A COMMENT ON JUSTICE MALCOLM WALLIS'S PAPER, "JUDGES AS EMPLOYEES", JCA COLLOQUIUM, FREMANTLE, SATURDAY, 6 OCTOBER 2012, 10.30 AM – 12 NOON

In commenting on Justice Malcolm Wallis's thought-provoking presentation I will refer primarily to the position in Queensland without reference to Ch III of the Commonwealth Constitution, simply to provide an Australian yardstick from which to begin discussion.

As Justice Wallis noted, Chief Justice Mason and Justices Brennan, Deane, Toohey, Gaudron and McHugh unequivocally stated in *Re Australian Education Union; ex parte Victoria*:[1] "Ministers and judges are not employees of a State." More recently, Chief Justice Gleeson repeated that statement in *Austin v The Commonwealth*.[2] We have neither France's judicial trade unions (and, no, the JCA is not in that category), nor England and Wales' part-time recorders like Dermot O'Brien QC,[3] and the European Court of Justice[4] with which to contend. But as Chief Justice Marilyn Warren pointed out earlier, we do have a range of different challenges. And we do have acting judicial officers.

Judicial independence and the separation of powers underpin democracy in Queensland. The Preamble to Queensland's Constitution enacted only in 2001 includes:

"The people of Queensland, free and equal citizens of Australia –

(a) intend through this Constitution to foster the peace, welfare and good government of Queensland; and

(b) adopt a principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution; and

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1 (1995) 184 CLR 188, 233.

2 215 CLR 185, [25].

3 *O'Brien v Minister of Justice* [2010] UKSC 34; (2010) 4 All ER 62 (SC).

4 Opinion of Advocate General Kokott, para 28 available at: http://csdle.lex.unict.it/Archive/LW/EU%20social%20law/EU%20case-law/Opinions/20120214-105335_Conc_C_393_10enpdf.pdf.

(f) resolve … to … build a society based on democracy … ."

Chapter 2 of our Constitution deals with Parliament; chapter 3 with the Governor and executive government; and chapter 4 with Courts, that is, Queensland's Supreme and District Court. As in South Africa, there are significant differences between Queensland's magistrates and District and Supreme Court judges, although, as the JCA recognises, our commonalities are far greater than our differences. Judicial independence and the separation of powers are critical concepts to every judicial officer.

Queensland's Constitution provides for the Governor in Council, by commission, to appoint a barrister or solicitor of the Supreme Court of at least five years standing as a judge.[5] Unlike South Africa and many other jurisdictions, there is no Judicial Appointments Commission in Queensland. The practice is that the Attorney-General of the day consults with knowledgeable others, including, but not limited to, the head of the jurisdiction to which the judicial officer is to be appointed, and the Presidents of the Bar Association of Queensland and the Queensland Law Society. The Governor appoints judges on the recommendation of Cabinet, informed by the Attorney-General. Although this system has its difficulties, it is democratic. The Attorney and other cabinet ministers are members of parliament, accountable to their electors for their judicial appointments. A judge must take the oaths or affirmations of allegiance and of office.[6] Independence is central to the latter. Every judge swears or affirms to:

"at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of [the judge's] knowledge and ability without fear favour or affection."[7]

A judge holds judicial office indefinitely during good behaviour,[8] but must retire at 70.[9] A judge may resign by giving written notice to the Governor.[10] As Chief

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5 Constitution of Queensland Act 2001, s 59(1).
6 Above, s 59(2).
7 Constitution of Queensland Act 2001, Sch 1.
8 Constitution of Queensland Act 2001, s 60(1).
9 *Supreme Court of Queensland Act* 1991, s 21(1) and *District Court of Queensland Act* 1967, s 14(1).
10 Constitution of Queensland Act 2001, s 60(3).

Justice Warren noted in the earlier session, the Queensland Crime and Misconduct Commission has a limited role in investigating complaints of official corruption against judges. But judges may be removed from office only by the Governor in Council, on an address of the Legislative Assembly, for proved misbehaviour justifying removal from office; or proved incapacity to perform the duties of the office.[11] That can occur only if the Legislative Assembly accepts a finding in a report of a tribunal that, on the balance of probabilities, the judge has either misbehaved in a way that justifies removal from the office[12] or is incapable of performing the duties of the office.[13] The tribunal must be established by statute[14] and have at least three members,[15] appointed by resolution of the Legislative Assembly,[16] who are former judges or justices of an Australian state or federal superior court,[17] and not judges of the same court at the same time as the judge who may be removed.[18]

So far, so good for judicial independence. But what about judicial salaries? The Queensland Constitution provides that all taxes, imposts, rates and duties and other revenues of the state form a single consolidated fund which is appropriated for the public service of the state as specified by an Act.[19] A judge must be paid a salary at the rate applicable to the judge's office.[20] The payment of judges' salaries is made from the consolidated fund and the consolidated fund is appropriated for that purpose.[21] Consistent with notions of judicial independence, a judge's salary may not be decreased.[22] In the Great Depression, however, following understandable pressure from the legislature, the executive and the public, judges in every Australian jurisdiction consented to a reduction of 10 per cent in their salaries as a general

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11 Above, s 61(1) and (2).
12 Above, s 60(3).
13 Above, s 60(4).
14 Above, s 60(5).
15 Above, s 60(7).
16 Above, s 60(8).
17 Above, s 60(9).
18 Above, s 60(10).
19 Above, s 64.
20 Above, s 62(1).
21 Above, s 62(3). See also *Judicial Remuneration Act* 2007 (Qld), s 24, which also applies to Land Court judges, magistrates and industrial commissioners.
22 Above, s 62(2). See also *Judicial Remuneration Act* 2007 (Qld), s 24, which also applies to Land Court judges, magistrates and industrial commissioners.

economy measure.[23] This seems to me an infinitely preferable outcome than the 2011 Irish referendum to reduce judicial salaries discussed by Justice Wallis.

And if an office held by a Queensland judge is abolished, the judge is entitled without loss of salary to be appointed to another office of equivalent or higher status.[24]

Judges' associates are not members of the Queensland public service but occupy a "public office" under the government and are appointed (or removed) by the judge.

The *Judicial Remuneration Act* 2007 deals with the payment of Queensland's judicial officers including magistrates and industrial commissioners. It commendably lists as the first of its main purposes: to provide for salaries and allowances for judicial officers in a way that maintains judicial independence.[25] The salaries of the various Queensland judicial officers are fixed by reference to a percentage of the "benchmark amount", the amount that a Supreme Court judge is entitled to be paid as salary and jurisprudential allowance for a financial year.[26] The benchmark amount is equal to the salary payable to a Federal Court judge for a financial year.[27] Through this circuitous path, the remuneration of Queensland judicial officers is tied to the Federal Remuneration Tribunal's annual determination so that I think Chief Justice Lamer's concerns raised by Justice Wallis are met.

Pensions and long leave entitlements of District and Supreme Court judges (but not magistrates) are provided for in the *Judges (Pensions and Long Leave) Act* 1957. A bit of trivia: following my appointment as a judge in 1991, this Act had to be amended by replacing the phrase "judge's wife" with "judge's spouse".

A Queensland judge receives a non-contributory pension on reaching 70, after serving not less than five years, at a rate equal to six per cent for each completed year of

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23 Leonard King, The IBA Standards on Judicial Independence, An Australian Perspective; Albert H Y Chen, 'The Determination and Revision of Judicial Remuneration: Report of a Consultancy Study' (2004), Ch 5: the Australian Experience, available at http://www.jsscs.gov.hk/reports/en/jscs_08/annex_e-ch_5.pdf

24 Constitution of Queensland Act 2001, s 63.

25 *Judicial Remuneration Act*, s 3(a).

26 Above, Sch 2 dictionary "benchmark amount".

27 Above, s 5.

service up to a maximum of 60 per cent.[28] A judge who is at least 60 with at least 10 years service who voluntarily retires, or who is permanently disabled, is entitled to a full pension.[29] Otherwise, a judge who retires from office because of permanent disability or infirmity, or is removed from office because of proved incapacity, is entitled to a pension at 75 per cent of the full pension,[30] with an additional five per cent of the full pension for each year of service in excess of five years, up to the full pension.[31] The judge's spouse, and dependent children under 25 in full-time education are eligible for a reduced pension up to 50 per cent of the judicial pension upon the death of the judge or retired judge.[32] Pensions are payable monthly, or at lesser intervals as directed by the Minister, out of the consolidated fund which is appropriated accordingly.[33]

Queensland judges are also entitled to six months long leave for each seven years of service.[34] Unless the Governor in Council decides otherwise,[35] a judge removed from office under the Constitution for misbehaviour[36] is not entitled to a pension and long leave.[37]

Although the *Judges (Pensions and Long Leave) Act* does not apply to Queensland magistrates, they are better off than recorder O'Brien QC in that they have superannuation. This brings me to the recent decision of the Full Court of the Federal Court in *Baker v Commonwealth of Australia*.[38] The court unanimously answered in the negative the question whether the applicants, 24 Federal Magistrates, were entitled to be provided by the Commonwealth a fixed and certain post-retirement lifelong pension of the non-contributory kind provided to judges of the High Court, the Federal Court and the Family Court. Keane CJ and Lander J held that, despite the terms of s 72(iii) Commonwealth Constitution, the impartiality of Federal Magistrates

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28 *Judges (Pensions and Long Leave) Act*, s 3.
29 Above, s 4.
30 Above, s 5(2)(a).
31 Above, s 5(2)(b).
32 Above, s 7 and s 8.
33 Above, s 17.
34 Above, s 15.
35 Above, s 16(2).
36 Constitution of Queensland, s 61.
37 Above, s 16(1).
38 [2012] FCAFC 121 (The Federal Magistrates pensions case).

was not put at risk by their lack of judicial pensions.[39] Their Honours also held that, although Federal Magistrates were judges appointed under Ch III Commonwealth Constitution, s 72(iii) did not require the Federal Parliament to continue to remunerate them after they have retired from office.[40] There is, happily, nothing in the decision to give comfort to those who would regard judges as employees of the executive.

As Justice Wallis noted, courts are not managed hierarchically. Heads of jurisdiction are not "bosses" but the first amongst equals, a notion incongruous with judges being employees. Mackenzie J explained in *Cornack v Fingleton*, a case concerning a dispute between a Queensland magistrate and the then Chief Magistrate:[41]
"The principle that judges are independent of one another, or internal judicial independence, … is incompatible with the existence of power to require a judicial officer to attend under compulsion to discuss issues concerning the way in which the judicial officer conducts hearings in court. … The notion that a head of jurisdiction could compel a judicial officer to modify how he or she conducted the actual hearing of cases by threat of sanctions is not reconcilable with the principle."

All this provides strong support for the High Court's unequivocal statement that in Australia: "judges are not employees."

But all too often even the well-educated public perception is that judges are public servants, albeit perhaps an important class of public servants. When the first delegation of Chinese judges visited Queensland's courts 20 years ago, we were keen to explain judicial independence and the separation of powers. The Chinese visitors listened politely before they inquired through their interpreter; "Who pays your salaries?" They remained unpersuaded that judicial salaries paid from the consolidated fund made judges independent of the legislature and executive.

In the early 1990s, the Queensland executive raised with the judges the concept of an independent courts service with its own budget. The level of trust between the judges and the executive at that time was low and the senior judges of the day chose not to

39 Above, [49].
40 Above, [72]–[76].
41 [2002] QSC 391, [34].

embrace this opportunity. Queensland public servants providing administrative support to the courts remain employed by the Department of Justice and Attorney-General, not by an independent courts service with a judge-controlled budget. Whilst judges' associates are not public servants, their personal assistants, court registrars and all other support and court staff are. This differs from the position in federal jurisdictions and in South Australia. Victoria is moving towards an independent court service and, I apprehend, is finding the devil in the detail. I will be interested to hear more from members of the audience about the Victorian experience. In Queensland, we are paying the price for our earlier lack of courage and vision. Recently, without consulting the judiciary, the Attorney-General announced that our State Reporting Bureau would be abolished. We do not yet have details of the entity to replace it.

After reading Justice Wallis's paper, I noticed for the first time that my fortnightly payslip is from "Department of Justice and Attorney-General" and lists my name under the heading "Employee Details". Perhaps, as Justice Wallis suggests, despite our High Court's clear contrary pronouncement, we in Queensland should be concerned about an expansion, however apparently innocuous, of the notion of judges as employees.

Some concluding observations. Australian and South African judges have come a long way since those pre-Act of Settlement days when the Stuart King interfered in the decisions of the judges who were dependent on him for their offices and remuneration.[42] But we must remain vigilant to ensure that the concepts of separation of powers and judicial independence are not undermined, however subtly, including by the notion of judges as employees.

The Chinese judges had a point. Even if judicial independence and the separation of powers are constitutionally enshrined, and the judiciary is supported by an independent courts service with its own budget, the bottom line is that if the parliament does not provide adequate funding, the efficacy and independence of the judicial arm of government will be undermined.

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[42] *Austin & Anor v Commonwealth of Australia* (2003) 215 CLR 185, 286 [240]; *Baker v Commonwealth of Australia* [2012] FCAFC 121, [38].

And even with the best Constitutional and structural independence, if the judiciary is not made up of men and women true to their oaths to "at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of [their] knowledge and ability without fear, favour or affection", then judicial independence and the judicial arm of government will be compromised.

Discussions like this are important. They enable us to develop best practice. I have three suggestions equally apposite, I think, in South Africa or Australia. First, as Neville Owen identified yesterday, we should educate the legislature, the executive and the public about the critical importance of the separation of powers and judicial independence in a democracy. Second, as Chief Justice Warren and Justice Terry Sheehan emphasised this morning, we should ensure the constitutional, legislative and administrative schemes in which we judges operate, strongly and unequivocally reflect these fundamental democratic principles. These lines must be clearly defined and where they are blurred doubts must be resolved cautiously on the side of the judiciary's independence. And as Justice Wallis highlighted, that requires vigilance to detect any creeping notion that judges are employees! And third, we judges must perform our roles competently, independently and accountably as we apply the rule of law. I am optimistic. I believe this way we can have a respectful, courteous discourse between the three branches of government. Individually and collectively, the judiciary, executive and the legislature can, with public legitimacy, deliver good government to our people. And then the answer to Justice Wallis's question will be that judges, like cabinet ministers and members of parliament, collectively govern, not as employees of the executive, but as public officers of their distinct branches of government. Thank you, Justice Wallis, for making us address the challenging question you pose.