Introduction

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Judicial independence is universally recognised as a necessary attribute of any society that claims adherence to the rule of law. In Australia, courts may be created by State, Territory and federal parliaments, giving rise to an interconnected network of judicial systems. Despite these divisions, Australian courts are all built upon a fundamental respect for judicial independence. In this volume, we reflect on the notion of judicial independence as it is relevant to the Australian context in the 21st century. We draw together chapters from leading and emerging constitutional scholars, to consider important questions and challenges to be faced as the nation strives to strengthen the independence of courts and judges in the Australian federation.

The place of judicial independence under the Australian Constitution has been the subject of significant debate almost since federation. The High Court first grappled with the issue in *Huddart, Parker & Co Pty Ltd v Moorehead*, where Griffith CJ held that the vesting of the judicial power of the Commonwealth in the federal courts under s 71 means that 'Parliament has no power to entrust the exercise of judicial power to any other hands'.[1] This strict approach to separating judicial power was shortly reiterated in the *Wheat Case*,[2] where it was held that the Inter-State Commission created by s 101 of the Constitution to administer and adjudicate matters relating to interstate trade could not exercise judicial power, since it was created by the executive and did not bear the hallmarks of a federal court. The existence of a body exercising both judicial and non-judicial powers and staffed by members not enjoying security of tenure (as required by s 72 of the Constitution) was held by the High Court to be repugnant to the separation of powers.

These early decisions established an interventionist role for the High Court in policing the boundaries of judicial and non-judicial functions at the Commonwealth level, as well as in deciding which bodies may appropriately exercise each of these roles. The now infamous *Boilermakers' Case*[3] established beyond doubt that Parliament may only vest federal judicial functions in a properly constituted court under Chapter III of the Constitution. This means, among other things, that a body exercising federal judicial power must be presided over by judges who enjoy security of tenure and remuneration as provided in s 72. A Chapter III court is also generally barred from exercising any powers other than the judicial powers of the Commonwealth, except those limited administrative functions incidental to the judicial role. The High Court's rigorous approach to these issues has regularly led to inconvenient outcomes for the Commonwealth Parliament. It has, for example,

1 (1909) 8 CLR 330, 355.
2 *New South Wales v Commonwealth* (1915) 20 CLR 54.
3 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.