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Litigation notes

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VALIDITY OF CONFERRAL OF COMMONWEALTH ADMINISTRATIVE POWER ON STATE OFFICERS

The High Court, in a 6:1 decision (Kirby J dissenting), has rejected a challenge to the validity of state magistrates determining under s 19 of the *Extradition Act 1988* (Cth) whether persons are 'eligible for surrender' to the requesting country.

O'Donoghue v Ireland; Zentai v Hungary; Williams v United States of America
High Court of Australia, 23 April 2008
[2008] HCA 14

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Constitutional issue

The constitutional issue before the High Court concerned whether the Commonwealth and a state could agree at the *executive* level for the holder of a state statutory office, such as a magistrate, to perform administrative functions under a Commonwealth law or whether conferral by the Commonwealth of such a function on a state magistrate required *legislative* approval of the state. The appellants had argued that the administrative function under s 19 of the Extradition Act was imposed on state magistrates as a *duty* and that it was an implication from the federal structure of the Constitution that a Commonwealth law could not impose a *duty* on holders of state *statutory* offices (such as magistrates) without the state giving *legislative* (rather than executive) approval.

The case is significant for federal–state relations as there are a wide range of Commonwealth administrative functions—beyond those under the Extradition Act—which are performed by state officers.

The High Court rejected the challenge to validity on the basis that s 19 of the Extradition Act did not impose a duty but conferred a power. The Court therefore did not need to decide whether the constitutional limitation asserted by the appellants, relating to the imposition of duties by Commonwealth laws, should be accepted.

However, the underlying premise of the majority judgments is that there is no constitutional limitation precluding the conferral by the Commonwealth of, at least, administrative powers on state officers in the absence of state legislative consent. This removes a potential threat to those existing federal–state arrangements under which administrative powers are exercised by state officers under Commonwealth legislation.

Background

O'Donoghue v Ireland and *Zentai v Hungary* involved determination by WA magistrates as to whether the appellants were 'eligible for surrender' under s 19

This issue

of the Extradition Act, whereas *Williams v United States of America* concerned performance of this function by NSW magistrates. In accordance with s 46 of the Extradition Act, arrangements had been made between the Governor-General and the Governors of WA and NSW respectively for magistrates in those states to perform functions under the Extradition Act.

In each matter the Full Federal Court had held that there was state legislative approval for the performance of the functions by WA magistrates (under s 6 of the *Magistrates Court Act 2004* (WA)) and by NSW magistrates (under s 23 of the *Local Courts Act 1982* (NSW)), so the constitutional issue did not need to be considered.

The three matters were heard together by the High Court on 5 and 6 December 2007.

The High Court

The main arguments put by the appellants to the High Court (see [13]) were:

1. It is an implication from the federal structure of the Constitution (reflected in the *Melbourne Corporation* doctrine) that the Commonwealth Parliament cannot impose an administrative *duty* on the holder of a state *statutory* office without state *legislative* approval. (The *Melbourne Corporation* doctrine prevents the Commonwealth from enacting laws that in their 'substance and operation' constitute 'in a significant manner, a curtailment or interference with the exercise of State constitutional power': *Austin v Commonwealth* (2003) 215 CLR 185 at 246 [115], 265 [168] (Gaudron, Gummow and Hayne JJ).)
2. Section 19 of the Extradition Act imposes an administrative duty on magistrates as holders of state statutory offices.
3. The imposition of that duty is not approved by any legislation of the parliaments of WA or NSW.
4. A member of the state executive, such as the Governor, has no power under a state constitution to alter or add to the functions of an office such as that of a magistrate created by state legislation.

Gummow, Hayne, Heydon, Crennan and Kiefel JJ delivered a joint judgment dismissing each of the appeals. In a separate judgment, Gleeson CJ also dismissed the appeals.

The joint judgment

Unnecessary to decide Melbourne Corporation *and state legislative approval questions*

From a constitutional perspective, the joint judgment's key finding (at [57]) was that it was unnecessary to decide whether the *Melbourne Corporation* doctrine prevents a Commonwealth law from imposing an administrative duty on the holder of a state statutory office without state legislative approval. This was because, as the Commonwealth submitted, s 19 of the Extradition Act merely confers an administrative power rather than imposing a duty on state magistrates to determine eligibility for surrender for extradition purposes (see also [47], [68], [79]). For the same reason it was not necessary to decide whether WA and NSW legislation provided legislative consent to the performance of functions under the Extradition Act by state magistrates ([78]).

It was unnecessary to decide whether the Melbourne Corporation *doctrine prevents a Commonwealth law from imposing an administrative duty on the holder of a state statutory office without state legislative approval.*

Extradition Act confers power rather than imposes duty on state magistrates

The joint judgment noted (at [40]) that it was settled by authority, including *Pasini v United Mexican States* (2002) 209 CLR 246 and *Vasiljkovic*

v Commonwealth (2006) 227 CLR 614, that the determination by state magistrates under s 19(1) of the Extradition Act of eligibility to surrender 'involves the exercise of administrative functions and not the exercise of the judicial power of the Commonwealth'.

The joint judgment then addressed the appellants' argument that s 19(1) of the Extradition Act imposed an administrative duty on state magistrates. As explained by the joint judgment (at [39]), s 19(1) provides that, where the preceding steps in the extradition process have been taken and the state magistrate considers there has been a reasonable time to prepare, the magistrate '*shall* conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence' (emphasis added).

The appellants conceded that particular heads of power under s 51 of the Constitution (such as the defence power in s 51(vi)) might by their 'subject matter or context' allow the Commonwealth to 'compel the performance of duties under federal law even without State legislative approval' (at [45]). The joint judgment noted that this concession was in apparent response to the *State of South Australia v Commonwealth (Uniform Tax Case (No. 1))* (1942) 65 CLR 373, which upheld wartime tax legislation authorised by the defence power enabling the Commonwealth to 'take over from the States their officers, premises and equipment concerned with the assessment and collection of income tax'. The appellants argued that, in contrast to laws enacted under the defence power, the Commonwealth could not impose administrative duties on the states in legislation authorised by the external affairs power in s 51(xxix) of the Constitution, such as the Extradition Act.

The joint judgment noted the appellants' concession that their case must fail if s 19(1) of the Extradition Act 'confers a power but does not impose a duty' (at [47]). This concession was said to reflect the reasoning in *Aston v Irvine* (1955) 92 CLR 353 at 364, where the High Court said that provisions of the *Service and Execution of Process Act 1901* (Cth) merely conferred powers upon state magistrates or other officers in respect of interstate service of process, and that this involved no interference with the executive governments of the states.

The central conclusion of the joint judgment was that s 19(1) of the Extradition Act must be read with s 4AAA of the *Crimes Act 1914* (Cth) and did not impose an administrative duty on state magistrates (at [57], [59]). Section 4AAA sets out:

> ... the rules that apply if, under a law of the Commonwealth *relating to criminal matters*, a function or power that is neither judicial nor incidental to a judicial function or power [such as an administrative extradition function under the Extradition Act] is conferred on ... a magistrate'. [Section 4AAA(1); emphasis added.]

The provision states that a function or power to which it applies is conferred on a magistrate 'only in a personal capacity and not ... as a court or a member of a court' (s 4AAA(2)), and, significantly—in s 4AAA(3)—that 'the person need not accept the function or power conferred'. While this latter provision appears to make it clear that any Commonwealth law to which s 4AAA applies does not impose a duty on a state magistrate, this can be countered by the operation of s 4AAA(6A), which states that 'a rule set out in this section does not apply *if the contrary intention appears*' (emphasis added).

The appellants accepted that if s 4AAA(3) of the Crimes Act applied to s 19(1) of the Extradition Act then their case must fail (joint judgment, [60], [67]). The Court decided that s 4AAA(3) did apply so that s 19(1) conferred only a power on state magistrates to determine eligibility to surrender rather than imposing a duty to do so. It rejected the appellants' argument that s 4AAA was not a law of the Commonwealth 'relating to criminal matters' (at [70], [71]). The Court also

The central conclusion of the joint judgment was that s 19(1) of the Extradition Act must be read with s 4AAA of the Crimes Act 1914 *(Cth) and did not impose an administrative duty on state magistrates.*

rejected the argument that the Extradition Act contained a 'contrary intention' (derived from the use of the term 'shall' in s 19(1)) to the operation of s 4AAA(3) (joint judgment, [66], [67]). The joint judgment said that any operative 'contrary intention' would need to state explicitly that 'a State magistrate is obliged to accept the obligation to perform the functions of a magistrate under the Act' in the first place (at [76]). This was not established merely by a function under the Act, such as s 19, being formulated in terms which, once the function is accepted, 'require the taking of steps by the magistrate if conditions precedent or jurisdictional facts be satisfied' (at [76]).

Chief Justice Gleeson's judgment

Gleeson CJ also found it unnecessary to decide whether, in accordance with the *Melbourne Corporation* doctrine, there was a prohibition implied from the federal structure of the Constitution that the Commonwealth cannot impose an administrative duty on state statutory office holders without the legislative approval of the state concerned (at [14]). He noted, however, (at [16]) that the capacity of the Commonwealth Parliament to enact laws which impose duties on officers of a state 'is a matter that has far-reaching consequences for Federal–State relations'. He observed that:

> Some of the arguments from both the Commonwealth and the States appeared to have a prophylactic purpose not directly related to the issues that have to be decided in the present cases. [at [16]]

As the joint judgment had concluded, Gleeson CJ also held that s 4AAA of the Crimes Act applied in this case in relation to s 19(1) of the Extradition Act, and that the conferral on state magistrates of the function of determining eligibility for surrender did not amount to the imposition by Commonwealth law of a 'duty' rather than the conferral of a power (at [21]–[25]).

Gleeson CJ also held that ... the conferral on state magistrates of the function of determining eligibility for surrender did not amount to the imposition by Commonwealth law of a 'duty' rather than the conferral of a power.

In addition, Gleeson CJ rejected the appellants' argument that there was no state legislative approval for the performance by WA and NSW magistrates of functions under the Extradition Act. His Honour agreed with the Full Federal Court that such approval could be found in s 6 of the WA Magistrates Court Act and s 23 of the NSW Local Courts Act. For that reason, Gleeson CJ said that it was unnecessary to consider what would have been the consequences of 'a state legislative impediment to effective [state] executive agreement' or why, in the absence of any such impediment, state legislative rather than executive approval would be a constitutional necessity (at [19]–[20]).

Justice Kirby's dissent

Kirby J said that the majority judgments ignored 'the deeper questions' raised by this case (at [117]), stating that:

> I do not agree that the problem presented by these cases can be circumvented in the manner suggested by my colleagues. I deprecate the avoidance of important constitutional questions by defining them out of existence. That is not the function of a constitutional court. [at [95].]

Kirby J said that the constitutional arguments of the appellants must be accepted. In his view, the Extradition Act:

> ... as a federal law, purported to impose 'functions' on State office-holders (so named as 'magistrates') without the approval of the State Parliament that created their offices and provided for the functions and duties of office. Without 'mirror' or counterpart State laws, the imposition of such 'functions' by federal law alone could not be valid. [at [166].]

In Kirby J's view, magistrates are not 'minor State employees' but 'amongst the most senior office-holders of the State' ([170]–[171]). Even when performing administrative functions in their personal capacity:

> ... where they are chosen to do so as 'magistrates' they inescapably retain the general character of their offices as such. Inferentially, they perform their functions in State facilities, using State resources, assisted by State officials, performing their functions in State time, by inference paid for in this respect by salaries and allowances drawn on the State Treasury. [at [170].]

There was a constitutional requirement, therefore, that 'the legal supplementation of the duties of State magistrates be authorised by State law' ([171]). Kirby J concluded that:

> Because of the absence of State laws signalling clear consent to the purported conferral of federal functions on State magistrates by the *Extradition Act 1988* (Cth) ('the Act'), that Act is, in this respect, invalid under the Constitution. The Federal Parliament cannot impose such functions in a unilateral manner. Nor can it do so by invoking executive arrangements. [at [97].]

AGS (Peter Prince, Thomas John, Heidi Willems and David Bennett QC from the Constitutional Litigation Unit and Stephen Vorreiter) acted for the Commonwealth in *Zentai* and the Commonwealth Attorney-General intervening in *O'Donoghue* and *Williams*, with the Commonwealth Solicitor-General David Bennett AO QC, AGS Chief General Counsel Henry Burmester AO QC and Graeme Hill of the Melbourne Bar as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/14.html

SHARING AUSTRALIA'S TELECOMMUNICATIONS NETWORK: AN UNJUST ACQUISITION OF TELSTRA'S PROPERTY?

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The High Court has unanimously upheld the validity of the telecommunications access regime in Part XIC of the *Trade Practices Act 1974* (Cth) (TPA). In particular, the Court rejected Telstra's claim that Part XIC, to the extent it requires Telstra to give its competitors access to its 'local loops' (which form part of its telecommunications network) to provide telephone and broadband services to their own customers, effected an acquisition of Telstra's property 'other than on just terms' contrary to s 51(xxxi) of the Constitution.

Telstra Corporation Ltd v Commonwealth of Australia
High Court of Australia, 6 March 2008
[2008] HCA 7; (2008) 243 ALR 1

Background

A telecommunications carrier (such as Telstra) which supplies a 'declared [telecommunications] service' is subject to various statutory obligations (referred to as 'standard access obligations') (TPA, s 152AR). The most significant such obligation is that the carrier must provide access to the declared service to another service provider when requested (s 152AR(3)(a)). Subject to certain exceptions, the terms and conditions on which the carrier must provide access to the declared service are determined by the ACCC when arbitrating an access dispute under Division 8 of the TPA (s 152AY(2)(b)(ii) and (iii)). (The exceptions are if the parties agree on terms and conditions or if there is an applicable 'access undertaking'.)

In the present case, services using parts of Telstra's fixed line telecommunications network had been declared under Part XIC by the ACCC, including the 'Unconditioned Local Loop Service' (ULLS) and the 'Line Sharing

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Service' (LSS). The ULLS and the LSS involve the use of 'local loops' to carry voice and data communications ([5]–[6]). (Local loops are the twisted pairs of copper or aluminium based wire which run from an end-user's premises to a local exchange. There are about 10.1 million local loops in operation, and they are installed, owned and operated by Telstra ([1]).)

In 2007, Telstra was supplying the ULLS and LSS to other providers in respect of approximately 470,000 local loops. Critically for Telstra's argument, when it supplies the ULLS or LSS in respect of a loop, the loop is physically disconnected from Telstra's equipment in the exchange and connected to the access seeker's equipment to enable the access seeker to send communications over the loop ([7]).

Telstra argued that the imposition of the standard access obligation requiring it to supply the ULLS and LSS to an access seeker (and thus to provide access to the relevant local loops) effected an acquisition of its property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution. Further, although s 152EB of the TPA requires the Commonwealth to pay 'reasonable compensation' if an ACCC determination of the terms and conditions of access would, amongst other things, result in an acquisition of property, Telstra argued that, properly construed, s 152EB did not apply. The result, according to Telstra, was that Part XIC was invalid, at least insofar as it applied to the ULLS and LSS.

The Court held that the operation of Part XIC did not result in an acquisition of Telstra's property otherwise than on just terms.

Decision

The High Court (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) delivered a single joint judgment in which it:

(a) held that Part XIC did not effect an acquisition of Telstra's property because Telstra's ownership of the local loops has always been subject to a requirement to provide some form of access to its network

(b) did not decide whether, if Part XIC did effect an acquisition, terms and conditions of access determined by the ACCC would necessarily provide just terms compensation, but, in any event,

(c) held that s 152EB of the TPA would operate to provide just terms if, contrary to (a), Part XIC did effect an acquisition of Telstra's property and an access determination did not otherwise provide just terms.

No acquisition of Telstra's property

Significantly, the Court held that the operation of Part XIC did not result in an acquisition of Telstra's property otherwise than on just terms ([52]). In doing so, the Court described Telstra's argument to the contrary as 'synthetic and unreal', because:

> ... it proceeds from an unstated premise that Telstra has larger and more ample rights in respect of the PSTN [public switched telephone network] than it has. But Telstra's "bundle of rights" in respect of the assets of the PSTN has never been of the nature and amplitude which its present argument assumes. Telstra's bundle of rights in respect of the PSTN has always been subject to the rights of its competitors to require access to and use of the assets. And the engagement of the impugned provisions (ss 152AL(3) and 152AR) does not impair the bundle of rights constituting the property in question in a manner sufficient to attract the operation of s 51(xxxi). [At [52].]

In concluding that Part XIC did not bring about an acquisition of Telstra's property, the Court relied on the following 'three cardinal features of context and history' (at [51]):

— The public switched telephone network [PSTN] which Telstra now owns (and of which the local loops form part) 'was originally a public asset owned and operated as a monopoly since Federation by the Commonwealth' ([51]).

— 'The successive steps of corporatisation and privatisation that have led to Telstra now owning the PSTN (and the local loops that are now in issue) were steps which were accompanied by measures which gave competitors to Telstra access to the use of the assets of that network' ([51]). In particular, the transfer of the PSTN to Telstra (from the Australian Telecommunications Corporation) in 1992 was preceded by the enactment of the *Telecommunications Act 1991*, which gave other carriers the right to interconnect their facilities to Telstra's network and to obtain access to services supplied by Telstra. Thus 'Telstra's 'bundle of rights in respect of the PSTN has always been subject to the rights of its competitors to require access to and use of the assets' ([51]–[52]). The introduction of Part XIC into the TPA in 1997 merely continued the right of other participants in the telecommunications market to have access to Telstra's network ([54]).

— In 1992, when the assets of the PSTN were vested in Telstra, Telstra was wholly owned by the Commonwealth ([51]). As a result, the 1991 laws vesting the PSTN in Telstra and establishing a regulatory regime providing for access by Telstra's competitors to Telstra's network and services could not be 'laws with respect to the acquisition of property' for the purposes of s 51(xxxi) because, insofar as those laws dealt with matters of property, they simply effected alterations in the property interests of one Commonwealth statutory corporation (the Australian Telecommunications Corporation) and another corporation wholly owned by the Commonwealth (as Telstra then was) ([53]).

Terms and conditions of access

The Court agreed with Telstra that:

> There may be cases ... in which the application of the statutory considerations would require the ACCC to fix terms and conditions which differ from those that would be fixed in arm's length bargaining by two commercial parties concerned only for their individual legitimate business interests. [At [32].]

The Court, however, did not decide whether terms and conditions other than those 'fixed in arm's length bargaining' could be just (cf [34], [41]). Instead, the Court moved directly to consider the application of s 152EB on the assumption that such terms may not provide just compensation.

Section 152EB would provide 'just terms'

Although not strictly necessary to decide, the High Court held that, if the application of Part XIC did result in an acquisition of Telstra's property otherwise than on just terms (which the Court held it did not), the constitutional saving clause in s 152EB of the TPA—the 'historic shipwreck clause'—would provide just-terms compensation ([42]).

Section 152EB is expressed to apply where an ACCC determination 'would result in an acquisition of property'. Telstra argued that s 152EB applied only where an ACCC determination itself effected an acquisition of property, and not where (as allegedly occurred here) the acquisition occurred at a prior point in time: namely, when Telstra first came under an obligation to supply the relevant service.

The Court rejected that argument ([38]) and the distinction sought to be drawn by Telstra between the obligation to provide access and the determination of terms and conditions of access by the ACCC ([39]). That was because the 'the determinations to which s 152EB are directed are determinations of access disputes and ... access disputes are defined by reference to compliance with standard access obligations' ([40]).

The Court then concluded that, if the relevant provisions do effect an acquisition of property, 'just terms for that acquisition are afforded by the operation of s 152EB' ([42]). As a result, the Court appears to have accepted that the obligation

The Court ... concluded that, if the relevant provisions do effect an acquisition of property, 'just terms for that acquisition are afforded by the operation of s 152EB' .

on the Commonwealth in s 152EB to pay 'a *reasonable* amount of compensation' as agreed or determined by a court meets the requirement in s 51(xxxi) to provide 'just terms'.

Section 51(xxxi): other significant points

Nature of 'property' and 'acquisition'

There was considerable argument before the High Court as to the relevant 'property' said to have been 'acquired' by Part XIC. In that regard, the Court emphasised in its judgment that s 51(xxxi) uses the compound expression 'acquisition-on-just-terms' ([43]). The Court then stated:

> ... it is also useful to recognise the different senses in which the word 'property' may be used in legal discourse. Some of those different uses of the word were identified in *Yanner v Eaton* [(1999) 201 CLR 351]. In many cases, including at least some cases concerning s 51(xxxi), it may be helpful to speak of property as a 'bundle of rights'. At other times it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources'. Seldom will it be useful to use the word 'property' as referring only to the subject-matter of that legally endorsed concentration of power [ie in this case the local loops themselves]. [At [44].]
>
> ...
>
> All of [the] attempts [by the parties] at characterising the legal consequences of the engagement of Telstra's standard access obligations may be understood as attempts at comparing the differences between the 'legally endorsed concentration of power' over a local loop before and after an access seeker requests the use of that loop. [At [47].]

In characterising those legal consequences in the present case, the Court warned against using 'analogies with other, more familiar forms of dealing with property' ([47]), especially in the case of statutory rights said to be inherently susceptible to change ([48]).

The High Court ... warned against approaching s 51(xxxi) of the Constitution as if 'discrete exceptions' to its application could be identified ...

'Exceptions' to section 51(xxxi)

The High Court also warned against approaching s 51(xxxi) of the Constitution as if 'discrete exceptions' to its application could be identified, stating:

> Rather than begin from some constructed taxonomy of rule and exceptions to a rule, it is necessary to begin by recognising the force of the observation by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v The Commonwealth (Industrial Relations Act Case)* [(1996) 187 CLR 416] that:
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> > 'It is well established that the guarantee effected by s 51(xxxi) of the Constitution extends to protect against the acquisition, other than on just terms, of "every species of *valuable right and interest* including ... choses in action".' [At [49]; emphasis added.]

Similarly, as the High Court indicated, there is no blanket exception for statutory rights 'inherently susceptible of change'. Instead, 'analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue'. In this case, the particular parts of Part XIC under challenge had to be understood in the context of both their statutory history and the history of the provision and regulation of telephone and telecommunications services in Australia (at [49]–[50]).

Andrew Buckland, Peter Prince and Susie Brown from the Constitutional Litigation Unit in AGS acted for the Commonwealth, with the Commonwealth Solicitor-General David Bennett AO QC and Chris Horan as counsel. Matthew

Blunn from the Litigation Practice Group in AGS acted for the ACCC, with Neil Young QC and Michael O'Bryan as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/7.html

TAKEOVERS PANEL'S POWERS VALID

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The High Court has unanimously upheld the power of the Takeovers Panel under s 657A(2)(b) of the *Corporations Act 2001* (Cth) to make orders in relation to takeovers, and overturned the decision of the Full Federal Court that the section invalidly purports to confer judicial power on the Panel (which is not a court). The Court did so in an appeal brought by the Commonwealth Attorney-General which the other parties did not oppose and where the only contradictor was counsel briefed by the Attorney-General as amici curiae.

Attorney-General of the Commonwealth of Australia v Alinta Ltd
High Court of Australia, 31 January 2008
[2008] HCA 2; (2008) 242 ALR 1

Background

This case originally arose out of a dispute involving the Australian Gas Light Company (AGL), Alinta Ltd, and the Australian Pipeline Ltd (APL) concerning the acquisition of units in the Australian Pipeline Trust. The Panel, on the application of APL and pursuant to s 657A(2)(b) of the Act, had declared the circumstances in relation to the acquisition to be 'unacceptable' because it considered that the acquisitions contravened s 606 of the Act. It had then made various remedial orders, including that the units so acquired be vested in ASIC. Alinta sought judicial review of the Panel's decision, including on the ground that s 657A was invalid. Alinta was unsuccessful at first instance, but on appeal a majority of the Full Federal Court declared s 657A(2)(b) invalid on the ground that it purported to confer judicial power on the Panel contrary to Chapter III of the Constitution. The Commonwealth Attorney-General then appealed this decision to the High Court. Because the other parties did not oppose the appeal, the Attorney-General arranged for counsel from the private bar to apply for leave to appear as amici curiae and to put arguments supporting the Full Federal Court's declaration of invalidity.

The Panel: sections 657A and 657D of the Corporations Act

The Panel was established with the stated intention of being 'the principal forum for resolving takeover disputes under the Corporations [Act]' ([72]). Any person whose interests are affected by 'circumstances' in relation to a (proposed) takeover bid can apply to the Panel for a declaration that the circumstances are 'unacceptable' (s 657C). A declaration of 'unacceptable circumstances' by the Panel is the trigger for the Panel then to make various orders in relation to the circumstances (s 657D).

One ground on which the Panel can make a declaration of unacceptable circumstances is if, relevantly:

— 'it appears to the Panel that the circumstances ... are unacceptable because they constitute, or give rise to, a contravention of a provision of [Chapters 6, 6A, 6B or 6C ('the Takeover Chapters') of the Act]' (s 657A(2)(b)) and

— the Panel considers that making a declaration is not against the public interest, after taking into account any policy considerations that the Panel considers relevant and other factors specified in the legislation, such as the 'Eggleston Principles' as set out in s 602 of the Act.

If the Panel makes a declaration of unacceptable circumstances it can then make various 'remedial orders', including an order directing a person to dispose of securities, and a costs order. However, the Panel cannot make an order directing a person to comply with a requirement of the Takeovers Chapters of the Act.

Previous High Court authority

In the case of *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (*Precision Data*) the High Court held that the then Corporations and Securities Panel (the precursor to the Takeovers Panel) did not exercise judicial power, on the basis that:

> ... where, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case the Panel, is entrusted with the exercise of judicial power. [At 190–191.]

As in the Full Federal Court, argument in the High Court turned on whether the decision in *Precision Data* could be distinguished.

High Court's decision

The leading judgments were given by Hayne J, and by Crennan and Kiefel JJ. Gleeson CJ and Gummow J each expressed general agreement with the reasons of Hayne J and of Crennan and Kiefel JJ, and added some comments of their own. Kirby J gave a separate judgment, and Heydon J agreed with the reasons of Finkelstein J, the dissenting judge in the Full Federal Court.

What is judicial power?

Although 'no single combination of necessary or sufficient factors identifies what is judicial power' (Hayne J at [93]), the purpose of the judicial function is:

> ...not controversial. An adjudication is undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are, not in order to determine what rights and obligations should be created. [Crennan and Kiefel JJ at [152]; see also [12], [94]–[95].]

'[The judicial function involves an adjudication] undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are, not in order to determine what rights and obligations should be created.'

Panel's task is to create new rights and obligation

Because the Panel can make a declaration of unacceptable circumstances (and subsequent granting of relief) based on its view that, amongst other things, the Act has been contravened, the amici sought to characterise the Panel's task as being to quell a controversy about whether there had been a contravention of the Corporations Act and to grant consequential relief to remedy that breach, in order to establish that the Panel exercised judicial power.

The Court disagreed with this characterisation on the basis that:

— '[T]he Panel's task is not completed by deciding that there has been a contravention ... . The Panel must make a declaration or decline to do so if it considers that doing that is not against the public interest after taking into account any policy considerations that the Panel considers relevant' (Hayne J at [82], [96]; see also [2], [43], [167]). (The role of policy factors is discussed further below.)

— Thus, the Panel's declaration of unacceptable circumstances is a 'statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances' (Crennan and Kiefel JJ at [169]).

— The Panel's view that the Act has been contravened is not itself binding on the parties or determinative of any legal question, and is akin to a jurisdictional fact ([163], [169], [171]; see also [100]). Furthermore 'it is not uncommon for a tribunal to find it necessary to form an opinion as to the existence of the legal rights of the parties as a step in arriving at its ultimate decision' ([37], [160]).

— The orders that the Panel can make consequent upon a declaration of unacceptable circumstances are not exclusively judicial. So, for example, the Panel may not make an order directing a person to comply with the requirement of the provision that has been contravened ([89], [171]–[174]).

— The Panel's orders are not enforceable in their own right, and it is the Act that operates on the orders to give them the force of law ([44], [97], [175]).

Accordingly, rather than resolving a dispute about existing rights, the Panel's order creates a new charter of rights and obligations for the parties. As in *Precision Data*, this was a significant factor in the Court's conclusion that the Panel does not exercise judicial power ([2], [14], [42], [88], [96]; see also [176]).

Rather than resolving a dispute about existing rights, the Panel's order creates a new charter of rights and obligations for the parties.

Role of policy

As noted above, the fact that the Panel is required to take into account any policy considerations it considers relevant was significant to the Court's conclusion that the Panel does not exercise judicial power. However, this factor was not determinative, because courts exercising judicial power also take into account policy considerations. Instead, the significance to be attached to the fact that a body takes into account policy considerations will depend on the nature of the policy involved and the statutory context. In the present case:

> ... [t]he policy considerations here reserved to the Panel are potentially of wide range ... [and] may involve matters relevant to the market, corporate behaviour and the interests of stakeholders beyond those directly affected by the proposal. In this regard Panel members may be taken to be qualified to make an assessment by their knowledge and experience. The considerations relevant to the Panel's decision point to a non-judicial function being undertaken. [Crennan and Kiefel JJ at [168]–[169]; see also [4]–[6], [14], [40].]

Other factors relied upon by the Full Federal Court

In concluding that the Panel exercised judicial power, the Full Federal Court had relied on four particular features of the current scheme. One of these was that, as in the present case, the Panel could make a declaration of unacceptable circumstances based on its view that there had been a breach of the law. Although this was the basis of the amici's argument in the High Court as discussed above, various judges also went on to address the other three features relied upon by the Full Federal Court.

Persons who can apply to the Panel

Unlike in *Precision Data*, any person whose interests are affected (and not just ASIC) can apply to the Panel for a declaration. This might suggest, as the Full Federal Court thought, that the panel's function involved (like the exercise of judicial power) an adjudication of a dispute between parties. However, the adjudication of a dispute between parties is not determinative of whether a tribunal is exercising judicial power. A controversy of the kind dealt with by the courts has as 'its subject-matter the *existence* of a legal right or obligation'

(Crennan and Kiefel JJ at [161]). A declaration by the Panel does not have as its sole subject-matter the finding of a contravention; other factors are required to be taken into account ([37], [161], [164]). Thus '[e]ven if it were right to describe the Panel's task as quelling a controversy, the controversy or dispute with which the Panel deals ... is wider than a controversy or dispute about contravention of the [Act]' (Hayne J at [90]).

Panel cannot compel compliance with its orders

Whether a body can enforce its own orders can be decisive as to whether the body exercises judicial power. In *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 (*Brandy*), legislation pursuant to which an order of HREOC became, upon registration, binding on the parties and enforceable as an order of the Federal Court was held invalid on the basis it purported to confer judicial power on the Commission. In the present case, the Full Federal Court had held that the fact that contravention of an order of the Panel is made an offence of strict liability meant that the Act provided even 'stronger methods of enforcement than were present in *Brandy*'. However, whatever is meant by 'stronger' methods of enforcement, the relevant point, as the High Court pointed out, is that the Panel's orders are not enforceable in their own right ([44], [92], [175]).

Whether a body can enforce its own orders can be decisive as to whether the body exercises judicial power.

Limitation on commencement of court proceedings

The Panel is intended as the main forum for resolving disputes about a takeover bid until the bid period has ended. To this end, there is a statutory limitation upon the persons who can bring court proceedings during the relevant bid period, and on the orders that a court can make in relation to a breach of the Act in respect of which the Panel has declined to make a declaration of unacceptable circumstances (ss 659B, 659C). This was an important step leading to the Full Federal Court's conclusion that there had been a 'transfer [of] the power to make orders to enforce a statute from the courts to another body otherwise than in conformity with Ch III of the Constitution' ([86]). However, rather than indicating that the Panel exercises judicial power, this limit on court proceedings 'is at least consistent with the Panel's task under s 657A being the task of creating new rights and obligations as between those affected by the bid' (Hayne J at [88]; see also [13], [41], [177]).

Procedural issues

Amici curiae as contradictors

As noted above, the Commonwealth Attorney-General, who had intervened in the Full Federal Court to support the validity of s 657A, sought and was granted special leave to appeal to the High Court from the decision of the Full Federal Court. Related applications for special leave to appeal were also brought by Alinta and APL. Before the Attorney's appeal was heard, Alinta and APL settled their commercial dispute, discontinued their applications and appeals and filed submitting appearances in the Attorney's appeal. As a result, the Attorney-General arranged for counsel from the private bar to apply for leave to appear as amici curiae and to submit arguments supporting the Full Federal Court's declaration of invalidity, to ensure that there was a contradictor to the Attorney-General's arguments. The amici were granted leave to appear, although Kirby J expressed some concern about the appropriateness of this ([22]–[33]).

Did the settlement mean there was no longer a 'matter'?

Notwithstanding that the private parties had settled their commercial dispute, the Court accepted that there remained a 'matter' before the Court which was not hypothetical or moot, for the following reasons. The Attorney-General had intervened in the matter before the Full Federal Court, which included a

controversy as to the validity of s 657A(2)(b) of the Act. By intervening in the Full Federal Court, the Attorney-General became a party to that controversy (s 78A(3) of the *Judiciary Act 1903*). As a party, the Attorney-General was equally subject to the Full Federal Court's declaration that s 657A(2)(b) was invalid. He had an 'evident' interest in appealing that declaration, and the fact that the other parties did not have any commercial reason to oppose the Attorney-General's appeal did not render the appeal hypothetical or moot ([67], [103]; see also [1], [9]; cf [32]–[33]).

AGS (Andrew Buckland and Thomas John from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General David Bennett AO QC, Melissa Perry QC and Elizabeth Collins as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/2.html

FREEDOM OF INTERSTATE BETTING

The High Court has unanimously declared invalid provisions of the *Betting Control Act 1954* (WA) prohibiting a person in Western Australia from betting with a 'betting exchange', and requiring approval to publish a 'WA race field'. The provisions were held to contravene the requirement in s 92 of the Constitution that 'trade, commerce and intercourse among the States ... shall be absolutely free.'

Betfair Pty Ltd v State of Western Australia
High Court of Australia, 27 March 2008
[2008] HCA 11; (2008) 244 ALR 32

Background

The first plaintiff (Betfair) has held a licence under Tasmanian law to operate a 'betting exchange' since 10 January 2006. A betting exchange is:

> a means by which parties stake money on opposing outcomes of a future event – such as a horse race or a football game. Exchanges are structured to facilitate customers betting a particular outcome will or *will not* occur. [At [8].]

The exchange operates by matching the opposing bets and derives income by charging a commission on winnings.

Although Betfair's operations are located in Hobart, Betfair's registered players are able to place bets via the phone or internet from anywhere in Australia, including Western Australia. However, on 29 January 2007 amendments to the Betting Control Act came into force. Among other things, these amendments made it an offence for a person in WA to bet through a betting exchange (s 24(1aa)) and introduced a requirement for authorisation to be obtained before a WA race field of horses or greyhounds could be made available (s 27D(1)). Betfair's application for authorisation was refused. Betfair and a WA punter brought proceedings in the High Court to challenge the validity of the amendments, alleging that the provisions discriminated against the betting services provided by Betfair (from Tasmania) to punters in WA, and protected WA-based wagering operators.

The High Court's decision

Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ delivered a joint judgment, with Heydon J separately concurring.

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When will a law infringe s 92 of the Constitution?

The parties had accepted that the source of the present doctrine concerning s 92 of the Constitution is the decision of the High Court in *Cole v Whitfield* (1988) 165 CLR 360 ([10]). That case relevantly decided, in summary, that s 92 is directed at laws that discriminate against interstate trade or commerce in a protectionist sense.

In the present case, the joint judgment held that a law that discriminates against interstate trade in a protectionist sense is not saved merely by the presence of another non-protectionist objective ([47]–[48]). Similarly, there is no separate exception to the operation of s 92 for state laws 'for the well-being of the people of that State' ([86]–[97]). Instead, the relevant test of whether a law that discriminates against interstate trade and commerce contravenes s 92 is whether the discriminatory mode of regulation selected is reasonably necessary to achieve such competitively 'neutral' objective as it is claimed the law is designed to achieve ([102]–[103]; see also [131]–[132]).

The joint judgment held that a law that discriminates against interstate trade in a protectionist sense is not saved merely by the presence of another non-protectionist objective.

Section 24(1aa): prohibition on betting with betting exchange

Betting Control Act burdens interstate trade and commerce

The joint judgment concluded that 'there is a developed market throughout Australia for the provision by means of the telephone and internet of wagering services on racing and sporting events' ([114]), and that there is close substitutability between the various methods of wagering ([115]). By restricting, on geographic criteria, competition in that national market, the Betting Control Act engaged s 92 of the Constitution ([116]).

Section 24(1aa) not reasonably necessary to achieve a legitimate end

Western Australia had advanced two policy reasons for prohibiting the establishment, operation and use of betting exchanges:

— first, that betting exchanges make no contribution to the racing industry in Australia ([106])

— second, that betting exchanges threaten the integrity of the racing industry by allowing players to bet on a horse to lose ([106], [134]).

The joint judgment rejected both of these arguments, finding that:

— there was evidence that, by agreement with the Victorian regulator, Betfair contributed to the Victorian racing industry ([107]) and that Betfair was prepared to undertake similar obligations in relation to the WA industry

— it could not be said that the prohibition was 'necessary' to protect the integrity of the industry, because of the lack of evidence that the operation of a betting exchange contributed to dishonest practices in the racing industry combined with the fact that Tasmania regulated betting exchanges without discriminating against interstate trade and commerce ([111]–[112]).

The Court concluded that, even though WA-based operators were also prohibited from operating a betting exchange, s 24(1aa) imposed a 'discriminatory burden on interstate trade of a protectionist kind' ([121]; see also [133]). This was because the types of wagering offered by Betfair and established WA operators were 'of the same kind' and the effect of the section was to protect those established wagering operators in WA from competition from Betfair ([121]). The section was thus invalid as contrary to s 92.

Section 27D(1): regulating publication of WA race field

In considering the validity of s 27D(1) the joint judgment held that the section 'operate[d] to the competitive disadvantage of Betfair and to the advantage of … in-State wagering operators' because:

— it denies to Betfair use of an element in Betfair's trading operations

— it denies to Betfair's registered players receipt and consideration of the information respecting the latest WA race fields by access to Betfair's website or by telephone (at [118]).

Accordingly, they found that the section 'answers the description of a discriminatory burden on interstate trade of a protectionist kind' ([118]).

[The joint judgment held that s 27D(1)] 'answers the description of a discriminatory burden on interstate trade of a protectionist kind'.

Similarly, Heydon J held that the practical operation of s 27D is to prohibit an out-of-state provider of wagering services using as an element of its services information about race fields generated by WA racing operators ([142]); and that the protectionist prohibition could not be saved by the discretion to create exemptions ([141], [144]; see also the joint judgment at [119]). For reasons similar to those in relation to s 24(1aa), Heydon J went on to reject WA's arguments that s 27D(1) was valid because it was aimed at preserving the integrity of racing in WA ([145]) or because it ensured that persons who seek to utilise the horse and greyhound races conducted in WA for the purpose of a wagering business make a contribution to the persons who conduct those races ([146]).

Alleged inconsistency between Western Australian and Tasmanian legislation

The plaintiffs had also argued that s 27D(1) was invalid by reason of the alleged direct conflict between it and the authority given to Betfair by its licence under Tasmanian law. The Court found it unnecessary to consider this argument concerning inconsistency between laws of different states ([123]).

AGS (David Lewis and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General David Bennett AO QC and Graeme Hill as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/11.html

KABLE PRINCIPLE REVISITED: STATE LAW RESTRICTING DISCLOSURE OF INFORMATION IN COURT PROCEEDINGS

The High Court has upheld the validity of WA legislation dealing with the circumstances in which information provided by the WA Commissioner of Police to the Supreme Court (for the purposes of the Court's review of a decision by the Commissioner of Police) could be withheld from disclosure to the applicant for review where the Commissioner had identified the information as confidential.

Gypsy Jokers Motorcycle Club Inc v Commissioner of Police
High Court of Australia, 7 February 2008
[2008] HCA 4; (2008) 242 ALR 191

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Background

Under Part 4 of the *Corruption and Crime Commission Act 2003* (WA) (CCC Act) the WA Commissioner of Police can issue a 'fortification removal notice' in relation to premises which the Commissioner reasonably believes are heavily fortified and are habitually used as places of resort for organised crime. A fortification removal notice was issued by the Commissioner requiring that specified fortifications at the Gypsy Jokers' club house be taken down.

The Gypsy Jokers applied to the WA Supreme Court under s 76 of the CCC Act which allowed a review of whether the Commissioner, on the information he took into consideration, could reasonably have had the required beliefs. For the purposes of the review, pursuant to s 76(2) the Commissioner identified certain information provided to the court as confidential so that it could not be disclosed to the applicant or publicly. Section 76(2) provides:

> 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.

Gleeson CJ said that s 76(2) addresses the problems of disclosing certain kinds of information, including information that would 'reveal the identity of police informers or compromise current police investigations' ([5]).

Constitutional challenge

The Gypsy Jokers challenged the constitutional validity of s 76(2), arguing that it allowed the state executive government to exercise an 'impermissible form of control over the exercise by the Supreme Court of its jurisdiction' ([10]). This was said to contravene Chapter III of the Constitution and the principle explained by six justices of the High Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 (*Bradley*) at 163 that:

> ...it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.

Bradley was an application of the principle first accepted in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (*Kable*) that Chapter III of the Constitution, which deals with the judicial power of the Commonwealth, invalidates state legislation that would substantially impair the institutional

integrity of a state Supreme Court, as this would be incompatible with the court's role as a repository of federal jurisdiction (*Forge v ASIC* (2006) 228 CLR 45 at 67 [40] per Gleeson CJ).

In this case, the Gypsy Jokers argued that s 76(2) compromised the institutional integrity of the WA Supreme Court by impairing its independence and impartiality because:

— the way the Court could use the confidential information was *dictated* by the executive government

— procedural fairness was denied to an applicant because it would not know details of the case against it

— the Court could not properly ascertain the facts of a matter without the benefit of submissions from the applicant about key information

— the Court could not provide proper reasons for its decision on the review.

High Court's decision

The WA Court of Appeal, in a 2:1 decision, had upheld the validity of s 76(2), and the Gypsy Jokers appealed to the High Court. By a 6:1 majority (Kirby J dissenting), the High Court also upheld the validity of s 76(2).

The main judgment was given by Gummow, Hayne, Heydon and Kiefel JJ. Crennan J (with whom Gleeson CJ agreed and made a few additional comments) wrote a separate judgment consistent with the joint judgment.

The joint judgment said that the first step in determining whether the legislation challenged in this case amounted to an impermissible form of control by the Executive over the exercise by the WA Supreme Court of its jurisdiction was to construe the legislation ([11]).

Court can review Commissioner's decision that information is confidential

The WA Court of Appeal had proceeded on the assumption that, under s 76(2), the Commissioner could determine 'unilaterally' that information was not to be disclosed. This was the basis on which Wheeler JA had held (in dissent) that the Supreme Court was impermissibly constrained by the Commissioner, an officer of the Executive, 'in the independent performance of its review function' ([34]).

However, the High Court accepted a construction of s 76(2), first put in oral submissions by counsel for the Commissioner, that s 76(2) allows the Commissioner to identify information as confidential only 'if its disclosure might prejudice the operations' of the Commissioner. Significantly, the majority concluded that satisfaction of this condition was a matter to be determined by the court:

> ... it is for the Supreme Court to determine upon evidence provided to it whether the disclosure of the information might have the prejudicial effect spoken of in the sub-section. [At [33]; see also, [7], [174].]

The conclusion that the Court determined whether the claim for confidentiality should be upheld meant that the principal basis for the challenge to validity failed, as:

> ... there is here no legislative mandate for dictation to the Supreme Court by the Commissioner of the performance of its review function (At [36]; see also [170], [174].]

The conclusion that the Court determined whether the claim for confidentiality should be upheld meant that the principal basis for the challenge to validity failed.

Comparison with public interest immunity claim

The joint judgment noted that the limitations on disclosure of information under the s 76 review scheme were in place of 'what otherwise might have been

a claim to public interest immunity by the Commissioner of Police' ([25]). A claim of public interest immunity may be determined by the Court inspecting, without disclosure to the applicant, the materials in question and, if successful, 'would have the consequence that the material was not admitted into evidence and would be denied both to the Court and the applicant' ([23]–[24]). As Mason J had noted in a previous case (*Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61, cited at [24]):

> The fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.

A claim of public interest immunity may be determined by the Court inspecting, without disclosure to the applicant, the materials in question ...

The joint judgment did not regard as significant to validity the circumstance that, unlike the outcome of a public interest immunity claim, under s 76(2) the Court (having first decided that disclosure might prejudice the operations of the Commissioner) could make use of the information although it would not be disclosed to the applicant ([36]).

Justice Crennan similarly noted that Parliament can validly legislate to exclude or modify the rules of procedural fairness ([182]) and that 'the availability and accessibility of all relevant evidence in judicial proceedings is not absolute' ([189]) Her Honour concluded that the modification effected by s 76(2) 'is indistinguishable from the modification of procedural fairness which can arise from the application of the principles of public interest immunity' ([183]) and did not invalidly impair the independence and impartiality of the Supreme Court.

Justice Kirby's dissent

Justice Kirby disagreed with the majority's 'novel' interpretation of s 76(2), holding instead that s 76(2) 'permits the respondent to the review (the Commissioner) to determine conclusively the ambit and identity of the confidential information which must not be disclosed to the applicant' ([84]–[88]).

Kirby J then held that, on that construction, s 76(2) of the CCC Act involves an impermissible legislative direction to the Supreme Court contrary to the *Kable* principle, because s 76(2):

> ...imposes the decision of an officer of the Executive Government upon the Supreme Court. That officer, in law or in substance, thereby controls the discharge of the judicial process, the effective participation of the Supreme Court in that process and the capacity of the Supreme Court to explain the reasons for its decision to the parties and the public. The judge may appear in robes to pronounce what shall be done. But the hand that directs the process is elsewhere, outside the courtroom, and actually belongs to the [Commissioner of Police]. [At [52], [125].]

In reaching this conclusion, Kirby J criticised the approach of the majority of the WA Court of Appeal that, to infringe the *Kable* doctrine, the Gypsy Jokers had to show that the legislation rendered the Supreme Court 'no longer a court of the kind contemplated by Ch III'. According to Kirby J 'such an approach would, in effect, define the *Kable* doctrine out of existence' ([105]–[106]).

State cannot prevent appeal to High Court

Finally, although s 76(7) of the CCC Act provided that a decision on review was 'final', the High Court confirmed that the section could not curtail the jurisdiction of the High Court to hear an appeal from a state Supreme Court under s 73(ii) of the Constitution ([20], [104]).

Kable's limited application

The decision in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* means that it remains the case that the High Court has only once applied the *Kable* principle to invalidate legislation: in *Kable* itself. (The Queensland Court of Appeal has also held a Queensland law to be invalid on *Kable* grounds.) Justice Kirby has cautioned against 'treating *Kable* as a constitutional guard-dog that would bark but once' (*Baker v R* (2004) 223 CLR 513 at 535). In *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601, however, McHugh J said it was likely that the *Kable* principle would rarely need to be applied, observing that the legislation in *Kable* 'was almost unique in the history of Australia'.

On 23 May 2008, the High Court granted special leave to appeal in another case raising the *Kable* principle in the context of a challenge to the validity of state legislation said to prevent disclosure to one of the parties of criminal intelligence information provided to a state court (*K-Generation Pty Ltd v Liquor Licensing Court* [2008] HCA Trans 197). The appeal is likely to be heard later in 2008.

It remains the case that the High Court has only once applied the Kable *principle to invalidate legislation: in* Kable *itself.*

AGS (Peter Prince, Asaf Fisher and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General who intervened in the High Court to support the validity of s 76(2), with the Commonwealth Solicitor-General David Bennett AO QC and Dr Stephen Donaghue as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/4.html

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