the common law courts threw their formidable weight behind Parliament’s cause to make the law supreme over the prerogative. At the same time, Parliament was defending the common law against royal incursions (Ratnapala 2002: 259-60).
Australia also follows the foundation of English statute law. Statute law is the law enacted by the legislature or by officials acting under authority conferred by the legislature, statute law supersedes common law in the event of conflict. In the modern era of constant legislation, statute law has become a major source of rights and duties of citizens. The distinctive character of statutory rights is that they are granted by the legislature or by a delegate of the legislature and may be withdrawn by the legislature or the delegate. In the United Kingdom, however, certain historic enactments have constitutional status. They include *Magna Carta* (the *Great Charter*) 1215; the *Bill of Rights* 1669 and 1689; the *Act of Settlement* 1701; the *Act of Union with Scotland* 1707 and the *Parliament Acts* 1909 and 1949. These statutes are regarded as constitutional in the sense that they have widely been accepted as defining the constitution and unlikely to be expressly abrogated by the sovereign Parliament. The *Human Rights Act* 1998 in the UK gives effect to the European Convention on Human Rights and it remains moot whether this statute will acquire similar status (Ratnapala 2002: 262).

In Australia, legislative powers belong to the Commonwealth and State Parliaments, but they may by Act delegate legislative power to other authorities. The Commonwealth Constitution grants the Commonwealth Parliament power to make laws with respect to the subjects specified in section 51. This power is concurrent with State legislative power, though in the event of a conflict between the Commonwealth and State law, the former prevails (section 109). The Commonwealth Constitution also grants certain legislative powers exclusively to the Commonwealth Parliament. Laws enacted under the general legislative powers conferred by the Commonwealth and State Constitutions do
not necessarily create constitutional freedoms and rights. The freedoms and rights that they establish are subject to modification and repeal by later laws of these legislatures (Ratnapala 2002: 262). In March 2004 the ACT Government enacted the ACT Bill of Rights (ACT Human Rights Act 2004) based on similar Bills in NZ and the UK. It will be interesting if this Act has an impact on the Australian States and the Commonwealth in the future.

**Conclusion**

The Separation of Powers (SOP) theory has a long history going back into ancient history. The modern theory of the SOP (Locke 1690; Montesquieu 1748; Blackstone 1765-69; Madison 1788) can be traced back to ancient Greece where a theory of mixed constitutions arose. Modern history has seen the development of the system of checks and balances developed by the French philosopher Montesquieu (1748). The English and American models of the SOP were developed in the seventeenth and eighteenth centuries. The Australian system of government and SOP derives from a mixture of these two systems or models. The Australian model mixes the English and American models; it might be called the Australian “Washminster” version or model (Thompson 1980). The Australian States also have this mixed system of government. The English system with executive control dominates at this level of government, however it lacks the SOP influence that can be seen at the Commonwealth level of government.

The SOP theory is important in protecting citizens, in practice, from the abuse of government power. However with recent reductions in civil rights by various pieces of
legislation, either a return to the ideas of Locke and Blackstone are required or the enactment of Bills of Rights. At the Commonwealth and State level, Bills of Rights will be required to restore the balance in the SOP and civil rights through the common law, that is, by judicial review. The Commonwealth is a guide for the States but improvement of the acceptance and implementation of the SOP at the Commonwealth and State level is necessary for the future.
CHAPTER 3
THE SEPARATION OF POWERS -
THE COMMONWEALTH OF AUSTRALIA

Introduction

A useful starting point for our investigation of the separation of powers doctrine in the Australian context is of course the federal government. It can serve as a useful guide for the States. Since federation the Commonwealth has taken priority over the States and continues to do so. The chapter establishes the advantages of the Commonwealth model over the States. The main advantage is the separation of powers entrenched in the Commonwealth Constitution. The Commonwealth Constitution cannot be amended without the approval of the people, unlike in the States. The State Constitutions are pieces of legislation that can be amended by State Parliaments and they do not include constitutionally entrenched separation of powers. The High Court has interpreted the Commonwealth Constitution as providing separation of judicial powers and only courts properly constituted under Chapter III of the Constitution could exercise any part of the judicial power of the Commonwealth. The High Court also held that the Parliament could delegate law-making powers to the executive. The chapter looks at the advantages and disadvantages of the federal model and also the importance of the Constitution, the SOP and judicial review in protecting citizens from the abuse of government power. A lack of civil rights in the Constitution and the executive legislating away rights may require a remedy in the form of a Bill of Rights.
The High Court has adopted a more limited separation of powers and a preference for British practice and theory (derived from Locke 1690 and Blackstone 1884) over the American practice and theory from the *Federalist* 1788 understanding of the separation of powers. The High Court has recently (under Mason CJ 1990) announced that it no longer declares the law and that in some sense it now makes the law and had always done so. This dislodged its jurisprudence from case-by-case adjudication to jurisprudence that pronounced on general principle. Mason’s view that the court is making not just declaring law is problematic but is backed in the well developed literature in the critical legal studies movement.

The executive interference with the court (Murphy and Kirby JJ) and problems with the separation of legislative and executive powers in a system characterised by responsible government suggest the Commonwealth model has its own problems. Disadvantages of the federal model include examples such as the political attack on the High Court by Rob Borbidge and Tim Fisher after the *Wik* (1996) Decision and the public battle between Gerard Brennan CJ and Darryl Williams over the role of the executive in defending the judiciary from political attack (McGregor 1998; Patapan 2002: 247-9). The fairly recent conflict between Ruddock and the Federal Court over immigration matters was another critical example of a problem with the separation of powers at the federal level. In 1998, the replacement of Gerard Brennan with Murray Gleeson as CJ of the High Court has endorsed a return to ‘legalism’ rather than the previous Mason and Brennan era of ‘judicial activism’ (Patapan 2002: 241-3).
The SOP in the Commonwealth Constitution

The *Commonwealth of Australian Constitution Act* (1900) sets out a type of separation of powers between the legislative power (section 1), executive power (section 61) and judicial powers (section 71). This follows the *Constitution of the United States of America* (1788) that set out a separation of powers and institutions. The US Constitution sets out the separation of powers (Article I, section 1: the legislative power is vested in Congress (Parliament); Article II, section 1: the executive power is vested in the President; and Article III, section 1: the judicial power is vested in the Supreme Court). The Australian Commonwealth Constitution sets out the SOP and institutions (Chapter I, Section 1: the legislative power is vested in a Federal Parliament; Chapter II, Section 61: the executive power is vested in the Queen and is exercisable by the Governor-General (in practice the PM and Cabinet); Chapter III, Section 71: the judicial power is vested in a Federal Supreme Court (the High Court and other Federal Courts) (see Figure 2).

High Court’s interpretation of the SOP

The separation of powers in Australia has been fundamentally shaped and defined by the High Court (Sawer 1961; Vile 1967; Finnis 1967) which chose a Blackstonian ([1765-69] 1884) common law conception of the separation of judicial powers, in preference to the principles elaborated in Hamilton, Madison & Jay [1788] *The Federalist* and articulated in the American Constitution (1788) (Patapan 1999: 391). The High Court’s admission that it now ‘makes the law’ (Mason 1990; Kirby 1990, 1997; Marks 1994; Brennan 1998;
Patapan 2000: 5, 31), as discussed below, has presented unprecedented theoretical and political challenges. The Court has been compelled to reconcile its new role with the rule of law and to explain what law-making means for the judiciary. There are now challenges to the concept of the separation of judicial power in Australia. This includes a transformation in the role of the Attorney-General, the creation of new institutions and a move towards an American conception of checks and balances (Patapan 1999).

The Australian Founding Fathers faced a choice between two major conceptions of the separation of powers: one derived from the American Constitution and The Federalist (Hamilton, Madison and Jay 1982 [1788]); the other from British constitutionalism and Blackstone (1765) (Patapan 1999: 391). The Australian Founding Fathers settled upon an amalgam of British responsible government and American federalism. The result has been described as ‘a hybrid form of government’ (Emy 1978: 181; Galligan 1995: 38). This amalgamated and mutated Australian system revealed the ambiguity of the terms settled upon in the Australian Constitution. It allowed the High Court to be the pre-eminent interpreter of the Constitution and to define the nature of the separation of powers in Australia (Thompson 1980; Maddox 1991; Singleton, Aitkin, Jinks & Warhurst 1996; Patapan 1999; Patapan 2000: 150).

The High Court took up this opportunity and defined the separation of powers in Australia principally as a separation of the judicial power from the other powers [Alexander’s Case (1918); Dignan Case (1931)]; this had far reaching influence on the development of Australian constitutionalism until the court’s recent admission in 1990.
that it not only interprets the law but also ‘makes’ the law (Mason 1990). This declaration has exposed the court to political and scholarly criticism and raised profound questions concerning the tension between a lawmaking judiciary and the doctrine of separation of powers. This theoretical tension creates immediate political implications for the separation of powers doctrine in Australia; it makes the judiciary more vulnerable to political attack, it requires a new role for the Attorney-General, and it requires the creation of new mediating institutions. In 1995 Attorney-General Williams argued that there was no longer any reason to treat the High Court as an institution differently to other policy-making bodies (Williams 1995). All of these suggest a shift towards an American conception of institutional checks and balances (Patapan 1999: 1-2).

A preliminary review of recent Australian literature on the separation of powers in Australia may be seen in the work of authors such as Haig Patapan and Suri Ratnapala. Their recent works on the subject of the separation of powers include: Patapan 1999: 391-407; Patapan 2000: 150-177; Ratnapala 2002: 88-117, 118-143. For the history and philosophical dimensions of the separation of powers doctrine: see Ratnapala 1990; Ratnapala 1994; Lumb and Moens 1995; and Zines 1997. At first glance the foundation of the legal and constitutional position of the separation of powers in the Australian Commonwealth Constitution appears clear (s. 1 legislative power; s. 61 executive power; s. 71 judicial power). In regard to the basic constitutional provisions (in the Australian Commonwealth Constitution) effecting the separation of legislative, executive, and judicial powers, the main sections are ss.1, 61, and 71. Yet the High Court has focussed on the separation of the judicial power (s. 71) [see the Dignan Case 1931].
The following diagram (Figure 2) on the theory and practice of the Australian Separation of Powers, indicates the separation of powers and the separation of institutions that use those powers at the Commonwealth level. The Commonwealth Constitution separates the three powers (legislative, executive and judicial powers) and the institutions that exercise them.
Figure 2

The Separation of Powers - Australian Commonwealth (in theory & practice)

This figure is not available online. Please consult the hardcopy thesis available from the QUT Library.

This diagram (Figure 2) (from a Commonwealth Government publication) indicates the separation of powers in the Australian Commonwealth in theory & practice. The constitution sets down the theoretical separation of institutions and functions and powers. The diagram does not include the fact that the British monarch is part of the legislature and the executive and that the courts are the courts of the Crown. In practice there is obviously some merging of functions and merging of powers when administering and implementing policies.

**Separation of Legislative and Executive Power**

The Westminster system blurs the separation between the personnel of the Parliament and of the Executive. Indeed, the personnel hold dual roles simultaneously. Section 64 of the Commonwealth Constitution gives effect to this position (Carney 1993: 8). The section indicates that the Governor-General appoints Ministers or officers to administer departments of State of the Commonwealth. The section also states that Ministers are to sit in Parliament, a Minister shall not hold office for a longer period than three months unless he or she becomes a Senator or a member of the House of Representatives. The practice has been for Ministerial appointments to be made from existing members of Parliament (Lumb and Moens: 1995: 344). The Prime Minister by convention comes from the House of Representatives.

The delegation of law-making power to the executive is also permitted: *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (Dignan’s Case)* (1931) 46 CLR 73. The High Court has upheld extremely wide delegations of power to the
Governor-General or a Minister. For example, it permitted a power to make regulations with respect to the employment of transport workers (*Dignan’s Case*). It has also permitted the power to prohibit the importation of goods (*Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170) (Carney 1993: 8). Importantly, the decision in *Dignan* overturned the rule against the delegation of unlimited law-making power that lies at the foundation of modern constitutionalism (Ratnapala 1990: 22).

In *Dignan’s Case* (1931) 46 CLR 73 at 101-2, the High Court stated that the delegation of wide law-making power was consistent with British constitutional practice. Ratnapala (1990: 23) argues that the Court was clearly mistaken in surmising that British constitutional practice had discarded the rule against delegating primary legislative power. The following year, the *Committee on Ministers’ Powers* examined the whole issue of delegated powers and concluded that there was no such practice! This Committee found that the British Parliament rarely delegated power to the executive to legislate in matters of principle; it did not delegate power to legislate without limits or to impose taxes (see Locke 1690 *Second Treatise*, sections 138-42). It also found that when Parliament resorted to such delegations, it had been on account of ‘the special subject matter and without intention of establishing a precedent’ (the *British Parliamentary Committee on Ministers’ Power* (the Donoughmore Committee): Report (1932), Cmd 4060, 1931: 31). There was a clear constitutional principle established by convention against the delegation of wide law-making power to the executive (Ratnapala 2002: 106).


Separation of Judicial and Non-Judicial Power

The High Court has given legal effect to the doctrine of Separation of Powers in relation to the judicial power of the Commonwealth. It is in this respect that the position at the Commonwealth level differs markedly from that at the State level. The reasons given by the High Court have already been indirectly noted earlier: the constitutional entrenchment of the judicial power in the High Court and the other federal courts (s. 71); the prescription of the content of the judicial power in Chapter III of the Constitution, and the critical need to maintain judicial independence in a federal system (Carney 1993: 8).

Carney (1993: 7) argues that there are two related legal principles inferred by the High Court from its interpretation of Chapter III of the Constitution, they were established forty years apart. First, judicial power can only be vested in s. 71 courts (the High Court, federal courts and State courts) (*New South Wales v Commonwealth* (the *Wheat Case*) (1915) 20 CLR 54 - Inter State Commission). Second, non-judicial power cannot be vested in s. 71 courts no other body other than s. 71 courts may be vested with judicial power (*Attorney-General (Cth) v R; Ex parte Boilermakers’ Society of Australia* (the *Boilermakers’ Case*) (1956) 94 CLR 254.

The rule that judicial power may be vested only in courts designated in s. 71 is important in determining which bodies may exercise judicial power in the Commonwealth of Australia. Nevertheless it does not completely answer the question. Apart from the High Court, s. 71 permits judicial power to be vested in ‘such other federal courts as the
Parliament creates, and in such other courts as it invests with federal jurisdiction’. Ratnapala (2002: 146) argues that the High Court has time and again said that judicial power can only be vested in a court in the strict sense of the term \textit{[Huddart Parker and Co Pty Ltd v Moorehead (Huddart Parker Case) (1909) 8 CLR 330 at 355; Waterside Workers’ Federation of Australia v J W Alexander Ltd (Alexander’s Case) (1918) 25 CLR 434 at 467 and 480; British Imperial Oil Co Ltd v Federal Commissioner of Taxation (1925) 35 CLR 422 at 432-3; R v Davison (1954) 90 CLR 353 at 366; Attorney-General (Cth) v R; Ex parte Boilermakers’ Society of Australia (Boilermakers Case) (1955-56) 94 CLR 254 at 270, 289 and 296; R v The Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1971) 123 CLR 361 at 372].}

In regards to the separation of judicial and non-judicial powers, according to Ratnapala (1999: 2-10) the case law on judicial power reveals four aspects of the High Court’s treatment of the subject. First, it reveals the High Court’s rationale of the separation of powers in Australia. An important question for the High Court is: Why does the Court think that judicial and non-judicial powers should be kept in different hands? Second, the case law reveals the High Court’s rules that determine the extent to which judicial and non judicial powers are separated. These rules are either prohibitory or permissive. Third, the case law reveals the High Court’s definition of the concept of judicial power, that is, the kind of power that is almost exclusively vested in federal courts. Fourth, the case law reveals the High Court’s expedient High Court decisions that have severely compromised the separation of powers doctrine. It is important to outline the High Court’s rationale for the separation of powers doctrine.
The High Court’s rationale for the separation of powers doctrine

The High Court has justified the existence and use of the separation of powers doctrine in its interpretation of the Australian Constitution in two ways: federalism and libertarianism. The first justification emphasizes the importance of a separated and independent judiciary for the purpose of maintaining the federal character of the Constitution. Three main High Court cases that involve the federalism theme are: Alexander’s Case (1918) 25 CLR 434, 469-70, 479; Boilermakers’ Case (1956) 94 CLR 254, 276; and A-G Cth v R (1957) 95 CLR 529, 540-541. The second justification used by the High Court actually has two strands. The first strand indicates that, as part of the system of checks and balances, the dispersal of powers helps to protect individual liberty. The High Court’s response to concerns, such as it has become a law-making court, has been the attempt by the Court to justify the separation of powers by emphasising its importance for the protection of liberty (Brown 1992; Winterton 1994; Zines 1994, 1997; Parker 1994; Hope 1996; Patapan 1999: 399). Two cases that involve the first strand of the libertarian theme are: Q v Davison (1954) 90 CLR 353, 380-81; and Q v TPC (1969-70) 123 CLR 361, 392. The second strand indicates that by securing judicial independence, the dispersal of powers protects liberty. Four cases that involve the second strand of the libertarian theme are as follows: NSW v Cth (1915) 20 CLR 54, 93; Kotsis (1970) 123 CLR 69, 109-10; Q v Quinn (1977) 138 CLR 1, 11; and Re Tracey (1988-9) 166 CLR 519, 579-80 (Ratnapala 1999: 2).

The Commonwealth Legislative Power
The Commonwealth legislative power is vested in the Federal Parliament under s. 1 of the Constitution. The Australian legislature is a Parliament that is bicameral and encompasses two representative bodies: the House of Representatives and the Senate. The Australian Parliament has both houses duly elected. In the Australian political system the Legislature proposes, amends and makes laws, however, it does not monopolise the law-making functions. Ministers also have access to law-making functions. The Parliament also spends much of its time on law making. A large part of the work of the legislature is not concerned with law making at all; one of its most important functions is to criticise the government (in some countries they make or unmake governments). The legislature debates issues of wide public concern. Members of some legislatures may have limited or no effective law-making role particularly if they see their primary goal as constituency work (eg. dealing directly with the concerns of constituents).

In the Australian Constitution, the first six sections deal with general matters relating to the Legislature and the Executive. The legislative power of the Commonwealth is to be found appropriately in Section 1 of the Australian Constitution. This power is to be exercised by a bicameral Legislature which is defined as consisting of the Queen, the House of Representatives and the Senate (As to the position of the Senate, see discussion and cases concerning ss. 7, 53 and 57; Lumb and Moens 1995: 48).

The system of government, in Australia is a constitutional monarchy because the Queen is part of system of government under the Constitution. The Queen is specifically
recognised as a constituent part of Parliament, in accordance with British and colonial constitutional practice. The Queen’s participation in legislation is, of course, a purely formal requirement. In practice, the Queen’s powers are exercised by the Governor-General (ss 2, 61) who assents in Her name to Bills passed by both Houses of Parliament (or, in the case of a deadlock, follows the procedure laid down in s 57 in the Australian Constitution). The royal assent is exercised by the Governor-General in the light of the doctrine of responsible government is given on the advice of the Ministry (see s. 64). Parliamentary Bills are required to be reserved for the Royal assent (see s. 74) but this is a purely formal requirement (see ss. 58, 60). (Lumb and Moens (1995: 48) argue that it is significant to note that the Queen may disallow a Bill assented to by the Governor-General (s. 59), but despite suggestions to the contrary in an early case (Commissioner of Taxation (NSW) v Baxter (1907) 4 CLR 1087 at 1097) this power must be regarded as moribund today. (See discussion of s. 59, Proceedings of the Australian Constitutional Convention (Adelaide Session), Vol II, 1983, p. 40).

The Commonwealth Executive Power

In theory, the executive branch of government has been depicted as the branch for law application and to execute and administer the law, unlike the legislative branch, which is depicted as responsible for law-making. In practice, in Australia, as has often been the case elsewhere, the executive branch (or arm) has become heavily involved in the making of law. It is important to understand the legal, constitutional basis of the Commonwealth executive power. The executive branch, in practice, includes a range of components including: the head of state (Monarch); the head of government (Prime Minister); the
heads of the government’s team (Cabinet or Ministry); the public service (the bureaucracy); and the police and armed forces (agencies responsible for enforcement of laws related to public safety and order). The legal basis of the power is found in the Australian Constitution. The Australian Constitution distributes legal powers between the various organs of government; Section 61 vests the executive power in the Queen but it also provides that such power is exercisable by the Governor-General as the Queen’s representative (Lumb and Moens 1995: 334).

It is important to note that, in practice, in Australia, the doctrine of separation of powers must be viewed in the light of the operation of the doctrine of responsible government, so far as it concerns the relationship between executive and legislative powers. The Executive (that is, the Ministry) is not confined to the mere execution and administration of the laws made by parliament. The members of the executive participate in the legislative power both in the making of legislation strictly speaking (as members of parliament) and in the making of subordinate legislation by the delegation of legislative power by the parliament. There is a fusion of legislative and executive personnel in the Australian version of the Westminster system of government. The theoretical check against abuse of power lies in the fact that by their membership of parliament, the ministers, are subject to its control, both in terms of their rule-making functions and in terms of their administrative functions. (See Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73. The Acts Interpretation Act 1901, s. 48 requires regulations to be laid before both Houses of parliament). The doctrine of responsible government ensures that ministers are responsible for their actions to parliament. This doctrine receives at least implicit recognition in succeeding sections of
Chapter II of the Constitution, especially in s 64. According to s 64, a Minister of State shall be or become, within a period of three months, a member of either House of the Parliament (Lumb and Moens 1995: 334).

In the Australian system of government the Executive government includes not only the Queen, the Governor-General and Her Majesty’s Ministers but also the members of the public service and various authorities, boards and tribunals (See, for example, Administrative Appeals Tribunal Act 1975) associated with the day-to-day administration of the affairs of the Commonwealth, although these bodies may not be within the shield of the Crown. In Jerger v Pearce (1920) 28 CLR 588 at 594 Stark J considered that s. 61 was an adequate basis for the exercise by the Governor-General (as distinct from the Queen) of the power to declare the cessation of a state of war. In R v McFarlane; Ex parte O’Flanagan and O’Kelly (1923) 32 CLR 518 at 533 Knox CJ said that it could not be maintained that s 61 prevented any body other than the Governor-General from sharing in the exercise of the executive power of the Commonwealth. As to the executive power of the Inter-State Commission, see State of New South Wales v Commonwealth (1915) 20 CLR 54 at 109 per Rich J; Huddart Parker and Co Ltd v Moorehead (1909) 8 CLR 330 at 358, 376, 387. See also discussion of s 51 (xxiv).

As to co-operative arrangements between Commonwealth and States. The content of the executive power is not exhaustively defined by s. 61 and its specific limits have to be determined aliunde (See Le Mesurier v Connor (1929) 42 CLR 481 at 514 Isaacs J). Part of the executive power is to be found in the Constitution itself, whether express or
implied (See discussions about s 51 (xxxix) - the incidental power). The executive power is limited by the Federal nature of the Constitution. Due to the Federal structure of government, there is a need to allocate the executive functions of the Commonwealth Government so that these do not overrule State powers. In the Australian Constitution, Section 61 (in conjunction with ss. 69 and 70) provides the outline of this allocation, dividing the constitutional powers between the Commonwealth and the States. This is true particularly of the routine matters of administration that fall within the competence of a Commonwealth department. (Whether they be departments transferred from the Colonies under s. 69 or established under s. 64) (Lumb and Moens 1995: 335). A leading figure in the executive is the Governor-General.

**The Commonwealth Judicial Power**

The judicial power of the Commonwealth is to be found in (s. 71) of the Australian Commonwealth Constitution. This section is one of the most important in the Constitution (Lumb & Moens 1995: 352). Various authors have studied the judicial power of the Commonwealth (Quick & Garran 1901; Else-Mitchell 1961; Wynes 1976; Cowen & Zines 1978; Lane 1979; Howard 1985; Zines 1992; Galligan 1995; Solomon 1999). The importance of judiciaries and judicial power to political life in Australia is undeniable. Citizens have regular dealings with the executive (or public service) branch of government but citizens do not have regular contact with the judicial system; nor does the news media regularly analyse court decisions. The role of the judiciary as a vital part of governmental process, as a result, is less appreciated. The growth of administrative courts and quasi-judicial tribunals has caused difficulty distinguishing between making
rules and interpreting them, that is, between rule-making and rule adjudication. The High Court as an apparently independent, impartial and neutral body that was supposed to interpret the law now claims to make the law (Patapan 1999: 403).

This recent development is a concern for Australia’s political system where separation of the judicial from the other arms of government is considered to be an indicator of ‘political civilisation’ and ‘democracy’. The rule of law is one of the pillars of constitutional democracy and the Legislature must operate not only through the law, but also under the law (de Q. Walker 1988: 4). The High Court’s pre-eminent role in interpreting the terms of the Commonwealth Constitution, has also as a result, delineated the character of the separation of powers and democracy in Australia (Thompson 1980; Emy & Hughes 1991; Lucy 1993: 321-4; Singleton et al 1996: 16; Maddox 1991: 176; Patapan 1999: 391-407; Patapan 2000: 150). The High Court has also emphasised the importance of the separation of powers for the protection of liberty (Brown 1992; Winterton 1994; Zines 1994, 1997; Parker 1994; Hope 1996). The legal and constitutional basis of Commonwealth judicial power is to be found in section 71 in the Australian Commonwealth Constitution.

Lumb and Moens (1995: 352) argue that one of the most important sections in the Australian Constitution is section 71. This section (s. 71) in the Australian Constitution has led to the judicial interpretation in *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 (*Alexander’s Case*) and the *Attorney-General of the Commonwealth v R* (1956) 94 CLR 254 (HC); (1957) 95 CLR 529 (PC) (*Boilermakers*
Case) which affirms the paramount and independent position of the courts in the constitutional scheme. Section 71 is tied to the following section (s. 72), which prescribes the tenure of High Court and other Federal judges.

The concept of Judicial Power

Nearly all decisions concerning judicial power have derived from the classic statement on judicial power, which is from the former Chief Justice of the High Court, Griffith CJ in *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357. In that case, Griffith CJ states that:

... the words ‘judicial power’ as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.’

Australia’s first Chief Justice, Sir Samuel Griffith in this way defined the Commonwealth judicial power. Griffith CJ’s definition of judicial power thus refers to three elements of the concept: (a) a controversy; (b) impact on life, liberty, or property; and (c) conclusiveness of the decision. One must, however, heed the warning issued in *R v Davison* (1954) 90 CLR 353 at 366 that ‘many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive’ (Lumb and Moens 1995: 353). Another issue of concern for the High Court in relation to the separation of powers is the separation of judicial and non-judicial power.
Separation of Judicial and Non-Judicial Power - Alexander’s Case

The High Court has been called upon, in a number of cases, to determine questions of two types, converse by nature, yet dependent for their resolution upon the same process of reasoning. In the first type of case, the question is whether there has been conferred upon a court, capable by virtue of Chapter III of exercising Federal jurisdiction, a power which, when characterised, is found to be non-judicial and therefore invalidly conferred. In the second type of case the High Court must decide whether a power that is found to be judicial has been conferred upon a body (whether it be called a court or not), which is precluded by Chapter III from exercising Federal jurisdiction.

The High Court in both types of cases must decide whether the power is judicial or not. In *Waterside Workers’ Federation of Australia v JW Alexander Ltd (Alexander’s Case)* (1918) 25 CLR 434, both questions arose. The High Court found in that case that the enforcement provisions provided for an exercise of judicial power, and the Court also found that the body exercising the power was not a court as its members were not appointed for life in accordance with s. 72 (before the constitutional amendment of 1977) (Lumb and Moens 1995: 360). The Judicial power cannot be combined with non-judicial power (see SOP theory by Locke, Montesquieu and Blackstone).
Combination of Judicial and Non-Judicial Powers

In 1915 a High Court case *New South Wales v Commonwealth* (1915) 20 CLR 54, dealt with judicial and non-judicial powers and the use of judicial power by persons who were not life appointees. The High Court held in this case that the Inter-State Commission established under s. 101 (the members of which were not appointed for life) could not exercise judicial power. In 1918 the High Court again dealt with a similar issue involving the Arbitration Court. After the High Court decision in *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (Alexander’s Case) (1918) 25 CLR 434 in which it was held that the power of enforcing decisions of the Arbitration Court could not be vested in that body as its members were not appointed for life in accordance with s. 72, the *Conciliation and Arbitration Act* 1904 was amended to provide for life appointment of its members. The Court of Conciliation and Arbitration then proceeded on the basis that it could not only make awards covering wages and conditions of workers in cases that came before it but it could also execute those awards; that is to say, it combined the exercise of judicial power with quasi-legislative power.

In another High Court case, [*Attorney-General of the Commonwealth v R* (the Boilermakers’ Case) (1956) 94 CLR 254 (High Court); (1957) 95 CLR 529 (Privy Council)] however it was held that a body established with the principal purpose of performing non-judicial functions could not validly have judicial powers conferred upon it even though it might be constituted on the same basis as that of a Federal court. Judicial power could not be combined with other types of powers. As a consequence the judicial
power conferred on the Arbitration Court to enforce awards and to punish for contempt was invalid. (It was recognised, however, that some administrative power could be conferred on a court so long as it was merely incidental to the exercise of the judicial power). The power of enforcement was of course pre-eminently judicial. As a result, the combination of power with the arbitral powers was not within the constitutional competence of the Federal Parliament. It was pointed out in the Boilermakers’ Case (1956) that:

... in a federal form of government a part is necessarily assigned to the judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme ... The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of respective powers of the governments were placed in the federal judicature [(1956) 94 CLR 254 at 267-8].

The effect of s. 71 was, therefore, according to the High Court case to the Boilermakers’ Case (1956) was to demarcate the judicial power as an independent power, which could not be tied to other powers. (For a discussion of the Boilermakers Case, see Thomson (1958) 2 Syd LR 420; Sawer (1961) 35 ALJ 177; see also Finnis (1968) 3 Adel LR 159). It was impossible to escape the conviction as pointed out in the Boilermakers’ Case that:

Chapter III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power, notwithstanding that it is organized as a court and in a manner which might otherwise satisfy ss. 71 and 72, and the Chap. III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it [(1956) 94 CLR 254 at 296].
As a consequence of this decision, the Federal Parliament reorganised the arbitration system. The reorganisation involved the establishment of an Arbitration Commission (Now the Australian Industrial Relations Commission) to exercise the arbitral powers of the old Arbitration Court and a new Industrial Court (There is now an Industrial Relations Court of Australia; see Industrial Relations Reform Act 1993 Pt 7; see discussion of cases involving s 51 (xxxv)) to exercise the judicial powers of the old court.

In another High Court case Seamen’s Union v Matthews (1956) 96 CLR 529 it was held by the High Court that the Industrial Court was a Federal court validly established under Chapter III and capable of exercising the judicial power of the Commonwealth. In the High Court case Tana v Baxter (1986) 160 CLR 572; 68 ALR 245, Brennan J raised doubts about whether the New South Wales Industrial Commission was a court for the purposes of s. 71 of the Constitution: at 581-2 (Lumb and Moens 1995: 364-5).

**ADVANTAGES OF THE AUSTRALIAN FEDERAL MODEL**

There are several advantages of the Australian federal model of the SOP over the States. The High Court chose a Blackstone (1884) theory of the SOP from the English system of government. The Australian system of government has inherited the Locke (1690) theory of the SOP (that was further modified and updated by the ideas of Montesquieu (1748) and Blackstone 1884) from England. The High Court chose a Blackstonian, common law conception of separation of judicial powers in preference to the principles elaborated in The Federalist (1788) and articulated in the American Constitution (1787). The advantages of the Commonwealth SOP also included the Australian Commonwealth Constitution, which can be altered only by referendum. Any alteration to the Australian
Commonwealth Constitution must be subjected to the constitutional alteration procedure prescribed by s. 128 of the Constitution. Advantages also includes: common law rights; Constitutional rights (express rights, implied rights); SOP – (3 institutions, 3 powers) – constitutionally entrenched; High Court – judicial review; High Court - Judicial independence; and the resulting protection of rights. Finally the SOP is important in protecting citizens from the abuse of government power.

The protection of rights in Australia

Australia does not have a Bill of Rights, like that in the Constitutions of the United States, the UK, Canada, NZ and other countries. As a general rule, in Australia, the protection of rights is left to the federal and State Parliaments and, in the application of the common law (i.e. judge-made law), to the courts. The High Court of Australia is Australia’s final court of appeal, therefore has a central role in the safeguarding of individual rights. Here are pointers to some of the High Court’s major decisions on individual rights. They are divided into decisions on constitutional rights and decisions on common law rights.

Constitutional rights

The Australian Constitution provides few explicit guarantees of individual rights. Such guarantees as there are mainly operate to limit legislative and executive action by the federal government; generally they do not limit the actions of State governments. In general, the High Court, in its interpretation of the Constitution, has taken a conservative view of the Constitution’s protection of individual rights. The main protection
recognized by the Court is a limitation on the legislative power of the Commonwealth (i.e. the federal government). Recently, however, the Court has recognized that the Constitution contains not only express rights but also implied rights. The scope of this controversial trend remains to be seen.

Limitation on the legislative power of the Commonwealth (Common law rights)

The High Court has limited the legislative power of the Commonwealth over the years in various important decisions. Two important decisions that demonstrate the authority of the High Court to limit the legislative power of the Commonwealth Government are the Communist Party (1951) Case and the Nationwide News (1992) Case. In the Communist Party Case, at the height of the Cold War, the Australian Government sought to ban the Australian Communist Party. This might be compared to the present Howard Government’s attempt to ban illegal immigrants and terrorists. The High Court held in the Communist Party Case that the legislation was unconstitutional. Its decision was not based on any guarantees of free speech or free association; the Court simply held that the legislation did not fall within any of the subject areas over which the Commonwealth Parliament could make laws (Australian Communist Party v Commonwealth (1951) 83 CLR 1). A future High Court challenge to the Howard Government’s migration laws, anti-terrorism laws or Industrial Relations (IR) laws might succeed on grounds of restriction of civil rights.
In the *Nationwide News* (1992) Case, a statute made it an offence to use writing and words calculated to bring into disrepute a member of the Industrial Relations Commission (a body for conciliating and arbitrating industrial disputes). The High Court held the law to be unconstitutional because it could not be said to be incidental to the power to make laws for conciliation and arbitration for the prevention and settlement of industrial disputes. Note that in the judgments of Brennan, Deane, Toohey and Gaudron JJ are the first signs of the recognition of an implied right of political disclosure (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1).

**Implied Bill of Rights**

The Australian Commonwealth Constitution is entrenched with Judicial Independence. The High Court judges have recently established constitutionally derived implied rights, due to the limited number of express rights in the Constitution. There is no constitutional or statutory Bill of Rights in Australia at the Commonwealth or State level, unlike for example: the UK (1689, and 1998); US (1791); Canada (1982); and NZ (1990); and more recently in Australia the ACT (2004). A Bill of Rights is a way to help protect basic civil and political rights. Human rights have been under significant threat in Australia since the September 11 attacks and the *Tampa* controversy. A Bill of Rights is not a guarantee of civil rights as seen in overseas experience. Examples such as the Constitution of the former USSR of 1977 which embodied a magnificent Bill of Rights yet the guarantees were ignored or flagrantly abused; or the tragedies associated with race relations in the USA (different interpretations of the Bill of Rights favouring
enforced segregation, then out-lawing segregation, then licencing affirmative action – reverse discrimination) and the original McCarthyism in the USA occurred notwithstanding the Bill of Rights. Menzies (1967: 54) articulated a classic statement of the traditional Australian view that the people’s democratic control over the executive through a parliament of elected representatives obviated the need for a Bill of Rights (Menzies cited in Galligan 1995: 140). Menzies gave his own ringing endorsement of responsible government as ‘the ultimate guarantee’ of rights:

[R]esponsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition.

I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world (Menzies 1967: 54).


A further danger to human rights and fundamental freedoms is posed by the dominance of the Executive Government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power … (Brennan 1992: 8).

As late as 1986 the High Court rejected the existence of an implied constitutional guarantee of freedom of communication. But by 1988 the High Court was hinting at a change in direction. Heightened concern with protecting human rights in Australia has
been evident in a range of public statements and forums in recent years. In 1988, the chief justice of the High Court, Sir Anthony Mason, announced that he had changed his mind in favour of an Australian Bill of Rights because Australia was going against the international trend and getting out of step with comparable countries such as Canada (Mason 1989). Again in 1988, the Constitutional Commission, after exhaustive consideration, came out in favour of a Canadian-style entrenched bill of rights for Australia and proposed that a new chapter be added to the Constitution for that purpose (Vol. 1, 1988: 435-838, 1012-21; Galligan 1995: 133).

In 1988, the Australian High Court’s new jurisprudence was inaugurated in two decisions handed down on the same day, Nationwide News (1988) Case and the Political Advertising (1988) Case. In Nationwide News the Court held invalid a provision of the Industrial Relations Act 1988 (Cth) that made it an offence to bring the Commission or its members into disrepute. Although all the judges in the case held the Act invalid, different theoretical bases and approaches were offered for the protection of fundamental rights. The elaboration and justification of these perspectives, as well as the resolution of which views would prevail, were outlined in greater detail in the Political Advertising case (Patapan 2000: 51).

The Political Advertising case concerned the validity of Labor’s Political Broadcasts and Political Disclosures Act 1991 (Cth) which extended the disclosure rules on donations and amended the Broadcasting Act 1942 (Cth), prohibiting the broadcasting of political advertising in election periods and requiring broadcasters to make units of time
available, free of charge, to political parties and other groups and individuals. The enactment was defended by the Labor government as a way of addressing the potential for undue influence in raising the increasingly prohibitive sums needed for election advertising, especially on television. The provision was challenged by New South Wales and television stations on the grounds that it affected State entitlements and contravened an implied guarantee of freedom of communication secured by the Constitution (Patapan 2000: 51).

By a majority, the High Court held the provision invalid because they infringed the right to freedom of communication on political matters implied in the system of representative government provided for in the Constitution (Patapan 2000: 51). In Nationwide Newspapers v Willis (Nationwide News) (1992-1993) 177 CLR 1 and Australian Capital Television v Commonwealth (ACTV) (1992-1993) 177 CLR 106, the High Court, by majority, decided that the Constitution contained an implied right to the freedom of communication on political matters. The Court’s decisions have generated vigorous debate in political and academic circles with some applauding the decisions and others viewing them as a dangerous trend in High Court activism. The critics of the decisions say that the High Court has gone too far in reading into the Constitution words that are not there (Ratnapala 2002: 276).

The theoretical foundation of implied rights in Australia can be traced back to English constitutional history and English common law tradition. It is relevant to note that Canadian implied rights decisions preceded the enactment of the Canadian Bill of Rights
in 1960 (more recently the Canadian Charter of Rights and Freedoms1982). The Australian High Court source or ground such rights and freedoms in institutions. The favoured institution is representative democracy as well as responsible government. Australian implied rights jurisprudence has mainly confined itself to freedom of speech. This might be explained by the public attacks on the Court over its decisions in Mabo (1988 and 1992) and Wik (1996) as well as changes in the High Court Bench (Patapan 2000: 59-61).

In March 2004 the ACT Chief Minister Joh Stanhope introduced the ACT Bill of Rights into the ACT Assembly and the Bill was passed. This was a historic moment for both the ACT and Australia. The ACT Human Rights Act 2004 was based on what happened in NZ (Bill of Rights Act 1990) and in the UK (Human Rights Act 1998). We have seen incremental erosions of rights such as the abuse of move-on powers, surveillance and the restriction of freedom of speech. We are also seeing threats to our lifestyle and basic rights, we all take for granted in the name of community security, the ‘war against terrorism’ and the fight against crime. The Chief Minister said the new laws are based on the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty to which Australia has been a signatory for over 20 years. The Act also establishes the office of Human Rights Commissioner. Mr Stanhope said “The Human Rights Act will protect our community by recognising basic and political rights” (ACT Media Release, 85/04 March 2004). More recently in October 2005 Mr Stanhope criticised and posted on his ACT Government website a draft of the proposed Commonwealth Anti-Terrorism
legislation. The draft was subsequently amended to accommodate concerns about reduction of civil rights.

**DISADVANTAGES OF THE AUSTRALIAN FEDERAL MODEL**

The Australian federal model also has disadvantages that make it problematic. The disadvantages can also be used as a guide for the States. Examples of recent problems or disadvantages of the federal model are provided below. Disadvantages include: the Commonwealth Constitution’s lack of civil rights; common law rights overruled by statute law; constitutional rights – No Bill of Rights. Examples of disadvantages of the federal model include: the High Court’s interpretation of the constitution in favour of the Commonwealth Government; the public battle between Gerard Brennan CJ and Darryl Williams over the role of the executive in defending the judiciary from political attack; the fairly recent conflict between Ruddock and the Federal Court over immigration matters; Judicial review (judicial independence); Commonwealth Executive infringes on the Judiciary; Murphy J (Judicial Activist); Kirby J (Judicial Activist); the Kirby Incident (2002); the Political attack on the High Court (by Rob Borbidge and Tim Fisher) after the *Wik* Decision; the High Court’s admission (through the then CJ Mason) that the court is involved in making and not just declaring law is problematic; the SOP importance in protecting citizens from the abuse of government power.
High Court – judicial review – High Court interpret the constitution in favour of the Commonwealth Government

Over a longer sweep of political history from 1920 to the present day, and in such leading decisions as the Engineers (1920), Uniform Tax (1942) and Tasmanian Dam cases (1983), the court has sanctioned substantial increases of central power. More recently, the court has awarded jurisdiction over the offshore sea and sea bed to the Commonwealth (New South Wales v Commonwealth 1975), sanctioned Commonwealth legislation outlawing racial discrimination that trumps competing State land title legislation (Koowarta v Bjelke-Petersen 1982), and has persisted in severely restricting the ability of the States to levy indirect taxes (Capital Duplications v ACT [No. 2] 1993). Thus, in its adjudicatory role the court has had the determining say in a range of major policy questions throughout Australian political history (Galligan 1995: 164).

The public battle between Gerard Brennan and Darryl Williams over the role of the executive in defending the judiciary from political attack

Where the reputation or independence of the courts was an issue the judiciary turned to the attorney-general to protect their interests. The reason for this was that it was not clear who could speak for the judiciary as a whole and because there was the danger that in speaking for itself on political matters the judiciary might appear to jeopardise its impartiality and independence. Thus, the need for someone to speak for the courts was justified by the relatively few avenues open to the judiciary in responding to the political
comments directed at it. In this context, the decision of the Commonwealth attorney-general, Darryl Williams, not to speak for the courts represented a major break from tradition and appeared to leave the Court without a public defender (Patapan 1999: 404). There is some ambiguity concerning the status of the attorney-general. For a discussion of the view that the attorney-general should be independent and aloof from politics and the philosophical differences in approach to the Office of Attorney-General (Edwards 1984: ch. 3).

According to Williams it is now time to abandon the notion that the attorney-general should speak for the courts because such a view, based on a British model, is not appropriate for Australia. In Australia the attorney-general does not necessarily have legal qualifications and is never excluded from the political debate in cabinet. Nor does the attorney-general exercise any independent discretion in supervising criminal or contempt of court proceedings. Therefore ‘the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous or at least eroded’ (Williams 1995). Consequently, Williams argues that there are good practical reasons why neither judges nor the public should look to the attorney-general ‘to take up cudgels for judges in media debate’ (1995: 7). There is a risk that in making a substantive reply on an issue the interest of the judiciary may conflict with the interest of attorney-general, the government or the party in government. In representing the judiciary the attorney-general may involve the judiciary in political controversy. Moreover, the demands on a modern attorney-general are so extensive that the response
on behalf of the judiciary may not be adequate or timely, such a response may ‘lack impact’ (1995: 7) (Patapan 1999: 404).

The attorney-general’s decision not to speak for the courts was criticised by the judiciary. Speaking at the 30th Australian Legal Convention, Chief Justice Brennan stated that the function of the attorney-general was not to justify the Court’s reasons of decision, rather it was to defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law. A speech by Justice Kirby to the American Bar Association meeting in Hawaii implicitly criticising the attorney-general for not protecting the judiciary from political attacks received extensive press coverage (The Age 6 January 1998; Kirby 1998a). The attorney-general expressed disappointment with the comments made by Justice Kirby, reiterating his view that ‘[j]udges are in a very good position to inform members of the public about what they do and the constraints there are upon what they can do’ (The Age 7 January 1998: A4). The tension between the judiciary and the attorney-general remains (Gleeson 1999; Patapan 1999: 404).

If the attorney-general will not ‘takeup the cudgels’ for the judiciary, who is to speak for the courts? According to Williams, judges should seek other means for responding to media criticism and communicating with the public. He has singled out the Judicial Conference of Australia as the body to speak for the courts, with the potential to be a potent political force for the judiciary. The Judicial Conference was incorporated in 1993 as an association with membership open to judges and magistrates in Australia, other
judicial officers exercising judicial power and former members of superior and intermediate courts. A secretariat with research functions was established with the assistance of the attorney-general (Judicial Conference News May 1997: Vol. 1.1). The mission statement and strategic plan of the Judicial Conference outlines its mission as the education of the community about the proper role of the judiciary, communication with the other arms of government, improvement in the judicial system as well as research to further these aims. Thus, the goal of the Judicial Conference is to represent the judicial and promote ‘harmonious and constructive relationships with the other arms of government’ (Judicial Conference News November 1997: Vol. 1.2, 3). Importantly, according to the conference guidelines, it may speak on general matters concerning the judiciary, the administration of justice, and upon request by the chief justice or the judge or judges of a court, although it accepts that it will not speak on specific matters without consulting the relevant chief justice or judge of the court (Patapan 1999: 404-5).

The conflict between Ruddock and the Federal Court

A fairly recent disadvantage for the SOP in Australia is the conflict between Immigration Minister Phillip Ruddock and the Federal Court over immigration matters. A major issue of the November 2001 federal election that returned the Coalition government to power was the Howard government’s refusal to accept the asylum-seekers on the Norwegian cargo vessel MV Tampa, employing SAS troops to transfer them to Nauru, and the subsequent enactment of border-control legislation. For the circumstances of the Tampa incident, (see Lynch and O’Brien 2001). The Tampa incident can be contrasted with the
less public yet equally significant problem posed by the government’s refugee policy for Australia’s legal system (Patapan 2002b: 247).

Australia grants permanent residence to non-citizens considered ‘refugees’ by the Department of Immigration and Multicultural Affairs, to fulfil its international obligations. Decisions by the Department may be appealed to the Refugee Review Tribunal, an administrative body whose decisions are reviewable by the courts. Problems for the separation of powers arose with amendments to the *Migration Act* 1958 (Cth) in 1994 which restricted appeals to the Federal Court to those cases where there is single jurisdictional error, nonconformity with legislation, and where there is bias. The major problem for the independence of the judiciary was that the Court could not review matters on broad grounds (such as denial of natural justice, unreasonableness, bad faith, abuse of power) that may have been seen on some occasions as sustaining judicial review on the merits of the decision (Patapan 2002b: 247-8). Judicial review and the independence of the judiciary is part of the separation of the judiciary.

The Howard Government’s attempts to restrict judicial review in the immigration area had two consequences. First the Federal Court continually tested the limits imposed by the amendments to the *Migration Act*, developing an adventurous approach to refugee decision making to give relief to litigants. These decisions, overturned by the High Court, were criticised by Immigration Minister Phillip Ruddock as legal ‘frolic’ by ‘creative’ judges of the Federal Court (McGregor 1998). For a general review of the Immigration Minister’s public campaign regarding ‘abusive refugee claimants’, tribunals
‘reinventing’ the definition of refugees and abuse of the system by lawyers (see Crook 2000: 214-15). Immigration Minister Ruddock’s attempt to legislate further limits to the grounds for legal appeal by refugee claimants did not succeed in the Senate. These attempts were rejected by Labor and Democrat Senators. This might be seen as a Senate or legislative check on the executive. For a critical evaluation of the proposed amendments (see Kneebone (2000)). The other amendments to the Migration Act concerned the High Court itself. The Australian Commonwealth Constitution, Section 75 guarantees the right to seek judicial review of most federal administrative action in the High Court, a right that cannot be abrogated by parliament. The parliamentary limits placed on appeals to the Federal Court meant that appellants would now turn to the High Court, with serious consequences for the workload of that Court and expense for litigants. As a result, the government’s refugee policy imposed considerable strains on the Australian legal system. It enacted limits on judicial review by the Federal Court, which were resisted by that Court, it gave rise to tension between the Federal Court and the High Court, and it potentially burdened the High Court with immigration cases. The High Court acknowledging the ‘inconvenience’ of these measures, accepted their constitutionality in the recent case of Abebe. According to the High Court, the ‘effect on the business of this court is certain to be serious’, per Gleeson CJ and McHugh J in Abebe v Commonwealth (1999) 162 ALR 1, at 17 (Patapan 2002b: 248).

The Howard Government and the Immigration Minister Ruddock to further limit recourses to the courts were unsuccessful until the Tampa incident. The pending federal election and the political appeal of the claim that Australia’s sovereignty was at issue
allowed the Howard Government to enact, with Labor support, its border-control legislation. The Commonwealth Government’s actions regarding the *Tampa* itself were challenged successfully before the Federal Court but overturned on appeal by the Full Federal Court. The *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) retrospectively legalised the government’s actions and precluded legal proceedings in the matter. Special leave to appeal to the High Court was refused: see *Vadarlis v Minister for Immigration and Multicultural Affairs & Ors* (M93 of 2001) (Patapan 2002b: 248).

Commonwealth Government legislation included: reducing access to judicial review in migration matters, prohibiting class actions in migration litigation, introducing time limits on applications to the High Court, clarifying the meaning of ‘refugee’ said to have been expanded by Australian courts beyond the original UN Convention, and addressing the increased incidence of fraud in the asylum process. Specifically, *Migration Legislation (Judicial Review) Act 1998; Migration Legislation Amendment Act (No 1) 2001; Migration Legislation Amendment Act (No 6) 2001*. In addition, the Commonwealth legislation introduced a new visa regime for people who arrived in areas (such as Christmas Island) excised from the migration zone, imposed penalties for people smuggling and amended the *Privacy Act*; see generally DIMIA (2001). An extensively political response to asylum-seekers resulted from the *Tampa* incident. Fundamental and continuing concerns regarding the limits of parliamentary power was overlooked due to the *Tampa* incident. An important issue concerning the separation of powers involved
the instrumental differences between courts, and the importance of the separation of powers in Australia (Patapan 2002b: 248-9).

**Judicial review (judicial independence)**

In exercising judicial review the High Court has been far more significant in developing the Constitution and adapting the federal division of powers than the people have been through the process of popular referendum. The court has endorsed far-reaching constitutional changes that almost certainly would not have been sanctioned by referendum. Until recently this was accepted without much question by Australian political and academic elites and citizens at large, whereas in the US the legitimacy of judicial review has been a central issue of constitutional jurisprudence for several decades. The Australian court has been able to reshape the constitutional powers of government and periodically overruled key initiatives of governments because such judicial activism was exercised discretely and disguised by the apolitical techniques of formal legalism. That is currently changing, with realist views now becoming accepted by the judiciary as well as its critics. The chief justice of the High Court, Sir Anthony Mason, observed: ‘In Australia we have moved away from the declaratory theory and the doctrine of legalism to a species of legal realism’ (Mason 1994a: 164). High Court judges are now admitting their law-making role publicly (Galligan 1995: 161).

The High Court’s central role within Australia’s system of government and law has been poorly articulated by the judges themselves and widely misunderstood by political elites and the public at large. Hence, it was hardly surprising that controversial decisions like
the *Mabo* (1988, 1992) and *Political Advertising* (1992) cases should spark public controversy and an uncharacteristic complaint by the then chief justice, Sir Anthony Mason (Galligan 1995: 163).

It is the High Court’s role as a constitutional court, however, that needs explanation and defence because it is alien to lingering, albeit mistaken public sentiments favouring parliamentary supremacy. The idea of parliamentary sovereignty coming from the Westminster system of Government inherited from England. The High Court or ‘judicature’ is, according to the Constitution, the third branch of the Commonwealth Government together with the legislature and the executive. Its primary function is the exercise of judicial review, which entails adjudicating high-level disputes involving the federal division of powers between the Commonwealth and State Governments; determining the institutional structure and powers of the legislative, executive and judicial branches of the Commonwealth; and authoritatively interpreting the Constitution that defines all of these. Judicial review is by its very nature political in the most fundamental sense since it involves the judiciary in performing a number of key functions that directly affect the institutional shape and powers of the branches and levels of government (Galligan 1995: 1633–4).

In its adjudicatory role the court is involved in deciding disputes about whether particular legislation by one or other branch or level of government comes within its constitutional powers. Such decisions can have enormous political and policy consequences. For example, in the 1940s the High Court struck down the Chifley Labor Government’s
(1945-9) attempts to nationalise banking (Banking Case 1948) and airlines (Airlines Case 1945), and severely curtailed its attempts at putting a national health scheme in place (Pharmaceutical Benefits Case 1945). As a result the Labor Government was forced to abandon its nationalisation plank and moderate its preference for a centralised and state-run welfare system. Thus the High Court, supported by the Privy Council, played a major part in taming the Labor Party and in shaping Australia’s postwar economy and restricting the scale of its welfare state. As if to even the balance, the court subsequently overturned the Menzies Liberal-Country Party Coalition Government’s most illiberal attempt to ban the Communist Party and deal with supposed Communist subversives (Galligan 1987; 1995: 164). It will be interesting to see future High Court decisions if there are future High Court challenges to the Howard Liberal-National Party Coalition Government’s proposed Anti-Terrorism and Industrial Relations (IR) Bills (2005) in relation to civil rights.

Even more significant than adjudication is the interpretive role of the court in exercising judicial review. That is because in authoritatively interpreting the Constitution, the court determines the powers of the Commonwealth and State Governments on the one hand and the shape and interrelationships among the branches of national governments on the other hand. In adjudication the court is a direct player, albeit the authoritative one, in the big political league; whereas in its complementary role of constitutional interpretation the court has a metapolitical function of shaping the very institutions and powers of government. While governments are subject to the court’s review, the court, although
appointed by the Commonwealth Government, is judge in its own case (Galligan 1995: 164-5).

The formative impact of judicial review on Australian public policy has been great indeed, although largely ignored by Australian constitutional lawyers in the past. The former chief justice, Sir Anthony Mason, lead judicial opinion by espousing the underlying policy component and consequences of judging:

Judges take account of relevant policy considerations (for principles of law ultimately rest on underlying considerations of policy) and they have an eye to the practical consequences of the rules they apply and the decisions they make (1994a: 164).

The policy-making role of the Australian judiciary is beginning to be recognised by public policy analysts, although little attention has been given to the curious way courts actually make policy or to the impact of judicial decisions on the other more routine policy processes and outcomes. Yet judicial review is highly significant as public policy-making in its own right, and it does have a major impact in shaping the pattern of much of Australia’s other public policy. For the court determines not only particular controversies about such key matters as environmental protection, racial discrimination, industrial relations and taxing, but also which level of government, Commonwealth or State, has jurisdiction to make policy in such areas and how far its powers extend. In other words, the court’s decisions shape the institutional framework of government that underlies public policy-making of a more routine kind (Galligan 1995: 165).
Commonwealth Executive infringes on the Judiciary

Commonwealth justices have security of permanent tenure (retirement age is 70 years of age) and independence from the executive (section 72, Commonwealth of Australia Constitution Act 1900). The executive however chooses, judicial replacements and makes the appointment official. The Executive can also remove justices from office. Justices are removed by the Governor-General in Council after an address from both houses of the Parliament and removal is on the ground of proved misbehaviour or incapacity (Lumb & Moens 1995: 375-6). In 1984 the Senate appointed committees to enquire into the behaviour of Murphy J (Justice of the High Court) in relation to allegations he attempted to pervert the course of justice.

Justices are appointed formally, by the Governor-General, in practice, however justices are selected by Cabinet. The Attorney-General will usually seek advice about the suitability of appointees from fellow ministers, from state Bar Associations, and (as required by law since 1979) from state Attorneys-General. Once appointed, members of the Court have tenure to the age of seventy. Section 72 gives Parliament the power to remove justices for proved misbehaviour or incompetence. There is no precedent for the removal of a High Court Judge, but in the mid-1980s anti-Labor Senators initiated two separate Senate committee inquiries and then a parliamentary commission of inquiry in their attempt to remove Justice Lionel K. Murphy (a former Labor Attorney-General) from the High Court, for alleged misbehaviour. This sorry episode, ending with Murphy’s death; the power of Commonwealth Parliament to dismiss a High Court Judge
remains untested. It demonstrated that in practice Parliament’s power to dismiss a judge has not had a final determination on the issue. The High Court, in practice, is beyond the direct influence of Parliament and the government of the day. The only opportunity governments have to direct the future of the Court in one direction or another comes infrequently when vacancies need to be filled with new appointments (Stewart & Ward 1996: 47-8).

The Commonwealth executive infringing on the Judiciary is best illustrated by the Lionel Murphy case. The separation of and independence of the judiciary is an important aspect of the doctrine of the separation of powers. The activist judge, Lionel Murphy had a controversial life and political and legal career and is worth mentioning. Judges personally exercise judicial power and their removal from the bench is of great interest to the issue of the independence of the judiciary within the separation of powers. It is important to look at who Lionel Murphy was, his background, and politics. As a Labor Party radical Lionel Murphy with his actions as a Labor Attorney-General and his decisions as a High Court Judge upset the conservative forces in politics and the law in Australia and attempts were made to remove him as a High Court Judge. The issue of judicial independence is important to the SOP theory and the independence of the judiciary can be demonstrated if judicial activism is acceptable in practice. Justice Murphy of the High Court has been regarded as an activist judge demonstrating judicial independence at the Commonwealth level.
Lionel Murphy (1922-86) was a Federal Labor politician and subsequently, a High Court Justice (1975-86). He was a former Labor Attorney General (1972-75) in the Whitlam Government, and a former Senator (1960-75) from the State of New South Wales. He helped restructure the Senate committee system. During his period on the High Court he was regarded as a judicial activist. He stood down from the High Court for a period, during a Parliamentary Inquiry into his behaviour.

In 1975, Murphy left politics to take up an appointment to the High Court. Whilst on the Court the uncompromising activism of his judgments often left him in the minority. During his eleven years on the High Court, he wrote 632 decisions; in 137 of these he was in dissent. This represents an average of nearly 22% dissenting opinions, much higher than any previous High Court Justice before, or since. Such a figure put him in the league of dissenting judges in the United States of America (Kirby (n.d.)). In the 1980s a number of controversial allegations of misconduct arose, making him something of a political embarrassment to the Labor Party,

In November 1983 it was reported in the press that there were tapes of telephone conversations between a Sydney Solicitor and a number of people including a judge. In March 1984 it was stated in the Queensland Parliament that the judge was Mr Justice Lionel Murphy. The Senate decided to investigate the allegations against Justice Murphy. This presented a problem for the doctrine of the separation of powers. Two

According to an Advisory Committee (*Jackson Report*, 1987: 78) these committees did not conduct a fair inquiry. The system had, according to the Advisory Committee, operated in a ‘prolonged, uncertain, repetitious, and unsatisfactory way ... amid a continued blaze of publicity and speculation’ (McGarvie 1999: 106-7). The members of Parliament (Senators), from various political parties, who participated in the inquiry found difficulty separating questions of fact and degree from issues of politics. As a result of evidence before the Parliamentary Committees, Murphy was charged with an attempt to pervert the course of justice. In 1985 he was tried on charges of attempting to pervert the course of justice on behalf of his solicitor friend, Morgan Ryan (*R v Lionel Murphy*, unreported, CCA (NSW) Nos 340 and 245 of 1985, 28 November 1985). He was found guilty on one of these charges but cleared at a subsequent retrial. In 1986 a parliamentary inquiry into further allegations was cancelled when Murphy publicly announced that he was suffering from a terminal disease (Lumb & Moens 1995: 376; Campbell and Lee 2001). He died later in that year. He remains a figure of controversy: to some he was a man who betrayed the traditions of his office; but to others he was something akin to a martyr.
Judicial activists such as Murphy J (and more recently Kirby J) have attempted to make new law for the benefit of democracy and civil rights and have been attacked on political and ideological grounds as well as other grounds by conservative forces. Murphy J’s vision, as part of a civil rights tradition, included an independent Australian common law, freed from English common law precedent, implied constitutional rights inherent in the democratic structure of the Australian Constitution.

KIRBY J (Judicial Activist)

In February 1996 Michael Kirby was appointed as one of the seven Justices of the High Court of Australia, Australia’s Federal Supreme Court. Justice Kirby was appointed to the High Court by the Keating Labor Government (1991-6) just prior to the federal election, held on 2nd March 1996. Kirby has written about judicial activism and attacks on judges as a universal phenomenon (Kirby 1997; Kirby 1998a). Kirby was a well-known ‘radical judge’ or ‘judicial activist’ ([http://www.lawfoundation.net.au/resources/kirby/background.html](http://www.lawfoundation.net.au/resources/kirby/background.html) (1997)).

Some of the views held by Justice Kirby about the independence of the judiciary can be seen in the Boyer Lecture he gave in 1983 where he spoke about the Judges (Kirby 1983). In Australia, as in Britain, politicians appoint Judges, however, once appointed, a Judge is expected to divorce himself completely from any party political allegiance he may previously have had (Kirby 1983: 20). The role of the Judge is growing and the function of judicial discretion is constantly being enlarged. In 1983 judicially enforceable human rights legislation was being promised in Australia, (by Attorney-General Gareth
Evans who had been involved with the Murphy bill of rights in 1973) and the undiscovered attitudes of the Judges are important and will become more so (Galligan 1995: 151-2; Kirby 1983: 23). The traditional role of the Judge was simply to try disputes between citizens or between the State and the citizen however with a Bill of Rights, Judges will be required to give meaning to the words and rights mentioned in the Bill of Rights (Kirby 1983: 26).

Commentators agree that Judges need to be careful of involvement in matters of partisan politics. The community wants its Judges to be neutral in such matters, like the monarchy, outside party politics. However the advice tendered by Sir Garfield Barwick to Sir John Kerr about the dissolution of the Australian Parliament in 1975 was seen by some as a glaring involvement of the judiciary in party politics (Kirby 1983: 29). Kirby speaks of Judges as reformers and the need for modernisation and reform in the law. Reform judges harken back to the great common law Judges in the past who developed the common law from precedent to precedent. In Australia, according to Kirby, our exemplar in this respect is Justice Murphy of the High Court. In Britain, Lord Denning (1899-1999) (called to the bar in 1923, appointed a judge in 1944, Master of the Rolls 1962-1982) was the boldest exponent of the reforming function of the Judge on the Bench (Kirby 1983: 59). Lord Denning was responsible for many decisions, often controversial and his decisions were closely followed by law students. The example set by the English Judge Lord Denning was later followed by Australian Justices Murphy and Kirby.
The Kirby Incident (2002)

In 12 March 2002, a member of the legislature and adviser to the executive, Liberal Senator Bill Heffernan (Parliamentary Secretary to the Cabinet in the Howard Government) under parliamentary privilege attacked a member of the judiciary. The High Court Judge that Heffernan attacked was Justice Michael Kirby. The attack was part of a campaign to have Justice Kirby removed from office, Senator Heffernan gave a speech in Parliament to discredit the High Court Judge.

Mr Howard read into the official record of the Parliament (House of Representatives, Hansard) a letter from Liberal Senator Bill Heffernan. Heffernan used parliamentary privilege to say that Justice Kirby was not a fit and proper person to sit on the High Court, claiming Justice Kirby trawled for rough trade with rent boys in a Sydney red light district (Shanahan 2002). Heffernan sent his allegations to the NSW police for investigation. Justice Kirby, who has acknowledged his homosexuality, rejected the allegations as absurd and false (High Court 2002). When asked if he was being loyal to Senator Heffernan, Mr Howard said: ‘I am acting appropriately’.

Prime Minister John Howard denied that he had violated the separation of powers over his handling of controversial sex allegations against High Court Judge Michael Kirby. Prime Minister Howard said, when speaking about the Kirby matter “I’ve always fully and faithfully respected the separation of powers” (The Age, 18 March 2002). To maintain that separation there is an obligation on members of the executive not to attack
the courts and there is also an obligation on the courts to refrain from involvement in
day-to-day political affairs. Prime Minister Howard however did not seem too concerned
with the inevitable damage being done to Justice Kirby’s reputation (Grattan 2002).

The Family Court of Australia’s Chief Justice Alistair Nicholson argued that the
government’s handling of the incident was an attack on judicial independence and
suggested a breach of the separation of powers (The Age, 18 March 2002). Justice
Nicholson said “In the past, members of the government have not been slow to invoke
the doctrine of separation of powers when in receipt of criticisms from Justice Kirby”
(Nicholson J cited in Johnson 2002). The doctrine might be considered something of a
one-way street. Senator Heffernan’s documents were found to be forged. Events then
unfolded quickly to end the Kirby incident. On the 19th March 2002 Senator Heffernan
apologised to Kirby J and the Senate, the Parliament, the PM and his coalition colleagues.
Kirby J accepted the apology (High Court 2002). Heffernan was censured by the Senate
for his abuse of parliamentary privilege. Heffernan admitted he damaged Kirby J’s
reputation in the speech. Heffernan was forced to resign as Parliamentary Secretary to
Cabinet; he was not dismissed or charged or tried or jailed for his abuse of parliamentary
privilege and false allegations. Heffernan’s speech in the Senate demonstrated the power
of parliamentary privilege, constrained largely only by convention (on the law regarding
parliamentary privilege, see Carney 2000: 159-205).

The evidence provided by Heffernan was discredited as being false. The first piece of
evidence, a statutory declaration, was revealed to be by a discredited witness in the John
Marsden defamation trial. The second piece of evidence, comprising Commonwealth car records tendered to NSW police, was rejected as not authentic when current and past politicians on the car list insisted that they had not been in Sydney at the time (Price 2002). On the 20th March 2002, it was claimed in the media that the Prime Minister’s former driver had supplied the forged Kirby Com Car document. This incident indicates the fragilities of the separation of powers in the Australian system of government.

The very formality and seriousness of the measures that need to be taken to remove a judge for ‘misbehaviour or incapacity’ is intended to support the judiciary in Australia. Previous attempts to remove justices has occurred. Attempts to remove Justice Murphy under s. 72(ii) were stopped shortly before his death on 21 October 1986. For a discussion of the Murphy affair, as well as the incidents concerning Justices Callinan, Vasta and Bruce (Campbell and Lee 2001: 101-31). The ‘Kirby incident’ affirmed the integrity of the High Court and depreciated the manner in which the allegations were made (Patapan 2003: 302).

Issues were raised by comments about Justice Ian Callinan made by Justice Goldberg in his judgment in White Industries v Flower and Hart [1998] FCA (14 July 1998). In Brisbane in the Federal Court, Justice Goldberg delivered a damming judgment that one of Brisbane’s most respected law firms Flower & Hart had perpetrated a serious abuse of process on the courts. They were found to have invented an allegation of fraud against a rival knowing they had no evidence to support such a serious charge. Worse still, the judgment by Justice Goldberg found that one of this country’s most senior judges High
Court Judge Ian Callinan, then a Brisbane QC, acquiesced in this abuse. The events in question took place 12 years prior to judicial appointment of Justice Callinan and do not relate to the discharge of judicial functions. The allegations concerning Justice Callinan were made in a case in which he was not a party. The Attorney-General decided that on the information available, no inquiry into the conduct of the judge was warranted (Former Australian Attorney-General – Justice Ian Callinan, 26 August 1998).

Political attack on the High Court (by Rob Borbidge and Tim Fisher) after the Wik Decision

The High Court’s announcement that it made law, its decisions on implied rights of political communication and rights derived from separation of powers, its decision on the implications to be drawn from the ratification of international human rights covenants all brought forth scholarly and political criticism. But the greatest attacks on the Court were occasioned by its decisions on native title. The Court’s decision in Mabo produced unprecedented criticism of the Court. It was the Court’s decision in Wik, however, that exposed the judiciary to the harsh new world of untrammelled political assault (Patapan 1999: 402).

Soon after the High Court handed down its decision in Wik, holding that the granting of a pastoral lease did not necessarily extinguish all native title rights and interests that might otherwise exist, Queensland Premier Rob Borbidge branded the High Court ‘an embarrassment’. He claimed that there were ‘virtually no checks and balances’ on
Australia’s superior supreme legal body, proposing ‘constitutional surgery’ to allow voters to select and sack judges in a referendum. Other proposals included a Federal Constitutional Court, limiting terms to 10 years, and an increased role for the states in selecting judges (Australian 19 February 1997: 1). According to Borbidge, ‘Judges are there to apply the law to the community, not to lead it by the nose in directions that community has had no say in choosing’ (Australian 19 February 1997: 2). Almost a week after the comments by Premier Borbidge, Prime Minister John Howard entered the debate, emphatically rejecting a law-making role for the High Court, declaring ‘the laws governing Australians ought to be determined by the Australian Parliament and by nobody else’ (Australian 19 February 1997: 2). Although Howard ruled out any change to the system of appointing High Court judges, he told federal Parliament that he held the ‘strongest possible view’ that the only way in which a law could be changed or should be changed was through Parliament passing a law. Deputy Prime Minister Tim Fisher had also criticised the Court’s Wik judgement as highlighting a trend toward ‘judicial activism’. He went on to state that should a position on the bench become available, the Howard government would appoint a new High Court judge who was ‘conservative with a capital C’, a person who rejected ‘the doctrine of judicial activism’ and the notion that judges should make the laws (Courier Mail 5 March 1997: 1; Patapan 1999: 402).

These unprecedented attacks on the Court indicated that the executive and Parliament now saw the judiciary in a new and different light. The Court was now seen as a powerful, financially and administratively independent body that was no different from other institutions that were ostensibly accountable to the public. The Court’s decisions
were not interpreted as measures to protect individual liberty, but as a form of institutional flexing of muscles. From this perspective the Court was clearly exercising its authority in order to extend it, by shaping the political outcomes in each case, and by gaining for itself greater public respect. Here was an apparently independent, impartial and neutral body that was supposed to interpret and apply the law actually claiming to make it. It had discerned in the interstices of the Constitution limitations on Commonwealth and state governments that no one had seen or anticipated. It had overruled legislation on political advertising, overturned legislation that had attempted to limit the vast sums expanded on election campaigns, as well as purporting to alter state defamation laws. It had compelled the Commonwealth to provide greater funding in serious criminal trials while curtailing the executive’s ability to enter into non-binding international conventions. Finally, it had overturned the common law by recognising native title in Australia, forcing the issue of indigenous rights on the political agenda. There was no longer any reason to treat this institution differently to other policy-making bodies (Williams 1995; Patapan 1999: 403).
The SOP importance in protecting citizens from the abuse of government power

Rights literature commonly distinguishes between negative and positive freedoms. Negative freedoms are usually signified by the words ‘freedom from’ and positive freedoms by the words ‘freedom to’. Thus, in the negative sense, it may be said the Constitution guarantees freedom from arbitrary deprivation of property as indeed was held to be the case in *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 (Ratnapala 2002: 258). The *Communist Party Dissolution Act* 1950 (Cth) was designed to proscribe the Communist Party, to liquidate its assets and to disqualify its members from public office. The reasons for these punitive measures was the alleged threat the Party and its members posed to public safety and constitutional government. However, the deprivations were to be imposed by executive order of the Governor-General and not by judicial determination according to pre-set legal standards. The high Court invalidated the Act on the ground that it was not within the defence power in time of peace. However, a key reason to this conclusion was the fact that such arbitrary power was not conducive to the maintenance of the Constitution but in fact undermined the rule of law that undergirded the Constitution (Ratnapala 2002: 270).

Dixon J stated:

Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating judicial power from other functions of government, others of which are simply assumed. Among these I think it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusions of the legislature concerning the doings and the designs of the bodies or persons to be
affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth (1951) 83 CLR 1 at 193.

**Conclusion**

The guide of separation of powers at the Commonwealth level needs to be followed at the State level in Australia (this theme is developed in later chapters). The Australian Constitution outlines the Commonwealth separation of powers in three main sections: legislative powers (s. 1), the executive powers (s. 61) and judicial powers (s. 71). The separation of powers in Australia has been fundamentally shaped and defined by the High Court (Ratnapala 1990, 1999, 2002; Patapan 1999, 2000). The rules of separation have been outlined by the High Court; however the court has given priority to the separation of judicial powers from the other powers (Alexander’s Case (1918); Boilermakers’ Case (1956); A-G Cth v R (1957); Ratnapala 1999, 2002).

The separation of legislative and executive powers has been given less priority due to the system of responsible government which requires that the executive be formed from within the legislature (Lumb & Moens 1995). Under the theory of responsible government, one of the Parliament’s role is the scrutiny of legislation. The Senate, as a part of the Parliament, is seen as a valuable institutional safeguard (Reid & Forest 1989: 358-60, 362-3, 477-84; Sharman 1990a). As a result there is a partial separation, rather than a complete separation, of powers in Australia. The authority for the proposition that
Parliament may delegate its power without significant restriction (the *Dignan Case* (1931)).

The legislative power (s. 1) involves the roles and functions of Parliament (Quick & Garran 1901; Crisp 1978, Singleton et al 2003) that is controlled by the executive (particularly in the Lower House), the Senate and parliamentary committees particularly Senate committees, which are a check on the executive (Evans 1999a & b). The executive power (s. 61) involves the roles and functions of the Governor-General (Quick & Garran 1901; Howard 1985; Lane 1979; Hasluck 1979; Kerr 1979; Barwick 1984) (in theory); and the Prime Minister and Cabinet (in practice). The Judicial power (s. 71) involves the role and functions of the High Court (and Federal Court) Justices. The decisions of the High Court not only interpret the law but also make the law (Mason 1990; Kirby 1990; Patapan 2000: 5); in effect this gives the High Court a political role (Galligan 1987, 1995; Solomon 1999). There is a mixing of powers between the institutions of government. However the greater the separation of powers the better for governance and democracy in Australia.

The issues of separation of the judicial power and the independence of the judiciary and the executive infringement of the judiciary is demonstrated by Justices Murphy and Kirby. Judicial activists such as Murphy J and recently Kirby J have attempted to make new law for the benefit of democracy and civil rights and have been attacked on political and ideological grounds as well as other grounds by conservative forces. Murphy J’s vision, as part of a civil rights tradition, included an independent Australian common law, freed
from English common law precedent, implied constitutional rights inherent in the
democratic structure of the Australian Constitution. In the High Court judgments of
Lionel Murphy, we see the first application of the principles of sociological jurisprudence
(Patapan 2000: 22). Kirby J has followed in the judicial footsteps of Murphy J (who
followed in the footsteps of Lord Denning). Checks and balances by the Legislature
(particularly the Senate) and the High Court are required to review government
legislation and to make the executive accountable.
CHAPTER 4  
THE SEPARATION OF POWERS  
CASE STUDY: QUEENSLAND

Introduction

The first case study, the state of Queensland, looks at the advantages and disadvantages of the separation of powers in this state. There is a lack of theoretical or constitutional SOP but there is a general acceptance of the SOP operating in practice, particularly since the Fitzgerald Inquiry (1987-89). The advantages of the Queensland case include the acceptance of the concept of the SOP. The SOP in practice includes legislative power being exercised by the Parliament, the executive power being exercised by the Government and the judicial power being exercised by the courts. The disadvantages of the Queensland case include the lack of the SOP not only constitutionally but also in practice. The Queensland executive has infringed on the legislature and the judiciary in various and significant ways. Various examples are provided to demonstrate problems for the SOP in Queensland. These include the following examples: The political penetration of the judiciary in Queensland. Problems created for judicial independence in Queensland. The case of the dismissal of a Queensland Supreme Court judge (Justice Angelo Vasta 1989). The case of the pressured resignation, jailing and reappointment of a Chief Magistrate (Di Fingleton 2002-3). The case of the jailing and subsequent release of Pauline Hanson and David Ettridge (2003). The role of the Attorney General (Rod Welford 2003) as interference or leadership. These issues have all created problems for the SOP in Queensland.
ADVANTAGES OF THE QUEENSLAND CASE

The advantages of the Queensland case include the acceptance of the concept of the SOP. The theory of Locke (1690) and Blackstone (1884) has been followed. The theory of Montesquieu (1748) identified the third power, the power of judging (judicial power) making up the new modern triad (as compared with the old dual structure of legislative and executive power). The SOP in practice includes legislative, executive and judicial power being exercised by separate institutions. Essentially the legislative power is exercised by the Parliament, the executive power is exercised by the Government and the judicial power is exercised by the courts (particularly the Supreme Court). The Queensland Constitution does not separate the powers and institutions like in the Commonwealth Constitution and there is no rigid doctrine of the SOP that is found at the Commonwealth level but the SOP concept is accepted and followed but only in a limited way. There is no constitutional impediment to the Queensland Parliament (essentially the executive government) legislating to intrude upon the exercise of judicial power. However under the Federation, the Queensland Government follows the lead of the Commonwealth Government and state courts follow the decisions of the High Court and Federal courts, under court hierarchy and stare decisis (the sacred principle of English law by which precedents are authoritative and binding and must be followed).

LEGISLATIVE POWER: LOWER HOUSE - LEGISLATIVE ASSEMBLY

A general power of law making is conferred on State legislatures including Queensland, subject of course, to the Commonwealth of Australia Constitution Act (Lumb 1991: 84).
In all Australian State parliaments except South Australia and Tasmania, the name for the lower house is the Legislative Assembly. It is the only house of parliament in Queensland and this is also the case in the Northern Territory. This nomenclature dates back to the chambers formed in the various colonies following the British granting responsible government in the latter half of the 19th century. The Parliament of Queensland is unicameral and has an assembly of elected representatives forming the legislature of the state. Coaldrake (1989: 159) notes the single house (unicameral) arrangement is one of four matters entrenched within the Queensland Constitution. In all Australian states the system of government is the parliamentary system, following the Westminster model, where Parliament holds ultimate authority and in which the cabinet governs and is formed within the parliament, answers to it and holds office while it maintains the majority in the lower house. The Queensland Legislative Assembly is a representative body, according to Hughes (1980: 111), that has a number of functions that overlap and interact. Amongst its functions the parliament control the executive arm of government.

In Queensland the lower house (Legislative Assembly) holds ultimate authority and provides the Cabinet, which governs the state. The Queensland Legislative Assembly, similar to other Australian state lower houses, is a representative assembly and is a place for public policy debate and enacting legislation. At least five functions may be identified: the passage of bills (statutes providing the framework of government activity and regulation of social and economic activity); provision of government finance (both revenue and expenditure); control over the executive arm of government (which is answerable and responsible to the Legislative Assembly); determination the composition
of the government (directly through the convention that the ministry must maintain a majority of the Legislative Assembly, and indirectly because performance in the Assembly determines which of the government’s supporters are chosen for the ministry); and educating the electorate through debate on political questions so that an informed choice can be made at general elections and between elections the public knows what is happening (Hughes 1980: 111).

The executive has dominated and infringed on the legislature in Queensland. Coaldrake (1989: 104) observes that in Queensland the cabinet dominates the political process as it does elsewhere in Australia. The executive dominance in Queensland politics developed under Labor rule before 1957. It was maintained and reinforced particularly during the Bjelke-Petersen premiership. Bjelke-Petersen, building on the Hanlon and Gair Labor Governments, blurred and mixed rather than separated the roles of cabinet (executive) and parliament (legislature). Bjelke-Petersen reformulated Westminster-derived assumptions. The Premier insisted upon unquestioning loyalty among colleagues. The concept of ministerial responsibility normally understood in the context of parliament was extended to apply to meetings of joint government parties. This allowed the Premier to maximise his influence in a coalition party room struggle (Scott, Coaldrake, Head & Reynolds 1986: 59).

Also the Premier developed a ministerial committee system based on government parties instead of an orthodox parliamentary committee structure. Along with this the Premier transferred the administration of a number of matters from the Speaker (and the
Parliament) to the Premier’s Department (part of the executive). Bjelke-Petersen chose to use the Peel findings to justify transferring administration from the Speaker to the Premier’s Department. James Houghton, the Speaker at the time unsuccessfully attempted to resist. Houghton made public criticism of the performance of the Queensland Parliament (Coaldrake 1989: 70). The weakening of the parliamentary institution may be seen as partly due to the weakness of the Speaker’s position, under the Westminster system to be a central and important position. Over the years the executive has removed almost entirely parliament’s managerial authority in respect of its own staff and finances. The Queensland Parliament under Bjelke-Petersen became a steadily less well-equipped and increasingly impotent and irrelevant institution (Scott, Coaldrake, Head & Reynolds 1986: 60-61). The Queensland Legislative Assembly needs to regain financial authority and develop an extensive parliamentary committee system to review the executive.

**EXECUTIVE POWER: QUEENSLAND GOVERNMENT - [Executive Council, Governor, Premier and Cabinet Ministers]**

In theory, the branch of government that is responsible for the implementation of laws is the executive branch. In practice cabinet ministers hold seats in the legislature but while this made them subject to legislative criticism, it has rarely made them subject to legislative control (Lumb 1991: 65). In Australia, the executive power, is vested in the sovereign and exercisable by her representative the Governor-General aided by the Executive Council. At the state level the executive power is vested in the Governor aided by the Executive Council. In effect it is the Prime Minister and Cabinet at the
federal level who head the executive (which in its widest sense includes the public service). At the state level it is the Premier and Cabinet who head the executive. In practice cabinet is not only an executive, administering laws made by the Parliament, it also shapes the formation of policy because it dominates the legislature. The Queensland Cabinet is outlined by Hughes (1980: 154-172). The Fitzgerald Report (1989: 125) under the heading 3.2 The Executive, notes that the Cabinet has no legal status but, in practice, is a recognised essential element in a parliamentary system; it determines Government policy in all areas of public administration. It also directs, co-ordinates and exercises overall control of Government activity, both legislative and executive. Ministers of the Crown, in Queensland, are also members of the Cabinet. The Executive Council on the other hand, in theory, has a mainly formal role. It comprises the Ministers of the Crown presided over by the Governor.

In Queensland, like other states, the executive arm of government is in practice dominated by the Premier and Cabinet. Cabinet determines both the flow and nature of the legislation coming before Parliament. Cabinet determines the economic and social regulations that the state government imposes. Also it is the body effectively responsible for making thousands of appointments each year to Queensland government and semi-government bodies. Under the system of responsible government it is the Executive Council - the body comprising the State’s Governor, the Premier and other Ministers - which is formally responsible for such decisions. In practice, the role of the Executive Council is mainly one of legitimisation (Coaldrake 1989: 104).

**JUDICIAL POWER**
Judicial Power is separated from the Legislative and Executive Power by convention in Queensland. There is a recognition that the State parliament (and Executive) may be made subject to the overall control of a rigid constitution means that a judicial body will have the jurisdiction to interpret such a constitution and to pass judgment on the validity of legislative and executive action. At the State level, 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, they continue to exercise such a jurisdiction. Such a jurisdiction is necessarily inherent in the courts of a system which has a controlled constitution. Unfortunately there is no constitutional impediment to a State parliament legislating in a manner which would intrude upon the exercise of judicial power (Lumb 1991: 131-2).

The separation of powers at the State level, as at the Commonwealth or national level, requires the judicial power to be separated from the legislative and executive power. This is the situation in Queensland as it is in the other Australian states. In the Westminster system the principle of judicial independence is an important feature. This feature is given prominent treatment in Montesquieu’s (1748) account of the “English Constitution”; it is really a fundamental component of the doctrine of separation of powers. The separation of powers doctrine is fully operational in the federal sphere but not in the state sphere: (see Clyne v East (1967)) with respect to the exercise of judicial power (Lumb 1983: 80). Hence it is essential to consider whether and to what degree this is a separation between judicial power, and the non-judicial (legislative and
executive) powers. The judicial power will be exercised by the courts in the Westminster system; there are exceptions that are well recognised, these include: Parliament’s power of contempt and control of its Members; courts martial. However there is no constitutional legal restriction on Parliament that prevents it (i) from vesting judicial power in tribunals or even officials outside the court system, or (ii) from directly exercising judicial power (Carney 1993: 7).

The State Parliaments, as regards (i), are not hampered in the same way as the Commonwealth Parliament and so can establish quasi-judicial tribunals to exercise powers which are of a judicial nature. Probably the most significant danger as regards (ii), of not having the doctrine as a legal restriction in Queensland is the capacity of Parliament to directly exercise judicial power that is usurp the judicial process, either (a) by exercising judicial power itself by determining the guilt of a person by a bill of attainder, or (b) by interfering in the judicial process (Carney 1993: 7).

The following note by Carney (1993: 7-8) explains (a) and (b):

(a) A bill of attainder is a law which adjudges a person or a class of persons to be guilty of punishable conduct which at the time it occurred was not prescribed by the general law as an offence or as punishable conduct, and thereupon prescribes the punishment for that conduct.

Bills of attainder are offensive to the doctrine of separation of powers and to the rule of law for they render what was at the time lawful conduct, retrospectively unlawful.
At present, there is no constitutional impediment to bills of attainder enacted by the States, but by virtue of the doctrine of separation of powers operating at the Commonwealth level, the Commonwealth Parliament is precluded from enacting them (see *Polyvkhovich v Commonwealth* (1991) 101 ALR 545).

(b) Laws which interfere in the judicial process have also been enacted from time to time by State Parliaments and while upheld as valid laws they have provoked considerable criticism from the court. In the *BLF v NSW Minister for Industrial Relations* (1986) 7 NSWLR 374, the NSW Court of Appeal upheld NSW legislation that was enacted just before an appeal was to be heard, which effectively directed the court to dismiss the appeal and make no order as to costs. Street CJ clearly disapproved of this legislation:

...it is contrary both to modern constitutional convention, and to the public interest in the due administration of justice, for Parliament to exercise that power by legislation interfering with the judicial process in a particular case pending before the Court (the BLF Case 1986: 381).

Under the doctrine of the separation of powers and also under the Westminster system of government, the judicial power is required to be separated, from the legislative power and executive power (Lumb 1983; *Fitzgerald Report* 1989; Carney 1993). After the excesses of the Bjelke-Petersen years, all aspects of government required review. The judicial culture in Queensland required examination and the behaviour of judges came under the terms of reference of the Fitzgerald Inquiry. The behaviour of Judges Pratt and Vasta, in particular, exposed deep problems in the appointment and removal of the judiciary (*Fitzgerald Report* 1989; Fitzgerald 1990). The unusual circumstances of the removal of
Judge Vasta from the Supreme Court required a process to be developed; the process included a Parliamentary Judges Commission of Inquiry to recommend dismissal before a Parliamentary vote on the matter (*Fitzgerald Report* 1989; Dickie 1989; Whitton 1989: 14).

The position of Chief Justice is an important position within the judiciary and the office holder is required to lead the judiciary and maintain its independence from the government of the day (de Jersey 2001a, 2001b). Under the Australian (and Queensland) version of the Westminster system of government the independence of the judiciary is an important aspect of the partial separation of powers. In Queensland, the judiciary has struggled to maintain its independence, free from political interference. The present Chief Justice Paul de Jersey has led well and maintained judicial independence. De Jersey CJ has constantly raised the issue of the lack of appropriate funding for the judicial system in Queensland. De Jersey CJ has also recently criticised the funding level and expertise, within the Office of the Director of Public Prosecutions (ODPP); he has suggested that, had greater resources been provided, the recent *Hanson* and *Ettridge* cases (2003) might not have reached trial (de Jersey in *R v Hanson; R v Ettridge* [2003] QCA 488 (6 November 2003); de Jersey cited in The Courier-Mail, 7 November 2003, p. 1). This case exposed some political influence and infringement on the judiciary and judicial independence.

**DISADVANTAGES OF THE QUEENSLAND CASE**
The state of Queensland, follows the system of government derived from England. The Westminster system of government does not have a strict separation between the three powers and the three branches of government. The theory from John Locke (1690) and William Blackstone (1884) indicated a separation between the legislative and executive power but with theoretical parliamentary supremacy. In practice however, the executive of course has come to dominate the Parliament in Queensland, as it has in the other Australian States and in the UK itself. The Parliament and the courts have traditionally been subordinate to strong governments. The Fitzgerald Inquiry (1987-89) exposed the lack of knowledge and adherence to the principle of the SOP in Queensland. Disadvantages of the Queensland case show the lack of SOP in Queensland. The Queensland executive has infringed on the legislature and the judiciary in significant ways. There has been a political penetration of the judiciary in Queensland. The judicial culture in Queensland has presented problems for judicial independence. The case of Justice Angelo Vasta (1988) and his dismissal presented problems for the SOP and judicial independence. The case of Chief Magistrate Di Fingleton (2002-3) has more recently presented similar problems for the SOP. Also the case of Pauline Hanson and David Ettridge (2003) has presented further problems for the SOP in Queensland. The role of the Attorney General is also a problem for the SOP.
Figure 3

Separation of Powers - State of Queensland

Parliament and Government in Queensland,
Parliamentary Education Services, Queensland Parliament, Updated September 2004,
p.6.
This diagram (Figure 3) differs greatly from the diagram of the SOP at the Commonwealth level (see Chapter 3, Figure 2). This diagram (Figure 3) Parliament and Government in Queensland was published by the Parliamentary Education Services, Queensland Parliament. The diagram (Figure 3) does not show the Queensland Constitution, it does not mention the three powers, it links the Queensland Parliament (Legislature) and the Executive Government (Executive) by the Premier and Cabinet, it places the Governor below the Parliament and Government, it also places the Judicature at the bottom below the other two institutions. At the Commonwealth level under the Commonwealth Constitution the three powers (legislative, executive and judicial) are clearly separated on the same level of authority. The Commonwealth Constitution and system of government (in theory and practice) indicates an intention for checks and balances between the three branches of government and the three powers the institutions exercise. The Commonwealth Constitution indicates an American or US inspired Separation of Powers (separation of three powers [legislative, executive and judicial powers]). The Queensland Separation Of Powers (similar to other Australian States) indicates an English or UK inspired Separation Of Powers (separation of two powers [legislative and executive powers] with Parliamentary Sovereignty). The Commonwealth has constitutional separation of powers whereas the States do not have constitutional separation of powers.
The Fitzgerald Inquiry (1987-9) and the Separation of Powers

The Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (The Fitzgerald Inquiry, a quasi-judicial inquiry) (1987-9), and handed down its Report in 1989. In December 1988, the former Premier of Queensland, Bjelke-Petersen despite his 19 years experience as Premier, was unable to explain the doctrine of the separation of powers to the Inquiry (see the extract of the exchange between former Premier Bjelke-Petersen and Barrister Michael Ford at the Fitzgerald Inquiry, in this section). Less than a year later, in September 1989, when Russell Cooper replaced Mike Ahern (who had replaced Bjelke-Petersen in December 1987), ABC journalist Quentin Dempster asked the Premier-elect the same question. “What do you understand by the doctrine of the separation of powers under the Westminster system?” The question was met from Cooper with the same display of incomprehension.
The ‘separation of powers’ (in Queensland) – Fitzgerald Inquiry (1988)

During cross-examination of the former Queensland Premier, Sir Joh Bjelke-Petersen, in 1988 at the Fitzgerald Inquiry into police corruption, the following exchange took place.

(Barrister, Michael Ford, represented the Australian Labor Party at the Inquiry.)

**MICHAEL FORD:**  What do you understand by the doctrine of the separation of powers, under the Westminster system?

**SIR JOH:**  Of the ...  

**MICHAEL FORD:**  The Westminster system.

**SIR JOH:**  The stock ...  

**MICHAEL FORD:**  The doctrine of the separation of powers, under the Westminster system.

**SIR JOH:**  N, I don’t quite know what you’re driving at. The document?

**MICHAEL FORD:**  I’ll say it again. What do you understand by the doctrine of the separation of powers, under the Westminster system?

**SIR JOH:**  I don’t know which doctrine you refer to.

**MICHAEL FORD:**  There’s only one doctrine of the separation of powers.

**SIR JOH:**  I believe in it very strongly, despite what you may say, I believe that we have a great responsibility to the people who elect us to government and that is to maintain their freedom and their rights. I did that, sought to do it always.

**MICHAEL FORD:**  I am sure you’re trying to be responsive to the question but the question relates to the doctrine of the separation of powers under the Westminster system, or the principles.

**SIR JOH:**  Between the government and the ... is it?

**MICHAEL FORD:**  No, you tell me what you understand.

**SIR JOH:**  Well the doctrine you refer to in relation to the ... where the Government stands and where the rest of the community stands and where the rest of the instruments of Government stand. Is that what ...?

**MICHAEL FORD:**  No.

**SIR JOH:**  Well, you tell me, and I’ll tell you whether you are right or not. Don’t you know?

THE QUEENSLAND EXECUTIVE INFRINGEMENTS ON THE JUDICIARY -

Political penetration of the Judiciary in Queensland

Political interference in Queensland’s judiciary has not been confined to recent years, having notably been evident during the premierships of Labor leaders William Forgan Smith and Vince Gair. The sequence of events that culminated in the appointment of Mr Justice Dormer Andrews as Chief Justice provides the most public evidence of political interference in Queensland’s judiciary during the Bjelke-Petersen premiership. The incident was interesting because it involved not only a conflict between the executive and judicial arms of government, but also within the coalition. It was also a test of the extent of the influence of Sir Edward Lyons, National party trustee and a personal confidant of Joh Bjelke-Petersen (Coaldrake 1989: 85).

The state Attorney-General Samuel Doumany (a Liberal), at a cabinet meeting on 21 December 1981, put forward the name of Mr Justice James Douglas to replace Sir Charles Wanstall as Chief Justice. The only person to object in cabinet and oppose the recommendation was Bjelke-Petersen, according to journalist Evan Whitton (Whitton 1987, cited in Coaldrake 1989). Bjelke-Petersen launched a stinging attack upon the judiciary, which caused the matter to be deferred to allow time for the names of other candidates to be considered. The Attorney-General Samuel Doumany had made his recommendation of Mr Justice Douglas on the basis of consultations with a wide cross-section of the legal community, judges and practitioners. The appointment of Chief Justice as the top judicial position had traditionally been decided on the basis of seniority.
within the Supreme Court. The Attorney-General’s nominee, Mr Justice Douglas, met that requirement; in addition, he enjoying very strong personal support for the post from within the legal profession. There were reports, however, that Sir Edward Lyons preferred Mr Justice Dormer Andrews, seventh in seniority, for the position. It was also known that Bjelke-Petersen held a general objection to the view that the preferred choice of the judiciary should be automatically endorsed by the government. It also might have been the situation that perhaps Bjelke-Petersen objected to the system of judicial seniority. Another suggestion, however, was put forward by journalist Quentin Dempster in the Brisbane Telegraph at the time: the premier was annoyed with the judiciary as a result of being barred from officially attending the opening of the new Supreme Court building several months earlier (this was because he was a litigant before the courts at the time) (Coadrake 1989: 85-6; Wear 2002: 157).

Prior to the January 1982 cabinet meeting at which the Chief Justice appointment was to be resolved, Attorney-General Sam Doumany gave the impression that he regarded his job as “on the line” over the matter. At the meeting, National Party Ministers supported the Premier’s preferred candidate, Mr Justice Andrews but he was apparently not even on the list of alternatives the Attorney-General presented in cabinet. A compromise candidate, Mr Justice Walter Campbell, was agreed upon after a difficult debate. Later the same day Mr Justice Andrews (on the recommendation of the Premier), and following an equally messy debate, was appointed Senior Puisne Judge. The appointment of Andrews occurred only over the strong objections of the Attorney-General and his Liberal ministerial colleagues, all of whom refused to sign the Executive Council minute
containing the appointments. Nevertheless, the Governor, Commodore Sir James Ramsey (1977-85), endorsed the minute, thereby confirming both appointments. Three years later, in 1985, Mr Justice Andrews went on to secure the top job of Chief Justice, following Sir Walter Campbell’s further elevation to the post of Governor (Coadrake 1989: 86-7; Whitton 1989: 72; Wear 2002: 157).

More than six years later, during the course of the Fitzgerald Inquiry, a much darker side to the political involvement in the Chief Justice appointment issue emerged. In a statutory declaration to the inquiry on 6 December 1988, former Liberal Party Minister Terry White said that, during its deliberations on the position of Chief Justice, state cabinet had been told by Liberal Party Minister Don Lane that Mr Justice Douglas had cast a postal vote for Labor in the 1972 state election. Mr Justice Douglas was an elector in Lane’s seat of Merthyr. Former Liberal Minister and deputy Premier, Sir Llew Edwards, and former National Party Minister, Vic Sullivan, also claimed in statutory declarations to the Fitzgerald Inquiry that Mr Justice Douglas was overruled for the Chief Justice post after cabinet was told of his postal vote. Another witness before the Fitzgerald Inquiry, Sir Edward Lyons, revealed his knowledge of the matter. He told the inquiry that Mr Lane “had found out that Mr Douglas had been overseas and had cast a postal vote and he [Mr Lane] saw those postal votes” (The Courier-Mail, 1 December 1988). Robert Douglas QC, a son of Mr Justice Douglas, also submitted a statutory declaration regarding his recollection of the matter. In the statement (dated 2 December 1988) Robert Douglas declared that at a social occasion in 1973 Don Lane had approached him and said “Bob, I am disappointed in your father”. According to Robert
Douglas, Lane then said to him that he was aware that Mr Justice Douglas had voted for Labor because he had seen his postal vote. Lane staunchly denied these allegations, claiming in a statutory declaration that he did not see any postal vote cast by Mr Justice Douglas. In support of Don Lane’s story, Ida Margaret Mackay, a Liberal Party scrutineer in Merthyr at the 1972 state election, also tendered to the Fitzgerald Inquiry a statutory declaration in which she indicated that Lane had not touched or looked at any vote that was being handled by the Returning Officer (Coadrake 1989: 87; Wear 2002: 157). Although the evidence is not conclusive the implication of political interference is obvious.

The judiciary in Queensland also may have contributed to its own apparent vulnerability to political interference by not distancing itself sufficiently from the political process. The Fitzgerald Inquiry (1989) referred to tawdry examples of legal identities ingratiating themselves to the government, or its political friends, in order to gain political influence for judicial appointments or promotions. This type of behaviour virtually compromises the judiciary, which, in order to administer justice in an impartial fashion, has a responsibility to ensure that it remains non-political and independent and at arm’s length from the government of the day. Although such practices may not be confined to Queensland, the appointment of judges to the boards of statutory bodies may be seen as exposing the judiciary to political influence from the government. These appointments are often prestigious and highly valued; they are also for fixed terms, and most allow for reappointment. As a result of these types of appointments, judges may be seen to be beholden to the government of the day. This poses problems for the separation of
powers. Institutional checks have failed to ensure that the government has operated with a measure of efficiency and accountability; the breaches of convention, conflicts of interest, and so on, have all contributed to produced institutional ‘dry rot’ in Queensland. Not only have the institutional mechanisms built into the political system failed but also the external checks purportedly provided by the parties of political opposition, and the state’s media (Coaldrake 1989: 88).

Bjelke-Petersen’s interference in and use of the judiciary, according to Wear (2002: 219), may be seen in the increasing use of defamation actions. Journalists, editors and producers, public servants (for example John Sinclair), as well as opposition members of Parliament and other opponents, were quietened by Bjelke-Petersen [see for example, Sinclair v Bjelke-Petersen [1984] 1 QdR 484, Bjelke-Petersen v Warburton & Burns [1987] 2 QdR 465, Bjelke-Petersen v Burns & ABC [1988] 2 QdR 129]. Whitton argues that defamation actions were generally used ‘to stop talk about a corrupt Government’ (Whitton 1989: 110). Premier Bjelke-Petersen warned potential critics to ‘stick to the truth and don’t say things that are wrong and you won’t have anything to worry about’ (Murphy 1986: 11). Fourteen of the 24 actions launched by Bjelke-Petersen and his ministers were publicly funded (Whitton 1989: 110). These included action against the then Leader of the Opposition, Neville Warburton, other Labor MPs, the general secretary of the Trades and Labor Council of Queensland, Ray Dempsey, and the ALP’s state secretary, Peter Beattie.
The Judicial Culture in Queensland

A fundamental requirement of the SOP doctrine is the separation of the judiciary and the independence of the judiciary. Let us now briefly look at the judicial culture in Queensland. As far as Fitzgerald was concerned, the behaviour of judges legitimately fell within his terms of reference (Fitzgerald Report, 1989: 322; Fitzgerald 1990: 70). His purpose was to delve as widely as necessary to determine the root cause of corruption. “Truth”, he argued, “does not cease to be truth because prominent citizens are involved, and an investigation which aims to find the truth cannot be curtailed or circumscribed to exclude categories of persons from its purview,” (Fitzgerald Report, 1989: 323). He continued, “And contention that any investigation (except an inquiry which has been appointed by the Parliament to recommend whether a judge should be removed) which comes up against some matter in which the behaviour or relationships of a judge arises for consideration should be abandoned or curtailed is unrealistic and untenable in practice” (Fitzgerald Report, 1989: 324; Fitzgerald 1990: 71).

Those judges named in the Fitzgerald Inquiry (1987-9) (Supreme Court Judge Angelo Vasta and District Court Judge Eric Charles Ernest Pratt) were offered the same rights as others to appear before it and to make statements. Judge Pratt had previously been the Chairman of the Police Complaints Tribunal (from 7 June 1983 to 1988). Pratt had been named on 12 April 1987 as the person likely to head the corruption inquiry. There appeared to be an obvious conflict of interest here. The appointment was later given to
Mr G.E. Fitzgerald, QC on the 26 May 1987, an Order in Council established the Commission of Inquiry and appointed Fitzgerald Chairman and Commissioner.

On 27 October 1988, Justice Vasta alleged a conspiracy against him by Attorney-General, the Chief Justice and Tony Fitzgerald, this allegation was later denied and withdrawn by Vasta. Judge Vasta particularly resented the intrusion by the Fitzgerald Inquiry, and he claimed that for him to appear before the Inquiry struck at the independence of the judiciary, the focal symbol of judicial culture. Vasta also vigorously and publicly questioned whether Fitzgerald, as a QC, was qualified to inquire into the behaviour of a Supreme Court judge. The Hon G.E. Fitzgerald QC had indeed previously been a judge, he had been in 1981-84 a Federal Judge and also a Judge in the Supreme Court of the ACT. The ethos of the judicial culture, threatened to disrupt Fitzgerald in his inquiries. Indeed, Fitzgerald was so dismayed at Vasta’s attacks on the Inquiry that he contemplated abandoning it. (Fitzgerald Report, 1989: A220). To claim that judges could exclude themselves from participating in an inquisitorially-based inquiry because of judicial independence was a repeated assertion of Vasta. The argument of judicial independence was a severe challenge to the integrity of a context-based inquiry such as the Fitzgerald Inquiry; no one else other than Vasta had been excluded from being a witness for examination at the Inquiry (Fitzgerald 1990: 71). In a letter to the Premier, Fitzgerald recognised his dilemma:

The independence of the judiciary is undoubtedly the most important feature associated with Mr Justice Vasta’s position. A commitment to equal treatment for all may have to yield if such an approach would imperil the judiciary’s independence. Conversely, especially having regard
to the public concern at what had been revealed in the Inquiry, care must be taken to ensure that concern for the judiciary’s independence does not lead to a less thorough scrutiny of judicial conduct, create a public perception that there are special rules and perhaps “cover-ups” available for a privileged few, or possibly cause a failure to dispel any doubts which may exist concerning judicial integrity (Fitzgerald Report, 1989: A222).

Fitzgerald’s concern for the independence of the judiciary led him to forego his full inquisitorial rights. As a result, Fitzgerald gladly handed over the task of inquiring into the behaviour of the judges to a Parliamentary (Judges) Commission of Inquiry, to be carried out by three retired judges: the Rt Hon. Sir Harry Talbot Gibbs (Presiding Member); the Hon Sir George Hermann Lush; and the Hon Michael Manifold Helsham (Parliamentary (Judges) Commission of Inquiry (two Reports 1989). (These Inquiries were similar to a body set up in 1987 by the Commonwealth Parliament to examine matters concerning High Court Justice Lionel Murphy; Sir George Lush was also a member of that body) (Fitzgerald 1990: 71-2, in Prasser et al 1990).

The relationship between inquisitorial public inquiries and judicial culture presents problems and this is particularly so in the case of inquiries into judicial misconduct. Fitzgerald, questioned whether an inquiry seeking to determine whether a judge should be removed from office needed to be “effectively adversarial” (Fitzgerald Report, 1989: 323). Vasta was certainly demanding an adversarial style contest. In a letter to the premier Fitzgerald had remarked: “Many who have been caught up in the Inquiry share Mr Justice Vasta’s wish to be excluded from such a process and to be called upon to face particularised allegations of which evidence is already available” (Letter to Premier, 26 October 1988, p. 2). Vasta achieved his wish, to a degree, in the Parliamentary Judges
Inquiry but it is doubtful given his fate that he achieved it to his satisfaction (Fitzgerald 1990: 72).

As a consequence of the Parliamentary Judges Inquiry, and the conclusions reached by Gibbs et al, serious questions arise as to whether an inquisitorial style will be adopted in the future. The Parliamentary Judges Inquiry was, in part, a retreat into the formalistic and familiar ethos of the judicial culture. Gibbs et al, for example, chose to firmly establish what, at the beginning of their inquiry, they called a “civil and curial” basis of hearing evidence (*First Report of the Parliamentary Judges Commission of Inquiry*, 12 May 1989: 11-13). While they did recommend that Parliament remove Vasta from office - largely because of the improper dealings of Vasta’s family company Cosco Holdings (a toilet paper manufacturer in Brisbane) - in their Conclusions they voiced doubts about the value of wide-ranging inquiries: The Commission, as a result of conducting the inquiry into Mr Justice Vasta and into Judge Pratt formed the opinion that holding an inquiry into the ‘behaviour’ of a judge may warrant his/her removal and as a result be open to grave objection. It is one thing to inquire into specific allegations of impropriety but it is quite another to conduct an inquiry into all aspects of a judge’s life (*Second Report of the Parliamentary Judges Commission of Inquiry*, 19 July 1989: 89; Fitzgerald 1990: 72).

Gibbs et al, concluded that “an inquiry of the latter [that is, of an inquisitional kind], exposes the judiciary to unacceptable risks that pressure will be applied to its members and it becomes especially dangerous if instigated by pressure groups or as a result of media clamour” (*Second Report of the Parliamentary Judges Commission of Inquiry*, 19
July 1989: 89). Why the judges questioned the value of an inquiry into judges is not entirely clear when viewed in the context of the whole Fitzgerald Inquiry. Their parting shot seems to hint at sinister external factors - pressure groups and media clamour. Evan Whitton (1989) has raised the following question: “Are Gibbs et al, saying it is better to have the judiciary sprinkled with such types as Vasta, who, in their opinion, had engaged in fraud on the revenue, rather than pry into their private lives?” (Whitton 1989: 14; Fitzgerald 1990: 72-3).

The question of whether judges should inquire into the behaviour of fellow judges raises the concept of self-regulation; this was a major concern of the Fitzgerald Inquiry. Another question is: how realistic is it to expect that inquiries conducted by judges will be inquisitorial? Gibbs in 1963-64 (National Hotel Inquiry), and Gibbs et al in the Parliamentary Judges Inquiry, showed how easy it is for those steeped in the judicial method to adopt the adversarial position. A person whose training has been in such a method must be determined to overcome this and assume an avowedly inquisitorial stance, as Fitzgerald did in his Inquiry (Fitzgerald 1990: 73).

It was the wide terms of reference, in particular, the reference to “any behaviour”, which was responsible for Vasta’s demise. The question of influence between sacked Police Commissioner Sir Terrance Lewis and Supreme Court Justice Angelo Vasta was quickly dealt with. Vasta’s evidence before the Parliamentary Judges Inquiry did not present evidence of misbehaviour; the Inquiry failed to find any hard evidence of Vasta’s misbehaviour to constitute warranting his removal from the Supreme Court bench.
Despite their conclusion that judges should only be required to face specific allegations, Gibbs et al noted that it was not necessary for them to determine whether any specific behaviour “in itself” was enough to warrant his removal. On the one hand, then, Gibbs et al were claiming the desirability of abandoning an inquisitorial style in the case of judges and dealing only with specific allegations. On the other hand, they refused to determine whether any specific behaviour of Vasta warranted his removal from the bench. It is fair to say that the Parliamentary Judges Inquiry conclusions have not clarified the issue of judicial standards. Concerning the priority to be given to the judicial culture in investigations of misconduct and corruption, the inquiry shed little light (Fitzgerald 1990: 73-4).

The return to formalism has created a disturbing public perception that there is in judicial culture a concern for the detail not the big picture. As Quentin Dempster wrote, it appears that the retired judges had beaten Vasta with a feather - his alleged tax fraud (Dempster 1989: 22). In not determining whether Vasta’s stance in the *Matilda* defamation case (1986) was in itself misconduct warranting removal from office, the retired judges also determined that there was no evidence that Vasta’s judicial judgment had been affected by his transgressions. It is not clear, according to Evan Whitton (1989), whether the judges based this determination upon any detailed examination of the transcripts of Vasta’s cases (*Justinian*, July 1989, p. 10). This creates confusion for the wider community. The right to judicial independence and the respect of the wider community, is claimed by Judges, as a prerequisite for fair trials. Nevertheless a panel of three retired judges (at a cost of $3,000 a day each), cannot give any specific guidance as
to whether acts of deceit, fraud and provision of false evidence of themselves are condonable acts of behaviour for a judge (Fitzgerald 1990: 74).

Changes clearly need to be made. One obvious need is greater public awareness of the judicial ethics and greater clarity of what constitutes “acceptable friendships” for judges. It is important to develop effective mechanisms to: 1) guard and protect the independence of the judiciary; and 2) to develop strategies to prevent and detect official or judicial misconduct. The judicial culture is important in relation to judicial independence and the separation of the judiciary from the other branches of government.

In looking at the executive infringing on the judiciary in Queensland it important to look at the Fitzgerald Inquiry and Justice Angelo Vasta. A note detailing the background of Justice Vasta and the events involving the removal of Justice Vasta follows in the next section.

**Hon Justice Angelo Vasta, QC (Queensland Supreme Court Judge: 1984-88)**

Angelo Vasta was born on 8 January 1941. Angelo Vasta was the son of a Sicilian canecutter who migrated to Australia in 1922. He was educated at Marcellin College (Vic), and the University of Melbourne. Vasta was admitted to the bar in Victoria in 1965; and in Queensland in 1968. He became a Crown prosecutor in 1969; he became a Queen’s Counsel and Chief Crown Prosecutor in 1981. He was a Director of Cosco Holdings (a paper products company). From October 1980 to 22 September 1983; after this time he remained a minority shareholder. His Toilet paper factory, at Carole Park, Brisbane, was opened by the Premier (Bjelke-Petersen) in May 1983. Mr Angelo Vasta
was appointed (unannounced appointment) Judge of the Supreme Court on 23 September 1983; this unannounced appointment by the minority National Party Government was rescinded four days later. Mr Vasta was officially appointed Supreme Court Judge on 13 February 1984.

Justice Vasta took legal action against the satirical magazine *Matilda* in 1986, in part, over allegations of his closeness to Police Commissioner Sir Terrence Lewis. Diaries of Sir Terrence were found to contain 60 references to Mr Justice Vasta in a list of special friends in a statement to the Fitzgerald Inquiry, July 1988; he gave evidence on this friendship, October 1988. Mr Justice Vasta was stood down from judicial duties on 24 October 1988; he alleged a conspiracy by the Attorney-General Paul Clauson, Chief Justice Dormer Andrews and Commissioner Tony Fitzgerald, 27 October 1988; he asked that this allegation (denied and later withdrawn) and any specific allegations against him be referred to a panel of three retired judges. A Parliamentary Judges Commission of Inquiry was appointed on 17 November 1988; the Commission reported on Mr Justice Vasta on 12 May 1989. It recommended that his removal as Supreme Court Justice was warranted because he gave false evidence, he arranged sham transactions for taxation advantages, and he made and maintained allegations of conspiracy. Strangely, however it also said that he was not guilty of any judicial misconduct. Vasta disputed the findings of the allegedly “scandalous” Gibbs et al Inquiry before the bar of Parliament on 7 June 1989. Parliament voted for his removal from office as a judge on 8 June 1989 (Dickie 1989: 328). This is the background to the dismissal of Vasta. Let us now look in more
detail at the lack of separation of the executive and the judiciary and political interference with Vasta.

Political influence in judicial appointments, and executive interference in the judiciary, generally can be seen in the relationship between Lewis, Lyons and Vasta. A political crisis was sparked in the Fitzgerald Inquiry when it probed Lewis’s relationship with Angelo Vasta. The Lewis diary entries appeared to show that he discussed Vasta’s suitability for elevation to the Supreme Court with Vasta himself, the Premier and Sir Edward Lyons, the Premier’s confidant. Lewis mentioned Vasta to the inquiry as “a special friend” and letters from Vasta tabled in evidence seemed to show the friendship was reciprocated. In one letter Mr Justice Vasta told Lewis, “I will always treasure your friendship”, and in another, written after Lewis had attended the opening of a paper products factory connected with Vasta, Vasta wrote, “Tell Hazel not to put toilet paper on her shopping list again” (Vasta cited in Dickie 1989: 267).

In a historic sitting, Mr Justice Vasta was invited to the bar of parliament where for 140 minutes on 7 June, 1989, he dissected and disputed the evidence against him and he labelled the conduct of the Parliamentary Judges’ Commission as “scandalous” (Dickie 1989: 277). After Vasta was removed (had his commission withdrawn) by the Queensland Parliament, he returned to practice as a barrister. Vasta was not reappointed as Supreme Court Judge or compensated for loss of income or legal costs (estimated at $750,000) during the Fitzgerald Inquiry. He also received a taxation bill for ($420,000) in avoided tax and penalties. In May 1994 ‘Justice for Vasta Committee’ calls for his
reinstatement and sends a submission to the International Commission of Jurists (ICJ). In September 1994, ICJ commissions Masterman, QC, to investigate Vasta’s removal. In February 1995 the Masterman Report was edited by the ICJ. In March 1995 an international human rights group condemned the sacking of former Queensland Supreme Court Judge Angelo Vasta as unfair and a breach of judicial independence. It has been claimed that the Judge was denied justice and the government has been urged to pay compensation to Vasta; this was not done (The Courier-Mail, 21 March 1995, p. 1). The removal of Vasta J presents an incident of the Queensland executive infringing on the judiciary and political interference in judicial independence.

The other judge of concern to the Fitzgerald Inquiry was Judge Eric Charles Ernest Pratt, QC. On 15 October 1987, Judge Pratt was named in hearsay evidence before the Fitzgerald Inquiry as a participant with corrupt police and criminal figures in meetings to work out police transfers, these allegations were denied by Eric Pratt. Pratt was judge of the District Court (29 October 1982 - 20 February 2001) and chairman of the Police Complaints Tribunal (7 June 1983 to 1988). Pratt said that the numerous entries referring to him in the Lewis diaries were “innocuous or incorrect” on March 1988. On October 1988 he stood down from the District Court bench. In November 1988 at the Parliamentary Inquiry by the three retired judges, commissioned to investigate certain allegations against Judge Pratt and Supreme Court Justice Angelo Vasta. In June 1989, the Commission was told by its counsel there was no evidence of judicial misconduct by Judge Pratt (Fitzgerald Report, 1989: 324; Dickie 1989: 324-5). The non-removal of Pratt J presented an incident of the Queensland executive not infringing on the judiciary
although there was political relationships which compromised judicial independence. Another more recent case involving executive interference in the judiciary is the incident involving the removal of the Chief Magistrate Diane Fingleton.

**Chief Magistrate Diane Fingleton (Queensland/Brisbane Magistrate’s Court)**

Another recent controversy concerning the judiciary and the separation of powers arose in the career of Diane Fingleton and events which ended her term in office as Chief Magistrate (see *R v Fingleton* [2003] QCA 266 (26 June 2003)). The Chief Magistrate Diane Fingleton was a controversial appointee of the former Labor Attorney General Matthew Foley. The executive infringement on the judiciary was at issue again (as it was with Justice Vasta). The executive seemed to interfere in the early stages of the judicial process to review the performance of the Chief Magistrate, but it was unclear about the later stages. There had been a judicial review process (including court cases) concerning the actions taken by the Chief Magistrate against her fellow and subordinate magistrates. The separation of powers doctrine requires that the executive stay out of the judicial process as much as possible and this includes the hearing of evidence and the determination of judgment about the Fingleton matter.

The facts and significant dates leading up to Magistrate Basil Gribbin’s complaint to the Crime and Misconduct Commission (CMC) about the Chief Magistrate Diane Fingleton are as follows: On June 4, 2002 Queensland’s Chief Magistrate Diane Fingleton summoned the Southport magistrate Sheryl Cornack to discuss complaints about her performance. On September 6, 2002 Cornack filed a Supreme Court affidavit calling for
a judicial review of Fingleton’s performance. On September 18, 2002 Chief Magistrate Fingleton e-mailed Beenleigh co-ordinating magistrate Basil Gribbin asking why he gave evidence against her for a fellow magistrate, Anne Thacker (who was fighting a transfer). The same e-mail also demanded Gribbin show cause why he should remain in his position. On September 20, 2002 Gribbin filed a complaint with the Crime and Misconduct Commission (CMC) claiming that Fingleton’s dealings with him represented criminal misconduct in attempting to pervert the course of justice.

The Labor Attorney General Rodney Welford said that he was satisfied with the judicial review process that investigated the matter. The CMC’s Chairman, Brendan Butler, SC, and one of his key lawyers, Stephen Lambrides, had disqualified themselves. Their substitute was retired Supreme Court of Appeal judge William Pincus QC, in consultation with Queensland’s Chief Justice Paul de Jersey QC. One key document of evidence in the case was an e-mail message sent by Fingleton to Gribbin in which she threatened him with demotion and it links her action to his decision to give evidence against her in the case of another magistrate, Anne Thacker (Thomas 2002: 26). Gribbin believed this behaviour by Fingleton was potentially ‘threatening a witness’ and attempting to pervert the course of justice in judicial proceedings and the Chief Magistrate as a judicial officer had a duty to uphold the law and protect witnesses against threatening conduct.

Under the Crime and Misconduct Act (2001), the CMC, when considering a complaint against a judge or magistrate, “is limited to investigating misconduct of a kind that, if established, would warrant the judicial officer’s removal from office”. The Queensland
*Magistrates Act* (1991) permits the suspension of a magistrate from office if a Supreme Court judge, on the application of the Attorney-General, “has determined that there are reasonable grounds for believing that proper cause for removal of the magistrate exists”. Reasonable grounds under the Act include proved misbehaviour, serious neglect of duties, incompetence or conviction of an indictable offence (Thomas 2002: 26).

There had been political comment and criticism on the matter. For example, Michael Horan the Opposition Leader has said that Ms Fingleton should stand aside until the CMC inquiry was completed. Mr Horan has said that “Queenslanders are rapidly losing confidence in the justice system of Queensland.” Attorney-General Rodney Welford, however, has said that he was stunned by Mr Horan’s “ignorance” of the due process of separation of powers. In reply, Mr Horan has said that under the *Magistrates Act* (1991), Mr Welford had the right to suspend a magistrate from office if he/she breached one of four grounds. He said the fact that this right existed showed there was no clear separation of powers between the Government - represented by the Attorney-General - and magistrates. Nevertheless, in this instance it appears that Ms Fingleton has not breached any of the four grounds, which included committing an indictable offence or being guilty of misbehaviour (Todd 2002: 16).

The Chief Magistrate Di Fingleton did forego a committal hearing and stood trial on charges of attempting to pervert the course of justice and threatening a witness. The matter was mentioned before the Brisbane Magistrate’s Court on May 28, 2003 (Lill 2003: 4). At Fingleton’s first trial – the Jury failed to reach a verdict. A retrial started
the next day. On June 4, 2003 Fingleton’s 2nd trial - she was found guilty of threatening a witness, & perverting the course of justice. Fingleton received from the Court the following Punishment - 1 year in jail with no parole recommended. Allegations were made that her appointment 4 years ago was not a popular one and that a political faction in the magistracy was keen to get rid of her. A relevant comparison to be made with the Queensland Chief Magistrate, is that of the former NSW Chief Magistrate Murray Farquar, who was sentenced to 4 years jail in 1985 for attempting to pervert the course of justice. Another comparison can be made with the former High Court justice, Lionel Murphy who received 18 months’ jail for perverting the course of justice but the conviction was overturned on appeal.

Executive interference may have occurred in the judicial process on June 27, 2003 when the Queensland Attorney-General Rod Welford puts a deadline of 5.00pm Friday 27 June 2003 for Di Fingleton to resign as Chief Magistrate, if he did not hear from her by then he would apply to the Queensland Supreme Court to order her removal from office. On June 30, 2003 Fingleton decided to resign (effective the next day June 31 2003). Fingleton bowed to Government pressure, she also, at the time, ruled out exercising her rights in the judicial process, that is a High Court Appeal to challenge the Court decision. On July 2, 2003 Fingleton officially resigned from the position of Chief Magistrate. On July 23, 2003 Fingleton sacked her Solicitor Patrick Murphy and also sacked her legal team, she will appeal to the High Court. On December 3, 2003 Fingleton left prison after serving six months jail time.
On October 8, 2004, Fingleton was granted leave to appeal to the High Court, 10 months after being released from jail. In the High Court lawyers were forced to admit they had overlooked laws which may have saved Fingleton from prosecution on a charge of retaliating against a witness. In a case reminiscent of Pauline Hanson’s court ordeal, the High Court found that Fingleton may have been protected by her position as a magistrate. High Court Justice Michael McHugh told the hearing (on October 8, 2004) that the judiciary may be protected from prosecution under Queensland’s Criminal Code (1899) and Magistrates Act (1991). Justice McHugh argued that Fingleton may have had the same protection under the laws in exercising her administrative duties as she did in performing her criminal function. In a joint decision with Justice William Gummow, Justice McHugh argued that Fingleton may have gone to jail for simply doing her job, that is, she was doing what she was authorised to do. Justice McHugh told the hearing that it was hard to imagine a stronger case of miscarriage of justice. A backlog of cases delayed Fingleton’s High Court appeal hearing until the middle of 2005 (*The Sydney Morning Herald*, 8 October, 2004).

The High Court, on 23 June 2005, unanimously allowed an appeal by Ms Fingleton, the former Chief Justice of Queensland, and quashed her conviction for unlawful retaliation against a witness, holding that the conduct that led to the charge was protected by the immunity against criminal prosecution conferred by the *Magistrates Act* (High Court of Australia, Public Information Officer 23 June 2005). The High Court’s decision may be found in *Fingleton v The Queen* [2005] HCA (23 June 2005). The former Chief Magistrate Di Fingleton returned to the bench as a magistrate at Caloundra on the
Sunshine Coast and also received $475,000 in compensation following a three-year ordeal which culminated in her being wrongly jailed for six months. Fingleton accepted a Government offer to become a magistrate at Caloundra on the Sunshine Coast under a compensation deal reached after two months of negotiations. In accepting the deal, she relinquished the right to sue the Government, along with the Crime and Misconduct Commission and the Director of Public Prosecutions. Her new salary was about $25,000 less than she earned as chief magistrate. Her lawyer, Matt Woods, issued a statement saying that The ex-gratia payment to her was some recognition of the injustice she had suffered (*The Courier Mail*, Odgers and Crossen, 2 September 2005).

The Fingleton case highlighted serious problems for the independence of the judiciary in Queensland. The case indicates the Queensland executive (Attorney-General) infringing on the judiciary; by the Attorney-General pressuring the Chief Magistrate to resign, so that a replacement appointment could be made. The role and powers of the Chief Magistrate and rules relating to the transfer of magistrates need greater clarity and transparency. There appears to be a lack of the separation of judicial powers from the executive power here.

Another case involving the apparent infringement of the judiciary by the executive is the Pauline Hanson and David Ettridge case (2003) in Queensland. The following chronology of events concerning the Hanson case (2003) also raises problems about clarity of the law, political interference in the judicial system and difficulties for judicial independence in Queensland.
The Pauline Hanson and David Ettridge case (2003)

The separation of powers has been at issue once again in Queensland in the recent case of Pauline Hanson and David Ettridge. The primary concern was the registration of “Pauline Hanson’s One Nation” as a political party under the Electoral Act (1992) in Queensland. The controversy arose from an amendment to the Queensland Electoral Act which allowed registration under one of two sets of preconditions: 1) the party had a member in the parliament; or 2) the party had 500 registered members. After the fall of the Bjelke-Petersen government, a report by the Electoral and Administrative Review Committee (EARC) on the review of the Elections Act of December 1991, recommended the amendment requiring the 500 members. Hanson and Ettridge as a result of fraudulently registering the ONP faced trial and were subsequently jailed.

A brief summary of facts, events and dates involving the Hanson and Ettridge case might be outlined in the following details. In December 1997 the One Nation Party (ONP) was registered in Queensland. In September 1998 the Queensland Electoral Commission hands over two cheques, to the ONP, totalling $498,637 as part of a public-funded reimbursement of poll costs. In late 1998 legal action was taken against the ONP, alleging it was fraudulently registered. On August 19, 1999 the ONP was officially de-registered in Queensland because the Supreme Court held that supporters had been passed off as party members (Sharples v O’Shea and Anor [1999] QSC 190). In March 2000 the Court of Appeal orders the ONP to repay the $498,637 (Sharples v O’Shea & Hanson [2000] QCA 23). On July 15, 2003 Hanson and Ettridge faced trial for
fraudulently registering the ONP in Queensland. On August 20, 2003 Pauline and David Ettridge were jailed for (3 years) by the District Court (Chief Judge Patsy Wolfe). Various comments were made by federal and state politicians and members of the national media. On November 6, 2003 the Queensland Court of Appeal overturned the convictions, Hanson and Ettridge were released (de Jersey CJ, McMurdo P and Davies JA; R v Hanson; R v Ettridge [2003] QCA 488).

Undermining the judicial process may have resulted from the various comments that were made by various people such as federal politicians (including PM John Howard, Bronwyn Bishop) and state politicians (including Premier Peter Beattie) and members of the national media (including Alan Jones). The separation of powers may have been infringed by members of the executive making critical comments of the decisions of the courts. Premier Peter Beattie in the Queensland Parliament, commenting on the Hanson and Ettridge case (after the Court of Appeal quashed the conviction; the judges commented on politicians’ critical statements of the earlier District Court’s decision and they also commented on the under-resourced Director of Public Prosecutions [DPP]) (de Jersey CJ, McMurdo P and Davies JA; R v Hanson; R v Ettridge [2003] QCA 488 (6 November 2003).

In the Queensland Parliament, on 11 November, 2003 the parliamentary debate recorded in Hansard remarks by various members including the Premier Hon P. Beattie (Brisbane Central - ALP), Hon J. Fouras (Ashgrove - ALP), Mr Flynn (Lockyer - ONP), Mr Wilson (Ferny Grove - ALP), and Mr Shine (Toowoomba North - ALP), on the Hanson
and Ettridge case and the Fingleton case in relation to the separation of powers. Premier Beattie stated the following about the separation of powers:

It has been difficult as Premier to defend, as strongly as I have, the criminal justice system. Politically there may be a price that we will pay for standing by the independence of the courts ... I will never make an apology at any time for standing by the separation of powers and the independence of the judiciary. I understand that there have been some people who have held this high office of Premier who never understood the separation of powers. As a lawyer I do. I am not prepared to see the Queensland courts undermined ... (Queensland Parliamentary Debates Hansard, 11 November 2003, p. 4729).

Premier Peter Beattie in the Queensland Parliament, on 11 November 2003 as recorded in the Queensland Parliamentary Debates (QPD) Hansard, in relation to the Hanson & Ettridge case continued his presentation on the benefits of the separation of powers:

... Unlike previous governments, this government has the utmost respect for the doctrine of the separation of powers. There has never been an attempt by my government to interfere in the courts, and while I am Premier there never will be. We do not have one law for political opponents and one law for political friends. I point out that a former member of the ALP was sentenced to three years in jail following her conviction for electoral fraud in 2000, and so she should have been. As soon as a government seeks to interfere in court cases, we are on the slippery slide to regimes such as Zimbabwe, where the opposition is suppressed and the media is shackled. That is why the independence of the courts is so important to democracy, freedom and our way of life. The integrity of our democracy depends on the independence of our courts and the strict separation of powers between the judiciary and the executive. We have come a long way since Tony Fitzgerald and the Fitzgerald reform package. ... I would not under any circumstances tolerate an attempt to undermine or destroy our democratic system by breaching this vital separation of powers. I have every faith in our courts, and I am confident that they have pursued this matter fairly, impartially and free from any government interference (Queensland Parliamentary Debates Hansard, 11 November 2003, p. 4730).
Recently Premier Beattie offered to hold an inquiry into allegations of misconduct by the Office of the Director of Public Prosecutions (ODPP). The Premier and Leader of the Labor Party in Queensland, chose to assign the inquiry to the Crime and Misconduct Commission (CMC). This is unfortunate, as it has been claimed that the CMC is itself a major part of the problem in the administration of justice in Queensland. This can be seen from the assignment of the politically-charged inquiry into Federal Liberal MP Tony Abbott (and his connection to the Hanson case) to the same CMC. It might be argued that the CMC is part of the executive rather than an independent judicial body (such as a court or a royal commission of inquiry). Mr Beattie does not regard the CMC as part of the justice system. His ‘Separation of Powers’ concept does not extend to the ever obliging CMC (Ambit Gambit, November 12, 2003, pp.1-4). In responding to the Court of Appeal’s concerns about the DPP’s resources, the Attorney General Rodney Welford argued that he had confidence in the DPP in regard to the Hanson case. He said: “I have absolute confidence that the DPP did a competent and professional job in doing what they did in the Hanson matter”. (Welford, cited in O’Brien, ABC Stateline Queensland, 14 November 2003).

Dr Geraldine MacKenzie (a QUT Professor who co-authored Queensland’s sentencing manual referred to by all the state’s judges) commented on the state of the courts in 2003. She said that the poor performance of the courts that year had been unusual. But the courts have done exactly what they are designed to do. The checks and balances are there in the system and it is important that the message goes out to the public that that is the case: “the judges are doing what they are told to do by the legislation and on the

The *Hanson* and *Ettridge* Case (2003) demonstrates some of the issues and problems for the judiciary and the judicial system in Queensland. Judicial independence is under strain when public criticisms comes from the members of the legislature to the extent it has occurred in the *Hanson* case. The Queensland executive infringes on the judiciary when the Premier publicly criticises such a politically oriented case as *Hanson*. The rules governing the enrolment of political parties and the decision by the DPP to pursue the case has the effect of appearing to indicate political and executive decisions rather than non-political administrative and judicial decisions. The political campaign waged against Pauline Hanson by the Liberal, National and Labor Parties as well as the media appeared to be unfair and attempted to silence Hanson and the One Nation Party (ONP) by attempting to prevent her democratic rights of freedom of speech and assembly.

Pauline Hanson, a right wing leader of a right wing political party, the One Nation Party (ONP) became an embarrassment to the Federal Liberal Party and Prime Minister John Howard. A Liberal Party Minister Tony Abbott attempted to shut down Pauline Hanson and the One Nation Party by offering to fund the *Sharples* civil case which formed the basis of the subsequent criminal prosecution which landed Hanson and Ettridge in jail. There are some overtones of the attitude of the Federal Liberal Party in the 1950s when it tried to shut down and even ban a left wing political party in Australia. Prime Minister Robert Menzies, through the use of the Commonwealth defence power (s. 51(vi)), tried
to ban the Communist Party in Australia. The High Court handed down its foremost decision on civil and political rights when it invalidated the Menzies Commonwealth Government legislation, the *Communist Party Dissolution Act* 1950 to outlaw the Communist Party (narrowly rejected at a referendum in 1951) (Solomon 1999: 56-7; see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1).

Another issue concerning the executive infringing on the judiciary in Queensland is the Attorney-General’s interference in the judicial process. The independence of the judiciary is compromised when there is excessive executive interference or executive criticism of judicial decisions. The following section briefly looks at Attorney-General Rodney Welford’s actions that may be considered as either interference or leadership.

**Attorney-General Rod Welford - interference or leadership?**

Executive interference in the judicial system can be seen in the Queensland State Government’s recent introduction of ‘indefinite sentencing’. It might be said that this undermines judicial power and increases the executive power. Following immense public concern expressed in early 2003 regarding the release of convicted sex offender Dennis Raymond Ferguson from prison upon the expiry of his term of imprisonment, the Queensland Legislative Assembly enacted the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). Attorney General Rod Welford introduced this legislation to overcome the High Court’s concerns in the NSW *Kable Case* [*Kable v DPP* (1995-96) 189 CLR 51] (see Ratnapala 2002: 114-5). The 1996 decision of the High Court in *Kable v DPP*
(1996) is authority for the principle that State legislatures may not vest in State courts functions which are incompatible with the operation and standing of those courts as repositories of the judicial power of the Commonwealth (Giskes 2004).

In the *Kable* Case (1996) the High Court considered the validity of s. 5(1) of the *Community Protection Act* 1984 (NSW), which empowered the NSW Supreme Court to make an order for the detention of a specified person (Gregory Wayne Kable, a prisoner convicted of the manslaughter of his wife). The High Court held that the Act was invalid for the reason that it conferred on the State Court a power that was incompatible with the exercise by it of federal judicial power (Ratnapala 2002: 114). In 1994 the NSW Government introduced a special Act, ordering Greg Kable to be detained indefinitely. Cathy Pereira (of the Prisoners’ Legal Service) in regard to the *Kable* Case (1996), has argued that: “The High Court in the case of Kable didn’t accept that community protection was a reason to impose imprisonment of people who hadn’t committed an offence and I guess it’s for the High Court to determine whether the Dangerous Prisoner’s Act is repugnant for the same reason” (Clark, ABC *Stateline Queensland*, 24 October, 2003).

**Conclusion**

Under the doctrine of the separation of powers the judicial power is to be separated from the other two powers: the legislative and executive power. In Queensland, however, the executive has at times infringed on the judiciary; this is especially evident in the judicial appointments made under Premier Sir Joh Bjelke-Petersen (1968-87), such as Mr Justice Dormer Andrews as Chief Justice exposed the political penetration of the judiciary

The Fitzgerald Commission of Inquiry into Illegal Activities and Associated Police Misconduct (The Fitzgerald Inquiry, a quasi-judicial inquiry) (1987-9) in Queensland helped expose a range of problems; and exposed an ‘institutional dry rot’ (Coaldrake 1989). Many of these institutional problems were traced back to the need for the separation of powers and the independence of the judiciary (Fitzgerald Report, 1989). At the Fitzgerald Inquiry, the Queensland Premier Sir Joh Bjelke-Petersen was unable to explain the doctrine of the separation of powers, under the Westminster system. The Fitzgerald Inquiry also exposed the judicial culture was the root cause of corruption (Fitzgerald Report 1989; Coaldrake 1989; Fitzgerald 1990). The most significant danger is for the Government to use the Parliament to directly exercise judicial power (Carney 1993).

The recent Fingleton Case (2003) has raised the issue of the Queensland executive infringing on the judiciary. The Chief Magistrate Di Fingleton, like the previous Justice
Vasta case (1989) (see Dickie 1989) raised the issue of judicial independence and judicial misconduct. It is important that the executive stay as much as possible out of the judicial processes to keep the judicial power separate and independent. The separation and independence of the judiciary requires sufficient resources. The current Chief Justice Paul de Jersey has frequently complained about the lack of resources for the courts and the judicial system. Chief Justice Paul de Jersey, in the recent Hanson & Ettridge Case (2003) in the Queensland Court of Appeal, provided criticisms of the lack of resources for the Office of the Director of Public Prosecutions (ODPP). Justice McMurdo criticised the public comments by a number of politicians especially the PM in the recent Hanson and Ettridge Case (2003) (R v Hanson; R v Ettridge [2003] QCA 488).

The Queensland Attorney-General as a member of the executive has also used his executive powers to infringe on the judiciary. Another case that involves executive interference in the judicial process in Queensland is the Fardon Case (2004). The Attorney-General Rodney Welford introduced The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) to overcome the problems associated with the NSW Kable case (1996) and to keep dangerous criminals in jail so that the community may be adequately protected. This may be seen as executive interference in the judicial process. The High Court has now approved of the Queensland legislation, however it is also true that the judicial review process and judicial power has in a sense in the end prevailed. The following chapter will look at the separation of powers situation in the State of Victoria.
CHAPTER 5
THE SEPARATION OF POWERS
CASE STUDY: VICTORIA

Introduction

The second case study, the state of Victoria, looks at the advantages and disadvantages of the separation of powers in this state. There is a lack of theoretical or constitutional SOP but there is a general acceptance of the SOP operating in practice, in Victoria. The advantages of the Victorian case include the acceptance of the concept of the SOP. The SOP in practice includes legislative power being exercised by the Parliament, the executive power being exercised by the Government and the judicial power being exercised by the courts. The disadvantages of the Queensland case include the lack of the SOP not only constitutionally but also in practice. The Victorian executive has infringed on the legislature and the judiciary in various and significant ways. These include the following examples: the executive through the legislature attempting to abolish various civil rights but fundamental rights are too entrenched in the legal and political culture for easy removal. These and other issues have created problems for the SOP in Victoria.

ADVANTAGES OF THE VICTORIAN CASE

The advantages of the Victorian case include the acceptance of the concept of the SOP. The theory of Locke (1690) and Blackstone (1884) has been followed. The theory of Montesquieu (1748) identified the third power, the power of judging (judicial power)
making up the new modern triad (as compared with the old dual structure of legislative and executive power). The SOP in practice includes legislative, executive and judicial power being exercised by separate institutions. Essentially the legislative power is exercised by the Parliament, the executive power is exercised by the Government and the judicial power is exercised by the courts (particularly the Supreme Court). The Victorian Constitution does not separate the powers and institutions like in the Commonwealth Constitution and there is no rigid doctrine of the SOP that is found at the Commonwealth level but the SOP concept is accepted and followed but only in a limited way. There is no constitutional impediment to the Victorian Parliament (essentially the executive government) legislating to intrude upon the exercise of judicial power. However under the Federation, the Victorian Government follows the lead of the Commonwealth Government and state courts follow the decisions of the High Court and Federal courts, under court hierarchy and stare decisis (the sacred principle of English law by which precedents are authoritative and binding and must be followed).

**Victoria’s Constitution**

The Victorian Parliament, in 1975, passed a *Constitution Act* to re-enact with additions and amendments the earlier legislation (the *Constitution Act* of 1855 and the *Constitution Act Amendment Act* of 1958) (Lumb 1991: 48). The Victorian Constitution, like other Australian States, was originally established by or under an Act of the British Parliament before the founding of the Australian federation. The Victorian Constitution bestowed on the Victorian Colonial Parliament the plenary legislative power within the territorial limits of the Colony. From the beginning, the Constitution Act of Victoria granted to the
legislature the general legislative power to make laws “in and for Victoria in all cases whatsoever” (*Australian Constitutions Act* 1850, s. 16; Lumb 1991: 84; Ratnapala 2002: 111). In Victoria, the Governor and Legislative Council were to have the power to make laws for the peace, welfare, and good government of the colony, subject to similar restrictions imposed in New South Wales (Lumb 1991: 26). Australian State Constitutions, including the Victorian Constitution, do not contain a rigid doctrine of the separation of powers such as to be found in the Commonwealth sphere (*Commonwealth of Australia Constitution Act* 1900, s. 1 legislative power, s. 61 legislative power, s. 71 judicial power and Courts). There is no constitutional impediment to a State Parliament, including the Victorian Parliament, legislating in a manner, which would intrude upon the exercise of judicial power (Lumb 1991: 132; Lane 1994: 221; also see *City of Collingwood v Victoria* (No 2) [1994] 1 VR 652).

In November 1855 the British Parliament passed the *Constitution Act* for Victoria, that set up an Upper House (Legislative Council) of 30 members and a Lower House (Legislative Assembly) of 60 members and Responsible Government was achieved. Holmes, Halligan and Hay (1986: 36) argue that, over the years, the reputation of the Victorian Legislative Council has been based on past episodes of ignominious behaviour: vested interests obstructed past governments and also occasionally blocked financial supply to the government. Davies (1960: 219) commenting on the Victorian Legislative Council’s style of activity, argued that not only was rejection of legislation the Council’s main function: it was also “its sole practical contribution of any significance”.

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A general doctrine of separation of powers operates in the state constitutional sphere as a matter of constitutional convention. The Victorian Constitution from 1855 until 1975, existed solely as an Act of the British Parliament. In 1975 the Victorian Constitution was proclaimed an Act of the Victorian Parliament, an updated version was proclaimed in 2003. The Victorian Parliament includes an Upper House (Legislative Council) and a Lower House (Legislative Assembly) (Holmes 1976; Holmes et al 1986; Griffith and Srinivasan 2001). The Victorian parliamentary committee system has provided extensive review of the executive (Kiss 1997). The Victorian executive infringes on the judiciary (Kirby 1995).

The Victorian Constitution, like the Queensland Constitution, only has the standing of an ordinary Act of Parliament, and it may be readily amended. Constitutional change can be achieved through the ‘manner and form’ requirements, these can be easily cleared by governments with large majorities. Parliament may amend laws relating to the constitution, powers or procedure, but the limitation on representative legislatures was that those laws were to be passed in the manner and form required by previous law (whether of Imperial or of local origin) (Lumb 1991: 116). The result is that such constitutional restraints on executive and legislative power are maintained principally by convention. Constitutional convention has proved unequal to the task of restraining a strong executive government. The Victorian Parliament, like the Queensland Parliament, has the power to repeal, alter or vary the Constitution Act (see the note on the Constitution of Queensland 2001, in a previous chapter).
Australia is not a country noted for very high rates of constitutional literacy, the State Constitutions have always been the ‘poor relation’ in the Australian framework of government in terms of popular and academic attention (see Lumb 1991; Saunders and Craven 1992; Blackshield and Williams 1998). Until recently, very little research has been directed towards the Constitutions of the Australian States (Twomey 1995; Waugh 1996; Larritt 1996; Coghill 1996; and Zifcak 1997a, & b). The *Victorian Constitution Act* 1975 is largely concerned with designating the machinery of government (Costar 1995). The *Victorian Constitution Act* 1975 does not provide a full account of the basic institutions, rules and regulative ideals of the Victorian system of government (Hanks 1992).

The doctrine of parliamentary supremacy (see Dicey 1959) holds that there are no legally enforceable limits to the legislative authority of the Parliament and applies to Victoria, subject to the constraints placed on the Parliament’s law-making power by the Constitution of the Commonwealth and the Australia Acts. The Victorian Constitution incorporates the doctrine of responsible government (Lumb 1991: 68). The doctrine of the separation of powers informs the Victorian Constitution but is not formally established or contained within it (Eckersley and Zifcak 2001). In the next section we will look at constitutional change and reform.

**Victoria’s Constitutional Change**
The Victorian Constitution’s details are not irrevocably fixed. As Victoria’s social and political circumstances have altered, so too has the Constitution been adapted to meet new challenges. This has also been the case with the other States including Queensland. Many constitutional amendments have taken place over the years by governments of the day; the amendments were mainly of a minor nature rather than fundamental or radical change. In Victoria, as with all other State parliamentary determinations (except for Queensland), constitutional change requires the agreement of both Houses. Some of the constitutional provisions that have been modified or altered since 1855, in Victoria, include the following: Parliamentary membership numbers, voter eligibility, payment of members, voting methods, size of the Ministry, electorate numbers and the powers and responsibilities of both Chambers. As already noted, the most important constitutional change that has taken place to Victoria’s Constitution was that on 22 October 1975 when Victoria’s Constitution was proclaimed an Act of the Parliament of Victoria. The Victorian Constitution far from being an historical artefact: it is practical and central to the way in which democracy operates in Victoria. It protects the interests of all Victorians, by defining what is possible (http://www.parliament.vic.gov.au/const.html (2002)).

The Victorian Constitution, like the Queensland Constitution, only has the standing of an ordinary Act of Parliament and it may be readily amended. The manner and form hurdles can be easily cleared by governments with large majorities in the Lower House. The convention is that Upper Houses do not unnecessarily block the executive but has a obvious role to review the executive through parliamentary committees. This has meant
that such restraints on executive and legislative power are maintained principally by convention. Convention has proved unequal to the task of restraining a strong executive government. As in Queensland, the Victorian Parliament has the power to repeal, alter or vary the Constitution Act.

The Victorian Constitution provides few restraints upon governments (Lumb 1991). The Victorian Constitution provides few restraints upon governments attempting to undermine civil and political rights, weaken the Opposition, marginalise institutions and restrict information (Keon-Cohen 1991). Government use the Parliament to implement their policies into law. The partial separation of powers and the doctrine of responsible government allows this to happen.

VICTORIA’S LEGISLATIVE POWER

In a review of Victoria’s legislative power we will look at the following topics: system of responsible government, deadlocks between houses, the upper house, the lower house and the parliamentary committee system. The legislative power (law-making power) in the State of Victoria is in the hands of a bicameral Parliament, that is two chambers - an Upper House (the Legislative Council) and a Lower House (the Legislative Assembly) (Holmes 1976; Holmes et al 1986; Griffith and Srinivasan 2001). In comparison, the legislative power in Queensland is in the hands of a unicameral Parliament, that is one chamber - a Lower House (the Legislative Assembly). In the Victorian Constitution, there is a provision to resolve deadlocks between the two Houses (see below under Deadlocks; Victorian Constitution Act 1975 (Vic) ss. 66-67).
Responsible Government

In theory, in Australia, under the Westminster system the government must have the support of a majority of the Lower House of Parliament. This is the situation at the Commonwealth and State level, where governments are responsible to lower houses. Responsible Government arrived with a Premier for Victoria in November 1855. The Victorian Colony, like the other Colonies, received from Responsible Government, three components of independence: 1.) a bicameral legislature; 2.) an elective legislature; and 3.) responsible government or the beginning of a cabinet system (Lane 1994: 194).

In Victorian history, the Lower House was considered to be the house of government, and this led to the belief by many governments that they were responsible only to the Lower House. In practice, the 1975 Commonwealth constitutional crisis established that governments are responsible to both houses of Parliament. This lesson is clearly relevant for State Parliaments. Australian courts have held that governments are responsible to both houses of Parliament (see the High Court of Australia case, Egan v Willis & Another [1998] HCA 71). Accountability is therefore to the Parliament as a whole. Prior to amendments in 1984, the Victorian Constitution Act gave the Legislative Council significant power over the Lower House. The Legislative Council was able to enforce accountability to it directly by threatening to refuse, or actually refusing, supply. The Victorian Upper House refused supply and forced the Government of the day to the polls on various occasions including: 1865, 1867, 1877, 1947 and 1952 (Constitution Commission Victoria 2002: 11).
In theory, responsible government under the Westminster system, the government must have the support of a majority of the Lower House of Parliament. In practice the government is responsible to both houses. When there is a conflict between the houses there needs to be a procedure to resolve deadlocks between the houses. The deadlock provision in the Constitution is necessary to resolve conflicts. The history of disagreement between the two Houses of the Victorian Parliament and the power of the Legislative Council has exerted, on these occasions, over the government of the day has gained for the Victorian upper house a formidable reputation as an influential second chamber (Griffith and Srinivasan 2001).

**Deadlocks between the Houses**

In colonial and State constitutional history deadlocks between the Houses have been a feature of constitutional relations between the Houses. A deadlock over a supply bill can lead to a situation where a government enjoying the confidence of the Lower House may be forced to resign or face an election without having recourse to a procedure whereby the bill itself may be subject to a referendum. Also the Lower House election may not necessitate the Upper House also facing the electorate. In relation to non-money bills, there may be no effective procedure for resolving a deadlock between the Houses where one House rejects or fails to pass a bill passed by the other House (Lumb 1983: 92-3).
In Victoria (and South Australia) provision is made for a staggered or separate double
dissolution, a procedure that is so complex that in neither State has it been used since its
inception (Lumb 1983: 94). The Victorian procedure embodies:

1. The passing of a bill by the Lower House and its rejection by the
   Upper House;
2. A dissolution of the Legislative Assembly by the Governor (at the
   Premier’s request) on the basis of the disagreement;
3. Passage of the bill by the new Assembly and (second) rejection by the
   Legislative Council;
4. A dissolution of the Council; and
5. In the event of continued disagreement, a joint sitting of the members
   of both Houses where the bill is subject to approval by an absolute
   majority (see Constitution Act 1975 (Vic) ss. 66-67).

A similar deadlock provision to resolve disagreement between the two federal Houses,
involving a joint sitting, is also applied at the Commonwealth level of government
(Commonwealth of Australia Constitution Act 1900, s. 57). In comparison, in
Queensland there is no deadlock procedure between the Houses of Parliament because
the Queensland Parliament has only one chamber, the Lower House (the Legislative
Assembly). In theory there are checks and balances of the legislative and executive
powers between the two Houses in Victoria; by comparison, in Queensland, in theory and
in practice the checks and balances of the legislative and executive powers between the
two Houses is missing.


VICTORIA’S EXECUTIVE POWER

In constitutional theory, the situation is that the executive power in Victoria is exercised by the Executive Council and the Governor. Despite the constitutional theory, in practice the executive power in Victoria is exercised by the Premier and the Cabinet. This is also the case in other States including Queensland. According to Lumb (1991: 26) originally in Victoria, the Governor and the Legislative Council were to have the power to make laws for the peace, welfare, and good government of the colony subject to similar restrictions which were imposed on the New South Wales legislature (this includes the legislative power, mentioned earlier). Under the Westminster system the government is associated with and dependent on the Parliament (Lane 1994: 130).

The Victorian Government operates in a unique political environment that creates its own state-centred identity made up of amongst other things, culture, geography and history (Holmes 1976: 1). In regard to the separation of powers at the state level in Australia, the State of Victoria is an obvious State for comparison to the State of Queensland because of the long existence of Victoria’s Upper House, the Legislative Council (established in 1851) and the absence of Queensland’s Legislative Council (abolished in 1922). The Victorian Constitution (1975) provides very few restraints upon a government seeking to radically transform the State. Clearly more checks and balances are needed. The partial separation and partial sharing of powers in Victoria, particularly legislative and executive powers, in the structure of government also require checks and balances. A balance in the system of government and an evolutionary progression toward
limited government can be achieved through the courts and their use of judicial power. This can partly be achieved by the independence of the courts and in their role of judicial review. Complete or absolute separation of powers (which would lead to anarchy) (Lumb 1983: 24) or concentration of power (which would lead to tyranny); the compromise is partial separation and partial sharing with a system of checks and balances. Let us now look at the Victoria’s Government in more detail, including Executive Council, Governor and the executive infringing on the legislature and judiciary.

The Victorian Government (executive), is much the same kind of Government as the other State governments and the Commonwealth except it has general powers to control only the area within the State. The Victorian Government, like other States, includes the Governor (the head of State for the State and the Queen’s representative in the State) and the Executive Council (which advises the Governor and consists of all Ministers including the Premier) and the Premier (who is the head of the Government in the State) (Lane 1994: 212-4). In Victoria, the executive, like in other States, keeps law and order within the State, runs the State Departments, makes regulations and sets up administrative tribunals to assist the Government in the running of the State (Lane 1994: 215). As Ratnapala (2002: 101) argues, under the parliamentary model of separation of powers the executive is chosen by the legislature from amongst its own numbers and remains in office until it loses the confidence of the legislature. The members of the parliamentary executive participate in the legislative process and because it generally has a majority in the Lower House, tends to control legislative activity.
In Victoria, strong Premiers like Henry Bolte (1955-72) and Jeffrey Kennett (1992-99) have dominated the Victorian Cabinet and Parliament. There is a partial separation of powers under the Westminster system of government there is a partial separation and partial sharing such that the distinct bodies would exercise their powers for the benefit of the nation or the State. The partial separation of powers could be explained as a pure doctrine modified by a system of checks and balances (Lumb 1983: 24). The partial separation of powers in Victoria has the executive and legislature with a partial separation and sharing of powers. The Westminster system of ‘responsible government’ has become increasingly irrelevant to the Australian States. Strong governments like the Kennett Government (1992-99) in Victoria [and the Bjelke-Petersen Government (1968-87) in Queensland] tend to undermine parliamentary sovereignty and erode democracy and civil rights (Eckersley and Zifcak 2001).

Today, in the constitutional system of the Australian States, the Westminster system of ‘responsible government’, has largely become irrelevant. Governments today to a great degree control the agenda of Parliament and the legislation passed by the Parliament. There are very few restraints in the Victorian Constitution upon a government seeking to undermine civil and political rights, to weaken the Opposition, to marginalise contestatory institutions or to restrict information. It has been recently argued by Costar and Economou (1999: vii) that the Kennett Government (1992-99) was ‘the most activist, controversial and ideological administration in twentieth century Victoria’.

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A range of workable reforms have been suggested by Eckersley and Zifcak (2001) to strengthen democracy and to improve the accountability of public power, particularly that of the political executive. Eckersley and Zifcak (2001: 75-9) recommended eleven reforms under headings established by the Constitution Act, 1975. These constitutional reforms include: 1. *The Crown* – the governor may exercise an independent discretion; 2. *The Parliament* – the Legislative Council be elected on the basis of proportional representation; 3. the establishment of an independent statutory office whose purpose is to determine the allocation of parliamentary staff, money and other resources to Parliament’s members; 5. *The Judiciary* ... - the establishment of a Supreme Court of Victoria having jurisdiction to hear appeals on questions of law in all matters whatsoever; 10. *Civil Rights* - the creation of a judiciably enforceable Charter of Rights and Freedoms, and 11. *Constitutional Amendment* - the Constitution be amended to provide that its core provisions with respect to the Crown, the Parliament, the judiciary and local government be capable of amendment only by a three-fifths majority of both houses of Parliament or simple majority at a popular referendum.

**VICTORIA’S JUDICIAL POWER**

The judicial power in Victoria is exercised by the State Courts including the Victorian Supreme Court and the Victorian Court of Appeal. The Commonwealth constitutional limitations may apply to State courts that have been invested with federal jurisdiction (see *Kable v DPP (NSW)* (1996) 189 CLR 51; Chisholm & Nettheim 1997: 101). This is also the situation in the other Australian States, including Queensland. In Victoria the *Constitution Act 1975* incorporates the basic provisions for the Supreme Court; similar
provisions are to be found in their Supreme Court Acts of other States. According to Crawford (1993: 25), these basic provisions for the Supreme Court are weakly entrenched in the *Victoria Constitution Act* (see *Victoria Constitution Act* 1975 Pt III ss. 75-87). In Victoria, a separate Court of Appeal was established by the *Supreme Court Act* 1986 (Vic) but it is a division of the Supreme Court rather than a separate court (McGarvie 1989; Byrnes 1992; Crawford 1993: 137).

The Victorian *Constitution Act* 1975, like other State Constitutions, does not contain a rigid doctrine of the separation of powers such as is to be found at the Commonwealth level (*Commonwealth of Australia Constitution Act* 1900, s. 1 legislative power, s. 61 executive power, s. 71 judicial power). In Victoria, like other States, the executive is not prevented by the Victorian Constitution from infringing upon the judicial power of the State courts. As Lumb (1991: 132) argues “there is no constitutional impediment to a State Parliament legislating in a manner which would intrude upon the exercise of judicial power”. The Victorian courts and the judiciary exercise the State’s judicial power. The Victorian Supreme Court exercises the power of judicial review of government legislation. A study of colonial constitutions demonstrate that judges of State Supreme Courts were intended, even before responsible government, to exercise the power of judicial review of legislative acts (Lumb 1991: 131). The *Victorian Constitution Act* 1975, s. 85(1), expressly conferred a jurisdiction “in or in relation to Victoria, its dependencies and the areas adjacent thereto in all cases whatsoever…”. The jurisdiction of the Victorian courts is inherent in the jurisdiction of the State of Victoria.
Victoria, like the other States has a Westminster based system of government, however the UK has some major differences to the Australian States and the Commonwealth. In the UK, the Upper House, the House of Lords, in addition to having a legislative function, has a judicial function as a court of last resort. The jurisdiction is ancient but regulated by the UK *Appellate Jurisdiction Act 1874* and other UK Acts. Appeals are made to the House of Lords or more properly to Her Majesty the Queen in Her Court of Parliament. By constitutional convention, however, judges known as the Law Lords, rather than all of the Lords, hear the appeals. In Australia, at the Commonwealth, State and Territory level, the courts are kept separate from the Parliaments. At the Commonwealth level, the High Court is not part of the Commonwealth Parliament, and at the State level the Supreme Court is not part of the State Parliament. In Australia, at the Commonwealth and State level, judicial power is exercised by the courts, not by Parliament.

The Supreme Court of a State is created by the State Parliament, and can, at least in theory, be abolished by the State Parliament (Heilbronn, Kovacs, Latimer, Nielsen, and Pagone 1996: 235-6). The Victorian Supreme Court basic provisions were incorporated into the Victorian *Constitution Act 1975* (Victoria: *Constitution Act 1975* Pt III, ss. 75-87). In other States, relevant provisions are to be found in Supreme Court Acts, and these are weakly entrenched (Crawford 1993: 25).

In 1992 a Victorian Act, in effect, directed the Supreme Court to accept certain documents as binding between Collingwood Council and a football club.
interference with the Supreme Court jurisdiction was contrary to the Victorian Constitution Act 1975. The Victorian Constitution Act 1975, however, prescribed a special manner-and-form provision (about certain parliamentary majorities) for amendments in the area concerned, and the Parliament had not followed the procedure. The result was that: the Act was invalid [see Collingwood City v Victoria (1994); Lane 1994: 199].

**DISADVANTAGES OF THE VICTORIAN CASE**

The state of Victoria, like Queensland, follows the system of government derived from England. The Westminster system of government does not have a strict separation between the three powers and the three branches of government. The theory from John Locke (1690) and William Blackstone (1884) indicated a separation between the legislative and executive power but with theoretical parliamentary supremacy. In practice however, the executive of course has come to dominate the Parliament in Victoria, as it has in the other Australian States and in the UK itself. The Parliament and the courts have traditionally been subordinate to strong governments. Disadvantages of the Victorian case show the lack of SOP in Victoria. The Victorian executive has infringed on the legislature and the judiciary in significant ways. The Victorian executive has introduced legislation which has as a result abolished various civil, political and industrial rights. Fundamental civil and legal rights have remained due to their general acceptance in the legal and political culture. These civil rights derive from the history and traditional common law of England. The role of the Attorney General is also a problem for the SOP in Victoria.
Victoria’s Executive infringes on the Legislature

The Victorian executive, has through history, infringed on the legislature (*Constitutional Commission, Report* 2002). The Labor Party in Victoria wanted to abolish the Upper House but failed (Holmes, Halligan and Hay 1986), unlike in Queensland. The Victorian executive also has infringed on the judiciary (McGarvie 1989; Byrnes 1992; Crawford 1993). Eckersley and Zifcak (2001) suggest reforms that are designed to strengthen democracy and improve the accountability of the executive.

The Victorian Government over the years has used its executive power to infringe on the Victorian Parliament and its legislative processes. Unlike Queensland, Victoria has two Houses of Parliament and the Victorian Government has often been restricted by the Upper House. The Victorian Constitution Act, prior to the 1984 amendments, gave the Legislative Council significant power over the Lower House. The Labor Party in Victoria, like its counterparts in other States, has wanted to abolish the Upper House; it was unable to attain a majority in the Upper House. The Labor Party in Victoria has recently shifted focus from abolishing, to reforming the Upper House.

Under the John Cain Labor Government (1982-90), the Victorian Executive infringed on the Legislature by restricting the power of the Upper House with an amendment in 1984 to the Victorian Constitution. As already stated, the Victorian Constitution Act, prior to amendments in 1984, gave the Legislative Council significant power over the Lower House. The Legislative Council was able to enforce accountability to it directly by threatening to refuse, or refusing, supply. It refused supply and forced the Government

The Cain Government, with partial support from the Liberal Party Opposition, was committed to introducing proportional representation, a four year term and a proper committee system, and abolishing the Legislative Council’s power over supply. These reforms to Victoria’s Parliament would ensure the Upper House’s longevity and improve its operations, but unlikely to endow the chamber with a singular identity, untrammelled by adversary politics. Since the Cain Government failed to win control of the Legislative Council, however, Labor’s proposed reforms of the Legislative Council were not passed. Hence the Victorian Legislative Council continued to exercise an important discretionary vote over Victorian legislation (Holmes, Halligan and Hay 1986: 37).

The Bracks Labor Government (1999-present) has brought about significant constitutional reform in the recently enacted Victorian Constitution 2003 (see the Constitution (Parliamentary Reform) Act 2003). The promises of constitutional reform and reform of the Upper House from the Cain Labor Government have been carried out to some extent by the Bracks Labor Government. The new Victorian Constitution includes the following important provisions: (c) the election of members of the Legislative Council by using a proportional representation system with optional preferential voting; (f) recognising the principle of Government mandate; (g) removing the power of the Legislative Council to block the Annual Appropriation Bill; (h) enacting a procedure to deal with disputes concerning Bills between the Legislative Assembly and

**Victoria, No. 2 of 2003 Constitution (Parliamentary Reform) Act 2003**

[Assented to 8 April 2003]

The Parliament of Victoria enacts as follows:

**Part 1--Preliminary**

1. *Purpose*

The purpose of this Act is to reform the Parliament of Victoria based on recommendations made by the Constitution Commission Victoria by--

(a) providing for a fixed 4 year term Parliament unless the Assembly is dissolved sooner;
(b) re-constituting the Legislative Council to consist of 40 members elected from 8 regions each returning 5 members;
(c) providing for the election of members of the Legislative Council by using a proportional representation system with optional preferential voting;
(d) providing for the filling of casual vacancies in the Legislative Council by a joint sitting of the Legislative Council and the Legislative Assembly;
(e) providing that the President of the Legislative Council has a deliberative vote but not a casting vote;
(f) recognising the principle of Government mandate;
(g) removing the power of the Legislative Council to block the Annual Appropriation Bill;
(h) enacting a procedure to deal with disputes concerning Bills between the Legislative Assembly and the Legislative Council;
(i) providing for the entrenchment of certain legislative provisions.
Victoria’s Executive infringes on the Judiciary

At various times, the Victorian Government, like its counterparts in other States, has used its executive power to infringe on the judiciary and judicial power. Significantly, in 1986 the Cain Government reformed the court system and the judiciary by the introduction of a Court of Appeal. A separate Court of Appeal was established in Victoria, with the introduction and enactment of the Supreme Court Act 1986 (Vic) but the Court of Appeal is a Division of the Supreme Court rather than a separate court (Note (1990) 64 ALJ 315; McGarvie 1989: 11; Byrnes 1992: 63-5; Crawford 1993: 137).

In 1991 the Cain Labor Government consolidated or entrenched the position of the judiciary in the Victorian Constitution. In a 1991 Victorian state referendum the voters of Victoria passed a constitutional change that would “entrench” the Justices’ independence in the Constitution.

The separation of powers and judicial powers in Victoria has to be influenced by the recent New South Wales based case: the Kable Case (1996). As Ratnapala (2002: 114) notes, none of the High Court Judges in the New South Wales case, Kable v DPP (NSW) (1996), 189 CLR51; 70 ALJR 813 (the Kable Case1996) accepted the argument that the State legislature was constrained by a constitutional separation of powers effected by the State constitution. The majority in the Kable Case (1996) found importantly that the legislative power of the State Parliament was limited by separation of powers implications arising from the Commonwealth Constitution. This New South Wales Case has obvious implications for Victoria and the other States; constitutional reform is needed at the State level to include constitutional amendments involving the separation of powers. This will
help to reduce executive power infringing on the other powers and allow greater judicial review of the executive.

This is the situation in Victoria, as it is in Queensland, as well as the other Australian States. The Victorian Constitution is an ordinary Act of the Parliament, as it is in other States, this means that judicial independence in the Supreme Court and other courts is maintained by convention rather than constitutional law. The High Court’s case *Kable v DPP* (NSW) (1996), 189 CLR51; 70 *ALJR* 813, however, noted that a State government may no longer abolish the Supreme Court and a range of other constitutional constraints on the exercise of judicial power by State Parliaments. According to the Supreme Court of Victoria, 1994-95, *Annual Report*, the jurisdiction of the Supreme Court of Victoria was eroded significantly under the Kennett Liberal-National Coalition Government (1992-99). This erosion of the Supreme Court’s jurisdiction occurred in relation to its capacity to review the legality of the Kennett Government’s central economic and social programs, such as the restructuring of hospitals, schools and local government.

In a more general sense in regard to the Victorian executive infringing on the judiciary, Kirby (1995) has criticised the dismissal of Victorian judges and notes that it has attracted world attention. The Kennett Liberal-National Coalition Government (1992-99) used its executive power to infringe on the judiciary and undermine the doctrine of the separation of powers. On April 10, 1995, Justice Michael Kirby (at the time President of the Court of Appeal, Supreme Court of NSW, 1984-96) called attention to the international criticism of the Victorian Kennett Government for interference in the
conduct of the judiciary and other independent office-holders. Justice Kirby called attention to the annual report of the Centre for the Independence of Judges and Lawyers in Geneva titled *Attacks on Judges* (Kirby 1995). This report was tabled in March 1995 in the Commission on Human Rights during its recently concluded session in Geneva. The report contained details of cases on the harassment and persecution of judges and lawyers throughout the world, including Australia.

Justice Kirby (1995) called attention to the fact that most of the cases mentioned in the report concerned instances of attacks on the independence of judges and other office-holders in Victoria. The three main cases mentioned included: 1) The effective dismissal of nine judges of the Accident Compensation Tribunal of Victoria when that Tribunal was abolished in 1992. 2) The attempted interference in the independence of the former Director of Public Prosecutions of Victoria, Mr Bernard Bonjorno, QC. 3) The non-reappointment of three members of the Administrative Appeals Tribunal of Victoria, allegedly because of their past association with the ALP.

Kirby (1995) argues that the Australian Federal Constitution protects Federal judges and since the recent referendum in NSW, State judges in NSW are similarly protected but judicial officers elsewhere throughout Australia, members of independent tribunals and independent office-holders such as the DPP, are not constitutionally protected. Kirby J advocates that the other States of Australia should enact legislation similar to that adopted in NSW, and approved at the referendum held in conjunction with the State election. This would prevent the growing practice of dismissing judges without proof to
Parliament of misconduct or incapacity by the simple expedient abolishing their court or tribunal. The restructuring of courts and tribunals is entirely acceptable; however judicial members must be safeguarded in their security of tenure. If this is not done then an important feature of our independent judiciary will be eroded, as it has been in Victoria.

Kirby (1995) also advances the view that an effective step that could be taken would be to follow the NSW constitutional entrenchment (1995) of the protection of the independence and tenure of judicial officers in Victoria and to reinstate the removed judges and tribunal members or compensate them fully. The advice was sound from Kirby J but was not followed in Victoria under the Kennett Government. It is not clear what the Bracks Labor Government intends to do in regard to this matter (of constitutionally entrenchment of judicial independence) is unclear. Although the Bracks Government has restored the powers and independence of the DPP and the Auditor-General [by the Victorian Constitution (Parliamentary Reform) Act 2003].

Can Victoria’s Executive through the Legislature abolish fundamental rights?

The Victorian Constitution provides very few restraints upon governments and its use of executive power (Lumb 1991). The Victorian executive, like the executives in other States, has used the legislature and its legislative power to undermine civil and political rights, weaken the Opposition, marginalise institutions and restrict information (Keon-Cohen 1991). Eckersley and Zifcak (2001) have suggested a range of possible democratic reforms. Keon-Cohen (1991: 67) argues that the Victorian Parliament can remove rights and protections in our criminal justice system but not abolish fundamental
rights. The *Community Protection Act* 1990 (Vic), introduced into the Victorian Parliament by the Labor Party, as amended in 1991 raises a range of issues across several disciplines. The sole object of that Act – Garry David, may be seen as testing the limits of many institutions, including the ethics of the tabloid press, the proper role and responsibilities of Parliament as against the judiciary, and the laws and procedures designed to punish and rehabilitate criminals, on the one hand, and care for and treat the mentally ill on the other. The Act, as amended, removes rights and protections central to our criminal justice system (onus of proof beyond reasonable doubt, entitlement to liberty save upon conviction for a crime.

Detaining a prisoner determined by experts not to be mentally ill in a psychiatric institution is not only not humane, it probably amounts to cruel and unusual punishment contrary to the UK Bill of Rights of 1688 and the International Covenant on Civil and Political Rights UN 1966. In 1993 the Victorian Government, led by the Liberal Party Premier Jeffrey Kennett, introduced into Parliament, further statewide preventive detention legislation focusing on sexual and violent offences (see Sentencing (Amendment) Bill 1993; Crimes (Amendment) Bill 1993; Crimes (HIV) Bill 1993; Crimes (Criminal Trials) Bill 1993). The Sentencing (Amendment) Bill included provisions which allowed judges to impose indefinite sentences for the most serious sexual and violent offences, when the judge is satisfied that the offender, as a high degree of probability, is a serious risk to the community.
The constitutionality of such legislation, according to Keon-Cohen (1991: 68), is required to be judged in reference to two criteria. Firstly, to contain fundamental civil rights established in the common law. Secondly, to the doctrine of the separation of powers (this involves the question of whether the powers of the Victorian Parliament under Victoria’s Constitution Act 1985 are limitless, or relatively restrained. Keon-Cohen (1991: 69) suggests that the Community Protection Act 1990 (Vic), introduced into the Victorian Parliament by the Labor Party, was unconstitutional and void. Keon-Cohen’s (1991) argument is that the Victorian Parliament, like other State Parliaments, do not enjoy unlimited legislative powers in regard to overriding fundamental rights and freedoms, and that some rights ‘run so deep’ that even Parliament cannot curtail them.

These fundamental rights can be traced back to Magna Carta, when Prince John signed the Magna Carta with his unruly Barons at Runnymede (in 1215). Further statements in England are seen in numerous revisions of Magna Carta and numerous other parliamentary instruments – the best known being the English Bill of Rights (1688) and the Act of Settlement (1701). The UK Bill of Rights 1688 was an Act for declaring the rights and liberties of the subject, and settling the succession of the Crown and states. These fundamental rights and freedoms are so entrenched in the culture, the common law and common customs of Australia (derived from England) that the Victorian executive and legislature cannot abolish them (Keon-Cohen 1991).
Conclusion

The separation of powers situation in Victoria, with its bicameral Parliament, is similar to that of other States in Australia. The State constitutions do not contain a rigid doctrine of separation of powers like that found at the Commonwealth level. There is no constitutional impediment to a State Parliament legislating in a manner which would intrude upon the exercise of judicial power (Lumb 1991: 132, 137; Clyne v East (1967); BLF Case (1986); City of Collingwood v Victoria (1994)). The government of Victoria has many similarities to the governments of the other Australian States (Davis 1960; Holmes 1976). There is only a partial separation of powers due to the Westminster system and the doctrine of responsible government in the Australian colonies (later States) was based on convention rather than formal law (Lumb 1991: 29). The State of Victoria is therefore, an obvious State to compare to Queensland in relation to the separation of powers.

In Victoria, like other States, the judicial power is exercised by the State Courts including the Victorian Supreme Court and the Victorian Court of Appeal. In Victoria, the Victorian Supreme Court’s basic provisions were incorporated into the Victorian Constitution Act 1975 (Victoria: Constitution Act 1975 Pt III, ss. 75-87). In other States, relevant provisions of Supreme Courts are to be found in Supreme Court Acts, however these are weakly entrenched (Crawford 1993: 25). In 1992 a Victorian Act, in effect, directed the Supreme Court to accept certain documents as binding between Collingwood Council and a football club. This interference with the Supreme Court
jurisdiction was contrary to the Victorian Constitution Act 1975, which prescribed a special manner-and-form provision (about certain parliamentary majorities) for amendments in the area concerned, and the Parliament had not followed the procedure. The result of a court case was that: the Act was invalid. Judicial review of the executive and its legislation was demonstrated to some extent in this recent Collingwood case, however the Court of Appeal Division of the Victorian Supreme Court held that the Constitution Act 1975 (Vic) does not embody the doctrine of the separation of judicial power (City of Collingwood v Victoria (No 2) [1994] 1 VR 652).
CHAPTER 6
THE SEPARATION OF POWERS
CASE STUDY: NEW SOUTH WALES

Introduction

The third case study, the state of New South Wales, looks at the advantages and disadvantages of the separation of powers in this state. Like the states of Queensland and Victoria, the state of New South Wales has had a lack of theoretical or constitutional SOP but there is a general acceptance of the SOP operating in practice. The advantages of the New South Wales case include the acceptance of the concept of the SOP. The SOP in practice includes legislative power being exercised by the Parliament, the executive power being exercised by the Government and the judicial power being exercised by the courts. Parliamentary scrutiny of the executive has been demonstrated by the Egan case 1998. The disadvantages of the New South Wales case include the lack of the SOP not only constitutionally but also in practice. The New South Wales executive has infringed on the legislature and the judiciary in various and significant ways. These include the following examples: an attempt to remove a NSW Supreme Court judge (Justice Vince Bruce); the executive interference in the judicial system (the Kable case 1996). These issues and others have created problems for the SOP in NSW.
ADVANTAGES OF THE NEW SOUTH WALES CASE

The advantages of the New South Wales case include the acceptance of the concept of the SOP. The theory of Locke (1690) and Blackstone (1884) has been followed. The theory of Montesquieu (1748) identified the third power, the power of judging (judicial power) making up the new modern triad (as compared with the old dual structure of legislative and executive power). The SOP in practice includes legislative, executive and judicial power being exercised by separate institutions. Essentially the legislative power is exercised by the Parliament, the executive power is exercised by the Government and the judicial power is exercised by the courts (particularly the Supreme Court). The New South Wales Constitution does not separate the powers and institutions like in the Commonwealth Constitution and there is no rigid doctrine of the SOP that is found at the Commonwealth level but the SOP concept is accepted and followed but only in a limited way. There is no constitutional impediment to the New South Wales Parliament (essentially the executive government) legislating to intrude upon the exercise of judicial power. However under the Federation, the New South Wales Government follows the lead of the Commonwealth Government and state courts follow the decisions of the High Court and Federal courts, under court hierarchy and stare decisis (the sacred principle of English law by which precedents are authorititative and binding and must be followed).

The formation and development of the NSW Constitution

After settlement in 1788, the Australian colonies evolved slowly in regard to parliamentary democracy. The New South Wales Constitution has evolved through various versions. In 1823 the New South Wales Act [4 Geo IV, c 96 (Imp)] established a
local legislature but the powers of self-government conferred by the 1823 Act were meagre, also in 1823 the *Australia Courts Act* [9 Geo IV, c 83 (Imp)] established a new Supreme Court. The New South Wales Executive Council and Legislative Council had its inception in 1824, after the 1823 Act came into force, ending the personal rule of the governor. The Imperial Parliament in 1828 passed a new Act (9 Geo IV, C 83; later known as the *Australian Courts Act* allowed NSW to inherit English common law). In 1842 the Imperial Parliament passed the *Australian Constitutions Act* (No 1) which established a form of representative government with a Legislative Council consisting of thirty-six members of whom two-thirds were to be elected and one-third appointed by the Crown (Lumb 1991: 12).

In 1850 the *Australian Constitutions Act* (No 2) [13 & 14 Vict, c 59 (Imp)] gave to NSW and other Australian colonies power to draw up their own constitution bills for royal assent. In 1855 the *Constitution Act* (NSW) [18 & 19 Vict, c 54 (Imp)] the British Parliament granted responsible government to NSW (and Victoria) and established a bicameral Parliament in 1856 in NSW consisting of a nominated Legislative Council and an elected Legislative Assembly. Finally in 1902 (after Federation in 1900) the *Constitution Act* (NSW) (1902) [2 Edw VII, No 32 (NSW)], which repealed the 1855 Act, established the present NSW Constitution (Lumb 1991: 3-25; 48).

The Constitutions of the States of Australia are today characterised by the features of representative and responsible government. As Lumb (1991: 3) argues, these features, it is important to keep in mind, were the product of gradual evolution and did not
accompany the establishment of legislative authority in the infant colonies of Australia. (For a comprehensive analysis of the development of the Constitution of New South Wales, see Quick and Garran 1901: 35-51; Melbourne 1963; also Sweetman 1925; McMinn 1979). The colony of New South Wales developed first and evolved from a despotic government to responsible government with the aid of a constitution and a bicameral Parliament. This created a partial separation between first the governor then the government exercising the executive power and later the Parliament exercising the legislative power, then the other colonies followed.

Dr Jenks has succinctly stated the course of development which a settled colony has usually undergone:

First there has been a purely despotic government, when the colony has been ruled as a military position by a Governor and a handful of officials appointed by the Home Government. Then there has been a constitution, with a Legislative Council, partly appointed by the Government and partly elective. Of the Council the Crown officials have always formed part, but the executive has been unassailable by the legislature and responsible only to the Colonial Office; possessions in these two stages being known technically as Crown Colonies. In the third stage, there have generally been two Houses of the legislature, both elective, or one elective and one nominee, and the executive has consisted of officials chosen for their Parliamentary position and liable to be dismissed, like ministers in England, in consequence of an adverse vote of the legislature. This is the era of Responsible Government (Jenks 1891: 11).

Under the Westminster system of government and responsible government, it is from within the legislature (two houses) that the executive is chosen. The executive exercises the executive power and the executive has come to dominate the legislature.
NSW LEGISLATIVE POWER

The Legislative power is formally vested in a Legislature or Parliament which consists of the Queen and two houses. The Lower House is known as the Legislative Assembly and the Upper House is known as the Legislative Council. The governor exercises the royal prerogative of assenting on behalf of the Queen to bills passed by the Parliament (Lumb 1991: 49). The legislative power in New South Wales is not fully separate from the executive power because some of the same people who exercise legislative power (Members of Parliament) also exercise executive power (Ministers). After the legislature makes the laws, a committee of the Parliament, the cabinet and its ministers (the Executive Council), that is the executive, most importantly put the laws into operation. The New South Wales Constitution Act 1902 mentions in Parts 2 and 3 the legislative powers: Part 2 - Powers of the Legislature (sections 5-8A) and Part 3 - The Legislative Council and Legislative Assembly (sections 10-34). The New South Wales legislature is made up of members of both Houses of Parliament including members of the Legislative Council and the Legislative Assembly. A recent example of the legislature scrutinising the executive may be seen in the recent case of NSW Treasurer Egan. Let us now look at responsible government in NSW.

Responsible Government

In 1855, responsible government was established in New South Wales when the NSW Constitution Bill passed through the British Parliament. From 1856, under this Constitution Statute, NSW gained a fully responsible system of government with an
elected Legislative Assembly and a nominated Legislative Council. Australian Colonial traditions were based on the doctrines of ‘responsible government’ (in the Westminster system this embodies the principle of collective responsibility) and partial separation of powers (incorporating checks and balances) (Lumb 1983: 66, 71). Under the Westminster system of responsible government, as it is followed in Australia, the government must have the support of the Parliament (that is a bicameral parliament with two co-equal chambers, except for Queensland). The powers and precedents of the Colonial Upper Houses, starting in New South Wales, made them powerful houses of review with the right to veto bills, including essential money bills (Lumb 1983: 85).

With the drafting of the Australian Federal Constitution in 1901, the States maintained the power of their Upper Houses to reject supply (that is, a supply or appropriation bill) and the power to bring down a government owing allegiance to the Lower House. The New South Wales Upper House, as a house of review, also had a responsibility to review the executive and government legislation. Lumb (1983: 68) notes that it has been argued that the major elements of the doctrine of responsible government in the Australian States have a conventional as distinct from a statutory basis (See FAI Insurance Ltd v Winneke (1982) 41 ALR 1 at 17 Mason J).

**Deadlocks between the Houses**

The Upper House, in New South Wales, does not have a veto power over money bills. In relation to non-money bills, s. 5B(1) of the New South Wales Constitution Act (1902)
lays down a very interesting procedure whereby a deadlock over a bill between the two NSW Parliamentary Houses, may be resolved (Lumb 1983: 93-4). The section requires:

1. Rejection of the bill or its failure to pass in the Council in two successive sessions (with an interval of three months between the first rejection in the Upper House and re-presentation in the Lower House);

2. A free conference between managers of the Houses (A free conference allows for the discussion of the bill by appointed representatives of the two Houses; See May’s *Parliamentary Practice* 1976: 602-3).

3. A joint sitting of the members of both Houses; and

4. In the event of continued disagreement, a referendum of the electors on the bill.

These provisions of the *New South Wales Constitution Act* (1902) were originally inserted by the *Constitution (Legislative Council) Amendment Act* (Act No. 2, 1933) and were the culmination of a long history of disagreements between the Legislative Assembly and the Legislative Council which until 1933 consisted of members appointed by the Governors holding their places for life (As prescribed by the original *Constitution Act* of 1855; Lumb 1991: 53). In summary the procedure incorporates conciliatory procedures (conference, and joint sitting) between the two Parliamentary Houses and, as a last resort, popular vote (referendum) on the disputed bill. Also it should be noted that the conference procedure is the common, indeed the only deadlock method used in America, to overcome disagreements between the Lower and Upper Houses whose powers are equal in terms of participation in the legislative process (See Schwartz 1955: 70; Lumb 1983: 93-4). On the other hand in Victoria and South Australia provision is
made for a staggered or separate double dissolution, a complex procedure not used since its inception (See Constitution Act 1975, (Vic) ss. 66-67).

**Parliamentary (Legislative) scrutiny of the NSW Executive - (Treasurer Egan)**

Parliamentary scrutiny of the executive and, in particular by the New South Wales Upper House, was tested recently in 1996-9 when the NSW Treasurer Michael Egan MLC on behalf of the NSW Cabinet, refused to table documents in the Legislative Council of which he was a member. The documents related to several controversial issues, and the reason given for this refusal included commercial confidentiality, public interest immunity, legal professional privilege and cabinet confidentiality. The NSW Legislative Council, determined to exercise its scrutiny of the executive, pressed the issues and eventually adjudged the Treasurer in contempt (of Parliament), suspending him from the Upper House twice. The matters were disputed in three cases in the NSW Supreme Court, the High Court and the NSW Court of Appeal (Egan v Willis and Cahill (1996) 40 NSWLR 650; Egan v Willis (1998) 73 ALJR 75; Egan v Chadwick and Others (1999) NSWCA 176 revised 04/08/99 CA 40828/98). The results in the Egan cases upheld the view that the Legislative Council did have the power to order the production of documents by a member of the House, including a Minister, and could counter obstruction where it occurred. However, the question of the extent of the power as regards Cabinet documents, will be subject to continued court interpretation (Spindler 2000: 3-5).

Mantziaris (1999) notes that the Egan cases may have broad implications for the conduct of parliamentary affairs at both the State and Commonwealth levels. A number of
important issues relating to the relationship of the Executive to the Parliament, have been considered by the courts in the Egan cases (see Mantziaris 1999). The Egan theory of government is noted by Harry Evans (Evans 1999a: 1-2; Evans 1999b: 2-3). The Egan view of government was expanded in submissions put before the courts in the first case (*Egan v Willis & Cahill* (1996) 40 NSWLR 650). The Egan view was essentially that the electors should not be allowed to elect a second chamber with the means to call the government to account. The courts rejected this view essentially because government is accountable to both Houses of Parliament.

It has been suggested that this is also the current theory of the system of government held by our Governors. It amounts to a denial of accountability and the right of the public to have the information that is needed and required to make an informed electoral choice. There is and has been historically a lack of government accountability in Lower Houses. A Legislative Council without scrutiny and review powers would mean that government could confidently operate in undisturbed secrecy. We must ensure that institutions of accountability, in the words of the authors of *The Federalist*, No. 51, have the means of their own defence (Evans 1999b: 5). It has been argued recently by Stone (2002: 267) that bicameralism is likely to lead to a positive contribution toward democracy.

The Australian High Court, in the *Egan* Case (1998) in its judgment of 19 November 1998 established that the NSW Legislative Council has the power to require the production of documents (Evans 1999a: 1). The High Court held by 5 to 1 majority that the New South Wales Legislative Council has the implied power to require one of its
members, who is a Minister, to produce State papers to the House, together with the
power to counter obstruction where it occurs. The relevant test is that an implied power
must be reasonably necessary for the exercise of the Legislative Council’s functions: these
include its primary legislative function, as well as its role in scrutinising the Executive
generally (Griffith 1999a: 1).

The High Court Justices Gaudron, Gummow and Hayne concluded that in the Egan Case
(1998) in determining what is reasonably necessary for the proper exercise of the
functions of the Council, reference is to be made to what have come to be conventional
practices established and maintained by the Legislative Council. Justice Kirby concluded
that notions of unreviewable parliamentary privilege and unaccountable determination of
the boundaries of that privilege which may have been apt for the sovereign British
Parliament, must in the Australian context, be adapted to the entitlement of constitutional
review. The issue of public interest immunity was not discussed in the case (Griffith
1999a: 1). Commenting on the Egan Case (1998), George Williams, a senior law
lecturer at the Australian National University said: “This case is really about the High
Court recognising that the Parliament is there to act as a check on the Executive”. Those
sentiments were echoed by Melbourne University’s reader in law (Geoff Lindell), who
said that the case was important because a State or Federal Upper House that is not
controlled by the Government would be more willing than a Lower House to use the
power to scrutinise an Executive (http://sa.democrats.org.au/Parlt/p2/981126_f.htm
(1998)).
In the decision *Egan v Chadwick* (1999) the New South Wales Court of Appeal on 10 June 1999 held that the Legislative Council’s power to call for documents did extend to privileged documents, on the basis that such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the Executive. There were different views on the question of the extent of the power to order documents. Priestly JA found no limitation on that power. Whereas the majority of Spigelman CJ and Meagher JA found that the power does not extend to ordering the production of cabinet documents (Griffith 1999b: 1-2).

**NSW EXECUTIVE POWER**

The executive power in New South Wales is not fully separate from the legislative power because the same people who exercise executive power (Ministers) also exercise legislative power. After the legislature makes the laws, a committee of the Parliament, the cabinet and its ministers (the Executive Council), that is the executive, most importantly put the laws into operation. The *New South Wales Constitution Act* 1902 mentions in Part 4 - the Executive (sections 35-51). The Divisions 2, 3, 4 respectively cover the following: The Executive Council; Appointment of Ministers; and Functions of Ministers of the Crowns. The New South Wales executive is made up of Ministers of the Crown and the Governor (ss. 9A-91) even though it is mentioned under Part 2A following on from Part 2: Powers of the Legislature.

**NSW JUDICIAL POWER**

The other power is the judicial power and this power has been regarded as separate from the other two powers. Let us now turn to look at the judicial power in New South
Wales. The judicial power in New South Wales is by convention and in practice separate from the other powers. Judicial power has the judiciary interpreting the laws that are made by the legislature and put into operation by the executive as well as following and setting precedents in the common law.

The *New South Wales Constitution Act* 1902 mentions in Part 9 - the Judiciary (sections 52-56). The sections cover the following: s. 52: definition and application; s. 53: removal from judicial office; s. 54: suspension from judicial office; s. 55: retirement; s. 56: abolition of judicial office. The New South Wales judiciary is made up of independent judges appointed to a hierarchical system of courts, the highest being the NSW Supreme Court (and the NSW Court of Appeal). There are also a series of federal courts with jurisdiction in the State of New South Wales. The High Court of Australia (a federal court) has been established as the highest court for the whole of Australia, including New South Wales (see the *Commonwealth of Australia Constitution Act* 1900, Chapter III The Judicature ss. 71-7; see also previous chapter including Commonwealth judicial power).

The judiciary is one of the three branches of government. The other two are the executive and the legislature. Each of these branches of government therefore has separate functions and is, to some extent at least, separate from each other. But each one is also linked with some connections with the other two, having some powers over the others, just as the other branches have some power over it. No one branch controls all the power in a democratic system we refer to this as ‘the doctrine of the separation of
powers’. The objective of separation of powers is to develop mechanisms to prevent power being overly concentrated in one arm of government (http://www.schools.nsw.edu/sites/nswconstitution/html/judge/bgr/overview.html).

The legislature makes the laws; the executive put the laws into operation; and the judiciary interprets the laws. In theory, under the separation of powers doctrine, the powers and functions of each are separate and carried out by separate people. No single agency is able to exercise complete authority, each being interdependent on the other. Power divided like this should prevent absolutism (as in absolute monarchies or dictatorships where all branches are concentrated in a single authority) or corruption arising from the opportunities that unchecked power offers. The doctrine can be extended to enable the three branches to act as checks and balances on each other. Each branch’s independence helps keep the others from exceeding their power, thus ensuring the rule of law and protecting individual rights. Of course, in practice, the executive exercises a huge influence and power over the legislature (http://www.schools.nsw.edu/sites/nswconstitution/html/judge/bgr/overview.html).

Judicial Review

In New South Wales, judicial review of legislation has operated from very early in its historical development (Lumb 1991: 9). Judicial review is part of the separation of the judicial power and independence of the judiciary. Under the Act of 1823 New South Wales attained the status of full colony, section 29 of the Act introduced a form of judicial review of proposed legislation. Under section 29, it was prescribed that no law

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or ordinance was to be laid before the Council until a copy had been laid before the Chief Justice of the Supreme Court. The chief justice had the duty to certify to the Governor that the proposed law was not repugnant to the laws of England and was consistent with them so far as the circumstances of the colony would admit. The Act provided further sections which imposed additional controls over the local authorities by vesting in the Crown power to disallow within three years any ordinance or law (s. 30) and requiring all laws and ordinances to be laid before the Imperial Parliament (s. 31). Pursuant to the 1823 Act, letters patent (the Third Charter of Justice) were issued establishing a new New South Wales Supreme Court of which Sir Francis Forbes was appointed the first Chief Justice (Lumb 1991: 9-10).

When the 1823 Act expired, the Imperial Parliament in 1828 passed a new act (9 Geo. IV., C. 83, later known as the Australian Courts Act). Under the 1828 Act, the supervisory power of the Chief Justice was modified. Within seven days of enactment, every law or ordinance was to be enrolled in the Supreme Court. If before the expiration of fourteen days the Judges of the Supreme Court declared that the law or ordinance was repugnant to the Act or to the laws of England, the Governor was to suspend the operation of the law and resubmit it to the Legislative Council. If the Governor and the Council continued to adhere to the law it was to have force until the pleasure of the Crown was known (s. 22). On the question of applicability of English law, pending a decision by the Governor and Legislative Council as to what laws were applicable, the Supreme Court was to decide the matter when it was in issue in proceedings before that court (s. 24) (Lumb 1991: 11). Judicial review of legislation remains in force today in
New South Wales, however there are a limited number of cases involving specifically the issue of the separation of powers.

The following diagram (Figure 4) - New South Wales: System of Government and Separation of Powers, indicates the separation of powers and institutions and the flow of decision making in the State of New South Wales.
Figure 4  Separation of Powers (NSW)
New South Wales: System of Government and Separation of Powers

PARLIAMENT puts THE PEOPLE in the CENTRE of the Democratic system

This figure is not available online. Please consult the hardcopy thesis available from the QUT Library

DISADVANTAGES OF THE NEW SOUTH WALES CASE

The state of New South Wales, like Queensland and Victoria, follows the system of government derived from England. The Westminster system of government does not have a strict separation between the three powers and the three branches of government. The theory from John Locke (1690) and William Blackstone (1884) indicated a separation between the legislative and executive power but with theoretical parliamentary supremacy. In practice however, the executive has dominated in New South Wales from the beginning of early settlement. The military power (including legislative, executive and judicial power) of the early Governors continued with the executive power of later representative parliamentary government. The executive dominates the Parliament, as it does in the other Australian States and in the UK itself. The Parliament and the courts have traditionally been subordinate to strong governments. Disadvantages of the New South Wales case show the lack of SOP in New South Wales. The New South Wales executive has infringed on the legislature and the judiciary in significant ways. There has been various examples these include: an attempt to abolish the upper house (following the Queensland example), an attempt to remove a New South Wales Supreme Court judge (Justice Vince Bruce in 1998), executive interference in the judicial system (the Kable case 1996). These examples demonstrate problems for the SOP in the state of New South Wales. The role of the Attorney General is also a problem for the SOP in New South Wales.
**NSW Executive infringes on the Legislature**

A number of attempts were made by Labor to abolish the New South Wales Upper House: 1926, 1930-31, 1959, and 1961. It was natural, that the Labor Party in New South Wales, from its beginnings should mark down the upper chamber (the Legislative Council) for destruction. As Hawker (1971) shows, “the Council amended the bills of all governments but disagreements led to the loss of many more bills when Labor was in power,” both in 1910-16 and during the 1920s and early 1930s. The Lang Government in 1925 set out on a course of reform including the abolition of the Council with appointment of new Labor members but they did not vote the required way and the Government proposals were defeated in 1926. In 1930, the Lang returned to Government with the specific mandate to abolish the Upper House, but was dismissed from government in 1932. In 1946, the McKell Government attempted to abolish, not merely reform the Council. Hawker (1971: 245) in relation to McKell noted that a strong Upper House attracts reformers, the more so when parliamentary control is divided. In 1959, the Heffron Government introduced another Bill for the Council’s abolition but after extended debate was soundly defeated at a referendum in 1961. In the next section we will look specifically at the Lang Government’s attempts to abolish the NSW Legislative Council.

**Lang Government’s attempts to abolish the NSW Legislative Council**

The executive in New South Wales has historically infringed on the legislature with attempts to abolish the Legislative Council with various Labor Governments particularly the Lang Labor Government. This is, in effect, the executive attempting to abolish part
of the legislature to which they are accountable, this undermines the doctrine of the separation of powers. The Lang Labor Government starting in 1926 made various attempts to abolish part of the legislature (the Upper House). The Jack Lang Labor Government served in New South Wales for two terms, from 1925-27 and again from 1930-32. In Lang’s first term (1925-27) he led one of the most progressive administrations in New South Wales history. The Lang administration made the earliest determined attempts to carry out the Labor Party’s official policy of abolition of the Upper House (Lumb 1991: 53).

In February 1926, Lang was frustrated by the failure of seven Labor Councillors (including four of the twenty-five he had appointed two months earlier to get a majority) to honour their obligation pledges. Lang was also frustrated by the NSW Governor’s (Dudley de Chair 1924-30) refusal to make the additional ten nominations to the Upper House that Lang now proposed. Lang made the extra nominations for the purpose of abolition of the Legislative Council which had not been mentioned in Labor’s policy speech at the previous election (See Hawker 1971: 242-46; Evatt 1956: chapter 44; Turner 1969; Parker 1978: 197-8). Lang’s attempt at abolition of the Legislative Council was not successful.

To forestall any further attempt at abolition of the Legislative Council by the kind already attempted by Labor, the Thomas Bavin Nationalist Party Government (1927-30) in 1929 added section 7A to the New South Wales Constitution Act 1902 (Lumb 1991: 53-4). This section required that bills for the abolition of the Upper House or altering its
constitution or powers must be approved by the electors at a referendum. This must be done before being presented for the royal assent and that this provision for a referendum could not itself be repealed or amended except by a bill similarly approved at a referendum (Parker 1978: 198).

The National Party was still divided over further legislation to reconstruct the Legislative Council itself when Labor regained office in 1930. Lang promptly introduced bills to repeal section 7A and abolish the Legislative Council, he was optimistically advised by his law officers that he could by-pass the referendum requirements (Lumb 1991: 54). Members of the non-Labor majority in the Legislative Council were much better advised by the legal luminaries in their own ranks. The non-Labor majority in the Council allowed the bills to pass the Council and then blocked them from receiving assent by an action for injunction, in which the Supreme Court of New South Wales, the High Court of Australia, and ultimately the Privy Council. All these courts confirmed that section 7A was both valid and well and truly “entrenched (unalterable by the ordinary process of amendment in Parliament alone) (Trethowan v Attorney-General for New South Wales (1930-31) 44 CLR 394 (High Court); [1932] AC 526 (Privy Council)). By that time the Lang Labor Government had been dismissed by the Governor (Turner 1969; Parker 1978: 198).
Parliamentary (Legislative) infringes on the NSW Judiciary (Justice Bruce - An attempt to remove a NSW Supreme Court Judge)

The legislative power has been used by the Upper House to scrutinise the judiciary with a review of Justice Bruce and his workload in 1998. The important issue of judicial independence was also recently raised in New South Wales, in the Bruce J incident, a rare Australian instance of a legislature exercising scrutiny over a judge. Judicial independence is essential to the separation of powers, that is the separation of the judiciary from the other two branches. The judge was Justice Vince Bruce, a New South Wales Supreme Court judge, who had been accused of incapacity to perform judicial duties due to his procrastination. In New South Wales, the power of removal of a judge lies with the Governor on Parliamentary recommendation, the possible grounds being ‘proved misbehaviour’ or ‘incapacity’ (Spindler 2000: 4).

In 1998 the New South Wales Judicial Commission recommended that the New South Wales Parliament consider removal of the Supreme Court Judge (Bruce J) on the grounds of incapacity. In relation to a serious complaint, the Conduct Division of the Judicial Commission, is required to present to the Governor a report setting out the Division’s conclusions. The Act contemplates that a complaint may be upheld on the basis of inability or incapacity, as distinct from misbehaviour, and that such inability may be the consequence of physical or mental unfitness. The issue of delay in delivering judgments by Justice Bruce, had become a matter of some public discussion through newspaper articles at the time, that are referred to in the report. The Conduct Division reclassified
the various complaints as serious. This is a technical expression defined as being ‘a complaint whose grounds, if substantiated, could in the opinion of the Division, justify parliamentary consideration of the removal of the judicial officer complained about from office.’

In the NSW Court of Appeal in The Hon Justice Vince Bruce v The Hon Terrence Cole and Others, Matter No CA 40337/98 NSWSC 260 (12 June 1998) (the Bruce Case (1998)), Justice Bruce (of the NSW Supreme Court) argued that this contradicted the concept of judicial independence. The New South Wales Supreme Court agreed that, despite the lack of any formal separation of powers in the New South Wales Constitution, the Commonwealth Constitution did significantly restrain Parliamentary interference with the judiciary. Nevertheless, the court held that nothing had occurred that would impinge on the integrity of the judicial system and that the New South Wales Parliament could consider the case. This placed the Parliament in the role of a court or quasi-judicial body to investigate and judge the facts of the Bruce J situation. The NSW Parliament (Upper House) was to make a decision about the removal of Justice Bruce, this undermined the separation of powers and independence of the judiciary and separation of the judicial power in the hands of the courts.

In the previous cases of attempts to remove judges from office included Murphy J in 1986 from the Australian High Court and Vasta J in 1988 from the Queensland Supreme Court. The procedure followed, in these cases, was the appointment by special legislation of ad hoc commissions of judges or retired judges to report upon the
allegations (see Parliamentary Commission of Inquiry Act 1986 (Commonwealth – Murphy J); Parliamentary (Judges) Commission of Inquiry Act 1988 (Queensland – Vasta J). Two reports were made under the latter Act. The First Report relating to Mr Justice Vasta of the Queensland Supreme Court. The Second Report relating to Judge Eric Pratt of the Queensland District Court. Judge Pratt who was exonerated as a result of the Report (Hamilton 1999: 7).

Under the New South Wales Constitution, the government has the right to appoint and remove judges. The issue, was of course as already stated, the possible removal of Justice Bruce from the NSW Supreme Court. The Judicial Officers Act (JOA) 1986 (updated in 2001) relates to the tenure of judicial office, judicial education and the forming of a Judicial Commission of New South Wales (which provides for the examination of complaints against Judges and other judicial officers), the JOA was relevant in relation to Justice Bruce. In 1998 the Judiciary Commission recommended that Parliament consider removal of the Supreme Court Judge (Justice Bruce) on the grounds of incapacity. In the case of Justice Vince Bruce three of the judge’s peers from the Judicial Commission were responsible for hearing the evidence and deciding whether the case was serious enough to go to Parliament (similar situation as Vasta J in 1989 in Queensland). In the present Bruce J situation, the two main issues were: 1.) Was Justice Vince Bruce incapable of doing his job?; 2.) Was the complaint, that Justice Vince Bruce’s backlog of judgments was unsatisfactory, a reasonable complaint?
What was in issue, in the Justice Bruce situation, was the present capacity of the judicial officer, a matter which was addressed by the Conduct Division in its Report. The Bruce J matter turned in part upon objective facts occurring over a period of time, and in part upon matters involving the plaintiff’s reaction to those facts, and in part upon medical evidence. Under the heading “Report to the Governor” it was stated: a.) the complaint as to incapacity is wholly substantiated; b.) ..., the Conduct Division is of the opinion that the matters referred to above, could justify Parliamentary consideration of the removal of Justice Bruce from the office of a Judge of the Supreme Court of New South Wales (http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1998/260.html (  )).

After a written defence and a spirited speech by the Judge, to gain an affirmative vote (16-24) in the Upper House (Legislative Council), where the motion for the address was first moved, the proceedings failed. The practical problems that arose revolved around the unsuitability of parliamentary houses as adjudicative bodies and the problem of the establishment in a satisfactory way of the proved incapacity or misconduct sought to be relied on. Justice Bruce appeared before the New South Wales Legislative Council but removal was not recommended (Spindler 2000: 4).

The New South Wales Parliament’s decision not to dismiss Justice Bruce, resulted after the debate that occurred in Parliament (that is in the Legislative Council). The debate in Parliament involved arguments that, on the one hand, the Judicial Commission of New South Wales had found Judge Vince Bruce incapable but on the other hand he shouldn’t be punished for a ‘mental illness that was now under control’. The majority of the NSW
Parliament (Upper House) found that the judge was capable and as a result he was not dismissed. The matter was as a result not proceeded to a vote in the NSW Legislative Assembly or signature of the Governor. In 1999 the Hon Justice Vince Bruce retired as a Judge of the Supreme Court of NSW.

**NSW Executive infringes on the Judiciary - (Issue of Judicial Independence – Dismissal/Removal of Judges)**

The dismissal of judges is important for the independence of the judiciary and the separation of powers. Removal of judges through the mechanism of parliamentary address and upon the ground of proved incapacity or misbehaviour of judges is the ideal however it has practical problems in the rare instances of the necessity for its application in practice. In Australia, before the modern constitutional provisions were in force, only a small number of Judges were removed in the colonial days of the 19th century. In summary, Lane (1994: 222) notes that in the 1840s-1860s Supreme Court Justices Willis, Montagu and Boothby were “amoved” (that is removed or dismissed from their position) by the Governor in Council, acting alone, in New South Wales, Tasmania and South Australia, respectively.

Hamilton (1999: 6-7) notes the three colonial Judges removed from office and their circumstances. One was Mr Justice Willis, the Port Phillip District Judge of the Supreme Court of New South Wales, in 1843, who was removed by the Governor without legislative address. (see generally Behan 1979: Chs 23, 24). This removal (and Montague’s) was under the *Colonial Judges Leave Act* 1782, which gave a right of
appeal to the Privy Council. Willis J in fact succeeded on an appeal on the ground of a
denial of natural justice (Willis v Gipps (1846) 5 Moo PC 379; 13 ER 536), but never
resumed office. A second was Mr Justice Montague who was removed from the
Supreme Court of Van Dieman’s Land (Tasmania) for impecuniosity and his actions in
avoiding his creditors. Montague failed in his appeal to the Privy Council: Montague v
The Lieutenant-General of Van Dieman’s Land (1849) 5 Moo PC 489; 13 ER 773. A
third was Mr Justice Boothby, of the Supreme Court of South Australia, who was
removed by the Governor in 1865, upon an address of both the South Australian Houses,
although he could probably have been removed, without any form of Parliamentary
address (see Kirby 1995: 184; McPherson 1999: 9). These precedents for the removal of
judges lay the foundation for later attempts by the legislature to remove judges (such as
Bruce J in 1998) and undermine the separation of powers. In the next section we deal
with executive interference in the judicial system a recent significant case dealing with this
is the Kable Case (1996).

**Executive interference in the judicial system – the Kable Case (1996)**

The background to the Kable Case (1996) is that Gregory Wayne Kable was convicted in
1990 of the manslaughter of his wife. Kable pleaded ‘diminished responsibility’ and was
sentenced to a minimum term of four years imprisonment with an additional term of one
year and four months. He was due for release in early January 1995. However his prison
behaviour, particularly numerous threatening letters he had written to relatives of his
deceased wife, caused serious concern to the authorities that he might repeat similar
violent conduct after his release from jail. The Robert Carr Labor Government in NSW
had enacted the *Community Protection Act* 1994 (NSW), it commenced in December 1994. The Act allows a single judge of the Supreme Court of New South Wales, on application of the NSW Director of Public Prosecution (DPP) (s. 8), to make “preventative detention orders” (s. 5), “interim detention orders” (s. 7) and issue arrest warrants (s. 6). A right of appeal to the NSW Court of Appeal is available in relation to a preventative detention order, but not an interim detention order (s. 25). After a preventative detention order is made, the court must make a further order appointing one or more medical practitioners, psychiatrists or psychologists to observe and report on the detainee (s. 11) (Giskes 2004: 12-13).

The legislation also requires reports to be prepared on a detainee’s condition and progress (s. 21). The New South Wales Director of Public Prosecutions (DPP) must meet the civil standard of proof (‘balance of probabilities’) for a preventative detention order to be made (s. 15). Despite statements that the rules of evidence apply (ss. 14, 17(1)(a)), the legislation effectively negates their application by permitting the court to consider material that would otherwise be inadmissible. Justice Levine of the Supreme Court of New South Wales, in February 1995, found that, on the balance of probabilities, Kable was “more likely than not” to commit a serious act of violence and detained him for a further six months. As a result Kable appealed to the NSW Court of Appeal, his appeal was dismissed in May 1995 (see NSW Court of Appeal case: *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374; Giskes 2004: 13-14).
Although the legislation is drafted generally in some provisions, it is clearly directed at only one person: Kable. The object of the legislation is “to protect the community by providing for the preventative detention … of Gregory Wayne Kable” (s. 3(1)). It authorises the making of a detention order against Kable “and does not authorise the making of a detention order against any other person” (s. 3(3)). In the construction of the Act, the need to protect the community must be given paramount consideration (s. 3(2)). The Act empowers the Supreme Court to order, on more than one occasion, Kable’s detention in prison for a specified period (up to 6 months) if it is satisfied on reasonable grounds that (a) he is more likely than not to commit a “serious act of violence” (see the Crimes Act 1900 (NSW)), and (b) it is appropriate, for the protection of a particular person or the community generally, that he be held in custody (ss. 5(1)-(2), (4)) (Giskes 2004: 13).

The High Court, in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 (the Kable Case 1996) considered the validity of section 5 (1) of the Community Protection Act 1994 (NSW). The 1996 decision of the High Court, in the Kable Case (1996), is authority for the principle that State legislatures may not vest in State courts functions which are incompatible with the operation and standing of those courts as repositories of the judicial power of the Commonwealth (Giskes 2004: 12). The Act was directed against a single named individual (Gregory Wayne Kable) and, as Toohey J put it, it ‘was designed to bring about the detention of a person by reason of the Court’s assessment of what that person might do, not what the person has done’ [Toohey J (1996) 189 CLR 51 at 97].
The majority of the High Court (Toohey, Gaudron, McHugh, and Gummow JJ; Brennan CJ and Dawson J dissenting) in the *Kable Case* (1996), found the relevant New South Wales Act to be invalid for the reason that it conferred on the State Court a power that was incompatible with the exercise by it of federal judicial power. They found that the involuntary detention order that the court was invited to make with respect to Kable compromised its independence and undermined public confidence in a court that exercised federal judicial power (Ratnapala 2002: 114; Griffith 1996).

In the *Kable Case* (1996), none of the High Court judges accepted that the State Legislature was constrained by a constitutional separation of powers effected by the State Constitution. None of the judges took the view that the Act, being a legislative judgment, lacked the quality of law as contemplated by section 5 of the *Constitution Act* (NSW) 1902 or by section 5 of the *Colonial Laws Validity Act* (UK) 1865. The majority of the judges in the *Kable Case* (1996) found that the legislative power of the State Parliament was limited by the separation of powers implications arising from the *Commonwealth of Australia Constitution Act* 1900. The Commonwealth Constitution allows Parliament to vest federal judicial power in State courts (section 71) and also it grants litigants the right to appeal to the High Court from decisions of the State Supreme Courts (section 73) (Ratnapala 2002: 114).

It was emphasised, in the *Kable Case* (1996), by Gaudron, McHugh and Gummow JJ that the Commonwealth Constitution established an integrated judicial system in which any measures that undermined public confidence in the State courts would also offend the
Commonwealth Constitution. Justice Gaudron concluded that the State Act makes a mockery of the judicial process and as a result ‘weakens confidence in the institutions which comprise the judicial system brought into existence by Ch. III of the Commonwealth Constitution’ [Gaudron J (1996) 189 CLR 51 at 108]. Justice McHugh, endorsed this position, and further concluded from a range of textual references to State courts that the Constitution ‘implies the continued existence of a system of State courts with a Supreme Court at the head of the State judicial system’ (McHugh J (1996) 189 CLR 51 at 109-15). Also McHugh J acknowledged that although the separation of powers was inapplicable to the State, ‘in some situations the effect of Ch. III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers’ ((1996) 189 CLR 51 at 118; Ratnapala 2002: 114-5). The next sections we will look at the New South Wales judicial power, judicial review, the NSW Supreme Court, the NSW executive infringing on the judiciary and the judicial review of executive legislation.

Conclusion

In New South Wales as in other Australian States, the theory or doctrine of the separation of powers will not necessarily be the same thing as the practice of the separation of powers. The Constitutions of the Australian States were established by or under Acts of the British Parliament before the founding of the Australian federation with the Constitution of the Commonwealth of Australia. The Colonial Constitutions bestowed on the Parliaments of the Australian Colonies the plenary legislative power that
was within the territorial limits of the Colonies (Spindler 2000: 4). The New South Wales Parliament received the legislative power to make laws ‘for the peace, welfare and good government of the colony’ under the constitution of a British colony, created in the image of the British Constitution and system of government (Ratnapala 2002: 111).

Indeed the separation of powers at the Australian State level (previously colonies), as seen in New South Wales, is based at the State level historically on convention and established practice. The purpose behind the doctrine of the separation of powers can be seen to be embedded in western style parliamentary democracies such as Australia and New South Wales as the original colony. In the Westminster system of government, as practiced in Australia today and previously in the colony of New South Wales, the discussion of the doctrine of the separation of powers (in practice the partial separation of powers) is riddled with exceptions and variations. This is certainly the situation in the Australian States today and previously in the original colony of New South Wales (Spindler 2000: 4).

The separation of legislative, executive and judicial powers, certainly in its classical form, exists here in Australia only partially at best. This is seen in New South Wales even though in Australia (the Australian Commonwealth and the Australian States such as New South Wales) it is generally practiced [see cases such as Clyne v East (1967) and Kable v DPP (NSW) (1996)]. In practice, mechanisms for avoiding the over-concentration of power (particularly executive power) exists in many ways. These mechanisms include: constitutions and conventions; the bicameral legislative system (the
use of Upper Houses of review - part of the legislative power); courts (judicial power) and tribunals; as well as multiple political parties; elections; the media; the federal system itself; and the active, ongoing participation of citizens (Spindler 2000: 4). State Supreme Courts and previously the Privy Council have repeatedly however declined to draw separation of powers implications from State Constitutions [Ratnapala 2002: 111; Clyne v East (1967); Gilbertson v State of South Australia (1978); BLF v Minister for Industrial Relations (1986); City of Collingwood v Victoria (1993)].

The main practical mechanisms for avoiding the over-concentration of power covered here in this chapter are: State Legislatures (Parliaments); State executives (Governments, Premiers and Cabinets and Governors); State judiciaries (courts, Supreme Courts); and State Constitutions. The introduction of a new section, s. 7A in 1929 in the NSW Constitution provided that no bill would abolish the Legislative Council unless passed by both Houses of Parliament and most importantly approved by a majority of electors voting at a referendum (Lumb 1991: 54). Also in 1995, a New South Wales referendum entrenched in the Constitution the Justices and Magistrates independence, the kind of protection that Victoria provided in 1991. Supreme Court Justices held office “during good behaviour” but since December 1992, the Justices rely “on the ground of proved misbehaviour or incapacity” (Lane 1994: 222).

The separation of powers doctrine is part of a simultaneously robust and delicate constant interplay between the arms of government. A tension between separation and concentration of powers will always exist, and the greatest danger will always lie with the
executive arm of government - rather than the judicial or legislative arms of government. This is because it is in the power of the executive arm of government that lies the greatest potential for concentration of power and the use and abuse of power leading to its ultimate corruption and misuse (Spindler 2000: 4; see also classical and modern separation of powers theory).

Preventing this corruption and misuse of power in our system of government, particularly at the Australian State level, as seen in New South Wales, relies as much upon conventions as constitutions. The New South Wales Premier Jack Lang failed in 1926 to abolish the Upper House (Turner 1969: 12-31; Parker 1978: 197; Stone 2002: 271) in an attempt to copy Queensland Premier Theodore who in 1922 managed to abolish the Queensland Upper House (Fitzgerald 1984: 22, 27; Lumb 1991: 53). This is an issue of the executive infringing on the legislature. The alarm bells should ring loudly when government, particularly State governments and State leaders (such as State Premiers) dismiss or profess ignorance of the concept of the separation of powers (Spindler 2000: 4). This was certainly the situation in Queensland under the former Premier Sir Joh Bjelke-Petersen (see previous chapter with section on Premier Joh Bjelke-Petersen and his evidence presented at the Fitzgerald Inquiry 1987-9).

Future constitutional reform of State Constitutions such as the New South Wales Constitution to specifically recognise the separation of powers will be an important constitutional reform. Also future constitutional reform in other States might include the constitutional entrenchment of the independence of their State Judiciary and judicial
power, the independence of the Upper House (and joint parliamentary committees of inquiry) and the doctrine of the separation of powers.
CHAPTER 7
CONCLUSION

The thesis presented above has examined various aspects of the separation of powers (legislative, executive, and judicial) at the Commonwealth and state levels in Australia. It is argued that there is a lack of constitutionally or legally recognised separation of powers and functions in the Australian States (Lumb 1983: 132, 137; Lane 1994: 220-21; Ratnapala 2002: 111-15). The thesis outlines the structural problems of the separation of powers in various States with particular reference to the legislative and executive powers in Queensland (Hughes 1980, Fitzgerald 1984; Coaldrake 1989; Wear 2002). There has also been a study of the SOP situation in Victoria (Holmes 1976; Holmes et al 1986; Costar and Economou 1999; Eckersley and Zifcak 2001). Finally a study of the SOP situation in the state of New South Wales (Parker 1978; Hagan and Turner 1991; Spindler 2000; Griffith and Srinivasan 2001).

Why the Entrenchment of the Separation of Powers at the State Level will Overcome the Problems Highlighted in the Case Study Chapters.

If the SOP was entrenched at the State level in State Constitutions then State courts would have to consider SOP at the State level and when considering State legislation. The entrenchment of the SOP in State Constitutions (similar to that in the Commonwealth Constitution) would create greater judicial independence at the State level. This would allow greater confidence on the part of the State judiciary for judicial review of State legislation.
How the Federal Situation is better than that at the State Level.

This is explained in terms of the theory reported in Chapter 2, the advantages of the Commonwealth system and the problems with the states. This is difficult, given that at the federal level there have been similar problems with executive interference with the judiciary as that noted at the state level. The SOP situation at the federal or Commonwealth level is better than that at the state level due to the theory and practice of the SOP reported in Chapter 2. The constitutional position of the High Court has given it an important role in interpreting the Commonwealth Constitution and has interpreted the SOP in terms of the UK model and the theories of Locke and Blackstone rather than the US model. The SOP situation at the federal or Commonwealth level is also better than that at the state level due to the advantages of the Commonwealth system and SOP reported in Chapter 3. Finally the SOP situation at the federal or Commonwealth level is better than that at the state level due to the problems with the states reported in Chapters 4 (Queensland), Chapter 5 (Victoria), and Chapter 6 (New South Wales).

In Australia, at the Commonwealth level, the High Court has had an important role in influencing and shaping the nature of democracy. This is simply not the case at the state level in Australia, state Supreme Courts have had very little to say about the SOP at the state level. At the Commonwealth level the High Court has understood the SOP in Blackstone’s terms, as a separation of judicial power, however it has also justified an aspect of the SOP as a necessary aspect of federalism. The fundamental basis of the High Court’s view of SOP has been the doctrine of responsible government, representative
democracy and a judiciary that is protected from political attack and will declare the law. The states Supreme Courts on the other hand are rarely called upon to decide state constitutional matters involving the separation of powers. State Supreme Courts views about SOP, is as a result of a lack of constitutional cases, is difficult to discover. The states Supreme Courts tend to avoid constitutional issues except where they are obliged to follow the High Court’s decisions (Patapan 1999: 406).

The High Court’s recent declaration that it always made the law created theoretical and practical problems for the doctrine of the SOP in Australia. The theoretical problem of the High Court’s abandonment of the declaratory theory presented a problem of reconciling the doctrine of the SOP with the functions of a law-making judiciary. The practical problem has been the High Court’s exposure to unexpected, sustained and vehement political criticism. The safe constitutional position of the High Court has allowed it to challenge or check the executive and its legislative function, in a way that states Supreme Courts could not consider because of their insecure constitutional position at state level. The High Court, by adopting a new method of interpretation has forced a reconsideration of the SOP in Australia. As a result of a new interpretation, the High Court has emphasised the importance of SOP for individual liberty, this aspect of protecting civil liberties also helps to justify the High Court’s independence. These ideas of protection of civil rights, the importance of the common law, checks and balances and judicial independence can be seen in the theories of Locke, Montesquieu and Blackstone. The greater emphasis on individual liberty, judicial independence and checks and balances creates a shift in the conception of the SOP in Australia away from the UK model to the
US model. The UK model of responsible government has not created limited
government, as a result it is necessary to move toward the US model of The Federalist
conception of liberal-democracy with checks and balances creating more limited

The Advantages of the Commonwealth System

The advantages of the Commonwealth model over the States are outlined and that the
SOP is constitutionally entrenched in the Commonwealth Constitution and recognised by the High Court as part of our system of government. The High Court accepted the Locke and Blackstone interpretation of the SOP. For Blackstone the SOP means primarily the separation of judicial powers, a principle developed over a long time. For Blachstone (1884) the SOP protects the common law, which is the ultimate security of life, liberty and property. The High Court has interpreted the Constitution as providing separation of judicial powers (Patapan 2000: 155, 157). Examples of advantages of the separation of powers at the federal level are outlined as a guide for the States.

There are various advantages of the Commonwealth system over the states in regard to
SOP. The Australian Constitution separated the three powers (legislative, executive and judicial) and the Commonwealth Constitution can only be altered by a referendum (s. 128). This gives the High Court an important role in interpreting the Constitution and deciding the constitutionality of government legislation and the boundaries between the three powers and the institutions that exercise those powers. Advantages of the Commonwealth system and the Commonwealth SOP includes: common law rights;
constitutional rights (express rights and implied rights); the constitutional separation of
the three powers; judicial review by the High Court; and High Court and Federal Court
protection of civil rights. The Mason Court’s new jurisprudence concerning implied
rights in the Constitution (may be seen as the High Court hinting at the necessity for the
Commonwealth Government to introduce an Australian Bill of Rights). Finally the
resulting importance in protecting citizens from the abuse of government power.

The SOP requires the separation of the judicial power and also judicial independence.
The High Court of Australia has repeatedly, over the past century, held the balance fixed
by law, upheld the Constitution and defended fundamental principles against the wishes
of elected governments and parliaments. This has demonstrated the separation of the
judicial power and the independence of the High Court. In 1948, the High Court struck
down the nationalisation of the private banks (*Bank of New South Wales v The
Commonwealth* (1948) 76 CLR 1). In 1951, the High Court declared unconstitutional an
attempt to dissolve the Communist Party and to deprive communists of basic rights
(*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1). In 1992, the
High Court overturned much earlier law to uphold the rights of Australian indigenous
people in their land (*Mabo v Queensland* [No. 2] (1992) 175 CLR 1). In 1996, the High
Court held that such rights were not necessarily extinguished by the grant of pastoral
leases which cover about half of the land of the Australian continent (*Wik Peoples v
Queensland* (1996) 187 CLR 1). Decisions like these, by the High Court, would be
unlikely in a society where judicial independence was not guaranteed by the letter of the
Constitution and not upheld by political convention, respected and obeyed even by
powerful interests and supported by the people (Kirby 1998b: 3). These types of decisions by the High Court demonstrate the advantage of the Commonwealth system over the states. These decisions are unlikely to be made at the state level by state Supreme Courts and state judiciaries.

The Problems with the States

The disadvantages of the States are outlined and that the SOP is not constitutionally entrenched in the State constitutions as part of our system of government. State Supreme Courts have limited ability to interpret State constitutions in regard to SOP at the State level. State Supreme Courts and other State courts however are required to follow federal and High Court decisions regarding SOP. The result is that State courts are required to follow the High Court’s acceptance of the Locke (1690) and Blackstone (1884) interpretation of the SOP from the English system of government. There is not the tradition of constitutional decisions overruling State Government legislation because it is usually left to the High Court. Examples of disadvantages or problems with the separation of powers at the state levels are outlined.

The situation under the Bjelke-Petersen era in Queensland is of particular interest to demonstrate the lack of separation of powers. The lack of separation of powers was further demonstrated by the revelations from the Fitzgerald Inquiry (1989). The Fitzgerald Inquiry (1987-89) exposed four decades of crime and corruption in Queensland (Dickie 1989). The post-Fitzgerald situation in Queensland is that the Fitzgerald recommendations were, as the then Premier Michael Ahern promised,
implemented ‘lock stock and barrel’ (Coaldrake 1989: 158; Reynolds 2002). However some of the issues raised by the Fitzgerald Report concerning the separation of powers still need to be addressed (Carney 1993). It is argued that there is a theoretical separation of powers, which by convention, is supported by the various actors (cabinet ministers, parliamentarians, and judges) within the institutions of governmental power (Cabinet - Executive Council, Parliament, and the Courts).

In practice, mainly due to the Westminster system of responsible government there is only a partial separation and also a partial sharing of powers, the executive is formed within and is accountable to the legislature (Lumb 1983: 24). The executive (cabinet ministers) is formed from within the legislature (parliament); the personnel have a joint role of members of the legislature and members of the executive. In regard to the Westminster system, Locke distinguished between legislative and executive power (Locke 1690; Friedrich 1968: 175-6; Locke cited in Lumb 1983: 24). Bagehot spoke of a ‘fusion’ of legislative and executive power (Bagehot 1867: 12; Bagehot cited in Lumb 1983: 42). The judiciary is considered to be independent of and separated from the other two branches, the legislature and the executive. Blackstone emphasized that judges adjudicate in the spirit of independence as well as conformity with tradition in the nature of English judicial power (Blackstone 1884; Vile 1967: 104; Blackstone cited in Lumb 1983: 25). In particular Queensland could make some changes to its present system (Carney 1993).
The problems or disadvantages of the SOP at the state level result from a lack of constitutional separation of powers. The Australian states following the UK model or Westminster system of government, derived from England, do not have a strict separation between the three branches of government. The theory from Locke and Blackstone indicated a separation between the legislative and executive power which Walter Bagehot (1867) spoke of as a fusion of these powers. The Australian states seem to have and continue with a fusion of legislative and executive powers along with subordinate judiciaries resulting in strong state governments.

Problems or disadvantages of the SOP in the states of Queensland, Victoria and New South Wales cases show the lack of SOP at the state level compared to the Commonwealth. This is demonstrated by the comparison of the prominent position of the High Court compared to state courts. At the state level the executive infringes on the legislature and particularly the judiciary. The judicial culture in Queensland has presented problems for judicial independence. The dismissal of Justice Angelo Vasta (1989) in Queensland and the attempt to remove Justice Vince Bruce (1998) in New South Wales presented problems for the SOP and judicial independence in those states. The treatment of Chief Magistrate Di Fingleton (2002) and the treatment of Pauline Hanson and David Ettridge (2003) has not only demonstrated problems for the SOP in Queensland but also vast inconsistencies in the treatment of the cases and the administration of justice.

The role of the Attorney-General at state level is problematic, like at the Commonwealth level, but the state level does not have a court system willing to challenge the abolition of
civil rights. The Victorian executive, through the legislature, attempted (in 1990-91) to abolish various civil rights but fundamental rights were too entrenched for easy removal, these include Magna Carta (1215, 1297); 42 Edward III C.3 (1368); the Bill of Rights (1688) and Act of Settlement (1701) (Keon-Cohen 1991: 69-70). In Queensland Attorney-General Rod Welford interfered in the judicial process in 2003 regarding the release of convicted sex offender Dennis Ferguson from prison. These examples indicate the problems for the SOP when there is executive and Attorney-General interference in the judicial system and the use of the judicial power.

**The Importance of the Separation of Powers in Protecting Citizens from the Abuse of Government Power**

The common law is the major protector of civil rights at the state level. However State governments have a tradition of introducing legislation that decreases civil rights rather than protecting civil rights. If state constitutions were entrenched with Bills of Rights then these would have to be considered by state courts when making decisions. State Bills of Rights would help to counter the trend toward the removal of civil rights. The constitutional entrenchment of state Bills of Rights would result in the High Court having to consider them when deciding cases.
Original Contribution to Knowledge

The concentration on the SOP at the State level and looking at the infringement of the executive on the other branches is original. Also the analysis of the SOP situation at the State level from a theoretical and practical way is original. Also the analysis of the SOP situation at the State level from a political and legal perspective is original. This originality comes about because most of the literature on the SOP in Australia is on the Commonwealth Government and the High Court decisions from a legal perspective. Recent examples of the executive infringing on the Legislature and the executive infringing on the judiciary are provided to highlight areas of concern for the practice of the SOP. The practice of the SOP is contrasted with the theory of the SOP and there are sometimes vast differences between them.

Implications for future research

This thesis has not looked at the SOP situation in the other three States (South Australia, Western Australia and Tasmania) and the two Territories (Northern Territory and the Australian Capital Territory) in Australia. These three other States in particular can provide a source of material to do future research on the SOP situation at the State level in Australia. The SOP situation in these States can be compared and contrasted with the situation at the federal level.
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