Covert law enforcement after *Ridgeway*

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1. Introduction

Organised crime elements today use extremely sophisticated methods to breach international border controls. Detection and investigation techniques, particularly those used to obtain evidence of large illegal drug imports, often involve major infiltration of the criminal group, and the active complicity of undercover law enforcement officers in the very crimes they seek to prevent. This paper reviews a recent judgment of the High Court in which it affirmed its discretionary powers to exclude evidence which has been unlawfully or improperly obtained by means of an entrapment. The paper also explores contemporary interstate and overseas views of the entrapment issue, as well as some new developments in Australian statutory law.

The High Court decision in *Ridgeway v. The Queen*[1] holds particular significance for law enforcement agencies. While affirming *per curiam* the widely held view that entrapment does not constitute a substantive defence within common law jurisdictions, the court held that there is a discretion to exclude real evidence of an offence or an element of an offence, on public policy grounds, where its commission has been induced by unlawful, or possibly improper, conduct on the part of law enforcement officers.

The High Court also determined that the appropriate remedy in entrapment cases is not, in the ordinary course of events, a stay of proceedings for abuse of process. Rather a stay, if granted, should follow because the exclusion of the charged offence, or of an element of it, means that the proceedings will necessarily fail and a continuance would be oppressive and vexatious.

The reaction to Ridgeway has been wide and varied,[2] but the real impacts for law enforcement officers are still being assessed and responded to.

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1 (1995) 129 ALR 41.

2 See, for example, the following press articles: Lane, B., 'Judges question police conduct in heroin sting', April 20 1995, *Australian*, 5; AAP, 'Police drug ploy deemed illegal', April 20 1995, *Herald-Sun*, 11; Lane, B., 'Police drug sting immunity attacked', June 10-11 1995, *Weekend Australian*, 3; and Oakley, A., 'When the law seems an ass', April 24 1995, *Herald-Sun Editorial*, 12. See also McDonald, P., 'Ridgeway decision', 23 August 1995, *7.30 Report*, ABC TV, Sydney. And see Leis, S., 'Law & Order at any cost is too

2. Background Facts

The appellant was convicted in the South Australian Supreme Court of possession without reasonable excuse of a prohibited import, namely heroin, in trafficable quantities, contrary to section 233B(1)(c) of the *Customs Act 1901* (Cwlth). His appeal to the Full Court was dismissed by the majority.[3] The Crown case was that he had travelled to Singapore using his brother's passport, in violation of his parole on another matter, and there met Lee, whom he had previously met while they were both in gaol. He arranged to purchase from Lee a quantity of heroin which Lee was to deliver to him in Australia. Unknown to the appellant, Lee had become a police informer who co-operated with the Royal Malaysian Police Force and the Australian Federal Police, who in turn effected the import contrary to section 233B(1)(b) of the *Customs Act,* in order that the drug could then be sold to the appellant, thereby leading to his arrest.

The Australian Federal Police officials managed the 'controlled delivery' pursuant to a Ministerial Agreement of June 1987 and a letter of request of 28 December 1989 to the Australian Customs Service. The Ministerial Agreement provides for the transfer of Customs control from the Australian Customs Service to the Australian Federal Police in circumstances where, *inter alia*, "certain persons...known to be carrying or having an involvement in drugs, are required by the Australian Federal Police...to be exempted from detailed Customs scrutiny and control".

The appellant argued:

(i) that the actions of the authorities constituted an entrapment, which was an abuse of process warranting a stay of proceedings, and which should be condemned by the court; and

(ii) that evidence of his guilt should have been excluded on discretionary grounds by reason of the fact that the heroin had been illegally imported into Australia under the auspices of, and with the active involvement of, the Australian Federal Police.[4]

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dear: *Ridgeway,* Justice and the Crimes (Controlled Operations) Amendment Bill' (1995) 33:2 *Law Society Journal* 63.

3 *R v. Ridgeway* (1993) 60 SASR 207.

4 [1995] Australian Legal Monthly Digest x3906.

3. The Doctrine of Entrapment

What constitutes entrapment?

Entrapment has been described as the inducement of a person to "commit an offence that, but for the inducement, he would not have committed on the occasion on which he committed the offence."[5] Such a subjective view of entrapment, focusing on the predisposition or mental state of the accused, has been adopted by most State courts.[6]

Unfortunately the term itself often causes confusion, as it is frequently used in a generic sense to cover the widest gambit of covert operations in law enforcement. It is when it has been used in the narrow sense that entrapment has received its strongest judicial criticism. The underlying concerns have perhaps best been articulated by Judge Dorothy Nelson of the United States who stated: "We see substantial mischief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals [where there is no specific suspicion.]"[7] Her Honour also observed that such operations result in ineffective and arbitrary law enforcement.[8] This then is the nub of the entrapment doctrine; that courts must, as their primary concern, maintain public confidence in the legal and judicial process. For the courts to be seen to be acquiescent in the face of unlawful police conduct would "demean the court as a tribunal whose concern is in upholding the law".[9]

In *Veneman*, Bray CJ distinguished between situations where the defendant has been given an opportunity to commit the crime if he or she is so minded, and those where an unwilling defendant has been beguiled or seduced into committing the offence.[10] While espousing the correctness of applying the subjective test many recent decisions show that the courts have also had regard for the conduct of the law enforcement authorities involved. Thus, in *Vuckov*, Cox J used the subjective test but then went on to evaluate the degree of coercion employed by police in targeting the accused.[11] This approach was adopted by Ryan J in *Venn-Brown*,[12] who, while referring to the

5 *Criminal Investigation Bill 1981*, cl.67.
6 *R v. Veneman and Leigh* [1970] SASR 506; *R v. Vuckov and Romeo* (1986) 40 SASR 498 at 511; *R v. Hsing* (1991) 25 NSWLR 685; *R v. Venn-Brown* [1991] 1 Qd R 458 at 468; *Coward* (1985) 16 A Crim R 257; *R v. Ridgeway* (1993) 60 SASR 207.
7 *United States v. Luttrell* 889 F 2d 806 (9th Cir. 1990) at 813.
8 Id.
9 *Bunning v. Cross* (1978) 141 CLR 54 at 78.
10 fn. 6 at 507.
11 fn. 6 at 523.
12 fn. 6 at 468, 469.

accepted subjective method of evaluation, directed much of his attention to the conduct of the infiltrator and exploitation of his relationship with the accused. Even in *Hsing*,[13] Samuels JA, after examining the lines of authority and concluding that the subjective test was the accepted law in New South Wales, was of the view that a reconsideration of "the proper nature of the principles which ought to underpin the doctrine of entrapment"[14] may be of assistance.

The use of entrapment in *Ridgeway*

The High Court, in *Ridgeway*, held that the illegality of the police conduct (facilitating the importation of heroin to entrap a known drug dealer) was grave and calculated and that it created an actual element of the charged offence.[15] The court found that at all times it was common ground that importation of the heroin was contrary to the *Customs Act*. "[T]he whole of the unlawful importation was arranged by and under the auspices of the Australian Federal Police and the police involvement reached upwards to a high level of command."[16]

The court described the importation as "controlled" and said "the objective acts of the responsible members of the Australian Federal Police...came within s. 233B(1)(d) of the *Customs Act* which provides that 'any person who aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies' is guilty of an offence...[T]he Commonwealth Director of Public Prosecutions expressly conceded that the Australian authorities 'had either counselled or at least were prepared to aid and abet' the illegal importation."[17]

Thus the police activities in Ridgeway fell easily within the narrow construction of the doctrine of entrapment.

Entrapment as a substantive offence

Police and other enforcement officers have long engaged in covert operations to detect consensual or 'victimless' crimes such as drug use offences, prostitution, illegal gambling and liquor sales, and wildlife poaching. The principal rationale has been that, while unlawful and constituting serious social evils, they generally occur in private with little evidence of their commission. By their nature it is

13 *R v. Hsing* (1991) 25 NSWLR 685.
14 Id at 696.
15 *Ridgeway v. R* (1995) 129 ALR 41 at 42.
16 Id at 45, per Mason CJ, Deane and Dawson JJ.
17 Ibid.

unlikely that an individual complainant would bring them to the attention of the legal authorities.

The judiciary in all common law countries have generally recognised a need for undercover techniques in the investigation and detection of certain offences; the use of spies, informers and infiltrators being regarded as a legitimate means of gathering evidence for prosecutions.[18] They have, however, tended to remain very uncomfortable with inherent notions of 'unfairness' which attend this form of surreptitious involvement by government officials. Judicial concern has been evidenced by all courts in Australia over many years, but has gained momentum since the beginning of the last decade which heralded a massive explosion in the quantities of illegally imported 'hard' drugs and a startling sophistication of the means by which those imports are achieved. Consequently, today's law enforcement techniques are aeons removed from the incitements to gamblers and prostitutes in the seventies which attracted the first judicial protests against entrapment. The use of the agent provocateur to elicit evidence is a direct result of the increasingly international aspect of major crime and concomitant growth in co-operation between enforcement agencies responsible for detection and prosecution of cross-border offences.[19]

In the United States entrapment constitutes a substantive defence[20] and, when proved, the courts have rigorously excluded that evidence where the behaviour of the authorities has actively encouraged the commission of a crime. The entrapment defence and the abuse of process ('due process') claim are distinctly and significantly different. The entrapment defence looks at the defendant's subjective state of mind to determine if there was a predisposition to commit the crime; abuse of process takes the objective path and considers the actions of the government officers to determine whether they have gone beyond acceptable norms in their pursuit of evidence.[21] Entrapment is a question of fact and is decided by the jury, while abuse of process is a question of law to be determined by the judge.[22] Abuse of process has received little favour in the United States courts until very recently, although strong arguments for its closer consideration are now being advanced.[23] Entrapment, on the other hand, has provided

18 Harris, W., 'Entrapment' (1994) 18 *Criminal Law Journal* 197.

19 Robertson, G., Q.C., 'Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?' (1994) *Criminal Law Review* 805 at 806.

20 *Ridgeway,* fn. 15 at 46.

21 Marcus, Prof. P., 'The Due Process Defense in Entrapment Cases: The Journey Back' (1990) 27 *American Criminal Law Review* 457.

22 Id at 459.

23 Id at 458.

defendants with a limited defence before United States juries,[24] based on a presumption of legislative intent,[25] for more than sixty years.[26]

The High Court of Australia[27] pointed to the dicta of Rehnquist J who said that neither the fact that officers or employees of the government afford opportunities for or facilitate the commission of an offence, nor the mere fact of a deceit, will defeat a prosecution. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense (sic) of entrapment comes into play".[28] However, the High Court considered that, on an analysis of the majority judgements in the United States Supreme Court, there was no satisfactory conceptual basis for accepting entrapment as a substantive defence to a criminal charge, and held that it did not constitute a defence under Australian law.[29] The court maintained the present view that such a defence is unknown, and quite contrary to, Australian common law. It said: "The decisions to that effect are not surprising since it is a central thesis of our criminal law that a person who voluntarily and with the necessary intent commits all the objective elements of a criminal offence is guilty of that offence regardless of whether he or she was induced to act by another, whether private citizen or law enforcement officer".[30] The High Court, referring to its own previous decision in *Hayden*[31] in which it had denied emphatically the existence of any substantive defence in the stronger circumstances of government directions or orders, said: "If obedience to actual orders is not a substantive defence to a criminal charge, it is difficult to see any logical basis for a conclusion that persuasion by mere inducement constitutes such a defence."[32]

The question of entrapment as a substantive defence had not previously been directly addressed by the High Court, but its finding accords with numerous decisions of the State Supreme Courts[33] and similar interpretations of the relevant laws in England, Canada and New Zealand.[34] By reaching this conclusion, the High Court did not,

24 The High Court in *Ridgeway*, fn. 15 at 46, briefly considered the leading cases of *Sorrells v. United States* (1932) 287 US 435; *Sherman v. United States* (1958) 356 US 369; and *United States v. Russell* (1973) 411 US 423.
25 *Sherman*, id at 372.
26 *Sorrells*, fn. 24 at 448.
27 *Ridgeway*, fn. 15 at 56.
28 *Russell*, fn. 24 at 427.
29 *Ridgeway*, fn. 15 at 46.
30 Id at 45.
31 *A v. Hayden (No. 2)* (1984) 156 CLR 532, per Gibbs CJ.
32 *Ridgeway*, fn. 15 at 47.
33 Harris, fn. 18 at 206.
34 ALMD, fn. 4 at 34.

however, grant investigators *carte blanche* to gather evidence without regard to the law as it effects the rest of society; rather, it took the decision regarding the consequences of entrapment from the realm of the jury and made it a matter reserved for consideration by the judiciary.

Discretionary exclusion of evidence

The High Court, following the decision in the leading case of *Bunning v. Cross,*[35] held that there was a discretionary power to exclude evidence which had been gained unlawfully. The court further held that this discretion applies to both 'real' and 'confessional' evidence,[36] and "[n]either its existence nor its exercise involves any intrusion into the exclusive sphere of the Executive".[37] The rationale of the discretion is that convictions obtained by means of unlawful conduct "may be obtained at too high a price".[38] The court, per Mason CJ, said: "[T]he discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes (and) applicable considerations of 'high public policy'[39] relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty."[40] Extrapolating from its earlier decision in *Bunning v. Cross,* the court found that such a discretion also extended to the exclusion of evidence which had been improperly obtained. In *Bunning v. Cross*, it was held that the discretion was not restricted to the simple notion of "unfairness" but "the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."[41]

Although Australian courts had previously made it clear that entrapment could lead to mitigation of sentence,[42] the High Court, in establishing the breadth of the discretionary power to exclude real

35 (1978) 141 CLR 54.
36 *Ridgeway,* fn. 15 at 48.
37 Id at 50
38 *R v. Ireland* (1970) 126 CLR 321 at 335; *Ridgeway,* fn. 15 at 48, per Barwick CJ.
39 *Bunning v. Cross,* fn. 34 at 74; *Ridgeway,* fn. 15 at 48, per Stephen and Aickin JJ.
40 *Ridgeway,* fn. 15 at 48.
41 *Bunning v. Cross,* fn. 34 at 74; *Ridgeway,* fn. 15 at 48, per Stephen and Aickin JJ.
42 Harris, fn. 18 at 215.

evidence, clearly accepted the contention that such mitigation does not constitute an unambiguous rejection of unlawful and improper practices sufficient to protect the court's reputation, nor a vindication of the rights of the accused. The decision recognises that undercover techniques are a necessary adjunct to the efficient investigation and detection of certain criminal activities, but has drawn a fine, albeit imprecise line, between those investigative actions which are permissible and those which will be considered unlawful or improper. "When those tactics do not involve illegal conduct, their use will ordinarily be legitimate notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity...The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances..."[43]

The decision also accords with the current law in England. The *Police and Criminal Evidence Act 1984* (UK) expressly provides that a court may refuse to allow evidence adduced which it appears would have "such an adverse effect on the fairness of the proceedings, that the court ought not to admit it."[44] According to Sharpe,[45] "[t]he discretion applies specifically to prosecution evidence, but beyond that it is unlimited, whether by reference to the genus of evidence involved, or to the circumstances giving rise to the unfairness." In practice, the English courts have generally been reluctant to apply the statute, even where the evidence has clearly been obtained by inducement, and have several times avoided the issue by ruling that, on the facts, the informer was not acting as an *agent provocateur.*[46] Unfortunately, they have not been entirely consistent in this respect, and English enforcement authorities have no clear path to tread. For example, in *Bryce,*[47] the court held that the informant had used his undercover pose to circumvent the codes of the 'PACE' Act and it therefore excluded the evidence. Similarly, in *Mason,*[48] the Court of Appeal overturned the conviction because a confession was elicited as a consequence of the lies of a police officer who said the man's

43 *Ridgeway,* fn. 15 at 53, per Mason CJ.
44 Section 78.
45 Sharpe, S., 'Covert Police Operations and the Discretionary Exclusion of Evidence' (1994) *Criminal Law Review* 793 at 796.
46 Ibid. See also *Gill and Ranuana* [1989] *Criminal Law Review* 358, *Edwards* [1991] *Criminal Law Review* 45 and *Smurthwaite and Gill* [1994] 1 All ER 898.
47 [1992] 4 All ER 567.
48 [1987] 3 All ER 481.

fingerprints had been found on a piece of glass. In *Shazad*,[49] however, a drug 'sting' which bears striking similarities to the instant case, the Court of Criminal Appeal upheld the conviction. In that case, a United States Drug Enforcement Agency informer, with the connivance of a British drugs liaison officer, falsely suggested to known suppliers of heroin that he could arrange for a courier to import drugs. Shazad supplied drugs to the informer which were imported into the United Kingdom by a British Customs Officer. The informer then came to England to persuade Shazad to come to England himself to receive the heroin. Eventually he was successful and a customs officer delivered bags resembling heroin to Shazad's hotel. At that point Shazad and his co-accused were charged with knowingly being concerned in fraudulent evasion of the prohibition on importation of a controlled drug. The importation of controlled drugs by and at the instigation of Customs Officials did not lead to the exclusion of the informer's evidence.[50] It appears the Court of Criminal Appeal "hardened its heart against the professional criminal and, given there was no bad faith[51], in future (the court) will take a great deal of persuasion before evidence in such a case would be excluded."[52]

The abuse of process argument

The High Court rejected the Canadian proposition that a stay of proceedings on the grounds that the proceedings constituted an abuse of process was the appropriate immediate remedy in an entrapment case.[53] Brennan J put the matter succinctly: "The process of a court which has jurisdiction to try an offender for an offence is not abused by the exercise of that jurisdiction for that purpose. Therefore it is not an abuse of process to prosecute an offender who has been induced to commit an offence in order to procure his conviction."[54]

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49 *Shazad* (unpub.) (UK) Transcripts 91/1712/X3 and 91/1713/X3. Leave sought to appeal to the House of Lords: Sharpe fn. 45 at 798.

50 Sharpe, fn. 45 at 798-799.

51 Defence counsel argued *inter alia* that this conduct by Crown officials was an abuse of process and also that entrapment negated an element of the offence *viz.* fraudulent evasion: Sharpe, fn. 45 at 799.

52 Morton, J., 'Entrapment and the courts.' (1994) 10 *Policing* 192. Note: Morton cites *Shazad*, fn. 49 as *Latif* (in fact, the co-offender who did not appeal against conviction).

53 The Canadian courts have traditionally taken a very narrow approach to unlawfully or unfairly obtained evidence, see *R v. Wray* [1971] SCR 272; but recognised a procedural "defence" of entrapment in *R v. Mack* (1988) 44 CCC (3d) 513 at 564, which lies in the need to preserve the purity of administration of justice and prevent abuse of process.

54 *Ridgeway*, fn. 15 at 60.

The court said: "[T]he appropriate ultimate relief in a case where the commission of the charged offence has been procured by illegal police conduct may well be a permanent stay of *further* (emphasis added) proceedings[55]...(since) the proceedings will necessarily fail with the consequence that a continuance of them would be oppressive and vexatious."[56]

In the present case, the court held that the critical question was "whether, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime against s. 233B(1)(c) of the Act of which he was guilty"[57] should have been answered in favour of the appellant and "further proceedings should have been stayed for the reason that they would inevitably fail."[58]

4. The present and future in undercover operations

State legislatures, in a number of instances over the years, have specifically provided protection from prosecution to investigating officials who, for the purposes of gathering evidence, undertake clandestine actions which may otherwise be regarded as aiding, abetting or procuring the commission of those offences. In Victoria, for example, 'immunities' have been provided since 1966 to members of the police force, and other persons acting with the written instruction of a sub-officer of police in a particular case, under the *Summary Offences and Vagrancy Acts*[59] and, since 1981, for matters under the *Drugs, Poisons and Controlled Substances Act*.[60] These immunities prevent the authorised member or persons from being regarded as either offender or accomplice when they gather evidence and, in doing so, undertake actions which would otherwise render them liable directly under the specific provision or, indirectly, by virtue of the operation of Part II, Division 1 of the *Crimes Act 1958*.[61] In establishing the immunities, the Victorian Legislature no

55 Id at 55.
56 Id at 56.
57 Ibid.
58 Id at 58.
59 No. 7405 of 1966 (Vic.), s. 58; No. 7393 of 1966 (Vic.), s. 17.
60 No. 9719 of 1981 (Vic.), ss. 50, 51.
61 No. 6231 of 1958 (Vic.), ss. 323 - 325.

doubt recognised that the arcane nature of the particular offences demanded employment of a greater versatility of investigative techniques than is normally apprehended by the law.

In *Ridgeway*, the High Court (obiter) said it recognised that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as heroin. However, any sanction for enforcement officers to depart from the strict requirements of the law must be provided by the Legislature (and not the Executive) as the courts must otherwise treat such excursions as criminal.[62] The court also gave the clearest of indications that a subsequent charge against the appellant under South Australian law was not precluded by its decision in the extant matter and that, since the illegal importation would not be an element of the new charge, an appeal on the same grounds may not succeed.

Since *Ridgeway*, the South Australian Legislature has enacted the *Criminal Law (Undercover Operations) Act No. 46 of 1995*. This provides that a law enforcement officer may, with the approval of a Superintendent or above, and in the course of duty, undertake acts which would otherwise constitute an offence, including procuring an offence, in order to gather evidence of a serious offence. A serious offence includes, but is not restricted to, an indictable offence.[63] The Commonwealth has also been busy in this respect. The *Crimes Amendment (Controlled Operations) Bill 1995* has been presented and read a first time to the House. Although delayed for various reasons, including the calling of the recent federal election, the Bill appears to have gained bi-partisan support and it is definitely on the current legislative agenda. Its passage is expected to occur before the end of July, 1996[64]. The purpose of this Bill is "to amend the Crimes Act 1914 to exempt from criminal liability certain law enforcement officers who engage in unlawful conduct to obtain evidence of offences relating to narcotic goods..."[65] The Bill seeks specifically to validate those law enforcement actions which were regarded in *Ridgeway* as unlawful by virtue of their contravention of section 233B of the *Customs Act*, and therefore grounds for the exclusion of evidence obtained by the entrapment. It remains to be seen what

62 fn. 15 at 58, per Mason CJ, Deane and Dawson JJ.

63 McIvaney, S/Sgt Frank, *pers comm.*, Police Legal Library, South Australia.

64 Tchakerion, B., *pers comm.*, Office of the Commonwealth Director of Public Prosecutions, Melbourne.

65 The Parliament of the Commonwealth of Australia, Preamble to *Crimes Amendment (Controlled Operations) Bill 1995*, Commonwealth Government Printer, Canberra.

actions the legislatures in other States will take to negate the High Court's decision and prevent the exclusion of entrapment evidence.

5. Excursis: The High Court's decision and the independence of the judiciary

Ever since its creation as the supreme court of the Commonwealth at the time of federation, the High Court has demonstrated, with at times surprising fierceness, its determination to repel any attempts by the Legislature or Executive to interfere with the exercise of its judicial power and, hence, its independence.[66] Decisions in early leading cases, such as the *Wheat* case,[67] *Alexander's* case[68] and the *Boilermakers'* case,[69] gave authority for the future narrow interpretation of section 71 of the *Commonwealth Constitution* which the High Court generally adopted.[70] There have been deviations from the doctrine, however, and the High Court, particularly since the 1970's has, at times, gone to some interesting lengths to justify its decision-making processes.

In *Bayer*,[71] the High Court determined it had jurisdiction to hear an appeal in relation to a trade mark and, in doing so, granted itself an administrative power which it characterised 'as partaking the nature of judicial power which involved a conclusive finding on the rights of parties.'[72] As a corollary to this, in *Quinn*,[73] the High Court determined that a registrar who removed a trade mark from the register was not involved in the exercise of a judicial power, even though this directly affected the legal rights of the parties involved. In *Hilton v. Wells*,[74] the High Court decided it was permissible for a Federal Court judge to exercise an administrative function, in the role of a

66 Gurney, K.W., '*Quo vademus?* The Separation of the Judicial Power of the Commonwealth' (1996) (unpub.) Deakin University, Geelong, 2.

67 *New South Wales v. Commonwealth* (1915) 20 CLR 54.

68 *Waterside Workers' Federation v. J.W. Alexander Ltd.* (1918) 25 CLR 434.

69 *R v. Kirby; Ex parte Boilermakers' Society* (1956) 94 CLR 254.

70 See also, for example, the decisions in *In re Judiciary and Navigation Acts* (1921) 29 CLR 257: No judicial function can be imposed upon the High Court which falls outside the jurisdiction described in Chapter III, and *British Imperial Oil v. Federal Commissioner of Taxation* (1925) 35 CLR 422, where authority was again denied to Parliament to invest any part of the judicial power in anything but a Court within Chapter III.

71 *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd* (1959) 101 CLR 652.

72 Omar, I., 'Darkness On the Edge of Town—The High Court and Human Rights in the *Brandy* Case' (1995) 2 *AJHR* 115 at 119.

73 *R v. Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1.

74 (1985) 157 CLR 57.

'persona designata', and in *Harris v. Caladine*,[75] it upheld a decision that authorised registrars of the Family Court to exercise delegated judicial powers. These, and other contemporary decisions,[76] indicated a certain willingness to relax the strict boundaries of judicial power and to adopt a more purposive approach to the interpretation of legislation. There was a blurring of the edges of the separation of powers doctrine which saw not only Chapter III courts exercising judicial power more widely than previously conceded, but also non-judicial bodies exercising much liberalised 'non-judicial' powers.[77]

Many advantages flow from the adoption of the purposive approach to the interpretation of legislation and some crossing of the boundaries established by the separation of powers doctrine. By examining social and economic considerations and investigating the objectives of the legislation enacted by Parliament, the Judiciary can be seen to be working to implement the will of the people. Unfortunately, by doing just this, they also leave themselves open to the criticism that their interpretation is necessarily coloured by their own political perspectives.[78]

Recent criticisms of the High Court, particularly its purported 'inventiveness' with respect to implied rights[79] and its 'activism' with respect to other decisions, appear to have caused it to step back from its previous path of rapid development of the law through judicial decision-making rather than Parliamentary processes. Thus, decisions such as Brandy,[80] where the High Court found that enforcement procedures provided for Commonwealth anti-discrimination legislation were invalid because they "were contrary to the principle of the separation of powers",[81] and now *Ridgeway*,[82]

75 (1991) 172 CLR 84.

76 See decisions of the High Court granting implied rights, for example, the implied constitutional right to equality: *Leeth v. Commonwealth* (1992) 174 CLR 455; the implied right of an accused person to a fair trial: *Deitrich v. R* (1992) 109 ALR 385; the implied right to freedom of political communication: *Nationwide News Pty Ltd v. Wills* (1992) 108 ALR 681; and the implied right to communication: *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.

77 Lane, P.H., 'The Decline of the Boilermakers' Separation of Powers Doctrine' (1981) 55 *ALJ* 6 at 6.

78 See Zines, L., *Constitutional Change in the Commonwealth*, 52 in Winterton, G., 'The Separation of Ju icial Power as an Implied Bill of Rights', in G. Lindell (ed) 1994, *Future Directions in Australian Constitutional Law*, Federation Press, Sydney, 206.

79 Especially *Sykes v. Cleary* (1992) 176 CLR 77, and *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.

80 *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

81 *Omar*, fn. 72 at 115.

have certainly served to re-inforce not only the discretionary powers of the High Court but its independence as well.

6. Conclusion

The true significance of *Ridgeway* is not found in the detail of the judgement or the short-term consequences for covert law enforcement operations involving interactive subterfuges. The High Court has made a strong statement in which it not only expressed its clear determination to maintain the integrity of the courts, but also confirmed the importance of the doctrines of the separation of powers and independence of the judiciary.

82 *Ridgeway*, fn. 15.