Rules of Evidence and the Constitution

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In the exercise of its incidental powers the Parliament of the Commonweali of Australia may enact legislation on the rules of evidence to be applied l federal courts and by State Courts when they are exercising a federal juri diction. The federal Parliament's power to enact such legislation is howeve constrained by implications found in Chapter III of the federal Constitution the Judicature Chapter — and notably by the implication that the Parliame cannot legislate in ways which impair the exercise by courts of judici powers of the Commonwealth. This article explores the impact of that implie constitutional constraint on the powers of the federal Parliament to enact rule of evidence which are to be applied by courts. It also considers the impact c the same constraint in proceedings before State courts exercising federal juris diction and which, under s 79 of the Judiciary Act 1903 (Cth), are directed t apply State rules of evidence.

INTRODUCTION

The Australian federal Constitution makes no reference to the rules of evi dence to be applied in courts of law. The framers of the Constitution no doub assumed that the legislative powers which were left to the State parliament would continue to enable them to make laws on the subject. They probabl assumed also that the federal Parliament would have a capacity to make law concerning rules of evidence to be applied by federal courts, and by Stat courts when they were exercising federal jurisdictions conferred on them b the federal Parliament, pursuant to s 77 of the Constitution.

Until recently the rules of evidence to be applied by courts exercisin federal jurisdiction were, in the main, those of the State or the Territory i which the courts sat. This was by virtue of s 79 of the *Judiciary Act* 1903 (Cth which provides that:

> The laws of each State or Territory, including the laws relating to procedure evidence and the competency of witnesses shall, except as otherwise pro vided by the Constitution or the laws of the Commonwealth, be binding o all Courts exercising federal jurisdiction in that State or Territory in al cases to which they are applicable.

So far as this section relates to laws on procedure and evidence, it rests on th express incidental power conferred on the federal Parliament by s 51(xxxix) o the Constitution.[1] Section 79 meant that federal courts could be applyin different rules of evidence, according to the State or Territory in which they happened to be exercising their jurisdiction.

The *Evidence Act 1995* (Cth) has altered this state of affairs. It ha

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1 See, eg, *Commonwealth v Melbourne Harbour Board Trust Commissioners* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ) and *Williamson v Ah On* (1926) 39 CLR 95.

provided a fairly comprehensive statement of the rules of evidence to be applied by federal courts and also by the courts of the Australian Capital Territory.[2] The Act does not, however, apply to State courts when they are exercising federal jurisdiction invested in them by legislation, enacted pursuant to s 77 of the Constitution. Nor does it displace special rules of evidence contained in other federal statutes, for example the *Crimes Act 1914* and s 16 of the *Parliamentary Privileges Act 1987*.

To date there has been no challenge to the constitutionality of provisions in the *Evidence Act 1995*. There have, however, been cases in which the constitutionality of evidentiary provisions in other federal statutes has been contested, usually without success. The High Court of Australia has nonetheless signalled that there are limitations on the federal Parliament's powers to make laws of evidence to be applied by courts of law. These limitations stem not only from the fact that the legislative powers of the federal Parliament are limited to enumerated subjects, but also from the implication found in Chapter III of the Constitution — the Judicature Chapter — that the Parliament cannot use its legislative powers to interfere with processes which are considered essential to the exercise of judicial powers.[3] While the High Court's statements have been directed only to the federal Parliament, the constraints on legislative powers found in Chapter III of the Constitution control the application of State laws which, by force of s 79 of the *Judiciary Act 1903* (Cth), will apply to State courts when they are exercising federal jurisdiction.

This article examines the sources of federal legislative powers to make rules of evidence and constitutional limitations on the uses which may be made of those powers. It considers also the extent to which the federal Constitution may affect the powers of State parliaments to make rules of evidence binding state courts in the exercise of State jurisdiction.

SOURCES OF FEDERAL LEGISLATIVE POWER

Before the nineteenth century, most of the rules of evidence had been developed by the courts themselves. It was, however, never in doubt that parliaments could change the judge-made rules. 'The rules of evidence', Brennan CJ observed in *Nicholas* 'have traditionally been recognised as being an appropriate subject of statutory prescription'.[4] But under the Australian federal Constitution, the power of the federal Parliament to prescribe rules of evidence is tied to specific heads of legislative power.

One of the relevant heads of power is the express incidental power conferred by s 51(xxxix).[5] This paragraph authorises the Parliament to make laws

2 *Evidence Act 1995* (Cth), section 4.

3 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Nicholas v The Queen* (1998) 193 CLR 173 ('Nicholas'). See also F Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash Law Review* 248.

4 (1998) 193 CLR 173, 188 (Brennan J). See also 203 (Toohey J), 225 (McHugh J), 260 (Kirby J).

5 See, eg, *Commonwealth v Melbourne Harbour Board Trust Commissioners* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ) and *Williamson v Ah On* (1926) 39 CLR 95.

with respect to, inter alia, 'Matters incidental to the execution of any pow vested by this Constitution in the ... Federal Judicature.' The federal judic ture includes not merely the High Court and the federal courts but also Sta courts invested with federal jurisdiction pursuant to legislation enacted und Chapter III. The *Evidence Act 1995* (Cth) has been enacted primarily i reliance on the express incidental powers.

The implied incidental legislative powers which accompany the precedin grants of power in s 51 of the Constitution have also been held to suppo federal evidentiary laws. In *Milicevic v Campbell,*[6] Gibbs J stated that:

> The [federal P]arliament may, when legislating with respect to a subjec within the ambit of its powers, validly enact laws prescribing the rules o evidence and procedure to be observed in any legal proceedings, whethe criminal or civil, arising in relation to that subject matter.[7]

In *Nicholas,*[8] the judges of the High Court did not find it necessary to identif the source of the power to enact the federal legislation under challenge in tha *case* — the *Crimes Amendment (Controlled Operations) Act 1996*. But the made general statements such as the following:

> It is clear that Parliament can enact evidentiary rules relating to the proof o offences it creates. No constitutional reason exists to prevent the Parliamen from altering the common law rules of evidence.[9]
>
> The Parliament has undoubted power to make and amend rules of evidenc to be applied in the exercise of the judicial power.[10]
>
> That Parliament may make laws prescribing rules of evidence is clear .. Plainly, Parliament may make laws (as it has) on subjects as diverse as th circumstances in which hearsay evidence may be received or the circum stances in which a confessional statement by an accused person may b admitted in evidence and it may do so to the exclusion of the previou common law rules.[11]

The opinions expressed by the Justices of the High Court in *Nicholas*[12] suggest that, for constitutional purposes, the class of laws describable as of an evidentiary character is not a narrow one. Brennan CJ quoted, with apparen approval, the statement in *Wigmore on Evidence* that:

> Rules of evidence are merely methods for ascertaining facts. It must be sup posed that a change of the law merely makes it more likely that the fact will be truly ascertained, either by admitting evidence whose former suppression — or by suppressing evidence whose former admission — helped to con- ceal the truth. In either case no fact has been taken away from the party; it is merely that good evidence has been given the one or bad evidence has been taken from the other.[13]

6 (1975) 132 CLR 307.
7 Ibid 316.
8 (1998) 193 CLR 173.
9 Ibid 225 (McHugh J).
10 Ibid 260 (Kirby J).
11 Ibid 272 (Hayne J).
12 (1998) 193 CLR 173.
13 Ibid 190–1.

The High Court has upheld the validity of federal laws which have reversed common law regarding the onus of proof,[14] though as Brennan CJ observed in *Nicholas*,[15] the Parliament's power to make laws of this kind is not unlimited. The limitation his Honour had in mind is suggested in the following passage in his opinion:

> The reversal of an onus of proof affects the manner in which a court approaches the finding of facts but is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates.[16]

The Parliament may also abrogate or modify the privilege against self-incrimination and legal professional privilege,[17] for those privileges are not constitutionally entrenched. The Parliament may also make changes to the rules governing exclusion of evidence.[18]

In *Nicholas*[19] a majority of the High Court upheld a recent amendment to the *Crimes Act 1914* (Cth) which precluded the rejection of evidence on the ground of the 'unlawful' conduct of law enforcement officers in the course of a 'controlled operation'.[20] The amendment was expressed to apply only to prosecutions for the particular offence created by s 233B(1) of the *Customs Act 1901* (Cth) to do with importation of drugs. In the opinion of the majority, the amendment did not interfere with or usurp the judicial power of the Commonwealth. Courts were still left with the function of adjudicating the guilt or innocence of an accused person.

LIMITATIONS ON LEGISLATIVE POWERS

Limitations on exercise of the incidental legislative powers of the Commonwealth

Federal laws on evidentiary matters are, in the main, laws made in exercise of the incidental powers of the Commonwealth Parliament, express or implied. Their validity will therefore depend, in part, on whether they have a sufficient nexus with one or more of the enumerated heads of legislative power. In particular cases there may be differences of judicial opinion about whether that nexus exists. *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*[21] provides an illustration.

14 The cases are noted in *Nicholas* (1998) 193 CLR 173; see in particular paras [152–5]. See also Wheeler, above n 3, 272–3.
15 (1998) 193 CLR 173.
16 Ibid 189.
17 *Sorby v Commonwealth* (1983) 152 CLR 281, 308; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503–4, 512, 533–4; *Reid v Howard* (1995) 184 CLR 1, 5, 12–14 (self-incrimination); and *Esso Australia Resources Ltd v Dawson* (1999) 162 ALR 79 (legal professional privilege).
18 *Nicholas* (1998) 193 CLR 173, 274 (Hayne J).
19 (1998) 72 ALJR 456.
20 *Crimes Act 1914* (Cth) s 15X, inserted by the *Crimes Amendment (Controlled Operations) Act 1996* (Cth).
21 (1982) 150 CLR 169.

One of the issues in this case was whether sub-ss 45D(5) and (6) of t *Trade Practices Act 1974* (Cth) were reasonably incidental to the corporatio power conferred by s 51(xx) of the Constitution. Prior sub-sections had ma it unlawful for persons to engage in what is generally known as a 'seconda boycott', directed against a corporation. The effect of sub-s (5) was that wh two or more persons who were members or officers of a trade union engag in prohibited conduct in concert with one another, the trade union was deem to have engaged in that conduct, and for the same purpose for which the co duct was engaged in by the participants, unless the union established 'that took all reasonable steps to prevent the participants from engaging in that co duct'. A majority of the High Court held sub-s (5) invalid, and with sub-s (6).[22] Mason J, with whom Stephen and Aickin JJ agreed, characterise sub-s (5) as 'a law about trade unions', having too remote a connexion wit corporations.[23] It was not, they said, 'an onus of proof provision',[24] for:

> To escape the deeming operation it will avail the trade union nothing t prove that it did not act in concert with the officers or that it did not act i concert for the relevant purpose. To escape it must go further and show th it took all reasonable steps to prevent the participants from engaging in tha conduct.[25]

Brennan and Murphy JJ agreed in result with the conclusion of the othe Justices in the majority on the validity of sub-ss 45D(5) and (6), though the reasons were somewhat different.[26]

Gibbs CJ, with whom Wilson J agreed, dissented on the issue. Sub-sectio 45D(5), the Chief Justice conceded, did 'more than merely change the onus o proof'. It provided rather 'that the burden of proof may be discharged only i a particular way'.[27] It seemed to Gibbs CJ that 'to require an organisation t take all reasonable steps to prevent its members from engaging in conduc likely to cause' substantial loss or damage to the trading activities of tradin corporations was 'incidental to the attainment of the object'[28] of protecting th trading activities of trading corporations from substantial loss or damage. Th Parliament had power under s 51(xx) of the Constitution to enact such protec tive laws and it was 'for Parliament to decide what measures of protection i will adopt'.[29]

Today the High Court might approach the constitutional issues presented by sub-ss 45D(5) and (6) somewhat differently. It might now prefer the approach which Murphy J adopted which was to ask whether the law represented ar illegitimate interference with the exercise by courts of the judicial powers invested in them, contrary to implications found in Chapter III of the

22 The latter sub-section was one which specified the legal consequences for the union.
23 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 211.
24 Ibid 210–11.
25 Ibid 210.
26 Ibid 223 (Brennan J), 214–5 (Murphy J).
27 Ibid 185.
28 Ibid 188.
29 Ibid.

Constitution. A question of that kind would not, however, arise for decision if a court concludes that the law under challenge is not a law with respect to a subject in respect of which the federal Parliament is authorised to legislate.

Should the law be one which is sustainable only as an exercise of an implied incidental power, the court would need to be satisfied that there is a sufficient nexus between that law and an enumerated head of federal legislative power. And in applying the nexus test the court may consider whether the law is reasonably and appropriately adapted to achieve an object which the federal Parliament may pursue in exercise of its legislative powers.[30] An evidentiary provision in a federal statute could be adjudged invalid because it fails this test of proportionality.

Legislative interference with judicial processes

The exercise of judicial power involves ascertainment of facts relevant to determination of legal rights and liabilities.[31] Legislative measures which prevent courts of federal jurisdiction from ascertaining relevant facts may therefore contravene Chapter III of the Constitution. Those measures could be ones which require courts to exclude evidence which, at common law, would be regarded as relevant and admissible. They could be ones which assign 'legal consequences on the basis of fictitious or invented facts'.[32]

In *Williamson v Ah On*[33] Isaacs J expressed the view that the federal Parliament cannot make a law which is 'flagrantly destructive of any real and reasonable chance to place the real facts before the [c]ourt for determination of the issue'.[34] He gave as an example a law which provided that 'a man found in possession of stolen goods shall be conclusively deemed to have stolen them'.[35] A law of that kind, he suggested, was distinguishable from one which provided that a man found in possession of stolen goods 'shall be deemed to have stolen them unless he personally proves that he got them honestly'.[36] A provision of the latter kind did no more than alter the burden of proof.

In *Actors and Announcers Equity Association of Australia v Fontana Films Ltd*[37] Murphy J agreed with the majority that sub-ss 45D(5) and (6) of the

30 *Leask v Commonwealth* (1996) 187 CLR 579. In this case some evidentiary provisions were upheld. See pages 599, 611, 626, 636.

31 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Ltd* (1970) 123 CLR 361, 374 (Kitto J).

32 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 704 (Gaudron J). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

33 (1926) 39 CLR 95.

34 Ibid 117. See also *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168, 185 (Mason CJ).

35 (1926) 39 CLR 95, 108.

36 Ibid. In *DCT v Richard Walter Pty Ltd (1995) 183 CLR 168 at 206* Deane and Gaudron JJ gave as examples of laws which would violate s 75(v) of the Constitution (a) a law which provided that in 'proceedings for injunctive relief to restrain unlawful conduct by an officer of the Commonwealth, there shall be an irrebutable presumption that the impugned conduct is lawful'; (b) a law which provides that where 'an injunction is sought to restrain an officer of the Commonwealth from enforcing an allegedly invalid decision, a certificate of the defendant officer to the effect that the impugned decision was valid and enforceable would conclusively determine that issue in his or her favour regardless of whether the decision was in fact valid.'

37 (1982) 150 CLR 169.

Trade Practices Act 1974 (Cth) were invalid but for a different reason. In hi opinion sub-s 45D(5) infringed Chapter III of the Constitution. He sai 'legislative provision for the suppression of truth in judicial proceedings i inconsistent with the exercise of judicial power and is unconstitutional'.[38]

Murphy J gave several examples of legislative provisions which he though would be inconsistent with the exercise of judicial power. One was a provisio which stipulated that one fact or circumstance should be presumed from th existence of another and there was no 'rational basis for the presumption'.[3 Another was a provision 'that proof of one fact is deemed to be proof o another fact, so that the party against whom the second fact is alleged is pre vented from attempting to disprove it'.[40] His Honour distinguished such a deeming provision from one where the second fact deemed to have beer proved by proof of the first fact 'is merely another description of, or an inevitable consequence of, the first fact'.[41] But, his Honour went on to say:

> It is not consistent with the exercise of judicial power that the courts be required to make findings contrary to fact or to adjudge persons guilty o civilly liable upon proof of facts from which a rational conclusion of guilt or liability does not follow but on the basis of a legislative conclusion which is unexaminable judicially.[42]

Statements in *Nicholas*[43] provide further indications of the kinds of statutory provisions which the High Court might now regard as impairing the exercise of judicial functions. In that case Brennan CJ spoke of 'a provision which, though in the form of a rule of evidence, is in truth an impairment of the curial function of finding the facts'.[44] In relation to statutory provisions on admissibility of evidence Toohey J said that 'it might be necessary, in a particular situation, to look closely at the consequences of rejecting or admitting the evidence'.[45] If the consequences were inimical to the idea of a fair trial, the law might contravene Chapter III. Gaudron J identified what she thought to be some essential features of judicial powers which are constitutionally protected. They included:

> The right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to the facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.[46]

38 Ibid 214.
39 Ibid 213.
40 Ibid 214.
41 Ibid.
42 Ibid.
43 (1998) 193 CLR 173.
44 Ibid 189.
45 Ibid 199.
46 Ibid 208–9.

Gaudron J thought also that Parliament cannot require or authorise a court 'to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute'.[47]

The Justices in dissent in *Nicholas,*[48] McHugh and Kirby JJ, agreed that a federal law will infringe Chapter III if it 'has a tendency to undermine public confidence in ... administration of justice'.[49] Indeed their principal reason for holding the law under challenge was unconstitutional was that they considered the law to have such a tendency.[50] But two of the Justices of the majority, Brennan CJ and Hayne J, emphatically rejected the proposition that in determining the validity of a law it is proper for the court to consider what effect, if any, the law might have on public confidence in the courts. Brennan CJ's view was that:

> To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court's opinion about its own repute to the level of a constitutional imperative.[51]

The Parliament had in the present case changed a rule of common law which allowed, and indeed demanded, exclusion of evidence. The common law rule was one based on the courts' perception of a public interest. 'The declaration of the balance of public interest devolves on the court when the Parliament is silent, but', said the Chief Justice, 'once the Parliament has spoken,' as it had in the present case, 'it is the voice of the Parliament that declares where the balance of the public interest lies'.[52]

There was one point on which all the Justices in *Nicholas* were agreed. It was that *ad hominem* federal legislation on matters of evidence which was applicable only to identifiable, individual cases would be ultra vires.[53] The legislation under review did not, however, offend in that regard.

The constraints imposed by Chapter III of the Constitution on the power of the federal Parliament to make rules of evidence must affect the application of state laws under s 79 of the *Judiciary Act 1903* (Cth). As has already been pointed out, s 79 continues to require State courts to apply state rules of evidence whenever they are exercising a federal jurisdiction. But this requirement is expressed to be subject to the Constitution and to federal legislation. State legislation on an evidentiary matter could be valid and binding in cases in which a State court is exercising a State jurisdiction. Nonetheless that legislation may not be applicable under s 79 of the *Judiciary Act 1903* when a State

47 Ibid.
48 (1998) 193 CLR 173.
49 Ibid 226 (McHugh J).
50 Ibid 254 (Kirby J).
51 Ibid 197. Hayne J endorsed these remarks at 275.
52 Ibid.
53 Ibid 191–193, 203, 211, 221–2, 257. See also E Campbell, *Rules of Court: A Study of Rule-Making Powers and Procedures* (1985) 48.

court is exercising a federal jurisdiction, for the reason that it impairs the exercise of judicial powers of the Commonwealth, contrary to Chapter III of the Constitution. The applicability of state laws of evidence in proceedings within a federal jurisdiction must ultimately depend on whether those laws would be valid if translated into federal legislation. The State laws rendered applicable under s 79 are, after all, applicable as a matter of federal law.

The High Court has not, as yet, struck down any federal rule of evidence on the ground that it impairs the exercise of judicial powers of the Commonwealth. There are dicta which have indicated what kinds of rules may be ultra vires on this ground and which make mention of factors which may be taken into account in determining the constitutionality of laws which take the form of rules of evidence. Some judges have suggested that one test to be applied in determining the constitutionality of federal legislation which affects court proceedings is whether application of the law in question would 'cause a court to act in a manner contrary to natural justice'.[54]

'The technical rules of evidence applicable to civil and criminal litigation' it has been said, 'form no part of the rules of natural justice'.[55] Nonetheless bodies whose decision-making functions involve ascertainment of facts have been held to be under a duty to decide on the basis of evidence which tends 'logically to show the existence or non-existence of facts relevant to the issue to be determined'.[56] Some judges have described this duty as one of the elements of a duty to accord natural justice.[57] On that view legislation which requires courts to decide otherwise than on the basis of evidence which tends 'logically to show the existence or non-existence of facts relevant to'[58] issues to be determined by them will cause them to act in violation of their duty to do natural justice.

A duty to accord natural justice involves, of course, an obligation to adopt procedures which are fair to the persons who will be affected by the ultimate decision. Those persons must be given an adequate opportunity of being heard on relevant issues. Common law rules of evidence reflect notions of procedural fairness and legislative alterations of some of those rules could be ones which are destructive of litigants' rights to procedural fairness. It could be legislation which effectively precludes admission of evidence which is relevant and vital to proof of a claim or a defence, or which assigns burdens of proof which will be extremely difficult to discharge, or which establishes an evidentiary regime which tips the scales of justice in favour of one adversary — say the prosecutor of a criminal charge.

It is perhaps not without significance that the High Court has held that provisions of the kind found in s 364 of the *Commonwealth Electoral Act 1918* are

54 *Leeth v Commonwealth* (1992) 174 CLR 455, (Mason CJ, Dawson and McHugh JJ). See also *New South Wales v Canellis* (1994) 181 CLR 309, 329.

55 *Mahon v Air New Zealand* [1984] AC 797, 821 (Lord Diplock).

56 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 689 (Deane J).

57 See E Campbell, 'Principles of Evidence and Administrative Tribunals' in E Campbell and L Waller (eds) *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982), 78–81.

58 Ibid.

not inimical to the exercise of the judicial powers of the Commonwealth. This section provides that:

> The Court [of Disputed Returns] shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, *or whether the evidence before it is in accordance with the law of evidence or not.* [Emphasis added.]

Provisions of this type, Gleeson CJ, Gummow and Hayne JJ observed in *Sue v Hill,*[59] 'do not exonerate the Court from the application of substantive rules of law and are consistent with, and indeed require the application of, the rules of procedural fairness.'[60]

EXCLUSION OF EVIDENCE OF PARLIAMENTARY PROCEEDINGS

The limits of the federal Parliament's power to make laws which require courts to exclude otherwise relevant evidence will be tested when the High Court is presented with a case in which it must determine the constitutional validity of s 16(3) of the *Parliamentary Privileges Act 1987* (Cth).

Section 16(1) of this Act confirms the application to the federal Parliament of Article 9 of the English *Bill of Rights 1689,* a provision which ensures that participants in parliamentary proceedings cannot incur legal liability for things said or done by them in the course of those proceedings.[61] Section 16(2) defines what are to be regarded as proceedings in the federal Parliament. Section 16(3) (read in conjunction with s 3(1)) requires courts — whether they be federal, State or Territory courts — to exclude evidence of federal parliamentary proceedings, when tendered for certain purposes, subject to several exceptions.[62] In some cases exclusion of evidence of parliamentary proceedings may mean that a court is not able to ascertain facts which are highly relevant to the issues before it. For example, if a member of the

59 (1999) 73 ALJR 1016.

60 Ibid [42]. They cited *British Imperial Oil Co Pty Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422, 438–41; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25, 36, 46–7.

61 Article 9 provides 'that the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament'.

62 Section 16(3) provides that:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of –
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
> (c) drawing, or inviting the drawing of inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The exceptions are set out in sub-ss (5) and (6). They cover questions arising under s 57 of the Constitution and prosecutions for offences against the Act or an Act establishing a parliamentary committee. See also *Amman Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710, 717–18 (Beaumont J).

federal Parliament sues a newspaper for defamation in respect of statements made about the member's conduct in Parliament, the court cannot not receive evidence of that conduct in support of defences such as truth, fair comment or qualified privilege.[63] In that case the court might conclude that it could not do justice according to law and that therefore it should order a stay of the action.[64] Section 16(3) also means that a defendant in a criminal trial cannot attack the credibility of witnesses for the prosecution by adducing evidence that they have given evidence before a federal parliamentary committee which is inconsistent with the evidence they have given in court.[65]

Section 16 of the *Parliamentary Privileges Act 1987* was enacted 'for the avoidance of doubt' about the meaning and effect of Article 9 of the *Bill of Rights 1689,* which declared that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. There had never been any doubt that, by force of s 49 of the Constitution, Article 9 applied to the federal Parliament, but recent rulings of the Supreme Court of New South Wales had interpreted the Article very narrowly so far as it affects the admissibility of evidence of parliamentary proceedings.[66] Section 16(3) of the Act was enacted to counter those rulings.[67]

Section 16 was enacted in reliance on s 49 of the Constitution, read in conjunction with s 51(xxxvi). Section 49 of the Constitution provides that:

> The powers, privileges and immunities of the Senate and the House of Representatives, and of the members and committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Section 51(xxxvi) of the Constitution authorises the federal Parliament to make laws with respect to 'matters in respect of which this Constitution makes provision until the Parliament otherwise provides'.

The constitutionality of s 16(3) of the 1987 Act has been considered by two State courts: first by Queensland's Court of Appeal in *Lawrance v Katter*[68] in 1996 and then by a Full Court of the Supreme Court of South Australia in *Rann v Olsen*[69] in 2000. Both cases were actions for defamation in respect of statements made outside parliament in the course of media interviews. In *Lawrance*

63 *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416 and *Prebble v New Zealand Television Ltd* [1995] 1 AC 321 are cases of this kind, though they concerned the effects of Article 9 of the *Bill of Rights* 1689.

64 *Prebble v New Zealand Television Ltd* [1995] 1 AC 321, 338.

65 *R v Murphy* (1986) 5 NSWLR 18 was such a case. Section 16(3) was enacted primarily to counteract the ruling in the case.

66 Ibid.

67 Commonwealth, *Parliamentary Debates,* Senate, 7 October 1986, 892.

68 (1996) 141 ALR 447. The High Court granted special leave to appeal in this case but the appeal was later discontinued. The Court recognised that the case raised important constitutional issues: Transcript or Proceedings, *Lawrence v Katter* (High Court, commencing 26 June 1997), 5. The case is discussed in E Campbell, 'Parliamentary Privilege and Admissibility of Evidence' (1999) 27 *Federal Law Review* 367.

69 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).

v Katter[70] the defendant had said no more than that he adhered to what he had already said in the federal Parliament. The plaintiff sought to adduce evidence of what the defendant had said in Parliament. In *Rann v Olsen*[71] the plaintiff was a member of the South Australian Parliament who had appeared before a federal parliamentary committee and had there accused the defendant, another member of the South Australian Parliament, of having leaked Cabinet documents. In media interviews the defendant denied the accusation and virtually accused the plaintiff of being a liar. In his defence the defendant pleaded, inter alia, truth, qualified privilege and fair comment on a matter of public interest. The defendant also sought a stay of the action by reason of the operation of s 16(3) of the Act. He asserted that, if by reason of that provision he could not lead evidence as to the truth or good faith of the plaintiff's evidence before the parliamentary committee, his defences of truth, qualified privilege and fair comment would fail. The case stated by the trial judge for the opinion of the Full Court required the Court to consider both the effect of s 16(3) and also its validity.

The decisions in these two cases have revealed some differences of judicial opinion on the effects of s 16(3) and also on whether the legislative power pursuant to which it has been enacted is subject to implied constitutional limitations.

There is first the question of whether s 16(3) is merely declaratory of effects of Article 9 of the *Bill of Rights 1689,* or whether it extends the operation of the Article. In R*ann v Olsen*[72] Prior J was of the view that s 16(3) was merely declaratory of effects of Article 9. That being so, it operated as if had been incorporated in the Constitution.[73] The other judges in that case, however, preferred to decide the constitutional issue on the assumption that s 16(3) may have extended the operation of Article 9.

In *Lawrance v Katter*[74] a majority of the judges rejected a plea based on s 16(3) by a reading down of its provisions. Davies JA did so by reading the provision as subject to the overarching principle expressed in Article 9 of the *Bill of Rights 1689.* This meant, in his opinion, that evidence of federal parliamentary proceedings is inadmissible only if the purpose of those seeking to adduce and make use of such evidence is to question or impeach the parliamentary proceedings.[75] That was not, in his view, the plaintiff's purpose in seeking to tender evidence of what the defendant had said in the federal Parliament. He did, however, concede that the position would have been different had the plaintiff sought to adduce the evidence to show that the defendant's statements outside parliament had been actuated by malice. The majority in *Rann v Olsen*[76] emphatically rejected Davies JA's reading down of s 16(3), having regard to its express terms.

70 (1996) 141 ALR 447.
71 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).
72 Ibid.
73 Ibid paras [225], [227–9].
74 (1996) 141 ALR 447.
75 Ibid, 490–1.
76 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000), paras [114], [256], [284], [391].

In *Lawrance v Katter*[77] Pincus JA also concluded that s 16(3) did no require exclusion of the evidence the plaintiff sought to adduce, but this wa because, in his opinion, the subsection 'does not validly operate with respec to the conduct of defamation suits'.[78] If it did operate in such suits it would, h observed, 'prevent examination in court of the truth or fairness of mos activity in parliament'.[79] It would 'inhibit attacks outside parliament on wha is said [in parliament], by subjecting the critics to the risk of unjust liability fo damages'.[80] His Honour's 'reading down' of s 16(3) was clearly moved by what he perceived to be the inhibitions imposed by the implied constitutional freedom of political communication.[81] But his approach was clearly not thought to be sound by the South Australian judges who sat in the case of *Rann v Olsen.*[82] They found no warrant for exempting the conduct of defamation actions from the operation of s 16(3), by whom or against whom.

A central issue which has been revealed in the cases of *Lawrance v Katter*[83] and *Rann v Olsen*[84] is whether the legislative power under which s 16(3) was enacted is constrained by implied constitutional limitations on the exercise of federal legislative powers; notably the implied freedom of political communication and the implied prohibition of legislative measures which interfere, illegitimately, with the exercise by courts of their judicial powers.

In *Lawrance v Katter,*[85] Fitzgerald P, in dissent, concluded that s 16(3) was authorised by s 49 of the federal Constitution. In his opinion the legislative power conferred by s 49 is a free-standing power and its exercise is not constrained by implied limitations on federal legislative powers.[86] His Honour did not, however, consider whether s 49 should be read in conjunction with s 51(xxxvi) of the Constitution. The legislative powers exercisable by the federal Parliament under s 51 of the Constitution are, prima facie, subject to most of the implied constitutional constraints on exercise of federal legislative powers.

In *Rann v Olsen*[87] a majority of the judges were prepared to consider the constitutionality of s 16(3) on the assumption that it does have the effect of extending the operation of Article 9 of the *Bill of Rights 1689,* and that the legislative power pursuant to which it was enacted is constrained by the implied constitutional freedom of political communication and also by the principle that federal legislative powers cannot be exercised to interfere with the

77 (1996) 141 ALR 447, 486.
78 Ibid.
79 Ibid.
80 Ibid, 485.
81 Ibid, 485–6. On the implied freedom see also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
82 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).
83 (1996) 141 ALR 447.
[2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).
85 *Lawrance v Katter* (1996) 141 ALR 447.
86 Ibid 478–81.
87 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).

exercise of judicial power. The majority accepted that s 16(3) imposes a burden on freedom of communication but in their view it could be regarded as a provision reasonably appropriate and adapted to enhancement of freedom of speech in Parliament and exclusion of judicial review of events in Parliament.[88] They also found the defendant's argument that s 16(3) impermissibly interferes with the functioning of courts lacked substance. Section 16(3) is, Doyle CJ stated:

> No different from any other rule of law that operates to exclude certain evidence from consideration by the Court. Plenty of examples came to mind, and they are examples which involve the application of the law in a manner that may have a telling or even decisive effect on the outcome of a case. The law relating to legal professional privilege and public interest immunity is a good example. These rules of law may result in the Court not receiving evidence which could have a decisive effect on a case.[89]

Hence in the opinion of all five members of the Full Court, s 16(3) is a valid law.

There are some general points to be made about cases like *Lawrance v Katter*[90] and *Rann v Olsen*.[91] The first is that actions for defamation are usually actions within a State or Territory jurisdiction.[92] If brought within a State jurisdiction they will not be converted into suits within a federal jurisdiction merely because a party relies on s 16(3) of the *Parliamentary Privileges Act 1987* (Cth).[93] Secondly, while it is clear that Chapter III of the federal Constitution imposes limits on the power of the federal Parliament to enact laws which interfere with the exercise of the judicial powers of the Commonwealth, the High Court has not yet held that Chapter III imposes limits on the power of the federal Parliament to enact laws which interfere with the exercise of State judicial powers. In *Rann v Olsen*[94] the Full Court seems not to have considered whether Chapter III could even be relied upon by the defendant. It certainly did not consider whether s 16(3) might violate the implied constitutional principle that federal legislative powers cannot be used to impair the capacity of State courts to perform their functions.[95]

In *Rann v Olsen*[96] the Full Court recognised that there could be cases in which the application of s 16(3) would create a situation in which it would be

88 Ibid paras [146–51], [181], [187] (Doyle CJ); [258] (Perry J), [284] (Mulligan J), [391] (Lander J).

89 Ibid para [191].

90 (1996) 141 ALR 447.

91 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).

92 Under s 75 (iv) of the Constitution such a suit will be within federal jurisdiction if it is between residents of different states.

93 *R v Commonwealth Court of Conciliation and Arbitration and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154; *Felton v Mulligan* (1971) 124 CLR 367.

94 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).

95 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217, 235; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231; *Victoria v Commonwealth* (1996) 187 CLR 416.

96 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000).

appropriate for a court to exercise its discretion to stay the proceedings befor it. Indeed in that case the defendant sought a stay on the ground that if s 16(3) were held to be valid, it would operate to preclude consideration of some of th matters raised in his defence. His application for a stay was supported by th Attorney-General for the Commonwealth who had intervened in the case.[9] The case for a stay order was based on a passage in the opinion of the Judicia Committee of Privy Council in *Prebble v New Zealand Television Ltd*[98] i which it had been observed:

> That there may be cases in which the exclusion of material on grounds o Parliamentary privilege makes it quite impossible fairly to determine th issue between the parties. In such a case the interests of justice may deman a stay of proceedings.[99]

Two of the judges in *Rann v Olsen* thought that the case before the Suprem Court was one in which it was appropriate to order a stay of the defamatio action.[100] But the other three judges thought that the application for a stay wa premature and should be dealt with not by the Full Court but by the trial judge.[101] They took this view largely because they were not satisfied tha s 16(3) would necessarily prevent the defendant from adducing evidence in support of all of the defences he had raised. But among the majority there seems to have been no clear view on whether it would ever be appropriate fo a court to order a stay of proceedings simply because of some statutory provision which precluded a party from adducing evidence relevant to an issue. Having reviewed principles developed in prior cases, Doyle CJ observed that

> Generally a court will not stay proceedings on the basis that the Court considers that the outcome of those proceedings, if heard according to law, will be unfair or unjust in the popular sense of that term.[102]

His Honour also stated that:

> In argument, no case except *Prebble* was identified in which the Court, exercising its civil jurisdiction, has stayed proceedings on the basis that the application of statute law to proceedings produces an injustice that enlivens the Court's jurisdiction to stay the proceedings.[103]

The Court seems not to have been aware of the fact that in 1995 English courts stayed two defamation actions brought by members of Parliament on the ground that Article 9 of the *Bill of Rights 1689* would prevent the defendants from adducing evidence essential to their defence.[104]

97 To defend the constitutionality of s 16(3).
98 [1995] 1 AC 321.
99 Ibid 338.
100 [2000] SASC 83 (Unreported, Full Court: Doyle CJ, Prior, Perry, Mullinghan and Lander JJ, 12 April 2000), paras [233] (Prior J) and [267–81] (Perry J).
101 Ibid paras [43], [200] (Doyle CJ), [285–6] (Mulligan J), [453] (Lander J).
102 Ibid para [43].
103 Ibid para [42].
104 *Hamilton v Hencke; Greer v Hencke*, 21 July 1995; *Allason v Haines* 14 July 1995. These cases are noted in United Kingdom Parliament, Joint Committee on Parliamentary Privilege, *First Report*, Parl Paper HL 43–I, HC 214-1 (1999) paras [62-3].

The fact that civil actions and criminal prosecutions may sometimes have to be stayed because of the operation of s 16(3) of the 1987 Act was apparently treated by the Full Court as having no bearing on the constitutionality of the provision.

Constitutional Limitations on State legislative powers

In *Kable v Director of Public Prosecutions (NSW)*[105] a majority of the High Court held that Chapter III of the federal Constitution prohibits State parliaments from investing non-judicial powers in State courts if those non-judicial powers are incompatible with the exercise by State courts of federal judicial powers. The majority based their opinion mainly on the fact that Chapter III envisages that State courts may be used by the federal Parliament as repositories of the federal judicial powers identified in ss 75 and 76 of the Constitution. In their view the aptness of State courts being employed as repositories of federal jurisdiction should not be compromised by State legislation which might undermine public confidence in the ability of State courts to exercise judicial powers in an independent manner. They concluded that New South Wales legislation had invested a non-judicial power in the New South Wales Supreme Court and that the exercise of that power was incompatible with the exercise of federal judicial powers. The minority (Brennan CJ and Dawson J) concluded that Chapter III of the federal Constitution does not, by implication, inhibit the power of State parliaments to invest non-judicial powers in State courts.

In *Kable*[106] the High Court did not have to consider whether Chapter III inhibits the powers of State parliaments to make rules of evidence which bind state courts in the exercise of state jurisdictions. In a subsequent case it left that question open.[107] The reasoning of the majority in *Kable,*[108] however, suggests that State legislatures cannot require state courts to exercise their State judicial functions otherwise than in accordance with essential judicial processes. After all, public confidence in courts can only be affected by the processes by which they discharge their functions. The High Court might therefore take the view that the constitutionality of State laws of evidence depends on whether their application is consistent with the exercise of judicial power. In *Esso Australia Resources Ltd v Dawson*[109] a Full Court of the Federal Court considered that the principle enunciated in *Kable*[110] was relevant to the validity of state legislation which abrogated legal professional privilege, though it upheld the validity of the legislation in question.

On the reasoning of Pincus JA in *Lawrance v Katter*[111] State legislative powers to make rules on evidentiary matters may be limited by the implied

105 ('*Kable*') (1996) 189 CLR 51.
106 Ibid.
107 *HA Bahrach Pty Ltd v Queensland* (1998) 156 ALR 563.
108 (1996) 189 CLR 51.
109 (1999) 162 ALR 79.
110 (1996) 189 CLR 51.
111 (1996) 141 ALR 447.

freedom of political communication. As has been mentioned, Pincus JA hel that s 16(3) of the *Parliamentary Privileges Act 1987* (Cth) does not validl operate in the conduct of suits for defamation.[112] Although s 16(3) relates onl to reception and use of evidence of proceedings of the federal Parliament Pincus JA's opinion casts doubts on the constitutionality of State legislatio along the lines of s 16(3) in relation to reception and use of evidence of Stat parliamentary proceedings.[113] Pincus JA's opinion also seems to require tha Article 9 of the *Bill of Rights 1689,* so far as it is incorporated into the laws o the States,[114] be read down in the light of the implied constitutional freedom Article 9 would therefore have to be construed as not incorporating an exclu sionary rule of evidence as wide and absolute as that stated in s 16(3) of th *Parliamentary Privileges Act 1987* (Cth). Specifically, Article 9 would hav to be read as not precluding reception and use by State courts of evidence o state parliamentary proceedings in suits for defamation. Such a reading o Article 9 would not, of course, derogate from the substantive principle tha participants in parliamentary proceedings incur no legal liability in respect o what they say or do in the course of those proceedings. It is conceivable tha the High Court would regard that immunity as having been underwritten by the implied constitutional freedom of political communication, though not neces sarily to the extent that the parliaments are denied any capacity whatsoever to legislate to derogate from the immunity. The implied constitutional freedom of political communication, the High Court has accepted, is not absolute and the parliaments may use their legislative powers to enact laws restrictive of the freedom, for the protection of other public interests.[115]

COMMON LAW

The rules of evidence were, to begin with, largely developed by the courts themselves. Some of those rules have been changed by legislation or else restated in legislation, but courts have retained a capacity to develop the rules. Their capacity to do so must, in Australia, be subject to the federal Constitution. '[O]f necessity', the High Court has said, 'the common law must conform with the Constitution. The ... common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds'.[116] That observation was made in relation to the common law of defamation, but there is no reason to confine its application to principles of substantive law.

112 *Lawrance v Katter* (1996) 141 ALR 447, 486.

113 To date, no State parliament has enacted such legislation.

114 NSW: *Imperial Acts Application Act 1969,* s 6 and Sch 1; *Gipps v McElhone* (1881) 2 LR (NSW) 18, 21, 24-5; Qld: *Constitution Act 1867,* s 40A; *Imperial Acts Application Act 1984,* s 5; SA: *Constitution Act 1934,* s 38; Tas: *R v Turnbull* [1958] Tas SR 80, 83-4; Vic: *Constitution Act 1975,* s 19; *Imperial Acts Application Act 1980* Part II, Div 3; WA: *Parliamentary Privileges Act 1891,* s 1. See also *Egan v Willis* (1998) 158 ALR 527.

115 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-2; *Levy v Victoria* (1997) 189 CLR 579.

116 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566.

It is unlikely that surviving common law rules of evidence would be found to violate the Constitution, but courts must clearly bear constitutional imperatives in mind when interpreting those rules and when resolving questions which have not been clearly answered by the common law or by legislation. Constitutional imperatives may require courts to be wary of rules which impair their ability to ascertain relevant facts or to accord a fair trial of the matters before them, whatever the source of those rules may be. Constitutional imperatives may even be held to have entrenched certain common law rules of evidence. For example the Constitution might now be invoked in defence of current common law regarding exclusion of evidence on the ground that its reception would be contrary to the public interest. Under that law the courts reserve power to decide whether, in a particular case, evidence should be excluded on that ground. Australian courts are not obliged to exclude relevant evidence simply because a Minister has certified that reception of the evidence would be contrary to the public interest.

CONCLUDING OBSERVATIONS

Australia's federal Constitution gives the federal Parliament limited power to enact rules of evidence binding on courts. The principal sources of the Parliament's power in this regard are the implied and express incidental powers found in s 51 of the Constitution and in s 49, read together with s 51(xxxvi). These powers enable the Parliament to alter common law rules of evidence otherwise applicable in courts exercising a federal jurisdiction. In its capacity as Australia's ultimate court of appeal, the High Court has a role to play in the development of the common law of evidence.

The federal Parliament's power to enact laws of an evidentiary character is constrained by implied constitutional limitations on the exercise of federal legislative powers, notably an implication found in Chapter III of the Constitution (on the Judicature). That Chapter is said to prohibit the federal Parliament from enacting legislation to require courts of federal jurisdiction to deviate from 'essential requirements of the curial process',[117] or 'to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'.[118] Judicial power involves the ascertainment of facts relevant to determination of legal rights and liabilities. Legislation which impairs the capacity of courts to ascertain the relevant facts will therefore be vulnerable to challenge on constitutional grounds.

What may prove to be more controversial is legislation which abrogates or modifies common law rules which require exclusion of relevant evidence. In *Nicholas*[119] there was a division of opinion among the Justices of the High

[117] *Leeth v Commonwealth* (1992) 174 CLR 455, 487 (Deane and Toohey JJ); see also 502 (Gaudron J).

[118] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

[119] (1998) 193 CLR 173.

Court on the constitutionality of federal legislation which overrode the common law rule that evidence obtained by illegal means should normally be excluded.[120] A majority upheld the legislation. The dissenting Justices, McHugh and Kirby JJ, thought the legislation unconstitutional because of what they thought to be its tendency to undermine public confidence in the courts.[121] Gaudron J, one of the majority, conceded that the federal Constitution does not allow the federal Parliament to enact laws which require courts to 'proceed in any manner which ... brings or tends to bring the administration of justice into disrepute',[122] but she did not find the legislation offensive in this regard. Two other Justices of the majority, Brennan CJ and Hayne J, emphatically rejected the notion that the constitutionality of legislation may be adjudged by reference to a court's assessment of the effect of the legislation on the court's reputation.[123]

The 'public confidence test' is not a novel one. It figured in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[124] and also in *Kable*.[125] In *Wilson* it had been an element in the High Court's consideration of constitutional constraints on the use of the services of judges of federal courts, as designated persons, to perform non-judicial functions. In *Kable* it had been an element in the majority's consideration of constitutional constraints on the power of State legislatures to endow state courts with non-judicial functions.[126] In *Esso Australia Resources Ltd v Dawson*[127] a Full Court of the Federal Court seems to have accepted the 'public confidence test' as one which could properly be applied in determining the constitutionality of state legislation abrogating legal professional privilege.

Judges may, understandably, be concerned about measures taken by other branches of government which oblige them to undertake functions which they perceive to be non-judicial and which they regard as ones which are incompatible with the exercise of judicial powers. Judges may be equally concerned about legislative measures which require them to exercise their judicial functions according to rules of evidence or procedure which they regard as contrary to notions of judicial process. But it seems to me that judges are engaging in no more than speculation when they make pronouncements on the likely or possible effects of legislative measures on public perceptions of the courts. They cannot point to any clear evidence which demonstrates what members of the public expect of the courts, or what kinds of legislative measures may be destructive of public confidence in the courts. Most members of the public are probably not conversant with rules of evidence and procedure which govern

120 (1998) 193 CLR 173. The common law had been expressed in the following cases: *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54; *Cleland v The Queen* (1982) 151 CLR 1; *Pollard v The Queen* (1992) 176 CLR 177; *Ridgeway v The Queen* (1995) 184 CLR 19.

121 *Nicholas v The Queen* (1998) 193 CLR 173, 226, 254, paras [126], [201].

122 Ibid 208.

123 Ibid 197–8, 275–6.

124 ('*Wilson*') (1996) 189 CLR 1.

125 (1996) 189 CLR 51.

126 Brennan CJ dissented in this case.

127 (1999) 162 ALR 79.

the conduct of litigation before institutions they can readily identify as courts. Criticisms of those rules which may be ventilated by lay persons, via mass media of communication, may be ill-informed and perhaps more destructive of public confidence in the courts than legislative measures may be.

I agree entirely with the view expressed by Brennan CJ in *Nicholas*[128] that a 'court's opinion as to the effect of a law on the public perception of the court' should not be regarded as 'a criterion of the constitutional validity of the law'.[129] This is not to say that the practical effects of a law can be of no relevance in determination of the constitutionality of a law. Whether a legislative enactment represents an illegitimate interference with judicial processes, contrary to Chapter III of the federal Constitution, may well involve consideration of whether the enactment impairs the capacity of courts to perform their functions and to discharge their responsibilities, amongst them to afford a fair trial.

Which of the rules of evidence to be applied by courts are essential to ensure that trials are fair, and which of them are inessential, are matters on which opinions (including judicial opinions) may differ. To date Australia's High Court has not had occasion to adjudge the constitutionality of legislation which seeks to make major changes in the rules of evidence to be applied by courts. The Court's pronouncements have, to date, been confined to the constitutionality of statutory provisions which alter common law rules of evidence in their application in very particular cases. Judges of the High Court have nonetheless intimated that they regard Chapter III of the federal Constitution as having imposed constraints on uses which the federal Parliament may make of its powers to enact laws with respect to evidentiary matters. Some judges have given hypothetical examples of legislative measures which they would not be prepared to recognise as constitutional. The High Court has not yet, however, had occasion to pronounce on the extent to which principles of evidence developed by the courts over centuries are ones which are central to the execution of judicial functions and consequently cannot be overridden by a legislature which is prohibited from exercising its legislative powers so as to interfere, in an illegitimate way, with the performance of the judicial functions of courts.[130]

Judicial opinions have generally been supportive of legislative measures which have abrogated, in limited circumstances, common law rules which require exclusion of evidence which is, or could be, relevant to the issues to be determined by a court. But one question yet to be determined by the High Court is the extent to which, if at all, the federal Constitution constrains the power of legislatures to enact legislation which requires courts to exclude

[128] (1998) 193 CLR 173.

[129] Ibid 197. See also E Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Powers' (1998) 20 *Sydney Law Review* 183.

[130] Wheeler (see above n 3) has discussed the question of whether Chapter III may prohibit enactment of federal legislation which alters basic rules such as that the prosecutor of a criminal charge must prove guilt beyond reasonable doubt, and the defendant to a criminal charge is not a compellable witness.

evidence of the utmost relevance to issues to be determined by them and with out which there can be nothing recognisable as a fair trial, according to applic able rules of substantive law, for example the rules governing liability fo defamation. The distinction between substantive rules of law and rules of evi dence (and rules governing procedures of courts) is, admittedly, not clear cut But rules which, on their face, appear to be no more than evidentiary in char acter may, in their practical operation, serve to impair the capacity of courts to administer the substantive law which they are obliged to apply in the exercise of the jurisdictions reposed in them.