"Communist Party Case: Core Themes and Legacy"

The Hon Justice Michelle Gordon AC*

Introduction

1. The 70 years that have passed since *Australian Communist Party v Commonwealth*[1] (the "***Communist Party Case***") was handed down provide an opportunity for reflection. There is no doubt that it is a landmark decision. It is frequently cited by the High Court and lower courts in respect of a range of issues. Constitutional law textbooks are replete with references to principles applied and developed in the case[2], many of which remain as relevant today as they were when the case was decided[3]. It has been hailed as one of the "greatest

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1 (1951) 83 CLR 1.

2 See, eg, Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) at xx; Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at xvii; Aroney, Gerangelos, Murray and Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (2015) at xxii; Keyzer, Goff and Fisher, *Principles of Australian Constitutional* Law (2017) at xx; Williams, Brennan and Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (7th ed, 2018) at xxv; Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) at xxiii; Bateman, Meagher, Simpson and Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (11th ed, 2021) at xxi.

3 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 630.

triumphs" of Australian constitutionalism[4] and "perhaps the most revered of the High Court's constitutional decisions"[5]. And rightly so.

2. Today we look back, with all the benefits of hindsight, to explore the legacy of the case; to examine its impacts; and to assess the principles and themes emerging from the case and how they have played out. When we do that, we see that the *Communist Party Case* was – and its legacy remains – not only doctrinally fundamental to Australian constitutional law, but also politically and symbolically critical to what has long been and must remain a shared understanding of the system of government established by the Constitution.

3. Before developing these ideas, an obvious point must be made. Many significant changes have taken place in the Australian legal system in the 70 years since the *Communist Party Case* was decided. New constitutional principles[6], implications[7] and approaches to constitutional interpretation[8] have been recognised. Statute law has dramatically increased. There have been expansions in the scope of various Commonwealth legislative powers[9].

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4 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 630.

5 Emerton, "Ideas" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 141 at 158. See also Winterton, "The Communist Party Case" in Lee and Winterton (eds), *Australian Constitutional Landmarks* (2003) 108 at 129.

6 See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Cole v Whitfield* (1988) 165 CLR 360.

7 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

8 See, eg, *Cole v Whitfield* (1988) 165 CLR 360 at 385.

9 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1. See also Aroney, Gerangelos, Murray and Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (2015) at 195.

There have been major developments in relation to Executive power[10]; a significant expansion and diversification of the statutory powers conferred on the Executive in our modern regulatory state; as well as an expanding use of non-statutory Executive power.
More generally, the complexities of modern government have posed novel legal issues and presented new challenges. Yet, despite all these changes, the legacy of the *Communist Party Case* has endured, in essence, because the case turned on fundamental and immutable principles on which our Constitution is based: first, the High Court is the ultimate custodian of the Constitution; and, second, the Commonwealth Parliament cannot enact legislation that falls outside of the powers conferred on it under the Constitution[11]. Those principles give effect to and protect the rule of law.

Background context

4. The discussion of the background context may be dealt with briefly. Many are familiar with the facts of the *Communist Party Case* and the social and historical context in which it arose. Others have considered these matters in significant detail before[12]. But, the themes and legacy of the case cannot be properly understood without mentioning a few contextual matters.

5. The late 1940s and early 1950s were characterised by public fear of, and hostility towards, communism – in Australia and around the world[13]. A Menzies-led Liberal and

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10 See, eg, *Williams v Commonwealth* (2012) 248 CLR 156.

11 Crawford, "The Rule of Law" in Dixon (ed), *Australian Constitutional Values* (2018) 77 at 82.

12 See, eg, Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 630-647; Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 *Canadian Bar Review* 490.

13 See Williams, "Reading the Judicial Mind: Appellate Argument in the Communist Party Case" (1993) 15 *Sydney Law Review* 3 at 3; Kirby, "A Forgotten Constitutional Jubilee: The Fiftieth Anniversary of the Defeat of the Referendum on Communists and Communism in

Country Party coalition Government won the December 1949 election on a platform which included a promise to ban the Australian Communist Party[14]. The implementation of that promise was the genesis of the *Communist Party Case*.

6. On 27 April 1950, Prime Minister Menzies introduced the Communist Party Dissolution Bill 1950 (Cth) ("**the Bill**") in the House of Representatives[15]. In his second reading speech, Menzies said that while the Bill was "admittedly novel, and ... far-reaching"[16], it was "in a most special and important sense, a law relating to the safety and defence of Australia ... to deal with ... the King's enemies in this country"[17].

7. Following the introduction of the Bill, the then Leader of the Opposition, the Honourable Ben Chifley, somewhat reluctantly confirmed that the Labour Party would not oppose the Bill[18], given the Government had a mandate to implement its election promise[19]. But Chifley made clear that the Labour Party would pursue amendments to aspects of the Bill

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September 1951", speech delivered at the University of Adelaide Law School (13 August 2001) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_forgotten_constitution.htm>.

14 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 634-635, 638.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950 at 1970.

16 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950 at 1994.

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950 at 1995.

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950 at 2271.

19 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950 at 2278.

which they regarded "as a complete negation of the principles of human justice and liberty"[20]. The Honourable Dr Evatt, then Deputy Leader of the Opposition, was particularly ardent in his criticisms of the Bill.

8. The Bill was hotly debated in Parliament for a number of months. The Senate – controlled by the Labour Party – passed various amendments to the Bill, but the House of Representatives (controlled by the Menzies Government) rejected the Bill in the form passed by the Senate; and the Bill was "laid aside" on 23 June 1950[21].

9. Two days later, the Korean War broke out[22]. By September 1950, an Australian army contingent as well as 77 Squadron Royal Australian Air Force and nine ships of the Royal Australian Navy were in Korea fighting with UN Forces[23].

10. On 28 September 1950, Menzies re-introduced the Bill in the House of Representatives[24]. It was "in terms identical" to those when it left the House of

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20 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950 at 2272; see also 2278.

21 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 645. See also Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 *Canadian Bar Review* 490 at 502.

22 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 645.

23 Kirby, "A Forgotten Constitutional Jubilee: The Fiftieth Anniversary of the Defeat of the Referendum on Communists and Communism in September 1951", speech delivered at the University of Adelaide Law School (13 August 2001) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_forgotten_constitution.htm>. See also https://www.awm.gov.au/visit/exhibitions/korea/ausinkorea.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950 at 78.

Representatives last[25]. Menzies urged that "[t]he people of Australia, by an overwhelming majority, demanded this legislation, and insist[ed] that it be placed on the statute-book"[26]. He asked rhetorically: "[d]oes anyone really believe that at a time when Australians are fighting and dying in a war against aggressive communism overseas, we in Australia should be so spineless as to leave the aggressive Communist agents at home free to do their work?"[27]

11. On 3 October 1950, the Bill was passed by the House of Representatives without any amendments[28]. On 19 October, the Senate also passed the Bill without amendment[29]. The *Communist Party Dissolution Act 1950* (Cth) ("**the Act**") commenced upon receiving royal assent the next day[30].

***Communist Party Dissolution Act 1950* (Cth) – pertinent features**

12. An important feature of the Act was its preamble, which contained nine recitals. The first three recitals simply referred to constitutional powers of the Commonwealth Parliament, specifically the powers referred to in s 51(vi) (the defence power), s 61 (the Executive power)

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25 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950 at 83.

26 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950 at 83.

27 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950 at 87.

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950 at 200. See also Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 *Canadian Bar Review* 490 at 503.

29 Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950 at 1092; Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1950 at 1177. See also Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 *Canadian Bar Review* 490 at 503.

30 *Communist Party Dissolution Act 1950* (Cth), s 2.

and s 51(xxxix) (the incidental power)[31]. They "recited" the powers the Commonwealth was relying upon to deal with the communists[32].

13. The next five recitals contained what Menzies described as "the case against" the communists – or, as he described it in the House of Representatives, the "counts in [the] indictment"[33] – based on allegations of facts which were said to "justif[y] ... the Government's action" and establish "a state of affairs both menacing and alarming and one which no democratic parliament [could] ignore"[34]. Among other things, these recitals asserted that the Australian Communist Party engaged in espionage, sabotage and treason and was engaged in violent activities designed to bring about a revolutionary "overthrow or dislocation of the established system of government of Australia", including by disrupting production and work in "vital industries" to the security and defence of Australia.

14. The final recital effectively stated that the operative provisions of the Act were necessary for the security and defence of Australia and the execution and maintenance of the Constitution and Commonwealth laws. The operative provisions did three main things[35].

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31 Derham, "Australian Communist Party v The Commonwealth" (1951) 33(3 and 4) *Journal of Comparative Legislation and International Law* 40 at 41.

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950 at 1998.

33 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950 at 1998.

34 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950 at 1998.

35 Derham, "Australian Communist Party v The Commonwealth" (1951) 33(3 and 4) *Journal of Comparative Legislation and International Law* 40 at 40; Lane, *A Digest of Australian Constitutional Cases* (5th ed, 1996) at 74.

15. First, the Australian Communist Party was declared to be "an unlawful association" and, by force of the Act, it was dissolved.

16. Second, the Governor-General was authorised to declare a body of persons possessing communist affiliations or connections[36] to be an "unlawful association" if he was satisfied that "the continued existence of that body ... would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution" or Commonwealth laws[37]. Bodies declared unlawful associations were also "dissolved"[38]. The property of the Australian Communist Party and any other body declared to be an unlawful association was to be vested in a receiver appointed by the Governor-General[39], who was to realize the property, to discharge the liabilities of the unlawful association and to pay or transfer any surplus to the Commonwealth[40].

17. Third, the Governor-General was authorised to declare that a person was "a member or officer of the Australian Communist Party"[41] or was at any time after 10 May 1948[42] "a communist"[43] if he was satisfied that the person was "engaged, or [was] likely to engage, in

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36 *Communist Party Dissolution Act 1950* (Cth), s 5(1).

37 *Communist Party Dissolution Act 1950* (Cth), s 5(2).

38 *Communist Party Dissolution Act 1950* (Cth), s 6.

39 *Communist Party Dissolution Act 1950* (Cth), ss 4, 8(1)-(2).

40 *Communist Party Dissolution Act 1950* (Cth), s 15.

41 *Communist Party Dissolution Act 1950* (Cth), s 9(1)(a).

42 *Communist Party Dissolution Act 1950* (Cth), s 3(1) definition of "the specified date" and s 9(1)(b).

43 "[C]ommunist" was defined to mean "a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin": *Communist Party Dissolution Act 1950* (Cth), s 3(1).

activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution" or Commonwealth laws[44]. Among other things[45], a person subject to such a declaration was incapable of holding office or being employed by the Commonwealth or a Commonwealth authority[46] and could not hold any office in an industrial organisation[47] if the Governor-General declared that the industrial organisation had a substantial number of members engaged in identified "vital industr[ies]"[48] or any industry which the Governor-General considered was "vital to the security and defence of Australia"[49].

18. Significantly, a body declared to be an unlawful association or an individual declared to be a communist by the Governor-General was only entitled to apply to a court to set aside the declaration on the ground that they did not possess "any of the defined forms of connection or affiliation with the Australian Communist Party or communism"[50]. There was no scope for review of the Governor-General's satisfaction that the existence of the body, or the activities of the individual, would be prejudicial to security and defence or the execution and maintenance of the Constitution or Commonwealth laws[51].

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44 *Communist Party Dissolution Act 1950* (Cth), s 9(2).

45 *Communist Party Dissolution Act 1950* (Cth), ss 11, 12, 14.

46 *Communist Party Dissolution Act 1950* (Cth), s 10(1)(a)-(b).

47 *Communist Party Dissolution Act 1950* (Cth), s 10(1)(c).

48 The "vital industries" were identified in s 10(3) as "the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry or the power industry".

49 *Communist Party Dissolution Act 1950* (Cth), s 10(3).

50 *Communist Party Dissolution Act 1950* (Cth), ss 5(4), 9(4). See also *Communist Party Case* (1951) 83 CLR 1 at 176.

51 *Communist Party Case* (1951) 83 CLR 1 at 176. See also Lane, *A Digest of Australian Constitutional Cases* (5th ed, 1996) at 74; Lindell, "The Australian Constitution: Growth,

Challenge to constitutionality validity – *Communist Party Case*

19. Just hours after the Act received royal assent[52], the Australian Communist Party, certain members of the Communist Party, a number of trade unions and certain union officials commenced proceedings in the original jurisdiction of the High Court[53]. They challenged the validity of the Act on grounds that[54]:

- it was outside the scope of Commonwealth legislative power and it was not brought within legislative power by the statements in the preamble because those statements, or some of them, were not in accordance with fact;

- it was contrary to Ch III (by usurping the judicial power of the Commonwealth and conferring judicial power upon the Parliament)[55];

- it was an acquisition of property without just terms contrary to s 51(xxxi)[56];

Adaptation and Conflict – Reflections About Some Major Cases and Events" (1999) 25 *Monash University Law Review* 257 at 274.

52 Case Stated at 1 [1].

53 Case Stated at 1 [1]. See also, eg, Writ of Summons in Matter No 39 of 1950 at 11-12. See also Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 647.

54 Case Stated at 3 [5]. See, eg, Writ of Summons in Matter No 39 of 1950 at 7-8 [11].

55 *Communist Party Case* (1951) 83 CLR 1 at 132.

56 *Communist Party Case* (1951) 83 CLR 1 at 93, 132.

- it contravened the freedom of inter-State intercourse, trade and commerce guaranteed by s 92[57]; and

- it was inconsistent with the maintenance of the constitutional integrity of the States[58].

20. The case was heard by the Full Court of the High Court by way of a case stated. The hearing commenced on 14 November 1950 and lasted 24 days[59]. It involved 10 silks and 12 junior counsel, many of whom went on to become judges of the High Court and State Supreme Courts[60]. And one – Dr Evatt (the then Deputy Leader of the Labour Party and a former justice of the High Court) – controversially appeared as counsel for two of the unions in the case (the Waterside Workers' Federation and the Federated Ironworkers' Association).

21. On 9 March 1951, a six-member majority (Justices Dixon, McTiernan, Williams, Webb, Fullagar and Kitto, each writing separately) held the Act invalid[61]. Chief Justice Latham was the sole dissentient.

22. There were two questions of law that had been stated for the opinion of the Full Court. The first question essentially asked whether the validity of the Act "depend[ed] upon a

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57 *Communist Party Case* (1951) 83 CLR 1 at 132.

58 *Communist Party Case* (1951) 83 CLR 1 at 34.

59 *Communist Party Case* (1951) 83 CLR 1 at 1. See Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 *Canadian Bar Review* 490 at 505.

60 Anderson, "The Australian Communist Party v The Commonwealth" (1950) 1 *University of Queensland Law Journal* 34 at 34; Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 *Canadian Bar Review* 490 at 505.

61 *Communist Party Case* (1951) 83 CLR 1 at 205, 213, 232, 248, 271, 285.

judicial determination or ascertainment of the facts" stated in the recitals[62]. A majority of the Court held it did not[63]. The second question asked whether the Act was invalid either in whole or in part[64]. The majority answered "yes", the Act was "wholly invalid"[65].

23. The case was momentous and its legacy three-fold – it is a landmark decision in terms of its *political, doctrinal and symbolic impacts.*

Political impact

24. It is appropriate to start with the political impacts.

25. In reviewing the Court's archival material on the *Communist Party Case*, one thing jumped out as revealing the political climate of the time. It was a letter to the District Registrar of the High Court relating to an incident that took place during the hearing, where "the steps of the [High] Court were defaced" with the slogan "Repeal Fascist Laws. The People Want Peace"[66]. It reflected the unusually high level of public interest and engagement about

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62 Case Stated at 5 [9]. Question 1 was in two parts. Question 1(a) asked: "Does the decision of the question of the validity or invalidity of the provisions of the ... Act ... depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of th[e] Act and denied by the plaintiffs"? Question 1(b) asked: "[A]re the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth?". Each question was answered "no".

63 Webb J answered question 1 differently to the other members of the majority, but his Honour held the Act invalid in its entirety because the onus was on the Commonwealth Parliament to prove the validity of the Act and it chose not to offer evidence in support of validity: *Communist Party Case* (1951) 83 CLR 1 at 244-245, 248.

64 Case Stated at 6 [9].

65 *Communist Party Case* (1951) 83 CLR 1 at 285.

66 See Letter to District Registrar of the High Court of Australia dated 2 November 1950.

the issues before the Court. Not only many members of the legal profession but also the public had eagerly awaited the Court's decision[67].

26. Once delivered, the case had immediate political impacts[68]. While both the Government and the Opposition agreed that the Justices of the High Court were not influenced by political considerations[69], the political significance of the decision was undoubtedly great. One need only refer to the events that took place immediately after the decision was handed down to make good this proposition.

27. Four days after the High Court handed down its decision, Prime Minister Menzies made a statement to the House of Representatives. He said that, while he had "no *legal* criticisms to make" of the Court's decision, "[i]t would be foolish to pretend that [the] decision ha[d] not given grave concern to the Government, and ... to ... millions of the Australian people"[70]. He said that the Government was considering "whether any new and adequate constitutional power to deal direct[ly] with the Communist wreckers [could] be obtained either by ... referred powers from the States or by direct constitutional amendment approved by the people at a referendum"[71]. Both avenues were pursued, without success.

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67 Anderson, "The Australian Communist Party v The Commonwealth" (1950) 1 *University of Queensland Law Journal* 34 at 34.

68 See Solomon, *The Political High Court: How the High Court Shapes Politics* (1999) at 3-4.

69 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951 at 365 (Meznies) and 371 (Chifley); Commonwealth, *Parliamentary Debates*, House of Representatives, 5 July 1951 at 1076 (Menzies).

70 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951 at 365 (emphasis added); see also 366.

71 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951 at 367.

28. The Government first sought a referral of legislative powers from the States pursuant to s 51(xxxvii) of the Constitution[72]. This attempt ultimately failed, as the Labour Governments in New South Wales and Queensland declined the request[73].

29. The Government subsequently initiated a referendum in accordance with s 128 of the Constitution seeking to add a new s 51A into the Constitution[74] that would give the Commonwealth Parliament the power to ban the Communist Party and permit the Parliament to re-enact the law held invalid by the High Court[75]. Chief Justice Latham controversially provided informal advice to the Government about the proposed constitutional amendments[76]. On 22 September 1951, the Australian public voted on the proposed

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72 Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 111; Irving, "Lessons from History: The High Court and the Invalidation of the Communist Party Dissolution Act" in Jones and McMillan (eds), *Public Law Intersections* (2003) 201 at 204-205.

73 Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 111.

74 The proposed s 51A(1) provided that "[t]he Parliament shall have power to make such laws for the peace, order and good government of the Commonwealth with respect to communists or communism as the Parliament considers to be necessary or expedient for the defence or security of the Commonwealth or for the execution or maintenance of this Constitution or of the laws of the Commonwealth": see Commonwealth, Gazette, 23 August 1951 (No 63) at 253.

75 Commonwealth, Parliamentary Debates, House of Representatives, 5 July 1951 at 1076-1081. See also Irving, "Lessons from History: The High Court and the Invalidation of the Communist Party Dissolution Act" in Jones and McMillan (eds), *Public Law Intersections* (2003) 201 at 205; Goot and Scalmer, "Party Leaders, the Media, and Political Persuasion: The Campaigns of Evatt and Menzies on the Referendum to Protect Australia from Communism" (2013) 44 *Australian Historical Studies* 71.

76 Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 111-112; Galligan, "Constitutionalism and the High Court" in Prasser, Nethercote and Warhurst (eds), *The Menzies Era: A Reappraisal of Government, Politics and Policy* (1995) 151 at 163.

constitutional amendment[77]. The referendum was defeated[78]. Two points may be made about the political circumstances relating to the case.

30. The first is that the outcome came as a surprise to the Government of the day[79]. It has since been described as a "slap on the face for the ... Government"; "a rebuff [that] had not been expected"[80]. As Professor George Williams has observed, Chief Justice Latham's passionate dissent in the *Communist Party Case* probably "produced the result ... expected to emerge" – that the Act would be held valid – "given the enormous political and community pressures upon" the High Court to uphold the Act[81]. The political climate in Australia was firmly against communism[82]. Five of the seven Justices that determined the case were appointed by conservative governments[83]. And, while the majority's reasoning on why the Act

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77 Parliamentary Library, Department of Parliamentary Services, "Referendums and Plebiscites" in Parliamentary Handbook of the Commonwealth of Australia (2014) at 393. The question asked at the referendum was: "Do you approve of the proposed law for the alteration of the Constitution entitled 'Constitution Alteration (Powers to deal with Communists and Communism) 1951'?"

78 Parliamentary Library, Department of Parliamentary Services, "Referendums and Plebiscites" in Parliamentary Handbook of the Commonwealth of Australia (2014) at 393.

79 Ayres, *Owen Dixon* (2007) at 223; Irving, "Lessons from History: The High Court and the Invalidation of the Communist Party Dissolution Act" in Jones and McMillan (eds), *Public Law Intersections* (2003) 201 at 203.

80 Kirby, "A Forgotten Constitutional Jubilee: The Fiftieth Anniversary of the Defeat of the Referendum on Communists and Communism in September 1951", speech delivered at the University of Adelaide Law School (13 August 2001) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_forgotten_constitution.htm>.

81 Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 104.

82 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 645.

83 Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1951 at 370. See Galligan, "Constitutionalism and the High Court" in Prasser, Nethercote and

was not supported by the defence power attributed significance to the fact that the case was decided during peacetime; it should be borne in mind that the decision was handed down at the height of the Cold War, and in the context of Australia's involvement in the Korean war. To say it was "a time of great international tension"[84] would be putting it mildly.

31. While the outcome may have been unexpected politically, the case ultimately turned on the application of basic and fundamental legal principles and values, none of which was especially novel[85].

32. The second point concerns what was really the key theme underpinning Chief Justice Latham's dissent: namely, that "matters of national security and the defence of the nation are matters for Parliament and not the courts"[86]. His Honour considered that it was necessary for Parliament to have "the decisive power to determine whether Australia is for communism or against communism, and to legislate in accordance with its decision", unrestrained by whether or not a court agrees[87]. That view was rejected by the majority.

Warhurst (eds), *The Menzies Era: A Reappraisal of Government, Politics and Policy* (1995) 151 at 160-161.

84 Derham, "The Defence Power" in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 157 at 177.

85 See Douglas, "A Smallish Blow for Liberty? The Significance of the Communist Party Case" (2001) 27 *Monash University Law Review* 253 at 254; Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 97, 108; Crawford, "The Rule of Law" in Dixon (ed), *Australian Constitutional Values* (2018) 77 at 82.

86 See Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 106. See also *Communist Party Case* (1951) 83 CLR 1 at 141-144.

87 *Communist Party Case* (1951) 83 CLR 1 at 143; see also 152.

33. The case serves as a reminder that it is not correct to say[88] that "[t]he courts have nothing to do with policy" or politics[89]. It must be recalled that the Constitution itself "is a political instrument" dealing with "government and governmental powers"[90]. Many issues arising under the Constitution have a "political" dimension, at least in a general sense[91]. As Justices Gummow and Crennan remarked in *Thomas v Mowbray*[92], "[w]here legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably consideration of that policy cannot be excluded from the curial interpretative process". Not infrequently the Court is called upon to exercise its functions of maintaining and enforcing the boundaries within which governmental power is exercised in a politically heated environment[93]. The significance of this will be considered later, but the point is simple: none of these political matters or dimensions releases the Court from its duty to perform its constitutional function[94].

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88 As Justice Kitto did in the *Communist Party Case* (1951) 83 CLR 1 at 277.

89 *Thomas v Mowbray* (2007) 233 CLR 307 at 348 [81] (Gummow and Crennan JJ). See also Hayne, "Rule of Law" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 167 at 181.

90 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J).

91 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 444 [359] (Kirby J). See also Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Federal Law Review* 151 at 178; Solomon, *The Political High Court: How the High Court Shapes Politics* (1999) at 4.

92 (2007) 233 CLR 307 at 348 [81].

93 Solomon, *The Political High Court: How the High Court Shapes Politics* (1999) at 3.

94 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 444 [359] (Kirby J).

Doctrinal legacy

34. The doctrinal and jurisprudential impacts of the *Communist Party Case* have been the subject of great interest for constitutional lawyers and academics for decades. The legacy of the case has captured the attention of many minds – judges, members of the legal profession and the academy. Much ink has been spilled analysing the *Communist Party Case*[95].

35. There are 133 decisions of the High Court alone citing and considering the *Communist Party Case*. The review of those cases revealed that, leaving aside the Justices that decided the *Communist Party Case*, the case has been cited by all but four[96] of the subsequent 36 Justices appointed to the High Court. And, it has been cited in support of many and varied propositions and principles relating to the separation of powers[97], various legislative powers

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95 See, eg, Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630; Lindell, "The Australian Constitution: Growth, Adaptation and Conflict – Reflections About Some Major Cases and Events" (1999) 25 *Monash University Law Review* 257 at 273-280; Douglas, "Cold War Justice? Judicial Responses to Communists and Communism, 1945-1955" (2007) 29 *Sydney Law Review* 43; Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 332-367; Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97; Crawford, *The Rule of Law and the Australian Constitution* (2017) at 59-81, 198-202.

96 Justices Taylor, Walsh, Owen and Jacobs do not appear to have cited the case.

97 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1 at 157 (Gummow J); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 634 [178] (Kirby J).

(express and implied)[98], Executive power[99], subordinate legislation[100], general principles of constitutional interpretation[101], the presumption of constitutional validity[102], judicial notice of facts[103], ex-post facto laws[104], bills of pains and penalties[105], and freedom of association[106] just to name a few.

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98 See, eg, *Milicevic v Campbell* (1975) 132 CLR 307 at 314 (Gibbs J); *Victoria v Commonwealth* (1975) 134 CLR 338 at 397 (Mason J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 199 (Gibbs CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 361 [139] (Gummow and Crennan JJ).

99 See, eg, *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464 (Gummow J).

100 See, eg, *Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 CLR 463 at 476 (Menzies J).

101 See, eg, *Cheatle v The Queen* (1993) 177 CLR 541 at 552 (the Court); *Brownlee v The Queen* (2001) 207 CLR 278 at 297 [52] (Gaudron, Gummow and Hayne JJ); *Singh v Commonwealth* (2004) 222 CLR 322 at 418 [268] (Kirby J); *Bennett v Commonwealth* (2007) 231 CLR 91 at 137 [136] (Kirby J).

102 See *Commonwealth v Tasmania* (1983) 158 CLR 1 at 162 (Murphy J).

103 See, eg, *Bradley v Commonwealth* (1973) 128 CLR 557 at 562 (Barwick CJ and Gibbs J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 177 CLR 480 at 513 (Dawson and Toohey JJ); *Simpson v The Queen* (1998) 194 CLR 228 at 234 [14] (Gaudron and McHugh JJ); *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 480 [67] (McHugh J); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 223 [76] (Gummow, Hayne, Heydon and Crennan JJ).

104 See, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 539 (Mason CJ), 645 (Dawson J), 707 (Gaudron J), 717-718 (McHugh J).

105 See, eg, *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 107 (Murphy J); *Haskins v Commonwealth* (2011) 244 CLR 22 at 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 311.

106 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508 at 600-601 [224] (Keane J); *McCloy v New South Wales* (2015) 257 CLR 178 at 228 [117] (Gageler J).

36. One tends to get the impression that it would be possible to draw support from some aspect of the case in just about any constitutional case that could arise[107]. It probably goes without saying that this article does not – nor could it – undertake a comprehensive survey of the influence of the case in relation to the spectrum of issues and principles it has touched.

37. The much narrower focus here is on three broad themes that emerge when one examines the principles and propositions in respect of which the *Communist Party Case* is most frequently cited. These are: (1) the High Court's role as custodian of the Constitution; (2) the scope of Commonwealth legislative powers; and (3) the rule of law. These themes are addressed in turn.

(1) High Court as custodian of the Constitution – judicial review

38. At its heart, the *Communist Party Case* concerned the balance to be struck between the High Court's role as the custodian of the Constitution and the scope of the legislative powers of the Commonwealth[108]. The central thread or theme running through the *Communist Party Case* is that it is the High Court's fundamental duty to determine, maintain and enforce the limits of governmental power. It is, as Professor Ross Anderson put it, "a

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107 Indeed, in some cases the *Communist Party Case* is cited by both the majority and dissenting Justices in support of their respective views: see, recently, *Commonwealth v AJL20* (2021) 95 ALJR 567 at 581 [48] (Kiefel CJ, Gageler, Keane and Steward JJ), 588 [80] (Gordon and Gleeson JJ).

108 See Galligan, *Politics of the High Court: A Study in the Judicial Branch of Government in Australia* (1987) at 203; Stubbs, "Protecting Judicial Independence and the Rule of Law: Dixon's Chapter III Legacy" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 80 at 91.

striking example of the Court's determination to guard its position as watch-dog of the Constitution"[109].

39. Justice Fullagar observed, in a frequently quoted passage of the *Communist Party Case*, that "in our [Australian] system the principle of *Marbury v Madison* is accepted as axiomatic"[110]. In *Marbury v Madison*[111], Chief Justice Marshall of the United States Supreme Court famously remarked that "[i]t is emphatically the province and duty of the judicial department to say what the law is". That is to say, it is the courts, not the legislature, that are the custodians of the Constitution and it is therefore the courts that have final responsibility for deciding whether legislation is valid[112].

40. While it was never "seriously doubted" that the High Court was to be the final arbiter of the Constitution[113], there could be no doubt about the matter after the *Communist Party Case*. The majority confirmed the importance of the Court's review function[114], cementing it

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109 Anderson, "The States and Relations with the Commonwealth" in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 93 at 98.

110 *Communist Party Case* (1951) 83 CLR 1 at 262 (footnote omitted).

111 5 US 137 (1803) at 177.

112 Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) at 193.

113 Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (2017) at 24. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 789-796, esp 791; Dixon, "Marshall and the Australian Constitution" (1955) 29 *Australian Law Journal* 420 at 425; Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Federal Law Review* 1 at 6; Emerton, "Ideas" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 141 at 158.

114 *Communist Party Case* (1951) 83 CLR 1 at 193 (Dixon J), 205-206, 211 (McTiernan J), 221-222, 224 (Williams J), 262-264 (Fullagar J), 272-273 (Kitto J).

in stone. The importance of that role has been repeatedly re-affirmed since[115]. The High Court has also adopted an equivalent approach to explain the Court's role in the judicial review of administrative action entrenched by s 75(v) of the Constitution[116]. There is, as Dr Lisa Burton Crawford has explained, "a clear and important symmetry" between the Court's constitutional and administrative review functions[117].

41. The flip-side of the Court's role as arbiter of the Constitution is that neither Parliament nor the Executive has the power to foreclose the Court from determining any matter of fact or law on which constitutional validity depends[118]. These limits on legislative and Executive powers are necessary to ensure the efficacy of the Court's role. Two related principles examined in the *Communist Party Case* are relevant in this regard.

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115 See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338 at 364 (Barwick CJ); *In the Marriage of Cormick* (1984) 156 CLR 170 at 177 (Gibbs CJ); *Gerhardy v Brown* (1985) 159 CLR 70 at 157-158 (Dawson J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J); *Commonwealth v Mewett* (1997) 191 CLR 471 at 547 (Gummow and Kirby JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89] (Gummow and Hayne JJ); *Abebe v Commonwealth* (1999) 197 CLR 510 at 560 [137] (Gummow and Hayne JJ); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348 [73] (McHugh, Gummow and Hayne JJ); *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 476 [506] (Hayne J); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24-25 [39]-[41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

116 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J). See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 [98], 513-514 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (2017) at 25; Gageler, "Deference" in Williams (ed), *Key Issues in Public Law* (2017) 1 at 2.

117 Crawford, *The Rule of Law and the Australian Constitution* (2017) at 106.

118 cf Kenny, "Constitutional Fact Ascertainment" (1990) 1 *Public Law Review* 134 at 155, cited with approval by Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307 at 386 [226].

The stream cannot rise above its source

42. The first principle – described by Justice Fullagar as "an elementary rule of constitutional law"[119] – is captured by the maxim that "a stream cannot rise higher than its source"[120]. This is, as Professor George Winterton has remarked, "undoubtedly the central doctrinal legacy of the [*Communist Party Case*]"[121].

43. It is underpinned by the idea that the powers of the Parliament and the Executive are sourced in the Constitution[122]. It follows that the Parliament cannot conclusively determine whether a law is within constitutional power (that is to say, it cannot "'recite itself' into power"[123]). The famous example given by Justice Fullagar was that "[a] power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse"[124]. Rather, it is a power to make a law about what a court determines to be a lighthouse[125].

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119 *Communist Party Case* (1951) 83 CLR 1 at 258.

120 *Communist Party Case* (1951) 83 CLR 1 at 258.

121 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 655.

122 Crawford and Goldsworthy, "Constitutionalism" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 357 at 364.

123 *Communist Party Case* (1951) 83 CLR 1 at 206 (McTiernan J); see also 263-264 (Fullagar J).

124 (1951) 83 CLR 1 at 258.

125 Gageler, "Deference" in Williams (ed), *Key Issues in Public Law* (2017) 1 at 2-3.

44. Equally, no law may confer upon a body or person (other than a court) the power "to determine conclusively any issue on which the constitutional validity of the law depends"[126]. Nor can a law confer a discretion on the Executive which entails "complete freedom from legal control" if the discretion is "capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force"[127].

45. The stream and source doctrine predated the *Communist Party Case*[128], but the majority judgments firmly reinforced the doctrine and provided clarity as to its operation[129]. The majority held that Parliament could not recite itself into power by asserting that an identified threat to the security of the Commonwealth existed and that particular steps were necessary to protect Australia from the asserted threat, as it purported to do in the preamble[130]. The preamble could not be treated as "decisive" of establishing the requisite connection between the Act and the Commonwealth's legislative power[131]. Further, while the plain intention of the Act was that the Governor-General was to have "an unfettered administrative discretion to decide whether"[132] the existence of a body or the activities of an

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126 Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 332.

127 *Communist Party Case* (1951) 83 CLR 1 at 258 (Fullagar J), quoting *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-630 (Dixon J).

128 See, eg, *Heiner v Scott* (1914) 19 CLR 381 at 393 (Griffith CJ); *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 67-68 (Knox CJ); *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-630 (Dixon J).

129 See Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 655; Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 335.

130 (1951) 83 CLR 1 at 205-206 (McTiernan J), 264 (Fullagar J).

131 (1951) 83 CLR 1 at 205 (McTiernan J).

132 (1951) 83 CLR 1 at 221 (Williams J).

individual would be prejudicial to the security and defence of the Commonwealth; the opinion of the Governor-General could not "supply the only link between the defence power and the legal effect of the opinion" (except perhaps during times of war or emergency)[133].

46. The stream and source doctrine has been applied and endorsed in a variety of contexts (sometimes without explicitly referring to the *Communist Party Case*), but it has not been the subject of in-depth examination since the *Communist Party Case* was decided[134]. It is useful to refer to some examples to illustrate not only the range of emanations and influences of the doctrine but that its operation in some contexts has been the subject of differing views, even recently.

47. First, the aliens power in s 51(xix) of the Constitution. In 1982 in *Pochi v Macphee*, Chief Justice Gibbs observed in a frequently-cited passage that "Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word"[135]. Put differently, as Justices Gummow, Hayne and Heydon explained in *Singh*[136], "a power to make laws with respect to aliens does not authorise the making of a law with respect to any person who, in the opinion of the Parliament, is an alien". As the recent case of *Love v*

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133 (1951) 83 CLR 1 at 258 (Fullagar J). See Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 334, 339.

134 Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 360.

135 (1982) 151 CLR 101 at 109; see also 112 and 116 (Mason and Wilson JJ agreeing). See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), 192 (Gaudron J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435-436 [132] (McHugh J), 469-470 [238] (Gummow and Hayne JJ), 490 [297], 491-492 [303] (Kirby J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31], 175 [39] (Gleeson CJ), 205 [159] (Kirby J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9] (Gleeson CJ, Gummow and Hayne JJ); *Singh v Commonwealth* (2004) 222 CLR 322 at 329 [4] (Gleeson CJ), 382-383 [151], [153] (Gummow, Hayne and Heydon JJ); *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 54-55 [81] (Callinan J).

136 *Singh v Commonwealth* (2004) 222 CLR 322 at 383 [153].

Commonwealth[137] demonstrates, although this core operation of the stream and source doctrine is not subject to any doubt, there remains a divergence of views as to the precise consequences of the limitation insofar as it concerns the extent to which Parliament is capable of defining the limits of the aliens power, particularly by using statutory citizenship to identify who are members of the Australian community.

48. Second, the "taxation" power in s 51(ii) of the Constitution. It has been held that "[f]or an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by [providing] criteria by which liability to pay the tax is imposed"[138]. Consequently, a tax "may not be made incontestable" – by leaving it to the Commissioner of Taxation to exclusively and conclusively determine whether a taxpayer has satisfied a criterion of liability for taxation – "because to do so would place beyond examination the limits upon legislative power"[139]. That is, it would violate the stream and source principle.

49. Third, Executive detention. While the Court in 2017 said in *Plaintiff M96A/2016 v Commonwealth* that "Parliament cannot avoid judicial scrutiny of the legality of detention" by "mak[ing] the length of detention at any time depend upon the unconstrained, and unascertainable, opinion of the Executive"[140], there have been differing views about the precise operation of the stream and source doctrine in this context over several decades –

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137 (2020) 94 ALJR 198 at 205-206 [7] (Kiefel CJ), 219 [87] (Gageler J), 259 [305], 263-264 [326]-[330] (Gordon J), 275 [401], 283-285 [433]-[437] (Edelman J). See also *Chetcuti v Commonwealth* [2021] HCA 25 at [37] (Gordon J), [66] (Edelman J); Gerangelos, "Reflections upon Constitutional Interpretation and the 'Aliens Power': Love v Commonwealth" (2021) 95 *Australian Law Journal* 109, esp 113-114.

138 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).

139 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 153 [9] (Gummow, Hayne, Heydon and Crennan JJ); see also 170-171 [82] (Kirby J). See also *Deputy Commissioner of Taxation v Hankin* (1959) 100 CLR 566 at 576-577 (Dixon CJ, Fullagar, Kitto and Windeyer JJ); *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640 (Gibbs CJ, Wilson, Deane and Dawson JJ); *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684-686 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 95-96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 244-245, 345-346.

140 (2017) 261 CLR 582 at 597 [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji[141] and *Al-Kateb v Godwin*[142], to name just two cases. The Court's recent decision in *Commonwealth v AJL20*[143] evidences that differences of opinion remain about the extent of Executive discretion to determine "[t]he location of [the] boundary line"[144] between lawful and unlawful detention.

50. Finally, delegated legislative powers. In *Plaintiff S157*[145] the Commonwealth made a submission to the effect that Parliament could "validly delegate to the Minister 'the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia', subject only to [the High Court] deciding ... the 'constitutional fact' of alien status". The Commonwealth also submitted that the challenged Act (which contained a privative clause to exclude judicial review of certain migration decisions) could be re-drafted "to say, in effect, '[h]ere are some non-binding guidelines which should be applied', with the 'guidelines' being the balance of the statute"[146]. The Court rejected these submissions, emphasising that, although Parliament has wide power to authorise subordinate legislation, "what may be 'delegated' is the power to make laws with respect to a particular head [of legislative power] in s 51 of the Constitution"[147]. The Court expressly noted that legislation of the kind suggested by the Commonwealth – conferring a wholly open-ended discretion on the

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141 (2004) 219 CLR 664 at 674-675 [28] (Kirby J).

142 (2004) 219 CLR 555 at 574 [50] (McHugh J), 586-587 [88], 600-601 [140] (Gummow J), 603 [149], 605 [155] (Kirby J).

143 (2021) 95 ALJR 567 at 578 [30], 580-581 [45] (Kiefel CJ, Gageler, Keane and Steward JJ), 587-588 [80], 588-589 [83], 592 [97], 593 [99] (Gordon and Gleeson JJ).

144 *Al-Kateb v Godwin* (2004) 219 CLR 555 at 601 [140] (Gummow J).

145 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 [101] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

146 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 [101] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

147 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512-513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

Executive – may fail to disclose a sufficient connection to a head of power if "there would be delineated by the Parliament no factual requirements to connect any given state of affairs with the constitutional head of power"[148]. The Court in *Plaintiff S157* also foreshadowed that provisions of the kind canvassed "would appear to lack th[e] hallmark of the exercise of legislative power ..., namely, the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'"[149]. Again, these limitations have not yet been the subject of any extensive consideration by the Court[150].

51. These examples are not exhaustive but they demonstrate that, although the stream and source doctrine is well-established and its significance enduring, there remains some uncertainty about the metes and bounds of its operation in at least some areas.

Constitutional facts

52. The second principle that is a "necessary corollary"[151] of the Court's review function is, as Justice Williams put it in the *Communist Party Case*, that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation"[152]. The facts that must be determined by

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148 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also Walker and Hume, "Broadly Framed Powers and the Constitution" in Williams (ed), *Key Issues in Public Law* (2017) 144 at 150.

149 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

150 Related issues arose in *CXXXVIII v Commonwealth* (A30/2019), but these proceeding were discontinued by consent: see *CXXXVIII v Commonwealth* [2019] HCATrans 251 (18 December 2019); *CXXXVIII v Commonwealth* [2020] HCATrans 102 (5 August 2020).

151 Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 109. See also Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) at 193; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 622 [67] (Gageler J).

152 *Communist Party Case* (1951) 83 CLR 1 at 222 (Williams J), affirmed in *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 165 (Dixon CJ, McTiernan and

the Court to determine the constitutional validity of a law are known as "constitutional facts"[153]. Constitutional facts are "a species of legislative facts"; as distinct from "ordinary questions of [adjudicative] fact which arise between the parties" to a case[154].

53. The *Communist Party Case* has been described as the "centrepiece of the modern Australian theory of 'constitutional' fact"[155]. That is correct at the level of principle; that is, it is the duty of the Court to be satisfied of constitutional facts. But, the majority in the *Communist Party Case* took the view that matters of constitutional fact were to be determined in accordance with the rules of evidence, which allowed for facts to be taken on judicial notice[156]. That view has not prevailed[157]. A more flexible approach to ascertaining constitutional facts has been developed in a number of subsequent cases, essentially based on the recognition that the Court must find constitutional facts as best it can and constitutional validity cannot be made to depend upon the conduct of parties to private litigation[158].

Webb JJ). "[T]he determination of constitutional facts is a central concern of the exercise of the judicial power of the Commonwealth": *Sue v Hill* (1999) 199 CLR 462 at 484 [38] (Gleeson CJ, Gummow and Hayne JJ).

153 Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 108.

154 *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ), quoted in *Re Day* (2017) 91 ALJR 262 at 269 [21] (Gordon J). See also *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 (Brennan J).

155 Kenny, "Constitutional Fact Ascertainment" (1990) 1 *Public Law Review* 134 at 155.

156 Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 11.

157 Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 11.

158 See, eg, *Commonwealth Freighters Pty Ltd v Snedden* (1959) 102 CLR 280 at 292 (Dixon CJ); *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ); *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 478-479 [65] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 481-484 [523]-[529] (Callinan J), 512 [614], 513 [618], 514-522 [620]-[639] (Heydon J); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 146-147 [427] (Heydon

54. There is much that has been and could be said about constitutional fact finding[159]. Reliance on statistics as constitutional facts, for example, may present particular challenges[160]; this is something that remains relatively unexplored, but which, in our "increasingly statistical world"[161], will no doubt be important. That is just one example. The use of empirical studies and, more generally, reliance on expert evidence present their own challenges. For present purposes the point that may be made is that the Court's duty to be satisfied of the existence of constitutional facts has significant practical implications for the conduct of constitutional litigation. Constitutional facts are particularly important in determining whether purposive powers (like the defence power and the external affairs power) are engaged[162] and whether a law burdens the freedom of "trade, commerce and intercourse among the States" guaranteed by s 92 of the Constitution or infringes the implied freedom of political communication[163]. Constitutional cases may be won or lost on the facts,

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J); *Maloney v The Queen* (2013) 252 CLR 168 at 298-299 [351]-[353] (Gageler J); *Re Day* (2017) 91 ALJR 262 at 268-269 [21]-[24].

159 See, eg, Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108; Kenny, "Constitutional Fact Ascertainment" (1990) 1 *Public Law Review* 134; Selway, "The Use of History and Others Facts in the Reasoning of the High Court of Australia" (2001) 20 *University of Tasmania Law Review* 129; Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1.

160 See *Thomas v Mowbray* (2007) 233 CLR 307 at 482-483 [526], 484 [529] (Callinan J), referring to *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 478 [63], 481 [69] (McHugh J), 513-514 [168]-[169] (Callinan J); *Palmer v State of Western Australia [No 4]* [2020] FCA 1221 at [37]-[40], [57], [234], [242]-[244], [314]-[315], [366] (Rangiah J).

161 Rose, "A Numbers Game? Statistics in Public Law Cases", speech delivered at Administrative Law Bar Association Annual Lecture (5 July 2021). cf *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38 at [35], [41]; *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 at [41], [65], [80].

162 *Thomas v Mowbray* (2007) 233 CLR 307 at 386-387 [227] (Kirby J); *Queensland v Commonwealth* (1989) 167 CLR 232 at 239 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 10.

163 *Cole v Whitfield* (1988) 165 CLR 360 at 408-409 (the Court); *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania*

as the Court's recent decision in *Unions NSW v New South Wales*[164] demonstrates. That case involved an implied freedom challenge to the validity of a law limiting expenditure by candidates, political parties and third-party campaigners on State electoral campaigns in certain specified periods. The Court held that New South Wales (the Government party seeking to support the validity of the impugned legislation) had failed to establish the existence of facts to justify that the burden on the implied freedom was reasonably appropriate and adapted to advancing its legitimate purpose[165].

55. While there is a degree of flexibility in how the Court may find constitutional facts, the parties to constitutional litigation have a responsibility to ensure that an appropriate and sufficient factual foundation is put before the Court to enable the proper determination of constitutional issues. Of course, a range of considerations influence the content and form of the facts ultimately provided to the Court, including temporal issues (parties might agree facts in the interest of having a case heard urgently), the complexity of the subject matter (constitutional cases are not always factually straightforward), and the dynamics and strategies involved in the conduct of litigation in an adversarial system (facts agreed in a special case, for example, will inevitably reflect compromises by the parties in reaching agreement in order to advance short-term interests and, often, preserve longer-term interests). These matters, as well as others, can result in an incomplete factual foundation being provided to the Court.

(2017) 261 CLR 328 at 370 [131] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 at 632 [95] (Gageler J), 650 [151] (Gordon J); *Palmer v Western Australia* (2021) 95 ALJR 229. See also Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 10-11; Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 682-694.

164 (2019) 264 CLR 595. See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 340-341 (Dixon J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 146-147 [427] (Heydon J); cf 123 [353] (Hayne and Kiefel JJ).

165 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 616-618 [45]-[53] (Kiefel CJ, Bell and Keane JJ), 631-634 [93]-[102] (Gageler J), 640-641 [117]-[118] (Nettle J), 649-651 [149]-[153] (Gordon J).

This gives rise to difficulties. In a number of recent cases[166], the Court has emphasised the point made in *Lambert v Weichelt*[167] that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties". Placing insufficient or incomplete facts before the Court can have the practical effect of inhibiting the Court from performing its constitutional fact-finding function.

56. The short point is that constitutional facts are important – and after 70 years we still do not seem to understand their practical importance in the conduct of constitutional litigation and therefore in the Court's deliberation. The old adage that facts win cases is as true today as it was 70 years ago. They need better and more considered attention.

(2) Scope of Commonwealth legislative powers

57. The second broad "theme" to be addressed concerns the scope of Commonwealth legislative powers and the fundamental principle that the Commonwealth Parliament cannot enact legislation that falls outside of the powers conferred on it under the Constitution.

58. The powers relied upon by the Commonwealth to support the validity of the Act were:

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166 See *Tajjour v New South Wales* (2014) 254 CLR 508 at 587-588 [173] (Gageler J); *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33] (the Court); *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36] (Kiefel CJ, Bell and Keane JJ), 216-217 [135]-[138] (Gageler J), 287-288 [332] (Gordon J); *Zhang v Commissioner of Police* (2021) 95 ALJR 432 at 437-438 [21]-[23] (the Court).

167 (1954) 28 ALJ 282 at 283 (the Court).

- the "defence power" under s 51(vi) of the Constitution, to make laws for "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth"; and

- the power to make laws "for the protection of the Commonwealth against subversive designs" derived either from the combined operation of s 51(xxxix) (the incidental power) and s 61 (the Executive power), or alternatively from "a paramount authority to preserve both [the Commonwealth's] own existence and the supremacy of its laws necessarily implied in the erection of a national government"[168] (now commonly known as the implied nationhood power).

The majority held that (regardless of the truth or falsity of the facts asserted in the recitals) neither power supported the validity of the Act, and so it was invalid[169].

Defence power

59. In relation to the defence power, the majority held that because the only links between the Act and defence were Parliament's opinion as to the threat posed by the Communist Party and the Governor-General's opinion as to the threat posed by affiliated or connected bodies and individual communists, the Act was not within power[170]. While the preamble referred to activities and operations which, in the opinion of Parliament, were pursued by the Australian Communist Party, its officers, members and other communists, "the condition of the application of the Act to the Australian Communist Party or any association or

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168 *Communist Party Case* (1951) 83 CLR 1 at 175 (Dixon J).

169 *Communist Party Case* (1951) 83 CLR 1 at 200 (Dixon J), 262 (Fullagar J). See also *Thomas v Mowbray* (2007) 233 CLR 307 at 454 [429] (Hayne J).

170 See, eg, *Communist Party Case* (1951) 83 CLR 1 at 261 (Fullagar J).

person [was] merely that it [was] communist or ha[d] communist associations"[171]. And, "[t]he connection of the Act with legislative power depend[ed] upon the aims and objects which communism implies, rather than upon the actions of the Party, or of its allies, or of individual communists"[172].

60. Two features of the majority's reasoning are of particular relevance. First, the majority treated the case as one arising during what was ostensibly peacetime, even though Australian forces were engaged in hostilities in Korea at the time[173]. They drew a distinction between the scope of the defence power during times of relative peace and times of war (or uneasy peace)[174]. And a number of Justices suggested that measures of the kind enacted might have been valid if Australia had been fully at war, in a period of grave emergency, or preparing for an imminent war[175].

61. The second, related, point is that the majority's reasoning seems to have been premised on the view that the defence power was centrally concerned with the protection of the nation from *external* threats; that is, "external enemies" acting within Australia[176].

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171 *Communist Party Case* (1951) 83 CLR 1 at 210; see also 206, 209 (McTiernan J).

172 *Communist Party Case* (1951) 83 CLR 1 at 210 (McTiernan J); see also 192 (Dixon J).

173 *Communist Party Case* (1951) 83 CLR 1 at 196 (Dixon J), 207 (McTiernan J).

174 *Communist Party Case* (1951) 83 CLR 1 at 195-196, 197-198 (Dixon J), 206-207 (McTiernan J), 268 (Fullagar J). See also Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) at 195; Derham, "The Defence Power" in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 157 at 177.

175 *Communist Party Case* (1951) 83 CLR 1 at 195 (Dixon J), 206, 208 (McTiernan J), 258 (Fullagar J). See Aroney, Gerangelos, Murray and Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (2015) at 149.

176 Pintos-Lopez and Williams, "'Enemies Foreign and Domestic': *Thomas v Mowbray* and the New Scope of the Defence Power" (2008) 28 *University of Tasmania Law Review* 83 at 85.

This view was expressed explicitly by Justices Dixon and Fullagar[177]. And it remained the dominant view for over 50 years[178]. Generally speaking, responsibility for dealing with threats arising internally and matters of domestic civil order were thought to rest with the States and their police forces[179]. While the power to deal with internal threats *to the Commonwealth Government* was understood to derive from the Commonwealth's power to protect itself (for example, from treason or sedition) which derived either from the combination of the incidental power and the Executive power, or from an implied "nationhood" power[180].

62. It would be fair to say that the majority's reasoning regarding the defence power has not prevailed[181]. Particularly since *Thomas v Mowbray*, the Court has taken an expansive view of the scope of the defence power which bears little resemblance to that adopted in the *Communist Party Case*.

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177 *Communist Party Case* (1951) 83 CLR 1 at 194 (Dixon J), 259, 268 (Fullagar). Justices Williams and Webb considered that the defence power would extend to dealing with some internal threats, especially those which interfered with preparations for war: see at 226 (Williams J), 243-244 (Webb J).

178 See Twomey, "Review of High Court Constitutional Cases 2007" (2008) 31 *University of New South Wales Law Journal* 215 at 219. This probably reflected the fact that the decisions of the High Court about the defence power mostly arose in the context of the First and Second World Wars: see *Thomas v Mowbray* (2007) 233 CLR 307 at 449 [411] (Hayne J).

179 cf s 119 of the Constitution, which provides that "[t]he Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence".

180 Twomey, "Review of High Court Constitutional Cases 2007" (2008) 31 *University of New South Wales Law Journal* 215 at 219.

181 See, eg, Anderson, "The Australian Communist Party v The Commonwealth" (1950) 1(3) *University of Queensland Law Journal* 34 at 35.

63. In *Thomas v Mowbray*[182], a majority of the High Court upheld the validity of a Commonwealth law that gave federal courts power to issue control orders as preventative measures to protect against terrorist acts. Chief Justice Gleeson and Justices Gummow, Hayne, Callinan, Heydon and Crennan held that the law was within the scope of the defence power[183]. The threat posed by terrorism was found to enliven the defence power even without Australia being involved in any actual war, and without there being any apparent connection between the law and Australia's military defence[184].

64. A key issue in *Thomas* was whether the defence power *only* supported legislation directed at external threats to the Australian body politic from other nations[185]. The whole Court, including Justice Kirby in dissent, held that the defence power extended to dealing with threats posed by non-State actors[186]. Chief Justice Gleeson and Justices Gummow, Heydon and Crennan also held that the defence power extended to protecting against internal threats posed to the public at large; that is, to protect the citizens or inhabitants of the

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182 (2007) 233 CLR 307.

183 *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [6], 326 [9] (Gleeson CJ), 363 [145], 364 [148] (Gummow and Crennan JJ), 460 [445] (Hayne J), 503 [582], 504 [585] (Callinan J), 525 [649] (Heydon J); cf 400 [263], 411 [296]-[297] (Kirby J, in dissent). Justice Hayne held that the law was invalid on the basis that it infringed Ch III of the Constitution: see at 447 [406].

184 Pintos-Lopez and Williams, "'Enemies Foreign and Domestic': *Thomas v Mowbray* and the New Scope of the Defence Power" (2008) 28 *University of Tasmania Law Review* 83 at 105.

185 Pintos-Lopez and Williams, "'Enemies Foreign and Domestic': *Thomas v Mowbray* and the New Scope of the Defence Power" (2008) 28 *University of Tasmania Law Review* 83 at 97. See *Thomas v Mowbray* (2007) 233 CLR 307 at 361 [139] (Gummow and Crennan JJ), 452 [424] (Hayne J).

186 *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [6] (Gleeson CJ), 362 [141] (Gummow and Crennan JJ), 395 [250] (Kirby J), 457-458 [437]-[438] (Hayne J), 504-505 [588]-[589] (Callinan J), 511 [611] (Heydon J).

Commonwealth and the States and their property[187]. The majority's reasoning in *Thomas* is broadly consistent with Chief Justice Latham's view in dissent in the *Communist Party Case* that the defence power extends to "defence against internal enemies and against real or suspected internal agents or supporters of actual or potential external enemies"[188].

65. Justices Hayne and Callinan specifically questioned the appropriateness of maintaining the sharp distinction between the scope of the defence power during times of war and peace[189] that was identified by the majority in the *Communist Party Case*[190].

66. In dissent, Justice Kirby did not hold back his criticism of the majority's decision. He said he had not expected, during his service, "[to] see the *Communist Party Case* sidelined, minimised, doubted and even criticised and denigrated in this Court"[191]. His Honour added

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187 *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [6]-[7] (Gleeson CJ), 362 [142] (Gummow and Crennan JJ), 511 [611] (Heydon J agreeing). Justice Kirby was prepared to accept that the defence power might be engaged by some internal threats, but only if they were directed (directly or indirectly) to the body politic: see at 395 [251]. Justice Hayne found it unnecessary to determine whether the defence power extended to threats that were "wholly 'internal'", because his Honour considered that the case concerned an "external threat", specifically "threats made by persons and groups outside Australia ... made for the ... purpose of effecting a change in Australia's foreign policies": see at 451 [419].

188 *Communist Party Case* (1951) 83 CLR 1 at 143; see also 150. Chief Justice Latham expressed a similar view in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 132. See Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 114.

189 *Thomas v Mowbray* (2007) 233 CLR 307 at 458 [439] (Hayne J), 503 [583], 504-505 [589] (Callinan J).

190 See Twomey, "Review of High Court Constitutional Cases 2007" (2008) 31 *University of New South Wales Law Journal* 215 at 222; Gray, "Internment of Terrorism Suspects and the Australian Constitution" (2019) 93 *Australian Law Journal* 300 at 306; Bateman, Meagher, Simpson and Stellios, "Hanks Australian Constitutional Law: Materials and Commentary" (11th ed, 2021) at 428.

191 *Thomas v Mowbray* (2007) 233 CLR 307 at 442 [386] (footnotes omitted).

that, given the majority's reasoning, "it appear[ed] likely that, had the Dissolution Act ... been challenged today, its constitutional validity would have been upheld"[192]. Whether that is so is a question for another day.

67. Recently, in *Private R v Cowen*[193] a majority of the Court again took an expansive approach to the scope of the defence power during peacetime. The majority held that a provision which relevantly provided that a member of the defence force committed an offence against the *Defence Force Discipline Act 1982* (Cth) if they engaged in conduct which would constitute an offence against the general criminal law was supported by the defence power. The plurality, Chief Justice Kiefel and Justices Bell and Keane, accepted the Commonwealth's argument that a law is within the scope of the defence power if it is "reasonably necessary for the good order and discipline of the [Australian Defence Force]"[194]. Why? "[B]ecause such a law is reasonably necessary to the defence of the nation"[195], and it is irrelevant that civil courts hear and determine similar charges[196]. By contrast, Justice Nettle and I held that the defence power supported the provision in its application to the charges laid against the plaintiff (which involved violence[197]) because there was a sufficient connection between those charges and maintaining and enforcing the good order and discipline of the defence force. Why? Because violence is inconsistent with or inimical to a disciplined service[198]; but we each held that some forms of conduct proscribed by the ordinary criminal law fall outside of the

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192 *Thomas v Mowbray* (2007) 233 CLR 307 at 442 [386].

193 (2020) 94 ALJR 849.

194 *Private R v Cowen* (2020) 94 ALJR 849 at 855 [8].

195 *Private R v Cowen* (2020) 94 ALJR 849 at 855 [8]; see also 867-868 [78]-[80].

196 *Private R v Cowen* (2020) 94 ALJR 849 at 855 [6], [8]; see also 868 [80].

197 *Private R v Cowen* (2020) 94 ALJR 849 at 880 [131] (Nettle J), 883-884 [145] (Gordon J).

198 *Private R v Cowen* (2020) 94 ALJR 849 at 880 [131] (Nettle J), 883-884 [145] (Gordon J).

defence power[199]. Clearly, a more expansive view of the defence power has prevailed, but its scope remains not clearly defined.

Power to protect against subversion and implied nationhood power

68. The legacy of the *Communist Party Case* is more mixed in relation to the other power relied upon by the Commonwealth – the power to make laws "for the protection of the Commonwealth against subversive designs"[200]. The majority accepted that the Commonwealth had such a power, although there were differing approaches as to the source of the power[201].

69. The legacy of the case is "mixed" in this area because, on the one hand, given the expansive approach to the defence power that has been adopted at least since *Thomas v Mowbray*, any separate power to make laws for the protection of the Commonwealth would seem to have a relatively confined operation[202]. On the other hand, Justice Dixon's reasoning in relation to the existence of an implied power derived from the Commonwealth's status as a polity has evidently influenced "the High Court's evolving jurisprudence with respect to [the]

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199 *Private R v Cowen* (2020) 94 ALJR 849 at 880 [130]-[131] (Nettle J), 882-883 [140]-[145] (Gordon J).

200 *Communist Party Case* (1951) 83 CLR 1 at 175 (Dixon J).

201 *Communist Party Case* (1951) 83 CLR 1 at 187-188 (Dixon J), 211-212 (McTiernan J), 231-232 (Williams J), 260-261, 266 (Fullagar J), 275, 277 (Kitto J).

202 Justices Gummow, Hayne and Crennan considered that the defence power provided sufficient legislative power without need to rely on any implication of the kind stemming either from the combination of ss 61 and 51(xxxix) or an implied nationhood power to legislate for the protection of the Commonwealth against domestic attack: see *Thomas v Mowbray* (2007) 233 CLR 307 at 363 [145] (Gummow and Crennan JJ), 448 [407] (Hayne J). See also Twomey, "Review of High Court Constitutional Cases 2007" (2008) 31 *University of New South Wales Law Journal* 215 at 225.

concept of 'nationhood' as a source of power"[203]. It is this aspect of the legacy which will be briefly considered now.

70. The idea that there are certain inherent powers derived from Australian "nationhood" (not dependent upon any express grant of legislative power in ss 51 and 52 of the Constitution) had been foreshadowed in earlier decisions of the Court[204]. Two streams of authority had begun to emerge: one concerned with an implied power to protect the Commonwealth from internal insurrection[205]; the other concerned with the Commonwealth's power to "foster and advance the polity, with initiatives undertaken for the benefit of its people"[206] – a kind of "utopian" implied legislative "nation-building" power. The former stream of authority – an implied legislative power which is protectionist – was "crystallised" by Justice Dixon in the *Communist Party Case*[207]. His Honour held that Parliament's power "to legislate against subversive or seditious courses of conduct and utterances" "has a source in principle that is deeper or wider than a series of combinations of the words of s 51(xxxix) with

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203 Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 56 at 57.

204 See Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 448; Keyzer, Goff and Fisher, *Principles of Australian Constitutional* Law (2017) at 341-343; Aroney, Gerangelos, Murray and Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (2015) at 196-197.

205 Saunders, "Nationhood power" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 495 at 495. See also *Burns v Ransley* (1949) 79 CLR 101 at 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121 at 148 (Dixon J).

206 Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 56 at 56-57. See also *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237 at 266 (Starke J), 269 (Dixon J).

207 Keyzer, Goff and Fisher, *Principles of Australian Constitutional Law* (2017) at 343.

... other constitutional powers" could produce[208]; it was a power derived from the establishment and character of the national polity[209].

71. A number of judges have subsequently endorsed the view that the Commonwealth has an implied legislative power based on nationhood[210], but the scope (and nature) of such a power has not been authoritatively determined[211]. The extent to which "nationhood" provides an independent source of Commonwealth legislative power as well as the scope of the power remains unsettled[212]; so Justice Dixon's legacy here – concerning the existence of an inherent legislative power – is a "qualified one"[213]. But that aspect of his Honour's reasoning has contributed to, and influenced, the development of some inherent Executive power based on the same notions of nationhood[214].

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208 *Communist Party Case* (1951) 83 CLR 1 at 187, 188.

209 *Communist Party Case* (1951) 83 CLR 1 at 188.

210 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1 at 252 (Deane J); cf 203-204 (Wilson J); *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ); cf 103-104 (Wilson and Dawson JJ), 119 (Toohey J).

211 Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 56 at 57, 75.

212 Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 449. See also Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) at 131.

213 Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 56 at 75.

214 See Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 56 at 63.

72. In an influential passage of the *AAP Case* in 1975, after referring to Justice Dixon's decision in the *Communist Party Case*, Justice Mason stated that[215]:

> "[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."

73. Other Justices in the *AAP Case* also recognised the existence of an implied "nationhood power"[216], and the notion has been endorsed and developed by a number of Justices in subsequent cases – Chief Justice Mason and Justices Brennan, Deane and Gaudron in *Davis v Commonwealth*[217] and Justices Gummow, Crennan and Bell in *Pape v Federal Commissioner of Taxation*[218]. And that reliance on the implied "nationhood power" to support activities of the Executive and Commonwealth spending continues – even in 2021. One need only look at the large number of explanatory statements to regulations amending the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth)[219]. However, the existence of such a power has been the subject of considerable criticism both by a number of Justices and the academy

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215 *Victoria v Commonwealth* (1975) 134 CLR 338 at 397.

216 *Victoria v Commonwealth* (1975) 134 CLR 338 at 362 (Barwick CJ), 375 (Gibbs J); see also 412-413 (Jacobs J).

217 (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ), 110-111 (Brennan J); cf 103-104 (Wilson and Dawson JJ), 117, 119 (Toohey J).

218 (2009) 238 CLR 1 at 87-88 [228] (Gummow, Crennan and Bell JJ).

219 See, eg, Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No 2) Regulations 2019 (Cth) at 6-7; Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (Health Measures No 1) Regulations 2019 (Cth) at 2-3; Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (Health Measures No 4) Regulations 2020 (Cth) at 8, 9; Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No 3) Regulations 2021 (Cth) at 5.

and there remain important questions about its scope[220]. For present purposes, it is sufficient to make one short point.

74. Whatever is to be the future of the implied *Executive* power derived from the character and status of the national polity – particularly, the so-called nation-building power – it should be kept in mind that when Justice Dixon identified an implied *legislative* power to deal with threats to the existence of the Commonwealth in the *Communist Party Case*, he did so in the context of "warning of the dangers of an unbridled executive power"[221]. His Honour stated[222]:

> "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected."

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220 See *Victoria v Commonwealth* (1975) 134 CLR 338 at 362 (Barwick CJ), 392 (Mason J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 115-116 [327], 122-124 [347]-[357] (Hayne and Kiefel JJ, in dissent), 174 [504], 175-177 [506]-[510], 198 [564] (Heydon J, in dissent); Twomey, "Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers" (2010) 34 *Melbourne University Law Review* 313; Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) at 453-454, 456; Gummow, "Unity" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 405 at 423.

221 Aroney, Gerangelos, Murray and Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (2015) at 458. See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 24 [10]; Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 56 at 72-73.

222 (1951) 83 CLR 1 at 187.

Symbolic significance – rule of law

75. That leaves the final, and probably most prominent, theme of the *Communist Party Case* – the rule of law. Justice Dixon famously described the rule of law as "an assumption" on which the Constitution was framed[223]. Although the phrase "rule of law" was only used that one time in the 156 pages of the case report, the case has been hailed "a celebrated victory for the rule of law"[224], "a powerful example of the rule of law ... at work"[225] and "[t]he classic case protecting the rule of law in Australia"[226]. My review of the cases citing the *Communist Party Case* also revealed that it is most frequently cited in relation to propositions about the rule of law[227].

76. Professor Winterton has observed that the "rule of law" aspect of the decision holds "symbolic" importance[228]. I tend to agree. In striking down the challenged Act, the High Court confirmed and reinforced its position as the independent arbiter of the exercise of

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223 *Communist Party Case* (1951) 83 CLR 1 at 193. See Crawford, "The Rule of Law" in Dixon (ed), *Australian Constitutional Values* (2018) 77 at 83.

224 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 630.

225 Gleeson, "Courts and the Rules of Law", speech delivered at Melbourne University (7 November 2001).

226 Stubbs, "Protecting Judicial Independence and the Rule of Law: Dixon's Chapter III Legacy" in Eldridge and Pilkington (eds), *Sir Owen Dixon's Legacy* (2019) 80 at 90.

227 See, eg, *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581 (Murphy J), 614 (Brennan J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196 (McHugh J); *Abebe v Commonwealth* (1999) 197 CLR 510 at 560 [137] (Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1 at 392 [963] (Callinan J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 73 [113] (Kirby J); *Al-Kateb v Godwin* (2004) 219 CLR 555 at 605 [155] (Kirby J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] (Gleeson CJ and Heydon J); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 346 [54] (the Court); *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 463 [91] (Gordon and Steward JJ).

228 Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 656; see also 653.

governmental power by the Parliament and Executive[229]. It is the clearest example in our constitutional history of the Court positively asserting its constitutional function, a function which is critical for the protection of the rule of law. However the rule of law is to be defined, there is no doubt about its "irreducible minimum"[230] – "that Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen"[231].

77. But, of course, there are limits to the Court's ability to uphold and give effect to the rule of law[232]. Ultimately, subject to the limits on legislative and Executive powers, it is for Parliament and the Executive to "choose whether to promote or diminish the rule of law"[233]. And, because of its nature as a Court, the power of the Court is "reactive and contingent"; the power of the Court is only exercised when a case is brought and the applicant has standing to seek relief[234]. These limits make it all the more important that when a case is brought in which the Parliament or Executive have stepped outside the scope of their powers, they be directly and decisively held to account[235]. There is little point lamenting on the importance of

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229 See Williams, "Communist Party Case" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 122 at 123; Williams, "Judicial Review" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 376 at 378.

230 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 463 [91] (Gordon and Steward JJ).

231 Stephen, "The Rule of Law" (2003) 22(2) *Dialogue* 8 at 8.

232 See, eg, *Victoria v Commonwealth* (1957) 99 CLR 575 at 429 (Latham CJ); *Leask v Commonwealth* (1996) 187 CLR 579 at 636 (Kirby J); *Electrolux Home Products Ptd Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328 [19] (Gleeson CJ); *Kuczborski v Queensland* (2014) 254 CLR 51 at 316 [217] (Crennan, Kiefel, Gageler and Keane JJ).

233 Hayne, "Rule of Law" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 167 at 188

234 Crawford, *The Rule of Law and the Australian Constitution* (2017) at 199. See also Twomey, "'Constitutional Risk', Disrespect for the Rule of Law and Democratic Decay" (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 293 at 295-296.

235 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56] (Gaudron J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

the rule of law and engaging in rhetoric about the importance of the Court's role as custodian of the Constitution unless those principles inform and direct the everyday work of the Court.

78. Two related observations may be made.

79. First, the High Court's ability to independently and impartially uphold the limits on the exercise of legislative and Executive power *in even the most politically sensitive cases* (like the *Communist Party Case*) is perhaps the clearest indicator of the effectiveness and success of the institution itself[236]. It bears repeating Justice Kirby's observations in *Fardon* that, "[a]s [the High] Court demonstrated in [the *Communist Party Case*], [the Court's] function ... responds to a time frame that is much longer than that of the other branches of government. Inevitably, it affords a constitutional corrective to transient passions and, sometimes, to ill-considered laws repugnant to the timeless constitutional design"[237]. Or, as Chief Justice French said in *South Australia v Totani*[238], "the strength of the protections for which the *Constitution* provides" cannot be made to "fluctuate according to public opinion polls ... [and] [t]he requirements of judicial independence and impartiality are no less rigorous in the case of the criminal or anti-social defendant than they are in the case of the law-abiding person of impeccable character". Inconvenient as it may be, at times it is necessary for the Court to make tough – and unpopular[239] – decisions that have significant political consequences. As Justice Kirby aptly put it in *Roberts v Bass*, "[i]nconvenience has never been a reason for

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236 See Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630 at 656.

237 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 627-628 [140].

238 (2010) 242 CLR 1 at 49-50 [73].

239 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 628-629 [143] (Kirby J).

refusing to give effect to the Constitution" and "[i]f it had been ... the *Communist Party Case*", among others, "would have been differently decided"[240].

80. It is, however, necessary for courts to pay close attention to the "boundaries between the legislative and judicial functions"[241] and to exercise particular caution not to cross those boundaries when determining issues that concern political matters and policy judgments. The use of labels like judicial "deference", "restraint" and "margin of appreciation" are, however, often unhelpful[242]. They are labels that tend to conceal more than they reveal. Any discussion of "deference" is fundamentally about the separation of legislative, Executive and judicial power, and the reciprocal need for each branch of government "to keep out of the ... territory" of the others[243]. For present purposes, the key point is that courts recognise that some matters fall outside of their institutional responsibility and competence[244].

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240 (2002) 212 CLR 1 at 55 [146]. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Cheatle v The Queen* (1993) 177 CLR 541; *Ha v New South Wales* (1997) 189 CLR 465; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

241 *McCloy v New South Wales* (2015) 257 CLR 178 at 220 [90] (French CJ, Kiefel, Bell and Keane JJ).

242 See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151-154 [40]-[44] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 252 [204], 262-263 [237]-[238] (Kirby J); *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 124 [304] (Gordon J); *McCloy v New South Wales* (2015) 257 CLR 178 at 220 [91] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 at 617 [51] (Kiefel CJ, Bell and Keane JJ). See also Hayne, "Deference – an Australian Perspective" [2011] *Public Law* 75; Gageler, "Deference" (2015) 22 *Australian Journal of Administrative Law* 151; Gageler, "Deference" in Williams (ed), *Key Issues in Public Law* (2017) 1.

243 Gleeson, "Courts and the Rules of Law", speech delivered at Melbourne University (7 November 2001). See also French, "Judicial Activists – Mythical Monsters?", Paper delivered at 2008 Constitutional Law Conference (8 February 2008) at 14 [29].

244 See Mantziaris, "The Executive: A Common Law Understanding of Legal Form and Responsibility" in French, Lindell and Saunders (eds), *Reflections on the Australian Constitution* (2003) 125 at 161-164.

81. But that recognition must not be blindly wielded (whether explicitly or otherwise) as a justification for judicial inaction[245]; nor should it be extended to the point that it obfuscates performance by the Court of its fundamental constitutional duty[246]. As was made clear by the majority in the *Communist Party Case*, even in relation to matters of defence and national security – areas where courts typically afford great weight and respect to the views of Parliament and the Executive[247] – it remains the ultimate responsibility of the Court to determine whether an exercise of governmental power is within constitutional limits. If the Court shies away from performing that function the rule of law is dealt a major blow. Equally, the Court must avoid succumbing to pressures that would render it a tool or mechanism for achieving outcomes of political importance for the Government of the day[248].

82. And, this is not a uniquely Australian issue. Autocratic governments and "strongman" leadership has tested the strength of judiciaries around the world. The ability of an independent judiciary to enforce the rule of law continues to be tested, to varying degrees, in many countries.

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245 See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 444 [359] (Kirby J). See also *Cormack v Cope* (1974) 131 CLR 432 at 454 (Barwick CJ); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 194-195 [99] (Gageler J).

246 cf Hayne, "Deference – an Australian Perspective" [2011] *Public Law* 75 at 83; Williams, "'Lone, Vehement and Incredulous': Chief Justice Latham in the *Communist Party Case* (1951)" in Lynch (ed), *Great Australian Dissents* (2016) 97 at 109; *RJR-MacDonald Inc v Attorney-General of Canada* [1995] 3 SCR 199 at 332-333 [136] (McLachlin J).

247 Gageler, "Deference" in Williams (ed), *Key Issues in Public Law* (2017) 1 at 3.

248 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 124 (McHugh J), 134 (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 207 [160] (Gordon J). See also Langen, "Under Lord Reed, the court has retreated into itself", The Justice Gap (online), 27 July 2021 <https://www.thejusticegap.com/under-lord-reed-the-court-has-retreated-into-itself/>.

83. A further observation is that the changes that have taken place in the Australian legal system since the *Communist Party Case* was decided – especially the increasing use of statute law, the expansion of statutory powers conferred on the Executive, the expanding use of non-statutory Executive power and the challenges facing modern governments – have only "increased and not diminished the importance of safeguarding"[249] the Court's role as constitutional watch-dog.

84. Now, more than ever, the Court must remain vigilant and the legacy of the *Communist Party Case* must be borne firmly in mind. Legislation that would undermine or impair the Court's role as custodian and arbiter of the Constitution[250] must be rejected. The Court must exercise caution in the face of inevitable pressures to expand the scope of legislative powers[251], keeping in mind that the heads of legislative power are "subjects of legislation, 'not pegs on which the Federal Parliament may hang legislation on any subject that it likes'"[252].

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249 cf *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 370 [67] (Kirby J). See also *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 115 (Kitto J); *Brown v The Queen* (1986) 160 CLR 171 at 216 (Dawson J); *New South Wales v Commonwealth* (2006) 229 CLR 1 at 229 [556] (Kirby J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 201 [28] (French CJ and Kiefel J); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 195 [103] (Gordon J).

250 Derham, "The Defence Power" in Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 157 at 179.

251 See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 581 [126] (Gummow and Hayne JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 at 610-611 [221]-[223] (Callinan and Heydon JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 122-123 [347]-[349], [351]-[352] (Hayne and Kiefel JJ), 181 [519], 193 [551] (Heydon J); *Lane v Morrison* (2009) 239 CLR 230 at 242-243 [29]-[30] (French CJ and Gummow J).

252 *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 117 (Higgins J), quoting *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 415 (Higgins J). See also *Communist Party Case* (1951) 83 CLR 1 at 212-213 (McTiernan J); *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 152 (Windeyer J); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 347 (Dawson J); *Love v Commonwealth* (2020) 94 ALJR 198 at 275 [401] (Edelman J).

85. And, they are matters of substance, not merely form. Indeed, in light of the *Communist Party Case*, one would not expect Parliament to ever be so overt again in assuming for itself powers that are "irrevocably committed to judicial determination"[253]. The use of different drafting techniques, sometimes more subtle, but sometimes not, which have the potential to obfuscate a lack of connection with power or a contravention of a constitutional limitation has been, and remains, problematic[254].

86. And the need for caution is not limited to the exercise of legislative power or the Court. It extends to "Executive assertions of self-defining and self-fulfilling powers"[255] – some of which are largely unchecked or incapable of being checked. Put in different terms, the problems which the Court grappled with 70 years ago in the *Communist Party Case* continue to arise unabated, sometimes in new ways.

Conclusion

87. At the start of this article the *Communist Party Case* was identified as legally, symbolically and politically important. Legally, symbolically and politically, the case emphasised the rule of law and the High Court's role in the Australian system of government. Whatever changes lie ahead, the rule of law must remain the fundamental informing principle for the legislature, the Executive and the judiciary in our shared system of government established by the Constitution. The 70th anniversary of the *Communist Party Case* reminds us all that it remains the fundamental duty of the High Court at all times to give effect to that basal principle.

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253 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 194 [99] (Gageler J).

254 See, eg, *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 209 [168] (Gordon J).

255 *Al-Kateb v Godwin* (2004) 219 CLR 555 at 603 [149] (Kirby). See also Twomey, "'Constitutional Risk', Disrespect for the Rule of Law and Democratic Decay" (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 293.