

Principles of good legislation: OQPC guide to FLPs



Institutional integrity of courts and judicial independence

Office of the Queensland Parliamentary Counsel



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Summary	3
Chapter III of the Commonwealth Constitution	3
Issues considered by parliamentary committees	3
Introduction	4
The <i>Kable</i> principle	4
Overview	4
The <i>Kable</i> decision	5
The High Court's subsequent consideration and application of the <i>Kable</i> principle	7
Confiscation etc. of property	7
Declared criminal organisations and freedom of association	9
Reliance on particular information used in criminal proceedings	11
Continuing detention of prisoners	15
Continuing detention orders made by Executive after Supreme Court proceedings	17
Miscellaneous	18
Pending litigation	19
Temporary judicial officers	19
Enforcement of arbitral awards	20
Consideration of judicial independence by parliamentary committees	21
Sentencing	22
Other aspects of judicial independence considered by parliamentary committees	26
Abolition, or change in constitution, of courts and tribunals	26
Judicial conditions and entitlements	27
Change of law affecting pending litigation	27



Summary

Consider whether legislation interferes with the independence of the judiciary or the institutional integrity of the courts. Judicial integrity of the courts may be unconstitutional and therefore inconsistent with the fundamental legislative principles under the [Legislative Standards Act 1992](#).

Chapter III of the Commonwealth Constitution

Legislation that offends Chapter III of the Commonwealth constitution by interfering with the judicial process in a way that undermines the institutional integrity of a State court invested with federal judicial power under that chapter is invalid (see paragraph [5]). This principle is often referred to as the *Kable* principle because it was first clearly articulated by the High Court in its decision in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 (see paragraphs [6]-[12]).

Legislation may be invalid under the *Kable* principle if it:

- confers powers on a court to freeze or confiscate property belonging to a suspected or convicted criminal without providing for proper judicial process and without allowing the court to reach an independent conclusion (see paragraphs [13]-[17]); or
- requires a court to declare a particular group or organisation to be of a criminal character and to impose restrictions on the freedom of members of the group or organisation to associate with one another (see paragraphs [18]-[22]); or
- directs a court to rely on particular information to reach a particular conclusion or to make a particular order (see paragraphs [23]-[32]).

Other challenges to legislative validity based on the *Kable* principle include the detention of sexual offenders, changes to parole requirements, the tenure of acting judges and the role of the courts in enforcing arbitral awards (see paragraphs [44]-[50] and [23]-[32]).

Issues considered by parliamentary committees

Even if legislation is not necessarily likely to be considered invalid, parliamentary committees may express concern about it if they consider it may affect or interfere with judicial independence and judicial process. The types of legislation about which parliamentary committees have commented on this basis include legislation that:

- affects sentencing discretion by, for example, requiring mandatory minimum sentences (see paragraphs [52]-[67]); or
- abolishes, or changes the constitution of, particular courts or tribunals (see paragraphs [68]-[69]); or
- affects judicial entitlements (see paragraphs [70]); or
- changes the law applicable in pending litigation (see paragraphs [71]-[72]).

The information contained in this chapter is current as at 30 June 2014.



Introduction

- [1] While the doctrine of the separation of powers does not apply to the States,¹ the so-called *Kable* principle limits what State legislatures may do with State courts and the decisions and judges of those courts. The principle is not expressly identified in section 4 of the [Legislative Standards Act 1992](#) but is generally considered to form part of the fundamental legislative principles against which Queensland legislation is considered.² The parliamentary committees have commented on, and referred to Parliament, legislation that appears to affect the institutional integrity of the courts.³
- [2] Unlike other fundamental legislative principles, inconsistency with the *Kable* principle may affect legislative validity. Chapter III of the Commonwealth Constitution permits the Commonwealth to invest State courts with federal judicial power and, since the High Court's 1996 decision in *Kable v Director of Public Prosecutions (NSW)* (*Kable*), State courts must retain 'institutional integrity' because they are potential repositories of federal jurisdiction.
- [3] In summary, the principle for which *Kable* stands is that because the Constitution establishes a integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislature which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.⁴
- [4] Given the practical consequences of chapter III issues for Queensland legislation, the first part of this chapter examines the *Kable* decision and its subsequent application by the High Court. After discussing the scope of the *Kable* principle, the second part of the chapter addresses judicial independence as a fundamental legislative principle generally and examines the issues parliamentary committees have commented on in relation to it.

The *Kable* principle

Overview

- [5] Although constitutional questions about the exercise of federal judicial power by State courts had arisen before *Kable*, the decision is a landmark because of the High Court's decision that State legislation that conferred power on a State court about matters of State jurisdiction constituted an invalid interference with the exercise of the judicial power of the Commonwealth. Although some earlier commentators considered the precise implications of

¹ *The Australian Workers' Union of Employees, Queensland v State of Queensland; State of Queensland v Together Queensland, Industrial Union of Employees & Anor* [2012] QCA 353

² The former Scrutiny of Legislation Committee considered it had capacity to consider matters not expressly mentioned in s 4 of the [Legislative Standards Act 1992](#) '... because FLPs are defined in broad terms in subsections (1) and (2) and because the matters listed in subsections (3) and (4) are only examples': Scrutiny of Legislation Committee Report No. 26 (2002) [Scrutiny of Bills for Constitutional Validity](#) p 1.

³ See, for example, [AD 2003 No 8 p 3 paras 14-18](#)

⁴ *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [40]



Kable to be somewhat uncertain,⁵ the following formulation of *Kable* is now generally accepted: State legislation that purports to invest a chapter III State court with a non-judicial function is invalid if the function is of a kind that undermines, or appears to undermine, the institutional integrity of the court and, by extension, the system established by chapter III of the Constitution.⁶

The Kable decision

- [6] The question before the High Court in *Kable* was the validity of the [Community Protection Act 1994 \(NSW\)](#) (the **NSW Protection Act**). The object of the Act, stated in section 3, was expressed to be the protection of the community by the preventative detention of Gregory Wayne Kable. The mechanism by which the object was to be achieved was an order of the NSW Supreme Court. Section 3(3) specifically provided that the only person against whom the NSW Supreme Court could make a preventative detention order was Mr Kable. Under section 5 of the [NSW Protection Act](#), the Supreme Court could make a preventative detention order against Mr Kable if the court were reasonably satisfied that he was ‘more likely that not to commit a serious act of violence’ and that his detention was appropriate for the protection of particular persons or the community generally.
- [7] By majority, the High Court held that the [NSW Protection Act](#) was invalid because of the operation of chapter III.⁷ The separate judgments delivered by Justices Toohey and Gummow emphasised the fact that the Act provided for Mr Kable’s detention in the absence of any breach by him of the criminal law and adjudication of his guilt. According to Justice Toohey:

[p]reventive detention under the Act is an end in itself ... [i]t is not an incident of the exclusively judicial function of adjudging and punishing criminal guilt. It is not part of a system of preventative detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt ... The function exercised by the Supreme Court under the Act offends Ch III ... because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt.⁸

- [8] Similarly, Justice Gummow held that:

[t]he present case is not one of incarceration by legislative or executive fiat. The involuntary detention of the appellant is brought about by orders of the Supreme Court in the exercise of what is described in s 24 as its “jurisdiction” under the Act. I have referred to the striking features of this legislation. They must be considered together. But the most significant of them is that, whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent on any adjudgment by the Court of criminal guilt. Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other

⁵ See, for example, Gogarty & Bartl ‘Tying *Kable* Down: The uncertainty about the independence and impartiality of State courts following *Kable v DPP (NSW)* and why it matters’ (2009) [32 UNSW Law Journal](#) 75

⁶ Halsbury’s (2011) at [90-5030]

⁷ Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting

⁸ (1996) 189 CLR 51 at 98 per Toohey J (citations omitted)



federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.⁹

[9] Justice Gummow explained that his view, that power of this kind could not constitutionally be conferred on or exercised by the Supreme Court of a State, was derived from the establishment, under the constitution, of an integrated system of law in Australia. The existence of this integrated legal system, in his Honour's view, precluded States from conferring jurisdiction on their own courts that would result in 'institutional impairment' of the judicial power of the Commonwealth.¹⁰

[10] The existence of an integrated system of law within Australia also formed an important part of the reasons given by Justices Gaudron and McHugh in their respective judgments. Justice Gaudron, while making clear that the constitution recognises the State courts as 'creatures of the States', observed that '[i]f chapter III requires that State courts not exercise particular powers, the Parliaments of the States cannot confer those powers on them'.¹¹ Her Honour then turned to the provisions of the [NSW Protection Act](#) noting that, although proceedings under it were designated as civil proceedings, the consequence of the Supreme Court making the orders was to detain Mr Kable in prison in the same manner as someone who had been convicted in a criminal proceeding. Justice Gaudron held that:

[t]he proceedings which the Act contemplates are not proceedings otherwise known to the law ... when regard is had to the precise nature of the function purportedly conferred by s 5(1), the matters to be taken into account in its exercise and its contrariety to which is ordinarily involved in the judicial process, the effect of s 5(1) is, in my view, to compromise the integrity of the Supreme Court of New South Wales and, because that court is not simply a State court but a court which also exists to exercise the judicial power of the Commonwealth, it also has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the Constitution.¹²

[11] Justice McHugh also held that the fact that the State courts are integral to the structure established by chapter III of the constitution meant that neither the States nor the Commonwealth could seek to confer on them powers that are incompatible with the exercise of judicial power under chapter III. His Honour further noted that it was irrelevant that the [NSW Protection Act](#) dealt with matters of State, and not federal, jurisdiction because:

[t]he compatibility of State legislation with federal judicial power does not depend on intention. It depends on effect. If, as Gibbs J pointed out in *The Commonwealth v Queensland*, State legislation has the effect of violating the principles that underlie Ch III, it will be invalid ... One of the basic principles which underlie Ch III and to which it gives effect is that judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government ... In the case of State courts, this means they must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and executive government. ... While nothing in Ch III prevents a State from conferring

⁹ (1996) 189 CLR 51 at 131-132 per Gummow J

¹⁰ (1996) 189 CLR 51 at 137-143 per Gummow J

¹¹ (1996) 189 CLR 51 at 102 per Gaudron J

¹² (1996) 189 CLR 51 at 106-107 per Gaudron J



non-judicial functions on a State Supreme Court in respect of non-federal matters, those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State. A State law which gave the Supreme Court powers to determine issues of a purely governmental nature—for example, how much of the State Budget should be spent on child welfare or what policies should be pursued by a particular government department—would be invalid. It would have the effect of so closely identifying the Supreme Court with the government of the State that it would give the appearance that the Supreme Court was part of the executive government of the State. The law would fail not because it breached any entrenched doctrine of separation of powers in the State Constitution but because it gave the appearance that a court invested with federal jurisdiction was not independent of its State government.¹³

- [12] Justice McHugh concluded that the [NSW Protection Act](#) offended against these principles because it compromised the institutional integrity of the NSW Supreme Court. His Honour considered that the Act made the Supreme Court a mere ‘... instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person’.¹⁴

The High Court’s subsequent consideration and application of the Kable principle¹⁵

Confiscation etc. of property

- [13] The *Kable* principle has provided the basis for several High Court challenges to State legislation providing for courts to freeze or confiscate property alleged to represent the proceeds of crime. The cases show, however, that the success of these challenges depends on the degree of discretion the courts are able to exercise in determining whether or not to make freezing or confiscation orders. If the courts are allowed very little or no discretion, the High Court has found that the legislative provisions are likely to be invalidated by the *Kable* principle. It would impair the courts’ institutional integrity if the effect of the legislation were to render them mere intermediaries through which the wishes of the executive government were carried out. However, if the legislative regime in question allows for a genuine exercise of judicial process, including the ability to examine evidence and form independent conclusions, the High Court has generally found they do not offend the *Kable* principle.
- [14] The first confiscation regime to be examined by the High Court in light of *Kable* was the [Crimes \(Confiscation of Profits\) Act 1988](#) (WA) (the **WA Confiscation Act**), which the High Court considered in *Silbert v Director of Public Prosecutions* (WA).¹⁶ The WA director of public prosecutions had applied for an order under that Act against Mr Silbert, who was the executor of the estate of Stephen Retteghy. Mr Retteghy had been charged on indictment with drug offences but died before trial. Section 6 of the [WA Confiscation Act](#) permitted confiscation

¹³ (1996) 189 CLR 51 at 116-117 per McHugh J (citations omitted)

¹⁴ (1996) 189 CLR 51 at 122 per McHugh J

¹⁵ The *Kable* principle has also been considered, and in some cases applied, by various State Supreme Courts both at first instance and at the appellate level. Unfortunately, space constraints make it impossible to consider those decisions in this chapter.

¹⁶ [2004] HCA 9; (2004) 217 CLR 181



orders and pecuniary penalty orders to be made against deceased estates. Mr Silbert resisted the application and argued *Kable* rendered the [WA Confiscation Act](#) invalid under the *Kable* principle because the WA Supreme Court was effectively prevented from making proper inquiries as to whether the deceased person had actually committed an offence before determining an application for a forfeiture order or a pecuniary penalty order against the estate.

- [15] A majority of the High Court rejected Mr Silbert's argument.¹⁷ The majority justices held that, although the [WA Confiscation Act](#) deemed Mr Retteghey to have committed an offence, the deeming provision was not conclusive. Under section 53 of the [WA Confiscation Act](#), the WA Supreme Court could not make a forfeiture order against Mr Retteghey's estate unless it was satisfied beyond reasonable doubt that he had actually committed the offence.¹⁸ Although it was slightly less clear whether the [WA Confiscation Act](#) would have allowed Mr Silbert to resist an application for a pecuniary penalty order on the basis that Mr Retteghey had not committed an offence, the High Court majority justices did not consider this uncertainty sufficient to invalidate the Act. The pecuniary penalty provision gave the WA Supreme Court power to assess the value of the benefits said to be derived from the commission of the serious offence. The justices considered that the words 'taken to have been convicted of a serious offence' in section 3 of the [WA Confiscation Act](#) did not amount to a 'legislative determination of guilt'. Rather, in their Honours' view, section 3 merely described '... the circumstances in which the operative provisions of the [[WA Confiscation Act](#)] may be enlivened'.¹⁹ Once enlivened, it was for the WA Supreme Court to decide how the 'benefits' of the property should be assessed and to use that assessment to calculate the pecuniary penalty order. The High Court referred to a similar provision in the [Customs Act 1901](#) (Cwlth), which it had previously upheld, and concluded that if the Commonwealth had power to enact legislation in these terms, the WA legislation could not be said to offend the *Kable* doctrine.²⁰
- [16] The next case to come before the High Court concerning the validity of provisions freezing and confiscating alleged proceeds of crime was *International Finance Trust Co Ltd v New South Wales Crime Commission*.²¹ The case arose out of an *ex parte* application by the NSW Crime Commission to the NSW Supreme Court under former section 10 of the [Criminal Assets Recovery Act 1990](#) (NSW) (the *NSW Recovery Act*) for an order freezing certain bank accounts held by International Finance Trust Co Ltd. Former section 10 of the [NSW Recovery Act](#) required the NSW Supreme Court to make the freezing order if the NSW Crime Commission application was supported by an affidavit sworn by an authorised person and deposing to the person's suspicion that the owner of the property had engaged in serious crime-related activities.

¹⁷ Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; Kirby J agreed with the orders made by the majority but for different reasons.

¹⁸ (2004) 217 CLR 181 at 186

¹⁹ (2004) 217 CLR 181 at 187

²⁰ (2004) 217 CLR 181 at 186-187. Note, however, Kirby J's comments at 193 as to the need for caution in using parallel Commonwealth legislation to determine the validity of impugned State legislation and cf *Fardon v AG (Qld)* (2004) 223 CLR 575 at 591 per Gleeson CJ, at 614 per Gummow J and at 655 per Callinan and Heydon JJ.

²¹ [\[2009\] HCA 49](#); (2009) 240 CLR 319



Under section 22 of the [NSW Recovery Act](#), once the NSW Supreme Court made a freezing order the NSW Crime Commission could apply to the Court for an asset forfeiture order and the Court was required to make the order if it considered it ‘more probable than not’ that the person who was subject to the restraining order had, within the previous six years, engaged in serious crime-related activity.

- [17] International Finance Trust Co Ltd resisted the NSW Crime Commission’s application for the freezing order on the basis that the *Kable* doctrine invalidated the [NSW Recovery Act](#). A majority of the High Court found in the company’s favour but for disparate reasons.²² Chief Justice French considered that section 10 of the [NSW Recovery Act](#) amounted to a legislative direction to the NSW Supreme Court as to the manner and outcome of the exercise of its jurisdiction and deprived the Court ‘of an important characteristic of judicial power’, namely, the power to ensure procedural fairness between parties.²³ In contrast, Justices Gummow and Bell did not consider it necessarily problematic that section 10(3) of the [NSW Recovery Act](#) required the NSW Supreme Court to make a restraining order if it was satisfied that the authorised officer’s affidavit disclosed reasonable grounds for suspicion.²⁴ Rather, in their Honours’ opinion, the real issue was that when the legislative scheme of the [NSW Recovery Act](#) was considered as a whole, its effect was to conscript the NSW Supreme Court into a process of mandatory *ex parte* sequestration of property, which was incompatible with the Court’s institutional integrity.²⁵ Justice Heydon decided the case on the basis that the [NSW Recovery Act](#) did not provide a mechanism by which a person whose property had been made subject to a freezing order could apply to have the order set aside. In his Honour’s view, the absence of such a mechanism effectively compelled the Supreme Court to engage in an ‘... activity which is repugnant to the judicial process in a fundamental degree.’²⁶

Declared criminal organisations and freedom of association

- [18] The *Kable* principle has been applied to statutory regimes under which State Supreme Courts are involved in declaring particular organisations to be of a criminal character and issuing orders limiting the freedom of members of those organisations to associate with other persons. As with statutory regimes dealing with freezing or confiscation of property, however, the relevant High Court decisions about the application of the *Kable* principle in the context of the ‘association cases’ depend on the precise wording of the legislative provisions.
- [19] *South Australia v Totani* concerned the validity of the [Serious and Organised Crime \(Control\) Act 2008](#) (SA) (the **SA Control Act**).²⁷ Under the Act, the SA Attorney-General could declare that an organisation represented a risk to public safety and order if satisfied members of the

²² French CJ, Gummow, Bell and Heydon JJ; Hayne, Crennan and Kiefel JJ dissenting

²³ (2009) 240 CLR 319 at 355

²⁴ (2009) 240 CLR 319 at 360. The Act provided that the NSW Supreme Court had to be satisfied there were reasonable grounds for the deponent’s suspicion.

²⁵ (2009) 240 CLR 319 at 366-367

²⁶ (2009) 240 CLR 319 at 385. A property owner could apply to the NSW Supreme Court to have an asset forfeiture order lifted if the owner satisfied the Court that it was ‘more probable than not’ that the owner had not acquired the property illegally or fraudulently.

²⁷ [\[2010\] HCA 39](#); (2010) 242 CLR 1



organisation were involved in serious criminal activity. Once the Attorney-General declared an organisation to be a ‘declared organisation’, the SA police commissioner could apply to the SA Magistrates Court for a ‘control order’ to be made against any member of the organisation, prohibiting the member from communicating or associating with particular persons. Section 14(1) of the [SA Control Act](#) provided that the SA Supreme Court must make a control order if satisfied that the person against whom it was to be made was a member of a declared organisation. In May 2009 the SA Attorney-General declared the Finks Motorcycle Club to be a declared organisation and in June 2009 the SA Police Commissioner applied for control orders against two Finks’ members, Mr Totani and Mr Hudson. Mr Totani and Mr Hudson resisted the police commissioner’s application for control orders, arguing that the [SA Control Act](#) offended the *Kable* principle and was therefore invalid.

- [20] A majority of the High Court accepted Mr Totani and Mr Hudson’s argument and held that the provisions of the [SA Control Act](#) were invalid.²⁸ The majority justices noted the following features of the Act. First, in order to make an organisation a ‘declared organisation’, the SA Attorney-General did not have to be satisfied that all, or even a majority, of the organisation’s members were involved in criminal activity. Second, once an organisation became a declared organisation and the SA police commissioner applied for a control order against its members, the SA Magistrates Court was required to make the control order.²⁹ Third, the SA police commissioner could apply *ex parte*. Finally, a person against whom a control order had been made could object to the order but the [SA Control Act](#) restricted the SA Magistrates Court, when determining an objection, to considering only the strength of the evidence about the person’s membership of the declared organisation. This degree of interference with what Chief Justice French termed the ‘decisional independence’ of the SA Magistrates Court was sufficient to impair the Court’s institutional integrity and therefore its ability to properly discharge its federal judicial responsibilities.³⁰
- [21] The High Court again considered the implications of the *Kable* principle for court orders restricting freedom of association in *Wainohu v New South Wales*.³¹ The case involved the (since repealed) [Crimes \(Criminal Organisations Control\) Act 2009](#) (NSW) (the ***NSW Criminal Organisations Act***). Under the Act, the NSW Attorney-General could declare that certain judges of the NSW Supreme Court were ‘eligible judges’ to whom the NSW police commissioner could make an application, under part 2 of the Act, for an order that an organisation was a ‘declared organisation’. If, on hearing the application, the eligible judge was satisfied that the organisation’s members associated for the purpose of serious criminal activity and represented a risk to public safety and order, the judge could declare the organisation to be a ‘declared organisation’. A declaration of this kind was stated to be an administrative act and the judge was not required to give reasons for his or her decision. Part 3 of the [NSW Criminal Organisations Act](#) conferred further power on the NSW Supreme Court to make control orders

²⁸ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting

²⁹ (2010) 242 CLR 1 47 at 48 per French CJ, at 67 per Gummow J, at 86-88 per Hayne J, at 149-152 per Crennan and Bell JJ and at 168 per Kiefel J

³⁰ (2010) 242 CLR 1 at 157, 160 and 172-173 per Kiefel J

³¹ [\[2011\] HCA 24](#); (2011) 243 CLR 181



over members, former members and purported members of a declared organisation that restricted their freedom to associate with others.

- [22] In July 2010 the NSW Police Commissioner applied for an order that the Hells Angels Motorcycle Club be made a declared organisation. Mr Wainohu, a member of the Hells Angels club, commenced proceedings in the High Court seeking a declaration that the [NSW Criminal Organisations Act](#) was invalid under the *Kable* principle. The High Court accepted Mr Wainohu's argument. However, the Court did not hold the [NSW Criminal Organisations Act](#) invalid because of the 'control order' regime under part 3 of the [NSW Criminal Organisations Act](#). In fact, the High Court considered that part 3 differed significantly from the SA regime in *Totani* because the NSW Supreme Court was not required under part 3 to make a control order strictly on the basis of an earlier administrative declaration.³² The principal basis on which a majority of the High Court found that the [NSW Criminal Organisations Act](#) was invalid was the regime established by part 2 of the Act.³³ The majority justices acknowledged that chapter III of the Constitution did not automatically preclude State legislatures from conferring administrative functions, such as declaring an organisation to be a declared organisation, on judges of State courts in the judges' capacity as *personae designatae*.³⁴ However, the [NSW Criminal Organisations Act](#) did not require judges to give reasons for making an organisation a declared organisation. In addition, when parts 2 and 3 of the Act were considered as a whole, they tended to create the appearance of a connection between the Court's performance of its administrative function (making a declaration) and its judicial function (making a control order). The majority justices considered that these elements of the [NSW Criminal Organisations Act](#) substantially impaired the NSW Supreme Court's 'essential and defining characteristics as a court'. Justices Gummow, Hayne, Crennan and Bell focussed in particular on the absence of a duty for eligible judges to give reasons for declaring an organisation to be a declared organisation, holding that the effect of part 2 of the Act was:

... to utilise confidence in impartial, reasoned and public decision-making of eligible judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under sections 9 and 12.³⁵

Reliance on particular information used in criminal proceedings

- [23] The High Court has considered several challenges based on the *Kable* principle to legislation providing for the suppression of information relied on in particular types of criminal proceedings.

³² (2011) 243 CLR 181 at 230 per Gummow, Hayne, Crennan and Bell JJ; Heydon J, who dissented as to the validity of the Act because of Part 2, also did not consider that the provisions of Part 3 would have rendered the Act invalid: at 235-237.

³³ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting

³⁴ (2011) 243 CLR 181 at 221 per Gummow, Hayne, Crennan and Bell JJ (but note the qualifications added by their Honours)

³⁵ (2011) 243 CLR 181 at 230



- [24] In *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police*, the High Court considered the validity of the [Corruption and Crime Commission Act 2003](#) (WA) (the **WA Corruption Act**).³⁶ Under section 68 of the Act, the WA police commissioner could apply *ex parte* to the WA Corruption and Crime Commission for the issue of a ‘fortification warning notice’ relating to particular premises. The WA Commission could issue the fortification notice and the WA police commissioner could then issue the owner of the premises with a ‘fortification removal notice’ under section 72 of the [WA Corruption Act](#) if the commissioner reasonably believed the premises were heavily fortified and ‘habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime’. The owner of the relevant premises could apply under section 76 of the [WA Corruption Act](#) to review whether the police commissioner had the relevant belief mentioned in section 72.
- [25] The Gypsy Jokers Motorcycle Club received a fortification removal notice relating to its clubhouse. In response, the club challenged the validity of section 76(2) of the [WA Corruption Act](#) on the grounds it required the WA Supreme Court to act in a manner that was inconsistent with judicial process and therefore with its status as a chapter III court. Section 76(2) provided:

The Commissioner of Police may identify any information provided to the court for the purposes of the review as confidential if its disclosure might prejudice the operations of the Commissioner of Police, and information so identified is for the court’s use only and is not to be disclosed to any other person whether or not a party to the proceedings, or publicly disclosed in any way.

- [26] The High Court rejected the club’s argument. It held that the purpose of section 76 was, effectively, to displace the WA police commissioner’s claim to public interest immunity and require the commissioner to give the WA Supreme Court documents relating to the commissioner’s decision to issue the fortification removal notice.³⁷ The High Court justices also considered it significant that section 76(2) of the [WA Corruption Act](#) was conditional on the WA Supreme Court being satisfied that a disclosure of the documents might prejudice the WA police commissioner’s operations. In other words the WA Supreme Court was not required to rely on a mere assertion of potential prejudice by the WA police commissioner.³⁸ The High Court justices held that this condition provided the context in which the prohibition against disclosure of the information in section 76(2) was to be interpreted. When considered in that context, it was clear that section 76(2) was not an ‘attempted legislative direction as to the manner of the outcome of any review application’ but was merely an attempt to ‘... focus attention by the [WA Supreme] Court to the prejudicial effect disclosure may have’.³⁹

³⁶ [\[2008\] HCA 4](#); (2008) 234 CLR 532

³⁷ (2008) 234 CLR 532 at 557 per Gummow, Hayne, Heydon & Kiefel JJ

³⁸ (2008) 234 CLR 532 at 558

³⁹ (2008) 234 CLR 532 at 561—Crennan J, with whom Gleeson CJ agreed, adopted a similar construction of s 76(2): at 593-594. Kirby J dissented.



[27] *K-Generation Pty Limited v Liquor Licensing Court* concerned the validity of section 28A of the [Liquor Licensing Act 1997](#) (SA) (the *SA Licensing Act*).⁴⁰ K-Generation and its director, Mr Krasnov, had applied to the SA liquor and gambling commissioner for an entertainment venue licence. The SA police commissioner opposed the application on the basis that Mr Krasnov and another person associated with the company, Ms Tay, were not fit and proper persons to hold the licence. The SA police commissioner tendered information to support this claim but that information was not disclosed to the company or to Mr Krasnov and Ms Tay because of section 28A of the [SA Licensing Act](#), which provided:⁴¹

- (1) No information provided by the [police commissioner] to the [liquor commissioner] may be disclosed to any person (except the Minister, a court or a person to whom the [police commissioner] authorises its disclosure) if the information is classified by the [police commissioner] as criminal intelligence.⁴²

...

- (5) In any proceedings under this Act the [liquor] Commissioner, the [Licensing] Court or the Supreme Court—
 - (a) must, on the application of the [police commissioner], take steps to maintain the confidentiality of information classified by the [police commissioner] ... as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and
 - (b) may take evidence consisting of or relating to information classified ... as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

[28] The SA liquor commissioner refused to grant the entertainment venue licence and K-Generation applied to the SA Licensing Court for a review of the decision to refuse. The case continued to the High Court on the issue of whether section 28A of the [SA Licensing Act](#) was invalid because it required the SA Licensing Court not to disclose the very information on which the liquor commissioner had relied to refuse the application.

[29] Perhaps unsurprisingly in light of its decision in *Gypsy Jokers*, the High Court held that section 28A of the [SA Licensing Act](#) was valid.⁴³ Chief Justice French did so despite considering that section 28A of the [SA Licensing Act](#) infringed principles of open justice and procedural

⁴⁰ [2009] HCA 4; (2009) 237 CLR 501

⁴¹ Similar provisions had previously resulted in the Queensland Court of Appeal finding that the [Criminal Proceeds Confiscation Act 2002](#) was invalid, but that case involved confiscation of existing property and the Act in question required applications for confiscation to be conducted *ex parte*: *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2003] QCA 249 at [57]; [2004] 1 Qd R 40 at 55 per Williams JA (White and Wilson JJ agreeing).

⁴² The SA Licensing Act defined 'criminal intelligence' to mean 'information relating to actual or suspected criminal activity ... the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement'.

⁴³ The High Court held that the SA Licensing Court was a Court for the purposes of chapter III.



fairness.⁴⁴ His Honour held that, because section 28A did not subject either the SA Licensing Court or the SA Supreme Court (which heard appeals from the Licensing Court) to executive direction, it therefore did not confer on either court ‘... functions which are incompatible with their institutional integrity as courts of the States or with their constitutional role as repositories of federal jurisdiction’.⁴⁵ Section 28A of the [SA Licensing Act](#) left both the SA Licensing Court and Supreme Court discretion in several important matters, including deciding the steps to be taken to preserve the confidentiality of the information disclosed by the SA police commissioner, deciding if that information satisfied the definition of ‘criminal intelligence’ and also deciding whether or not to rely on the information in reaching a decision.

- [30] Justice Kirby, like Chief Justice French, had reservations about aspects of the legislation but held that they were not sufficiently problematic as to impair the SA Licensing Court’s or SA Supreme Court’s institutional integrity.⁴⁶ Justices Gummow, Hayne, Heydon, Crennan and Kiefel focussed on the words ‘could reasonably be expected’ in the definition of ‘criminal intelligence’, and held that those words required the SA Licensing Court to be satisfied that facts existed to support the expectation.⁴⁷ If the Court were so satisfied, their Honours held, it was then open to it to decide what should be done to protect confidentiality.⁴⁸ Finally, the SA Licensing Court (and, by extension, the SA Supreme Court) was not required to accept or rely on the ‘criminal intelligence’.⁴⁹
- [31] The High Court again considered legislation providing for making of declarations as to criminal character on the basis of confidential information in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd*.⁵⁰ The case concerned an application by the Assistant Commissioner of the Queensland Police Service for a declaration by the Supreme Court of Queensland that the Finks Motor Cycle Club (Gold Coast Chapter) constituted a ‘criminal organisation’ under section 10 of the [Criminal Organisation Act 2009](#) (the *Qld Criminal Organisation Act*). Information previously declared by the Supreme Court as being ‘criminal intelligence’ under the [Qld Criminal Organisation Act](#) was relied on in support of that application. Section 59 of the [Qld Criminal Organisation Act](#) defined ‘criminal intelligence’ as information relating to actual or suspected criminal activity, the disclosure of which could reasonably be expected to prejudice a criminal investigation, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement, or endanger a person’s life or physical safety. To make a declaration that information was criminal intelligence, the Supreme Court was required to hear applications to declare particular intelligence ‘criminal intelligence’ *ex parte* and in closed hearings. Further, if as a result of the declaration being made about the information, any part of a hearing of an application for a declaration that an organisation was a ‘criminal organisation’ was also required to be a closed hearing.

⁴⁴ (2009) 237 CLR 501 at 512

⁴⁵ (2009) 237 CLR 501 at 512

⁴⁶ (2009) 237 CLR 501 at 575-580

⁴⁷ (2009) 237 CLR 501 at 540 and 542

⁴⁸ (2009) 237 CLR 501 at 542-543

⁴⁹ (2009) 237 CLR 501 at 543

⁵⁰ [2013] HCA 7



- [32] Before the High Court, the Finks argued the provisions of the [Qld Criminal Organisation Act](#) were invalid because they denied procedural fairness to such a degree that the institutional integrity of the Supreme Court was impaired. However, the High Court rejected the respondent's arguments. It noted that, as pointed out by Justice Crennan in *Gypsy Jokers*, '...[p]arliament can validly legislate to exclude or modify the rules of procedural fairness'.⁵¹ Therefore, if it is contended that the Supreme Court's institutional integrity is compromised because procedural requirements deny procedural fairness, the validity or invalidity of the procedural requirement will depend largely on its effect on the Court's fairness and impartiality. In the context of the [Qld Criminal Organisation Act](#), the High Court concluded that the fact that the Supreme Court was still expected to act fairly and impartially under the Act pointed firmly against invalidity.⁵²

Continuing detention of prisoners

- [33] The continuing detention of prisoners was considered by the High Court in *Fardon v Attorney-General (Qld)*, which concerned the validity of the [Dangerous Prisoners \(Sexual Offenders\) Act 2003](#) (the [Sexual Offenders Act](#)).⁵³ Under that Act, the Attorney-General was able to apply to the Supreme Court of Queensland for an order that a prisoner serving a sentence of imprisonment for a serious sexual offence be detained in prison after the end of his or her term. Section 8 of the [Sexual Offenders Act](#) gave the Supreme Court power to order that a prisoner be kept in prison pending the hearing of the Attorney-General's application, even if the prisoner would otherwise have been released before the hearing date. Once the Queensland Supreme Court had heard an application, if it was satisfied that there was an 'unacceptable risk' that the prisoner would commit a serious sexual offence if released, it had the power to order that the prisoner be indefinitely detained for control, care or treatment or to release the prisoner subject to supervision.
- [34] A majority of the High Court held that the [Sexual Offenders Act](#) did not offend chapter III because it neither compromised the institutional integrity of the Queensland Supreme Court nor impaired its ability to function as a court exercising federal judicial power.⁵⁴ The High Court majority justices noted several important differences between the [Sexual Offenders Act](#) and the [NSW Protection Act](#) considered in *Kable*. Unlike the [NSW Protection Act](#), the [Sexual Offenders Act](#) was an Act of general application and the purpose of detaining prisoners under it was to protect the public rather than to punish the individual prisoner.⁵⁵ Perhaps most importantly, however, the [Sexual Offenders Act](#):

authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character ... It confers a substantial discretion as to whether an order should be made,

⁵¹ [2013] HCA 7 at [152]

⁵² [2013] HCA 7 at [156]-[169]

⁵³ [2004] HCA 46; (2004) 223 CLR 575

⁵⁴ Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; Kirby J dissenting

⁵⁵ The High Court considered the existence of a protective rather than punitive purpose was demonstrated by the power given to Queensland Supreme Court to order treatment or supervision for prisoners instead of merely detaining them in prison: (2004) 223 CLR 575 at 607-614 per Gummow J and at 654-655 per Callinan and Heydon JJ but *cf* at 647-648 per Hayne J



and, if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the Attorney-General. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged ... to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits.⁵⁶

- [35] The High Court has also considered whether or not legislative changes affecting a prisoner's eligibility for release on parole may offend the *Kable* principle. In *Crump v New South Wales*, Mr Crump sought a declaration that the *Kable* principle operated to preclude the application to him of section 154A of the [Crimes \(Administration of Sentences\) Act 1999](#) (NSW) (the ***NSW Sentencing Administration Act***) after the plaintiff was sentenced under the repealed [Sentencing Act 1989](#) (NSW).⁵⁷
- [36] Mr Crump had been convicted of murder in 1974. He was sentenced to life imprisonment and the sentencing judge expressed the view that he should never be released.⁵⁸ In 1997, Justice McInerney of the NSW Supreme Court made a determination under section 13A of the [NSW Sentencing Administration Act](#) that Mr Crump was required to serve a minimum term of 30 years imprisonment and an additional term of life imprisonment after the end of the minimum term. In September 2003, Mr Crump applied to the NSW parole authority under section 143 of the [NSW Sentencing Administration Act](#) for preliminary consideration as to whether he ought to be released on parole. However, under section 154A of the [Act](#), which had been introduced in 2001, the parole authority was only required to give preliminary consideration to the parole of a serious offender who, like Mr Crump, was the subject of a judicial non-release recommendation if the prisoner specifically applied. On Mr Crump's application, the NSW parole authority considered that section 154A(3) of the [NSW Sentencing Administration Act](#) precluded it from directing Mr Crump's release. At the time, section 154A(3) provided:
- (3) After considering [a serious offender's application for consideration as to release on parole], the Parole Authority may make an order directing the release of the offender on parole, if, and only if, the Parole Authority:
 - (a) is satisfied (on the basis of a report prepared by the Chief Executive Officer, Justice Health) that the offender:
 - (i) is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person, and
 - (ii) has demonstrated that he or she does not pose a risk to the community, and
 - (b) is further satisfied that, because of those circumstances, the making of such an order is justified.

⁵⁶ See (2004) 223 CLR 575 at 592 per Gleeson CJ

⁵⁷ [\[2012\] HCA 20](#); (2012) 247 CLR 1

⁵⁸ At that time, life sentences in NSW extended for the term of the prisoner's 'natural life' and, accordingly, the only possibility of release for prisoners such as Mr Baker and Mr Crump was by way of an executive order under section 463 of the [Crimes Act 1900](#) (NSW).



[37] Mr Crump argued that Justice McInerney's determination had created in Mr Crump a right or entitlement to be considered for release on parole at the end of his minimum term and that, in purporting to deprive him of that right, section 154A amounted to an interference with the NSW Supreme Court's exercise of judicial power. Although Mr Crump sought to raise broad issues about the scope of chapter III and the *Kable* principle in argument before the High Court, these questions were ultimately not addressed in any of the reasons for judgment. All members of the Court held that the case ultimately turned on the narrow question of whether s 154A did, in fact, alter the effect of Justice McInerney's determination and all the members concluded that it did not. Justices Gummow, Hayne, Crennan, Kiefel and Bell held that it was clear from s 13A(6) of the [Sentencing Act 1989](#) (NSW) that Justice McInerney's order was a 'judgment, decree, order or sentence of the NSW Supreme Court'.⁵⁹ However, that order did not confer on Mr Crump rights in relation to release on parole because:

[i]n that regard, the determination itself had no operative effect. Rather it constituted a factum by reference to which the parole system (later including s 154A) operated ... [and accordingly, section 154A] did not impeach, set aside, alter or vary the sentence under which ... [Mr Crump] suffers his deprivation of liberty.⁶⁰

Continuing detention orders made by Executive after Supreme Court proceedings

[38] In the *Attorney-General (Qld) v Lawrence*,⁶¹ the Queensland Supreme Court considered whether the [Criminal Law Amendment \(Public Interest Declarations\) Amendment Act 2013](#) (**Declarations Act**) was invalid under the *Kable principle*. The Declarations Act amended the [Criminal Law Amendment Act 1945](#)⁶² (CLAA) to authorise the Governor in Council, on recommendation from the Attorney-General, to make an order authorising the continuing detention of a person who was subject to:

- a continuing detention order under the [Sexual Offenders Act](#); or
- a supervision order if, immediately before the supervision order is made, the person was subject to a continuing detention order under the [Sexual Offenders Act](#).

[39] The Attorney-General could make a recommendation to the Governor in Council if the declaration is in the public interest and the Attorney-General gives the person to whom the recommendation is being made a notice and an opportunity to respond.⁶³

⁵⁹ (2012) 247 CLR 1 at 26

⁶⁰ (2012) 247 CLR 1 at 26-27 and *cf* the reasoning of French CJ at 19 and Heydon J at 28

⁶¹ [2013] QCA 364

⁶² Section 6 of the Declarations Act inserted parts 4 and 4A into the CLAA, which provided for the scheme of Governor in Council declarations to allow for the further declarations in the public interest. Section 3 of the Declarations Act provided for the amendment of the long title to reflect the purpose of the new parts 4 and 4A of the CLAA. Sections 4 and 5 of the Declarations Act provided for the movement of the definition of corrective services facility from section 18 to section 2A as it was used in the definition of institution for CLAA parts 4 and 4A.

⁶³ [CLAA](#), section 22(2) and (3). A notice was not required to be given to the person if the declaration is required to be made urgently: CLAA, section 22(4).



- [40] The Governor in Council could order the continuing detention of a person only if the continuing detention was in the public interest, and after any appeal under the Sexual Offenders Act was dealt with or appeal period had expired.⁶⁴
- [41] A decision based on the public interest could be based on any matter the Minister or Governor in Council considers relevant, and is not limited by the provisions of the [CLAA](#) or another Act.⁶⁵
- [42] The Court of Appeal (Holmes, Muir and Fraser JJA) held in a joint judgment that the Declarations Act was invalid as it infringed the *Kable* principle. The Court held the provisions invalid because those provisions had the effect of rendering the Supreme Court orders made under the Sexual Offenders Act a provisional order that could be overturned by the executive with an order made under the amended [CLAA](#).
- [43] The Court recognised that the State legislatures could affect the orders of the Supreme Court without making the legislation repugnant to the Court’s institutional integrity.⁶⁶ However, in considering whether the legislation was invalid, the Court was required to consider the overall effect the amendments had on the institutional integrity of the Court.⁶⁷ The Court held that as the provisions of the [CLAA](#) stepped in after the Supreme Court decided to release a person under the [Sexual Offenders Act](#), the [CLAA](#) provisions put the Executive in the place of an appellate court that could overturn the Supreme Court’s order under the [Sexual Offenders Act](#).⁶⁸ The Court held:

All such orders now must be regarded as provisional, their effect after the expiry of the appeal period or the resolution of any appeal being contingent upon the executive subsequently deciding on a case by case basis not to exercise its power to nullify the effect of the orders. The power conferred upon the executive to make a declaration which would result in a nullified order subsequently becoming effective enlarges the executive’s case by case control of the effect of orders made by the Supreme Court under the Sexual Offenders Act.

The effects of the amendments made by the Declarations Act ... distinguish it from legislation which merely alters rights or obligations which are in issue in litigation or which merely creates rules to be applied by the courts in a way which may affect the finality of previous court orders. These amendments are within that exceptional category of legislation which is invalid on the ground that it is repugnant to that institutional integrity of the Supreme Court which is entrenched under the Commonwealth as “the highest court for the time being in the judicial hierarchy of the State”.⁶⁹

Miscellaneous

- [44] The *Kable* principle has also formed the basis for various discrete challenges to State legislation, including to legislation that:

⁶⁴ [CLAA](#) section 21

⁶⁵ [CLAA](#) section 20

⁶⁶ *Attorney-General (Qld) v Lawrence* [2013] QCA 364 at [33]

⁶⁷ *Attorney-General (Qld) v Lawrence* [2013] QCA 364 at [33]

⁶⁸ *Attorney-General (Qld) v Lawrence* [2013] QCA 364 at [35]

⁶⁹ *Attorney-General (Qld) v Lawrence* [2013] QCA 364 [41] and [42] (citations omitted).



- affects pending litigation; or
- permits the employment of temporary judicial officers; or
- enables the courts to enforce arbitral awards.

Pending litigation

- [45] In *H A Bachrach Pty Ltd v Queensland* the High Court was asked to determine whether the principles in *Kable* operated to invalidate certain amendments to the (since repealed) [Local Government \(Planning and Environment\) Act 1990](#).⁷⁰ The plaintiff owned a shopping centre and was engaged in a dispute with local council over its decision to rezone nearby land, because the rezoning would allow a rival shopping centre to be built. The plaintiff unsuccessfully appealed the council's decision to the Queensland Planning and Environment Court. It apparently intended to appeal the Planning and Environment Court's decision to the Queensland Court of Appeal but before it did so the Queensland Parliament enacted the now repealed [Local Government \(Morayfield Shopping Centre Zoning\) Act 1996](#) (the *Morayfield Act*), which effectively permitted the rival development to proceed. The plaintiff challenged the validity of the [Morayfield Act](#) on the grounds that it was an unconstitutional interference with the judicial power of the Queensland Supreme Court.
- [46] The High Court dismissed the plaintiff's action. The Court acknowledged the [Morayfield Act](#) removed certain rights that the plaintiff had enjoyed under the [Local Government \(Planning and Environment\) Act 1990](#). However, the Court held that it was clear that, properly characterised, the [Morayfield Act](#) did not, and was not intended to, interfere with judicial process. The mere fact that further litigation over the council's decision was pending at the time the [Morayfield Act](#) was passed did not deprive the Queensland Parliament of the power to pass legislation affecting the area's zoning. The High Court observed that:

[t]here are some matters which appertain exclusively to the judicial power. For example, the determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs are inalienable exercises of judicial power. *Changes by the legislature to what might be called town planning legislation previously enacted by it are not of this character.*⁷¹

Temporary judicial officers

- [47] The question of whether the employment of temporary or 'acting' judges impairs the institutional integrity of chapter III courts was considered in *Forge v Australian Securities and Investments Commission*.⁷² *Forge* concerned a decision of the NSW Supreme Court that Mr Forge and others were guilty of breaches of the *Corporations Act 2001* (Cwlth) and liable to civil

⁷⁰ [1998] HCA 54; (1998) 195 CLR 547

⁷¹ (1998) 195 CLR 547 at 562 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ (emphasis added, references omitted). Note, however, the distinction between the exercise of judicial power and the rights of individuals consequent to the exercise of that power was made in *Crump v State of New South Wales* [2012] HCA 20; (2012) 247 CLR 1.

⁷² (2006) 228 CLR 45



penalties.⁷³ The judge who had heard and determined the case at first instance was an acting judge, who had been temporarily appointed to the NSW Supreme Court under section 37 of the [Supreme Court Act 1970](#) (NSW) (the *NSW Supreme Court Act*). Mr Forge and the other defendants challenged the validity of their convictions on the ground that the trial judge's appointment was invalid because section 37 of the [NSW Supreme Court Act](#) was inconsistent with chapter III. Mr Forge and the other defendants argued that chapter III required a State court exercising federal jurisdiction to be composed exclusively of permanently appointed judges with secure tenure.

- [48] A majority of the High Court rejected the argument.⁷⁴ Chief Justice Gleeson, with whom Justice Callinan agreed, held that chapter III required the State Supreme Courts to 'continue to answer the description of "courts" ... and '[f]or a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality'.⁷⁵ Therefore, while it might be possible 'to imagine extreme cases in which abuse of the power conferred by section 37 [of the [NSW Supreme Court Act](#)] could so affect the character of the [NSW] Supreme Court that it no longer answered the description of a court or satisfied the minimum requirements of independence and impartiality', the possibility of such an extreme situation was not sufficient to invalidate the [NSW Supreme Court Act](#).⁷⁶ Justices Gummow, Hayne and Crennan held that, properly construed, section 37 did not 'give an unlimited power to appoint acting judges' and did not enable the NSW government to appoint a number of acting judges that exceeded the number of permanent judges.⁷⁷ Justice Heydon analysed the historical background of chapter III, demonstrating that acting and temporary judges were a common feature of the State courts before federation. His Honour concluded that, given this historical background and the fact that section 37 of the [NSW Supreme Court Act](#) incorporated safeguards for judicial independence, the legislation was not invalid.⁷⁸

Enforcement of arbitral awards

- [49] In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*, TCL Air Conditioner (Zhongshan) Co Ltd (*TCL*) opposed the making of Federal Court orders to enforce arbitral awards requiring TCL to pay certain amounts to another company called Castel.⁷⁹ TLC manufactured air conditioners in China and had entered into an agreement with Castel for the exclusive distribution of the air conditioners within Australia. It was a term of the distribution agreement that the parties would submit a dispute arising under it to arbitration in Australia. However, TLC failed to pay Castel under two arbitral awards made after a commercial arbitration between the parties. Castel applied to the Federal Court under the [International Arbitration Act 1974](#) (Cwlth) (the *International Arbitration Act*) for orders enforcing the arbitral awards. TCL opposed the application on the ground that section 16 of the [International](#)

⁷³ The second aspect of the case, concerning the validity and effect of particular transitional provisions, is not relevant for present purposes.

⁷⁴ Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J dissenting

⁷⁵ (2006) 228 CLR 45 at 67

⁷⁶ (2006) 228 CLR 45 at 69

⁷⁷ (2006) 228 CLR 45 at 79 and 81

⁷⁸ (2006) 228 CLR 45 at 149

⁷⁹ [2013] HCA 5



[Arbitration Act](#), which provided that the [UNCITRAL Model Law on International Commercial Arbitration](#) (the *Model Law*) has ‘the force of law in Australia’, infringed chapter III of the Constitution. TCL sought to invoke the *Kable* doctrine, arguing:

... the effect of the Model Law is to co-opt or enlist the Federal Court “into providing assistance during the course of the arbitral proceeding and in enforcing the resulting awards” while denying the Federal Court “any scope for reviewing substantively the matter referred to arbitration [including situations in which an error of law appeared or was manifest on the face of the award], and the ability to act in accordance with the judicial process ” ... [and therefore] distorts the institutional independence of the Federal Court.⁸⁰

- [50] The High Court held that section 16 of the [International Arbitration Act](#) did not impair the Federal Court’s institutional integrity contrary to the *Kable* doctrine.⁸¹ The majority of the Court dismissed TCL’s submission that, in not conferring jurisdiction on the Federal Court to review and correct errors of law in arbitral awards, the [International Arbitration Act](#) excluded a ‘defining characteristic of a court’. Given the exceptional character of the common law jurisdiction to set arbitral awards aside for error on the face of the award, and its ‘haphazard and anomalous’ operation, the majority of the High Court did not consider jurisdiction of this kind to be a defining characteristic of a court.⁸² Further, the majority held the absence of the jurisdiction did not amount to an interference with judicial independence because:

... judicial independence mandates independence from the legislature and the executive. Judicial independence does not compel the federal legislature to balance the “rival claims of finality and legality in arbitral awards” in any particular way ... The problem with the legislation considered in each of *Kable* and *Totani* was that the relevant State courts were enlisted or co-opted by the executive to perform a task which did not engage the courts’ independent judicial power to quell controversies. There is no analogy between those cases and the long understood relationship between private arbitration and the courts in which the courts enforce an arbitral award, which is the determination of the parties’ original controversy.⁸³

Consideration of judicial independence by parliamentary committees

- [51] The former Scrutiny of Legislation Committee (*the Scrutiny Committee*) considered that ‘the independence of the judiciary, including security of tenure and remuneration, underlie a parliamentary democracy based on the rule of law.’⁸⁴ On this basis, although judicial

⁸⁰ [2013] HCA 5 at [64] per Hayne, Crennan, Kiefel and Bell JJ

⁸¹ French CJ and Gageler J emphasised the distinction between the judicial power of the Commonwealth and arbitral authority which is based on voluntary agreement, concluding that the Federal Court’s enforcement of arbitral awards did not signify that it endorsed the legal decision embodied in the award: [2013] HCA 5 at [34].

⁸² [2013] HCA 5 at [104] per Hayne, Crennan, Kiefel and Bell JJ

⁸³ [2013] HCA 5 at [105] per Hayne, Crennan, Kiefel and Bell JJ (references in original text omitted). The majority also consider the provisions of the [International Arbitration Act](#) giving the Federal Court power to refuse to enforce an arbitral award or, in certain circumstances, to set it aside were actually ‘... protective of the institutional integrity of the courts in the Australian judicial system which are called upon to exercise jurisdiction under the Act: [2013] HCA 5 at [103] per Hayne, Crennan, Kiefel and Bell JJ.

⁸⁴ [AD 2008 No 4 p 28 para 25](#) and see also [AD 2003 No 11 p 17 para 5](#); [AD 1999 No 8 p 45 para 9.4](#); [AD 1997 No 5 p 23 para 3.4](#); [AD 2007 No 11 p 14 para 4](#) and [AD 2008 No 3 p 4 para 11](#)



independence is not specifically mentioned in section 4 of the [Legislative Standards Act 1992](#), the Scrutiny Committee considered it to be one of the fundamental legislative principles. The Scrutiny Committee and the successor parliamentary committees have commented on a variety of Bills that raise questions about potential interference with various aspects of the principle of judicial independence.

Sentencing

- [52] Perhaps the most commonly encountered issues arising in connection with the general issue of judicial independence are those relating to sentencing of offenders, especially the imposition of mandatory sentences. Sentencing is within the traditional realm of the courts.
- [53] FLP considerations are consistent with sentencing provisions providing at least some discretion for the courts. Examples of Bills that attracted comment by the Scrutiny Committee because they sought to impose mandatory sentences include:⁸⁵
- the [Offenders \(Serious Sexual Offences\) Minimum Imprisonment and Rehabilitation Bill 2006 \(P\)](#), which sought to make imprisonment mandatory for persons convicted of certain sexual offences;⁸⁶ and
 - the [Criminal Code \(Assaults Against Police and Others\) Amendment Bill 2007 \(P\)](#), which sought to amend section 340 of the [Criminal Code](#) to require a minimum penalty be imposed on persons convicted of assaulting a police officer acting in the exercise of the officer's duty;⁸⁷ and
 - the [Criminal Code and Other Acts \(Graffiti Clean-up\) Amendment Bill 2008 \(P\)](#), which sought to impose mandatory sentences for all persons convicted of graffiti offences;⁸⁸ and
 - the [Criminal Code \(Serious Assaults on Police and Particular Other Persons\) Amendment Bill 2010 \(P\)](#), which sought to impose a mandatory term of imprisonment for certain serious assaults and to limit the sentencing court's discretion to suspend all or part of a sentence for those assaults.⁸⁹
- [54] The Scrutiny Committee expressed concern about each of these Bills, on the ground that setting minimum penalties offended principles of judicial independence and the courts' traditional role of ensuring individualised criminal justice. The Scrutiny Committee acknowledged in its consideration of the [Criminal Code \(Serious Assaults on Police and Particular Other Persons\) Amendment Bill 2010 \(P\)](#) that minimum sentences had applied to a small number of offences.⁹⁰ The Committee observed that it is at least arguable that

⁸⁵ The symbol (P) after the name of a Bill indicates the Bill is a private member's Bill.

⁸⁶ [AD 2006 No 4 p 27 para 8](#)

⁸⁷ [AD 2007 No 11 pp 6-7 paras 11-17](#)

⁸⁸ [LA 2008 No 3 p 4 paras 12-15](#)

⁸⁹ [LA 2010 No 3 p 1 para 1](#)

⁹⁰ [LA 2010 No 3 p 4 para 25](#)



prescribing sentences constitutes an interference with judicial discretion and therefore undermines the independence and integrity of the judiciary.⁹¹

- [55] The [Penalties and Sentences \(Sentencing Advisory Council\) Amendment Bill 2010](#) drew comment because it proposed to introduce a new section 9(5) into the [Penalties and Sentences Act 1992](#) that would make it mandatory to imprison offenders convicted of sexual offences against children unless there were exceptional circumstances justifying a non-custodial sentence. The new section 9(5) would displace the principle in section 9(2)(a) of the [Penalties and Sentences Act 1992](#), which required sentencing courts to have regard to a principle that a sentence of imprisonment should be imposed as a last resort. However, the Bill also proposed to amend section 161B of the [Penalties and Sentences Act 1992](#) to require courts sentencing offenders convicted of a violent offence against a child under 12 to treat the child's age as a aggravating factor in determining whether to declare that the offender had been convicted of a 'serious violent offence'.
- [56] The Explanatory Notes for the Bill stated that the effect of the Bill was to preserve judicial discretion in sentencing.⁹² However, the Scrutiny Committee quoted from a submission by the Queensland Law Society arguing that, in fact:
- the proposed change envisages that a child sex offender must serve an actual term of imprisonment. We consider that this unduly fetters the sentencing discretion of judicial officers. ... Furthermore, we are concerned that the significant tightening of judicial sentencing discretion in the proposed new section comes unacceptably close to mandatory sentencing.⁹³
- [57] The Scrutiny Committee concluded that the proposed changes might operate to limit judicial discretion, including sentencing discretion.⁹⁴
- [58] The [Penalties and Sentences and Other Legislation Amendment Bill 2012](#) also raised questions about limitations on judicial sentencing discretion. The Bill inserted a new part 10A into the [Penalties and Sentences Act 1992](#), which required that a court impose an offender levy when an offender is sentenced for an offence. The Legal Affairs and Community Safety Committee (LACSC) noted that the Bill inserted a new section 48(3A) into the [Penalties and Sentences Act 1992](#), which prevented a court from taking into account the offender levy imposed on an offender when considering the financial circumstances of an offender for imposing a sentence, and that the levy could not be waived.⁹⁵ LACSC also quoted the following passage from the QLS's submission:

We consider that it is inappropriate to remove judicial discretion in the imposition of fines. The inability of the Court to take the offender levy into account on sentence is unjust (especially for those suffering under other economic burdens). This will have an unfair and economically

⁹¹ [LA 2010 No 3 p 3 para 23](#)

⁹² [Penalties and Sentences \(Sentencing Advisory Council\) Amendment Bill 2010 Explanatory Notes p 4](#)

⁹³ QLS submission on the Penalties and Sentences (Sentencing Advisory Council) Bill 2010, quoted in [LA 2010 No 9 p 24 para 29](#)

⁹⁴ [LA 2010 No 9 p 23 para 25](#)

⁹⁵ [Legal Affairs and Community Safety Committee Report No 5 \(2012\) on the Penalties and Sentences and Other Legislation Amendment Bill 2012 p 35 \(LACSC Report No 5\)](#)



devastating impact on some offenders ... We propose that the offender levy be discretionary and allow learned judicial officers to decide on an individual case-by-case basis as to whether it would be in the interests of justice to impose the tax. At the very least, the Society strongly suggests that the Bill be amended to allow judicial officers to take the imposition of the mandatory offender levy into account when considering sentencing options.⁹⁶

- [59] In the same year, the [Criminal Law \(Two Strike Child Sex Offenders\) Amendment Bill 2012](#) proposed to insert provisions in the [Penalties and Sentences Act 1992](#) and the [Corrective Services Act 2006](#) requiring mandatory sentences of life imprisonment and minimum 20 year non-parole periods for particular persons convicted of sexual offences involving children. A number of public submissions made about the Bill expressed concern about the removal of judicial discretion, both in terms of judicial independence and in terms of the effect on individual offenders not having the individual circumstances of offending taken into account. In correspondence with the LACSC, the department acknowledged the withdrawal of judicial discretion but noted:

... the Bill recognises that the extreme legislative response in the form of mandatory sentencing must be limited to ensure against arbitrary and unjust results. The Bill achieves this by specifically limiting the application of the regime to non separate listed sexual offences contained in the schedule to the Bill. ... Withdrawal of judicial discretion through the prescription of mandatory life sentences and minimum non-parole periods is not without precedent. Queensland recognises the seriousness of the offence of murder through prescription of a mandatory life sentence and minimum non-parole period. The prescription of mandatory life imprisonment with a minimum non-parole period for serious recidivist child sex offenders reflects that this form of repeat offending is among the most abhorrent in the community. ... The impact of the new regime and associated impact on judicial discretion must be balanced against the need for community protection and the need to denounce repeat child sex offenders.⁹⁷

- [60] LACSC acknowledged the extent of the submissions, concluding that:

[n]otwithstanding the merits of arguments advanced in submissions, the Committee noted that the Bill represents the Liberal National Party's pre-election commitment to toughen sentences for repeat child sex offenders and acknowledges that removing judicial discretion and increasing non-parole periods, affects that change.⁹⁸

- [61] LACSC recommended the Minister monitor and review the implementation of the proposed amendments and report to Parliament on those matters within two years after the commencement of the amendments.⁹⁹

⁹⁶ QLS Submission No 2 on the Penalties and Sentences and Other Legislation Amendment Bill 2012, p 3, quoted in [LACSC Report No 5 p 35](#)

⁹⁷ Letter from the Department of Justice and Attorney-General to LACSC dated 3 July 2012, quoted in [LACSC Report No. 2 on the Criminal Law \(Two Strike Child Sex Offenders\) Amendment Bill 2012](#) (July 2012) ([LACSC Report No. 2 \(2012\)](#)) pp 19-20

⁹⁸ [LACSC Report No. 2 \(2012\) p 24](#)

⁹⁹ [LACSC Report No. 2 \(2012\) p 24](#)



- [62] Mandatory minimum sentences were also considered in LACSC's report on the [Weapons and Other Legislation Amendment Bill 2012](#).¹⁰⁰ The Bill proposed to impose mandatory minimum terms of imprisonment on adults convicted of particular weapons offences, including weapons trafficking and weapons supply. As with its submission on the [Criminal Law \(Two Strike Child Sex Offenders\) Amendment Bill 2012](#), the QLS submission on the Bill strongly opposed mandatory sentencing, principally on the basis that it would:

... unduly fetter[r] judicial discretion [and the] ... removal of judicial discretion ...[would] greatly hinder the courts ability to bring about justice in individual cases.¹⁰¹

- [63] LACSC noted the responses to the QLS submission provided by the Minister, which stated that the mandatory sentences would apply only in a small number of cases, involving very serious offences, and were expected to provide greater community safety.¹⁰² LACSC concluded that although:

... the Bill and its policy objectives represent a departure from previous sentencing practices in Queensland ... the facts and figures simply cannot be ignored ... [considering the number of relevant offences committed in the previous two years] the Committee considers the proposed amendments to strengthen the Weapons Act to act as a deterrent to potential firearms offenders are warranted.¹⁰³

- [64] LACSC also considered an issue related to mandatory minimum sentencing in its report on the [Criminal Law Amendment Bill \(No. 2\) 2012](#).¹⁰⁴ The Bill sought to amend the [Corrective Services Act 2006](#) to require all persons convicted of drug trafficking and sentenced to immediate full-time imprisonment to serve a minimum non-parole period equivalent to 80% of the term of imprisonment. In a submission to LACSC, the QLS opposed the mandatory minimum non-parole period, stating:

The Society's long-held position is that sentencing should have at its core a system of judicial discretion exercised within the bounds of precedent....We would object to the application of a mandatory minimum non-parole period constituting a de facto mandatory sentencing regime.¹⁰⁵

¹⁰⁰ [LACSC Report No. 17 on the Weapons and Other Legislation Amendment Bill 2012](#) (November 2012) (*LACSC Report No. 17 (2012)*)

¹⁰¹ QLS submission on the [Weapons and Other Legislation Amendment Bill \) 2012](#), quoted in [LACSC Report No. 17 \(2012\) pp 5-7](#)

¹⁰² Letter from the Minister for Police and Community Safety to LACSC dated 15 November 2012, quoted in [LACSC Report No. 17 \(2012\) pp 8-9](#)

¹⁰³ [LACSC Report No. 17 \(2012\) p 9](#)

¹⁰⁴ [LACSC Report No. 27 on the Criminal Law Amendment Bill \(No. 2\) 2012 \(April 2013\)](#) (*LACSC Report No. 27 (2013)*)

¹⁰⁵ QLS submission No. 3 on the [Criminal Law Amendment Bill \(No. 2\) 2012](#), quoted in [LACSC Report No. 27 p 16](#) The QLS had raised similar objections of mandatory minimum non-parole periods included in the [Criminal Law Amendment Bill 2012](#): see [LACSC Report No. 3 on the Criminal Law Amendment Bill 2012](#) (July 2012) pp 3-4



[65] The Bar Association of Queensland expressed similar concerns in its submission, emphasising the importance of the courts being able to make discretionary judgments in individual cases.¹⁰⁶

[66] LACSC concluded that the amendments reflected:

... the Government's commitment to deliver safer communities by taking a hard-line approach to drug traffickers with tougher sentencing laws. Mandatory minimum non-parole periods are true to the policy objective of the Bill, and therefore, receive the Committee's endorsement.¹⁰⁷

[67] The [Criminal Law Amendment Bill \(No. 2\) 2012](#) also sought to impose a mandatory community based Graffiti Removal Order on any child aged between 12 and 16 years who was convicted of a graffiti offence. Despite concerns expressed in submissions by the QLS and the Bar Association of Queensland,¹⁰⁸ LACSC supported the introduction of the mandatory graffiti removal regime, regarding it '... as a constructive way to tackle the ongoing increase in graffiti crime'.¹⁰⁹

Other aspects of judicial independence considered by parliamentary committees

Abolition, or change in constitution, of courts and tribunals

[68] The Scrutiny Committee considered whether legislation to abolish, or radically change the composition of, particular courts and tribunals amounted to an interference with judicial independence. For example, the [Land Court and Other Legislation Amendment Bill 2007](#) sought to abolish the Land and Resources Tribunal and transfer its jurisdiction to the Land Court. The Bill provided for the President and Deputy President of the Tribunal (who were remunerated as if they were Supreme Court Judges) to be appointed to the District Court and to the Land Court. As the President's salary would be lower under the new appointment, the Bill also provided for an amount of compensation to be paid to the President. The Scrutiny Committee recognised that legislative interference with judicial tenure has the potential to undermine judicial independence but ultimately concluded that the Bill could not be seen as a direct or intentional interference with the independence of the judiciary. In its report, the Scrutiny Committee quoted the statement of Chief Justice Gleeson in *North Australian Aboriginal Legal Aid Service Inc v Bradley* that:

Within the Australian judiciary, there are substantial differences in arrangements concerning the appointment and tenure of judges and magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and court administration...

¹⁰⁶ Bar Association of Queensland Submission No. 7 on the [Criminal Law Amendment Bill \(No. 2\) 2012](#), quoted in [LACSC Report No. 27 p 17](#)

¹⁰⁷ [LACSC Report No. 27 p 18](#)

¹⁰⁸ QLS submission No. 3 on the [Criminal Law Amendment Bill \(No. 2\) 2012](#), quoted in [LACSC Report No. 27 p 16](#); Bar Association of Queensland Submission No. 7 on the [Criminal Law Amendment Bill \(No. 2\) 2012](#), quoted in [LACSC Report No. 27 p 17](#)

¹⁰⁹ [LACSC Report No. 27 p 27](#)



There is room for legislative choice in this area; and there are differences in constitutional requirements.¹¹⁰

- [69] A similar issue arose during the Scrutiny Committee's consideration of the [Justice and Other Legislation Amendment Bill 2010](#). The [Industrial Relations Act 1999](#) had previously provided that the Industrial Court of Queensland was constituted by the president sitting alone. Section 243(1) of the Act required the president to be either a Supreme Court judge or a lawyer of at least five years' standing.¹¹¹ The Bill, however, would allow a non-judicial president of the Industrial Court to be appointed on a part-time basis and hold another office, perform other duties or engage in employment if the Minister gave written approval, having been satisfied that the other office, duties or employment were compatible with the office of president.¹¹² The Scrutiny Committee considered that this clause raised the issue of independence of the judiciary. Noting that no information had been provided in relation to the possible effect of the clause on the integrity and independence of the Industrial Court of Queensland, the Scrutiny Committee invited the Minister to provide further information.¹¹³

Judicial conditions and entitlements

- [70] The [Justice and Other Legislation Amendment Bill 2010](#) also included provisions affecting leave of absence for judges. At the time the Bill was introduced, the [Judges \(Pensions and Long Leave\) Act 1957](#) allowed the Governor in Council to give approval for leave of absence for judges.¹¹⁴ Clause 119 of the Bill proposed to change this system by allowing the Chief Justice to approve the long leave and the deferral of leave of the Chief Judge and the Chief Magistrate, unless the Chief Magistrate was also a District Court Judge, in which case the Chief Judge would approve the leave.¹¹⁵ The Scrutiny Committee expressed concern that the Explanatory Notes for the Bill provided no information as to whether there was any effect on the integrity and independence of the judges whose leave was governed under the [Judges \(Pensions and Long Leave\) Act 1957](#).¹¹⁶ The Committee sought further information from the Minister.¹¹⁷

Change of law affecting pending litigation

- [71] The Scrutiny Committee considered that legislation changing or affecting law that is the subject of existing or pending litigation may constitute interference with the judicial process and judicial independence.¹¹⁸ The [Mineral Resources \(Peak Downs Mine\) Amendment Bill 2008](#) sought to amend the [Mineral Resources Act 1989](#) and the Explanatory Notes stated that its object was to resolve a dispute between mining companies about particular mining tenures

¹¹⁰ (2004) 218 CLR 146 at 152, quoted in [AD 2007 No 8 p 2 para 7](#)

¹¹¹ [LA 2010 No 12 p 12 para 60](#)

¹¹² [LA 2010 No 12 p 12 para 61](#)

¹¹³ [LA 2010 No 12 p 12 para 62](#)

¹¹⁴ [LA 2010 No 12 p 12 para 63](#)

¹¹⁵ [LA 2010 No 12 p 12 para 64](#)

¹¹⁶ [LA 2010 No 12 p 12 para 65](#)

¹¹⁷ [LA 2010 No 12 p 12 para 65](#)

¹¹⁸ For a particularly famous example of this type of legislation, which the Privy Council held to be invalid, see *Liyanage v R* [1967] 1 AC 259. For discussion of *Liyanage v R* and the constitutional position of Commonwealth legislation see *Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173.



and to secure the continued operations of the Peak Downs Coal Mine.¹¹⁹ The tenure dispute was long-standing and the mining companies had been involved in litigation with each other. The Explanatory Notes stated that if certain applications were determined administratively, it ‘... would almost certainly lead to further litigation, causing further uncertainty and delay and leaving ... [existing confusion about the mining tenures] unresolved’.¹²⁰

- [72] Although noting that the High Court’s decision in *H A Bachrach Pty Ltd v Queensland* meant that a challenge to the Bill based on the *Kable* principle would probably not succeed, the Scrutiny Committee referred the question of judicial independence and judicial process to Parliament, observing that:

*However, the committee also notes that, while the Parliament may have the power to legislate to affect the outcome of the legal proceedings to which the bill is directed, it has been suggested that generally ‘it is contrary both to modern constitutional convention and to the public interest in the due administration of justice’ to do so.*¹²¹

¹¹⁹ [Mineral Resources \(Peak Downs Mine\) Amendment Bill 2008 Explanatory Notes pp 2-4](#)
¹²⁰ [Mineral Resources \(Peak Downs Mine\) Amendment Bill 2008 Explanatory Notes pp 4-5](#)
¹²¹ [AD 2008 No 5 p 30 para 11-13](#) (emphasis added), citing *BCE & BLF of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 376 per Street CJ