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Litigation notes

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WATER ENTITLEMENT REDUCTIONS VALID: ACQUISITION OF PROPERTY AND ABRIDGMENT OF RIGHTS TO WATER

In two 6:1 decisions, the High Court upheld the validity of a funding agreement (and related Commonwealth and NSW legislation) under which NSW agreed to reduce entitlements to groundwater and the Commonwealth provided financial assistance for payments to affected entitlement holders.

The challenges were based on allegations of an acquisition of property on other than just terms contrary to s 51(xxxi) of the Constitution and, in one of the cases, also on allegations of an abridgment of the rights of residents of a State to the reasonable use of the waters of rivers contrary to s 100 of the Constitution.

ICM Agriculture Pty Ltd v Commonwealth
High Court of Australia, 9 December 2009
[2009] HCA 51; (2009) 240 CLR 140

Arnold v Minister Administering the Water Management Act 2000
High Court of Australia, 10 February 2010
[2010] HCA 3; (2010) 240 CLR 242

Background

In 2004 the Commonwealth, the eastern mainland States and the Territories entered into the National Water Initiative. One of the objects of the initiative was to complete the return of all currently over-allocated or overused surface water and groundwater systems to environmentally sustainable levels of extraction. Groundwater is water under the ground, typically extracted by use of a bore. Surface water is water above the ground, including water in a river or lake.

As envisaged by the initiative, the Commonwealth established the National Water Commission by enacting the *National Water Commission Act 2004* (the NWC Act).

The NWC Act allowed the Commonwealth Minister to award financial assistance to projects relating to water resources and to determine that the financial assistance would be provided from the Australian Water Fund Account established by that Act. The Commonwealth agreed to provide funding to NSW from the account to help NSW make ex gratia 'structural adjustment payments' to water entitlement holders who would be affected by a proposed reduction, to sustainable levels, of groundwater entitlements held under NSW laws in certain regions.

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This issue

The National Water Commission, acting on behalf of the Commonwealth, subsequently entered into a funding agreement with NSW concerning the payment of the financial assistance to NSW.

Under the funding agreement, NSW agreed to convert bore licences under the *Water Act 1912* (NSW) to aquifer access licences under the *Water Management Act 2000* (NSW). Over a transitional period, water entitlements would be reduced to sustainable levels. In return, the Commonwealth agreed to provide some of the funding for the structural adjustment payments as specified criteria were met.

The reduction in water entitlements was effected by NSW laws, including 3 subordinate legislative instruments. The States have legislative power to acquire property without providing 'just terms'. It was conceded by the Commonwealth that the ex gratia structural adjustment payments by NSW (to which the Commonwealth contributed) did not of themselves amount to 'just terms' for the purposes of s 51(xxxi) of the Constitution (*ICM Agriculture Pty Ltd v Commonwealth (ICM)* at [7], [99]).

Constitutional issues

Groundwater was not the subject of private, common law rights but of statutory rights given by licences under NSW laws.

In both *ICM* and *Arnold v Minister Administering the Water Management Act 2000 (Arnold)*, the challenging parties held water entitlements that were reduced. They argued that the funding agreement was invalid because it offended s 51(xxxi) of the Constitution. Section 51(xxxi) empowers the Commonwealth Parliament to make laws with respect to the acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws. Additionally, in *Arnold*, the appellants argued that the funding agreement was contrary to s 100 of the Constitution, which prohibits the Commonwealth from abridging 'the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation'.

The acquisition of property argument was rejected by a majority in *ICM* (French CJ, Gummow and Crennan JJ at [84], Hayne, Kiefel and Bell JJ at [154]; Heydon J dissenting: [245], [249]). For the reasons given in *ICM*, the same majority also rejected that argument in Arnold (French CJ at [3], [11], Gummow and Crennan JJ at [48]–[49] and Hayne, Kiefel and Bell JJ at [72]; Heydon J dissenting: [81]–[82]). The s 100 argument put in *Arnold* was also rejected by six justices (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J did not need to consider this issue).

No acquisition of property

The challenging parties argued that their entitlements under the bore licences to groundwater were proprietary rights that had been acquired through the steps taken by NSW to convert them to reduced entitlements under the aquifer access licences without the provision of just terms. The steps taken by NSW were then said to be invalid because, first, the grant of funds by the Commonwealth to NSW was an exercise of the power given by s 96 of the Constitution to the Commonwealth Parliament to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'; secondly, s 96 is itself subject to s 51(xxxi) and does not authorise a Commonwealth grant to be made on condition that a State acquire property otherwise than on just terms; thirdly, the funding agreement in issue here was therefore invalid; and, fourthly, the making of the 3 State instruments by which the reductions in water entitlements were implemented in furtherance of the

funding agreement were steps taken in breach of the guarantee in s 51(xxxi) and therefore invalid by application of covering clause 5 to, or s 106 of, the Constitution (which respectively refer to the Commonwealth Constitution binding the people of every State and continue State Constitutions *subject* to the Constitution).

The majority judgments decided that this challenge failed at the threshold, as the 'central proposition' ([107]) that there had been an 'acquisition of property' was not made out.

The majority judgments in *ICM* noted that, at common law, water, like light and air, is generally regarded as common property ([55], [109]; see also Heydon J at [196]). At common law, while there was no ownership of groundwater before it was extracted, there was no limit to the use an overlaying landowner could make of groundwater (*ICM* at [55]–[57], [109]–[111]).

However, in NSW, since 1966, the right to the use, flow and control of sub-surface water has been vested by statute in the State 'for the benefit of the Crown' (*ICM* at [72]–[73], [108], [124], [144], [146]). The 1966 NSW provisions (if not earlier provisions) extinguished any common law (private) rights to extract groundwater (*ICM* at [72], [122], [144], [150]; see also Heydon J at [194]–[196]). Further, NSW legislation imposed a prohibition on access to, and use of, groundwater without a licence (*ICM* at [58]–[59], [84], [122]–[123], [144]). That is, groundwater was not the subject of private, common law rights but of statutory rights given by licences under NSW laws.

Section 51(xxxi) (unlike the equivalent US provision) concerns 'acquisition' and not the 'taking' or deprivation of property (*ICM* at [81], [132], [147]). There will only be an acquisition of property if someone obtains an identifiable and measurable advantage relating to the ownership or use of property (*ICM* at [82], [147]).

There will only be an acquisition of property if someone obtains an identifiable and measurable advantage relating to the ownership or use of property.

The challenging parties in *ICM* and *Arnold* did not have common law rights in the groundwater (*ICM* at [84], [144]). Rather, the groundwater was a natural resource and the State always had the power to limit the volume of water to be taken from that public resource (*ICM* at [84], [144], [146]). Although the cancelled bore licences were a species of property ([147]), there was no 'acquisition' by NSW (or other licensees or prospective licensees) because no advantage relating to the ownership or use of property was derived by NSW (or other licensees) in consequence of replacing the bore licences and reducing water entitlements (*ICM* at [84], [148]–[154]; but see Heydon J at [232]–[235]). Hayne, Kiefel and Bell JJ summarised the reasons for that conclusion as follows (*ICM* at [149]):

> The four considerations set out earlier in these reasons [at [143]–[146]] (the replaceable and fugitive nature of groundwater; that the licences in issue are a creature of statute and inherently fragile; that groundwater has not hitherto been thought to be a subject of property; and that the rights vested in the State are statutory rights for the purpose of controlling access to a public resource) all point towards the conclusion that the State gained no identifiable or measurable advantage from the steps that have been taken with respect to the plaintiffs' water licences and entitlements.

Although the cancelled bore licences were a species of property, there was no 'acquisition' by NSW (or other licensees or prospective licensees) because no advantage relating to the ownership or use of property was derived by NSW (or other licensees.

Because the State already had the right to the use, flow and control of groundwater (although not thereby having ownership of or property in the groundwater), the reduction of the challenging parties' entitlements did not

give NSW any larger or different right than it already had to extract, or permit others to extract, groundwater (*ICM* at [150], [153]):

> [T]he measure of control which the State has over the resource was unaltered by the cancellation of any particular entitlements to extract groundwater. The amount of water that the State could permit to be extracted was bounded only by the physical state and capacity of the aquifer, and such policy constraints as the State chose to apply. Neither the existence, nor the replacement or cancellation, of particular licences altered what was under the control of the State or could be made the subject of a licence to extract. If, as was hoped or expected, the amount of water in the aquifer would thereafter increase (or be reduced more slowly) the State would continue to control that resource. But any increase in the water in the ground would give the State no new, larger, or enhanced 'interest in property, however slight or insubstantial', whether as a result of the cancellation of the plaintiffs' bore licences or otherwise.

The cancellation of the bore licences and the reduction in water entitlements did not involve an 'acquisition of property'.

Accordingly, the cancellation of the bore licences and the reduction in water entitlements did not involve an 'acquisition of property'.

Acquisition and State grants: s 51(xxxi) and s 96

A significant issue argued was whether terms and conditions of a grant of financial assistance to a State under s 96 of the Constitution may require the State to acquire property on other than just terms, or whether such a requirement is prohibited by s 51(xxxi).

French CJ, Gummow and Crennan JJ held that a grant under s 96 cannot be made on terms and conditions that *require* a State to acquire property on other than just terms (that is, s 96 is subject to s 51(xxxi)) (*ICM* at [46]; see also Heydon J at [174]). They rejected the Commonwealth's argument that s 96 is a non-coercive power and therefore is not subject to s 51(xxxi), which relates to compulsory acquisition of property (*ICM* at [30]–[45]). Their Honours left open whether, in considering the application of s 51(xxxi), 'the terms and conditions attached to a s 96 grant may sufficiently be disclosed in an informal fashion, falling short of an intergovernmental agreement of the kind seen in this case' ([38]). This reservation was important for the Court's later decision in *Spencer v Commonwealth* (see p 6 of this issue of *Litigation Notes*).

Hayne, Kiefel and Bell JJ said that it was unnecessary to decide the issue about the intersection of s 51(xxxi) and s 96 because there had been no acquisition of property. Accordingly, that question should not be determined, in accordance with the Court's established practice of only deciding constitutional issues where necessary (*ICM* at [141]). However, in a similar vein to French CJ, Gummow and Crennan JJ, Hayne, Kiefel and Bell JJ referred to the practical operation of a law being relevant to its characterisation, and to the principle that the constitutional restraint in s 51(xxxi) may be contravened directly or indirectly, expressly or implicitly (*ICM* at [138], [139]).

No abridgment of the 'right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation'

Section 100 of the Constitution provides:

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Though the judges comprising the majority in *Arnold* published 3 separate judgments, they each rejected the s 100 argument on the basis that the phrase 'waters of rivers' did not include the underground water in issue (French CJ at [26], [29]; Gummow and Crennan JJ at [55]; Hayne, Kiefel and Bell JJ at [75]). In arriving at this conclusion, the majority emphasised different considerations, including:

— the drafting history of s 100, which showed that the subject matter of the limitation imposed by (what ultimately became) s 100 was 'rivers which could be used for navigation and shipping' (French CJ at [26]; as to historical considerations, see also Gummow and Crennan JJ at [56])

— the purpose (or purposes) of s 100. Hayne, Kiefel and Bell JJ said ([75]):

> An important purpose (perhaps the purpose) behind the inclusion of s 100 in the Constitution was to mark a particular limit upon the power of the federal Parliament to regulate navigation ... The federal Parliament's legislative powers with respect to navigation have no immediate intersection with the extraction, for use in irrigation, of groundwater that percolates through the soil and does not flow in a defined channel. They do have an obvious intersection with the use of the waters of rivers for that purpose.

— the understanding of the concept of 'waters of rivers' at federation as explained in the following terms by Quick and Garran in their commentary on s 100: 'A river is a stream flowing in a defined channel; and the waters of a river are the waters flowing over its bed and between its banks. Rainwater flowing over or percolating through the soil, but not flowing in a defined channel, is not the water of a river' (cited by French CJ at [28] and Gummow and Crennan JJ at [58]).

The phrase 'waters of rivers' did not include the underground water in issue.

Having disposed of the s 100 argument on the basis that 'waters of rivers' did not include the underground water in issue, various 'important constructional questions' to which s 100 gives rise did not need to be addressed. In particular, the Court did not need to decide the appellants' application to overrule *Morgan v Commonwealth* (1947) 74 CLR 421 ([23], [53], [76], [83]). *Morgan* relevantly held that the limitation in s 100 was to be confined to laws made (or perhaps capable of being made) under s 51(i) of the Constitution (the trade and commerce power) ([23], [52], [68]).

AGS (in *ICM*, David Lewis, Asaf Fisher and David Bennett QC from the Constitutional Litigation Unit; in *Arnold*, Roshana Wikramanayake from AGS Sydney and David Lewis and David Bennett QC) acted for the Commonwealth parties, with the Commonwealth Solicitor-General, Stephen Gageler SC, Alan Robertson SC and Craig Lenehan as counsel in both matters.

Text of the decisions is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2009/51.HTML
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2010/3.HTML

SUMMARY JUDGMENT INAPPROPRIATE WHERE COMPLEX ISSUES OF FACT AND CONSTITUTIONAL LAW IN ISSUE

In *Spencer v Commonwealth* the High Court unanimously held that summary judgment was inappropriate in that case where the pleadings raised the resolution of important questions of constitutional law and potentially complex questions of fact.

The constitutional issues included the significance of informal arrangements or understandings between the Commonwealth and a State concerning grants of financial assistance to a State under s 96 of the Constitution where there were allegations that, through combined Commonwealth and State actions, there had been an acquisition of property on other than just terms contrary to s 51(xxxi) of the Constitution.

Differing views were expressed on the operation of the summary judgment provisions in s 31A of the *Federal Court of Australia Act 1976* (Cth).

Spencer v Commonwealth
High Court of Australia, 1 September 2010
[2010] HCA 28; (2010) 241 CLR 118

Background

Section 51(xxxi) of the Constitution empowers the Parliament to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

Mr Spencer instituted proceedings in the Federal Court in which he claimed that 2 Commonwealth Acts and 4 intergovernmental agreements (allegedly entered into under the Acts) were invalid to the extent that they effected or authorised acquisitions of property from him on other than just terms contrary to s 51(xxxi). The 2 Acts were the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth). Mr Spencer claimed that some or all of his interests in farming land, including carbon sequestration and abatement rights, were acquired, other than on just terms, when prohibitions or restrictions on his clearing native vegetation were imposed under 2 NSW Acts in furtherance of the agreements. The NSW Acts were the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW). Mr Spencer said that this acquisition came about as a result of a cooperative arrangement between the Commonwealth and NSW in performance of the Commonwealth's commitments under the *United Nations Framework Convention on Climate Change*.

Mr Spencer's pleadings obliquely suggested that there was an informal arrangement between the Commonwealth and NSW (or a scheme or device, or a partnership or joint venture), beyond what appeared in the relevant Acts and intergovernmental agreements. His case was that there was a 'connection' between the Commonwealth making grants of money to NSW under s 96 of the Constitution and the State exercising its legislative powers in enacting the State Acts and making administrative decisions under those Acts, sufficient to trigger the 'guarantee' in s 51(xxxi) of the Constitution. Section 96 authorises the Commonwealth Parliament to grant financial assistance to a State 'on such terms and conditions as the Parliament thinks fit'.

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The constitutional issues included the significance of informal arrangements or understandings between the Commonwealth and a State concerning grants of financial assistance to a State.

Federal Court decisions

In the Federal Court, Emmett J gave summary judgment for the Commonwealth under s 31A(2) of the *Federal Court of Australia Act 1976* on the basis that Mr Spencer had 'no reasonable prospect' of successfully prosecuting the proceeding. Mr Spencer's appeal to the Full Federal Court was dismissed. The Federal Court decisions were based on the conclusion that the Commonwealth Acts did not authorise the making of an agreement with NSW requiring it to acquire property on unjust terms. Mr Spencer's application for special leave to appeal to the High Court was referred to the Full Court of the High Court to be heard as on appeal.

High Court's decision

Application of s 31A summary judgment here

The High Court granted special leave and allowed the appeal, effectively setting aside the summary judgment and allowing the matter to proceed in the Federal Court for further determination.

The Court unanimously decided that summary judgment under s 31A was inappropriate in this case. The pleadings raised the possible existence of an informal arrangement between the Commonwealth and NSW, beyond the relevant Acts and agreements. In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (decided after the Federal Court decisions in issue here; see page 1 of this issue of *Litigation Notes*), 3 judges had left open for future determination the question whether the terms and conditions attached to a s 96 grant may sufficiently be disclosed in an 'informal fashion, falling short of an intergovernmental agreement' (at 168 [38] per French CJ, Gummow and Crennan JJ).

In their joint judgment in this case, Hayne, Crennan, Kiefel and Bell JJ said that 2 points followed from Mr Spencer's allegation of an informal arrangement or understanding and the lack of any admission about that by the Commonwealth, in the light of the point left open in *ICM* (at [46]–[48]):

> First, there is a factual question presented by the applicant's allegations. Is there any arrangement or understanding beyond what appears in the relevant intergovernmental agreements and applicable legislation? Second, if there is, what is its constitutional relevance?
>
> ... [N]either the factual question that has been identified, nor the associated constitutional question, can or should be answered at this stage of the proceeding.
>
> The factual question depends upon what evidence is adduced. What evidence is adduced may well be affected by what is revealed by further interlocutory processes in the proceeding. The constitutional question may be affected by, even depend upon, the resolution of the factual question. Even if it is not directly affected by what particular facts are found, it is not a question suitable for determination on a summary judgment application.

The pleadings raised the possible existence of an informal arrangement between the Commonwealth and NSW, beyond the relevant Acts and agreements.

According to French CJ and Gummow J, the possibility of an informal arrangement was open on Mr Spencer's pleading and it was likely that there were records of negotiations between the Commonwealth and NSW which might flesh out or cast light on the operation of the funding arrangements (at [31]). Those records might be amenable to discovery or similar processes in the Federal Court (at [31]). Accordingly, in the light of the constitutional point left open in *ICM*, it 'could not be said, for the purposes of s 31A(2), that [Mr Spencer] has no reasonable prospect of successfully prosecuting the proceedings' (at [34]).

Heydon J wrote separately to similar effect (at [61]–[62]).

Scope of summary judgment under s 31A generally

Except for Heydon J, the High Court also discussed the scope of s 31A of the *Federal Court of Australia Act 1976*. As noted, s 31A(2) provides that the Court may give summary judgment if satisfied that the applicant has 'no reasonable prospect of successfully prosecuting the proceeding'. Further, s 31A(3) states that a proceeding need not be 'hopeless' or 'bound to fail' for it to have no reasonable prospect of success. Section 31A was introduced in 2005 to strengthen the powers of the Federal Court to deal with unmeritorious matters ([18]). The intention was to broaden the traditional grounds of summary dismissal (for example, proceedings which were frivolous or vexatious or an abuse of process, including where the pleadings failed to disclose a reasonable cause of action).

Summary dismissal may now be available upon grounds wider than previously permitted.

French CJ and Gummow J warned that the 'exercise of powers to summarily terminate proceedings must always be attended with caution' ([24]). Their Honours seemed to doubt whether the test under s 31A (that is, the requirement of 'real' as distinct from 'fanciful' prospects) was significantly different from earlier approaches to summary dismissal, while apparently accepting that summary dismissal may now be available upon grounds wider than previously permitted ([24]). In particular, their Honours said that, where there are factual issues in dispute, summary dismissal should not be awarded just because the Court has formed the view that the applicant is unlikely to succeed on the factual issue ([25]).

However, Hayne, Crennan, Kiefel and Bell JJ took the strong view that s 31A 'departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered' ([53]). The earlier provisions required formation of a 'certain and concluded determination that a proceeding would necessarily fail' ([53]). Section 31A instead asked whether there was no 'reasonable' prospect of prosecuting the proceeding (at [52], [58]–[59]). Although concluding that the meaning of the phrase 'no reasonable prospect' was best elucidated 'through a succession of decided cases', their Honours noted that the purpose of s 31A would be defeated if its application were read as confined to cases of a kind which fell within earlier, different, regimes ([60]).

AGS (Nick Gouliaditis and Andras Markus from AGS Sydney and David Lewis and David Bennett QC from the Constitutional Litigation Unit with others from the Office of General Counsel) acted for the Commonwealth, with the Commonwealth Solicitor-General, Stephen Gageler SC, Alan Robertson SC and Craig Lenehan as counsel.

Text of the decision is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2010/28.HTML

INCONSISTENCY BETWEEN COMMONWEALTH AND STATE CRIMINAL LAWS

In a unanimous decision in a single joint judgment, the High Court held that provisions of the *Crimes Act 1958* (Vic) which create an offence of conspiracy to steal are, to the extent that they apply to property that belongs to the Commonwealth, inconsistent for the purpose of s 109 of the Constitution with provisions of the *Criminal Code* (Cth) that create an offence of conspiracy to steal property belonging to the Commonwealth. (Under s 109 a State law is invalid to the extent of its inconsistency with a Commonwealth law.)

In these circumstances, the State provisions did not validly operate to create an offence so a charge under the State provisions could not succeed. Rather, any charge had to be brought under the Commonwealth provisions.

Dickson v The Queen
High Court of Australia, 22 September 2010
[2010] HCA 30; (2010) 84 ALJR 635; (2010) 270 ALR 1

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Background

In 2008, the appellant was convicted of the offence of conspiracy to steal contrary to s 321(1) of the *Crimes Act 1958* (Vic) (s 74(1) of the Crimes Act creates the offence of theft of property belonging to another and s 321 creates the ancillary offence of conspiracy to commit an offence). The property that was the subject of the charge was a large quantity of cigarettes that had been seized by the Australian Customs Service (Customs). After seizure, the cigarettes had been held by Customs in a locked storage area located inside a warehouse. The storage area was leased by Customs from the warehouse operator. Before the High Court it was common ground between the parties that, on the facts, the cigarettes 'belonged to' the Commonwealth for the purposes of both the Commonwealth and Victorian offence provisions ([11]).

The appellant unsuccessfully appealed to the Victorian Court of Appeal against his conviction and sentence on grounds that did not include the constitutional issue: *R v Dickson* (2008) 192 A Crim R 121. On 27 July 2010 the Full High Court gave the appellant special leave to include a new ground of appeal based on s 109 of the Constitution. This ground raised whether the offence of conspiracy to steal the cigarettes was not an offence against the law of Victoria so that the presentment preferred against the appellant should have been quashed ([8]). The appellant's argument was that the conspiracy offence under the Crimes Act was, in relation to the cigarettes the subject of the charge, inconsistent with ss 11.5 and 131.1 of the Criminal Code (Cth) and hence invalid by reason of s 109 of the Constitution (s 131 in Chapter 7 created an offence of theft of Commonwealth property to which the conspiracy provision in s 11.5 in Chapter 2 attached).

The Court held that there was 'direct inconsistency' between the operation of the Victorian and Commonwealth provisions in relation to property belonging to the Commonwealth.

High Court's decision

Conspiracy offences inconsistent

The Court held that there was 'direct inconsistency' between the operation of the Victorian and Commonwealth provisions in relation to property belonging to the Commonwealth. The Court therefore quashed the appellant's conviction. A direct inconsistency arises for the purposes of s 109 of the Constitution where

a State law 'alters, impairs or detracts from' the operation of a Commonwealth law ([10], [13], [22] and [30]). The direct inconsistency arose because ([22]):

> [Section] 321 of the Victorian Crimes Act renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth Criminal Code. In the absence of the operation of s 109 of the Constitution, the Victorian Crimes Act will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in Devondale Cream, the case is one of 'direct collision' because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.

Of particular importance was the conclusion that the Victorian offence criminalised conduct not caught by, and indeed (as shown by the extrinsic materials referred to at [24]) deliberately excluded from, the Commonwealth offence.

Of particular importance was the conclusion that the Victorian offence criminalised conduct not caught by, and indeed (as shown by the extrinsic materials referred to at [24]) deliberately excluded from, the Commonwealth offence. The Court identified the following features as significant in indicating a deliberately narrower scope for the operation of the Commonwealth conspiracy offences ([26]–[28]):

- the Commonwealth conspiracy provision only applies to primary offences punishable by imprisonment for than 12 months, whereas the Victorian provision applies to all primary offences
- the Commonwealth conspiracy offence requires an overt act to be committed pursuant to the agreement, whereas the Victorian offence is complete upon agreement to commit an offence being reached
- a person cannot be found guilty under the Commonwealth provision if, before the commission of an overt act, they withdraw from the agreement and take all reasonable steps to prevent the commission of the primary offence, whereas there is no equivalent Victorian provision, and
- there is no Victorian equivalent to s 11.5(7) of the Criminal Code which applies to a conspiracy offence those defences, procedures, limitations and qualifying provisions that apply to the primary offence.

The Court also referred to the circumstance that s 80 of the Constitution (trial by jury) would apply to a trial for the Commonwealth offence ([12], [20]). An essential feature of the jury trial required by s 80 is that there be a unanimous jury verdict, rather than the majority verdict permitted by Victorian law in a trial for the Victorian offence ([20], [22]). The differing methods of trial were said to 'strengthen' the case for inconsistency between the 2 conspiracy provisions.

In finding that the conspiracy offences were directly inconsistent, the Court contrasted its decision in *McWaters v Day* (1989) 168 CLR 289. That case concerned the interaction of a State offence of driving a car while under the influence of liquor with a Commonwealth offence that applied to a defence member driving on service land while under the influence of intoxicating liquor 'to such an extent as to be incapable of having proper control of the vehicle'. It was difficult to construe the Commonwealth offence in that case 'as conferring a liberty on a drunken defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle', upon which the State law impinged ([29]).

As there was a direct inconsistency, the Court said that it was unnecessary to consider arguments based on 'covering the field' and 'indirect inconsistency' ([31]). However, the Court referred to the significance for 'covering the field' inconsistency of an express intention that a Commonwealth law not make exhaustive provision on a subject to the exclusion of State laws ([33]–[35]) and observed that 'close attention is necessary to the place of such a statement in the particular statutory framework in which it is to be found' ([35]). The Court went on to note the express statement in s 261.1 in Chapter 7 of the Criminal Code, denying an intention for Chapter 7 (which contains s 131.1) to exclude the operation of State criminal laws. Chapter 2 (which contains s 11.5) did not include a similar provision. The Court said ([37]):

> The presence of s 261.1, whatever else its effect in considering the application of s 109 to charges under State law of theft of the property of the Commonwealth, a matter upon which it is unnecessary to enter here, could not displace or avoid the direct collision between the conspiracy provisions with which the appeal is concerned.

AGS (Ros Kenway and Simon Thornton from the Constitutional Litigation Unit and Heidi Willems from the Office of General Counsel) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General, Stephen Gageler SC, and Kate Morgan as counsel.

Text of the decision is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2010/30.HTML

STATE PRIVATIVE CLAUSES

The High Court has held that each State Supreme Court has an entrenched jurisdiction to enforce jurisdictional limits on the exercise of State judicial (and executive) power by persons and bodies other than the Supreme Court itself. That supervisory jurisdiction is exercised through the grant of prohibition, certiorari, mandamus and habeas corpus, and cannot be removed by State legislation.

Kirk v Industrial Court of New South Wales
High Court of Australia, 3 February 2010
[2010] HCA 1, 239 CLR 531

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Background

Following the death of an employee, Graeme Kirk and Kirk Group Holdings Pty Ltd (the Kirks) were convicted in the Industrial Relations Commission of NSW (now called the Industrial Court of NSW) of offences against s 15(1) and s 16(1) of the *Occupational Health and Safety Act 1983* (NSW) (OHS Act).

The Kirks unsuccessfully appealed against their convictions to the Full Bench of the Industrial Court. They then unsuccessfully sought judicial review in the NSW Supreme Court (Court of Appeal) of the decisions of the Industrial Court at first instance and on appeal. The Supreme Court and the parties proceeded on the basis that that Court could review the decisions of the Industrial Court for jurisdictional error, notwithstanding s 179 of the *Industrial Relations Act 1996* (NSW) (the IR Act) ([48]).

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Section 179 Industrial Relations Act: State privative clause

Section 179 of the IR Act relevantly provides that a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called

into question by any court or tribunal' (s 179(1)); and it extends to 'proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise' (s 179(5)).

On appeal to the High Court the Kirks challenged the validity of the OHS Act in conferring a criminal jurisdiction on the Industrial Court in circumstances where that Court was protected from review by s 179 of the IR Act. The Kirks also argued, in the alternative, that the Industrial Court was, for the purposes of s 73(ii) of the Constitution, part of the NSW Supreme Court, with the result that an appeal lay (with special leave) direct from the Industrial Court to the High Court (s 73(ii) relevantly confers jurisdiction on the High Court to hear appeals from 'the Supreme Court of any State').

The majority acknowledged the difficulty in distinguishing between jurisdictional and non-jurisdictional error but maintained the distinction.

High Court's decision

The High Court found that the Industrial Court had made jurisdictional errors and construed, for constitutional reasons, s 179 as not preventing the NSW Supreme Court (including the Court of Appeal) from granting relief for jurisdictional error. This was a sufficient basis for the Court to make orders quashing the orders by the Industrial Court for the convictions of the Kirks ([109]), without having to consider the other constitutional issues raised by the Kirks ([49]).

French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (the majority) published joint reasons. Heydon J agreed generally with their reasons but dissented as to orders in relation to costs and the future of the Industrial Court proceedings ([113], [124]).

Did the Court of Appeal err in holding that the Industrial Court did not fall into jurisdictional error?

The first issue considered by the majority was whether the Court of Appeal erred in holding that the Industrial Court had not fallen into jurisdictional error. The majority acknowledged the difficulty in distinguishing between jurisdictional and non-jurisdictional error ([56], [66]–[70]) but maintained the distinction ([65], [66]). The majority noted that jurisdictional error may manifest itself in a number of ways but considered it 'neither necessary, nor possible' to 'mark the metes and bounds of jurisdictional error' ([71], [73]). In broad terms, however:

> There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do.

(*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163], cited with approval at [66].)

The majority held that the Industrial Court, at first instance, did fall into jurisdictional error with the consequence that the grant of relief in the nature of certiorari to quash the convictions and sentences of the Kirks was 'warranted, and in this case required' ([54]). Two jurisdictional errors, which attended the decision of the Industrial Court at first instance, were identified.

— First, the Industrial Court had misconstrued s 15 of the OHS Act ([74]; see also [34]–[38]). This caused it to misapprehend the 'limits of its functions and powers' and led it to 'make orders convicting and sentencing Mr Kirk and the Kirk company where it had no power to do so' ([74], [75]). The misconstruction of s 15 meant that the Industrial Court convicted the Kirks

of offences 'when what was alleged and what was established did not identify offending conduct' because no particular act or omission on the part of the Kirks was identified.

— Secondly, the Industrial Court 'misapprehended a limit on its powers by permitting the prosecution to call Mr Kirk at the trial' contrary to s 17(2) of the *Evidence Act 1995* (NSW) ([76]; see also [53], [114]). The Industrial Court's power was limited to trying the charges applying the laws of evidence.

Relief in the nature of certiorari lies to quash the decision of a court of limited jurisdiction where the court falls into jurisdictional error ([56]). Thus, 2 jurisdictional errors having been identified, the majority said that certiorari would lie in this case '*putting aside* consideration of the privative provisions of s 179 of the IR Act' ([77]; emphasis added).

Effect of s 179 of the IR Act

As noted above, s 179(1) and (5) of the IR Act read together purported to prevent a court (including the Supreme Court) from, amongst other things, issuing certiorari to quash 'a decision' of the Industrial Court. The majority concluded, however, that 'decision' should not be read to include a decision of the Industrial Court made outside the limits on its power (ie a decision attended by jurisdictional error), because of the following 'constitutional considerations' ([104]–[105]).

Constitutional issue: the supervisory jurisdiction of State Supreme Courts

Section 73(ii) of the Constitution requires that 'there be a body fitting the description "the Supreme Court of a State" ', a consequence of which is that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description' ([96]).

At federation, each of the State (formerly colonial) Supreme Courts exercised a supervisory jurisdiction – through granting relief in the nature of prohibition, certiorari, mandamus and habeas corpus – which was 'the mechanism for the determination and enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court' ([98]). The High Court accepted the submission of the Commonwealth Attorney-General to the effect that this supervisory jurisdiction of State Supreme Courts 'was, and is, a defining characteristic of those courts' ([98]). Because a defining characteristic of a State Supreme Court is its supervisory jurisdiction, it is beyond the legislative competence of a State to 'take from a State Supreme Court power to grant relief on account of jurisdictional error' ([100]; see also [55(f)]).

Because a defining characteristic of a State Supreme Court is its supervisory jurisdiction, it is beyond the legislative competence of a State to 'take from a State Supreme Court power to grant relief on account of jurisdictional error'.

Further, because the High Court has appellate jurisdiction under s 73 of the Constitution to hear appeals from the State Supreme Courts, the exercise of their supervisory jurisdiction is ultimately subject to the superintendence of the High Court and is exercised 'according to principles that in the end are set by the High Court'. As the majority stated ([99]):

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.

Having regard to these considerations, the word 'decision' in s 179(1) is to be understood as referring only to decisions of the Industrial Court made within the limits of its power; thus s 179, on its proper construction, does not preclude the grant of certiorari for jurisdictional error ([105]). As the majority stated, 'the amenability of the Industrial Court to the supervisory jurisdiction

of the Supreme Court is a corollary of the Industrial Court being a court of limited power and the position which the State Supreme Court has in the constitutional structure' ([107]). This conclusion was not altered by the statutory designation of the Industrial Court as a 'superior court of record' ([107]).

Section 179 is effective to exclude review for error on the face of the record

The majority also concluded that the errors made by the Industrial Court were errors of law on the face of the record and that, but for s 179 of the IR Act, certiorari would lie on that ground as well ([90]). However, s 179 could validly deny relief for *non-jurisdictional* error of law appearing on the face of the record ([100], see also [108]). This difference 'points to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context', as that distinction 'marks the relevant limit on State legislative power' ([100]). That is, the distinction has significance in this broader Australian constitutional context and not only in determining the scope of the High Court's own entrenched supervisory jurisdiction under s 75(v) of the Constitution.

This difference 'points to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context', as that distinction 'marks the relevant limit on State legislative power'.

Supervisory jurisdiction extends to State executive power

Finally, although this case concerned an exercise of State judicial power by the Industrial Court, the majority's reasons include as part of the entrenched supervisory role of State Supreme Courts, jurisdiction to determine and enforce the limits on the exercise of State *executive* power ([98], [99]).

AGS (Andrew Buckland, Asaf Fisher and David Bennett QC from the Constitutional Litigation Unit) acted for the Attorney-General of the Commonwealth (intervening), with the Commonwealth Solicitor-General, Stephen Gageler SC, and Stephen Free as counsel.

Text of the decision is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2010/1.HTML

APPLICATION OF THE *KABLE* PRINCIPLE: INVALIDITY OF FUNCTIONS CONFERRED BY STATE LAWS ON STATE COURTS

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In two recent decisions (*International Finance Trust Company Ltd v NSW Crime Commission and South Australia v Totani*) the High Court has ruled that laws enacted by the New South Wales and South Australian parliaments were invalid, as they conferred powers on State courts that were incompatible with their constitutional status as courts appropriate for the exercise of federal jurisdiction under Ch III of the Constitution. Chapter III of the Constitution prevents a State from enacting a law that would be incompatible with the maintenance of the 'defining characteristics' of the courts of the State. These include (but are not limited to) the characteristics of independence and impartiality, an aspect of which is that a court cannot be required to act in a manner 'repugnant to the judicial process in a fundamental degree'.

International Finance Trust Company Ltd v NSW Crime Commission
High Court of Australia, 12 November 2009
[2009] HCA 49; (2009) 240 CLR 319

Background

The *Criminal Assets Recovery Act 1990* (NSW) provides for civil proceedings for the confiscation of property derived from serious criminal activity, without requiring conviction of a criminal offence. The Act also provided for a preliminary restraining order to freeze suspected criminal property pending a substantive forfeiture hearing. As French CJ observed, both statutory forfeiture of assets by reason of criminal conduct, whether established by criminal conviction or in civil proceedings, and related interim restraining or freezing processes have a long history in English law as a means of deterring criminal activity ([25], [29], [33]).

Under s 10 of the NSW Act, the NSW Crime Commission 'may apply to the Supreme Court, ex parte, for a restraining order in respect of' property of a person suspected of having engaged in a serious criminal offence or property of any other person suspected of being derived from a serious criminal offence. The NSW Supreme Court is required to make the restraining order if the application is supported by an affidavit by an authorised officer stating that the officer has the required suspicion and the grounds on which that suspicion is based, and the Court considers that, having regard to the matters in the affidavit, there are 'reasonable grounds' for the suspicion.

A restraining order prevented a person from disposing of or otherwise dealing with property to which the order applied except as permitted by the order.

A restraining order prevented a person from disposing of or otherwise dealing with property to which the order applied except as permitted by the order. After a restraining order was made, it continued in force at least for 2 working days and thereafter only while, relevantly, an application by the Commission under s 22 of the Act for an assets forfeiture order was pending in the Supreme Court. An application for an assets forfeiture order was required to be made on notice to the person to whom it related and that person could appear and adduce evidence at the hearing of the application ([10], [13]). However, the Act did not limit the period within which the application for an assets forfeiture order had to be brought on for determination and there was no sanction against delay in doing so ([68]). There was also provision for the Court to make an 'exclusion order' under s 25 excluding property from an assets forfeiture order if the person applying for the exclusion order established that the property was not acquired from illegal activity, which covered any conduct involving an offence at common law or against the laws of NSW or the Commonwealth ([14], [94]).

The validity of s 10 was challenged on the basis that it imposed on the Supreme Court 'functions which so distort its institutional integrity as to be inconsistent with its status as a repository of federal jurisdiction', relying on the principle in *Kable v DPP* (NSW) (1996) 189 CLR 51 ([3]). The Commonwealth Attorney-General intervened to support the validity of s 10.

High Court's decision

The High Court (by a 4:3 majority) declared s 10 of the NSW Act to be invalid because it required the NSW Supreme Court to hear and determine an application for a restraining order by the NSW executive government on an ex parte basis without any effective mechanism for judicial review of the order that was made. In the majority, French CJ and Heydon J published separate judgments and Gummow and Bell JJ gave a joint judgment. Hayne, Crennan and Kiefel JJ delivered a joint dissenting judgment.

Majority judgments

While ex parte applications are 'not unusual' in the context of interim orders such as for urgent relief or to preserve assets where notice might lead to their concealment or dissipation, a court will ordinarily have a discretion to require that notice be given ([39], [54]). However, under the NSW Act, if the Commission chose to bring an ex parte application for a restraining order (that is, without giving notice of the application to the person affected) then s 10 of the Act required the Supreme Court to hear and determine the application ex parte ([40], [43]–[44]).

Section 10 was invalid because it required the NSW Supreme Court to hear and determine an application for a restraining order by the NSW executive government on an ex parte basis without any effective mechanism for judicial review.

These 2 interrelated factors (the conferral on the Commission of a discretion whether or not to apply for a restraining order ex parte and the preclusion of the Supreme Court from requiring that the Commission give notice where it had made an ex parte application) led French CJ to the conclusion that s 10 was invalid. Section 10 impermissibly directed the Court as to the manner of the exercise of its jurisdiction because its 'discretion as to the conduct of its own proceedings in the key area of procedural fairness is supplanted by the Commission's judgment' ([45]; see also [4], [47], [54]–[56]). That is, the decision whether procedural fairness required that notice be given was left to the discretion of the NSW executive government, on which the Supreme Court was required to act. This was 'incompatible with the judicial function of that Court' and 'distorts the institutional integrity of the Court and affects its capacity as a repository of federal jurisdiction' ([56]). A law could not validly require a court to receive an ex parte application from the executive government and to hear and determine it ex parte, if the executive so desired ([54]).

French CJ did not consider it 'germane to the issue of validity' that a mechanism might have been available by which a party affected by a restraining order could apply to have it discharged ([48]; see also [4]). An 'impermissible invasion of the judicial function' could not be 'remedied at some later time' ([48]). In any event, his Honour considered, for reasons given by Gummow and Bell JJ, that the Act provided no sufficient mechanism for review of a restraining order within a short time ([58]).

Gummow and Bell JJ referred to earlier statements in the High Court that an essential element of the judicial process, in accordance with which a court is required to discharge its judicial functions, is that 'parties be given an opportunity to present their evidence and to challenge the evidence led against them' ([88]). They recognised that applications 'entertained ex parte for orders with immediate effect upon the person or property of another are a well-established qualification to that general principle' ([89]). Gummow and Bell JJ also accepted (as did French CJ at [49], Hayne, Crennan and Kiefel JJ at [120] and

Heydon J at [157]) that legislation was not invalid merely because it conferred on a court a duty to make an order if certain conditions were satisfied ([77]).

However, Gummow and Bell JJ emphasised that other legislative contexts allowing ex parte procedures also include mechanisms by which orders made ex parte are able to be reviewed 'in the very short term' at a subsequent contested hearing and that enable an ex parte order to be discharged if the party that applied for the order failed to disclose material facts relevant to its making ([89], [91]–[92]). By contrast, although there were limited appeal rights, a restraining order made under s 10 of the Act was not subject to an effective judicial review mechanism which would involve the Court hearing a contested application a short time after the order was made ([68], [90], [97]); nor does the Act provide for 'effective curial enforcement of the duty of full disclosure [of material facts] on ex parte applications' ([97]; see also [93]). The availability of an application for an exclusion order under s 25 was not sufficient because of the burden it imposed on the applicant for exclusion to prove 'a negative proposition of considerable legal and factual complexity' ([97]).

The principle that there should be a contested hearing before making a judicial decision having substantive consequences is central to the judicial process.

Gummow and Bell JJ concluded that s 10 'conscripted' the Supreme Court for a process which, in requiring 'in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications', is 'repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia' ([97]–[98]).

Heydon J also regarded s 10 as invalidly conferring on the Supreme Court a power 'repugnant to the judicial process in a fundamental degree' ([140]). The principle that there should be a contested hearing before making a judicial decision having substantive consequences is central to the judicial process. His Honour considered that the repugnancy arose here from the potential for extreme injustice flowing from the Act's failure to provide a speedy facility for the Court to 'entertain an application to dissolve an ex parte restraining order once the defendant [had] received notice of its grant' ([159]–[160]). However, like Gummow and Bell JJ ([89], [93], [97]), but unlike French CJ, Heydon J did not consider that a mandatory ex parte process was, by itself, conclusive of invalidity ([152]; see also Hayne, Crennan and Kiefel JJ at [135]–[136]).

Joint judgment of the minority

Hayne, Crennan and Kiefel JJ differed from the majority in that they considered that the Act, properly construed, did not exclude the right of a party against whom an ex parte restraining order was made to apply to the Supreme Court to have the order discharged, including on the ground that the Commission had failed to make full and frank disclosure on matters material to the making of the order ([126], [128]). On this basis, the procedure prescribed by s 10 for the making of a restraining order did not differ from the procedure usually followed in the judicial process ([122], [136]). So construed, s 10 did not require the Supreme Court to act at the direction of the executive government and was not repugnant to the judicial process. It did not deny the impartiality of the Supreme Court.

AGS (Asaf Fisher and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General, Stephen Gageler SC, and Kate Richardson as counsel.

Text of the decision is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2009/49.HTML

SOUTH AUSTRALIAN CRIMINAL ORGANISATION CONTROL ORDER PROVISION INVALID

In a 6:1 decision, the High Court held invalid a provision of an SA Act that required the SA Magistrates Court to make a control order if satisfied that the defendant was a member of an organisation 'declared' by the SA Attorney-General.

The provision was invalid because it enlisted the Magistrates Court to implement the executive's decision in making the declaration in a manner incompatible with the Court's institutional integrity.

South Australia v Totani
High Court of Australia, 11 November 2010
[2010] HCA 39

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Background

This appeal concerned s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) (the SA Act). The objects of the SA Act included the disruption and restriction of the activities of organisations involved in serious crime and of their members and the protection of the public from violence associated with the organisations. Part 2 of the SA Act allowed the SA Attorney-General to 'declare' organisations on the basis of their involvement in serious crime and Part 3 required the SA Magistrates Court (the Court) in specified circumstances to make a control order against a member of a declared organisation.

The SA Commissioner of Police (the Commissioner) could apply to the Attorney-General for a declaration in relation to an organisation. Under s 10(1) of the SA Act, the Attorney-General could make the declaration if 'satisfied' that:

— members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and

— the organisation represented a risk to public safety and order in the State.

Under s 14(1), the Court, on application by the Commissioner, was required to make a control order against a person if the Court was satisfied that the person was a member of a declared organisation. The Court was required to include in the control order prohibitions against the person associating with other members of declared organisations and against possessing a dangerous article or a prohibited weapon, 'except as may be specified in the [control] order'. There was provision for a person against whom a control order was made to object to the control order after it had been served, and on hearing the objection the Court could confirm, vary or revoke the order. There was also provision for an appeal to the Supreme Court against a decision on an objection.

On the application of the Commissioner, the SA Attorney-General made a declaration under s 10 of the SA Act in respect of the Finks Motorcycle Club. On application of the Commissioner, the Court subsequently made a control order under s 14(1) in respect of one of the respondents to this appeal, and the Commissioner applied for a control order in respect of the other respondent. By a 2:1 majority, the SA Supreme Court held that s 14(1) was invalid. SA appealed to the High Court.

The Constitution prevents a State from enacting a law that would be inconsistent with the maintenance of the defining characteristics of the courts of the State.

High Court's decision

The Commonwealth Attorney-General intervened in the High Court and made submissions on the application of the High Court's decision in *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 (see page 11 of this issue of *Litigation Notes*) but did not make submissions about the validity of s 14(1) of the SA Act.

Majority judgments

In the majority, Crennan and Bell JJ wrote a joint judgment while each of French CJ, Gummow J, Hayne J and Kiefel J wrote separately. Heydon J dissented.

Section 14(1) was invalid

Decisions of the High Court on the principle first articulated in *Kable v NSW Director of Public Prosecutions* (1996) 189 CLR 51 have established that Chapter III of the Constitution prevents a State from enacting a law that would be inconsistent with the maintenance of the defining characteristics of the courts of the State. A defining characteristic is that a State court be an independent and impartial tribunal for the exercise of the judicial power of the Commonwealth. A State law that seeks to impair the institutional integrity of a State court, particularly by depriving it of the minimum requirements of institutional independence and impartiality, is invalid ([58], [69], [132], [202], [427]–[428], [443]). According to French CJ, '(a)t the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities' ([62]).

Section 14(1) was held to require the Court to act in a manner incompatible with its institutional integrity and the requirement that it be, and appear to be, an independent and impartial tribunal. Its effect was that the Court was required to act as an instrument of the executive. The Attorney-General's declaration of the organisation, which required the Attorney-General to be satisfied that members of the organisation had engaged in criminal conduct ([14], [75], [450]), was dominant, the 'significant integer', the 'vital circumstance', or the 'essential foundation' of the making of the control order by the Court (at [28], [81], [130], [139], [142], [435]). The Court was 'enlisted' to implement the legislative policy of the Act at the 'behest' of the Attorney-General ([82], [149], [229], [436], [479]–[481]).

French CJ said (at [4]):

> Section 14(1) requires the Magistrates Court to make a decision largely pre-ordained by an executive declaration for which no reasons need be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court. The [SA Act] thereby requires the Magistrates Court to carry out a function which is inconsistent with fundamental assumptions, upon which Ch III of the Constitution is based, about the rule of law and the independence of courts and judges. In that sense it distorts that institutional integrity which is guaranteed for all State courts by Ch III of the Constitution so that they may take their place in the integrated national judicial system of which they are part.

In assessing the role of the Court in the legislative scheme, it was significant that membership of a declared organisation was not an offence, and the Court was not required to make any findings about criminal guilt or the past or potential future involvement of the defendant in criminal activities ([23], [35], [75], [106], [110], [215], [222], [225], [397], [434]–[435], [450], [453], [464], [469],

In assessing the role of the Court in the legislative scheme, it was significant that membership of a declared organisation was not an offence, and the Court was not required to make any findings about criminal guilt or the past or potential future involvement of the defendant in criminal activities.

[478]). Rather, the Court's primary task was to determine if the defendant was a member of the organisation, and if it was so satisfied of that one matter, the Court was required to make a control order affecting personal liberty that was enforced by criminal offences affecting both the member and persons with whom the member associates ([16], [23], [79], [97], [100], [103], [169], [225], [229], [405], [453]–[454]). In this context, it was relevant that the making of a control order by the Court involved a significant restriction on the defendant's freedom of association ([30], [110], [180], [213], [423], [464]). French CJ described the operation of the legislative scheme in the following terms (at [75]):

> Section 14(1) of the [SA Act] confers upon the Magistrates Court the obligation, upon application by the Commissioner, to make a control order in respect of a person by reason of that person's membership of an organisation declared by the Attorney-General. The declaration rests upon a number of findings including, in every case, a determination by the Attorney-General that members of the organisation, who need not be specified, have committed criminal offences, for which they may never have been charged or convicted. The findings, of which the Magistrates Court may be for the most part unaware and which in any event it cannot effectively or readily question, enliven, through the declaration which they support, the duty of the Court to make control orders against any member of the organisation in respect of whom the Commissioner makes an application. That is so whether or not that member has committed or is ever likely to commit a criminal offence. Membership of a declared organisation is not made an offence by the [SA Act].

The Court's power to make exceptions to the prohibitions required to be included in a control order did not allow the Court to make an order without content and did not render the Court's function sufficiently independent of the executive's declaration.

The Court's power to make exceptions to the prohibitions required to be included in a control order did not allow the Court to make an order without content and did not render the Court's function sufficiently independent of the executive's declaration ([18], [172], [213], [435], [459]–[460]).

Thomas v Mowbray (2007) 233 CLR 307, which upheld the validity of the terrorism interim control order provisions of the Commonwealth Criminal Code, was distinguished, as:

> Importantly, the Code does not purport to impose any obligation upon a court to make a control order upon the basis of an executive determination or otherwise. Whether a control order is made or not is in the discretion of the court. The court cannot make such an order unless it is satisfied, on the balance of probabilities, that to do so would substantially assist in preventing a terrorist act or that the person in question has provided training to, or received training from, a listed terrorist organisation. ([39]; see also [140], [223]–[224], [430], [434], [476]).

French CJ also contrasted the SA Act with similar legislation in NSW, the NT and Queensland ([40]), as well as the offences relating to 'criminal organisations' in Part 9.9 of the Commonwealth Criminal Code ([38]; see also [140]).

Hayne J held that s 14(1) enlisted the Court to create new norms of behaviour for those particular members identified by the executive, with those members being subjected to special restraint not for what they have done or may do but because the executive has chosen them, and that that function was repugnant to the institutional integrity of the Court ([236]; French CJ agreeing at [82]).

Privative provision: Kirk

Consistently with the decision in *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531, the Court indicated that a privative provision in the SA Act could not prevent the SA Supreme Court from reviewing for jurisdictional error the making of a declaration by the SA Attorney-General ([26], [128], [193], [415]).

'Criminal intelligence'

Section 31 of the SA Act required the Court to keep confidential any information classified by the Commissioner as 'criminal intelligence', including from the defendant. The High Court held that s 31 did not itself impermissibly impair the Magistrates Court's institutional integrity, applying the reasoning in *K-Generation Pty Ltd v Licensing Court of SA* (2009) 237 CLR 501. It was for the Court to determine whether information was properly classified as 'criminal intelligence' ([44], [124], [416]; see also [195]). However, French CJ referred to the requirement to keep information confidential as an aspect of his reasoning in holding s 14(1) invalid ([82]).

Dissenting judgment of Heydon J

Heydon J would have held that the SA Act was valid ([385]). His Honour identified 6 strands of reasoning put forward by the respondents to support the argument that s 14(1) was invalid, and rejected them all (see [267]–[345]). Heydon J emphasised that, under the SA Act, the process was almost identical to ordinary judicial processes ([352]); the Attorney-General's declaration, and the making of the control order by the Court, were separate, equally important elements in the scheme not giving rise to the Court acting as a 'rubber stamp' for the executive ([311], [320]); and, as he would construe the SA Act, the Court was required to consider the defendant's past and possible future connection to criminal activities in deciding what exceptions to make to the prohibitions required to be included in the control order ([361]–[367]).

AGS (Asaf Fisher and David Lewis from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Commonwealth Solicitor-General, Stephen Gageler SC, and Albert Dinelli as counsel.

Text of the decision is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2010/39.HTML

Section 31 of the SA Act required the Court to keep confidential any information classified by the Commissioner as 'criminal intelligence', including from the defendant... s 31 did not itself impermissibly impair the Magistrates Court's institutional integrity.

PROSECUTION APPEAL FROM DIRECTED ACQUITTAL CONSISTENT WITH 'TRIAL BY JURY'

Six justices of the High Court upheld the availability of an appeal by the Commonwealth Director of Public Prosecutions (DPP) on a question of law against an acquittal by a jury that was directed by the trial judge. Such an appeal is consistent with the trial by jury requirements of s 80 of the Constitution (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ; Heydon J not deciding).

The Queen v LK; The Queen v RK
High Court of Australia, 26 May 2010
[2010] HCA 17; (2010) 84 ALJR 395; (2010) 266 ALR 399

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Background

Section 80 of the Constitution provides that '(t)he trial on indictment of any offence against any law of the Commonwealth shall be by jury'. The 2 respondents to the appeals were charged on indictment with conspiring to deal with the proceeds of crime, being reckless as to the fact that the money was the proceeds of crime, contrary to s 11.5 of the Criminal Code (Cth) ([3], [83]–[84]). At the close of the Crown case in the NSW District Court, the trial judge directed the jury to acquit the respondents, ruling that the indictment did not disclose an offence known to law. This was on the basis that the indictment did not allege the correct fault element to establish the offence of conspiracy – it was not sufficient to show only that the alleged conspirators were reckless as to whether the money dealt with was the proceeds of crime ([5]–[6], [85]).

Section 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) (as picked up and applied by s 68(2) of the *Judiciary Act 1903* (Cth) to proceedings in federal jurisdiction, such as the prosecution here) 'provides a right of appeal from a directed acquittal involving a question of law alone' ([86]; see also [12]–[20]). The DPP appealed to the NSW Court of Criminal Appeal against the directed acquittal on the basis of the trial judge's ruling. That appeal was dismissed and the DPP then appealed to the High Court.

The respondents contended as a threshold point that s 80 of the Constitution precluded the DPP's appeal against a directed verdict of acquittal as, in allowing the jury's verdict to be undermined, the appeal infringed on an essential attribute of 'trial by jury'. The Commonwealth Attorney-General intervened in the High Court to put submissions that the prosecution appeal did not infringe s 80.

An appeal on a question of law against a directed acquittal therefore does not encroach on any essential (fact-finding) function of a jury.

High Court's decision

The High Court rejected the respondent's contention and held that a prosecution appeal, solely on a question of law, against a directed acquittal did not infringe upon any of the essential functions of trial by jury ([40], [88]). Essentially this was because the jury's function is to decide questions of fact and the trial judge's function is to decide questions of law ([31], [36]). The trial judge's power to direct a jury to return a particular verdict on the basis that the indictment does not disclose an offence known to the law or that there is no evidence upon which a jury could convict 'is an incident of the duty of the judge to decide questions of law' ([29], [31]). An appeal on a question of law against a directed acquittal therefore does not encroach on any essential (fact-finding) function of a jury.

The High Court unanimously rejected the DPP's appeal on the issue of the applicable fault element under the Criminal Code and upheld the trial judge's ruling that the indictment did not disclose an offence known to the law.

AGS (David Lewis and Simon Thornton from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General, Stephen Gageler SC, Guy Aitken and Patricia McDonald as counsel.

Text of the decision is available at:
HTTP://WWW.AUSTLII.EDU.AU/AU/CASES/CTH/HCA/2010/17.HTML

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