Chapter 5

WARRANTS

The Bill

5.1 An 'Issuing Authority' is a person who is appointed by the Attorney-General.[1] The Attorney-General may appoint a Federal Magistrate or a Judge by consent.[2] The regulations may also declare 'persons in a specified class' to be Issuing Authorities.[3]

5.2 An Issuing Authority may issue a questioning and/or detention warrant if the Director-General has requested the warrant in accordance with the process in the Bill and the Issuing Authority is satisfied there are reasonable grounds for believing that:

- the warrant will *substantially assist* the collection of intelligence that is *important* in relation to a terrorism offence; and
- the warrant, *in the context of a series of previous warrants*, does not result in a person being detained for a continuous period of more than 168 hours (7 days).[4]

5.3 The Director-General must obtain the Attorney-General's consent.[5] He or she must give the Attorney-General a draft request that includes the draft warrant, statement of supporting facts and other grounds, and a statement regarding any previous requests for warrants in relation to the subject person.[6]

5.4 The Attorney-General *may* consent if he or she is satisfied that:

- there are 'reasonable grounds for believing that the warrant will *substantially assist* the collection of intelligence that is *important* in relation to a terrorism offence';[7] and
- 'relying on other methods of collecting that intelligence would be ineffective';[8] and
- if the warrant authorises detention, etc., there are 'reasonable grounds for believing that, if the person is not *immediately* taken into custody and detained' he or she may alert a person involved in a terrorist offence, may fail to appear

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1 Proposed section 34AB.

2 Proposed subsections 34AB(1) and (2).

3 Proposed subsection 34AB(3).

4 Proposed subsection 34D(1).

5 Proposed paragraph 34D(1)(a) with proposed section 34C(4).

6 Proposed subsection 34C(2).

7 Proposed paragraph 34C(3)(a).

8 Proposed paragraph 34C(3)(b).

before the Prescribed Authority or may destroy, damage or alter evidence described in the warrant.[9]

5.5 The Attorney-General may make changes to the draft request.[10]

5.6 There are essentially two kinds of warrants: *questioning warrants* and *detention warrants.* A questioning warrant must require a person to attend before a Prescribed Authority immediately after notification or at a time specified in the warrant. A detention warrant must authorise a person to be 'taken into custody immediately' by a police officer and brought before a Prescribed Authority immediately for questioning[11] and then detained under arrangements made by the officer 'for a specified period of *not more than 48 hours*' commencing from the time the person is brought before the Prescribed Authority.[12]

5.7 A questioning warrant can effectively be turned into a detention warrant by the Prescribed Authority with the approval of the Attorney-General if it is satisfied that there are 'reasonable grounds for believing that, if the person is not detained' he or she may alert a person involved in a terrorist offence, may fail to appear or may destroy, damage or alter evidence described in the warrant.[13] A detention warrant can be issued after a person has been released from earlier detention.[14]

5.8 Once served with a warrant, it is an offence to fail to appear before a Prescribed Authority;[15] or to provide information;[16] or to produce records or things requested in accordance with the warrant.[17] It is also an offence to provide false or misleading information in answer to questions before the Prescribed Authority.[18] All of these offences are subject to imprisonment for a maximum of 5 years.

Serial warrants

5.9 Clearly, multiple detention warrants can be issued.[19] While each is subject to a limit of detention for *no more than 48 hours*, multiple warrants can be issued with the result that a person may be detained for a longer period, subject to two caveats:

- no warrant, in the context of a series of previous warrants, may result in the person being detained for a continuous period of more than 168 hours; and

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9 Proposed paragraph 34C(3)(c).

10 Proposed subsection 34C(3).

11 Proposed section 34DA.

12 Proposed subsection 34D(2).

13 Proposed section 34F(3).

14 Proposed section 34F(7).

15 Proposed subsection 34G(1).

16 Proposed subsections 34G(3) and (4).

17 Proposed subsection 34G(6) and (7).

18 Proposed subsection 34G(5).

19 For example, see proposed subsection 34C(1A).

- a warrant that may result in the person being detained for a continuous period of more than 96 hours may only be issued by an Issuing Authority who is a judge or a member of a class specified in regulations for the purposes of section 34AB.[20]

5.10 With ASIO and the Attorney-General's Department, the Committee examined the prospect of serial or rolling warrants in which a person is released and detained to refresh the detention period. The 'serial warrants' issue seemed to arise in relation to:

- 48 hour detention periods, permitting serial incommunicado detention, and
- 168 hour detention periods, permitting indefinite detention for questioning.

5.11 ASIO's legal counsel suggested that the practice might constitute an 'abuse of process' and therefore sustain a ground of judicial review.[21] However, the issue remains that the practice is still possible. This is complicated by the fact that, while an 'abuse of process' ground may be open, it may be a difficult case to argue, given the scope, purpose and object of the legislation. A legislative regime that deals with national security and operates as a last resort preventive device might be one that does not admit rigid boundaries from which to measure concepts such as 'abuse of process' or 'improper purpose'.

5.12 On this issue the Attorney-General's Department emphasised the possible need to have access to witnesses at some future time following an initial period of questioning:

> How would you draft a piece of legislation or a provision that would pick up a situation where a person is actually detained for a period of only, say, 48 hours, under the first warrant, but you gain no information from that individual and therefore that person is released? If in six months time you get further intelligence that indicates that this individual might be able to assist and you then call them in, a six-month time gap has elapsed.[22]

5.13 While respecting this need, the Committee took the view that there may be a need to place limits on the ability of ASIO and the AFP to obtain 'serial warrants'.

5.14 Both ASIO and the Attorney-General's Department emphasised that the availability of further information from other sources would determine how soon a further warrant would be needed in the case of a person who had been released and that they would not be 'in the business of dragging citizens back in every so often to keep them in for seven days to try to wear them down'.[23]

5.15 The Attorney-General's Department made the following comment:

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20 Proposed section 34C(5).

21 *Hansard*, 12 November 2002, p. 18.

22 Ibid, p. 19.

23 Ibid.

> What I was putting was that it might well be that you do not get anything the first time around, but then you might get more information that you can then put to the person if you bring them in, to say, 'Okay, you said you didn't know this, but what about this?' The difficulty would be in having a time period that would not prevent you from doing that further down the track.[24]

5.16 Similarly, ASIO found it very difficult:

> to envisage circumstances in which you could define a particular period of grace in which a person released should be, say, free to stay at large pending the gathering of a new warrant. Given that a new warrant on detention is designed for urgent circumstances, it seems to me that imposing that sort of prohibition would only have effect in those very, very rare circumstances when you most need access to the person without such a prohibition.[25]

5.17 'Thinking laterally', the Director-General of ASIO suggested in evidence that one possible additional safeguard in respect of serial warrants might be that 'if someone were to be detained a second time within X period of time, their right of access to a lawyer would be from the beginning of their period of detention'.[26]

5.18 The Committee agrees that there is a large difference between serial warrants, involving, for example, continuous periods of detention which do not allow for access to the Federal Court, and broken periods of detention over six months where further information or evidence arises in order to sustain a fresh application for a warrant.

Silence

5.19 One of the issues raised in evidence was the effect of a person's silence before the Prescribed Authority. (It should be noted that there is no right to silence under the Bill, but a person might, nonetheless, defy this provision). When asked what would happen if a witness simply refused to answer, ASIO suggested that the grounds for the warrant would cease to exist:

> [I]f [ASIO] became convinced that there was no way that the person would provide the information that was being sought and that with it was entirely fruitless to have the warrant, then the Director-General would have an obligation to inform the minister and the issuing authority that the ground upon which the warrant existed had ceased to exist, and take steps necessary to ensure that further action under the warrant was discontinued. If it was a clear case in which there was no basis upon which further action under the warrant would assist the organisation in collecting intelligence that is important in relation to a terrorist offence, that particular provision in section 34R requiring discontinuation of action would take place.[27]

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24 *Hansard*, 12 November 2002, p. 19.

25 *Hansard*, 18 November 2002, p. 127.

26 Ibid, p. 127.

27 *Hansard*, 12 November 2002, p. 31.

5.20 The corollary may be that continued detention and questioning may be beyond the scope, purpose and object of the legislation. The conclusion may be even stronger in relation to the issuing of subsequent warrants in these circumstances.

5.21 Silence before the Prescribed Authority may also have wider effects. It may lead to the making of adverse inferences in subsequent prosecutions that are discussed in Chapter 6. It may also alter the characterisation of detention in respect of the constitutional limits relating to non-punitive detention that are discussed in Chapter 7.

Suspects v non-suspects

5.22 Many submissions objected to the issuing of warrants for the detention and questioning of non-suspects. FCLC (Victoria) argued 'it would be inconsistent if a person detained on criminal charges had more beneficial rights than someone who had not been charged'.[28]

5.23 On the other hand it might be argued that fewer rights need be accorded to persons if the information obtained from their examination is not be used against them in criminal proceedings. The Attorney-General has commented that the detainees in Guantanamo Bay 'have been the subject of interviews for the purposes of intelligence gathering *and* law enforcement. It's appropriate that any interviews they give not be used against them in criminal proceedings if they're not accorded appropriate rights'.[29] The Attorney-General's Department noted that the 'broader threshold' that existed in the Bill, vis-à-vis the law enforcement regimes in the United Kingdom and Canada, was based on the fact that the process targeted non-suspects: 'the person you are looking at is not someone you would [have] expected to put in jail and punish'.[30] In effect, it would seem, fewer 'appropriate rights', or a 'broader threshold' may be permissible in relation to non-suspects or persons who are subject to a lower risk of criminal prosecution.

5.24 The issue is not clarified by the fact that the detention and questioning regime is limited to a purpose that relates to *terrorism offences* and not *acts of terrorism*. These '*terrorism offences*' may be *primary* or *secondary* offences. They include terrorist acts and other more remote acts such as providing or receiving training and the collection or making of documents; and, in relation to terrorist organisations, direction, membership, recruitment, financial coordination and support.[31]

5.25 In a very real sense, there is a wide discretion, in issuing a warrant, to select from suspects and non-suspects who may have a remote proximity to terrorist acts. One approach is to limit the regime to suspects. Dr Gavan Griffith QC suggested:

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28 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 20.

29 The Hon. Daryl Williams, 'Second Class Citizens: One Year on from September 11', Transcript of Interview, *Sunday*, 25 August 2002.

30 *Hansard*, 12 November 2002, p. 4.

31 *Criminal Code*, sections 101.1-101.7.

> [I]t would seem more appropriate that the scheme of the Act should be limited to those who have been suspected of having some involvement with respect to terrorism or a terrorist offence, rather than relying on the goodwill and judgment of the Director-General of ASIO and the relevant Minister.[32]

5.26 Another approach is to limit the regime to deal with primary offences. In his recommendation of a 'non disclosure offence' modelled on United Kingdom law, Dr Greg Carne focused on the notion of an 'imminent terrorist attack', where a 'terrorist attack' would be defined as a 'widespread or systematic use or threat of the use of serious force or application of serious harm in the commission of a terrorist act'.[33] This would confine the regime to the primary terrorist offence in the *Criminal Code*.[34]

Changing purposes or outcomes

5.27 One of the issues that arose in evidence was the prospect that the questioning and detention process could be consciously made to serve a law enforcement purpose.

5.28 The purposes of the process were discussed in some detail in Chapter 3. The tentative conclusion was that the objectives of intelligence collection and criminal investigation only diverge when a choice is made as to what outcome is intended. As noted in that discussion, a proposed oversight committee would be responsible to 'determine when an intelligence matter becomes a criminal investigation':

> If it came to a situation where a decision needed to be made to continue or a decision needed to be made in terms of the best outcome, we would need to decide whether we disrupt the organisation through security intelligence or through a criminal prosecution. That decision is made by the [proposed counterterrorism information oversight committee].[35]

5.29 The issue for the present discussion is whether those choices may be made during the questioning process rather than at the outset. The concern is that agencies could cooperate so as to use the Prescribed Authority process to obtain information for a criminal prosecution that was otherwise unavailable.

5.30 However, ASIO rejected this possibility in responding to the following question on notice:

> Is it possible, within the one process, for ASIO to stop questioning before incriminating statements have been made, and the AFP to start questioning for the purposes of gathering evidence for prosecution? Could this be done intentionally and cooperatively?

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32 Dr Gavan Griffith QC, *Submission 235*, p. 7.

33 *Submission 24*, p. 12.

34 *Criminal Code*, section 101.1.

35 *Hansard*, 14 November 2002, pp. 75-76.

5.31 It stated:

> No. A person could only be questioned pursuant to the new ASIO warrant for the purposes for which that warrant was issued (ie., the collection of intelligence by ASIO that is important in relation to a terrorism offence). AFP questioning of persons for the purpose of gathering evidence for prosecution is governed by a discrete statutory regime under Part 1C of the *Crimes Act 1914*. That Part imposes obligations on investigating police officials in respect to persons arrested for Commonwealth offences, and in respect of persons being questioned as suspects in relation to Commonwealth offences. The AFP would not be authorised under the proposed ASIO warrants to ask questions for the purpose of gathering evidence foe prosecution, and it would not be possible to have the basis of the questioning altered for this purpose within the one process of the ASIO warrant.[36]

Constitutional issues

5.32 One of the key concerns for the Committee is the possible constitutional issues arising from the conferral of the power to issue warrants on judicial officers.

5.33 As originally introduced, the Bill gave the power to issue warrants, and to preside over questioning, to a single Prescribed Authority. The provisions gave the Attorney-General the power to authorise federal judges in that role.

5.34 Following the PJCAAD report Government Amendments split the dual powers under the Bill:

> The judges are not exercising the power of the prescribed authority under the legislation as it has been drafted. Resulting from a discussion of this issue in the PJC, it was decided to divide up what was originally one power. Under the original bill, the prescribed authority was also the authority that issued the warrant and . . . it was decided to divide it up so that the issuing of the warrant would be done by a judge or a federal magistrate but the actual prescribed authority would be a member of the Administrative Appeals Tribunal, not a chapter III court. Therefore, it would not raise the problems that arise in respect of [*Grollo v. Palmer*].[37]

Judges as *personae designatae*

5.35 The prime function of an Issuing Authority is to mediate the relationship between the state and the individual. For example, in issuing a criminal search warrant, the relevant authority must be satisfied that the requesting agency has

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36 ASIO, 'Answers to questions on notice', 22 November 2002, p. 5.

37 *Hansard*, 12 November 2002, p. 24 (Mr Holland, Attorney-General's Department)

provided concrete information.[38] Moreover, he or she must balance *at arms length* the competing public and private interests. He or she must 'stand between the police and the citizen' and give 'real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen'.[39]

5.36 Mr Bret Walker SC emphasised the importance of the Issuing Authority for warrants maintaining a strictly impartial role:

> Warrant issuing … must be impartial or it is rotten. There is nothing worse than a warrant-issuing authority that sees himself or herself as a rubber stamp, and those that do are behaving disgracefully. It is an impartial role.[40]

5.37 In the criminal justice system, the role of issuing authority is given to judges as *personae designatae*, that is, in their personal rather than their judicial capacity. The argument in favour of judges, as opposed to tribunal members or other administrators, is that they are, by their role and tenure, well suited to this task. In evidence before the PJCAAD, the Law Council of Australia put the argument this way:

> [T]he powers proposed to be granted to ASIO pursuant to [questioning] warrants … are so far reaching, including the power to request detention of persons for 48 hours and longer, that the issuing of warrants should only be capable of being authorised by a Chapter III judge. The common law has long recognised the role of the judiciary in the authorisation of the issuing of warrants. Such a role fits within the established principle of the performance of such function by judges as *personae designatae*.[41]

5.38 Similarly, in evidence to this Committee Dr Gavan Griffith QC argued that the proposed questioning and detention warrants involved a heavy responsibility: '[i]t is the sort of responsibility that someone with judicial experience should exercise'.[42] He referred also to a concession that was made in *Grollo v. Palmer* in support of conferring a role to issue telephone intercept warrants on judges:

> [I]t is … because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against

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38 For example, a search warrant may be issued if a Justice of the Peace 'is satisfied by information' (*Crimes Act 1914*, old s 10), 'satisfied by information upon oath' (*Crimes Act 1958* (Vic), s 465) or if it appears 'on a complaint made on oath' (*Criminal Code 1913* (WA), s 711) that there is reasonable ground for suspecting the existence of property connected with an offence, etc.

39 *Parker v. Churchill* (1985) 9 FCR 316 per Burchett J at p. 322, quoted with approval by the High Court in *George v. Rockett* (1990) 93 ALR 483.

40 *Hansard*, 26 November 2002, p. 256.

41 Law Council of Australia, *submission 147* to the Parliamentary Joint Committee on ASIO, ASIS and DSD, quoted by the *Advisory Report on the ASIO Legislation Amendment (Terrorism) Bill 2002*, 5 June 2002, p. 16.

42 *Hansard*, 22 November 2002, p. 156.

> serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property …., be authorised to control the official interception of communications. In other words, the professional experience and cast of mind of a Judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.[43]

Separation of powers

5.39 A key issue for the present inquiry regarding warrants is the separation of powers requirement implicit in Chapter III of the Constitution and discussed in the *Boilermakers' Case*.[44] Basically, Chapter III prohibits the conferral of executive power on the Judiciary and, vice versa, the conferral of judicial power on the Executive.

5.40 However, the issue of a warrant is an exercise of administrative power rather than judicial power. This proposition is widely accepted in relation to listening device and telecommunications interception warrants.[45] In part it is based on the fact that such decisions do not involve such things as the adjudication of the rights of parties,[46] or the identification and enforcement of rights in accordance with legal principles.[47]

5.41 It appears that the issue of a warrant is not necessarily inconsistent with the exercise of judicial power. It appears, not least from the decision of the High Court in *Grollo v. Palmer*, that the conferral of a power on a judge to issue warrants will be consistent with the *Boilermakers* principle if it is given to the judge as an individual, it is received by consent and it is not incompatible with the judge's performance of his or her judicial functions or the proper discharge by the judiciary of its responsibilities as an institution.[48] In evidence to the Committee, the Attorney-General's Department seemed to suggest that there was 'only one factor' affecting the conferral of power on judges which was that the judge exercise the power voluntarily.[49] However, other submissions and evidence suggested that the key concept was compatibility, or more specifically, the need to ensure that the conferral did not undermine judicial integrity.

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43 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at p. 367.

44 *R v. Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

45 *Hilton v. Wells* (1985) 157 CLR 57; *Coco v. The Queen* (1994) 179 CLR 427; *Grollo v. Palmer* (1995) 184 CLR 348. The High Court has also held that federal judges can issue telecommunications interception warrants.

46 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

47 *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 CLR 144; *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43.

48 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at pp. 360–365.

49 *Hansard*, 12 November 2002, p. 24.

Testing incompatibility

5.42 Examples of incompatibility would include the conferral of an overwhelming non-judicial workload, the conferral of functions which *of their nature* compromise or impair judicial integrity or undermine public confidence in the integrity of the judge or the judiciary.[50] Another example may be the conferral of an unduly confined administrative discretion. Dr Griffith indicated that six judges in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*[51] 'broadened the scope for recognition of matters of constitutional incompatibility to the holding of judicial office to the function of reporting to the Minister'.[52] In that case, the basic issue was that a judge, in preparing a report under heritage legislation, was so confined by ministerial direction and control as to be deprived of a free and open discretion. This, combined with other factors, made it incompatible with the exercise of judicial function.

5.43 It was argued that the power to issue a warrant, actually or potentially involving detention and with limitations on the Issuing Authority's discretion to vary the terms of the warrant, may undermine public confidence in the integrity of the judiciary. The majority in *Grollo v. Palmer* indicated that a live issue in respect of compatibility was 'whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch'.[53] This statement was borrowed from a decision of the United States Supreme Court, *Mistretta v. United States*. In *Mistretta* the court reacted against a perception that the court could be 'borrowed by the political branches [the Parliament or the Executive] to cloak their work in the neutral colours of judicial action'.[54]

5.44 Dr Gavan Griffith QC suggested that '[i]t would seem on this structure of legislation that [there is] almost nothing for a Federal Court judge to do other than sign a warrant. You are not able to vary its terms'.[55] Moreover, he suggested, while there was a basic discretion to reject the warrant, there might be 'no reason not to sign if the forms are in order'. In his view 'there is no scope for the exercise of effective discretion'.[56] Dr Griffith also offered the opinion that:

> It seems repugnant to the status of impartial judicial office for government investigating authorities to have unpublicised access to a Judge in his chambers in Court premises to present privately information to a Judge making administrative decisions affecting the liberty of persons.[57]

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50 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at pp. 360–365.

51 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

52 *Submission 235*, pp. 2-3.

53 *Grollo v. Palmer* (1995) 184 CLR 348, per Brennan CJ and Deane, Dawson and Toohey JJ, at p. 365, quoting from *Mistretta v. United States* 488 (1989) US 361 at 404.

54 488 U.S. 361, 407 (1989).

55 *Hansard*, 22 November 2002, p. 149.

56 Ibid.

57 *Submission 235*, p. 3.

5.45 In addition, he raised the possibility that an Issuing Authority would be exposed to the possibility of 'being summoned and cross-examined as a witness in proceedings, even to the point of attack on credit in that judge's own court'. He concluded that the practice 'seems unacceptable as a matter of constitutional practice'.[58]

5.46 A similar position was taken by Dr Stephen Donaghue,[59] Professor George Williams[60] and the Federation of Community Legal Centres (Victoria).[61] On the other hand, the Law Council of Australia referred to the suggestion in its submission to the inquiry by the PJC that a Chapter III judge should authorise the issue of a warrant for compulsory questioning and detention.[62]

5.47 The legal adviser to ASIO suggested that the potential for conflict might be less likely to arise under the Bill because the purpose behind the warrant was intelligence gathering rather than prosecution:

> unlike, for example, law-enforcement TI warrants, the particular purpose of this warrant is to assist in the collection of intelligence, as opposed to facilitating the collection of evidence for the purposes of prosecution … So the issue of conflict is less likely to arise in the first instance.[63]

5.48 In his submission Dr Griffith raised the prospect that the majority of the High Court may have applied the incompatibility test wrongly in *Grollo v. Palmer*. In his submission he expressed the view that the line of authority supporting that case[64] was based on 'fragile and impermanent reasoning'.[65] In addition, he commented:

> I regard it as likely that the High Court … would come to find that the designation … of judges … as an issuing authority would be unconstitutional for the reasons convincingly stated by McHugh J in his sole dissenting judgment in *Grollo v. Palmer*.[66]

5.49 In *Grollo v. Palmer*, McHugh J seemed to question the underlying basis of the doctrine. He referred to a comment by Mason and Deane JJ in *Hilton v. Wells*:

> To the intelligent observer, unversed in what Dixon J. accurately described – and emphatically rejected – as "distinctions without differences", it would come as a surprise to learn that a judge, who is appointed to carry out a

58 Ibid, p .3.

59 *Submission 61*, p. 7.

60 *Submission 22*, p. 6.

61 *Submission 243*, pp. 30-32.

62 *Submission 299*, p. 8.

63 *Hansard*, 12 November 2002, p. 27.

64 *Church of Scientology v. Woodward*; *Jones v. Commonwealth* (1987) 71 ALR 497; *Hilton v. Wells* (1985) 157 CLR 57.

65 Dr Gavan Griffith QC, *Submission 235*, p. 2.

66 Ibid, pp. 1-2.

> function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.[67]

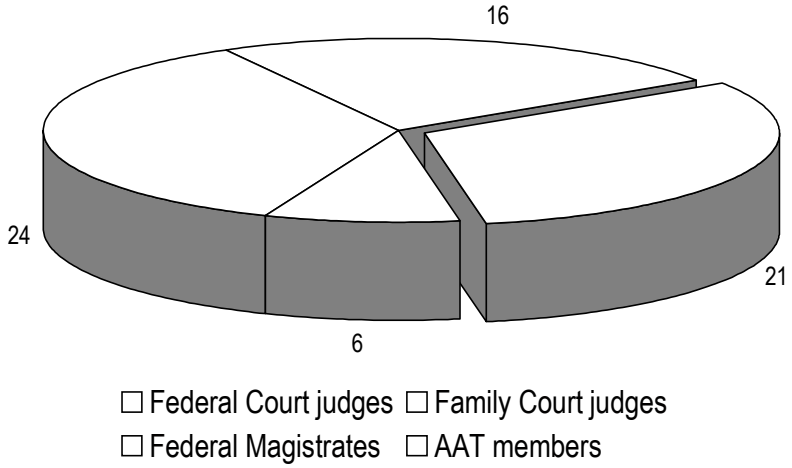
5.50 In Dr Griffith's view, the *persona designata* notion that a judge could exercise executive power in his or her personal capacity was 'not one that is likely for much longer to be apparent to, and accepted by, the majority of the High Court'.[68] He also suggested that the majority in *Grollo v. Palmer* had, perhaps, been somewhat indulgent toward the Government 'in accepting that it may be appropriate, to restore public confidence or to maintain public confidence in these matters, to have a Federal Court judge in effect supervising [the issuing of telephone intercept warrants]'.[69]

Judicial officers and their consents

5.51 Clearly, one of the fundamental criteria identified in *Grollo v. Palmer* is that a judge must consent to the conferral of the power to issue questioning and detention warrants. An issue of practical concern is whether any federal or state judges would be willing to consent, given the nature of the warrants and the possibility of later review.

5.52 In evidence and submissions, reference was made to the fact that a number of federal judicial officers had refused to consent to the conferral of a power to issue warrants under the *Telecommunications (Interception) Act* 1979. In answers to questions on notice, the Attorney-General's Department provided statistics for the numbers of Federal Court and Family Court Judges and Federal Magistrates that were currently appointed as 'eligible judges' under that Act.[70] (See graph below)

Eligible judges and nominated AAT members
(as at 13 November 2002)



67 *Hilton v. Wells* (1985) 157 CLR 57 at p. 84.

68 Dr Gavan Griffith QC, *Submission 235*, p. 3.

69 *Hansard*, 22 November 2002, p. 149.

5.53 In particular, Dr Griffith suggested, '[i]t is to be doubted that any federal judicial officer, acting advisedly, would volunteer to expose himself or herself to such risks by volunteering to act in a non-judicial capacity as an issuing authority'.[71] Given the numbers of 'eligible judges' under the existing telecommunications intercept warrant arrangements, this argument must be based on the particular aspects of the questioning and detention warrants. For its part, the Attorney-General's Department was ambivalent, and therefore unconvincing, about the prospect of judges consenting to the conferral of the power to issue these warrants. The Department simply made the observation: '[i]t will be interesting to see how many judges take up the offer'.[72]

A tribunal?

5.54 While it is a difficult issue to predict, the evidence and submissions suggest a live debate on *Grollo v. Palmer* and the issue of incompatibility.

5.55 Mr Bret Walker SC, on behalf of the Law Council of Australia, declined to comment, except to say 'I have no doubt that what the law is at the moment is to be found in the majority not the minority [in *Grollo v. Palmer*]'.[73] He did say:

> That being said, there are powerful reasons … why, constitutionally or not, serving judges, particularly in courts who will have the job of judicial review of the lawfulness of conduct under any such law, should really not be getting into this game. Whether there is a *persona designata* doctrine in Australia or not does not matter for the purpose of the merits that we would take. The merit we would take is that judges should not be involved in matters which are so closely allied with the executive and that retired judges have [a number of] virtues that you might like to consider.[74]

5.56 Dr Gavan Griffith QC put forward a more elaborate proposal:

> My own suggestion is that it would be appropriate, if it is desired to keep a public confidence in the process, to establish some form of tribunal, particularly constituted by a retired federal judge, for example someone like Gordon Samuels who was head of the [*Commission of Inquiry into ASIS*].[75]

5.57 Philip Boulten, on behalf of the Criminal Defence Lawyers Association said:

> I have given endorsement … to Gavan Griffith's suggestion that there should be no currently serving magistrates or judges given the power to issue these warrants, or to preside at the questioning.[76]

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70 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 9.

71 Dr Gavan Griffith QC, *Submission 235*, p. 3.

72 *Hansard*, 12 November 2002, p. 25.

73 *Hansard*, 26 November 2002, p. 230.

74 Ibid.

75 *Hansard*, 22 November 2002, pp. 149-150.

76 *Hansard*, 26 November 2002, p. 231.

5.58 Similarly, Dr Stephen Donaghue, in considering other models, suggested that appointing a retired judge would increase public confidence in the warrants process.[77] The Victorian Bar thought the idea 'had a tremendous amount to commend it'.[78]

5.59 The proposal relating to retired judges is considered more fully in Chapter 8.

77 *Submission 61*, p. 8.

78 *Hansard*, 22 November 2002, p. 160.