HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

STUART ANTHONY SILBERT (as Executor of the Estate of Stephen Retteghy deceased) APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA RESPONDENT

Silbert v Director of Public Prosecutions for Western Australia
[2004] HCA 9
Date of Order: 9 December 2003
Date of Publication of Reasons: 3 March 2004
P16/2002

ORDER

Application for special leave to appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

M J Buss QC with M M N Byrne for the applicant (instructed by Talbot & Olivier)

R J Meadows QC, Solicitor-General for the State of Western Australia, with C J Thatcher for the respondent and intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

H C Burmester QC, Acting Solicitor-General of the Commonwealth with C J Horan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General of the State of Queensland, with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law Division, Department of Justice)

M G Sexton SC, Solicitor-General for the State of New South Wales, with K M Guilfoyle intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Silbert v Director of Public Prosecutions for Western Australia

Constitutional law – Judicial power of the Commonwealth – Vesting in State courts – Power of State Parliament to confer functions incompatible with exercise by State court of judicial power of the Commonwealth – State Act deems person who dies before a charge is finally determined to be taken to have been convicted of a "serious offence" – Whether provision of State Act amounts to parliamentary determination of guilt and imposition of conviction – Whether provision of State Act precludes a court from making any or any sufficient inquiry into whether the deceased committed the offence – Whether State law invokes the principles in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Criminal law – Confiscation of profits – Person charged with "serious offence" dies before charge finally determined – *Crimes (Confiscation of Profits) Act* 1988 (WA) deems deceased to be taken to have been convicted of the "serious offence" – Application for pecuniary penalty order and forfeiture order – Whether court precluded from making any or sufficient inquiry into whether the deceased committed the offence – Relevance of principles identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 – Whether legislative determination of guilt of the offence and imposition of conviction.

Words and phrases – "abscond", "serious offence".

Crimes (Confiscation of Profits) Act 1988 (WA), ss 3, 6, 15, 53.
Criminal Property Confiscation Act 2000 (WA), ss 6, 157, 160.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. On 9 December 2003 the Court ordered that this application for special leave be dismissed. What follows are our reasons for joining in that order.

2 The applicant sought special leave to appeal to contend that the *Crimes (Confiscation of Profits) Act* 1988 (WA) ("the Confiscation Act") is invalid in its operation in relation to the estates of deceased persons who before death had been charged with, but not convicted of, serious crimes. The Confiscation Act has been repealed[1] since the application to the Supreme Court of Western Australia in this matter, but it continues to operate in respect of that application[2]. It is convenient therefore to continue to speak of it in the present tense.

3 Section 6(1) of the Confiscation Act provides that "[w]here a person is convicted of a serious offence" an appropriate officer may, subject to some qualifications not now relevant, apply to the Supreme Court of Western Australia, or to the court before which the person was convicted of the offence, for one or both of a forfeiture order in respect of particular property and a pecuniary penalty order.

4 Section 3(2) of the Confiscation Act identifies four cases in which "[f]or the purposes of this Act, a person is to be taken to have been convicted of a serious offence". One of those circumstances (s 3(2)(d)) is if the person has been charged with the offence but, before the charge is finally determined, the person has absconded. The circumstances in which a person shall be taken to have absconded are exhaustively defined in s 3(5). One set of those circumstances, being the circumstances applicable in this matter, is if a complaint is made alleging the commission of the offence by the person, a warrant for the person's arrest is issued in relation to that complaint (or the person is arrested without warrant), and the person subsequently dies.

5 Here, Stephen Retteghy was charged on indictment with two offences under the *Misuse of Drugs Act* 1981 (WA). Each of those offences was what the Confiscation Act calls a "serious offence". It is not clear whether Mr Retteghy

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1 *Criminal Property Confiscation (Consequential Provisions) Act* 2000 (WA), s 4.

2 *Criminal Property Confiscation (Consequential Provisions) Act*, s 6.

was arrested with or without warrant but it was common ground in the courts below that he died after his arrest and before he was tried.

6 The applicant is executor of his estate. The application by the State Director of Public Prosecutions for orders under the Confiscation Act originally named the Public Trustee as representative of Mr Retteghy's estate, and joined the executors and beneficiaries named in the will. By order made on 12 November 1998 all defendants other than the present applicant ceased to be parties. The applicant, as the sole executor to whom probate had been granted, became the only defendant in the proceeding.

7 The linchpin of the applicant's contention, that relevant provisions of the Confiscation Act are invalid, was that those provisions of the Confiscation Act by which the deceased was to be taken to have been convicted of a serious offence precluded the Court, asked to make either a pecuniary penalty order or a forfeiture order, making any, or at least any sufficient, inquiry into whether the deceased had committed the offence in question. This preclusion was said to invoke the principles identified in *Kable v Director of Public Prosecutions (NSW)*[3].

8 In the case of forfeiture orders, the short answer to the applicant's contention is that the Confiscation Act works no such preclusion. Section 53(2) requires that a court not make a forfeiture order in reliance on a conviction unless it is satisfied, beyond reasonable doubt, that the person committed the offence.

9 In so far as pecuniary penalty orders are concerned, s 15(1)(a) empowers a court "if it considers it appropriate" to "assess the value of the benefits derived by the person against whom the application is made as a result of the commission of the serious offence in reliance on which the application is made or of any other unlawful act".

10 It is unnecessary to explore whether this provision permits or requires any inquiry into whether the offence was committed. The applicant founds his argument in *Kable*. As was pointed out in *H A Bachrach Pty Ltd v Queensland*[4]:

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3 (1996) 189 CLR 51.

4 (1998) 195 CLR 547 at 561-562 [14].

> "*Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 [of the Constitution] and to the exercise by them of the judicial power of the Commonwealth under Ch III."

As in *Bachrach*[5], so too in this case:

> "If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise."

11 Section 15(1)(a) of the Confiscation Act, if it had been a law of the Commonwealth empowering the making of a pecuniary penalty order by a court created under s 71 of the Constitution, would not have been invalid. If it permits a party to an application for pecuniary penalty to contend that the offence in reliance on which the application is made was not committed, the premise for the applicant's contention, that s 15(1)(a) of the Confiscation Act is invalid, would be wrong. That s 53(1) of the Confiscation Act would require the determination of such an issue on the balance of probabilities would not affect that conclusion.

12 If, however, s 15(1) would not permit a party to an application for pecuniary penalty to contend that the relevant offence had not been committed, the Act would, nonetheless, be valid. On that hypothesis, the Confiscation Act would operate in a fashion not relevantly different from the way in which forfeiture provisions of the *Customs Act* 1901 (Cth), considered in *Burton v Honan*[6], operated. Those forfeiture provisions, which could apply even if the goods in question were in the possession of an innocent third party, provided that a conviction of any person for an offence causing forfeiture of goods operated as a condemnation of the goods. The provisions were held to be valid.

13 The references in the Confiscation Act to a person being "taken to have been convicted of a serious offence", like the reference to a conviction in the Customs provisions considered in *Burton*, describe the circumstances in which operative provisions of the Confiscation Act may be enlivened. There is no legislative determination of guilt of an offence; there is no legislative conviction of a person accused of crime. The central issue raised by an application for pecuniary penalty order is whether the value of benefits derived by the person

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5 (1998) 195 CLR 547 at 562 [14].

6 (1952) 86 CLR 169.

against whom the application is made (who can be, and in this case was, a person other than the person "taken to have been convicted of a serious offence") as a result of the commission of that offence or any other serious offence[7] should be assessed and, once assessed, whether that value of benefits should form a basis for calculation under s 15(1)(b) of a pecuniary penalty to be paid to the Crown. Nothing in the application for an order, the assessment of benefits derived, and the making of an order for payment of pecuniary penalty is antithetical to Ch III.

14 An appeal would therefore have enjoyed no prospects of success if special leave to appeal had been granted. The Confiscation Act having been repealed, it is neither necessary nor appropriate to explore the matter beyond the point of identifying that the premises of the applicant's argument were flawed.

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7 *Crimes (Confiscation of Profits) Act* 1988 (WA), s 15(1)(a), read in conjunction with the definition of "unlawful act" in s 3(1).

15 KIRBY J. This application for special leave, referred into the Full Court by a panel before whom it first came[8], was dismissed by the Court at the conclusion of argument[9]. Reasons for the Full Court's order were reserved. I now state my reasons.

16 I will first set out the basis for the appeal and consider the possible implications of the impugned provisions. I will then make clear why I cannot join in the reasoning of the majority. Finally, I will explain why I nevertheless agree in the Court's conclusion.

Implications of a deemed conviction of a serious offence

17 *The matter of concern*: The matter of concern that occasioned the reference to the Full Court was s 3(2)(d) of the *Crimes (Confiscation of Profits) Act* 1988 (WA) ("the Act")[10]. This states that, for the purposes of the Act, a person is to be taken to have been "convicted of a serious offence" if:

> "the person has been charged with the offence but before the charge is finally determined, the person has absconded".

18 Section 3(5)(c)(i) provides that a person shall be taken to "abscond" in connection with an offence if:

> "the person dies without the warrant being executed or after the execution of the warrant or, in the case of a person arrested without warrant, after that arrest".

19 These provisions which affect the appellant and the estate of the deceased person which he administers, when read in isolation, appear very broad. Do they mean, in effect, that the Parliament of Western Australia has, by legislative fiat, imposed a "conviction" upon the deceased person which no court of law in Australia has imposed, or possibly could impose, in such circumstances? Do they assert a legislative power in the State Parliament that, by extension, would

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8 McHugh and Heydon JJ and myself. (See Trans, 9 May 2003 at 503-505).

9 On 9 December 2003. See *Silbert v Director of Public Prosecutions for Western Australia* [2003] HCATrans 515 at 2466.

10 As noted in the reasons of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons"), the Act has been repealed since these proceedings were brought. However, by the *Criminal Property Confiscation (Consequential Provisions) Act* 2000 (WA), s 6, the Act continues to operate in respect of this application. As in the joint reasons, I shall refer to the repealed Act in the present tense.

permit the legislative "conviction" of a serious criminal offence of a living person upon some other criterion, irrelevant to the guilt of that person of such a criminal offence[11]? Do they suggest a revival of parliamentary "convictions" of individuals, including in respect of "serious offences", which would be inimical to our system of criminal justice and the usual constitutional arrangements governing such convictions in this country[12]? Does the imposition upon a court (in this case, the Supreme Court of Western Australia) of such a statutory fiction constitute an offence to the constitutional implication concerning courts in Australia, explained in *Kable v Director of Public Prosecutions (NSW)*[13], given that the court concerned is envisaged by the federal Constitution, expressly[14] and by implication[15], as part of the integrated Judicature of the Commonwealth? Given that such court is bound to receive federal jurisdiction invested in it by federal law[16], and must therefore be a suitable recipient of such jurisdiction, does the Act infringe the Constitution?

20 *Vigilance to the boundaries of power*: At least in constitutional questions, a court such as this does not address its attention solely to the issue presented by the parties, viewed in the narrowest of terms. Constitutional law is a river of doctrine. Constitutional decisions are watched by those who propose, draft and make laws. The lesson of constitutional history is that laws are sometimes made that test the boundaries of legislative power. Once upheld, further laws are sometimes enacted to extend those boundaries, occasionally pushing constitutional power to snapping point[17].

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11 The Act provides for deemed convictions of "serious offences" in the case of various living persons other than those factually convicted of such offences by a court of law. See the Act, s 3(2)(c) and (d).

12 See *Liyanage v The Queen* [1967] 1 AC 259 at 290-292; *Nicholas v The Queen* (1998) 193 CLR 173 at 188 [20], 211-212 [83], 221-222 [113]-[114], 232-233 [144]-[148], 254-257 [201], 278 [252].

13 (1996) 189 CLR 51.

14 Constitution, s 73(ii).

15 Constitution, s 106.

16 Constitution, s 77(iii).

17 The decision in *Ha v New South Wales* (1997) 189 CLR 465 is a good illustration. The history of the course of the Court's decisions on excise duties and State "licence fees" on the sale of tobacco is described there.

21 Where a law intrudes into the traditional area of the courts, this Court should be vigilant lest there be a case of legislative excess or repugnancy. The Constitution, as it has been interpreted, so provides[18]. Unless the courts are vigilant, there is a risk that bad precedents, sanctioned by judicial endorsement, will undermine and erode important constitutional assumptions. Matters traditionally decided by courts of law, that are independent and impartial, may then come to be decided elsewhere, contrary to the express constitutional provisions and to constitutional implications.

The issue and the decision of the Full Court

22 The fundamental question presented by the application for special leave is therefore whether the present is an instance where the language of the Act, to which the applicant objected, in terms of what it provided and what it might grow into, justified the intervention of this Court.

23 In the Full Court of the Supreme Court of Western Australia, Wallwork J dissented[19]. By reference to observations of this Court in *Polyukhovich v The Commonwealth (War Crimes Act Case)*[20], *Re Tracey; Ex parte Ryan*[21], *Kable v Director of Public Prosecutions (NSW)*[22] and *Nicholas v The Queen*[23], his Honour concluded that the deeming provisions of the Act, complained of by the applicant, were "repugnant to judicial process"[24] and thus "inoperative because they were inconsistent with the proper exercise of the judicial power of the Supreme Court of Western Australia"[25]. The majority in the Full Court (Owen and Steytler JJ) disagreed. They upheld the validity of the State Act[26]. It is from the order that followed the majority conclusion that the present application was brought.

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18 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

19 *Silbert v Director of Public Prosecutions (WA)* (2002) 25 WAR 330.

20 (1991) 172 CLR 501 at 704.

21 (1989) 166 CLR 518 at 580.

22 (1996) 189 CLR 51 at 102-106, 131.

23 (1998) 193 CLR 173 at 186 [16], 208 [73].

24 *Silbert* (2002) 25 WAR 330 at 339 [51], citing Gummow J in *Kable* (1996) 189 CLR 51 at 134.

25 *Silbert* (2002) 25 WAR 330 at 340 [53].

26 *Silbert* (2002) 25 WAR 330 at 347-348 [85]-[86].

The principle in *Kable's* case

24 On the return of the application, an attempt was made to rely upon – and to clarify – the principle of the federal Constitution, upheld by this Court in *Kable*[27]. The basic concept in *Kable* is relatively simple. In my view, the essential ways in which it is expressed by the members of the majority in that decision are not very different from each other, despite complaints to that effect by some judges in intermediate courts[28]. The constitutional implication expressed in *Kable* has not, so far, attracted enthusiastic application by intermediate courts, although constitutional implications are inherent in the task of construing a written constitution. Some implications are very well established in Australia[29]. Other, even new, implications are occasionally embraced with judicial alacrity[30]. The cases in which *Kable* has been argued in State and Territory courts were drawn to this Court's attention[31]. In only one case has an argument based on *Kable* succeeded at that level[32]. Appeals or applications to this Court are pending in some other cases.

25 *Kable* holds that Ch III of the Constitution limits the power of State Parliaments to confer non-judicial functions or non-judicial characteristics on State courts that are incompatible with, or repugnant to[33], the core requirements of such courts as potential recipients of federal jurisdiction, as provided for in the Constitution[34]. The core requirements referred to include those of the manifest independence and impartiality of the judiciary in the discharge of their functions.

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27 (1996) 189 CLR 51.

28 See *R v Moffatt* [1998] 2 VR 229 at 249-250 per Hayne JA (referred to in *Silbert* (2002) 25 WAR 330 at 347 [84]) and *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81 at 111 [169] per Meagher JA.

29 For example *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

30 As in *Austin v The Commonwealth* (2003) 77 ALJR 491; 195 ALR 321.

31 See Johnston and Hardcastle, "State Courts: The Limits of Kable", (1998) 20 *Sydney Law Review* 216.

32 In *Re Criminal Proceeds Confiscation Act* 2002 (Q) [2003] QCA 249 (Court of Appeal per Williams JA, White and Wilson JJ).

33 See *Fairfax* (2000) 158 FLR 81 at 88 [43].

34 Constitution, s 77(iii). See *Kable* (1996) 189 CLR 51 at 98, 103-104, 116, 132.

This includes independence from legislative directions over individual judicial decisions and in the findings of fact and law that are necessary to them.

26 The reasoning of the majority in *Kable* was possibly complicated by the references made in their reasons to a suggested consideration of public perception about, and confidence in, the integrity of the courts[35]. Public perception represents a consideration obviously difficult for judges to ascertain objectively and with complete certainty[36]. Properly analysed, I do not consider that this consideration was a criterion for the operation of the constitutional principle expressed in *Kable*. Instead, I regard it as a description of the likely outcome, in relation to the integrated Judicature provided by the Constitution, unless the principle in *Kable* is respected by the legislatures and executive governments of the nation and upheld, where necessary, by the courts. Judges should accept the responsibility of stating what is, or is not, inconsistent with (or repugnant to) judicial process – a subject upon which they have both knowledge and experience. They should not feel bound to invoke the fiction of public perceptions to explain or justify such conclusions.

Approach, relevant facts and legislation

27 Do the deeming provisions of the Act, challenged in this application, attract the *Kable* principle so explained? Clearly, the rule in *Kable* is not one confined to the extraordinary legislation that was considered in that case. The rule, as expounded by the majority in *Kable*, is one of general application[37]. I also accept that the rule requires attention to considerations of matters of substance, as befits an implication derived from the Constitution. It is not one confined to matters of form or to the mere expression of legislation, viewed in isolation. I further accept that the orthodox approach of this Court, where constitutional invalidity is charged, applies. In such cases, the first function of a

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35 See *Kable* (1996) 189 CLR 51 at 108 per Gaudron J, 118-119 per McHugh J, 133 per Gummow J. See also *Mann v O'Neill* (1997) 191 CLR 204 at 245 per Gummow J.

36 The reference to "public perception" as a criterion of constitutional validity was criticised by Brennan CJ in *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] with whom, at 275-276 [242], Hayne J agreed.

37 *Fairfax* (2000) 158 FLR 81 at 84 [15]; cf *Bruce v Cole* (1998) 45 NSWLR 163 at 167.

judge is to construe the impugned legislation – to understand what it says and what it does not say[38].

28 The background facts in the application were uncontested. They are stated in detail in the joint reasons in this Court, sufficient for the needs of my opinion[39]. The essential provisions of the Act are mentioned there, in addition to s 3(2) and (5) of the Act, which I have quoted[40].

Points of distinction from the joint reasons

29 *Repeal of the Act is not significant*: I would not assign any weight, in resolving this application, to the fact that the Act has now been repealed[41]. I say this for three reasons.

30 First, by a cognate measure, enacted with the repeal, the Act continues to apply to the case of the applicant. He has invoked the protection of the courts and is now before us for that purpose. Secondly, the new Act contains provisions in some ways similar to those which he challenges.[42] The interpretation and validity of these provisions is therefore of significance to all persons potentially bound by them. Thirdly, the model of the legislation adopted in the Western Australian Act is the same, or virtually the same, as that in Victoria[43], South Australia[44], Queensland[45] and the Australian Capital Territory[46]. By way of contrast, the analogous legislation in New South Wales[47], Tasmania[48] and the

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38 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 202 CLR 535 at 565 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81].

39 The joint reasons at [2]-[7].

40 The joint reasons at [3]-[4]. See above at [17]-[18].

41 The joint reasons at [14].

42 *Criminal Property Confiscation Act* 2000 (WA), ss 157(1)(d), 160(2)(c).

43 *Confiscation Act* 1997 (Vic), ss 4(1)(d), 5(a).

44 *Criminal Assets Confiscation Act* 1996 (SA), s 12(b).

45 *Criminal Proceeds Confiscation Act* 2002 (Q), ss 106(1)(c), 109(1)(b), 111.

46 *Confiscation of Criminal Assets Act* 2003 (ACT), ss 15(1)(c), 16(2)(a).

47 *Confiscation of Proceeds of Crime Act* 1989 (NSW), ss 5(1)(d), 6(1).

Northern Territory[49] does not contain provisions deeming a person who dies before trial to have absconded and thus taken to have been convicted of a serious offence. Nor does the present or former federal Act[50] contain such provisions. However, the federal Act does provide for orders for the forfeiture of property and pecuniary penalties to be made in circumstances where the alleged offender has not been convicted of an offence[51].

31 These differences in legislative approach suggest that there is a way by which the problem of accused persons who have died before trial can be dealt with without requiring a court, in effect, to treat the deceased as having "absconded" (contrary to the fact) and thereby to be someone who has been "convicted of a serious offence" (also contrary to the fact)[52]. Moreover, the evidence of equivalent legislation in jurisdictions other than Western Australia suggests that, if the applicant could make good his arguments based on *Kable*, the decision would be of significance beyond his case and beyond the borders of his State.

32 *Focussing on the State Act*: Contrary to the joint reasons[53], I would not regard it as essential, or necessarily useful, in considering an argument based on *Kable* to start with the hypothetical case of the validity of the impugned provisions of the Act, were they contained in federal legislation. This may sometimes be a confirmatory technique for judging whether the principle in *Kable* has been breached[54]. However, I would hesitate to adopt it as a universal criterion for the more nuanced assessment that the reasoning in *Kable* demands.

33 In the present case, adopting such an approach involves piling an additional fiction upon the fictions in the Act – all fictions known to be factually false. Such reasoning risks collapsing under the weight of its own artificial

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48 *Crime (Confiscation of Profits) Act* 1993 (Tas), ss 5(1)(d), 6.

49 *Criminal Property Forfeiture Act* 2002 (NT), ss 161(1)(c), 162.

50 *Proceeds of Crime Act* 2002 (Cth), ss 331(1)(d), 334; see also *Proceeds of Crime Act* 1987 (Cth), ss 5(1)(d), 6(c)(i).

51 *Proceeds of Crime Act* 2002 (Cth), ss 47, 49, 51, 80, 84, 85, 110, 116, 120, 145, 149, 150.

52 The Act, s 3(2)(d), read with s 3(5)(c)(i).

53 The joint reasons at [11].

54 See *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14].

hypotheses. Here, we should focus our attention on the State Act itself, as it stands, and apply the constitutional standard to its provisions.

34 *Rebutting preclusion is not fatal*: Nor do I regard it as necessarily fatal to the applicant (as the joint reasons suggest[55]) that the hypothesis demanded by the impugned provisions does not preclude the making of an inquiry, or sufficient inquiry, into whether the deceased did, in fact, commit the offence in question.

35 In his argument, the applicant took a more fundamental and threshold point. He submitted that, once a matter of this character was before a court of the Australian Judicature, it was not competent for a State legislature, for whatever purpose, to require such a court to deem a person to be "convicted of a serious offence". Judicial acceptance of a conviction, so the applicant argued, was traditionally, properly and only assigned, within Australia's constitutional arrangements, to an independent and impartial court, acting judicially, following a hearing that observed proper standards of fairness, including the hearing of both sides *before* such a "conviction" was accepted[56].

36 Ultimately, this is what persuaded Wallwork J in the Full Court of the correctness of the applicant's case. He quoted what Gummow J had said in *Kable*[57]:

> "… if certain criteria are met, then the Supreme Court is to inflict upon that individual a penalty. Moreover, the penalty is not inflicted upon, and by reason of, conviction by the Supreme Court on any charge of contravention of the criminal law."

37 Wallwork J expressed the view that the present was an analogous case and that the foregoing words of Gummow J applied to it[58]. With respect, it seems to me that there is more to the applicant's argument than the joint reasons suggest. In the face of the clear provisions of the Act, which I have quoted, it cannot be denied that the Act, for a specified purpose, attaches serious consequences to a deemed "conviction" of a serious criminal offence. It does so, although, by our history and law, such a "conviction" is normally a formal judicial act, performed by an independent judge in a given way and only after established procedures are duly followed.

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55 The joint reasons at [8]-[11].

56 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Polyukhovich* (1991) 172 CLR 501.

57 (1996) 189 CLR 51 at 125.

58 *Silbert* (2002) 25 WAR 330 at 338 [46].

38 Moreover, the Act, in effect, obliges the Supreme Court to accept the fictitious "conviction" and to perform specified judicial functions on that footing although everyone knows, in the case of an accused who has died before trial, that, by law, the criminal proceedings against him abate and that no such "conviction" can be secured thereafter by ordinary judicial process[59]. In considering the application and its constitutional argument, it is obviously important that the complaint be judged in terms of what would occur to the actual and perceived independence and impartiality of the courts if such legislative "convictions" became commonplace or extended to wider circumstances on the basis of this precedent.

The *Kable* argument should be rejected

39 I therefore understand the force of the applicant's arguments concerning the suggested invalidity of the provisions of the Act that he impugns. However, I ultimately come to the same conclusion as the other members of this Court. On closer analysis of the legislation, read as a whole, it does not engage the rule in *Kable*. My reasons for this conclusion are as follows:

40 First, the terms of the Act evince an actual purpose to make a provision in relation to property. Arguably that is its primary character. Decisions of this Court establish that the federal Constitution does not deny legislative power to the States to deprive an owner of property, even without the provision of just terms[60].

41 Secondly, the Act does not, in fact or law, provide that the deceased is "convicted" of a criminal offence, serious or otherwise. On its face, the Act does not involve an impermissible determination of criminal guilt or liability to criminal punishment as such; nor an invalid legislative direction to a court concerning its fact-finding functions in such matters. If it did, it might indeed enliven considerations of constitutional invalidity[61].

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59 Archbold, *Criminal Pleading, Evidence and Practice* (2002) at [3-202]; *R v Jefferies* [1969] 1 QB 120 at 124; *R v Kearley (No 2)* [1994] 2 AC 414 at 422-423.

60 See *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 at 409-410 [12]-[14], 425 [56] and authorities cited there.

61 *Polyukhovich* (1991) 172 CLR 501 at 684-685, 703-704; *Chu Kheng Lim* (1992) 176 CLR 1 at 26-27; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470; *Kable* (1996) 189 CLR 51 at 98.

42 No criminal consequences could, or do, apply to the deceased or to the executor of his estate by reason of the provisions complained about. The "conviction" is not entered on the person's criminal record, if any. Instead, the expression has been used solely as a legal fiction, a shorthand expression of statutory drafting[62]. So much appears in the language of the Act. As the statutes of other Australian jurisdictions show, a different formula might have been used. However, this is not alone a sufficient reason to attract the serious consequence of constitutional invalidity to the way in which the Parliament of Western Australia has chosen to express its statute[63].

43 Thirdly, that the provisions complained of are solely a legislative fiction is made clear by the use of the words "is to be taken to have been"[64]. The Act makes it plain that the fiction is limited. It is only "for the purposes of this Act". It is not a "conviction" for larger and different purposes of criminal justice and punishment. Of its nature, a legal fiction usually involves acceptance that, in truth and for other purposes, what "is to be taken to have been" the case is not in fact so[65]. Accordingly, the limited operation of the impugned provisions is plain. They do not oblige a court, contrary to the truth, to find facts or to adjudge a person criminally guilty on the basis of a legislative conclusion that is not judicially examinable.

44 Decisions of this Court have occasionally suggested that in some circumstances the operation of deeming provisions, that prevent parties before the courts from proving the truth of contested matters, may involve an invasion of the judicial power and on that basis be unconstitutional[66]. Thus, if a legislature requires a court to apply the law to facts invented by the legislature,

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62 See *Hughes* (2000) 202 CLR 535 at 550-551 [23]-[24], 572-573 [88]-[91].

63 See *Williamson v Ah On* (1926) 39 CLR 95 at 117 per Isaacs J.

64 The Act, s 3(2).

65 cf *R v The County Council of Norfolk* (1891) 60 LJ QB (NS) 379 at 380-381; *Rowe v Transport Workers' Union of Australia* (1998) 90 FCR 95 at 112; *Maroney v The Queen* (2003) 202 ALR 405 at 408 [11], 419-420 [55]-[57].

66 See *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 214-215. See also *The Queen v Bowen; ex parte Amalgamated Metal Workers & Shipwrights Union* (1980) 144 CLR 462 at 480. cf *The Queen v Ludeke; ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 651; McHugh, "Does Chapter III Protect Substantive as well as Procedural Rights?" (2001) 21 *Australian Bar Review* 235 at 243-244.

occasioning a "travesty of the judicial process"[67], the law might, in the case of federal courts, contravene s 71 of the Constitution and be invalid on that account. Relying on the *Kable* principle, instances might arise in which a similar question is presented in respect of State courts. However, the present case falls far short of such an instance.

45 Fourthly, as the majority in the Full Court found[68], the deeming provisions in the Act, of which the applicant complains, are no more than devices used to identify persons of a class against whom applications under the Act may be made. They have no other effect. In particular, they do not have the effect of making a "binding and authoritative"[69] decision for other and different judicial purposes.

46 In dealing with an application for a forfeiture order under the Act, made in relation to the property of a person who has died, the court deciding the application is still required to satisfy itself beyond reasonable doubt, before making the order, that the person committed a relevant offence[70]. Moreover, to determine that a person derived benefits as a result of the commission of a serious offence or applicable unlawful act, the court must, in my opinion, be satisfied that the person committed a serious offence or unlawful act. Such provisions fall far short of those declared invalid in *Kable*.

47 Fifthly, the outcome of an application made under the Act remains to be determined by a court in accordance with the normal procedures of a court, decided by independent judicial officers, applying rigorous standards of proof. Under the Act, they retain a discretion reflecting the judicial duty to do justice. Thus, under the Act, the court may only make a forfeiture order or order a pecuniary penalty, "if it considers it appropriate"[71]. Moreover, the Act provides for a facility of appeal, including in respect of a finding that the person committed the offence[72]. In this sense, the impugned legislation bears no real similarity to the old laws on forfeiture, attainder and corruption of the blood[73],

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67 *Polyukhovich* (1991) 172 CLR 501 at 704 per Gaudron J.

68 *Silbert* (2002) 25 WAR 330 at 344-347 [76]-[82].

69 *Nicholas* (1998) 193 CLR 173 at 187 [18] per Brennan CJ.

70 The Act, s 53(2). See also s 10(1).

71 The Act, ss 10(1), 15(1).

72 The Act, ss 19, 58.

73 See *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 588-589, 593, 602, 609-610.

abolished by statute in Western Australia[74] as elsewhere[75], which were mentioned in argument as a spectre against which this Court should be on guard[76].

48 In sum, the legislation bears numerous normal hallmarks of judicial assessment, discretion, judgment and reconsideration[77]. It has judicial substance. It does not impose on judges functions that make them effectively the agents of the other branches of government. The suggested flaw, in the particular and limited reference to a deemed conviction of a serious offence emerges, upon closer inspection of the Act, to be no more than a device of legislative drafting. The legislation, viewed as a whole, does not require the court concerned to act in a manner inconsistent with, or repugnant to, the exercise of judicial power within the Australian Judicature.

Conclusion and order

49 *Kable is inapplicable*: The foregoing are the reasons why I joined in the decision of the Court. In accordance with the language of the majority in *Kable*, the Act does not oblige the Supreme Court of Western Australia to act in relation to the applicant "in a manner which is inconsistent with traditional judicial process"[78]. Nor could the proceedings against the applicant under the Act be characterised as "proceedings [not] otherwise known to the law" or not partaking "of the nature of legal proceedings"[79]. They do not "compromise the institutional

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74 *Criminal Code* (WA), s 683.

75 *Director of Public Prosecutions (Cth) v Toro-Martinez* (1993) 33 NSWLR 82 at 85-88.

76 See *Silbert* Trans, 9 May 2003 at 18-68, 235-253; *Silbert* [2003] HCATrans 515 at 70-85. The Constitution of the United States of America, in Art I, s 9, forbids Bill(s) of Attainder. In Art III, s 3, it provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted". There is no equivalent provision in the Australian Constitution.

77 See *Fencott v Muller* (1983) 152 CLR 570 at 608; *Chu Kheng Lim* (1992) 176 CLR 1 at 27.

78 (1996) 189 CLR 51 at 98 per Toohey J.

79 (1996) 189 CLR 51 at 106 per Gaudron J.

impartiality of the Supreme Court"[80]. Nor are such proceedings "repugnant to judicial process"[81].

50 The fictional deemed "conviction", understood in the context of the entire Act, interpreted to give effect to its limited purpose, would not occasion public concern about the independence and impartiality of the Supreme Court, or the courts of Australia more generally, assuming (contrary to my view[82]) that this is a separate constitutional consideration in such cases.

51 *Dispositive orders*: As the matter was prepared and fully argued as on the return of an appeal; as several law officers intervened to make detailed submissions; as considerable cost was incurred by the parties; as the issues concerned the application of the federal Constitution and affected the laws of several Australian jurisdictions, I would myself have been inclined to grant special leave, but to dismiss the appeal[83]. However, as the other members of the Court favoured dismissal of the application, and because nothing turned on the disposition, I joined in that order.

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80 (1996) 189 CLR 51 at 121 per McHugh J.

81 (1996) 189 CLR 51 at 134 per Gummow J.

82 See above at [26].

83 cf *Durham* (2001) 205 CLR 399 at 432 [78].