

# BROADENING THE REACH OF CHAPTER III: THE INSTITUTIONAL INTEGRITY OF STATE COURTS AND THE CONSTITUTIONAL LIMITS OF STATE LEGISLATIVE POWER

SURI RATNAPALA\* AND JONATHAN CROWE†

*[This article reviews the High Court's emerging jurisprudence on the institutional integrity of state courts. It begins by surveying the Court's recent decisions in this area. The authors argue that these decisions can usefully be placed into four interrelated categories, concerning the constitution of state courts, impermissible grants of jurisdiction, impermissible withdrawal of jurisdiction and procedural guarantees. After summarising the central principles arising from the rulings, the authors consider four possible broader implications, focusing particularly on Kirk v Industrial Court of New South Wales. It is argued that Kirk has potentially wideranging implications for the powers of state legislatures to restrict judicial review and modify the requirements of natural justice.]*

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\* LLB (Colombo), LLM (Macq), PhD (UQ), FAAL; Professor of Public Law, T C Beirne School of Law, The University of Queensland.

† BA (Hons), LLB (Hons), PhD (UQ); Associate Professor, T C Beirne School of Law, The University of Queensland. The authors would like to thank the anonymous referees for their helpful comments.

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## I INTRODUCTION

It has been the longstanding judicial view, repeatedly affirmed by state supreme courts, the High Court and the Privy Council, that the doctrine of the separation of powers is not constitutionally entrenched at state level.<sup>1</sup> This orthodox view, we argue, no longer represents the constitutional law of Australia following a series of judgments of the High Court commencing with *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').<sup>2</sup> The High Court declared in *Kable* that state and federal courts form an integrated hierarchy and, for that reason, that state legislatures do not have unrestricted power to alter the constitution, jurisdiction or procedures of state courts. In that case, the High Court invalidated New South Wales legislation that empowered the Supreme Court to order the continued detention of a named prisoner beyond his imposed prison sentence, not on the grounds of violating the law but on account of the likely danger he posed to others.

In the words of Gaudron J in *Kable*, s 5 of the *Community Protection Act 1994* (NSW) 'makes a mockery of [the judicial] process' and

because the judicial process is a defining feature of the judicial power of the Commonwealth, the Act weakens confidence in the institutions which comprise the judicial system brought into existence by Ch III of the *Constitution*.<sup>3</sup>

McHugh J remarked that although the separation of powers doctrine was inapplicable to the states, 'in some situations the effect of Ch III of the *Constitution* may lead to the same result as if the State had an enforceable doctrine of separation of powers.'<sup>4</sup>

<sup>1</sup> See, eg, *Clyne v East [No 1]* [1967] 2 NSW 483; *Gilbertson v South Australia* [1978] AC 772; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652.

<sup>2</sup> (1996) 189 CLR 51.

<sup>3</sup> *Ibid* 108 (citation omitted).

<sup>4</sup> *Ibid* 118.

Two High Court cases decided after *Kable — Fardon v Attorney-General (Qld)* ('*Fardon*')<sup>5</sup> and *Baker v The Queen* ('*Baker*')<sup>6</sup> — upheld state laws that empowered the respective supreme courts to order further detention not of named individuals, but of categories of offenders considered to endanger society. These decisions prompted Kirby J to wonder in 2004 whether *Kable* was 'a constitutional guard-dog that would bark but once'.<sup>7</sup> This was not strictly true at the time, as the Supreme Court of Queensland had applied the *Kable* rule to invalidate legislation dealing with the proceeds of crime,<sup>8</sup> an implication later confirmed by the High Court.<sup>9</sup> At any rate, it is certainly not true now, given the recent proliferation of cases on institutional integrity considered in this article.

This article reviews the current state of the High Court's jurisprudence on institutional integrity. We begin by surveying the Court's recent decisions in this area. We argue that these decisions can usefully be placed into four interrelated categories. The first category, represented by *Forge v Australian Securities and Investments Commission* ('*Forge*'),<sup>10</sup> deals with the constitution of state courts in the strict sense of the term. The second, including *South Australia v Totani* ('*Totani*')<sup>11</sup> and *Wainohu v New South Wales* ('*Wainohu*'),<sup>12</sup> concerns impermissible grants of jurisdiction to state courts or judges as *personae designatae*, while the third, represented by *Kirk v Industrial Court of New South Wales* ('*Kirk*'),<sup>13</sup> deals with impermissible withdrawal of jurisdiction from state courts. The fourth and final category, including *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* ('*Gypsy Jokers*')<sup>14</sup> and *K-Generation Pty Ltd v Liquor Licensing Court* ('*K-Generation*'),<sup>15</sup> concerns

<sup>5</sup> (2004) 223 CLR 575.

<sup>6</sup> (2004) 223 CLR 513.

<sup>7</sup> *Ibid* 535 [54]. See also Transcript of Proceedings, *Forge v Australian Securities and Investments Commission* [2006] HCATrans 22 (7 February 2006) 69–70 (Kirby J); Transcript of Proceedings, *Forge v Australian Securities and Investments Commission* [2006] HCATrans 25 (8 February 2006) 4452–9 (Kirby J); Chief Justice J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 79.

<sup>8</sup> *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, 55 [58] (Williams JA).

<sup>9</sup> *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

<sup>10</sup> (2006) 228 CLR 45.

<sup>11</sup> (2010) 242 CLR 1.

<sup>12</sup> (2011) 243 CLR 181.

<sup>13</sup> (2010) 239 CLR 531.

<sup>14</sup> (2008) 234 CLR 532.

<sup>15</sup> (2009) 237 CLR 501.

the procedural guarantees associated with the doctrine of institutional integrity.

After summarising the central principles arising from these decisions, we consider four wider implications of the cases, focusing particularly on *Kirk*. These concern the constitutional entrenchment of the supervisory jurisdiction of state supreme courts; whether a state legislature can shield from judicial review errors of law affecting jurisdiction; whether a state legislature can deny a criminal defendant the right to the factual particulars on which an offence is founded; and whether a state legislature can deny state supreme courts the power to review decisions of subordinate courts and tribunals on grounds of natural justice. We argue that *Kirk* has potentially far-reaching consequences in each of these areas.

## II THE CONSTITUTION OF A COURT

Section 71 of the *Constitution* vests the judicial power of the Commonwealth in three types of courts: the High Court, federal courts established by Parliament and such other courts as Parliament invests with federal jurisdiction. The last category refers to state courts created by state law. In *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*'), the High Court determined that this affirmative vesting, by necessary implication, prohibits the reposing of federal judicial power in any other body.<sup>16</sup> In each case, the body that exercises judicial power must be a court.

The High Court has made it clear in a series of cases that a body is not a court for constitutional purposes simply by being called a 'court'. It must be a court in the strict sense of the term.<sup>17</sup> It is in such state courts that s 39(2) of the *Judiciary Act 1903* (Cth) invests 'federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it'. A state tribunal that is officially designated a 'court' but is not a court in the strict sense may exercise judicial power arising

<sup>16</sup> (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), affd *A-G (Cth) v The Queen* (1957) 95 CLR 529, 538 (Viscount Simonds for Viscount Kilmuir LC, Viscount Simonds, Lords Morton, Tucker, Cohen, Keith, Avonholm and Somervell) (Privy Council).

<sup>17</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355, 357 (Griffith CJ); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 442 (Griffith CJ), 467 (Isaacs and Rich JJ), 480–1 (Powers J); *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422, 432–3 (Knox CJ); *R v Davison* (1954) 90 CLR 353, 364–6 (Dixon CJ and McTiernan J); *Boilermakers' Case* (1956) 94 CLR 254, 270, 289, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1971) 123 CLR 361, 372 (Kitto J).

under state law, but may not exercise the judicial power of the Commonwealth.

It is not easy to determine what the phrase ‘court in the strict sense’ means. In *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (‘*Alexander’s Case*’), the High Court addressed the question whether the Commonwealth Court of Conciliation and Arbitration was a court.<sup>18</sup> Griffith CJ concluded that it was a court because its primary function, though described as arbitral, was judicial.<sup>19</sup> Barton J came to the same conclusion.<sup>20</sup> However, Isaacs and Rich JJ and Powers J reached the contrary conclusion that the tribunal’s primary function was non-judicial and hence it was not a court in the strict sense of the term.<sup>21</sup> All the judges applied the primary function test, although they differed in their conclusions. Geoffrey Sawer has argued that this approach involves circular thinking and the better test is whether the institution would have been regarded as a court at the time of federation.<sup>22</sup> It is likely, however, that even at the time of federation courts were widely identified by the fact that their primary function was judicial.

A court is constituted by the judges who serve on it. The constitution of the High Court and other federal courts is determined by s 72 of the *Constitution*, which deals with appointment, tenure and remuneration of judges. It is now well-established that a body created by Commonwealth law that is not constituted according to s 72 will not be a ch III court and therefore cannot exercise the judicial power of the Commonwealth. Early in its history, the High Court decided by majority that limited-term appointments to federal courts were incompatible with the requirements of s 72, even if the appointees continued to enjoy constitutional tenure as judges of the High Court.<sup>23</sup>

The provisions of s 72 have no direct application to territory courts<sup>24</sup> or state courts.<sup>25</sup> The High Court has also held that in vesting federal jurisdiction in state courts the Commonwealth Parliament must ‘take the [State] Court as

<sup>18</sup> (1918) 25 CLR 434.

<sup>19</sup> *Ibid* 446–7.

<sup>20</sup> *Ibid* 453–4.

<sup>21</sup> *Ibid* 466 (Isaacs and Rich JJ), 485 (Powers J).

<sup>22</sup> G Sawer, ‘The Separation of Powers in Australian Federalism’ (1961) 35 *Australian Law Journal* 177, 180.

<sup>23</sup> *Alexander’s Case* (1918) 25 CLR 434.

<sup>24</sup> *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

<sup>25</sup> *Forge* (2006) 228 CLR 45, 66–7 [38] (Gleeson CJ).

it finds it',<sup>26</sup> since the Parliament has no legislative power to change the constitution of a state court.<sup>27</sup> State courts must nonetheless satisfy basic curial standards to qualify as courts within the meaning of s 71. In the absence of express constitutional direction, these standards remain to be judicially established in specific cases.

*Forge*, concerning a challenge to the law and practice in New South Wales of appointing acting judges to the Supreme Court, was such a case.<sup>28</sup> The High Court in *Forge* considered and ultimately approved s 37 of the *Supreme Court Act 1970* (NSW), which permitted the appointment of acting judges to the Supreme Court of New South Wales for limited terms, during which they were removable only by address of Parliament. The Court acknowledged that acting and short-term appointments were a feature of English and colonial courts at federation and that the practice has continued. However, Gummow, Hayne and Crennan JJ in their joint judgment were careful to point out that although the 'institutional integrity of State Supreme Courts is not *inevitably* compromised by the appointment of an acting judge',<sup>29</sup> it is nonetheless the case that

the institutional integrity of the body may be distorted by such appointments if the informed observer may reasonably conclude that the institution no longer is, and no longer appears to be, independent and impartial as, for example, would be the case if a significant element of its membership stood to gain or lose from the way in which the duties of office were executed.<sup>30</sup>

Their Honours went on to note that '[a]s was said in *Bradley*, there may come a point where the series of acting rather than full appointments is so extensive as to distort the character of the court.'<sup>31</sup> It is because a body must be a court in the strict sense to exercise Commonwealth judicial power that the doctrine of institutional integrity of state courts is constitutionally entrenched. As their Honours put it,

<sup>26</sup> *Federated Sawmill, Timberyard and General Woodworkers' Employés' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ).

<sup>27</sup> *Le Mesurier v Connor* (1929) 42 CLR 481, 495–6 (Knox CJ, Rich and Dixon JJ).

<sup>28</sup> (2006) 228 CLR 45.

<sup>29</sup> *Ibid* 86 [93] (emphasis added).

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* 87 [97], citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 164 [32] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[b]ecause Ch III requires that there be a body fitting the description ‘the Supreme Court of a State’, 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.<sup>32</sup>

A state law therefore may not alter a ‘defining characteristic’ of a state supreme court.<sup>33</sup>

A key consideration in *Forge* was the ‘apprehension of bias’ principle.<sup>34</sup> The state is frequently a party to actions or has an interest in the outcome of a case. A court comprising judges whose tenure depends (or is seen to depend) on the pleasure of the government may lead to apprehension of bias and a loss of public confidence in the court. It is not clear from the judgments whether the qualitative standard that the High Court expects of the supreme courts is also expected of other state courts. There is no reason in principle to think that the standard does not apply at all levels, although this remains to be tested in future cases.

Despite its fuzziness, *Forge* sends a cautionary signal to state governments about the overuse of acting appointments, whether for financial or political reasons. More broadly, the decision makes it clear that the composition of a court forms a central part of the doctrine of institutional integrity. Even though s 72 has no direct application to state and territory courts, such bodies must nonetheless be constituted in a way that reflects the independence and integrity of the curial method, taking into account issues such as apprehension of bias.

### III IMPERMISSIBLE JURISDICTION

The analysis offered by Gummow, Hayne and Crennan JJ in *Forge* makes it clear that the limits ch III of the *Constitution* places on state legislative power go well beyond prohibiting the types of detention orders against specified persons considered in *Kable*. A series of cases decided since *Forge* has shown that the institutional integrity of a court may be affected both by the grant of power and the withdrawal of power.<sup>35</sup> *Kable* was an example of the first kind of case, where a power granted to the state supreme court was found to be

<sup>32</sup> *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ); see also at 67–8 [41] (Gleeson CJ).

<sup>33</sup> *Ibid* 76 [63] (Gummow, Hayne and Crennan JJ).

<sup>34</sup> *Ibid* 77–8 [66]–[68].

<sup>35</sup> Withdrawal of power will be dealt with below in Part IV.

inconsistent with the court's institutional integrity. The recent decisions in *Totani*<sup>36</sup> and *Wainohu*<sup>37</sup> also fall into this category. *Totani* extended the principle in *Kable* to all levels of state courts.

#### A Control Orders

In *Totani* and *Wainohu*, the High Court faced the question of the use of state courts to make or implement control orders that restrict the activities of individuals as a means of crime prevention. In the earlier case of *Thomas v Mowbray* ('*Thomas*'),<sup>38</sup> the High Court had upheld the validity of interim control orders made for the prevention of terrorist acts under s 104.4 of the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*'). The interim control order system was challenged on the ground of the lack of legislative power under s 51, but the key ch III issue was whether s 104.4 conferred non-judicial power on the Federal Magistrates Court, contrary to the *Boilermakers' Case*. The High Court in *Thomas* held by majority (Gleeson CJ, Gummow and Crennan JJ, Callinan J and Heydon J; Hayne J and Kirby J dissenting) that the power was judicial, even though it did not involve existing rights and obligations.

The majority in *Thomas* took the view that the issuing of interim control orders belongs to the category of powers historically exercised by courts. The category includes apprehended violence orders and the kind of judicial detention approved by the High Court in *Fardon*.<sup>39</sup> As Gleeson CJ stated, '[t]o decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history, and would not constitute an advance in the protection of human rights.'<sup>40</sup> The majority considered that the kind of evaluations that the Court undertakes under s 104.4 — such as drawing inferences about the threats and whether the control orders are reasonably necessary, proportional and adapted to the protection of the public — were consistent with the curial method.<sup>41</sup> The

<sup>36</sup> (2010) 242 CLR 1.

<sup>37</sup> (2011) 243 CLR 181.

<sup>38</sup> (2007) 233 CLR 307.

<sup>39</sup> (2004) 223 CLR 575.

<sup>40</sup> *Thomas* (2007) 233 CLR 307, 329 [17].

<sup>41</sup> *Ibid* 333 [27] (Gleeson CJ), 353 [102]–[103] (Gummow and Crennan JJ), 507–9 [595]–[600] (Callinan J), 526 [652] (Heydon J).

majority rejected the argument that s 104.4 did not provide adequate legal standards for judicial determination.<sup>42</sup>

In *Thomas*, the gravity of the threat and the proportionality of the interim control order were matters for the Court to decide. In contrast, the *Serious and Organised Crime (Control) Act 2008* (SA) considered in *Totani* empowered the Attorney-General and the Commissioner of Police to make the critical determinations leading to the imposition of control orders by the Magistrates Court. Under s 10(1) of the Act, the Attorney-General could, on application by the Commissioner, make a declaration in relation to a specified organisation if satisfied that

- (a) members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
- (b) the organisation represented a risk to public safety and order in this State.

According to s 14(1), which has since been amended, the Magistrates Court, on application by the Commissioner of Police, was compelled to make a control order against a person if satisfied that the person was a member of a declared organisation. In contrast, under s 14(2), the Court could make a control order against past-members and non-members of such an organisation. According to s 14(3), a control order could be made without notice to any person. The only matters that the Magistrates Court was directed to consider under s 14(1) were whether a declaration has been made and whether the defendant is a member of the declared organisation. Section 14(5)(b) required the control order to prohibit the defendant from associating with other members of declared organisations, except as may have been specified in the order.

As French CJ stated in *Totani*, '[s]uch an order places, and results in, restrictions upon the freedom of association and communication of the person to whom it applies and others who might wish to associate or communicate with him or her.'<sup>43</sup> The majority judges in the case (Heydon J dissenting) held that s 14(1) was unconstitutional for impairing the institutional integrity of the Court. The principal factor was that the Magistrates Court had no judicial discretion, but rather was compelled to give effect to an executive decision that could not be questioned before the Court. That is, 'the Court must act at the behest of the Executive.'<sup>44</sup>

<sup>42</sup> Ibid 333 [27] (Gleeson CJ), 347–8 [79] (Gummow and Crennan JJ), 509 [600] (Callinan J), 526 [652] (Heydon J).

<sup>43</sup> (2010) 242 CLR 1, 21 [3].

<sup>44</sup> Ibid 89 [229] (Hayne J).

Hayne J made the further important point that what the executive does by s 14(1) is to 'enlist the Magistrates Court to create new norms of behaviour for those particular members who are identified by the Executive as meriting application for a control order.'<sup>45</sup> In other words, a curial form is given to a legislative act. French CJ's conclusion speaks for the majority:

The ... 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.<sup>46</sup>

*Totani* represents a significant extension of the institutional integrity doctrine to state courts other than supreme courts. Section 73 of the *Constitution* presupposes the existence of a supreme court in each state. There is no specification of any other state court in ch III. However, apart from the High Court and federal courts, s 71 only allows the vesting of federal judicial power 'in such other courts'. Hence the repository of federal jurisdiction must have the character of a court. In *Totani*, the High Court held that 'institutional independence and impartiality' were the minimum characteristics of a court within the meaning of s 71.<sup>47</sup> This reasoning, in our view, has merit. Section 71 permits Parliament to repose federal jurisdiction only in 'courts'. The mere formal designation of a body as a court does not make it a court. Independence and impartiality are qualities that the public readily identifies with courts and would have at the time the *Constitution* was drafted.

*Wainohu* involved a challenge to pt 2 of the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The part provided for the initial declaration of an organisation to be made by an 'eligible judge' on the application of the Commissioner of Police. All parties agreed that the declaration was an executive act. However, it was an act that resulted in serious legal consequences for members of the organisation as the declaration conferred power on the Supreme Court to make control orders prohibiting specified members from associating with each other. Hence the decision of the eligible judge was one that attracted the common law standards of natural justice and fairness. However, pt 2 departed from these norms in significant ways. A member of

<sup>45</sup> *Ibid* 92 [236].

<sup>46</sup> *Ibid* 21 [4].

<sup>47</sup> *Ibid* 41 [58] (French CJ), 157 [427] (Crennan and Bell JJ).

the organisation could make submissions at the hearing, but the Commissioner had the right to object to the presence of members when criminal intelligence was to be disclosed.<sup>48</sup> The eligible judge was not bound by the rules of evidence and, importantly, was not required to give reasons for the decision.<sup>49</sup> The lack of reasons limited the scope for judicial review, a fact that critically weighed against the validity of the part.

An eligible judge was appointed by the Attorney-General with the judge's consent, thereby satisfying one of the two conditions established in *Grollo v Palmer* for the vesting of non-judicial powers in federal judges as *personae designatae*.<sup>50</sup> However, the majority found that the second condition, concerning compatibility with judicial functions, was not satisfied.<sup>51</sup> French CJ and Kiefel J framed the issue in this way:

The principle in *Kable* also leads to the conclusion that a State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member. Although the function may be conferred upon the judge in his or her capacity as an individual, the statute may create a close connection and therefore an association with the person's role as a judge. Where this is the case, the potential for incompatibility of the non-judicial function is brought more sharply into focus. The question which then arises is whether the performance of that function would impair the defining characteristics of that court. It is that question with which the Court is concerned in this case.<sup>52</sup>

The majority accepted that, historically, judges of state and territory supreme courts have undertaken administrative functions. Such activities are unobjectionable if they do not impair the institutional integrity of the court. The second *Grollo v Palmer* condition in appointing a judge as *persona designata* to perform an executive function is that the function must be detached from the judicial role. Part 2 of the Act did the opposite, as the quasi-judicial decision of the eligible judge was a condition precedent to the exercise of the control power of the Supreme Court. The eligible judge, far from appearing detached, would be identified in the public eye with the Court itself. French CJ and Kiefel J observed that '[i]f attention is directed to matters of

<sup>48</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 8(1)–(3).

<sup>49</sup> *Ibid* s 13.

<sup>50</sup> (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ).

<sup>51</sup> This was also the outcome in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

<sup>52</sup> (2011) 243 CLR 181, 210 [47].

substance rather than form, the appearance of the eligible judge would differ little from that of a judge of the Court exercising precisely the same function under Pt 2 in his or her capacity as a judge.<sup>53</sup>

The majority was of the view that the Supreme Court's integrity would be damaged if the eligible judge's function (performed in a non-curial way) would be likely to be identified with the Court. In the majority's view, the executive was using the dignity and respect of the Court to achieve an executive aim. As the joint judgment of Gummow, Hayne, Crennan and Bell JJ observed,

[t]he effect of Pt 2 is to utilise confidence in impartial, reasoned and public decision-making of eligible judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under ss 9 and 12.<sup>54</sup>

The scheme of pt 2 therefore undermined the institutional integrity of the Supreme Court. The exemption from the duty to give reasons created by s 13(2) was, in the minds of the majority, fatal to the validity of pt 2. The Act created the appearance of a judge making the declaration while denying a hallmark of the judicial office.<sup>55</sup> French CJ and Kiefel J concluded that '[t]hese features cannot but affect perceptions of the role of a judge of the Court, to the detriment of the Court.'<sup>56</sup>

### B *Declarations of Incompatibility*

The discussion of the jurisdictional aspects of institutional integrity would not be complete without mention of the declaratory power questioned in *Momcilovic v The Queen*.<sup>57</sup> In this case, the High Court by 4:3 majority upheld the power of the Victorian Supreme Court to make declarations under s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') to the effect that a statutory provision cannot be interpreted consistently with a human right set out in the *Charter*. The majority rejected the argument that this function impaired the integrity of the Supreme Court.

<sup>53</sup> Ibid 218 [66].

<sup>54</sup> Ibid 230 [109].

<sup>55</sup> Ibid 219 [68] (French CJ and Kiefel J).

<sup>56</sup> Ibid.

<sup>57</sup> (2011) 280 ALR 221.

Section 32(1) of the *Charter* stated that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' Where this is not possible, s 36(2) gives the Supreme Court the *discretion* to make a declaration to that effect as, in this case, the Court of Appeal did. A declaration has no effect upon the validity of the provision or the legal rights of any person but creates a duty on the Minister under s 37 to lay before Parliament the declaration and his or her response to it and further to publish them both in the Government Gazette. The questions regarding institutional integrity were: (a) whether this function was a part of judicial power or incidental to the exercise of judicial power; and (b) if it were not, whether the function violated the *Kable* principle.

French CJ answered question (a) in the negative, observing that a declaration under s 36 'does not enable nor support nor facilitate the exercise by the court of its judicial function' and was not incidental or ancillary to the exercise of its judicial power.<sup>58</sup> However, on question (b) he held that '[b]y exemplifying the proper constitutional limits of the court's functions [the declaration] serves to reinforce, rather than impair, the institutional integrity of the court.'<sup>59</sup> Bell J agreed with both answers.<sup>60</sup> Crennan and Kiefel JJ in their joint judgment answered question (a) in the affirmative, holding that the power to make declarations of inconsistency was incidental to the exercise of judicial power.<sup>61</sup> Consequently, they answered question (b) in the negative. Their Honours pointed out that '[i]t is not unknown for judges to incidentally pass comments upon conclusions they have reached about defects in legislation in the course of their reasons' and that this is 'a function properly regarded as incidental to the exercise of the power'.<sup>62</sup>

Gummow J, Hayne J and Heydon J disagreed and found that declarations of inconsistency are incompatible with the court's judicial functions. Gummow J thought that s 36 'attempts a significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law'.<sup>63</sup> Hayne J agreed with this conclusion.<sup>64</sup>

<sup>58</sup> Ibid 258 [91].

<sup>59</sup> Ibid 260 [97].

<sup>60</sup> Ibid 404–5 [661].

<sup>61</sup> Ibid 389 [586].

<sup>62</sup> Ibid 392–3 [600], quoting *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 20 n 68 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

<sup>63</sup> *Momcilovic v The Queen* (2011) 280 ALR 221, 283 [183].

<sup>64</sup> Ibid 306 [280].

Heydon J construed s 32 as requiring the Court to consider s 7(2), which states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including —

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Heydon J thought the Court was required to consider the question of reasonable limits in determining incompatibility and concluded that '[t]he criteria by which the limit is to be decided are so vague that s 7(2) is an impermissible delegation to the judiciary of power to make legislation.'<sup>65</sup> Bell J agreed that reasonable limits are relevant to determining incompatibility but failed to see this as a threat to the Court's institutional integrity.<sup>66</sup> French CJ considered the application of s 7(2) as a distinct exercise that does not come into play unless and until the Court finds that an Act is inconsistent with a *Charter* right.<sup>67</sup> Crennan and Kiefel JJ did not consider s 7(2) to apply at all, either to the process of interpretation and finding that an Act is inconsistent with a *Charter* right or to the exercise of the power to make a declaration.<sup>68</sup> We find the majority view regarding the compatibility of the declarations with the institutional integrity of the Court more convincing. As Crennan and Kiefel JJ said, courts have a tradition of pointing out legislative inconsistencies and defects. Section 36 leaves the Court's discretion intact. Formal declarations under s 36 only serve to draw the attention of government and the public to the inconsistency.<sup>69</sup>

<sup>65</sup> Ibid 340 [409].

<sup>66</sup> Ibid 412 [684].

<sup>67</sup> Ibid 239 [35]–[36] (French CJ).

<sup>68</sup> Ibid 386 [574]–[575] (Crennan and Kiefel JJ).

<sup>69</sup> Ibid 392–3 [600]–[603].

## IV WITHDRAWAL OF JURISDICTION

*Totani* and *Wainohu* show that state legislatures lack the power to grant state courts or state judges as *personae designatae* jurisdiction that is inconsistent with their curial status. The case of *Kirk* establishes that institutional integrity also prevents state legislatures from withdrawing certain types of jurisdiction from state courts.<sup>70</sup> The Hon James Spigelman, then Chief Justice of New South Wales, whose judgment was the subject of appeal, remarked that '[i]t is not always the case that, when the High Court overturns one of my own decisions, I respond with unmitigated admiration. That is, however, the case with *Kirk*.'<sup>71</sup> It is fair to point out that the arguments that succeeded in the Court of Appeal were not the grounds on which the decision was reversed. However, his Honour's remark points to the constitutional significance of the case.

The High Court held unanimously (Heydon J dissenting only on the orders for costs and the discontinuance of the trial) that the power to correct jurisdictional errors of courts and tribunals is a defining characteristic of the supreme court of every state. The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ summarised the issue as follows:

A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.<sup>72</sup>

The implications of *Kirk* run deeper than it might at first seem. The decision effectively identifies new limitations on state legislative power deriving from ch III. The primary limitation is that a state legislature cannot divest the supreme court of its supervisory jurisdiction to set aside the decisions of inferior courts and other tribunals made outside jurisdiction. However, the case also has broader consequences, as we will see later in this article.

*Kirk* concerned provisions in the *Industrial Relations Act 1996* (NSW) seeking to combine arbitral, legislative and judicial functions in the hands of the Industrial Relations Commission and to limit recourse against decisions

<sup>70</sup> (2010) 239 CLR 531. See generally Wendy Lacey, 'Kirk v Industrial Court of New South Wales: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641; George Williams and Andrew Lynch 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1014–18.

<sup>71</sup> Spigelman, above n 7, 77.

<sup>72</sup> *Kirk* (2010) 239 CLR 531, 566 [55].

of the Commission whether by appeal or judicial review. The separation of the judicial and non-judicial functions within the Commission was incomplete. Section 151 of the Act established a 'court' within the Commission called the 'Commission in Court Session' comprising the 'judicial members' of the Commission. Section 152(1) provided that '[t]he Commission in Court Session is established by this Act as a superior court of record.' According to s 149, a person was not eligible to serve on the Commission in Court Session unless the person held or had held a state or Commonwealth judicial office or was an Australian lawyer of at least seven years' standing.

Notably, the judicial members constituting the Court could also sit in the wider Commission and exercise non-judicial arbitral powers when not sitting in Court Session under s 151(2). This dual role of legislator and adjudicator is precisely the arrangement that was condemned in the *Boilermakers' Case*. The rule in the *Boilermakers' Case* has no direct application to state tribunals. Nevertheless, this arrangement means that the judicial members are called upon to interpret and enforce rules and awards that they legislated into existence. The curial detachment that the public expects is thus sacrificed and the Court is drawn into the public policy framework and institutional culture of the wider Commission. As Heydon J speculated, this framework may have helped to bring about the jurisdictional errors identified by the High Court in *Kirk*:

Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. ... Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up.<sup>73</sup>

The judicial members of the Commission did not have tenure to a fixed retirement age but could be appointed for limited non-renewable periods.<sup>74</sup> They were protected by the relevant provisions of pt 9 of the *Constitution Act 1902* (NSW) with respect to suspension, removal, retirement and abolition of office during their term of office. However, s 53(4) of the *Constitution Act* makes it clear that the protection against removal except upon an address

<sup>73</sup> (2010) 239 CLR 531, 590 [122]. See also Justice J Gilmour, 'Kirk: Newton's Apple Fell' (2011) 34 *Australian Bar Review* 155.

<sup>74</sup> *Industrial Relations Act 1996* (NSW) s 150, sch 2 cl 10.

from both Houses of Parliament ‘does not apply to the holder of the office at the expiry of such a term’.

Section 179 of the *Industrial Relations Act* was intended to ensure the finality of the decisions of the Commission and the Industrial Relations Court by excluding all forms of judicial review. Section 179(1) declared that a ‘decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal’. Section 179(5) confirmed that the exclusion 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’. Section 179(4) extended the exclusion to proceedings brought in respect of a decision of the Commission on an issue of jurisdiction. The subsection read:

This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

- (a) the Full Bench of the Commission in Court Session, or
- (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

The effect of this provision was to prevent any court other than the Full Bench of the Commission in Court Session from reviewing the Commission’s decisions on jurisdictional grounds. In other words, jurisdictional questions had to be finally resolved ‘in house’ within the Industrial Relations Court, rather than by the Supreme Court of New South Wales and ultimately the High Court.

The aim of these provisions was therefore to make questions of jurisdiction determinable only by the Industrial Relations Court in the first instance or by the Full Bench without further judicial review. However, the High Court in *Kirk* unanimously ruled that a state legislature cannot remove from the state supreme court its power to review judicial decisions to ensure that they do not exceed the limits of lawful authority. The starting point of the argument, according to the joint judgment in *Kirk*, is

the requirement of Ch III of the *Constitution* that there be a body fitting the description ‘the Supreme Court of a State’, and the constitutional corollary 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.<sup>75</sup>

The High Court's position raises a number of interesting questions. In the first place, why is supervisory jurisdiction a defining characteristic of a state supreme court envisaged by ch III and, in particular, by s 73? The joint judgment observed that, at the time of federation, the supreme courts were invested with supervisory jurisdiction of the Queen's Bench:

At federation, each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England. It followed that each had 'a general power to issue the writ [of certiorari] to any inferior Court' in the State.<sup>76</sup>

This, however, does not wholly dispose of the issue. Why is supervisory jurisdiction a defining characteristic of a state supreme court simply because the court had it at federation? The High Court seems to take an originalist approach to the question.<sup>77</sup> Victoria and South Australia in their interventions argued that privative provisions limiting supervisory jurisdiction of supreme courts were well known before federation.<sup>78</sup> The joint judgment in response turns to the pre-federation Privy Council decision in *Colonial Bank of Australasia v Willan* ('*Willan*') to note that colonial privative legislation limited, but did not extinguish, the jurisdiction to grant certiorari on grounds of fraud or lack of legal power:

It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground

<sup>75</sup> (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

<sup>76</sup> *Kirk* (2010) 239 CLR 531, 580 [97], quoting *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 440 (Sir James W Colville for Sir James W Colville, Sir Barnes Peacock, Sir Montague E Smith, Sir Robert P Collier and Sir Lawrence Peel).

<sup>77</sup> On the High Court's use of originalism in *Forge*, see Leslie Zines, 'The High Court and the Constitution in 2006' (2007) 30 *University of New South Wales Law Journal* 174, 183–5.

<sup>78</sup> *Kirk* (2010) 239 CLR 531, 544–5 (M G Hinton QC, S-G (SA)), 548 (S G E McLeish SC, S-G (Vic)) (during argument).

either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.<sup>79</sup>

The joint judgment reasons that the framers of the *Constitution* regarded the power to issue certiorari on jurisdictional grounds to be one of the defining characteristics of colonial supreme courts when they sought to integrate them into the federal judicial hierarchy.

The trouble with this type of originalism is that the original intent of the constitution-makers is often unclear. The court therefore has to infer intent from contemporary law, social conditions and understandings. In *Kirk*, this task was not without difficulty, notwithstanding the common law dogma that no authority, judicial or executive, may act outside the bounds of statutory power. The High Court found that supervisory jurisdiction is the historical means by which the rule of law is maintained.<sup>80</sup> Hence, the ‘supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts.’<sup>81</sup> This constitutional entrenchment of the supervisory jurisdiction of state supreme courts represents the central finding in *Kirk*.

This finding is open to the criticism that it misreads constitutional history. *Willan* is authority on the way privative clauses are interpreted, but it is not authority on the question of the competence of colonial legislatures to extinguish supervisory jurisdiction to correct jurisdictional errors.<sup>82</sup> The counsel for the parties in *Kirk* and the intervening Attorneys-General were able to cite only one case where the power of colonial legislatures to oust the supreme court’s power to correct jurisdictional error was judicially acknowledged. In the case of *Re Biel* (*‘Biel’*), the Victorian Supreme Court held that the supervisory jurisdiction was completely excluded by the unambiguous

<sup>79</sup> (1874) LR 5 PC 417, 442 (Sir James W Colvile for Sir James W Colvile, Sir Barnes Peacock, Sir Montague E Smith, Sir Robert P Collier and Sir Lawrence Peel), quoted in *ibid* 580 [97].

<sup>80</sup> More specifically, the joint judgment stated that to deprive a state supreme court of its supervisory jurisdiction would be to ‘create islands of power immune from supervision and restraint’: *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>81</sup> *Ibid* 581 [98].

<sup>82</sup> Leslie Zines, ‘*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531’ (Speech delivered at the Centre for Comparative Constitutional Studies/Australian Association of Constitutional Law Seminar ‘Recent Developments in Chapter III’, Melbourne, 26 November 2010) 6–8 <[http://cccs.law.unimelb.edu.au/files/Kirk\\_v\\_Industrial\\_Court.pdf](http://cccs.law.unimelb.edu.au/files/Kirk_v_Industrial_Court.pdf)>; Ronald Sackville, ‘Bills of Rights: Chapter III of the *Constitution* and State Charters’ (2011) 18 *Australian Journal of Administrative Law* 67, 78; Williams and Lynch, above n 70, 1018.

language of a colonial Act.<sup>83</sup> Section 203 of the *Licensing Act 1890* (Vic) provided:

No determination order or proceedings under Part II of this Act or any amendment thereof shall be removed or removable by certiorari or otherwise into the Supreme Court for any want or alleged want of jurisdiction, or for any error of form or substance, or on any ground whatsoever.

Higginbotham CJ, giving the judgment of the Court, distinguished *Willan* as dealing with the case of an 'ordinary privative clause' under which every want of or excess of jurisdiction would remain a ground for certiorari. In contrast, s 203 was 'intended to cover that very case, and to prevent in any case where a total or partial want of or excess of jurisdiction appears in any inferior court, the proceedings of that court being reviewed by means of this writ.'<sup>84</sup>

Significantly, Higginbotham CJ noted that 'no section in any other Act of Parliament can be found which contains words so strong as these are.'<sup>85</sup> The fact that the courts and counsel in two cases decided a century apart could find only one pre-federation instance of successful ouster of supervisory jurisdiction to correct jurisdictional errors points strongly to a general constitutional practice of not denying that power to the state supreme courts. However, the decision in *Biel* indicates that if a legislature had elected to do so, a state supreme court (or, at any rate, the Higginbotham Court) would have given effect to it. Surprisingly, the judgments in *Kirk* make no reference to *Biel*. Given the significance of that case, it would seem more persuasive had the High Court held that the supervisory jurisdiction that the state supreme courts undoubtedly possessed at federation was entrenched by ch III, although it was previously susceptible to legislative removal.

## V PROCEDURAL GUARANTEES

The institutional integrity of state courts may be undermined by legislation authorising or requiring departures from the basic procedural standards expected of a court of justice. The High Court has so far considered three kinds of laws that have been challenged on this basis.

<sup>83</sup> (1892) 18 VLR 456.

<sup>84</sup> *Ibid* 459.

<sup>85</sup> *Ibid*.

### A Confidentiality of Criminal Intelligence

State law providing for non-disclosure to the public of criminal intelligence in judicial proceedings came under scrutiny in *Gypsy Jokers*<sup>86</sup> and *K-Generation*.<sup>87</sup> The principal question in each of these cases was whether the institutional integrity of a state court was impaired by the relevant provisions. Two issues therefore figured in these challenges. The first was whether the legislature, by enacting the provisions in question, directed the outcome of judicial proceedings. The joint judgment of Gummow, Hayne, Heydon and Kiefel JJ in *Gypsy Jokers* observed that

[a]s a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals.<sup>88</sup>

The second issue was whether the non-disclosure of information used by the court in reaching its decision violated one of the defining characteristics of a state court exercising federal judicial power — namely, the ‘open court principle’, according to which court proceedings should be open and accessible to the public. As French CJ noted in *K-Generation*, while the open court principle is an ‘essential aspect’ of the character of a court, there are established exceptions to the rule that may be recognised and expanded by Parliament.<sup>89</sup>

The High Court interpreted the provisions in the above cases in ways that preserved their constitutionality. In *Gypsy Jokers*, the appellants were members of a motorcycle club that had been issued with a fortification removal notice by the Commissioner of Police under s 72(1) of the *Corruption and Crime Commission Act 2003* (WA). The removal notice had to follow a previous ‘fortification warning notice’ under s 69(1). Under s 72(2), the Commissioner could not issue the removal notice unless, after considering any submissions, she or he reasonably believed that the premises were

- (a) heavily fortified; and

<sup>86</sup> (2008) 234 CLR 532.

<sup>87</sup> (2009) 237 CLR 501.

<sup>88</sup> (2008) 234 CLR 532, 560 [39].

<sup>89</sup> (2009) 237 CLR 501, 520–1 [49], quoting *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

- (b) habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime.

The appellants applied for review of the removal notice to the Supreme Court under s 76(1) of the Act. The question for determination, according to s 76(5), was ‘whether or not the Commissioner could have reasonably had the belief required by section 72(2) when issuing the notice.’ The joint judgment noted this was ‘readily recognised as the performance of a judicial function.’<sup>90</sup> The main point of contention concerned s 76(2), which provided:

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

The majority, as a matter of construction, rejected the dissenting view of Wheeler JA in the Supreme Court of Western Australia that the Commissioner unilaterally determined the question ‘with the result that the Supreme Court was constrained by the Commissioner of Police, an officer of the Executive Branch of government, in the independent performance of its review function’.<sup>91</sup> The joint judgment found that ‘it is for the Supreme Court to determine upon evidence provided to it whether the disclosure of the information might have the prejudicial effect’.<sup>92</sup> Their Honours further held that the words ‘[nor] publicly disclosed in any way’ should not be read as a legislative direction as to the outcome of a review application under s 76 but as ‘no more than an attempt at exhortation and an effort to focus attention by the Court to the prejudicial effect disclosure may have.’<sup>93</sup>

The subsequent case of *K-Generation*<sup>94</sup> concerned s 28A(5) of the *Liquor Licensing Act 1997* (SA). The provision required the Liquor Commissioner, the Licensing Court or the Supreme Court

<sup>90</sup> (2008) 234 CLR 532, 557 [28] (Gummow, Hayne, Heydon and Kiefel JJ).

<sup>91</sup> *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245, 286 (Wheeler JA), cited by *Gypsy Jokers* (2008) 234 CLR 532, 559 [34] (Gummow, Hayne, Heydon and Kiefel JJ); see also at 551–2 [7] (Gleeson CJ), 594 [174] (Crennan J).

<sup>92</sup> *Gypsy Jokers* (2008) 234 CLR 532, 558 [39] (Gummow, Hayne, Heydon and Kiefel JJ).

<sup>93</sup> *Ibid* 561 [44].

<sup>94</sup> (2009) 237 CLR 501.

to take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives ...<sup>95</sup>

Section 28A(5)(b) allowed the taking of classified information by way of affidavit of a police officer at or above the rank of superintendent.

French CJ recognised that s 28A infringed the open court principle and the requirements of procedural fairness in requiring the Licensing Court and the Supreme Court to consider classified criminal intelligence without disclosure to the affected party.<sup>96</sup> However, his Honour found, as a matter of construction, that the scheme did not harm the institutional integrity of the two courts as ‘the section leaves it to the courts to determine whether information classified as criminal intelligence answers that description [and] to decide what steps may be necessary to preserve the confidentiality of such material.’<sup>97</sup>

The joint judgment of Gummow, Hayne, Heydon, Crennan and Kiefel JJ agreed that the Licensing Court is free to question the criminal intelligence and observed that the ‘injurious effects’ of the provision may be mitigated by the fact that ‘the Licensing Court may feel disinclined to place weight on material which the Police Commissioner’s application has prevented the applicant for a licence being able to test, or even see.’<sup>98</sup> It is evident from the reasons of the Chief Justice and the joint judgment that the two state laws were saved by constructions that left the state courts with sufficient judicial discretion to evaluate independently the grounds on which secrecy is sought. The derogations from the open court rule were considered within the scope of the historically established exceptions.

However, there is little doubt that the High Court would have invalidated these Acts if they were not capable of being interpreted in a way that preserved the judicial discretion of the courts. We may conclude from these cases that a law that removes the discretion of a ch III court as to the manner of using evidence would fail on grounds of violating the institutional integrity of the court.

<sup>95</sup> *Liquor Licensing Act 1997 (SA)* s 28A(5)(a), later amended by *Statutes Amendment (Power to Bar) Act 2008 (SA)* s 5(2).

<sup>96</sup> *K-Generation* (2009) 237 CLR 501, 512 [10].

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* 543 [148].

### B *Suppression Orders*

The question whether legislation enabling state courts to make suppression orders impairs institutional integrity was considered in *Hogan v Hinch* ('*Hogan*').<sup>99</sup> Whereas the complaint in *Gypsy Jokers* and *K-Generation* concerned prejudice to affected parties to proceedings, the challenge in *Hogan* was about the open court principle generally and the right of the media and the public to information about court proceedings. The suppression order in question was made under s 42(1) of the *Serious Sex Offenders Monitoring Act 2005* (Vic). The provision empowered the Victorian Supreme Court and the County Court, in any proceeding under the Act, on its own initiative or on the application of a party, to make an order that certain matters not be published except in the manner and to the extent specified in the order. The publication of matters in contravention of such an order is an offence under s 42(1). The provisions enabled the suppression of the identities of parties and witnesses in sex offence trials as part of a scheme designed to protect the community and 'to promote the rehabilitation, and the care and treatment, of the offender'.<sup>100</sup>

Hinch, who was charged with committing the offence, challenged the constitutional validity of s 42 on free speech grounds and on the basis that suppression orders harmed the institutional integrity of the court and violated the open court principle implied in ch III. In support of these arguments, counsel for Hinch submitted that under the Act the court need not give reasons for its orders and that there was no possibility of appeal against the order. The case was removed to the High Court, which unanimously rejected the arguments.

On the preliminary questions, the Court found that the legislation did not remove the duty to give reasons and that an appeal was available. As to institutional integrity, the joint judgment noted that the power to make orders under s 42(1) 'is enlivened by the satisfaction of the court that it is "in the public interest" to do so' and hence 'does not present to the court a criterion which is "so indefinite as to be unsusceptible of strictly judicial application"'.<sup>101</sup> The judges accepted the submission of the Queensland Solicitor-General that s 42(1)(c) must be construed in a manner 'consistent

<sup>99</sup> (2011) 243 CLR 506.

<sup>100</sup> *Serious Sex Offenders Monitoring Act 2005* (Vic) s 15(2)(b).

<sup>101</sup> *Hogan* (2011) 243 CLR 506, 551 [80], citing *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368, 383 (Kitto J).

with its character as an ancillary provision and consistent with the context and purpose of the Act.<sup>102</sup>

The High Court in *Hogan* accepted unanimously that the open court principle is a characteristic of a court of justice, but ch III does not impose an unqualified duty to conduct proceedings in public view. French CJ said:

In my opinion the better view is that there is inherent jurisdiction or implied power in limited circumstances to restrict the publication of proceedings conducted in open court. The exercise of the power must be justified by reference to the necessity of such orders in the interests of the administration of justice.<sup>103</sup>

The Court concluded that suppression orders under s 42 were justifiable and hence not harmful to the institutional integrity of the Victorian courts.<sup>104</sup>

### C *Ex Parte Orders*

The powers of courts to make orders affecting property without notice to interested parties have been invalidated in two cases. In *Re Criminal Proceeds Confiscation Act 2002*, the Queensland Court of Appeal invalidated s 30 of an Act that required the Supreme Court to make restraining orders and orders for the disposal of proceeds of crime without notice to affected parties.<sup>105</sup> The provision was held to be subversive of the institutional integrity of the Court.<sup>106</sup>

In *International Finance Trust Co Ltd v New South Wales Crime Commission* ('*International Finance Trust*'), the High Court by majority (French CJ, Gummow and Bell JJ, and Heydon J; Hayne, Crennan and Kiefel JJ dissenting) invalidated s 10 of the *Criminal Assets Recovery Act 1990* (NSW).<sup>107</sup> The provision empowered the Crime Commission to obtain a restraining order from the Supreme Court of New South Wales in respect of the property of a person suspected of having committed a serious offence, as a step in securing the judicial forfeiture of the property. The fact that the restraining order could be obtained without notice to the property owner was held by the Court to be

<sup>102</sup> *Hogan* (2011) 243 CLR 506, 538 [36] (French CJ).

<sup>103</sup> *Ibid* 534 [26]; see also at 553–4 [88]–[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>104</sup> *Ibid* 551 [80] (French CJ), 554 [91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>105</sup> *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.

<sup>106</sup> *Ibid* 55–6 [58]–[59] (Williams JA), 56 [61] (White J), 57 [64] (Wilson J).

<sup>107</sup> (2009) 240 CLR 319.

incompatible with the Supreme Court's judicial function. As French CJ said, '[i]n that way, directing the Court as to the manner of the exercise of its jurisdiction, it distorts the institutional integrity of the Court and affects its capacity as a repository of federal jurisdiction.'<sup>108</sup>

## VI BROADER IMPLICATIONS

The constitutional position arising from the High Court's decisions on institutional integrity may be roughly summarised as follows. A state Parliament may not make any law that negates a 'defining characteristic' of the state supreme court.<sup>109</sup> These defining characteristics include appropriate security of judicial tenure, independence from legislative and executive judgments, the power to make orders for the correction of jurisdictional errors of courts and statutory authorities and appropriate respect for procedural guarantees, such as the open court principle. More generally, state Parliament may not vest in a state supreme court (or in a judge as *persona designata*) a power or function that is 'incompatible with the court's essential and defining characteristics as a court and thereby with its place in the national integrated judicial system for which Ch III of the *Constitution* provides.'<sup>110</sup> The latter principle has been extended to all other state courts as actual or potential repositories of federal jurisdiction under s 71 of the *Constitution*.<sup>111</sup>

A power given to a court may be regarded as an unconstitutional vesting under the doctrine of institutional integrity because of the substantive implications of its exercise or by reason of the manner in which it is required or allowed to be exercised. The defining characteristics of a court may be identified in relation to its constitution, the limits of its jurisdiction and the method of exercising jurisdiction. The issues of jurisdiction and procedure raised by these enquiries are interrelated. Judicial power is not the power to determine a dispute in any manner, but rather to resolve it in the curial manner. From the standpoint of state policy, these decisions limit the ways in which the courts may be used for crime prevention, as opposed to the trial and punishment of persons accused of crimes.

The High Court has not attempted to itemise exhaustively the defining characteristics of a supreme court but rather has assessed the issue on a case-

<sup>108</sup> *Ibid* 355 [56].

<sup>109</sup> *Kable* (1996) 189 CLR 51, 108 (Gaudron J); *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181, 210 [47] (French CJ and Kiefel J).

<sup>110</sup> *Wainohu* (2011) 243 CLR 181, 192 [7] (French CJ and Kiefel J).

<sup>111</sup> *Totani* (2010) 242 CLR 1, 21 [4] (French CJ).

by-case basis. Recent years have seen the emergence of a series of authorities, canvassed in detail above. Nonetheless, the limits of non-judicial power that may constitutionally be vested in a state court (or a judge acting as *persona designata*) remain to be progressively defined. State lawmakers must therefore seek guidance from the *rationes decidendi* and *obiter dicta* of the relevant decisions.

The High Court's jurisprudence in this area raises many interesting constitutional questions. Our aim in the remainder of this section is to consider some of the broader constitutional implications of the relevant decisions, focusing particularly on *Kirk*. We will argue that *Kirk* has potentially wideranging implications for the powers of state legislatures to restrict judicial review and modify the requirements of natural justice. These implications go significantly beyond the specific jurisdictional issues identified in the High Court's judgments.

#### *A Jurisdiction of Inferior Courts and Tribunals*

One constitutional implication of *Kirk* is that state legislatures cannot constitutionally authorise inferior courts or tribunals to finally determine the legality of their own actions. A body that is the judge of its own power is effectively above the law. Questions of jurisdiction by their nature can be highly disputed. They are resolved by reference to statutory provisions (including but not necessarily limited to those which create the court or tribunal) and the body of common law principles to be applied when interpreting those provisions. The High Court's appellate jurisdiction over all judgments, decrees, orders and sentences of every supreme court makes the High Court the final authority on the common law. The joint judgment in *Kirk* noted that, consequently, 'the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court.'<sup>112</sup>

The High Court in *Kirk* clarified that the availability of judicial review on grounds of jurisdictional error cannot be removed by Parliament designating an inferior court as a superior court of record. The reasoning in *Kirk* strongly suggests that while legislation can define the jurisdiction of a tribunal, the question whether the tribunal has acted within the jurisdiction is always a matter for judicial resolution, ultimately by the High Court. The legislature is therefore incapable of directing a court on a jurisdictional dispute after the

<sup>112</sup> (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

issue has arisen, but before it has been judicially determined. Similarly, a legislative attempt to reverse a judicial decision on jurisdiction *ex post facto* would raise constitutional issues concerning the validity of legislative judgments, as considered in *Totani* and *Wainohu*. There is therefore now considerable doubt as to whether state legislatures may intervene in jurisdictional disputes.

In *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* ('BLF Case'), the New South Wales Supreme Court held that it was within the State Parliament's plenary power to enact legislation that nullified a trade union's pending action challenging its deregistration on the grounds that it was made in violation of natural justice.<sup>113</sup> All the judges agreed that the Act, which retrospectively validated the deregistration process, amounted to a legislative judgment, but they nonetheless unanimously upheld the statute.<sup>114</sup> Following *Kirk*, however, a state law that seeks to preclude a judicial ruling on a jurisdictional question would be unconstitutional for violating s 73 of the *Constitution*. Whether the *BLF Case* can stand after *Kirk* is an issue for another time, but the decision must surely be regarded as open to question.

The resolution of this issue depends in part on whether *Kirk* is understood as ruling out state legislation that prevents state courts from reviewing the decisions of inferior bodies on the grounds of natural justice. We will return to this question below. Also weighing against the currency of the *BLF Case* are judicial comments made in *Gypsy Jokers*. The legislation considered in the *BLF Case* amounted to a direction to the Court as to the outcome of the proceeding. The High Court in *Gypsy Jokers* made it clear that state legislation directing the manner or outcome of judging would impair the institutional integrity of the Court.<sup>115</sup>

### B Errors of Law Affecting Jurisdiction

A second constitutional issue arising from *Kirk* is whether a state legislature can shield errors of law affecting jurisdiction from the supervisory jurisdiction of the supreme court. According to *Kirk*, the supervisory function of state supreme courts with respect to jurisdictional error is inalienable. The common law grounds on which state supreme courts may grant the writ of

<sup>113</sup> (1986) 7 NSWLR 372.

<sup>114</sup> *Ibid.* See especially at 401 (Kirby P).

<sup>115</sup> See above n 88 and accompanying text.

certiorari include the tribunal exceeding the limits of its legal power; errors of law on the face of the record that amount to jurisdictional error; and errors of law on the face of the record that are made within jurisdiction. We will consider shortly the impact of this decision on other grounds such as the failure of natural justice.

It is often said that the distinction between jurisdictional error and error of law on the face of the record is superfluous because certiorari lies in either case. However, as the joint judgment explained, the distinction remains critical for the *Constitution*.<sup>116</sup> The supreme courts envisaged in ch III are courts that were endowed with supervisory jurisdiction as defined by the common law at federation. Once the Court determined that the supervisory jurisdiction was entrenched by ch III, it followed that state legislatures are competent to limit judicial review of errors of law on the face of the record, except where the errors remove the tribunal's jurisdiction. The joint judgment in *Kirk* stated:

It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.<sup>117</sup>

As Chief Justice Spigelman has pointed out, the distinction between jurisdictional error and non-jurisdictional error is necessitated in Australia by the separation of powers doctrine.<sup>118</sup> This is because of the 'fundamental constitutional proposition' emphasised in the joint judgment in *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*'):

the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the

<sup>116</sup> *Kirk* (2010) 239 CLR 531, 576 [80] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>117</sup> *Ibid* 581 [100].

<sup>118</sup> Spigelman, above n 7, 83.

jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed.<sup>119</sup>

The High Court thus confirmed that a privative clause that purports to exclude the correction of jurisdictional errors would fail for limiting the High Court's inherent jurisdiction under the *Constitution*.

Chief Justice Spigelman observed that *Kirk* brings state legislatures into line with the position of the Commonwealth Parliament in relation to s 75(v). In *Plaintiff S157*, the principles outlined by Dixon J in *R v Hickman; Ex parte Fox*<sup>120</sup> about the powers of review reserved for the High Court under s 75(v) were replaced by a more general exposure of decisions to review on the basis of jurisdictional error. *Kirk* achieves a similar result in relation to state legislative power. Importantly, the decision entrenches the power of supreme courts to review not only jurisdictional errors with respect to the limits of power but also errors in the interpretation and application of law of the kind that courts would regard as affecting jurisdiction.

The joint judgment in *Kirk* also rejected as unhelpful the distinction drawn in *Craig v South Australia* ('*Craig*')<sup>121</sup> with respect to errors of law made by inferior courts and those of administrative tribunals, both of which are amenable to certiorari. It was suggested there that errors of law that affect the jurisdiction of a tribunal may not necessarily be jurisdictional errors if made by a court. The alleged jurisdictional error that engaged the Court's attention in *Craig* concerned the misconstruction by a trial judge of the majority decision in *Dietrich v The Queen* concerning the circumstances in which a criminal trial should be stayed on account of the non-representation of the defendant.<sup>122</sup> The contested issue was whether the absence of fault on the part of the defendant was a material consideration in granting the stay. The Court remarked in this context that '[b]e that as it may, any such error on the part of Judge Russell would not have been jurisdictional error.'<sup>123</sup>

The Court suggested in the course of its judgment in *Craig* that if an administrative tribunal asked the wrong question, relied upon irrelevant matter or failed to consider relevant matter the error may go to jurisdiction, but that such an error, if made by a court, would 'not, however, ordinarily constitute

<sup>119</sup> (2003) 211 CLR 476, 512 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>120</sup> (1945) 70 CLR 598, 615.

<sup>121</sup> (1995) 184 CLR 163.

<sup>122</sup> (1992) 177 CLR 292.

<sup>123</sup> *Craig* (1995) 184 CLR 163, 186 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

jurisdictional error.<sup>124</sup> The reason given was that an ordinary court is competent to determine authoritatively questions of law, whereas an administrative tribunal is not.<sup>125</sup> The Court observed that ‘constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal.’<sup>126</sup> In *Kirk*, the High Court pointed out that the distinction between administrative and judicial tribunals was not so clear in the states, whose constitutions did not implement the separation of judicial and non-judicial powers.<sup>127</sup> The distinction also breaks down because the test of authoritativeness is amenability to supervisory correction. Administrative tribunals and courts are equally subject to certiorari for errors of law on the face of the record.<sup>128</sup> It is therefore inappropriate, in the wake of *Kirk*, to maintain a strict distinction between courts and tribunals at state level for the purposes of identifying jurisdictional errors.

### C *The Right to Factual Particulars*

The High Court in *Kirk* found that the conviction of the defendants was invalidated by two jurisdictional errors that were beyond the legislative power of the New South Wales Parliament to shield from judicial review. The first was the failure to particularise the charges.<sup>129</sup>

It is a longstanding common law rule that a charge of committing a criminal offence must not only describe the nature of the offence, but should also state the particular acts or omissions of the defendant that violated the offence-creating provision. As Dixon J stated in *Johnson v Miller* (*‘Johnson’*), the information must specify ‘the time, place and manner of the defendant’s acts or omissions’.<sup>130</sup> The common law requirement to provide factual particulars of a criminal charge arises directly from the principles of natural justice. This is not only a requirement of the common law, as stated in *Johnson*, but is also a universally recognised human right. Article 14(1) of the

<sup>124</sup> *Ibid* 179–80.

<sup>125</sup> *Ibid* 179.

<sup>126</sup> *Ibid*.

<sup>127</sup> (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>128</sup> *Ibid* 573 [69]–[70].

<sup>129</sup> The second, which was the denial of natural justice, is dealt with below in Part VID.

<sup>130</sup> (1937) 59 CLR 467, 486.

*International Covenant on Civil and Political Rights*<sup>131</sup> (to which Australia is a party) states that

[i]n the determination of any criminal charge against him [or her], or of his [or her] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The *Covenant* is not binding on Australian courts, except as implemented by legislation. Nevertheless, art 14(1) confirms the longstanding common law position. In the light of principle's significance, it is at least strongly arguable that the right of an accused to particulars of a criminal charge is an essential aspect of the curial process.

In *Kirk*, the defendants were charged with the commission of the offences created by ss 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW). The High Court found that the charges against the defendants failed to meet this requirement.<sup>132</sup> The High Court reached its decision by interpreting the existing state law.<sup>133</sup> However, the constitutional question now raised is whether a state legislature may by express language deny the defendant to a criminal charge the right to know the particulars as to time, place and manner of the alleged acts or omissions.

Is the common law requirement also a constitutional requirement? The definition of judicial power that the High Court employs is usually some nuanced version of the classic formulation set out by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*.<sup>134</sup> This definition captures the substantive aspect of judicial power, which is the capacity to conclusively determine controversies concerning existing rights. However, judicial power is not power to resolve a controversy in any manner, but rather to determine it by the curial mode of decision-making. This aspect of judicial power was explained by Deane J in *Polyukhovich v Commonwealth* ('*Polyukhovich*').<sup>135</sup> The object of the separation of powers, Deane J said, is to ensure that 'the life, liberty, and property of the subject [is not] in the hands of arbitrary judges,

<sup>131</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>132</sup> (2010) 239 CLR 531, 558 [28] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>133</sup> The relevant provisions were *Occupational Health and Safety Act 1983* (NSW) ss 15–16, 53 and *Criminal Procedure Act 1986* (NSW) s 11. The High Court followed Dixon J in *Johnson* to find that s 11 did not oust the common law rule: *Kirk* (2010) 239 CLR 531, 559 [29] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>134</sup> (1909) 8 CLR 330, 357.

<sup>135</sup> (1991) 172 CLR 501.

whose decisions [are] then regulated only by their own opinions, and not by any fundamental principles of law'.<sup>136</sup> His Honour continued:

That objective will, of course, be achieved only by the *Constitution's* requirement that judicial power be vested exclusively in the courts which it designates if the judicial power so vested is exercised by those courts *in accordance with the essential attributes of the curial process* ... Indeed, to construe Ch III of the *Constitution* as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of the separation of powers. Common sense and the provisions of Ch III, based as they are on the assumption of *traditional judicial procedures, remedies and methodology* ... compel the conclusion that, in insisting that the judicial power be vested only in the courts designated by Ch III, the *Constitution's* intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that notion essentially requires.<sup>137</sup>

If the curial method is an essential aspect of the judicial power of the Commonwealth, and the right of a defendant accused of a crime to factual particulars of the alleged offence is an essential aspect of the curial method, then Parliament cannot constitutionally deny the defendant that right. The requirement applies to all trials of federal offences, whether they are heard by the High Court, by other federal courts or by state courts vested with federal jurisdiction. A Commonwealth Act therefore cannot grant a state court power to try a federal crime on a charge that does not disclose factual particulars.

The question now is whether a state Act may dispense with the factual particulars of a charge under state law triable in a state court. In other words, can a state legislature abrogate one of the basic common law requirements of natural justice in proceedings under state law? As the joint judgment in *Kirk* noted, without sufficient particularisation of criminal charges 'the Industrial Court would be placed in the position to which Evatt J referred in *Johnson v Miller* where it would act as "an administrative commission of inquiry" rather than undertake a judicial function.'<sup>138</sup> A commission of inquiry typically engages in fact finding and policy assessment. Its findings may or may not

<sup>136</sup> Ibid 606, quoting William Blackstone, *Commentaries on the Laws of England* (17<sup>th</sup> ed, 1830) vol 1, 269.

<sup>137</sup> *Polyukhovich* (1991) 172 CLR 501, 607 (emphasis added).

<sup>138</sup> (2010) 239 CLR 531, 559 [30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Johnson v Miller* (1937) 59 CLR 467, 495.

lead to criminal or civil proceedings, but they do not make binding decisions on civil or criminal liability. The critical point made in the joint judgment is that the Industrial Relations Court had no power to convict and punish persons for crimes by a method more appropriate to administrative inquiries than to courts of justice. If state legislatures had general power to remove this requirement in criminal proceedings under state law, the effect on what Gaudron J in *Kable* called ‘the integrated judicial system for which Ch III provides’<sup>139</sup> would be drastic. Her Honour stated the constitutional position as follows:

To put the matter plainly, there is nothing anywhere in the *Constitution* to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament. ...

State courts, when exercising federal jurisdiction ‘are part of the Australian judicial system created by Ch III of the *Constitution* and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States’. Once the notion that the *Constitution* permits of different grades or qualities of justice is rejected, the consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.<sup>140</sup>

It is not possible to predict with certainty how the High Court will respond to any future state legislation that seeks to dispense with the common law requirements to provide defendants notice of the particulars of a criminal charge. However, given the reasoning in *Kirk*, it should not surprise anyone if the High Court finds such a law offensive to the character of the state courts that ch III designates as present or potential repositories of federal judicial power.

#### D Denial of Natural Justice

The second jurisdictional error identified in *Kirk* was the decision to call one of the defendants as a witness for the prosecution. According to s 17(2) of the *Evidence Act 1995* (NSW), a defendant is not competent to give evidence for

<sup>139</sup> *Kable* (1996) 189 CLR 51, 102–3.

<sup>140</sup> *Ibid* 103, quoting *Leeth v Commonwealth* (1992) 174 CLR 455, 498–9 (Gaudron J). See also *Kable* (1996) 189 CLR 51, 117–18 (McHugh J), 138–43 (Gummow J).

the prosecution.<sup>141</sup> This is not among the provisions that the court may waive under s 190 with the consent of the parties. The joint judgment concluded that ‘[t]he Industrial Court thus conducted the trial ... in breach of the limits on its power to try charges of a criminal offence.’<sup>142</sup> Heydon J agreed, saying that the incompetence of a defendant to give evidence for the prosecution is ‘an absolutely fundamental rule underpinning the whole accusatorial and adversarial system’.<sup>143</sup>

The Commonwealth Parliament cannot deprive the High Court of its jurisdiction to quash by writ of certiorari a decision made in violation of natural justice. Any doubts on this question were removed by *Plaintiff S157*,<sup>144</sup> where the High Court read down s 474(1) of the *Migration Act 1958* (Cth). That provision stated that:

A privative clause decision:

- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

The term ‘privative clause decision’ was defined in s 474(2) to include, inter alia, a decision to refuse a visa.

The plaintiff in the case, a Bangladeshi asylum seeker, sought certiorari from the High Court to set aside the decision of the Refugee Review Tribunal that denied him a temporary protection visa, on the grounds that the decision was made in violation of natural justice. The Commonwealth conceded that s 474, if read literally, would be unconstitutional for limiting the High Court’s original jurisdiction under s 75. However, the High Court chose to read down the plain meaning of s 474(2), rather than invalidate the provision. As the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ stated, ‘A decision flawed for reasons of a failure to comply with the principles of

<sup>141</sup> The *Evidence Act 1995* (NSW) applied to the Industrial Court of New South Wales by virtue of *Industrial Relations Act 1996* (NSW) s 163(2).

<sup>142</sup> *Kirk* (2010) 239 CLR 531, 575 [76] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>143</sup> *Ibid* 586 [115].

<sup>144</sup> (2003) 211 CLR 476.

natural justice is not a “privative clause decision” within s 474(2) of the Act.<sup>145</sup>

The question that now arises is whether a state legislature can take away certiorari from a state supreme court with respect to the failure of natural justice. In *Forge*, Gleeson CJ expressed the following view:

It follows from the terms of Ch III that State Supreme Courts must continue to answer the description of ‘courts’. For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the *Constitution*. It is the principle that governs the outcome of the present case. If State legislation attempted to alter the character of a State Supreme Court in such a manner that it no longer satisfied those minimum requirements, then the legislation would be contrary to Ch III and invalid.<sup>146</sup>

Gummow, Hayne and Crennan JJ, in their joint judgment, agreed. Their Honours noted that

[a]n important element ... in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.<sup>147</sup>

These statements do not directly answer whether a state supreme court may be denied the power of certiorari on natural justice grounds. However, as we argue presently, the absence of such supervisory jurisdiction may mean that state inferior courts may not answer the description of state courts that may receive federal judicial power in accordance with s 71.

The judges in *Kirk* were unanimous in ruling that a state legislature cannot constitutionally deprive the supreme court of its power to quash decisions of inferior courts or tribunals made without jurisdiction and decisions that flow from errors of law affecting jurisdiction. The rationale of the ruling is that the state supreme courts possessed this power at the time that the *Constitution* integrated them to the national hierarchy of courts. As the joint judgment stated, the ‘accepted doctrine at the time of federation was that the jurisdiction of the colonial supreme courts to grant certiorari for jurisdictional error

<sup>145</sup> Ibid 508 [83].

<sup>146</sup> (2006) 228 CLR 45, 67–8 [41].

<sup>147</sup> Ibid 76 [64] (citation omitted).

was not denied by a statutory privative provision.<sup>148</sup> Hence, it is a defining characteristic of these courts.

Were there at the time of federation other aspects of supervisory jurisdiction that could not be denied by privative provisions? In particular, could a privative clause have extinguished the supervisory power of a supreme court to quash a judicial or quasi-judicial decision made in disregard of the rules of natural justice? Did colonial legislatures, in other words, have the power to condone or permit real or apparent judicial bias or the judicial denial of fair hearing to the parties affected by judicial decisions?<sup>149</sup> If the colonial legislatures could not do so at federation, the state legislatures cannot, by parity of reasoning with *Kirk*, do so now.

A tribunal that may conclusively determine<sup>150</sup> a person's existing legal rights and duties without regard to the requirements of natural justice exercises a power akin to legislative power. Bias in the curial process opens the way to fraud and abuse. Failure to hear a party is not only straightforwardly unfair but also makes decisions more susceptible to jurisdictional error. It is perhaps for this reason that it is hard to find in the books any authority for the proposition that an ouster clause contained in legislation may validly prevent the judicial review of decisions affecting life and liberty made in violation of natural justice.

Nevertheless, legislatures have always been competent to depart from the common law standards of natural justice in relation to administrative decisions. Where the statute is silent on procedural requirements, the relevant common law standards will apply to a decision affecting rights and their non-observance will amount to jurisdictional error. If the statute has modified or excluded the common law requirements of natural justice, the decision-maker need only observe the statutory requirements to stay within jurisdiction.<sup>151</sup> In each case, a supreme court, following *Kirk*, will have supervisory jurisdiction to determine whether the applicable procedural standards have been met.

<sup>148</sup> *Kirk* (2010) 239 CLR 536, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>149</sup> Violations of the Latin maxims *nemo iudex in causa sua* and *audi alteram partem* respectively.

<sup>150</sup> We use the term 'conclusively' in the sense of a judicial decision that may be corrected only in appellate or supervisory jurisdiction of a superior court.

<sup>151</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 74–5 [52]–[53] (Gleeson CJ and Hayne J).

The position is different with respect to state courts because of the force of ch III of the *Constitution*. The observance of the rules of natural justice is an essential characteristic of the curial method. A court that is not bound to determine cases by the curial method will not meet the requirements of a body that can be invested with federal judicial power as stated in *Kable* and later reiterated in *Forge*. This is a rule founded on the constitutional concept of a court that exists independently of a supreme court's supervisory jurisdiction.

## VII CONCLUSION

The High Court's doctrine of institutional integrity resembles a tree that has branched out from the root of the principle established in *Kable*. The Court in *Kable* ruled that state legislatures must not vest in a state supreme court powers and functions that are incompatible with its position as a court exercising federal judicial power within the integrated hierarchy of courts envisaged by ch III. In several recent cases, the High Court has emphasised the broader implications of this doctrine for the institutional integrity of state courts.

In *Totani*, *Wainohu* and *International Finance Trust*, the High Court found that institutional integrity was undermined by legislative direction of the exercise of jurisdiction. In *International Finance Trust*, the High Court regarded mandatory ex parte hearings to be 'repugnant to the judicial process in a fundamental degree'.<sup>152</sup> The High Court's decision in *Forge*, by contrast, focused on the meaning of 'court' within ch III of the *Constitution*. Gleeson CJ said that '[f]or a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality'.<sup>153</sup> In *Kirk*, the High Court looked at a specific defining attribute of a state supreme court — namely, its supervisory jurisdiction.

Do these different formulations represent branches of the same conceptual tree or are they separate saplings? Do they have a common element? The element they share is their concern with the institutional integrity of courts exercising federal judicial power. A law harms the integrity of a court if it adversely affects its defining characteristics. In *Kirk*, the High Court attribut-

<sup>152</sup> (2009) 240 CLR 319, 363 [87] (Gummow and Bell JJ), 379 [140], 384 [152] (Heydon J), quoting *Kable* (1996) 189 CLR 51, 132 (Gummow J). Cf *International Finance Trust* (2009) 240 CLR 319, 354–5 [55]–[56] (French CJ).

<sup>153</sup> *Forge* (2006) 228 CLR 45, 67 [41]; see also at 76 [63]–[64] (Gummow, Hayne and Crennan JJ).

ed to state supreme courts the defining characteristic of having the power to correct jurisdictional error. The Court did not draw this feature directly from the *Kable* principle, but from the requirement in ch III that there exist in each state a supreme court endowed with supervisory jurisdiction under the ultimate superintendence of the High Court. This might seem to suggest that *Kirk* represents a new sapling. However, it is possible conceptually to connect *Kirk* to *Kable*.

It is because state supreme courts form part of an integrated judicial hierarchy, under the ultimate supervision of the High Court, that they cannot be deprived of supervisory jurisdiction. As the joint judgment in *Kirk* observes, echoing a point made by McHugh J in *Kable*:<sup>154</sup>

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. 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.<sup>155</sup>

Any attempt to remove the supervisory jurisdiction of state supreme courts not only undermines their role in the federal judicial hierarchy, but also reduces the High Court's jurisdiction as the ultimate court of appeal.<sup>156</sup> *Kirk*, like *Kable*, therefore reflects the position that the supreme courts form part of the integrated judiciary established by ch III.<sup>157</sup> The case links the power of supreme courts to correct jurisdictional error to the integrity of the judicial system as a whole.

The High Court in *Kirk* changed the constitutional law of Australia by ruling unanimously that a state legislature has no power to deprive a state supreme court of its supervisory jurisdiction to set aside decisions of inferior courts made outside jurisdiction and decisions flawed by errors of law on the face of the record amounting to jurisdictional error. The ruling also applies to

<sup>154</sup> (1996) 189 CLR 51, 114. See John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 277.

<sup>155</sup> *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citation omitted).

<sup>156</sup> Basten, above n 154, 279; Zines, above n 82, 13–14.

<sup>157</sup> Cf Zines, above n 82, 9–10; Williams and Lynch, above n 70, 1017.

decisions of officials and other tribunals affecting the rights and liberties of parties.<sup>158</sup> The unanimous decision strengthens the separation of powers in the states in two ways. First, it establishes the inalienability of the judicial power of state supreme courts to correct jurisdictional error. Second, it denies inferior courts and tribunals the power to determine the limits of their own powers, which in effect would make them lawmakers. The decision thereby strengthens the rule of law in the states.

We have argued in this article that a number of far-reaching constitutional implications may potentially be drawn from *Kirk*. One is that a state legislature may not be constitutionally able to deprive a person charged with a criminal offence of notice of factual particulars on which the charge is based. Another is that a state legislature may not be able to deprive the state supreme court of the supervisory jurisdiction to set aside judicial decisions made in violation of the rules of natural justice. These two implications, if authoritatively recognised as constitutional rules in future decisions, will further serve the rule of law in the states, by upholding the duty of courts and other tribunals to act judicially when determining disputes concerning the rights and liberties of citizens.

The criminal intelligence cases discussed in this article expose the tension between procedural fairness and the requirements of public safety. They show that the High Court is likely to favour the constitutionality of non-disclosure provisions in state legislation if they are capable of a construction that leaves the court in charge of how the intelligence is used. It is also evident that the consequences of non-disclosure in the criminal intelligence cases of *Gypsy Jokers* and *K-Generation* were much less drastic for civil liberties than the results of the schemes considered in the control order cases of *Totani* and *Wainohu*. In *Gypsy Jokers*, the consequence was the loss of fortifications, while, in *K-Generation*, the non-disclosure procedurally disadvantaged an applicant for a liquor licence.

The decisions in *Totani* and *Wainohu*, by contrast, had direct implications for the freedoms of association and communication. The control order cases have further strengthened the jurisdictional and procedural dimensions of the institutional integrity of state courts by limiting the power of state Parliaments to engage courts as direct agents of executive action. The decisions pose significant challenges to state governments in using control orders and similar mechanisms to combat organised crime. As Gleeson CJ observed in

<sup>158</sup> *Totani* (2010) 241 CLR 1, 27 [26] (French CJ), 105–6 [268]–[269] (Heydon J), 153 [415]–[416] (Crennan and Bell JJ).

*Thomas*, giving such power exclusively to the executive hardly serves the interests of civil liberties.<sup>159</sup>

Since *Kirk*, it is not possible to insulate executive orders from the supervisory jurisdiction of the supreme court to correct jurisdictional errors. However, to make such decisions reviewable in practice, a higher standard of procedural fairness must be required of decision-makers. Alternatively, state legislatures will have to embrace the model of interim control orders approved by the High Court in *Thomas*. Improving crime prevention capabilities in the age of terrorism and sophisticated criminal organisations is a legitimate public policy aim, but so is the maintenance of the rule of law and constitutional government. The institutional integrity of courts is indispensable for the latter objective.

<sup>159</sup> (2007) 233 CLR 307, 329 [17].