ALBARRAN..... APPELLANT;
APPLICANT,

AND

COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD AND ANOTHER.. ..... RESPONDENTS.
RESPONDENTS,

GOULD..... APPELLANT;
APPLICANT,

AND

MAGAREY AND OTHERS..... RESPONDENTS.
RESPONDENTS,

[2007] HCA 23

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC of A 2007

Jan 30; *May* 24 2007

Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ

Constitutional Law (Cth) — Judicial power of Commonwealth — Companies Auditors and Liquidators Disciplinary Board — Power to suspend or cancel registration of liquidators — Commonwealth Constitution, Ch III — Corporations Act 2001 (Cth), s 1292(2).

Section 1292(2) of the *Corporations Act 2001* (Cth) conferred power on the Companies Auditors and Liquidators Disciplinary Board to cancel or suspend the registration of a person as a liquidator for a specified period if satisfied that certain conditions were fulfilled.

The Board made an order suspending the registration of a liquidator and, in a separate proceeding, the Australian Securities and Investments Commission applied to the Board for an order cancelling the registration of another liquidator. Both liquidators applied to the Court to prevent the taking of any further steps pursuant to the order and the application respectively. The question arose of whether s 1292 was invalid on the ground that the power to impose a penalty or otherwise to punish a person was exclusively part of the judicial power of the Commonwealth and could not be exercised by the Board.

Held, that the power conferred on the Board by s 1292 was not judicial. Hence s 1292 was valid.

R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, considered.

Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board (2006) 59 ACSR 698 at 710; 24 ACLC 1,412 at 1,417, approved.

Per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ. In determining whether a particular power is part of the judicial power of the Commonwealth, the focus is upon the manner in which and subject matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes.

Decisions of the Federal Court of Australia (Full Court): *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466, affirmed.

APPEALS from the Federal Court of Australia.

Vanda Russell Gould and Richard Albarran each applied to the High Court of Australia for orders preventing the taking of any further steps in relation to the suspension or cancellation by the Companies Auditors and Liquidators Disciplinary Board of their registration as liquidators. Mr Gould's proceeding was remitted to the Federal Court. The High Court refused Mr Albarran's application and remitted the balance of the cause to the Federal Court. Black CJ directed that both proceedings be dealt with by a Full Court. The Full Court (Emmett, Allsop and Graham JJ) (1) held that the exercise of the Board of power under s 1292(2) did not involve the exercise of the judicial power of the Commonwealth and dismissed each proceeding. Heydon and Crennan JJ granted Mr Gould and Mr Albarran special leave to appeal to the High Court from the judgment of the Full Court.

B W Walker SC (with him *P J Brereton* and *P Kulevski*), for the appellant Gould. The Board's order suspending Mr Gould's registration as a liquidator was an adjudication on the question of his right to be registered as a liquidator. It was a combination of a determination of wrongdoing or impropriety followed by the imposition of punishment, in the sense of visiting an adverse and stigmatising consequence, that characterises the Board's power as judicial. No independent exercise of judicial power or intervention by a court is required to give effect to the determination (2). The making of the decision by the Board was conditioned solely on ascertainable criteria (3). The cancellation or suspension of a liquidator's registration protects the public interest in the same way that the imprisonment of criminals does. Suspension from the office of a liquidator impacts on a person's capacity to earn a living in his chosen field and detrimentally impacts on that person's reputation and standing in his professional and personal community. The nature of this type of penalty falls in the

(1) *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466.

(2) *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Luton v Lessells* (2002) 210 CLR 333.

(3) *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 301.

judicial province (4). Section 221 of the *Australian Securities and Investments Commission Act 2002* (Cth) secures for members of the Board's panel the same protection and immunity enjoyed by a judge of the High Court. A number of Commonwealth offences which are focused on the integrity of court proceedings are made to apply to proceedings of the Board, such as perjury, suborning a witness, attempting to pervert the course of a hearing, fabrication of evidence. It cannot be concluded from *R v Quinn; Ex parte Consolidated Foods Corporation* (5) that the taking away of rights by statute necessarily is outside the jurisprudence on Ch III of the *Constitution* (6). The application by the Commission to the Board manifested a controversy or dispute between the Commission and Mr Gould. The Board's determination resolved that dispute in favour of the Commission and the order made responds to his wrongdoing by depriving him of something valuable, his right to accept appointment and act as a liquidator. It should be distinguished from a determination under a law of domestic application (7). The present disciplinary arrangements are found in a law of general application and punishment is inflicted for breach. [He also referred to *Reference Re Residential Tenancies Act* (8); *Sobey Stores v Yeomans* (9); *Massey-Ferguson Industries v Government of Saskatchewan* (10); *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (11); *Cheong Ah Toy v Registrar of Companies (NT)* (12); *R v Davison* (13); *Pasini v United Mexican States* (14); and *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (15).]

N Perram SC (with him *A D Crossland*), for the appellant Albarran. The power of the Board under s 1292 extends to suspending or cancelling a liquidator's registration in circumstances where it finds that the liquidator has breached a law of general application (16), eg,

(4) *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.
(5) (1977) 138 CLR 1.
(6) *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; *Health Insurance Commission v Peverill* (1994) 179 CLR 26; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; *District of Columbia Court of Appeals v Feldman* (1983) 460 US 462.
(7) eg, as in *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682; *R v White; Ex parte Byrnes* (1963) 109 CLR 665.
(8) [1981] 1 SCR 714.
(9) [1989] 1 SCR 238.
(10) [1981] 2 SCR 413.
(11) (1989) 19 NSWLR 434.
(12) (1985) 9 ACLR 998.
(13) (1954) 90 CLR 353.
(14) (2002) 209 CLR 246.
(15) (1987) 163 CLR 656.
(16) *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (In liq)* (2003) 177 FLR 289; 47 ACSR 155; 22 ACLC 822; *Goodman v Australian*

by failing to perform duties required by law to be carried out or performed by a registered liquidator. The exercise of that power accordingly constitutes the infliction of punishment for breach of a law of general application (17). Chapter III of the *Constitution* prevents Parliament authorising the infliction of punishment for breach of generally applicable laws on any entity other than a court exercising the judicial power of the Commonwealth (18). The suggestion that disciplinary forms of punishment do not infringe Ch III (19) has been exploded by *Rich v Australian Securities and Investments Commission* (20).

H C Burmester QC (with him *K L Eastman*), for the Attorney-General for the Commonwealth, intervening on behalf of the respondent Board in both matters. Between the exclusively judicial (21) and exclusively non-judicial (22) powers and functions, there are powers and function which take their character from the nature of the body on which they are conferred (23). The Board is a professional standards body established to discipline liquidators. An administrative system for the registration of liquidators has existed in each State since the 1961 Uniform Companies Acts, and since then an administrative body, not the court, has been responsible for cancelling or suspending a liquidator's registration. The functions performed by the Court under s 536 of the *Corporations Act* and the role played by the court in supervising liquidators do not point to the Board exercising judicial power. The purpose of the Court's inquiry and the scope of its

(cont)

Securities and Investments Commission (2004) 50 ACSR 1; 22 ACLC 1,079.

(17) *Police Service Board v Morris* (1985) 156 CLR 397; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

(18) *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

(19) *R v White; Ex parte Byrnes* (1963) 109 CLR 665; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 167.

(20) (2004) 220 CLR 129.

(21) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v The Commonwealth* (1915) 20 CLR 54; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Polyukovich v The Commonwealth* (1991) 172 CLR 501; *Nicholas v The Queen* (1998) 193 CLR 173.

(22) *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656; *King v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 109 FCR 447; *Civil Aviation Safety Authority v Boatman* (2004) 138 FCR 384.

(23) *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *R v Davison* (1954) 90 CLR 353; *Aston v Irvine* (1955) 92 CLR 353; *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652; *Cominos v Cominos* (1972) 127 CLR 588; *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 167; *Harris v Caladine* (1991) 172 CLR 84; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

power under s 536 are different from the purpose of the Board's determination and the scope of its power under s 1292 (24). Section 1292 is concerned ultimately with whether a person is a fit and proper person to remain registered as a liquidator. The object is not simply to ascertain whether there has been a breach of an Australian law and impose consequences for such breach. The adequacy level or sufficiency of performance of the liquidator may be assessed by the Board against professional standards and codes (25). To the extent that the Board is required to form any opinion as to existing rights, it is no more than a step necessary to its ultimate conclusion that the liquidator's performance of his duties is adequate and proper. Disciplinary schemes are concerned with the application of policy standards, which is an indication of non-judicial power (26). The Board has no role in determining what may be an appropriate sanction for any breach of a legal obligation. It has no enforcement powers. Any enforcement of its decision requires recourse to a court. The exercise of non-judicial power may affect rights and liabilities in a binding and final (albeit not conclusive) manner (27). The relevant provisions of the *Corporations Act* are analogous to the legislation in issue in *Attorney-General (Cth) v Breckler* (28) in that a determination by the Board confers by virtue of legislation curially enforceable rights and liabilities and requires an independent exercise of judicial power to give it effect. The procedures, powers and immunities of the Board are not indicative of a judicial process; they provide procedural fairness to a liquidator who is under consideration. While some sanctions the Board may impose have a punitive effect, the proper characterisation of the Board is as protective of the public interest. Cases from other jurisdictions do not apply where, in those jurisdictions, it is accepted that judicial power may be conferred on a non-judicial tribunal.

The respondent Board submitted to any order the Court might make.

B W Walker SC, in reply.

N Perram SC, in reply.

(24) *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 301; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Tankey v Adams* (2000) 104 FCR 152.

(25) *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698; 24 ACLC 1,412.

(26) *R v White; Ex parte Byrnes* (1963) 109 CLR 665; *Medical Board of Queensland v Byrne* (1958) 100 CLR 582; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 167; *Tankey v Adams* (2000) 104 FCR 152; *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 516.

(27) *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 301; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 167; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

(28) (1999) 197 CLR 83.

Cur adv vult

24 May 2007

The following written judgments were delivered: —

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. These appeals from the Full Court of the Federal Court of Australia (Emmett, Allsop and Graham JJ) (29) were heard together, as the two proceedings had been in the Full Court. The one set of reasons for judgment was delivered by the Full Court. The first respondent in each appeal comprises members of the Companies Auditors and Liquidators Disciplinary Board (the Board). That body is continued in existence by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) and consists of a membership provided for in s 203. The effect of s 204 of the ASIC Act is that the Board has the functions and powers conferred on it by the ASIC Act and the *Corporations Act 2001* (Cth).

2 The Australian Securities and Investments Commission (ASIC) is the second respondent in each appeal. Both the Board and ASIC entered submitting appearances. The active opposition to the appeals was provided by the Attorney-General of the Commonwealth as intervener.

The registration of liquidators

3 Part 9.2 (ss 1276-1298) of Ch 9 of the *Corporations Act* is headed "Registration of auditors and liquidators". Prohibitions are imposed by ss 532(1) and 448B of the *Corporations Act* respectively upon persons acting as a liquidator, or as administrator of a company or deed of company arrangement. These prohibitions are backed by the offence provision in s 1311(1) and in Pt 9.6A provision is made (30) for the vesting of federal jurisdiction in respect of criminal matters arising under the *Corporations Act*.

4 A registered liquidator is relieved from the effect of the prohibitions imposed by ss 532(1) and 448B, but suspension or cancellation of registration by the Board reactivates those prohibitions. However, enforcement of a suspension or cancellation order made by the Board requires the exercise by a court of jurisdiction provided for in Pt 9.6A of the *Corporations Act*.

5 Section 1292 of the *Corporations Act* confers certain powers and functions on the Board. In particular, it is s 1292(2) which provides that, in the stipulated circumstances, the Board may by order cancel or suspend for a specified period the registration of a person as a

(29) *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466.

(30) By Div 2 (ss 1338A-1338C). See generally *Gordon v Tolcher* (2006) 231 CLR 334 at 341 [10], 345-346 [29]-[33].

liquidator. From decisions of the Board applications may be made under s 1317B for review by the Administrative Appeals Tribunal (31).

6 Thus, not only does the Board lack the power to enforce its decisions (32), they are not conclusive in the sense used in authorities such as *Attorney-General (Cth) v Breckler* (33) and *Luton v Lessels* (34). Nor, as will appear, does the Board settle disputes about existing rights and duties.

7 Nevertheless, the appeals challenge the holding by the Federal Court that the power conferred on the Board by s 1292(2) does not involve the exercise of the judicial power of the Commonwealth and that s 1292(2) is not an ineffective attempt by the Parliament to confer such power on a body other than one of the courts identified in Ch III of the *Constitution*.

8 In a limited sense, it may be said that the exercise by the Board of its powers under s 1292(2) of cancellation and suspension affects the "status" of registered liquidators. But the invocation of that term does not necessarily lead to any particular answer to the questions of constitutional law raised in these appeals. In particular, and for reasons to be developed below, the Board does not adjudicate guilt or inflict punishment when acting under s 1292(2).

9 It should be noted immediately that the citation by the appellants of *Rich v Australian Securities and Investments Commission* (35) does not assist them. That case concerned a different field of discourse, namely, the application of the body of law concerning privileges against penalties and forfeitures to court proceedings under ss 206C and 206E of the *Corporations Act* for disqualification of directors, in the course of which the directors were ordered to give discovery of documents.

The facts

10 Something now should be said respecting the facts. Mr Vanda Russell Gould has been registered as a liquidator under the *Corporations Act* and its predecessors since 7 January 1983. On 15 July 2001, ASIC applied to the Board for an order suspending Mr Gould's registration. On 21 December 2004, the Board made various orders including an order that the registration of Mr Gould as a liquidator be suspended for a period of three months. The orders had been preceded by a written determination and supporting reasons published on 26 August 2004.

11 Mr Gould applied in this Court for prohibition against the Board and ASIC to prevent the taking of any further steps pursuant to the determination and the order. He also claimed a declaration that certain

(31) See *Fletcher v Federal Commissioner of Taxation* (1988) 19 FCR 442 at 451-453.
(32) See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 259-260, 268-269.
(33) (1999) 197 CLR 83 at 111-112 [46]-[47].
(34) (2002) 210 CLR 333 at 346 [24], 360 [76], 374-375 [127]-[128].
(35) (2004) 220 CLR 129 at 145 [32].

laws, in particular s 1292 of the *Corporations Act*, were invalid on the ground that the power to impose a penalty or otherwise punish a person is exclusively part of the judicial power of the Commonwealth and could not be exercised by the Board. The proceedings in this Court were remitted to the Federal Court and Black CJ directed that the Gould proceeding and the Albarran proceeding be dealt with by a Full Court.

12 Mr Richard Albarran has been registered as a liquidator under the *Corporations Act* and its immediate predecessor since 19 August 1999. On 6 January 2005, ASIC applied to the Board for an order that Mr Albarran's registration be cancelled. Before the application was heard by the Board, Mr Albarran applied to this Court for an order preventing the taking of any further steps in the ASIC application. This Court refused a stay of the ASIC application and the balance of the cause was remitted to the Federal Court. The Board proceeded to a determination on 23 December 2005. This was adverse to Mr Albarran and, on 3 May 2006, the Board ordered a nine months suspension of his registration.

13 On 21 March 2006, the Full Court heard argument in the Gould proceeding and the Albarran proceeding and, on 19 May 2006, published reasons in support of the conclusion that the exercise by the Board of power under s 1292(2) of the *Corporations Act* does not involve the exercise of the judicial power of the Commonwealth, with the consequence that each proceeding was to be dismissed with costs.

The Board determinations

14 Section 1292(2) provides as follows:

> "The Board may, if it is satisfied on an application by ASIC for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:
>
> (a) the person has:
>
> (i) contravened section 1288; or
>
> (ii) ceased to be resident in Australia; or
>
> (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
>
> (i) the duties of a liquidator; or
>
> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
>
> or is otherwise not a fit and proper person to remain registered as a liquidator;
>
> by order, cancel, or suspend for a specified period, the registration of the person as a liquidator."

15 The determinations by the Board in respect of Mr Gould and Mr Albarran were substantially the same. The Board determined that the registered liquidators in question had failed within the meaning of para (d)(ii) of s 1292(2) to carry out or perform adequately and properly the duties and functions required by Australian law to be

carried out or performed by a registered liquidator. Counsel for Mr Gould, whose submissions in this respect were adopted by counsel for Mr Albarran, submitted that (a) the orders made by the Board involved "in effect" an adjudication of the question whether the respective liquidators had "a right to be registered"; and (b) there were determinations of wrongdoing or impropriety and the imposition of punishment "in the sense of visiting an adverse [and] stigmatising consequence". This combination of the nature of the determinations and the consequences thereof served to characterise what the Board had done as something that could only be done in exercise of the judicial power of the Commonwealth. That submission should be rejected.

The judicial power of the Commonwealth

16 In *Federal Commissioner of Taxation v Munro* (36), Isaacs J instanced a trial for murder as a matter so clearly and distinctively appertaining to the judicial branch of government as to be incapable of exercise by another branch of government. That theme has been taken up in later cases. In *R v Quinn; Ex parte Consolidated Foods Corporation* (37), Jacobs J described the governance of a trial for the determination of criminal guilt as the classic example of a matter for determination by a judiciary independent of the Parliament and the Executive. More broadly, in a well-known passage in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (38), Kitto J emphasised the judicial function in determining a dispute inter partes as to the existence of a right or obligation in law and in applying the law to the facts as determined. These aspects of the judicial power of the Commonwealth will now be considered in turn.

No determination of guilt and no punishment

17 There has been no determination by the Board of whether Mr Gould or Mr Albarran has committed any offence whether under the *Corporations Act* or otherwise. Consideration of *R v White; Ex parte Byrnes* (39) assists an understanding as to why that is the case. In *White*, this Court dealt with the disciplinary structure created by the *Public Service Act 1922* (Cth) and emphasised the distinction between disciplinary proceedings and criminal proceedings; in the former category no offence was specified and no declaration of guilt made. Subsequently, when delivering the advice of the Judicial Committee in *Kariapper v Wijesinha* (40), Sir Douglas Menzies remarked:

"Speaking generally, however, their Lordships would observe that

(36) (1926) 38 CLR 153 at 178.
(37) (1977) 138 CLR 1 at 11. See also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40]; *Luton v Lessels* (2002) 210 CLR 333 at 357-358 [67], 386 [184].
(38) (1970) 123 CLR 361 at 374-375.
(39) (1963) 109 CLR 665.
(40) [1968] AC 717 at 737.

it is not readily to be assumed that disciplinary action, however much it may hurt the individual concerned, is personal and retributive rather than corporate and self-respecting."

18 In construing para (d) of s 1292(2), weight must be given to the introductory but controlling words "to carry out or perform adequately and properly". Of the words "proper" and "adequate" as they appear here, Tamberlin J said in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (41) that they invite:

> "the testing of performance against a relevant standard or benchmark of performance. The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of 'adequacy'. The standard is that the duty must be performed 'properly'."

19 Section 203 of the ASIC Act, in dealing with the composition of the Board, requires that it include members appointed by the Minister from panels nominated by professional accountancy bodies. The section also now requires the appointment of "business members" from among persons the Minister is satisfied are suitable as representatives of the business community by reason of qualifications, knowledge or experience in fields including business or commerce, the administration of companies, financial markets, and financial products and financial services (42).

20 Against that background, in *Dean-Willcocks*, Tamberlin J went on to observe that para (d)(ii) of s 1292(2) (43):

> "is designed to enable a board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out. To assess this, it is permissible, in my view, to have regard to the standards operative in the relevant sphere of activity."

21 That reasoning of Tamberlin J should be accepted as indicative that the function performed by the Board in the present cases was not the ascertainment or enforcement of any existing right or liability in respect of an offence and the punishment for an offence. So, also, should the conclusion expressed by the Full Court in the judgment here under appeal. Their Honours said (44):

> "The function of the Board is not, as was submitted, to find (as an exercise of deciding present rights and obligations in the above sense) whether an offence has been committed and, if so, to inflict a

(41) (2006) 59 ACSR 698 at 710; 24 ACLC 1,412 at 1,417.

(42) This is the result of amendments made to s 203 by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), Sch 1, Pt 8, Items 135, 137. In respect of Mr Gould, the Board was constituted under the unamended legislation; in respect of Mr Albarran, the Board was appointed pursuant to the current provision.

(43) (2006) 59 ACSR 698 at 710; 24 ACLC 1,412 at 1,417.

(44) (2006) 151 FCR 466 at 478.

> punishment therefor. It is, as we have said, to assess whether someone should continue to occupy a statutory position involving skill and probity, in circumstances where (not merely because) the Board is satisfied that the person has failed in the performance of his or her professional duties in the past. Messrs Gould and Albarran say that punishment or a penal or harmful consequence is finally inflicted on the person consequent upon the finding of the committal of an offence prescribed by law. That is not what s 1292(2) says the function of the Board is. It is not, in substance, what the Board does."

22 This construction of para (d) of s 1292(2) is not qualified or displaced by any considerations flowing from the final words in that paragraph "or is otherwise not a fit and proper person to remain registered as a liquidator".

23 In *Hughes and Vale Pty Ltd v New South Wales [No 2]* (45), Dixon CJ, McTiernan and Webb JJ, after saying that the expression "fit and proper person" was familiar as comprising "traditional words" when used with reference to offices and vocations, added that the very purpose of the expression was to give the widest scope for judgment and indeed for rejection; thus, "fit" involved honesty, knowledge and ability. That passage was relied upon by Hill J in *Davies v Australian Securities Commission* (46) when construing an earlier provision drawn in the same terms as s 1292(2) of the *Corporations Act*.

24 Counsel for the Attorney-General in the present appeals correctly submitted that the words "adequately and properly" import notions of judgment by reference to professional standards rather than pure questions of law and that the concluding expression containing the words "otherwise not a fit and proper person" expands or adds to what precedes it but does not draw in a discrete subject matter.

Tasmanian Breweries (47)

25 The purpose or object of the inquiry undertaken by the Board in exercising its power conferred by s 1292(2) is not the ascertainment or enforcement of any existing right or liability in the sense found in the reasoning of Kitto J in *Tasmanian Breweries* (48). We turn to explain why that is so.

26 As a starting point, it should be noted that the determination of legal rights spoken of in the joint judgment of five members of the Court in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (49) as

(45) (1955) 93 CLR 127 at 156. See also *A Solicitor v Council of Law Society (NSW)* (2004) 216 CLR 253 at 261 [3], 267-268 [20]; *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630.
(46) (1995) 59 FCR 221 at 232.
(47) (1970) 123 CLR 361.
(48) (1970) 123 CLR 361 at 374-375.
(49) (1987) 163 CLR 140 at 148.

involving the exercise of the judicial power of the Commonwealth was not limited to matters of criminal responsibility. Their Honours observed (50):

> "A claim for the payment of wages due and payable by an employer to an employee is a claim for the enforcement of an existing legal right. Likewise, a claim for the enforcement of a provision in an award for the payment of wages to an employee is also a claim for the enforcement of an existing legal right. Claims for the enforcement of existing legal rights necessarily invoke the exercise of judicial power."

27 However, later in the same judgment, their Honours added (51):

> "Indeed, a tribunal may find it necessary to form an opinion as to the existing legal rights of the parties as a step in arriving at the ultimate conclusions on which the tribunal bases the making of an award intended to regulate the future rights of the parties: [*R v Gallagher; Ex parte Aberdare Collieries Pty Ltd*] (52). Of course, the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights."

28 The Attorney-General correctly submits that, to the extent that with respect to Mr Gould and Mr Albarran the Board was required to form an opinion as to existing rights, that was no more than a step necessary to its ultimate conclusion. This was whether, in terms of para (d)(ii) of s 1292(2), the performance of duties or functions required by Australian law had been carried out or performed "adequately and properly".

29 Further, the Full Court put the matter correctly when it said (53):

> "If one takes the exercise of power here – that is to terminate or suspend a right or status, created by statute, by reference, in part, to past conduct – it can be readily accepted that a court might do this or an administrative tribunal might do this. This is not a power which is inherently judicial. The character of the Board, the undoubted bringing to bear by the Board of professional standards (with the knowledge of which its members can be taken to be imbued), an absence of an assigned task of deciding a controversy between parties as to the existence or not of present mutual rights and obligations of those parties upon the application of the law to past events, the exercise of an evaluative and discretionary power in the protection of the public as to whether a person is fit and proper to continue to hold a position of importance provided for by the

(50) (1987) 163 CLR 140 at 148 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

(51) (1987) 163 CLR 140 at 149. See also the judgments of the whole Court in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189, and of Mason CJ, Brennan and Toohey JJ, and of Deane, Dawson, Gaudron and McHugh JJ, in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 268 respectively.

(52) (1963) 37 ALJR 40 at 44.

(53) (2006) 151 FCR 466 at 477-478.

statute, all combine to give the conclusion that the conferral on the Board of the power in s 1292 is not judicial."

Historical considerations

30 There are two further submissions to be considered. With an eye to *R v Davison* (54), in the Gould appeal the appellant referred to historical considerations concerning the control and direction of liquidators exercised by the Court of Chancery and its successors. In his general statement of principle in *Tasmanian Breweries* (55), Kitto J put to one side questions of the application of "traditional concepts" as in *Davison*. In their joint judgment in that case, Dixon CJ and McTiernan J referred to the long history of the English law of bankruptcy as showing that (56): "the process by which a compulsory sequestration has been brought about has always been of a description which may properly be called judicial."

31 However, counsel for the Attorney-General correctly emphasised that historical considerations concerning the role of liquidators did not disclose the exercise by the courts of any general role in the exercise of functions of a disciplinary nature such as those performed by the Board. It may also be remarked that in England the Board of Trade was given significant powers to supervise the conduct of liquidators by legislation pre-dating the adoption in Australia of the *Constitution* (57). The reasoning in *Davison* does not assist the appellants.

Laws of domestic and general application

32 In oral submissions, counsel for Mr Albarran sought to develop a determinative distinction for the constitutional purposes of these appeals between laws of domestic and general application. Counsel instanced the jurisdiction of university visitors in England and the position established by decisions including *R v Lord President of the Privy Council; Ex parte Page* (58). In that case, Lord Browne-Wilkinson applied to the University of Hull what his Lordship said the common law for 300 years had recognised, namely, that the decision of the visitor on questions of law and fact was final and conclusive and not to be reviewed by the courts (59). This, counsel now submitted, was an instance of "intramural" or domestic disciplinary arrangements

(54) (1954) 90 CLR 353.
(55) (1970) 123 CLR 361 at 373.
(56) (1954) 90 CLR 353 at 365.
(57) See s 25(1) of the *Companies (Winding up) Act 1890* (UK), which stated: "The Board of Trade shall take cognizance of the conduct of liquidators of companies which are being wound up by order of the court, and in the event of any such liquidator not faithfully performing his duties and duly observing all the requirements imposed on him by statute, rules, or otherwise, with respect to the performance of his duties, or in the event of any complaint being made to the Board by any creditor or contributory in regard thereto, the Board shall inquire into the matter, and take such action thereon as may be deemed expedient."
(58) [1993] AC 682.
(59) [1993] AC 682 at 703.

which did not attract the exercise of judicial power, even by way of judicial review. However, the extent to which the English decisions respecting visitors to universities are applicable in Australasia, where educational structures differ, is unsettled (60). In any event, members of the Board are officers of the Commonwealth and s 75(v) of the *Constitution* itself provides a measure of judicial review.

33 Counsel also referred to the public service regulatory scheme considered in *R v White; Ex parte Byrnes* (61). However, the Court there did not rely on any distinction such as that now sought to be drawn; rather, as mentioned earlier in these reasons, the Court emphasised the differential outcome involved in disciplinary and criminal proceedings.

34 Counsel submitted that, whilst disciplinary arrangements in "domestic areas" such as those considered in *Page* and *White* do not engage the judicial power of the Commonwealth, the contrary is the case where (i) the rules in question are found in a law of "general application" and (ii) punishment is inflicted for breach of such a law. Section 1292 was found in a law of this character and punishment was said to have been inflicted.

35 To this, two things are to be said. First, upon the grounds given earlier in these reasons, no "punishment" in the sense of the authorities dealing with the judicial power of the Commonwealth has been inflicted by the determination and orders made by the Board. Secondly, the suggested discrimen which fixes upon laws of domestic and general application is obscure and, more fundamentally, does not provide an appropriate basis for the distinctions required when construing the phrase "the judicial power of the Commonwealth" in Ch III of the *Constitution*. Rather, as the Attorney-General submitted, the focus in the authorities is upon the manner in which and subject matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes. Examples include *Attorney-General (Cth) v Breckler* (62) and *Luton v Lessels* (63).

Functional analysis

36 Although much attention was given to the matter in argument, there is no occasion here to canvass the line of authorities which establish that there are some powers which appropriately may be treated as administrative when conferred on an administrative body and as judicial when conferred on a federal court or court exercising federal jurisdiction (64). The appellants in these appeals have sought to demonstrate that s 1292(2) of the *Corporations Act* confers upon the

(60) See the Australasian authorities referred to in *Griffith University v Tang* (2005) 221 CLR 99 at 116 [40].
(61) (1963) 109 CLR 665.
(62) (1999) 197 CLR 83.
(63) (2002) 210 CLR 333.
(64) *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12]-[13].

Board not a power of a chameleon-like nature which would take its colour from the administrative nature of the Board, but a power of an essentially judicial character so that the power, to be valid, may be conferred only upon a Ch III court.

Orders

37 Each appeal should be dismissed. The Attorney-General seeks no costs order.

38 KIRBY J. These appeals from a judgment of the Full Court of the Federal Court of Australia (65) concern the meaning of the phrase "the judicial power of the Commonwealth" in s 71 of the *Constitution*.

39 If, by federal legislation, such "judicial power" is to be exercised, it must be vested in a Ch III court. It cannot be vested in a legislative committee (66); nor in an officer, or a tribunal or other body established within the executive government.

40 The Companies Auditors and Liquidators Disciplinary Board (the Board) does not purport to be a Ch III court. Its constitution is provided for in Pt 11 Div 1 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) (67). Its members are "officer[s] of the Commonwealth" for the purposes of s 75(v) of the *Constitution*. The Board and its members are part of the executive. They do not constitute a "court".

41 The issue in these appeals is whether, in determining the challenges brought separately by the two appellants, Mr Richard Albarran and Mr Vanda Gould, the Full Court erred in holding that the Board and its members, in discharging the powers given to them by s 1292(2) of the *Corporations Act 2001* (Cth), were not exercising the judicial power of the Commonwealth (68).

42 The appeals should be dismissed. In my view, the Full Court was correct in its conclusion and in its general approach. A "'functional' analysis" (69) was appropriate to the issues tendered by the parties (70). The Full Court's judgment should be confirmed (71).

The facts and legislation

43 *The facts*: Mr Albarran is a chartered accountant. He was first registered as a company liquidator in 1999 under statutory provisions continued under the *Corporations Act* (72) after that Act commenced in

(65) *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466 (Emmett, Allsop and Graham JJ).
(66) Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910), pp 323-324.
(67) See ASIC Act, s 203, which outlines the membership of the Board.
(68) (2006) 151 FCR 466 at 478 [52].
(69) *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15].
(70) (2006) 151 FCR 466 at 477-478 [46]-[48].
(71) cf reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (joint reasons) at [36].
(72) See *Corporations Act*, ss 1279, 1282. Note *Corporations Law*, ss 1278, 1279, 1282

2001. In January 2005, pursuant to s 1292(2) of the *Corporations Act*, the Australian Securities and Investments Commission (ASIC) applied to the Board for orders cancelling Mr Albarran's registration as a liquidator (73).

44 Originally, ASIC pressed eight contentions against Mr Albarran. Only one (contention 1) was found by the Board to have been established. This alleged that Mr Albarran had participated in a contrived nominee arrangement, the essence of which was that identified persons were appointed to administer a company whilst, in effect, Mr Albarran or his firm performed the functions of administrator and received related payments. ASIC's allegation was that Mr Albarran and any member of his firm were precluded from accepting appointment as administrator because Mr Albarran's firm had a disqualifying conflict of interest. By inference, ASIC's contention was that Mr Albarran continued the arrangement complained of in order to circumvent the disqualification.

45 In December 2005, in respect of the first contention, the Board determined that Mr Albarran had "failed to fulfil his duties under s 1292(2)(d)(ii)" of the *Corporations Act*. The Board ordered that Mr Albarran's registration as a liquidator be suspended for nine months. Pending the outcome of these proceedings, the operation of that order has been stayed by the Administrative Appeals Tribunal (the AAT) (74).

46 Mr Gould was likewise registered as a liquidator. He practised in that capacity, also pursuant to a registration deemed to subsist under the *Corporations Act* (75).

47 The application to the Board in Mr Gould's case was made by ASIC in July 2001. It alleged that he had failed, in a number of respects, to carry out or perform adequately and properly the duties or functions required by law of a registered liquidator.

48 The Board found that some, but not all, of ASIC's contentions against Mr Gould were established. It ordered that his registration as a liquidator be suspended for a period of three months from the coming into effect of its order. That order was also stayed by the AAT, pending the outcome of these proceedings.

49 The foregoing facts cut both ways. On the one hand, they illustrate the serious character of the orders of the Board and the impact that such orders would have, if sustained and given effect, upon the property of each of the appellants, in the sense of their respective entitlements to earn their professional livelihood during the period of

(cont)

(repealed). See also joint reasons at [12].

(73) Mr Albarran subsequently sought a stay of the ASIC application in this Court: see joint reasons at [12].

(74) Under the *Administrative Appeals Tribunal Act 1975* (Cth), s 41(2).

(75) Note that all breaches of duty alleged by ASIC against Mr Gould were said to have occurred prior to the commencement of the *Corporations Act*, thus falling under the *Corporations Law* as then applicable.

suspension. If upheld, they would also impinge on the entitlements of the appellants to enjoy an unblemished reputation amongst chartered accountants and others as persons suitable to be appointed as liquidators of companies (76).

50 On the other hand, the facts illustrate the way in which the Board's functions are performed within the comprehensive legislative scheme established by the *Corporations Act*. It is that Act that now provides the legal authority (registration) for persons to act as company liquidators and upholds the standards required of that office as an incident of registration. The Act does this, amongst other ways, by suspension of registration for a specified period for a proved failure to carry out or perform, adequately and properly, the duties or functions of the office. The provisions play an integral part in the maintenance of high standards in the governance of corporations in Australia and the administration of those corporations during winding up.

51 Other facts relevant to the appeals are set out in the reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (the joint reasons) (77). None of the facts was contested in the appeals.

52 *The legislation*: The provisions of s 1292(2) of the *Corporations Act* are also set out in the joint reasons (78). So too is a description of the provisions of s 203 of the ASIC Act, explaining the past and present requirements for the composition of the Board so that it includes persons with relevant accounting and business experience (79).

53 Self-evidently, the object of constituting the Board in this way was to ensure that the body determining the contentions of ASIC, presented by its applications to the Board, could do so with full knowledge of ordinary practice and with sensitivity to proper professional standards. Inferentially, the object included the avoidance of the necessity to prove all the details of such practice and standards that might have been required in the case of a non-expert generalist court.

54 Once again, provisions of this kind cut both ways. On the one hand, they ensure that the decision-maker is aware of any relevant practicalities that may arise in company liquidations, so that attention is not solely paid to the letter of the law. On the other hand, the common assumptions and expectations of specialists can sometimes demand standards not readily apparent to an untutored eye, informed

(76) See International Covenant on Economic, Social and Cultural Rights (ICESCR), Art 6 (right to work); International Covenant on Civil and Political Rights (ICCPR), Art 17 (right to reputation). The ICCPR and ICESCR were adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) on 16 December 1966. The ICCPR entered into force generally on 23 March 1976 in accordance with Art 49 and entered into force in Australia on 13 November 1980: [1980] ATS 23. The ICESCR entered into force generally on 3 January 1976 in accordance with Art 27 and entered into force in Australia on 10 March 1976: [1976] ATS 5.

(77) Joint reasons at [10]-[15].

(78) Joint reasons at [14].

(79) Joint reasons at [19].

only by a legislative text. Occasionally, they may be more demanding although not spelt out in a normative way.

The reason for separating judicial power

55 *The basic requirement*: The appellants' argument that orders of the kind made against them could not be made by a body such as the Board, but only by a Ch III court, involved the assertion that, in Australia, under federal legislation, some governmental functions can only be performed by "courts" (80).

56 In the past, this argument was advanced largely by reference to verbal analysis of the phrase "the judicial power of the Commonwealth" in s 71 of the *Constitution*. However, especially in more recent decades, with the expansion of the modern regulatory state, a verbal analysis would only take the decision-maker so far.

57 Given the rapid expansion of the number, type and variety of decisions that have to be made under federal legislation, often having deleterious consequences for natural or legal persons, it is necessary to have some concept of the decision-making functions that, of their character, are reserved to courts, so as to distinguish them from those that are not. To identify those functions, it may be useful, though not determinative, to have regard to considerations of history, analysis of typical judicial activities and an understanding of the reasons given by this Court in deciding such questions in the past.

58 The starting point for answering a challenge of the type brought by the appellants is a recollection of the fundamental purpose (or function) of this feature of the *Australian Constitution* and of the doctrine of the separation of powers that has been found within it (81). Why is it inherent in the *Constitution* that "the judicial power of the Commonwealth" *must* only be vested in Ch III courts? Why *must* that power not be intermingled with judicial and non-judicial functions (82)? Why is the performance of some functions consistent with the exercise of judicial power as well as the exercise of non-judicial power so that they may, at the option of the Parliament, be exercised by a Ch III court or by an executive body or even by both alternatively or consecutively (83)?

59 *The rationale of separation*: To answer these questions, it is necessary to return to the purpose of this aspect of the separation of powers doctrine, as it appears from the text and structure of the *Constitution* and as it has been expounded by this Court. What is involved is not simply a matter of words. At the heart of the requirement is a notion of the type of governance established by the

(80) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296.
(81) See *Constitution*, ss 1, 61, 71; *Boilermakers* (1956) 94 CLR 254 at 275-276.
(82) See *Boilermakers* (1956) 94 CLR 254 at 296.
(83) See *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 95; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 6, 9-12; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 126-127 [83]-[84].

Constitution and a belief that such governance is best, or only, secured by keeping the Judicature, provided for in Ch III, separate from the other governmental powers in the nation.

60 The language of the *Constitution* alone might perhaps have permitted a less rigid separation of powers doctrine to emerge. Thus, the separate treatment of Ch III in the text of the *Constitution* might have been treated as nothing more than a convenient drafting device (84). The importation of American rigidities might have been rejected as unsuitable to the *Australian Constitution* where the executive is intended to sit in Parliament, thereby making a strict separation of the three branches of government impossible (85). Alternatively, any rigid theory might have been confined to this Court and held inapplicable to other Ch III courts because this Court alone is identified by name in s 71 of the *Constitution* and arguably has special needs for insulation from other governmental pressures or influences in order to discharge its vital federal role (86). Perhaps the language of s 71 might have been construed as non-exhaustive of the deployment of federal judicial power (87). Or more "exceptions" might have been acknowledged to the exclusive vesting of federal judicial power in Ch III courts (88), so as to cast doubt on the principle of strictly separating "the judicial power of the Commonwealth".

61 Instead of taking any of the above approaches, this Court adopted a strict view. In part, this was done because of the perceived requirements of the language and structure of the *Constitution*. But that textual analysis has been reinforced by identified requirements of abiding constitutional principle.

62 The governing principle can be traced to concepts expounded in Alexander Hamilton's views (89) concerning the special need in a federation to have a branch of government, the judiciary, which was insulated from the other branches of government so as to be able to perform the functions essential to its purposes (90). Hamilton considered the independence of the judiciary from the other arms of

(84) Wheeler, "The *Boilermakers* Case", in Lee and Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, at pp 161-162, citing Garran, *Prosper the Commonwealth* (1958), p 194.

(85) *Constitution*, s 64.

(86) Zines, *The High Court and the Constitution*, 4th ed (1997), pp 212-213.

(87) See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 604-611 [197]-[210]; *Ruhani v Director of Police* (2005) 222 CLR 489 at 545-550 [173]-[191].

(88) Such as those so far allowed under the defence power (s 51(vi)) or the territories power (s 122). See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540-541; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 333 [11], 348 [63]; cf at 378 [143].

(89) Reproduced in Hamilton, Madison and Jay, *The Federalist or, The New Constitution* (1911), p 396: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution … Without this, all the reservations of particular rights or privileges would amount to nothing."

(90) *Principality of Monaco v Mississippi* (1934) 292 US 313 at 322-323.

government essential to ensure impartial decision-making in those matters where, otherwise, there was a risk of encroachment and partiality in the administration of federal laws affecting such matters as the "life, liberty or property" (91) of those who are subject to such laws.

63 It is as well to recall the explanations for the functional separation, and guaranteed exclusivity, of Ch III courts when judging challenges like the present, arising in new legislative circumstances. Simply to apply passages from reasons in a few earlier cases by analogy or to pluck sentences and phrases from the opinions of our predecessors, is to risk losing one's constitutional bearings. Alternatively, it is to succumb, in effect, to a "vibes" approach to constitutional adjudication (92). It may overlook the importance of the constitutional design as a protection for the "basic legal rights" secured by that design (93).

64 In upholding a rule of strictness expressed by this Court in this context (94), the Privy Council explained in 1957 (95):

> "[I]n a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."

65 A decade after those words were written, in *Liyanage v The Queen* (96), an appeal from Ceylon, the Privy Council wrote in similar, even stronger, language. Their Lordships identified dangers that exist in any country where other branches of government sometimes seek to bypass or encroach upon the independent and impartial courts. Doing so threatens to deprive those subject to the law in that country of the special characteristics typical of the exercise of judicial power in the courts. The Privy Council explained (97):

> "[I]n their Lordships' view … there exists a separate power in the judicature which under the *Constitution* as it stands cannot be usurped or infringed by the executive or the legislature.
>
> …
>
> [T]heir Lordships are not prepared to hold that every enactment … which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it

(91) *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; cf *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 469-470 per Isaacs and Rich JJ.

(92) See Israel, Handsley and Davis, "'It's the Vibe': Fostering Student Collaborative Learning in Constitutional Law in Australia", *Law Teacher*, vol 38 (2004) 1.

(93) *Quinn* (1977) 138 CLR 1 at 11-12 per Jacobs J.

(94) *Boilermakers* (1956) 94 CLR 254 at 267-268, 275-276, 295-296.

(95) *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 540-541; [1957] AC 288 at 315.

(96) [1967] 1 AC 259.

(97) [1967] 1 AC 259 at 289-290.

> necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence … of [any] common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

66 *Liyanage* was an extreme case. It was judged to be akin to taking judicial power "out of the hands of the judges" (98). However, the Privy Council's warning was that the erosion of the "judicial power" and its "usurpation" by the other branches of government infringed the basic constitutional design of Ceylon because it undermined the assignment of the "judicial power" to a special class of public officials, namely the judges, who operate in a particular and public way, with guaranteed protection against interference and retaliation. They are the officials who are protected by tenure, remuneration, appellate and other procedures of review, as well as by convention and long tradition, against the power, influence, opinions and potential partiality of other public office-holders, operating in the other branches of government.

67 The essential reason behind the separation of powers doctrine as it applies to the judiciary is as true today as it was when the Privy Council's words were written. What was said in respect of the *Constitution of Ceylon* applies with equal or even greater force in respect of the Australian Commonwealth because our *Constitution* is older and, in respect of the judicial branch, was consciously modelled on that of the United States of America. If anything, the growth of the modern regulatory state (99), and of powerful and opinionated officials in the executive government answerable to political ministers, has increased and not diminished the importance of safeguarding this separation.

68 However, the difficulty remains one of distinguishing the functions that may only be vested in Ch III courts from those that need not be. Like the Privy Council in *Liyanage* (100), this Court has found it impossible to identify in a universally applicable formula exactly "where the line is to be drawn" (101). Yet saying that each case must be decided only on its own facts, or resolving challenges such as the present only by factual analogies with past decisions involving different legislation, risks performing this Court's function in a constitutional vacuum and in an unconvincing and unsatisfying way.

69 *Desirability of predictable criteria*: Criticism of this Court's decisions on the issue of principle presented by these appeals suggests

(98) [1967] 1 AC 259 at 291.
(99) Joint reasons at [19].
(100) [1967] 1 AC 259 at 289-290.
(101) See *Breckler* (1999) 197 CLR 83 at 113-114 [53], 124-126 [78]-[81].

that they have lacked a coherent doctrine (102); deployed criteria that are difficult to predict (103); and embraced overly fine distinctions (104) that cannot easily be traced to an identified principle or policy (105). It is said that this has resulted in ad hoc determinations that lack a consistent rule.

70 The strongest criticism in this regard has been reserved for the so-called "chameleon" (106) principle of "innominate" (107) functions (108). By this principle, it has been accepted that a parliamentary assignment of a particular function may, in certain instances (109), colour the constitutional characterisation of the exercise of that function. If it were left uncontrolled, this principle could have a tendency to subvert the constitutional separation of powers (110). It could encourage the notion that, effectively, it is for the Parliament, and not the courts, to draw the constitutional line.

71 Yet, this has never been the way that I have understood the "chameleon" principle to apply (111). In every case, it is for the courts (ultimately this Court) to characterise the federal law in question and to decide whether it involves the vesting of federal judicial power in an impermissible repository. If it does, by s 71 of the *Constitution*, such an assignment is invalid. The power in question must be vested in a Ch III court and not elsewhere.

72 The appellants were too prudent to call to notice the criticisms of this aspect of the Court's constitutional jurisprudence (112). However, if it is the case that no exhaustive definition can be provided for the

(102) Ratnapala, *Australian Constitutional Law: Foundations and Theory*, 2nd ed (2007), pp 124, 129.

(103) Williams, "Commentary", in Stone and Williams (eds), *The High Court at the Crossroads* (2000) 178, at p 179.

(104) Williams, p 181; Perry, "Chapter III and the Powers of Non-Judicial Tribunals: Breckler and Beyond", in Stone and Williams (eds), *The High Court at the Crossroads* (2000) 148, at p 177.

(105) Ratnapala, p 143.

(106) *Quinn* (1977) 138 CLR 1 at 18 per Aickin J.

(107) See Ratnapala, pp 136-147.

(108) Starting with the reasons of Isaacs J in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176-180. See also *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, 631-632; *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320-321; cf Sawer, "Judicial Power Under the Constitution", in Else-Mitchell (ed), *Essays on the Australian Constitution*, 2nd ed (1961), p 71; Lane, "The Decline of the Boilermakers Separation of Powers Doctrine", *Australian Law Journal*, vol 55 (1981) 6; Gibbs, "The Separation of Powers – A Comparison", *Federal Law Review*, vol 17 (1987) 151, at pp 157-159; de Meyrick, "Whatever Happened to Boilermakers? Part I", *Australian Law Journal*, vol 69 (1995) 106, at p 119.

(109) These instances are described by Kitto J in *Spicer* (1957) 100 CLR 277 at 305.

(110) Ratnapala, pp 132-133, 135.

(111) *Pasini v United Mexican States* (2002) 209 CLR 246 at 268-269 [62], 271-272 [71].

(112) See Lane's description of the reasoning as "formulary": Lane, *Some Principles and Sources of Australian Constitutional Law* (1964), pp 114-115.

phrase "the judicial power of the Commonwealth" (113) and if future attempted definitions are likely to be no more successful or universal than those offered in the past (114), this does not mean that the issue is left entirely at large.

73 The Court's decisions afford a general description of what is involved in "judicial power" (115). However, the phrase "the judicial power of the Commonwealth" in s 71 involves a narrowing of that notion because of other provisions in the constitutional text, most notably the requirement that there must be a "matter" (116) for every exercise of federal judicial power. This requirement, in turn, reserves that "power" to the determination of controversies by the application of legal norms. Under current doctrine, it excludes purely advisory or hypothetical decision-making by Ch III courts pursuant to federal legislation (117). It also excludes participation by such courts (or by serving judges of federal courts) in the investigation of crime (118). It forbids the provision of non-binding advice to the executive, effectively as part of executive government operations (119).

74 Identifying the functions that are alien to federal judicial power, which *cannot* be vested in a Ch III court by federal law, is simpler than identifying the functions that *must* be so vested. Yet that is the issue ultimately presented by these appeals. So why did the appellants submit that the decision committed by the *Corporations Act* to the Board fell outside the "innominate" functions that might be performed, pursuant to federal law, by an executive body or by the judiciary or by both (as the Parliament, according to its decision, pleased)? Why did the appellants contend that the functions committed to the Board under s 1292(2) of the *Corporations Act* were, of their nature, *required* to be vested in a Ch III court?

75 The formal answer to these questions is that the appellants argued that vesting in a court was what was required by the *Constitution* because the powers appearing in s 1292(2) comprised part of "the judicial power of the Commonwealth". However, when pressed for further elaboration, the reasons offered by the appellants were that, on balance, by reference to considerations of history, practical effect, normative function and intended operation, the powers conferred by

(113) *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, 396; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267-268.

(114) Jackson, "The Australian Judicial System: Judicial Power of the Commonwealth", *University of New South Wales Law Journal*, vol 24 (2001) 737, at p 743.

(115) See esp *Huddart, Parker* (1909) 8 CLR 330 at 357.

(116) *Constitution*, ss 75, 76 and 77.

(117) *South Australia v Victoria* (1911) 12 CLR 667 at 674-675, 715; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

(118) *Hilton v Wells* (1985) 157 CLR 57 at 72-73.

(119) *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 16, 25; cf at 47-48.

s 1292(2) were properly to be characterised as part of "the judicial power of the Commonwealth". They were powers that properly belonged to the Judicature alone. They were thus invalidly vested in the Board because it was not part of the Judicature. Its orders concerning the appellants' status as registered liquidators were therefore invalid. The appellants asked this Court to so declare and to relieve them of the Board's orders.

The appellants' arguments

76 *A functional approach*: The parties involved in these appeals tackled the issues before this Court by way of a "functional analysis" (120) of the powers enlivened by s 1292(2) of the *Corporations Act*. In these proceedings, it would be difficult to undertake a sensible examination of the questions to be decided in any other way. Evaluating the criteria for the presence of "the judicial power of the Commonwealth" cannot be undertaken in a vacuum, divorced from considerations of constitutional principle and policy. It is necessary to have some conception of the "functions" of courts which particular criteria may suggest to be exclusive, or non-exclusive, to such bodies.

77 Both in his written and oral submissions, Mr Gould acknowledged that cases such as his case presented questions of degree (121). The Court was therefore involved in the drawing of a "line". He submitted that, in the present instance, s 1292(2) fell on the wrong side of the line. He did not suggest that any feature of that sub-section conclusively demonstrated that it involved an exercise of federal judicial power. Nor did he argue that the Board's functions lacked any features apt to the exercise of administrative, as distinct from judicial, power. He simply submitted that the combination of functions reposed in the Board disclosed an exercise of the judicial power of the Commonwealth which was therefore impermissibly assigned to the Board, a body other than a Ch III court.

78 It would not be correct to say that the "chameleon" principle was missing from the arguments of the parties. It was expressly acknowledged by Mr Gould. It was certainly relied on by the Commonwealth (122). It is undesirable to attempt a checklist of criteria for the existence of federal judicial power which is divorced from a notion about the essential functions reserved to the exercise of that power (123). A conception of those functions provides the glue that holds together particular characteristics, detected in past cases.

(120) cf joint reasons at [36].

(121) [2007] HCATrans 005, pp 867, 878-879. Mr Albarran did not refer to "functional analysis" in his submissions. However, I agree with the Attorney-General's submission that it was implicit in his argument.

(122) [2007] HCATrans 005, pp 2361-2363, 2915-2920, 3163-3172.

(123) *Breckler* (1999) 197 CLR 83 at 125 [79].

79 Having said this, what are the features of the power conferred by s 1292(2) relied on by the appellants to establish that those functions belonged exclusively to the federal judicial power and thus could not be vested in the Board?

80 *Historical considerations*: Mr Gould pointed out that company liquidators have existed in our legal tradition since the company law reforms in the United Kingdom in the mid-nineteenth century. Initially, *The Joint Stock Companies Winding-up Act 1848* (UK) provided for the Master of the Court of Chancery to appoint a person or persons to be the official manager or managers of a company undergoing winding up (s 22). The appointee or appointees were subject to judicial supervision and removal for cause. When, following *The Joint Stock Companies Act 1856* (UK), provision was made for "liquidators" to be involved in the winding up of the affairs of a company and an "official liquidator" was appointed by the Court on a compulsory winding up, those officers also acted under the control and direction of the Court (124).

81 Of their nature, from the start, company liquidators had functions of high responsibility. They bore a fiduciary character and, in some respects, they were quasi-judicial. The appellants argued that, as a matter of history, the adjudication of the question of whether a liquidator should be removed from office in a particular winding up was traditionally reserved to, and determined by, a court. To the extent that it is relevant to examine considerations of history in deciding whether a function is, or is not, exclusively "judicial", the history of company liquidators, dating back to the origin of that office in our legal tradition, was said to support judicial and not administrative supervision.

82 Of course, history did not stand still when the *Constitution* was adopted. The regulation of corporations expanded greatly throughout the twentieth century. It did so out of a recognition of the growing role that corporations came to play in the economy of the nation and of the world (125). Such recognition, partly in response to corporate failures and losses to shareholders, creditors, employees and others, produced much more detailed regulation of corporations before, but particularly after, the 1990s (126). Nevertheless, the traditional relationship between liquidators and courts indicated (as the Commonwealth conceded) that the regulation and discipline of liquidators could, as in early history, have been assigned to a court. That left open the question whether it *must* be so assigned in order to conform to the Australian constitutional design.

(124) See ss 88-93. See also *Companies Act 1874* (NSW), ss 151-156.

(125) *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 116-121 [183]-[196], 206 [484]-[485].

(126) *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 170-177 [102]-[120].

83 *Features of punishment*: The appellants' central contention was that amongst the functions reserved exclusively to courts were those concerned with punishment: in other words, a determination of wrong-doing of a public nature (127), in consequence of which a sanction is imposed on a person to indicate the established wrong-doing and to provide deterrence to others by virtue of the sanction in the particular case.

84 The Commonwealth accepted as "undoubtedly true" that "the adjudgment and punishment of criminal guilt under a law of the Commonwealth" was "exclusively judicial" (128). However, the appellants contested any sharp distinction between the operation of criminal punishment and professional discipline. They submitted that the question of whether a particular order was punitive, so as to be reserved to a Ch III court, was not to be decided merely by reference to the nomenclature adopted by the Parliament. Thus, the proliferation of "civil penalties" would not necessarily escape the constitutional requirement that punishment of a public nature under federal law must be reserved to judicial determination and orders.

85 Nor did the appellants accept a strict dichotomy between "punitive" and "disciplinary" provisions. Although a law might answer to the description of "disciplinary", in the federal context, it might also involve the infliction of public punishment reserved to judicial determination and judgment. In support of this dual characterisation of disciplinary provisions, both appellants invoked what was said by five members of this Court in *Rich v Australian Securities and Investments Commission* (129). Although expressed in a different legal context, the observations of the Court in that case are not to be denied. In truth, they are self-evident:

> "[T]he supposed distinction between 'punitive' and 'protective' proceedings or orders suffers the same difficulties as attempting to classify all proceedings as either civil or criminal. At best, the distinction between 'punitive' and 'protective' is elusive. That point is readily illustrated when it is recalled that … account must be taken in sentencing a criminal offender of the need to protect society, deter both the offender and others, to exact retribution and to promote reform."

86 Adapting those words to the present context, the appellants submitted that the orders made by the Board in relation to each of them constituted a public punishment. The orders impinged substantially on their economic freedom, particularly their capacity to earn their livelihood. The orders also diminished their reputations (130). In these

(127) *R v Wigglesworth* [1987] 2 SCR 541 at 560.

(128) Citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

(129) (2004) 220 CLR 129 at 145 [32] (footnotes omitted).

(130) Although ordinarily hearings take place in private, a person entitled to appear at a hearing may request that the hearing take place in public: see ASIC Act, s 216(2),

circumstances, the appellants contended that a classification that characterised such orders as "non-punitive", simply because they were also disciplinary or regulatory, involved embracing a fiction that was inimical to the text and purposes of the *Constitution*.

87 *Normative functions*: Many of the appellants' arguments were addressed to the nature of the functions to be performed by the Board as expressed in s 1292(2). The appellants submitted that inclusion of the adverbs "adequately" and "properly" in para (d) of that sub-section did not deprive the function of a normative legal content. Certainly, many functions vested in Ch III courts under federal legislation are expressed in similarly broad language. Such expressions as "fairly based" in the *Patents Act 1990* (Cth) (131), "harsh, unjust or unreasonable" in the *Industrial Relations Act 1988* (Cth) (132) and "reasonably related" in the *Civil Aviation Act 1988* (Cth) (133) are just three recent instances that spring to mind.

88 *Intended operation*: Finally, the appellants argued, as they had to, that there was no particular need for a specialist body, including professional or business personnel, to discharge the functions assigned to the Board under s 1292(2) of the *Corporations Act*. The appellants pointed out that the words "fit and proper person" were familiar ones in the context of the ethics and competence of businesses, trades and professions (134). They were well known to courts. The functions were proper to be discharged by courts.

89 So much may be granted. However, the question remains whether, when provided as criteria by federal law, particularly in conjunction with the reference in s 1292(2) to the performance of liquidators' duties "adequately and properly", the functions are such that they necessarily involve the exercise of "the judicial power of the Commonwealth" and thus *must* be vested only in Ch III courts. Or may such powers equally be deployed as the Parliament has here chosen to do?

The appellants' arguments are rejected

90 *Disposing of the arguments*: The appellants' arguments are not persuasive in this instance. Neither separately, nor together, do they constitute a case for confining to Ch III courts the powers exercised by the Board under s 1292(2).

(cont)

(3). Even if the hearing is conducted in private, any orders made by the Board under s 1292 of the *Corporations Act* are published in the *Gazette* pursuant to s 1296 of that Act.

(131) See *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274.

(132) See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

(133) See *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133.

(134) *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 156-157.

91 So far as history is concerned, as the Full Court pointed out, the origin of the present federal legislative regime for the registration of auditors and liquidators may be traced to the Uniform Companies Acts of 1961. For example, s 9(8) of the *Companies Act 1961* (NSW) provided: "[a]ny registered company auditor may apply to the [Companies Auditors Board] for registration as a liquidator." Thereupon, if satisfied about the applicant's "experience and capacity", the Companies Auditors Board was required, on tender of the prescribed fee, to register the person as a registered liquidator (135).

92 Irrespective of the early provisions for acting as a company liquidator in the United Kingdom and Australia, and their origins, once registration as an office-holder was introduced into statute law (136), such registration became a prerequisite to performing the duties. The entitlement to act as a liquidator was not at large. Appointment was not granted by a court ad hoc subject to the court's discipline and supervision (137). Regulation of appointments was no longer discharged simply by the application of the general law of fiduciary duties (138). The position comprised a statutory office, created by legislation ultimately applicable throughout Australia. Moreover, the appointment and retention of registration was subject to investigation as required. On proof of discreditable or incompetent performance, registered liquidators were subject to sanctions. Initially, those sanctions included admonishment or reprimand; requirement to pay the costs of an inquiry; requirement to give undertakings; imposition of a fine; suspension of registration for a period not exceeding one year; or cancellation of registration and removal of a name from the register (139).

93 When, in 1991, the *Corporations Law* came into operation, the State and Territory disciplinary boards were replaced by a single national board constituted under Pt 11 of the *Australian Securities Commission Act 1989* (Cth). Registration remained a prerequisite to the lawful performance of the functions of a liquidator. The only change of substance introduced by the federal Act was the deletion of the power to impose fines or penalties. That deletion was continued in the present *Corporations Act* (140).

94 The history of the determination of earlier legal controversies, factually similar and apparently analogous to a later controversy, can sometimes be useful as indicating a function which, by the *Constitution*, is reserved, in the case of federal law, to the necessary exercise of the judicial power. Thus, the Commonwealth conceded that

(135) *Companies Act 1961* (NSW), s 9(8).
(136) See, eg, *Companies Act 1936* (NSW), s 228(1): "A liquidator appointed by the court may resign or, on cause shown, be removed by the court."
(137) cf *In re George A Bond and Co Ltd* (1932) 32 SR (NSW) 301 at 310.
(138) cf *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 599.
(139) *Companies Act 1961* (NSW), s 9(12).
(140) See (2006) 151 FCR 466 at 474 [31]-[34].

under federal law, the adjudication of criminal guilt; the determination of liability under the laws of contracts, tort and trusts (141); the imposition of fines; and possibly the contested dissolution of a marriage would comprise a (non-exhaustive) list of functions reserved exclusively to Ch III courts (142). In its submission, the powers conferred on the Board by s 1292(2) fell outside any of these "core", or historical, categories.

95 Considerations of the history of Australian companies legislation also tell against the appellants. Once the growth of the economy and its necessities suggested the need for a more systematic and detailed regulation of company liquidators by procedures involving registration (a proper matter for administration) (143), the establishment of professional disciplinary boards to supervise such registration became a logical and natural development. It might not have been the only way to provide discipline for company liquidators. No doubt courts might have been deployed. However, it offered advantages over the courts of cost saving, speed, flexibility and specialist knowledge. It also offered less publicity and less formality than court proceedings tend to entail. When the Board was established as a federal body, with disciplinary powers, considerations of history did not *oblige* a different institutional arrangement.

96 When other disciplinary legislation in the federal context accepted by this Court is remembered (144), the character of s 1292(2) may be even better understood. Whilst it is true, from the point of view of persons such as the appellants, that an order by the Board suspending their registration as a liquidator for a specified period would doubtless seem to be a kind of public punishment for past conduct judged by the Board to be in breach of the sub-section, on analysis, that is not the true legal character and function of that order (145). Legally and functionally, the purpose of the provision is to uphold the standards of registered liquidators; to ensure their compliance with an adequate and proper performance of the duties imposed on company liquidators; to protect company shareholders, creditors, officers and employees, and the public; and to uphold professional and business expectations in that regard. I agree with the analysis in the joint reasons both as to the function which the Board performs and as to the interpretation of

(141) cf *Bachrach* (1998) 195 CLR 547 at 562 [15], referring to *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 706; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269.

(142) [2007] HCATrans 005, pp 2580, 3036-3038. See also pp 3356-3360.

(143) A system of licensing or registration of company liquidators was first introduced in Australia by the *Companies Act 1934* (SA), s 371 and the *Companies Act 1943* (WA), ss 402, 406.

(144) See, eg, *R v White; Ex parte Byrnes* (1963) 109 CLR 665; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 380-381.

(145) *Southern Law Society v Westbrook* (1910) 10 CLR 609 at 625; *Kariapper v Wijesinha* [1968] AC 717 at 737 (PC); *R v Wigglesworth* [1987] 2 SCR 541 at 549.

s 1292(2) (146). I also agree with what is said there concerning intramural or domestic disciplinary arrangements (147).

97 It follows that the Board is not engaged in the adjudication or determination of guilt, still less of criminal guilt, or in the imposition of punishment, as such. Nor, having regard to the broad terms of s 1292(2) and the composition of the Board, is it apt to say that the Board is engaged in the enforcement of existing legal rights and duties (148). On the contrary, the broad language of the Board's remit invokes the exercise of statutory powers expressed in wide, and deliberately expansive, terms. Doubtless those terms were chosen in the knowledge that the Board, to which the evaluative determination and action was committed, was constituted so as to include members with particular backgrounds and experience, and was not confined to generalist judges. All of these considerations combine to support the rejection of the appellants' arguments that the functions of the Board were such that the *Constitution* required that they be vested in a Ch III court.

98 *A functional check*: When the foregoing conclusion is reached, it is appropriate to look back and to check it against the basic objective, reflected in the *Constitution*, of reserving the exercise of federal judicial power (properly understood) to Ch III courts. In *R v Quinn; Ex parte Consolidated Foods Corporation*, Jacobs J described the function to be served by this reservation in these terms (149):

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our *Constitution* to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

99 His Honour further expressed the view that "there are a multitude of such instances" (150). In his opinion, they were concerned with the determination of what he called "basic legal rights" (151). Various questions have arisen in respect of particular, traditionally judicial, functions, such as punishment for contempt, enforcement of orders in

(146) Joint reasons at [17]-[24].
(147) Joint reasons at [32]-[35].
(148) *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 663-664.
(149) (1977) 138 CLR 1 at 11.
(150) (1977) 138 CLR 1 at 11.
(151) (1977) 138 CLR 1 at 12.

the nature of mandamus, or the grant of injunctions (152). Whilst it would be contrary to the nature of the constitutional source to close the list or to determine its contents solely by reference to history, it is unconvincing to assert, as the appellants did, that the orders made in their cases required the intervention of courts as "the bulwark of freedom" for the protection of what have been traditionally regarded as "basic legal rights". A decision adverse to the appellants in these appeals cannot therefore be regarded as condoning an intrusion by other governmental powers into the essential functions of Ch III courts, which the separation of powers doctrine is basically designed to prevent (153).

100 On the contrary, what is involved in the appellants' cases is no more than the operation of a disciplinary scheme designed ultimately to uphold standards of integrity and competence in the liquidation of companies. Such a disciplinary scheme involves functions apt to an administrative body. The Board is thus an unremarkable disciplinary institution which, for functional reasons, includes relevant professional and business expertise. The Board cannot enforce its own decisions and its decisions are subject to facilities of administrative review (154) of which the appellants have availed themselves (155).

101 Structured in a slightly different way, similar functions might possibly have been vested in a Ch III court. But the functions vested in the Board were not of such a character that they required judicial performance.

Conclusion and order

102 It follows that the appellants' challenges to the constitutional validity of s 1292(2) of the *Corporations Act* were rightly dismissed by the Full Court, substantially for the reasons that it gave. As the joint reasons propose, each appeal should be dismissed.

In each matter, the appeal is dismissed

Solicitors for the appellant Albarran, *NOT Lawyers*.

Solicitors for the appellant Gould, *Henry Davis York*.

Solicitor for the respondent Board, *Australian Government Solicitor*.

CL

(152) Lane, *The Australian Federal System*, 2nd ed (1979), pp 439-440; Ratnapala, p 140; cf *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 at 630-631, 638-639, 649-650.

(153) The intrusion into the capacities of another constitutional branch of government appears to be the present criterion of the Supreme Court of the United States: *District of Columbia Court of Appeals v Feldman* (1983) 460 US 462 at 479.

(154) See joint reasons at [32].

(155) cf *Breckler* (1999) 197 CLR 83 at 111-112 [46]-[47], 132-134 [97]-[101]; *Luton v Lessels* (2002) 210 CLR 333 at 346 [24], 360 [76], 374-375 [127]-[128].