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THE CONSTITUTION AS PHYSICS: A COMMENTARY ON PAPERS BY PROFESSOR SAUNDERS AND DR MANTZIARIS

I THE PROBLEMS OF CONSTITUTIONAL IDENTITY

At first sight these two papers seem to deal with disparate topics. Professor Saunders discusses the possibility of constructing an effective rights protection regime that respects each party to the federal polity within a reconstituted constitutional matrix, while Dr Mantziaris focuses on the various roles of the Commonwealth and State attorneys general within the existing federal constitutional framework. Each project does have a common context, albeit a problematic one. This is the unresolved issue concerning what or who are the fundamental integers for whom Dr Mantziaris' attorneys speak and which make up the Australian constitutional universe where Professor Saunders seeks to locate her scheme of rights protection. The identification of these integers also entails the nature of the federal arrangement between them. In turn that raises the more complex question of what are the legal forces that bind the integers together in a single though complex national polity and whether there is space within that ensemble for the rights regime envisaged by Professor Saunders.

II THE CONSTITUTIVE ELEMENTS OF THE FEDERATION

At the simplest level, according to the *Commonwealth Constitution* the Federation is composed of 'the Commonwealth' and 'the States'.[1] But from that point on conceptual and linguistic problems emerge. What is 'the Commonwealth'? We can accept that the expression is capable of several meanings. But in the kind of debates that Professor Saunders and Dr Mantziaris are conducting are we talking of the Commonwealth *executive government*, the *legislature*, the *judicial* arm or a composite of each? Similar questions can be raised about 'the States'.

The complexities increase when we attempt to fit in the relationship between each of the primary integers and their 'people(s)'. Do we ascribe a necessary identity between 'the Commonwealth' and the 'people of the Commonwealth'?[2] In turn

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1 *Commonwealth of Australia Constitution Act 1900* (UK) ss 4, 6.

2 See for example Constitution s 24 which uses both terms in different senses.

where do we locate the basic constitutional atom, the individual citizen as a rights bearer, within these collective molecules?[3]

Somewhere in the interstices of this collocation one can add the mystical monarchical element of the 'Crown'[4] manifested in the various constitutional instruments as 'the Queen'. How does it/she fit into the constitutional equation? Like some 'brane' or skein of tissue stretched across the other entities?

At a more abstract level a further problem of identification emerges when we seek to add the notion of the 'public' to our anatomy of the federal creature. What do we mean by the 'public interest'? Is it the same as the 'people's' interest? In a federal institution can there be more than one public interest *divided* between the States and the Commonwealth, or more intriguingly as perhaps suggested by Professor Saunders, *shared* between the two?

The analytic task becomes even more complicated when we overlay this flat structure with properties and characteristics such as 'rights', 'interests', 'immunities', 'powers', and in these post-*Henderson*[5] days, 'capacities'. These may be strong or weak according to whether they are founded on the Constitution, statute, common law, prerogative or convention.

In the kind of discussion engendered by Professor Saunders' paper in what respect can we speak in terms of a State's 'right' to protect its citizens? In vindication of its own constitutional interest(s)? As the polity that speaks for the people of that State? Can the State's interest be separate from that of its people? And importantly for her discussion of the protection of *human rights* can the State's interest change with a change of government?

Talk of constitutional rights has its counterpart in the notion of *constitutional wrong*. The analysis of a constitutional injury or violation is still relatively unsophisticated, perhaps because the courts have yet to advance a concept of constitutional harm. Different kinds of such injuries can be contemplated. The most basic of these is where one party to the federal polity has an interest *per se* in seeking to vindicate a breach of the Constitution by another.[6] A more tangible or

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3 The Constitution in provisions like ss 34 and 117 uses 'subject of the Queen' rather than 'citizen'.

4 In contrast to the singular reference to a 'Federal Commonwealth under the Crown of the United Kingdom' in the Preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) the Constitution uses the expression of 'the Queen' in ss 1 to 4 and 61.

5 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

6 Peter Johnston, 'Governmental Standing under the Constitution' in L Stein (ed), *Locus Standi* (1979) 173, 184–9.

material wrong can be asserted when there is an impact on an entity's revenue or law making powers. Many of these conundrums crystallise in Dr Mantziaris' paper on attorneys general.

Finally, any attempt to tease out these conceptual tangles entails the most fundamental unresolved issue of all. This is the need to devise an explanatory theory or principle that defines how the Commonwealth and the States are *bound together* in the one federal polity. This project necessarily engages covering clause 5 of the *Commonwealth of Australia Constitution Act 1900* (UK) and s 106 of the Constitution. These provisions shape the federal implications of constructing a new regime of rights in the direction suggested by Professor Saunders. The same considerations are inherent in Dr Mantziaris' attempt to devise a more coherent contemporary basis for the roles of Commonwealth and State attorneys in constitutional litigation.

III ANALOGUES FROM THE 'WORLD' OF PHYSICS

Before commenting on the individual papers let me digress for a moment to seek fresh metaphors for discussing their constitutional context. These are drawn from the field of physics.

Even as lay people most of us have some vague notion of the revolution wrought in the early part of the 20th century by Einstein's theories of general and special relativity which displaced long established Newtonian principles. By conceiving reality not simply as represented in the three dimensions accessible by our senses but by adding a fourth temporal dimension he was able to demonstrate that space could be analysed in terms of curves rather that simple straight lines or flat surfaces. Yet however satisfactory his theories proved in explaining phenomena such as how light can travel vast distances through space at constant speed his principles could not be reconciled with the developments in quantum theory that emerged around the 1930s as physicists like Heisenberg explored the interstices of sub-atomic particles. Quantum mechanics postulated that energy in the form of light was emitted in waves, not straight lines. From about the mid-1980s a new twist has been given to the enterprise of reconciling relativity with quantum theory with the emergence of what is now called 'string theory'.[7] Going beyond an analysis that entails the four dimensions proposed by Einstein, string theorists contemplate multi-dimensional structures where space folds in on itself leaving notional gaps and spaces in which phenomena akin to musical strings vibrate. This produces forces that bind the

[7] The advances in understanding the fundamental elements and principles in physics from relativity to string theory are discussed in Brian Greene, *The Elegant Universe*, (2000).

subatomic particles together. Models for up to 11 dimensions and possibly more have been hypothetically constructed.

The implications of string theory as a model for describing reality have already started to be addressed by some philosophers. Our present linguistic models, of which constitutional discourse is a specie, are essentially based on a view of language as consisting of *particles* of thought and meaning. Tentative proposals for replacing these by alternative 'string' concepts of meaning are now being advanced in the realm of linguistic philosophy. These involve a more complicated and nuanced system of layering and folding of meanings.[8]

Given the skeptical nature of lawyers it will probably be some decades before these conceptual developments seep through to legal discourse and constitutional interpretation. It may be expected that constitutional lawyers will persist for some time with conventional flat-earth, spatial metaphors like 'covering the field',[9] or Copernican notions of 'overarching' and 'underlying' principles. Nevertheless, as metaphors, emerging concepts drawn from string theory may have some explanatory force.

Some might quarrel with a comparison of Justices Deane and Kirby to Einstein but in this conference devoted to '*Dead Hands or Living Trees'* it is possible to discern a resemblance to relativity principles where those Justices add the dimension of time to constitutional construction.[10] Their analysis is premised on the warping effect that changing circumstances and culture can have in curving and reshaping constitutional language and meanings over time. Whilst controversial, their program of contemporising constitutional discourse is arguably as valid as those who pursue what one can call the '*Tardis*'[11] theory of constitutional interpretation. This entails notionally transporting to the 21st century the original constitutional

8 See for example Richard Campbell and Mark Bickhard, *Physicalism, Emergence and Downward Causation* (2001) ANU Eprints repository, 8–9 <http://www.lehigh.edu/~mhb0/physicalemergence.pdf> at 7 April 2004.

9 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

10 By way of incorporating temporal factors into constitutional interpretation, Deane J in *Theophanous v The Herald and Weekly Times Ltd* (1994) 182 CLR 104, 171–4, refers to the Constitution as 'a living force' while in *Grain Pool of Western Australia v The Commonwealth* (2001) 202 CLR 479, 522, Kirby J suggests that the long dead framers of the Constitution would not have intended to impose their understanding of the Constitutional text on later generations.

11 The 'Tardis' (Time and Related Dimensions in Space) was the science fictional device in the BBC television series, *'Dr Who'* used for transferring people between time-zones.

document complete with its 1900 original meanings and values, unaffected by intermittent developments.[12]

IV APPLICATION TO PROFESSOR SAUNDERS' PAPER

More relevantly to this *festschrift,* I suggest that the program of rights protection envisaged by Professor Saunders exhibits elements of string theory though doubtless unwittingly. Rather than adopt simpler concepts of federalism that assimilate the prime constitutional entities, the Commonwealth and States, to separated particles randomly combining or colliding within the constitutional molecule she has offered a nuclear framework within which a duality of State and Commonwealth interests are enfolded in a binary relationship. This relationship entails mutual recognition of core human rights values, commonly shared by the individual citizens that together comprise the 'peoples' of the State and at the same time 'the people of the Commonwealth'. As dual 'citizens' the latter are subject to binary forces.

Professor Saunders has not ventured far beyond outlining the possibilities of such a constitutional arrangement. Her contribution lies principally in turning the diamond and exposing new facets to reflect light on the problems of rights protection.

Turning to how these general observations relate to Professor Saunders' proposal for a refurbished rights regime, I agree with her in rejecting the adversative option of protecting human rights through the medium of a Commonwealth law that would bind the States, and by virtue of s 109 of the Constitution, override their laws.[13] Whatever the States might be and however we might define their interests such an antagonistic solution denies respect to them, disturbs the constitutional equilibrium,[14] and would be politically divisive.

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12 This is admittedly a characature of much more sophisticated and respectable theories of constitutional interpretation.

13 While Deane J saw the existence of a s 109 override as serving the function of protecting the individual from the injustice of being subjected to inconsistent State and Commonwealth laws, *University of Wollongong v Metwally* (1984) 158 CLR 447, 477, the issue will turn on how just the Commonwealth law is in substantive terms.

14 'Equilibrium' is used here instead of the more discredited notion of 'constitutional balance' espoused by, for example, Gibbs CJ in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 198. Equilibrium presupposes an inclination for the integers of the Federation to assume relative positions towards each other that leave the greatest spaces for mutual accommodation and minimise potential causes of friction. Constitutional balance assumes a preexisting normative order that constrains initiatives by the Commonwealth to arrogate greater powers to itself.

Certainly in the past significant advances have been promoted through overriding Commonwealth legislation such as the *Racial Discrimination Act 1975*. That said it always seemed strange to me to characterise issues of the kind that arose in *Koowarta's* case[15] regarding the validity of that Act as a matter of a State's *right*. That case was not really about State's 'rights' unless Queensland's claim can be expressed as the State having *a right* or immunity *to engage in racial discrimination* against a minority of its citizens.

In similar vein I have always thought it odd that in the *Tasmanian Dam* case[16] the Tasmanian government as plaintiff claimed not to be bound by a Commonwealth law that sought to give effect to a decision made by a previous Tasmanian government to seek World Heritage listing for an area of the State. Did the interest of 'the State' change with the ensuing election or could the latter day State/government claim to be speaking as the representatives of a newly reconstituted 'people of Tasmania' and their legislative representatives?

In lieu of a conflictual model that asserts Commonwealth legislative supremacy based on s 109 Professor Saunders substitutes a mutually negotiated and agreed minimal core of rights which may be located in a constitutional space enclosed within a double helix of protective safeguards and safety valves. The latter could include a 'notwithstanding clause' based on that in the Canadian Charter of Rights and Freedoms. This would provide the States with some leeway to fashion their laws within the protected parameters. It could be accompanied by a disapplication clause along the lines of the United Kingdom model.[17] It would preserve any State or Commonwealth law that could conflict with the core values from instant annihilation.[18]

Rather than rehearsing the arid kind of debate about entrenched bills of right, Professor Saunders is offering something of a novel and perhaps revolutionary *federal solution* for rights protection. The strong virtue of her proposal, in my view, is that it does offer the prospect of a reconciliation of *shared* Commonwealth and State *responsibilities* for advancing the human rights of their citizens. It does so without incurring the distaste of the States for a Commonwealth imposed solution.

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15 (1982) 153 CLR 168.

16 *Commonwealth v Tasmania* (1983) 158 CLR 1.

17 The *Human Rights Act 1998* (UK) ss 4, 8 permit a court to make a declaration of incompatibility of an Act with the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*, whereupon a Minister may introduce amendments to cure the incompatibility. In the interim the Act remains valid.

18 The proposal for a bill of rights for the ACT includes variations of both these elements; see ACT Bill of Rights Consultative Commitee, Parliament of the Australian Capital Territory, *Towards an ACT Human Rights Act* (2003).

I doubt, however, whether it could or should be achieved without a constitutional amendment under s 128. This is for two reasons. The first is that the participation of the States and their peoples would give an enhanced legitimacy to the new dispensation. The second is that without constitutional entrenchment there is no guarantee that as a *co-operative venture* involving not simply the relevant legislatures but also the respective executive and judicial arms of government, would survive High Court scrutiny. The latter, in *re Wakim; Ex parte McNally*[19] and *Hughes*,[20] has not shown itself overly supportive of 'cooperative arrangements'. The Court may well take a strict approach and frame the relevant inquiry in terms of whether there is *express* constitutional *authorisation* for a Saunders' scheme, given that the rights protection does legally impact on the individual freedoms of citizens, rather than whether the Constitution expressly or impliedly *forbids* such an arrangement.

One must query, also, whether the Australian people are ready for such developments. Given the apparent insensitivity of the Australian community generally to issues of civil liberties in the post-September 11 and *Tampa* era it is not evident that a proposal like Professor Saunders' would attract much popular support in the current climate. Its realisation lies in the future. As Einstein predicted, it is only a matter of time.

V COMMENTS ON DR MANTZIARIS' PAPER

The examination by Dr Mantziaris of the roles of attorneys general is timely. Following a period in the 1990's when the High Court increasingly addressed questions of judicial power and Chapter III, the nature of federal litigants in constitutional litigation is coming under renewed scrutiny and redefinition. The issues for the Court's resolution include the status of the States and inferentially the Crown as constitutional persons in Chapter III suits, the effect of s 64 of the *Judiciary Act 1903* (Cth) in possibly 'trumping' claims to State immunity based on Crown Suits Acts, and the standing and capacities of the Commonwealth and State attorneys.[21] The latter aspect entails not only the role of attorneys as plaintiffs but also as defendants. At the heart of those issues, the recurrent issue is whether the suit involves a Chapter III 'matter'.

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19 (1999) 198 CLR 511.

20 *The Queen v Hughes* (2000) 202 CLR 535.

21 The relationship between the *Judiciary Act* and state procedural laws in federal jurisdiction has recently been explored in other cases such as *Macleod v Australian Securities and Investment Commission* (2002) 76 ALJR 1445 and *Solomons v District Court of New South Wales* (2002) 76 ALJR 1601.

In 2002 a cluster of these related issues surfaced in *Yougarla v Western Australia*[22] but the High Court did not find it necessary to determine them. Some of those issues have since fallen for determination. The *Catholic Bishops* case[23] raised the conflicting roles of the Commonwealth attorney general as nominal plaintiff in a relator action and as intervener to represent the Commonwealth. More recently, *British American Tobacco Australia Ltd v Western Australia*[24] established the primacy of the States instead of the Crown as the proper parties to suits involving 'matters arising under the Constitution'.[25] Less conclusively that case also addressed the impact of the *Judiciary Act* on State immunity. The case of *Marquet v Western Australia and the Attorney General for Western Australia*[26] also engages a similar set of problems.[27] It is against this fluid background of evolving jurisprudence that one may consider Dr Mantziaris' contribution.

After a careful delineation of the diverse and sometimes contradictory roles associated with the office of attorney, Dr Mantziaris turns to some of the inherent difficulties that arise in respect of the attorneys' role(s) in public law litigation. Similar quandaries to those mentioned in the first part of this comment arise in that context. Is the interest of the attorney identical, or a least coincidental, with that of the Commonwealth or State which she represents? Can the interest of the attorney diverge from that of the polity with which she is associated particularly when seeking to advance the elusive 'public interest'[28] or when acting as the representative of the Queen as *parens patriae*,[29] the guardian of the vulnerable? Thus many of the same problems one can identify in defining the elements of the federal structure crystallise in his analysis of their roles.

These problems are exacerbated by the lack of explicit recognition of attorneys in the constitutional text. The Commonwealth attorney, like the Prime Minister for

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22 (2001) 75 ALJR 1316.

23 *Re McBain: Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

24 [2003] HCA 47; 77 ALJR 1566.

25 Constitution s 76(i).

26 (2002) 26 WAR 201 ('*Marquet's Case*').

27 An application by the Attorney-General of Western Australia for special leave to appeal was heard by the Full Bench of the High Court on 5–6 August 2003; (leave to appeal granted but appeal dismissed); Attorney -General (WA) v Marquet (2003) 202 ALR 233.

28 For a more recent discussion of these issues see P Knowles, 'Putting the Relator Action into an Australian Context' (2003) 6 *Constitutional Law and Policy Review* 1.

29 On the existence of this principle see *B and B v Minister for Immigration* [2003] FamCA 451; overturned on appeal to the High Court as *Minister for Immigration v B* [2003] HCA 20: The *parens patriae* principle is mentioned at [19] and [52] (Gleeson CJ and McHugh J).; [70], [84]–[86], [91], [93] and [107] (Gummow, Hayne and Heydon JJ) [139] (Kirby J); [208] (Callinan J); also Gerard Carney, 'The Role of the Attorney-General' (1997) 9 Bond Law Review 1, 5.

that matter, is a constitutional non-person. No s 64A entrenches her in the Commonwealth Constitution. Further, in the uncertain light of *Ruddock v Vadarlis*[30] it cannot be said with confidence that prerogatives traditionally associated with attorneys like that of *parens patriae* have necessarily been subsumed into the Commonwealth's executive power under s 61 of the Constitution.[31] Certainly, as Dr Mantziaris notes, attorneys are the subject of statutory provisions such as ss 78A and 78B of the *Judiciary Act*. This then leaves an amalgam of common law, statute and possibly inherent Constitutional power as the source of their authority. But that in turn raises questions of the *Lange* genus[32] about the extent to which the exercise of the Commonwealth attorney's common law powers, if they exist, must conform to the Constitution.

The issues are even more indeterminate when one comes to state attorneys. The location of State executive power, and particularly those powers and authorities derived from the mysterious prerogative, is even more ambiguous given the colonial origins of the State constitutions. The meaning of 'the Constitutions of the States' in s 106 of the Commonwealth Constitution remains elusive[33] as does the interrelationship between the state constitutions and the Commonwealth. The ambiguities surrounding the status and role of 'the Crown', and the attorneys' relation to it, also remain unresolved. Perhaps States' attorneys share a closer affinity with their British counterparts than the High Court suggested in *Bateman's Bay*.[34] A greater independence from the governments they advise might inhere in their role as guardians of the public interest or protectors of the vulnerable.

Turning more specifically to the role of attorneys in the conduct of constitutional litigation, the critique by Dr Mantziaris of the *Catholic Bishops*' case warrants particular consideration. He takes issue with the High Court majority's disposition of the action seeking prerogative/constitutional writs in the original jurisdiction of the Court under s 75(v). The majority held that, so far as the controversy between

30 (2001) 110 FCR 491.

31 Ibid. For a discussion of relationship between the pre-existing common law prerogatives and the executive power in s 61 of the Constitution, see [30]–[32] (Black CJ); [176]–[198] (French J). If a prerogative such as that of *parens patriae* has been subsumed within the executive power under s 61, a separation of powers issue arises whether it can also subsist within the judicial power of the Commonwealth.

32 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court held the common law must conform to any limitation inherent in the Constitution.

33 Constitution s 106; see *Yougarla v Western Australia* (2001) 75 ALJR 1316 [86]–[88] (Kirby J).

34 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247, 262 (Gaudron, Gummow and Kirby JJ)

the parties to the original *McBain* decision in the Federal Court[35] was concerned, there was no subsisting 'matter' to enliven the judicial power of the Commonwealth for Chapter III purposes. The minority Justices were prepared to recognise that a matter may have existed in so far as there was a definable legal dispute that the Bishops, through the Commonwealth attorney, were seeking to agitate. This concerned whether Victorian health legislation was inconsistent with the Commonwealth's *Sex Discrimination Act 1984*. The more fundamental question of the validity of the Commonwealth Act was imbedded in that issue.[36] The fracture between those two aspects of the action (the Commonwealth Attorney-General's support for the relators and the Commonwealth's interest in defending the validity of its legislation) produced the schizophrenia in the role of the attorney that troubled the majority. For the minority, however, it was *discretionary* factors, such as the failure of the Bishops to assume the responsibilities of intervenors in the Federal Court action, preferring to enter the litigation as *amici curiae* that moved them to dismiss the action.

I question whether the difference between the majority and the minority is as great as Dr Mantziaris suggests. Both sets of Justices were concerned that the judicial resources available under Chapter III were not dissipated or devalued in an improperly or ineffectively constituted suit. There is even a hint of concern about the somewhat artificial or contrived aspects of the action. For the majority this went to the existence of a 'matter'. For the minority it provided grounds for pragmatically declining to determine the legal questions that were presented for decision. It may be said that so far as the latter were concerned the issues could always be resubmitted in appropriate circumstances for adjudication by a party concerned to agitate them.

Catholic Bishops seems to me to be the latest in a line of cases stretching back to *Re Judiciary and Navigation Acts*[37] where the High Court has been concerned to avoid hypothetical and artificially contrived issues. Dr Mantziaris is concerned about the blurring of what apparently he would maintain as a bright line between standing and justiciability,[38] and matter and discretion.[39] To me a more pragmatic elision of the various factors is not objectionable so long as the Court's underlying concerns are not fudged. In that calculus there must of necessity be a legal issue that can be

35 *McBain v Victoria* (2000) 99 FCR 116.

36 Lurking in the background?

37 (1921) 29 CLR 257.

38 Standing and justiciability are related but distinct issues; Henry Burmester, 'Locus Standi in Constitutional Litigation', in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives*, (1992) 148, 148–9.

39 The relationship between the existence of a constitutional 'matter' and discretion to refuse relief is also discussed by Knowles, above n 28, 10. See also Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 16–7.

clearly articulated (as there was in *Catholic Bishops*). But other factors such as whether the suit is presented by parties with an adequate interest to provide the Court with a proper adversarial contest should continue to loom large in the balance. This is irrespective of whether it is cast in terms of a 'matter' or disposed of having regard to discretionary considerations.

Some of the problems that arose in *Catholic Bishops* regarding the composition of the parties were present in *Marquet's* case. It was the State sequel to *McGinty v Western Australia*.[40] Having failed in their quest in the High Court to demolish the malapportionment inherent in the Western Australian electoral system the Premier, Dr Gallop and the Attorney General, Jim McGinty, on attaining government, introduced legislation to move that system closer to one of electoral parity between voters. The attempt foundered on a manner and form requirement in the controlling statute, the *Electoral Distribution Act 1947* (WA). This requires that *amendments* to that Act must be passed by an *absolute majority*[41] of members of the Houses. The government (the 'State'?) sought to outflank that requirement by *repealing* the entire Act and incorporating provisions for regulating future electoral distributions in a separate bill. In the Legislative Council the relevant bills passed by only a simple majority. There being concerns about the validity of that course, the Clerk of the Legislative Council undertook to seek a ruling from the Supreme Court, prior to presenting the bills to the Governor for the Royal Assent, as to the lawfulness of his conduct if he were to do so. Accordingly he instituted a suit in his name against the State and the attorney general as defendants. The Supreme Court held by four judges to one that the bills could not lawfully be presented to the Governor for assent in the absence of an absolute majority. That decision was upheld by majority on appeal to the High Court.[42]

The way the case was argued in the Supreme Court and again in the High Court was curious. In the Supreme Court the ostensible plaintiff, the Clerk advanced argument through counsel supporting both sides of the dispute. In that manner he appeared to have adopted the role of *amicus curiae*. An assorted group called 'the Country Alliance' provided the real opposition. It was comprised of the State Opposition parties, One Nation members, and pastoralist and country local government organisations. In order to avoid liability for costs they chose to appear as *amici* rather than as interveners. As such they had no standing as parties to the action. Submissions were made to the Court that assumed the suit fell within Chapter III federal jurisdiction. That prompts the question whether the Clerk was

40 (1996) 186 CLR 140. In *McGinty* the plaintiff challenged state legislation providing for malapportioned electoral districts on the ground of inconsistency with the State and Commonwealth constitutions.

41 Section 13.

42 (203) 202 ALR 233 (Kirby J dissenting.)

seeking an advisory opinion and if so, whether the form of the action was justiciable under Chapter III.

At base, *Marquet* involved a real constitutional controversy. On the view that Dr Mantziaris favours the action and the appeal should be regarded as raising a 'matter' irrespective of the artificial way the action was constituted. The only basis on which the High Court could have declined to grant relief would therefore have been on discretionary grounds. One such ground could have been whether the *amici* should have been accepted as providing the requisite element of contest. There was a close parallel in that respect to the position of the Catholic Bishops Conference, who declined to enter the lists in *McBain* as interveners, choosing instead the more limited role of *amici*. The parallel with *Catholic Bishops* was not exact, however. In the latter case the plaintiffs' suit in the High Court was parasitic on a prior action, *McBain*, that had been authoritatively concluded by a decision of the Federal Court from which there was no appeal. In *Marquet* the defendants, including the attorney, instituted an appeal to the High Court from a decision involving the same parties.[43]

Another interesting aspect of *Marquet* was that of the capacity of the attorney general as a party to the original proceedings.[44] The basis for suing the attorney separately from the State was not clear. Was he joined as the representative or agent of the State in his official capacity? Or as the advisor to the Crown and hence, to its representative, the Governor? Or as a member of the Executive Council of the State to advise the Governor in that capacity? Or as advisor to the executive government of the State to advise them as to any appropriate steps to take in consequence of the decision? Or as the Minister who had the carriage of the legislation?

As intriguing as these questions were the High Court in *Marquet* did not shed any light on whether proceedings where the contest is really between *amici curiae* and a State constitute a 'matter'. The same may be said about the precise role of an attorney general in such cases. None of the interested participants sought to agitate those issues and the High Court did not raise them of its own motion. They will await clarification on another occasion.

In the meantime Dr Mantziaris has not only exposed many of the ambiguities inherent in the role of attorneys general but significantly offered suggestions for their resolution.

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43 None of the points discussed in this paragraph were aired in the High Court.

44 One of the few attempts to differentiate the litigious status of the attorney general and the State is that by Stephen J in *Victoria v The Commonwealth and Hayden* (*A.A.P.* case) (1975) 134 CLR 338, 388.