HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

GYPSY JOKERS MOTORCYCLE CLUB INCORPORATED APPELLANT

AND

THE COMMISSIONER OF POLICE RESPONDENT

Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police
[2008] HCA 4
7 February 2008
P26/2007

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

D Grace QC with M K Moshinsky and A M Dinelli for the appellant (instructed by Williams Ellison Barristers & Solicitors)

D F Jackson QC with R M Mitchell for the respondent (instructed by State Solicitor for Western Australia)

D M J Bennett QC, Solicitor-General of the Commonwealth with S P Donaghue intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

C J Kourakis QC, Solicitor-General for the State of South Australia with M J Wait and J P McIntyre intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

P M Tate SC, Solicitor-General for the State of Victoria with J M Davidson and J A Redwood intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with P Davis SC and D D Keane intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for Queensland)

M P Grant QC, Solicitor-General for the Northern Territory with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police

Statutes – Interpretation – *Corruption and Crime Commission Act* 2003 (WA) – The appellant sought review of a decision of the Commissioner of Police to issue a fortification removal notice in the Supreme Court of Western Australia – Section 76(2) of the Act provided that the Commissioner could identify any information provided to the Supreme Court for the purposes of review proceedings as confidential "if its disclosure might prejudice the operations of the Commissioner" with consequences for the use and disclosure of the information – Whether s 76(2) renders unexaminable by the Supreme Court the decision of the Commissioner – Relevance of the Constitution to statutory construction.

Constitutional law (Cth) – Chapter III – Judicial power – Integrity of State Supreme Courts – Whether s 76(2) impairs the Supreme Court's character as independent and impartial or otherwise improperly controls the exercise of its jurisdiction contrary to Ch III of the Constitution – Effect of restriction on ability to ensure equality between litigants – Effect of restriction on publication of information in reasons for judgment – Effect of restriction on ability of party to bring appeal proceedings – Role of Executive officers in relation to the judicial process.

Words and phrases – "confidential", "fortification removal notice", "publicly disclosed", "review".

Constitution, Ch III.
Corruption and Crime Commission Act 2003 (WA), s 76(2).

1 GLEESON CJ. The issues, the facts and the legislation appear from the reasons for judgment of Crennan J. I agree that the appeal should be dismissed for the reasons given by Crennan J, and would make the following additional comments.

2 In question was the possible invalidity of s 76 of the *Corruption and Crime Commission Act* 2003 (WA) ("the CCC Act"), or at least s 76(2). The appellant contended that s 76(2) was invalid, but that the remainder of the section was valid. The respondent argued that s 76 was wholly valid but, if that were not so, then it was wholly invalid: in brief, that, if s 76(2) were invalid, it was inseverable.

3 The legislation of which s 76 is a part, in its broadest outline, is of a kind which authorises the executive government to order the making of alterations to, or the carrying out of work on, buildings. As was pointed out in argument, such orders are commonly made for a variety of reasons, including health, sanitation, considerations of local amenity, or lack of permission under laws relating to planning and development. When made, the orders affect property rights. The orders with which the relevant provisions of the CCC Act are concerned have a narrower focus. They affect a certain kind of property right, involving the erection and maintenance of heavy fortifications on premises. Where the premises are suspected of being used by people involved in organised crime, there is a power to order removal of the fortifications. Such removal facilitates access to the premises (for example, pursuant to search warrants) by law enforcement agencies. The relevant provisions of the CCC Act were enacted to replace earlier legislation entitled the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act* 2002 (WA).

4 Section 76 provides for a limited form of judicial review of fortification removal notices issued by the Commissioner of Police under s 72(2) of the CCC Act. Such a notice requires a reasonable belief by the Commissioner of Police that the subject premises are heavily fortified and are habitually used as a place of resort by people reasonably suspected to be involved in organised crime. Under s 76(1), the question for the Supreme Court, upon review, is whether the Commissioner of Police could reasonably have had that belief.

5 It is only necessary to state the context and the issue to see that it is likely that judicial review proceedings under s 76 may give rise to problems of confidential information, including information that would reveal the identity of police informers or compromise current police investigations. Parliament sought to address those problems in s 76(2). It is, however, important to consider the alternative, especially since it is said that s 76 could operate without s 76(2). An alternative would have been to make no specific provision about confidentiality, but to leave the general law to apply. Claims for public interest immunity against

disclosure of information of the kind just mentioned are well known[1]. The consequence of success of such a claim is that information which is subject to the immunity is not available as evidence to be taken into account in deciding the outcome of the proceedings. In view of the nature of the proceedings for which s 76(1) provides, and the issue in those proceedings, there would almost certainly be cases in which a successful claim for public interest immunity by the Commissioner of Police would have the practical consequence of making it impossible for the Court to exercise the review function contemplated by s 76(1). The Court would not be able to have regard to some, or perhaps any, of the information on which the Commissioner's belief was based. In that event, the application for review may be bound to fail. Without s 76(2), not only would s 76 have a substantially different practical operation; there would be plainly foreseeable circumstances in which it would have no practical operation at all. A provision such as s 7 of the *Interpretation Act* 1984 (WA) cannot be applied to produce a consequence so radically different from that which Parliament has enacted[2].

6 Quite apart from the question of severability, this consideration of how s 76 would work without s 76(2) assists to place in proper perspective the appellant's arguments based on *Kable v Director of Public Prosecutions*[3]. Another consideration essential to an evaluation of that argument is the true construction of s 76(2). Wheeler JA, who dissented in the Western Australian Court of Appeal, recorded that there was little argument addressed to that Court about the proper construction of s 76 in its statutory context. In this Court, senior counsel for the respondent's first argument was that Wheeler JA had based her decision upon an erroneous interpretation of s 76(2).

7 Wheeler JA held it to be fatal to the validity of s 76(2) that, in a context of determining (under s 76(1)) the validity of executive action, the Court was required by s 76(2) to accept a decision, *dictated* to it by the Commissioner of Police, as to the confidentiality of information, without exercising its own judgment about the matter of confidentiality. Senior counsel for the respondent Commissioner submitted that this view of s 76(2) is incorrect, and the error of construction undermines the basis of Wheeler JA's reasoning. The submission should be accepted. For the reasons explained by Crennan J, and by Gummow, Hayne, Heydon and Kiefel JJ, s 76(2) does not empower the Commissioner of Police to dictate anything. It enables the Commissioner of Police to identify information and make a claim for confidentiality, advancing reasons (if the

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1 See, for example, *Sankey v Whitlam* (1978) 142 CLR 1 at 61-62; *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 674-675.

2 *Pidoto v Victoria* (1943) 68 CLR 87 at 107-111.

3 (1996) 189 CLR 51.

conclusion is not self-evident) as to why its disclosure might prejudice the operations of the Commissioner. It is for the Court to decide whether the claim for confidentiality should be upheld, that is, whether the condition upon which s 76(2) operates (that disclosure might prejudice the operations of the Commissioner) has been made out. That is the construction of s 76(2) advanced on behalf of the Commissioner of Police in this Court. It appears from what Wheeler JA said that it was not a question that was the subject of much, or any, argument in the Court of Appeal, but it is not suggested that the point is not now open for debate. The ground on which Wheeler JA decided the case in favour of the appellant makes the point very important. Senior Counsel for the Commissioner submitted that "if the Court determined that disclosure of the information identified as confidential could not prejudice the Commissioner's operations, then that information would be information in relation to which there would not be an efficacious identification" for the purposes of s 76(2). Once that construction of s 76(2) is accepted, as it seems to me it should be accepted, then the principal foundation for the appellant's argument on validity disappears.

8 GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. This appeal from the Court of Appeal of the Supreme Court of Western Australia (Martin CJ and Steytler P; Wheeler JA dissenting)[4] concerns the validity of legislation of that State which confers jurisdiction upon the Supreme Court in a new species of judicial review of administrative action. There has been no adjudication of the underlying review proceedings in the course of which constitutional issues have arisen. This Court is concerned with those issues and not with any other questions which are yet undetermined in the Supreme Court.

9 The Supreme Court is identified in Ch III of the Constitution both as "the Supreme Court of any State" in s 73(ii) and as "any court of a State" in s 77(iii). In the instant proceeding in the Supreme Court, the objection to legislative validity having been taken by the present appellant, the Supreme Court became seised of a matter arising under the Constitution or involving its interpretation (Constitution ss 76(i), 77(iii), *Judiciary Act* 1903 (Cth) s 39(2)). However, the disputed constitutional issues concern the efficacy of the exercise by the Supreme Court not of federal jurisdiction, but of jurisdiction provided by State statute law. That efficacy is challenged for reasons based in Ch III of the Constitution, but the jurisdiction in question is State jurisdiction.

10 In their joint judgment in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[5], McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ expressed acceptance of the proposition:

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

Their Honours went on[6] to remark upon the impossibility of making an exhaustive statement of the minimum characteristics of such an independent and impartial tribunal. But it may be said that the conditions which must exist for courts in this country to administer justice according to law are inconsistent with some forms of external control of those courts appropriate to the exercise of authority by public officials and administrators. The appellant contends that the

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4 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245.

5 (2004) 218 CLR 146 at 163 [29].

6 (2004) 218 CLR 146 at 163 [30]. See also the remarks of Gleeson CJ at 152-153 [3].

legislation under challenge does purport to exercise an impermissible form of control over the exercise by the Supreme Court of its jurisdiction.

11 The first step in the making of that assessment of the validity of any given law is one of statutory construction. So far as different constructions appear to be available, a construction is to be selected which would avoid rather than lead to a conclusion of constitutional invalidity[7]. Further, where, as in this case, no facts are in dispute, it is not only competent but may be expedient in the interests of justice for this Court to entertain an argument as to statutory construction even if it was not previously fully developed in that form[8].

12 When the task of statutory construction is performed in the present case it becomes apparent that the majority of the Court of Appeal reached the correct result in dismissing the challenge to validity.

The legislation

13 Part 4 of the *Corruption and Crime Commission Act* 2003 (WA) ("the Act") is headed "Organised crime: exceptional powers and fortification removal". Division 6 (ss 67-80) of Pt 4 is headed "Fortifications". The expression "fortification" is so defined as to mean any structure or device that is designed to prevent or impede uninvited entry to premises or to provide any other form of countermeasure against such uninvited entry; the structure or device may stand alone or be part of a system (s 67(1)). Premises are "heavily fortified" if there are fortifications to an extent or of a nature reasonably regarded as excessive for premises of the kind in question (s 67(2)).

14 An important part in the scheme provided by Div 6 is played by the Corruption and Crime Commission ("the Commission"), a body established by Pt 2 of the Act. Section 68 of the Act states:

> "68(1) The Commissioner of Police may, without giving notice to any other person, apply to the Commission for the issue of a fortification warning notice.

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7 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 161-162 [355].

8 See *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

(2) The Commission may issue a fortification warning notice if satisfied on the balance of probabilities that there are reasonable grounds for suspecting that the premises to which it relates are –

(a) heavily fortified; and

(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.

(3) The Commission may be satisfied by a statement made by a police officer and verified by statutory declaration."

The expression "organised crime" is defined in s 3 so as to identify the activities of two or more persons who are associated together solely or partly for purposes in the pursuit of which two or more of a certain species of offence are committed and the commission of each offence involves substantial planning and organisation. The offences are those listed in Sched 1. This lists a range of offences under the statute law of the State, in particular under the *Criminal Code* (WA), the *Criminal Property Confiscation Act* 2000 (WA), the *Firearms Act* 1973 (WA) and the *Misuse of Drugs Act* 1981 (WA). A main purpose of the Act is stated in s 7A as being "to combat and reduce the incidence of organised crime".

15 A "fortification warning notice" is addressed by the Commission to the owner of the premises and other "interested persons", including any lessee and others in actual occupation (s 69(1)). The notice must include, among other information, a warning that "a fortification removal notice" may be issued unless within a period of 14 days after the giving of the notice ("the submission period"), the Commissioner of Police is satisfied of two matters which are expressed in the alternative and in the negative (s 69(2)(b)). The matters are:

"(i) the premises are not heavily fortified; or

(ii) the premises are not 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".

16 The power of the Commissioner of Police to issue a fortification removal notice (s 72(1)) is constrained, in particular, by s 72(2). This has an affinity to s 69(2)(b), set out above, but is cast in affirmative terms and states:

> "The Commissioner of Police *cannot* issue the fortification removal notice *unless*, after considering each submission, if any, made before the submission period elapsed, *the Commissioner of Police reasonably believes that* the premises are –
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> (a) heavily fortified; and
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> (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." (emphasis added)

In default of compliance with a fortification removal notice, the Commissioner of Police may cause the fortifications to be removed or modified to the extent required by the notice (s 75(1)). Section 77 renders it a crime for a person to do anything intending to prevent, obstruct, or delay, the removal or modification of fortifications in accordance with a fortification removal notice. Sections 79 and 80 respectively provide that no claim for compensation arises by reason of the exercise of powers under Div 6 and no action lies in tort against a person for damage to property at the premises caused by the performance in good faith of a function under Div 6.

The Supreme Court

17 The Supreme Court is drawn into this statutory scheme by the provisions of s 76. The appellant contends, in particular, that the Court of Appeal should have declared that s 76(2) is invalid. If the appellant were to succeed in that submission questions then would arise of the possible severance of s 76(2).

18 The appellant commenced in 2004 a proceeding in the Supreme Court seeking review under s 76 of the decision of the respondent, the Commissioner of Police, to issue a fortification removal notice dated 5 May 2004 in respect of premises at 10 Lower Park Road, Maddington. There has been no adjudication of that review. Rather, on 1 May 2006, Blaxell J, acting under s 43 of the *Supreme Court Act* 1935 (WA) ("the Supreme Court Act") reserved for consideration of the Court of Appeal the question of the validity of s 76(2). An originating summons dated 3 October 2006, seeking declaratory relief to the same effect, was also referred to the Court of Appeal. The Court of Appeal answered the question reserved adversely to the appellant and dismissed the application for declaratory relief.

19 It is convenient now to turn to sub-ss (1), (5), (6) and (7) of s 76. These exemplify legislation which both creates fresh rights and liabilities and confers jurisdiction to provide remedies[9]. Further, subject to contrary provision, this conferral of jurisdiction is to be understood as bringing with it the usual incidents of the exercise of jurisdiction by the Supreme Court[10].

20 One such contrary provision is s 76(7). The sub-section renders the decision of the Supreme Court "final", and thereby attracts s 60(1)(c) of the Supreme Court Act. This stipulates that no appeal shall lie to the Court of Appeal from a decision which any statute of Western Australia states to be final[11].

21 It also should be noted that by operation of s 83 of the Act the "review" for which s 76 provides is to the exclusion of what otherwise would be the general jurisdiction of the Supreme Court[12] to issue the prerogative writs, grant injunctions and make declarations with respect to the performance of a function under Pt 4[13].

22 Something more should be said here respecting what would be involved in the exercise of that general jurisdiction of the Supreme Court in a case such as the present and the absence of the exclusion of the jurisdiction by s 83 of the Act.

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9 See *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24].

10 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7].

11 However, a provision to this effect in State legislation is ineffective to curtail the jurisdiction of this Court conferred by s 73(ii) of the Constitution: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 433 [55], 453 [127].

12 See s 16 of the Supreme Court Act.

13 This exclusion of judicial review by the Supreme Court is qualified by the opening words of s 83(1) of the Act, "Except with the consent of the Parliamentary Inspector [of the Commission]"; the giving of that consent is a function conferred on the Inspector by s 195(1)(f). The Inspector is an officer of the Parliament of the State (s 188(4)).

23 In such a proceeding for judicial review of a decision of the Commissioner of Police to issue a fortification removal notice, an attempt by an applicant to gain access by discovery or on subpoena to material relied upon by the Commissioner, and thereby support a case of reviewable error by the Commissioner, could be expected, as to at least some of that material, to be met by a claim of public interest immunity[14].

24 For the purpose of ruling on such a claim the Supreme Court might inspect for itself, and without disclosure to the applicant, the materials in question[15]. A successful claim to such immunity (preferably by decision of a judicial officer other than the trial judge) would have the consequence that the material was not admitted into evidence and would be denied both to the Court and the applicant. The handicap to which an applicant (and the Court) thereby are subjected appears from the following observations by Mason J in *Church of Scientology Inc v Woodward*[16], which were made when dealing with matters of national security:

> "Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying. It is a test which presents a formidable hurdle to a plaintiff and not only because a successful claim for Crown privilege may exclude from consideration the very material on which the plaintiff hopes to base his argument – that there is no real connexion between the intelligence sought and the topic. The fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials."

The construction of s 76

25 It is against this background that s 76 is to be construed. The scheme of s 76 is to displace what otherwise might have been a claim to public interest immunity by the Commissioner of Police. Section 76 does so by providing that

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14 See *Sankey v Whitlam* (1978) 142 CLR 1 at 61-62, as to the protection of police informers by the privilege.

15 *Sankey v Whitlam* (1978) 142 CLR 1 at 46, 110.

16 (1982) 154 CLR 25 at 61. See also the remarks of Brennan J at 75-77.

information supplied by the Commissioner to the Supreme Court is subject to limitations upon use and disclosure of that information where the Supreme Court is satisfied disclosure might prejudice the operations of the Commissioner.

26 Section 76(1) states:

> "If a fortification removal notice relating to premises has been issued, the owner or an interested person may, within 7 days after the day on which the notice is given to the owner of the premises, apply to the Supreme Court for a review of whether, having regard to the submissions, if any, made before the submission period elapsed and any other information that the Commissioner of Police took into consideration, the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice."

Sub-sections (5) and (6) of s 76 provide:

> "(5) The court may decide whether or not the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice.
>
> (6) If the court decides that the Commissioner of Police could not have reasonably had the belief required by section 72(2) when issuing the notice, the notice ceases to have effect."

27 The nature of the jurisdiction conferred upon the Supreme Court is identified in s 76(1) as a "review". This requires the Supreme Court to decide whether the Commissioner of Police, when issuing the fortification removal notice, "could have reasonably had" a certain belief. The "belief" is that required by s 72(2), as to the premises being "heavily fortified" and "habitually used" as a place of resort by certain persons being "members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime". If the Supreme Court decides that the Commissioner of Police could not have reasonably had the requisite belief, then the fortification review notice "ceases to have effect" (s 76(6)).

28 The determination, in an action for judicial review, of whether a statutory or other office holder could reasonably have had a belief of a particular description is readily recognised as the performance of a judicial function. Upon that review the Supreme Court is to be satisfied that facts exist which are

sufficient to have induced that belief in a reasonable person[17]. With respect to s 76(1) of the Act, the belief in issue is that of the Commissioner of Police stipulated by s 72(2) and its reasonableness is to be determined by the Supreme Court upon regard of any submissions and any other "information" which the Commissioner of Police took into consideration. It is that material which provides the record upon which this particular species of judicial review is determined by the Supreme Court.

29 Section 76(1) proceeds upon the footing that the Supreme Court will have before it the information which the Commissioner took into consideration when issuing the notice. The Commissioner of Police, in argument in this Court, accepted (and correctly so) that it is implicit in s 76(1) that information which was available to the Commissioner only in non-written form would have to be reduced to writing for the purposes of the review by the Supreme Court.

Section 76(2)

30 It is with the foregoing in mind, that attention is to be given to the text of s 76(2). This states:

> "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."

31 Counsel for the respondent put at the forefront of his oral submissions to this Court the proposition that s 76(2) does not render unexaminable by the Supreme Court the decision of the Commissioner of Police. That submission should be accepted and the contrary submission by the appellant rejected.

32 It will be apparent that the text of the sub-section falls into two parts, the second commencing with the words "and information ...". The first part of the sub-section identifies the circumstances in which the information in question may be identified as confidential; the second part is controlled by the first and deals with the consequences of that identification for the conduct of the review by the Supreme Court.

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17 *George v Rockett* (1990) 170 CLR 104 at 112-113.

33 Any exercise by the Commissioner of Police of the power conferred by s 76(2) is conditioned upon the requirement introduced by the phrase "if its disclosure might prejudice the operations of the Commissioner of Police". The power is not conditioned upon the existence of the opinion of the Commissioner to that effect. Rather, the condition operates in circumstances where information is provided by the Commissioner to the Supreme Court and it is for the Supreme Court to determine upon evidence provided to it whether the disclosure of the information might have the prejudicial effect spoken of in the sub-section. (It may be added that even if the power were expressly conditioned upon the existence of the opinion of the Commissioner, this would be treated as requiring an opinion formed reasonably upon the material before the Commissioner[18].)

34 The dissenting judgment of Wheeler JA in the Court of Appeal largely was premised upon a construction of s 76 which gave to the Commissioner the power to determine "unilaterally" that materials were not to be disclosed, 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 under s 76[19]. However, for the reasons given above, that premise should not be accepted and as a result the stated consequence of Executive Branch constraint does not follow.

35 What then of the second part of s 76(2)? This states that the information is for "the use" only of the Supreme Court. However, that "use" entails all that is necessary or appropriate for the exercise by the Supreme Court of its jurisdiction to conduct the "review" identified in s 76(1)[20]. The sub-section continues in terms cast in the passive voice, a legislative drafting practice as undesirable as it is frequent. The information is not to be disclosed to any other person (including a party to the proceedings) and is not to be publicly disclosed in any way. But, one asks, disclosed by whom and under what sanction?

36 The Act specifies no sanction or offence under the criminal law, and none was pointed to in submissions. The preferable construction of the words "and is not to be disclosed to any other person, whether or not a party to the

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18 The relevant authorities in this Court are collected in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34].

19 (2007) 33 WAR 245 at 286.

20 See the reasons of Brennan CJ in *Nicholas v The Queen* (1998) 193 CLR 173 at 188-189 [23].

proceedings" is that they deny what otherwise would be any standing or entitlement of parties and non-parties under the usual processes of the Supreme Court in civil litigation to obtain any order or relief whether by way of discovery, subpoena or otherwise, which would entail disclosure of the information. However, two points should be made here. The first is that the operation of this legislative regime has an outcome comparable with that of the common law respecting public interest immunity, but with the difference that the Court itself may make use of the information in question. The second is related to the first, and is that the operation of this provision, like the balance of s 76(2), is conditioned upon the Supreme Court first having determined that disclosure of the information, identified by the Commissioner from that provided to the Court, might prejudice the operations of the Commissioner. Accordingly, there is here no legislative mandate for dictation to the Supreme Court by the Commissioner of the performance of its review function.

37 There remains the phrase "[nor] publicly disclosed in any way". This may be addressed generally to any party to the proceedings and any other third person, but without any sanction beyond, perhaps, the contempt power of the Supreme Court in an appropriate case. However, the critical complaint by the appellant is that the requirement that there be no public disclosure also is directed to the Supreme Court and to the contents of any reasons for judgment it delivers upon a review application.

38 A possible construction of the phrase in question in any application it has to the Supreme Court is that it operates as a condition upon the grant of jurisdiction to conduct the "review". But that construction should only be accepted in a case (unlike s 76(2)) where the legislative will is clearly expressed, particularly so where the court is a State Supreme Court[21].

39 As 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[22]. However, as indicated by the result in *Nicholas v The Queen*[23], upholding the validity of s 15X of the *Crimes Act* 1914

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21 See *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 375 [31].

22 cf *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 669-670 [47]-[48].

23 (1998) 193 CLR 173.

(Cth), there is no impermissible interference with the exercise of judicial power even by such a significant evidentiary provision displacing the common law formulated in *Ridgeway v The Queen*[24].

40 If read as addressed to the Supreme Court, the words "[nor] publicly disclosed in any way" must also be read against the practice which from time to time sees the courts restrict the publication of portions of reasons for judgment and to formulate the balance of the reasons to accommodate the restriction. In argument on this appeal much was made by the respondent, and the Attorneys-General who intervened in support, of what might be done in that respect where issues of national security were involved. Perhaps a more mundane example is the treatment of formulae and the like in trade secrets litigation.

41 Remarks of Deane J in *Australian Broadcasting Commission v Parish*[25] are relevant here. His Honour said:

> "The results of an undue discounting of legitimate claims to confidentiality are likely to be both the deterrence of the subject from having recourse to courts of justice for the vindication of legal rights or the enforcement of criminal law and the discouragement of willing co-operation on the part of witnesses whose evidence is necessary to enable the ascertainment of truth. The interests of the administration of justice plainly make it desirable that obligations of confidence be not lightly overruled and that legitimate expectations of confidentiality as to private and confidential transactions and affairs be not lightly disregarded."

He added[26]:

> "In some cases, where publicity would destroy the subject matter of the litigation, the avoidance of prejudice to the administration of justice may make it imperative that the ordinary prima facie rule of open justice in the courtroom gives way to the overriding need for confidentiality."

42 The words in s 76(2), "[nor] publicly disclosed in any way" must be read with the whole of what precedes them in that sub-section. The subject matter is information the disclosure of which the Supreme Court considers might prejudice

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24 (1995) 184 CLR 19.

25 (1980) 29 ALR 228 at 255.

26 (1980) 29 ALR 228 at 255.

the operations of the Commissioner of Police. One of the ways in which that prejudice might be sustained could be from publication in the reasons for judgment of the Supreme Court.

43 The form taken by reasons of the Court which might subsequently be given when completing the "review" for which s 76 provides, is a matter for consideration at an earlier stage. That stage arises when the Court first considers, as to the information identified by the Commissioner, whether "its disclosure might prejudice the operations of the Commissioner of Police".

44 In their application to the Supreme Court itself, the words "[nor] publicly disclosed in any way" should not be read as an attempted legislative direction as to the manner of the outcome of any review application made under s 76. The words are no more than an attempt at exhortation and an effort to focus attention by the Court to the prejudicial effect disclosure may have. That is, however, something the Supreme Court necessarily will have in mind throughout, given the framework provided by s 76(2).

Orders

45 The appeal should be dismissed with costs.

46 KIRBY J. The function of this Court in constitutional adjudication is "to give the proper meaning to … public values"[27]. Such values are derived from the constitutional text, read in the light of past authority, legal history and considerations of legal principle and policy.

47 Inevitably, a judge tests each case by reference to its possible implications for foreseeable future controversies and in the context of the overall operation of the system of government provided by the Constitution. That is why, in *Roach v Electoral Commissioner*[28], the majority scrutinised a federal law enlarging the disqualification of prisoners from voting against a number of postulates. Were the Parliament's powers of disenfranchisement unqualified? Could disenfranchisement of Roman Catholics, for example, be restored[29]? Or of women[30]? Or of Aboriginals[31]? Negative answers to these questions demonstrated that the issue before the Court demanded the drawing of a constitutional line, identified by reference to the text, historical considerations and the basic principles and purposes of representative democracy to which the Constitution gives expression.

48 Important principles of the Constitution are also found in Ch III. That Chapter contains unique arrangements for an integrated national Judicature, including State Supreme Courts, federal and other courts. All such courts must enjoy institutional integrity and impartiality. This follows both from the appellate arrangements of the Constitution[32] and from the capacity of federal legislation to invest courts with federal jurisdiction[33].

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27 Fiss, "The Supreme Court 1978 Term – Foreword: The Forms of Justice", (1979) 93 *Harvard Law Review* 1 at 30 cited Marshall, "The Separation of Powers, An American Perspective", (2006) 22 *South African Journal on Human Rights* 10 at 10.

28 (2007) 81 ALJR 1830; 239 ALR 1.

29 (2007) 81 ALJR 1830 at 1834 [8]; 239 ALR 1 at 5. See *Roman Catholic Relief Act* 1829 (UK); *Roman Catholic Relief Act* 1926 (UK).

30 (2007) 81 ALJR 1830 at 1833 [5]; 239 ALR 1 at 4.

31 (2007) 81 ALJR 1830 at 1833 [5]; 239 ALR 1 at 4.

32 Constitution, s 73. See also s 74.

33 Constitution, ss 71 and 77(iii). See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

49 This appeal, which arises from a divided decision of the Court of Appeal of the Supreme Court of Western Australia[34], presents this Court with a question as to the validity of s 76(2) of the *Corruption and Crime Commission Act* 2003 (WA) ("the Act"). In order to answer the question of validity, it is necessary first to determine the meaning of the contested sub-section. If the provision is demonstrated to be invalid, a consequential question arises as to whether it can be severed from the Act.

50 In deciding these questions, this Court is called upon, once again, to consider the ambit of the constitutional principle which it established in *Kable v Director of Public Prosecutions (NSW)*[35]. That principle[36]:

> "forbids attempts of State Parliaments to impose on courts, notably Supreme Courts, functions that would oblige them to act in relation to a person 'in a manner which is inconsistent with traditional judicial process'[37]. It prevents attempts to impose on such courts 'proceedings [not] otherwise known to the law', that is, those not partaking 'of the nature of legal proceedings'[38]. It proscribes parliamentary endeavours to 'compromise the institutional impartiality' of a State Supreme Court[39]. It forbids the conferral upon State courts of functions 'repugnant to judicial process'[40]."

51 Experience teaches that governments and parliaments in Australia occasionally attempt "to spend the reputational currency of the independent courts in the pursuit of objectives which legislators deem to be popular"[41]. They sometimes seek to cloak their decisions "in the neutral colors of judicial

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34 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245.

35 (1996) 189 CLR 51.

36 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 628 [141].

37 *Kable* (1996) 189 CLR 51 at 98 per Toohey J. See also *Grollo v Palmer* (1995) 184 CLR 348 at 363-365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 8-9, 13-14, 20-22.

38 *Kable* (1996) 189 CLR 51 at 106 per Gaudron J.

39 *Kable* (1996) 189 CLR 51 at 121 per McHugh J.

40 *Kable* (1996) 189 CLR 51 at 134 per Gummow J.

41 *Fardon* (2004) 223 CLR 575 at 628 [142].

action"[42]. Novel arrangements are then introduced into the law that impinge on the "judicial process". When challenged, such arrangements should be the subject of strict scrutiny.

52 In the present appeal, an unusual (if not unique) State law appears to impinge on the performance by the Supreme Court of Western Australia ("the Supreme Court") of its ordinary functions in the ordinary way. I consider that the sub-section involves an impermissible legislative direction to the Supreme Court[43]. Effectively, it imposes the decision of an officer of the Executive Government upon the Supreme Court. That officer, in law or in substance, thereby controls the discharge of the judicial process, the effective participation of the Supreme Court in that process and the capacity of the Supreme Court to explain the reasons for its decision to the parties and the public. The judge may appear in robes to pronounce what shall be done. But the hand that directs the process is elsewhere, outside the courtroom, and actually belongs to the respondent party.

53 The *Kable* principle was at first regarded as "far-reaching"[44]. Yet if this is so, it has certainly been "under-performing"[45]. The circumstances of this case are in some ways special and peculiar. However, the endorsement by the majority of the challenged legislation is a matter of concern. Section 76(2) of the Act represents a disturbing precedent. To prevent the endorsement and possible future extension of the precedent, the appeal should be allowed. The conclusion favoured by the dissenting judge in the Court of Appeal was correct. It should now be adopted by this Court.

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42 *Mistretta v United States* 488 US 361 at 407 (1989); cf *Fardon* (2004) 223 CLR 575 at 602 [44], 615 [91].

43 cf *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 190 [25].

44 *Baker v The Queen* (2004) 223 CLR 513 at 544 [83] citing eg Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 408; Miller, "Criminal Cases in the High Court of Australia", (1997) 21 *Criminal Law Journal* 92 at 100.

45 Wheeler, "The *Kable* Doctrine and State Legislative Power Over State Courts", (2005) 20(2) *Australasian Parliamentary Review* 15 at 30; cf *Fardon* (2004) 223 CLR 575 at 646 [190]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 125 [203].

The facts

54 The background facts are described in the reasons of Gummow, Hayne, Heydon and Kiefel JJ ("the joint reasons")[46] and in the reasons of Crennan J[47]. As those reasons point out, there has been no adjudication of the underlying proceedings by which the Gypsy Jokers Motorcycle Club Incorporated ("the appellant") invoked the jurisdiction of the Supreme Court. It did so by an originating summons claiming an order for review from the Supreme Court pursuant to s 76 of the Act.

55 The application for review challenged the decision of the Commissioner of Police of Western Australia ("the Commissioner") to issue a "fortification removal notice" ("notice") to the appellant. Initially, an identified police officer was named as the respondent. Subsequently, when the judge of the Supreme Court before whom the summons was returned (Blaxell J) referred the validity of s 76 or alternatively s 76(2) of the Act for the opinion of the Court of Appeal[48], the name of the respondent was changed to the State of Western Australia. By the time the orders of the Court of Appeal were made, the Commissioner had been substituted as respondent. That is the form in which the proceedings come before this Court. Because of the terms of s 76 of the Act, it is the correct form[49].

56 Although special leave was granted in respect of the whole of the decision of the Court of Appeal, the only point argued by the appellant concerned the validity of s 76(2) of the Act. The appellant did not dispute that s 76 was otherwise valid. Given that, in these proceedings, the appellant initiated the s 76 "review", a general invalidation of the section would destroy its proceedings.

57 The Commissioner contended that even if s 76(2) were invalid, the sub-section could not be severed. The entire section would fall. This would leave the appellant with no statutory right of "review" of the notice issued by the Corruption and Crime Commission of Western Australia ("the Commission") pursuant to s 68(2) of the Act. Presumably, any judicial review that might then be available to the appellant would be of a general or "prerogative" kind[50]. Given the limited question before this Court, the availability of any such review need not be explored. However, it appears that it too would be subject to a

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46 Joint reasons at [18].

47 Reasons of Crennan J at [135]-[142], [153]-[156].

48 Pursuant to s 43 of the *Supreme Court Act* 1935 (WA).

49 See in particular the Act, s 76(5).

50 See *Supreme Court Act* 1935 (WA), s 16.

precondition of official consent for the issue of such a writ, itself a somewhat surprising requirement[51].

58 In response to the appellant's summons, the Commissioner filed an affidavit describing his application to the Commission in February 2004 for the issue of a notice. The affidavit annexed the Commissioner's application itself and other related documents. Given that some two years elapsed between the issue of the notice in May 2004 and the referral to the Court of Appeal in May 2006, and that nearly two further years have elapsed since, it scarcely seems arguable that an urgent problem of dangerous fortification or organised crime[52] exists in this case. Otherwise, one would have expected the authorities to have sought expedited hearings and facilitated a prompt determination of the review. The languid pace of the proceedings sits most oddly with the highly exceptional features of s 76(2).

59 This Court was informed that, whilst the proceedings were pending at first instance, a video film of the appellant's allegedly offending premises was shown, over the objection of the Commissioner. The primary judge was asked to "accommodate a view"[53]. I take this to have meant an inspection by him of the premises. His Honour reserved his position on that apparently sensible application. Once the legal questions were reserved for the Court of Appeal, the proceedings went into hibernation.

60 Most of the contents of the Commissioner's affidavit (and the annexures) were made available to the appellant. However, certain paragraphs were blacked out and indecipherable. This is the form in which the documents appear in the record as it has been seen by this Court, as presumably also by the Court of Appeal. These proceedings concern the validity of the operation of the Act on the use that may be made by the Supreme Court of the information the documents contain, including that part of it masked in this way.

The legislation

61 The joint reasons describe the overall scheme of the Act, the provisions governing "fortifications" and the way in which the Commissioner may apply to the Commission for the issue of a notice obliging the removal or modification of

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51 The Act, s 83. See reasons of Crennan J at [152].

52 See the Act, s 72(2).

53 [2007] HCATrans 551 at 152 [6810].

such fortifications[54]. Additional particulars are contained in the reasons of Crennan J[55].

62 The joint reasons explain how the Supreme Court is "drawn into [the] statutory scheme"[56] and how the Act affords an "owner or an interested person" an entitlement to invoke the jurisdiction and powers of the Supreme Court to conduct a "review" of the Commissioner's decision to issue the notice[57]. Although the relevant provisions of s 76 of the Act are set out in other reasons, that section is critical to this appeal, and I will reproduce so much of it as is essential to my analysis:

> "76 Review of fortification removal notice
>
> (1) If a fortification removal notice relating to premises has been issued, the owner or an interested person may, within 7 days after the day on which the notice is given to the owner of the premises, apply to the Supreme Court for a review of whether, having regard to the submissions, if any, made before the submission period elapsed and any other information that the Commissioner of Police took into consideration, the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice.
>
> (2) 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.
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> (3) …
>
> (4) …

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54 Joint reasons at [13]-[16].

55 Reasons of Crennan J at [143]-[150].

56 Joint reasons at [17].

57 Joint reasons at [26]-[27]. See also reasons of Crennan J at [151].

(5) The court may decide whether or not the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice.

(6) If the court decides that the Commissioner of Police could not have reasonably had the belief required by section 72(2) when issuing the notice, the notice ceases to have effect.

(7) The decision of the court on an application for review under this section is final …"

The decision of the Court of Appeal

63 *Majority opinions*: The principal reasons for the majority in the Court of Appeal were given by Steytler P. His Honour undertook an analysis of the decisions of this Court, and of intermediate courts, in which the "*Kable* principle" had been considered[58]. He noted that the only decision of an intermediate court in which the principle had proved effective to invalidate legislation was *Re Criminal Proceeds Confiscation Act* 2002 (Qld)[59], a decision of the Queensland Court of Appeal.

64 Steytler P accepted that there were "aspects of s 76 that are antithetical to the judicial process". He said[60]:

> "It is unfair to give to one party to a controversy (that directly affects property rights) a power, effectively, to prevent evidence, relevant to and potentially decisive of the controversy, from being disclosed to the other party to that controversy. The unfairness of this process seems to me to be incontrovertible, no matter how well-intentioned the former party might be thought to be and even if (which is not suggested by either party) it might be implicit in the section that the Supreme Court is itself able to make some (necessarily limited) assessment as regards the question whether disclosure 'might' in fact prejudice operations of the Commissioner and therefore whether confidentiality has properly been claimed. There is no doubt that s 76(2) has the potential to result in a serious denial of natural justice … The situation is made worse by the inability of the court to publicly explain its decision by way of adequate reasons … when its decision turns upon the confidential information, as it often will, and by the denial of any right of appeal."

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58 (2007) 33 WAR 245 at 266-273 [77]-[95].

59 [2004] 1 Qd R 40 cited (2007) 33 WAR 245 at 266 [77].

60 (2007) 33 WAR 245 at 276 [106].

65 Nonetheless, Steytler P concluded that the offending features of s 76(2) of the Act were insufficient to support a finding of invalidity. The sub-section did not "compromise the institutional integrity of the court to such an extent that it is no longer a court of the kind contemplated by Ch III of the *Commonwealth Constitution*"[61]. In coming to this conclusion, his Honour was clearly affected by what he took this Court to have held in earlier cases, including *Fardon v Attorney-General (Qld)*[62] and *Forge v Australian Securities and Investments Commission*[63].

66 Steytler P pointed out that courts are "often required to implement laws of which they disapprove"[64]. In light of this Court's decisions since the *Kable* principle was first expounded, he described the challenge facing the appellant as a "substantial hurdle"[65]. Relevant to his conclusion was what he described as the "very limited function given to the court by s 76"[66]. He decided that, as in *Fardon*, the Supreme Court was "still able to exercise some form of genuine evaluative or adjudicative review"[67]. He felt reinforced in this opinion by the approach of the Full Court of the Supreme Court of South Australia in *Osenkowski v Magistrates Court of South Australia*[68] and by a reflection on the way in which Australian courts in the past have dealt with claims of public interest immunity[69].

67 Martin CJ, in separate reasons, agreed with Steytler P's conclusion[70]. He also addressed some additional comments to what he called the "tension between

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61 (2007) 23 WAR 245 at 276 [107].

62 (2004) 223 CLR 575.

63 (2006) 228 CLR 45. See (2007) 33 WAR 245 at 276-277 [109].

64 (2007) 33 WAR 245 at 276 [107].

65 (2007) 33 WAR 245 at 277 [110].

66 (2007) 33 WAR 245 at 277 [110].

67 (2007) 33 WAR 245 at 277 [110] referring to *Fardon* (2004) 223 CLR 575 at 656 [219].

68 (2006) 96 SASR 456 at 467 [28] cited (2007) 33 WAR 245 at 278 [113].

69 (2007) 33 WAR 245 at 277-278 [112] referring to *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61; *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39.

70 (2007) 33 WAR 245 at 248 [1].

the contemporary desire to afford judicial review of administrative decisions and the occasional need to protect the confidentiality of the material to be relied upon in conducting the review"[71]. He referred to decisions addressing that tension in the United Kingdom, Europe, New Zealand, Canada and the United States of America[72]. He laid emphasis on the fact that no Australian authority could be cited "in support of the proposition that unrestricted access by a party to all the information upon which a court relies for its adjudication of the case before it, is an essential or indispensable aspect of a fair trial"[73]. Martin CJ concluded that s 76 "does not, singularly, constitute a departure from accepted judicial process … [or] compromise the institutional integrity of this Court"[74].

68 *Dissenting opinion*: Wheeler JA, in dissent, also examined recent decisions of this Court. Drawing upon the joint reasons in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[75], she considered that essential to the *Kable* principle was the requirement that special care be taken in the performance by all judges, federal or State, of activities that are rendered "subject to instruction by the Legislature or the Executive in [that] performance"[76]. Her Honour concluded[77]:

> "[I]f one applies the principles enunciated in *Wilson*, then the consideration which is fatal to the validity of s 76(2) is that the court is required to determine the validity of Executive action in circumstances in which the procedure it adopts is dictated by a decision made … by an officer of the Executive, rather than by the court either applying a law or instrument made under a law, or exercising its own inherent jurisdiction to regulate its procedures."

69 Supportive of Wheeler JA's conclusion was a principle that she derived from observations of the United States Supreme Court in *Mistretta v United States*[78], mentioned by Gummow J in *Kable*[79] and by other judges earlier both in

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71 (2007) 33 WAR 245 at 249 [9].

72 (2007) 33 WAR 245 at 249-261 [10]-[55].

73 (2007) 33 WAR 245 at 261 [56].

74 (2007) 33 WAR 245 at 263 [62].

75 (1996) 189 CLR 1 at 17 cited (2007) 33 WAR 245 at 284-285 [144].

76 (2007) 33 WAR 245 at 285 [145].

77 (2007) 33 WAR 245 at 286-287 [152].

78 488 US 361 at 407 (1989). See reasons of Crennan J at [168].

Grollo v Palmer[80] and in *Wilson*[81]. That principle was said to be to the effect that it is impermissible for other branches of government to impose on judges a task amounting to "a grossly unjudicial chore"[82], in an attempt to "borrow" the judiciary's "reputation for impartiality"[83].

70 Wheeler JA accepted that there were arguments favouring a conclusion that s 76(2) was valid. However, "the concatenation of factors" that she identified led her to an opposite result[84]. My reasoning in this case proceeds along lines similar to that of Wheeler JA.

The issues

71 Three issues arise for decision:

(1) *The construction issue*: What is the meaning and operation of s 76 of the Act, and in particular of s 76(2)? What is the effect of s 76(2) as to the power of the Commissioner, an officer of the Executive Government of Western Australia[85], to control (in law or practical effect) the use the Supreme Court can make of "identified" information?

(2) *The Kable issue*: On its correct interpretation and in light of its operation in the present case, does s 76(2) of the Act offend the constitutional principles established in *Kable*? Is s 76(2), read with s 76(7), incompatible with the appellant's entitlement to bring an "appeal" against the Supreme Court's decision to this Court in accordance with the Constitution[86]? and

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79 (1996) 189 CLR 51 at 133.

80 (1995) 184 CLR 348 at 377 per McHugh J, 392 per Gummow J.

81 (1996) 189 CLR 1 at 9 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

82 *Hobson v Hansen* 265 F Supp 902 at 930 (1967) cited *Kable* (1996) 189 CLR 51 at 133.

83 (2007) 33 WAR 245 at 289 [160].

84 (2007) 33 WAR 245 at 289 [162].

85 *Police Act* 1892 (WA), s 5.

86 Constitution, s 73.

(3) *The severance issue*: If s 76(2) is invalid, should this Court sever it from the remainder of s 76, leaving issues of confidentiality and Executive privilege to be decided by reference to the common law governing public interest immunity and non-disclosure of confidential evidence? Would such severance amount, as the Commissioner contends, to an impermissible rewriting of the Act?

The interpretation of s 76 of the Act

72 *Importance of interpretation*: In constitutional adjudication it is important first to construe the legislation that is in issue[87]. The adoption of a particular construction might narrow, or obviate altogether, the constitutional question. It is therefore axiomatic that the starting point must be a precise understanding of what the impugned law means and how it is intended to operate in given circumstances.

73 Only one judge in the Court of Appeal made express reference to this starting point. That was Wheeler JA. Her Honour acknowledged Gummow J's observation in *Fardon*[88] to the effect that the question of whether a State law is incompatible with the exercise of federal judicial power requires both "close attention to the detail of impugned legislation" and advertence to the fact that the critical notion of "incompatibility" may be "insusceptible of further definition in terms which necessarily dictate future outcomes".

74 Correctly, in my view, these remarks call attention to the evaluative character of the question presented by the *Kable* principle. It is not really surprising that, over time, the Justices of this Court have had differences of opinion as to its application. The principle is expressed in words of considerable generality. It invokes deep-lying notions about the nature and requirements of the system of governance established by the Constitution. In effect, the *Kable* principle demands that judges give meaning and effect to public values, as explained by Professor Owen Fiss in the quote at the outset of these reasons[89].

75 *The evolution of the construction issue*: Wheeler JA noted that there was "little argument addressed to the [Court of Appeal] about the proper construction and effect of s 76"[90]. Nevertheless, it is clear that each of the judges below was

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87 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; *R v Hughes* (2000) 202 CLR 535 at 565-566 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; cf joint reasons at [11].

88 (2004) 223 CLR 575 at 618 [104] cited (2007) 33 WAR 245 at 289 [162].

89 See above these reasons at [46].

90 (2007) 33 WAR 245 at 280 [128].

cognisant of their obligations in this regard. However, none of those judges took a view of s 76 that was as narrow as that now adopted in the majority reasons in this Court. In particular, none of those judges supposed that the Commissioner's "identification" of particular information as confidential gave rise to a justiciable issue.

76 A thorough examination of the relevant documents reveals that the construction issue developed in the following manner:

- all three judges in the Court of Appeal proceeded on the assumption that the Commissioner's power of identification was both exclusive and conclusive;
- the parties did not challenge this assumption in that Court;
- the appellant in this Court framed its written submissions on the basis that the Court of Appeal's understanding was not under challenge;
- neither the Commissioner nor the interveners foreshadowed an attack on that understanding in their written submissions. Indeed, their written submissions indicate that all of them approached the matter on the basis that the propounded understanding was correct;
- the construction argument now accepted in the reasons of the majority in this Court appears first to have been raised during the Commissioner's oral submissions; and
- most of the interveners embraced the novel argument in the course of their oral arguments in the hearing before this Court.

77 *The Court of Appeal*: The joint reasons conclude that Wheeler JA fell into error in accepting the premise that s 76(2) accords unilateral power to the Commissioner to determine that information is subject to a non-disclosure requirement[91]. However, it is apparent that Martin CJ and Steytler P also proceeded on that basis. So much is certainly implicit in their reasons. Martin CJ refers, for instance, to the "*statutory authority* given to the Commissioner of Police to *determine* that information provided to the court for the purposes of its review shall not be disclosed to any other person"[92]. Steytler P refers to "the Commissioner's right to *claim confidentiality, and hence*

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91 Joint reasons at [34]. See eg (2007) 33 WAR 245 at 286-287 [148]-[152].

92 (2007) 33 WAR 245 at 248 [6] (emphasis added). See also at 262 [59], 262-263 [61].

to limit the extent to which the information relied upon by him should be disclosed"[93].

78 All of the relevant discussion in the Court of Appeal, then, was founded on the assumption that the Commissioner could make an effective and conclusive "identification" without the imprimatur of the Supreme Court. Indeed, it is apparent from certain remarks of the judges below that the opposite interpretation, now embraced by the majority in this Court, was not even pressed in the Court of Appeal. Steytler P noted that it was "not suggested by either party" that s 76(2) envisaged even a limited role for the Supreme Court in assessing "whether confidentiality has properly been claimed"[94].

79 *A shift in the argument*: In this Court, the appellant's arguments assumed the correctness of the Court of Appeal's interpretation of s 76(2). Neither the Commissioner nor any of the interveners attempted, in their written submissions, to challenge that assumption. Each acknowledged, either expressly or implicitly, that s 76(2) obliged the Supreme Court to conform to the decision of the Commissioner. Each sought to meet the submissions of the appellant on that footing. It was not until the matter came before this Court for oral argument that the suggestion was first made that "section 76(2) does not render unexaminable by the Court the decision of the Commissioner of Police"[95]. According to counsel for the Commissioner[96]:

> "[I]f the Court determined that disclosure of the information identified as confidential could not prejudice the Commissioner's operations, then that information would be information in relation to which there would not be an efficacious identification – if I could pick up the words of section 76(2) – for the purpose of that provision, and the material, that information, would be available to the other side."

80 Most of the interveners then embraced this novel interpretation of s 76(2) in the course of oral argument. At one point, I remarked that I had never "seen so many law officers coming along … trying to read down the words of a Parliament"[97]. Normally, in this Court, one becomes accustomed to submissions urging the *widest* meaning of governmental legislation and the *largest* ambit of

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93 (2007) 33 WAR 245 at 277 [110] (emphasis added). See also at 276 [106].

94 (2007) 33 WAR 245 at 276 [106]. See also at 280-281 [128] per Wheeler JA.

95 [2007] HCATrans 550 at 52 [2323].

96 [2007] HCATrans 550 at 63 [2809].

97 [2007] HCATrans 551 at 137 [6157].

constitutional power to support it. At least one of the interveners, whilst embracing the narrow construction of the Act in oral argument, acknowledged that it was inconsistent with their written submissions, which had been drafted on the basis of the same "construction on which the court below proceeded"[98].

81 *A novel interpretation*: Thus, neither in the submissions of the parties before the Court of Appeal nor at an initial stage in this Court was the narrow view of s 76(2) advanced as a viable interpretation. Nevertheless, that is the view now accepted by the other members of this Court[99].

82 This is not the first time that this Court has adopted a novel interpretation of impugned legislation[100]. Of course, the Court has its own obligations in giving effect to legislation as it understands it. At least in this case, the novel interpretation was signalled in the course of oral argument. It was put to the parties and interveners during the hearing. However, it is important to appreciate that this interpretation represents a marked departure from that accepted or assumed by everyone to be correct before the appeal reached this Court.

83 *Defects of the new interpretation*: So far, the *Kable* principle has not attracted a substantial application from this Court, having never been applied since *Kable* itself. It has been suggested that "the principle may be operating prophylactically"[101]. One manifestation of this could be the reading down of State legislation so as to avoid inconsistency with the *Kable* principle.

84 If I could adopt the narrower view of s 76(2) of the Act, I would. However, in my opinion, it is artificial. Even making full allowance for applicable canons of construction, protective of the jurisdiction and powers of the Supreme Court, it is not an expression of the true meaning and operation of the provision as enacted and expressed to achieve a clear legislative purpose.

85 The Court of Appeal's interpretation of s 76(2) gives effect to the natural meaning of the text of that provision. It is plain that the term "information so identified" refers to information "identified" on the part of the Commissioner,

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98 [2007] HCATrans 551 at 94 [4179].

99 Reasons of Gleeson CJ at [1]; joint reasons at [31]; reasons of Crennan J at [170]-[171].

100 See eg *Combet v The Commonwealth* (2005) 224 CLR 494 at 611-613 [279]-[283]; cf at 566-567 [128]-[134].

101 *Forge* (2006) 228 CLR 45 at 125 [203] citing Wheeler, "The *Kable* Doctrine and State Legislative Power Over State Courts", (2005) 20(2) *Australasian Parliamentary Review* 15.

and the Commissioner alone. It is the Commissioner in whom the power of identification is reposed in the preceding words of the sub-section. No other view is compatible with the text and structure of the Act. Once the "information" is "so identified", its use is subject to the closing words of s 76(2). The Court is instructed that the information "*is*" available only for its own use, and "*is not*" to be disclosed to any other person (emphasis added). These consequences are not provisional or conditional, but rather arise as a simple function of the fact of "identification". It follows that whatever the Supreme Court might think or wish or need to do as a court, if the provisions of the Act are valid in these respects, the prohibition on disclosure is absolute. It carries into effect not the Supreme Court's ultimate judgment on the information, but in substance, and in law, that of the Commissioner.

86 The alternative construction of s 76(2) seizes upon the words "if its disclosure might prejudice the operations of the Commissioner of Police" as though their effect is to conjure up a role in this scheme, overlooked until now, for the Supreme Court. However, the sub-section provides no indication that that criterion is for the Supreme Court to examine. The criterion is, rather, referable to the power of identification. That is a power reserved to the Commissioner.

87 Had the legislature of Western Australia intended the construction now accepted in this Court to prevail, there would have been obvious ways of expressing that intention. One of any number of drafting conventions could have been employed to indicate that the Supreme Court was to be vested with an oversight role. However, the sub-section does not provide, for instance, that the Supreme Court must be "satisfied" that an identification was proper, or envisage the Commissioner making an "application" to have information quarantined. There is nothing analogous in this context to s 76(5) of the Act, which makes explicit the ability of the Supreme Court to "decide whether or not the Commissioner … could have reasonably had the belief required by section 72(2) when issuing the notice". Rather, s 76(2) establishes an apparently simple consequential scheme by which the Commissioner's act of identification has the results stated in the sub-section. In this context, I cannot accept that the present case is one in which infelicitous drafting has served to obscure the legislative intention. The intention is all too clear.

88 *The correct interpretation*: The first impressions of the judges in the Court of Appeal, and of the parties below and in their written submissions in this Court, were correct. Section 76(2) permits the respondent to the review (the Commissioner) to determine conclusively the ambit and identity of the confidential information which must not be disclosed to the applicant. This interpretation entails a number of practical consequences:

(1) The final decision-maker on the confidentiality of identified information is the Commissioner and not the Supreme Court;

(2) The Supreme Court cannot override or reverse the Commissioner's "identification" of the information as "confidential", however unreasonable such identification might appear to the Supreme Court to be;

(3) The Supreme Court is precluded from disclosing such information, including to the applicant for review, even if some disclosure is essential to permit the applicant to meet the case put against it or to make responsive submissions; and

(4) In giving reasons for its decision, the Supreme Court cannot, however important such information is to its reasoning, disclose it, even in a limited or guarded manner.

89 *The development of judicial review*: The character of s 76(2) becomes even more clear when developments of judicial review in Australia and England over the past 50 years are remembered.

90 In *Duncan v Cammell, Laird and Co*[102], following the failure of the submarine *Thetis* to resurface after a trial dive with the loss of many lives, dependants of the victims sued the shipbuilders for negligence. In a wartime decision, the House of Lords held that the sole arbiter of the public interest in relation to whether government documents, otherwise relevant and liable to production, should be produced to the court, was the relevant Minister.

91 Earlier, in *Robinson v South Australia [No 2]*[103], an Australian case involving commercial transactions of a State government, the Privy Council had held that courts retained a "reserve power", available in exceptional circumstances, to call for the production of documents over which Crown privilege had been claimed. After inspection, the court could disallow the claim if it were clear that it was unreasonable. That decision was disapproved by the House of Lords in *Duncan*.

92 Following Duncan, courts in a number of Commonwealth jurisdictions gradually reasserted the residual judicial power to overrule a claim of Crown privilege[104]. Thus, Australian courts approved and applied Robinson, preferring

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102 [1942] AC 624.

103 [1931] AC 704. See de Smith, *Judicial Review of Administrative Action*, 3rd ed (1973) at 37.

104 See eg *R v Snider* [1954] SCR 479; *Gagnon v Commission des Valeurs Mobilières du Québec* [1965] SCR 73; *Corbett v Social Security Commission* [1962] NZLR 878.

it to the House of Lords decision in Duncan[105]. The legal position was not corrected in England until a line of decisions culminating in Conway v Rimmer[106]. The effect of these decisions was that the ratio in Duncan had been unnecessary, obiter and wrong.

93 Professor de Smith, and other commentators, recognised that the reversion to the previous understanding of the residual function of the courts rendered *Conway* a decision "of first-rate importance"[107]. Yet, however important it was in the English context, it represented no more than the re-expression of a basic law inherent in the Australian constitutional setting. Here, the integrated Judicature of the Commonwealth, its separate constitutional position and its high importance in deciding federal questions, rendered notions of unreviewable Executive or legislative decision-making unpersuasive, at least where the "judicial process" was concerned. The re-expression of the English law was promptly approved and endorsed by this Court in *Sankey v Whitlam*[108].

94 In an Australian context, and certainly in federal courts, English constitutional notions of conclusive ministerial certificates must now be seen as of dubious legal validity. Their status under the Australian Constitution in respect of constitutional facts was specifically reserved by this Court in *Attorney-General (Cth) v Tse Chu-Fai*[109]. The Act in question in these proceedings must be considered against the background of the foregoing historical and constitutional developments. So much is made clear by the assertion on the part of the Commissioner that it was open to the Parliament of Western Australia to "take up the common law position adopted for a time after the decision in *Duncan* … and [to] make the issue of an official certificate [on the part of the Commissioner] the *factum* on which the law requiring or prohibiting admission of evidence operated". It is submissions such as this that lead me to my conclusion that the true "intention" or purpose of the Parliament in the challenged provisions of the Act was all too clear. Effectively, the Police Commissioner's identification of confidential information was akin to a conclusive ministerial certificate, as upheld in *Duncan*.

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105 See eg *Christie v Ford* (1957) 2 FLR 202; *Bruce v Waldron* [1963] VR 3; *Ex parte Brown; re Tunstall* (1966) 67 SR (NSW) 1.

106 [1968] AC 910. See also *Re Grosvenor Hotel, London (No 2)* (1965) Ch 1210; *Merricks v Nott-Bower* [1965] 1 QB 57; *Wednesbury Corporation v Ministry of Housing and Local Government* [1965] 1 WLR 261; [1965] 1 All ER 186.

107 de Smith, *Judicial Review of Administrative Action*, 3rd ed (1973) at 37.

108 (1978) 142 CLR 1 at 38.

109 (1998) 193 CLR 128 at 149 [54].

95 *Conclusion: The meaning of s 76(2)*: The response to this challenge in the majority reasons is to narrow the operation of s 76(2) so as to reduce the absolute conclusiveness of the Commissioner's determination that particular information is confidential. Whilst I fully understand the purpose of adopting that approach, it is difficult to reconcile it with the language of s 76(2) and with the expressed defence of its historical basis and of the supposed constitutional entitlement of the State Parliament to so provide.

96 It follows that the Court of Appeal's interpretation of s 76(2) of the Act was correct. It reflects the language of the sub-section. It gives effect to the purpose that lay behind the enactment of such an extraordinary and virtually unique provision[110]. It upholds the purpose which the Commissioner was propounding in his submissions, virtually to the last moment.

97 The question that then arises is whether a provision such as s 76(2) of the Act, so understood, attracts the *Kable* principle. In my view, it does.

The *Kable* principle applies

98 *Serious burden on institutional integrity*: As Wheeler JA concluded, the legislative scheme embodied in s 76(2) of the Act is incompatible with the institutional integrity of the Supreme Court which, in turn, is essential to that Court's place in the integrated Judicature of the Commonwealth. It impinges impermissibly on the Supreme Court's expressed role as a court with constitutional functions[111], as a court that might be vested with federal jurisdiction[112] and as a court whose judgments and orders enliven a right of appeal to this Court which cannot be abolished[113].

99 In a number of cases I have endeavoured to explain the essential elements of the *Kable* principle[114]. Although stated in slightly different terms by the

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110 It was accepted in argument that the provision was virtually unique in Australian legislation. See [2007] HCATrans 551 at 144 [6465] (Federal Attorney-General). The only suggested comparable provision was that considered in *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518, which is distinguishable.

111 Constitution, s 73(ii).

112 Constitution, s 77(iii).

113 Constitution, s 73(ii).

114 See eg *Baker* (2004) 223 CLR 513 at 541-544 [74]-[84]; *Fardon* (2004) 223 CLR 575 at 626-631 [136]-[144] and *Forge* (2006) 228 CLR 45 at 121-125 [192]-[203].

several judges in the majority in *Kable*, the distinctions of expression are less significant than the unity of the constitutional concept. No party and no intervener in this appeal doubted, questioned or criticised that concept. Instead, the task of the Court was presented as the application of the principle to the circumstances of this case.

100 I fully recognise that, in a number of decisions, I have adopted a more ample view of the application of the *Kable* principle than some of my colleagues. No doubt my differences from the majority in this respect derive from a disagreement over the "public values" that are at stake and different perceptions of the risks that are presented by erosions of what have hitherto been normal attributes of the "judicial process" in Australia.

101 I have therefore tested the explanation of the *Kable* principle in the present context not by reference to my own earlier reasons in dissent (although I adhere to those reasons) but by reference to the notions of "institutional integrity" explained in the reasons of those who have formed the majority on such questions.

102 Important amongst the statements about the requirements of "institutional integrity" essential to State courts after *Kable* is the following passage from the joint reasons of Gummow, Hayne and Crennan JJ in *Forge*[115]:

> "Because 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. One operation of that limitation on State legislative power was identified in *Kable*. The legislation under consideration in *Kable* was found to be repugnant to, or incompatible with, 'that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'[116]. The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislature required the Court to perform. At the risk of undue abbreviation, and consequent inaccuracy, the task given to the Supreme Court was identified as a task where the Court *acted as an instrument of the Executive*[117]. The consequence was that the Court, if required to perform the task, would not be an appropriate

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115 (2006) 228 CLR 45 at 76 [63] (emphasis added).

116 *Fardon* (2004) 223 CLR 575 at 617 [101].

117 *Kable* (1996) 189 CLR 51 at 124, 134.

> recipient of invested federal jurisdiction. But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)*[118] and *North Australian Aboriginal Legal Aid Service Inc v Bradley*[119], the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."

103 According to this explanation of the *Kable* principle, what sets a court apart is the feature, inherent in its constitution and functions, of independence and impartiality. It is a governmental institution. But it is one of a particular kind. It must act in particular ways. There may be innovations and differences between courts. However, there are limits upon permissible departures from the basic character and methodologies of a court. As a nominated court, expressly provided for in the Constitution, a Supreme Court of a State plays an essential role in the governance of the State and the nation. It adjudicates disputes between constituent parts of the federation. It also adjudicates disputes between individuals and government in its various manifestations. In *Bass v Permanent Trustee Co Ltd*[120], the joint reasons said:

> "Judicial power involves the application of the relevant law to facts as found in proceedings conducted *in accordance with the judicial process*. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them."

104 In addition to these essential features of the judicial process, it is inherent in the constitutional design that an adjudication by such a court will permit a disappointed party to engage effectively with the appellate jurisdiction of this Court. So much is made clear in *BHP Billiton Ltd v Schultz*[121]. Despite the statement in s 76(7**)** of the Act that a decision on an application for review is "final"[122], I agree with the joint reasons that such a provision cannot exclude the

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118 (2004) 223 CLR 575.

119 (2004) 218 CLR 146 at 164 [32].

120 (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (emphasis added, footnotes omitted).

121 (2004) 221 CLR 400 at 433 [55], 453 [127].

122 Thereby attracting s 60(1)(c) of the *Supreme Court Act* 1935 (WA).

constitutional right of appeal to this Court[123]. So much was not ultimately contested by the Commissioner.

105 The basic error of the majority in the Court of Appeal lay in their conclusion that, to find offence to the *Kable* principle, the appellant had to show that the impugned legislation rendered the Supreme Court "no longer a court of the kind contemplated by Ch III"[124]. If that were indeed the criterion to be applied, it would be rare, if ever, that constitutional incompatibility could be shown. *Kable*'s constitutional toothlessness would then be revealed for all to see. The fact is that, whatever the outcome of this case, the Supreme Court would continue to discharge its regular functions. Overwhelmingly, it would do so as the Constitution requires. A particular provision, such as s 76 of the Act, will rarely be such as to poison the entire character and performance by a Supreme Court of its constitutional mandate as such or alone to result in a complete re-characterisation of the Court.

106 Adoption of such an approach would, in effect, define the *Kable* doctrine out of existence. This should not be done. *Kable* recognised an important principle arising from the unique features of the Judicature of Australia. Such features necessitate vigilant protection of the State courts and their processes.

107 The proper application of the *Kable* principle requires a close examination of the particular provision that is impugned. Such an examination is performed so as to prevent attempts to pollute the jurisdiction and powers of the State Supreme Courts. Special vigilance is required whenever it appears that other branches of government may be attempting to interfere with the independence and impartiality of the State courts or to trade on the reputational capital which such courts have won by their special character and established methodologies.

108 *Application to the present case*: I agree with Wheeler JA that, in combination, a number of features of s 76(2), understood as intended to operate, render it seriously incompatible with the institutional integrity of the Supreme Court. Those features are:

(1) The special power afforded to the Commissioner to deem "information" provided to the Supreme Court to be "confidential", with consequences that are binding on the Supreme Court in the manner in which it discharges its functions as such. Such consequences arise pursuant to the decision of the Commissioner rather than by the application of norms of law or by the exercise of the inherent jurisdiction of the Supreme Court. The fact that there may, or may not be, a place for review by the Supreme

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123 See joint reasons at [20].

124 (2007) 33 WAR 245 at 276 [107] per Steytler P. See also at 248 [1] per Martin CJ.

Court of the Commissioner's decision is irrelevant to this power of "identification", which, under s 76(2), belongs only to the Commissioner;

(2) The power is provided to the Commissioner to control or influence the basic issue for determination, that is, the reasonableness of his own belief. This feature of s 76(2) has the appearance (and in my view the legal consequence) of permitting the subject of the "review", in effect, to stack the cards. It affords the Commissioner control, and certainly great influence, over the decision that the Supreme Court makes in the review adjudication concerning his own conduct. To say the least, it is not normal to the judicial process in Australia that a party, especially a governmental party, can control conclusively information which a court may use in conducting a review of that party's own determinations;

(3) The Commissioner is thus afforded the power to control (and certainly profoundly to influence) the manner in which the Supreme Court performs its function of ensuring, so far as is possible, general equality between the parties to the adjudication[125]. If, by the decision of a subject of the review, the Supreme Court is controlled (or even greatly influenced) in the way in which it secures evidence, and responses and submissions of the opposing parties, a real adjudication may prove impossible. Courts have long experience in balancing the need to ensure a real adjudication whilst protecting other interests in relation to, for example, national security, public interest immunity and confidentiality. But s 76(2) of the Act reserves the decision on the balance in this case to the Commissioner. In law (or certainly in substance), it subtracts the independence and utility of the decision of the Supreme Court. The result is that the Supreme Court, whilst appearing to perform a judicial adjudication will in many, perhaps most, cases be unable to do so;

(4) The proscription of the disclosure "in any way" of information "identified" by the Commissioner may, and in many cases will, prevent the Supreme Court from providing proper reasons for its judgment and orders. This too impinges on what is now a settled and universal feature of the judicial process in Australia[126]. Courts are well accustomed, where it is required,

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125 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-490 per Deane and Toohey JJ, 501-503 per Gaudron J; cf at 466-469 per Mason CJ, Dawson and McHugh JJ, 475-478 per Brennan J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 112 per Gaudron J. See Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341 at 350-353.

126 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259-261, 268-269, 277-278; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667.

to anonymising information, avoiding identifiers and adopting expedients to protect confidential evidence or like interests. In this case the Supreme Court is not trusted to do this. A general and legally (or substantially) unreviewable determination by a party to the proceedings is *imposed* on the Supreme Court by that party. This removes from that Court the judgment and function normal to it as such; and

(5) By limiting both the legal and effective participation of the party challenging the Commissioner in the review proceedings and preventing the Supreme Court from revealing information, the process may render pointless or unavailing the facility of appeal to this Court envisaged by the Constitution. Moreover, the inability of the Supreme Court to provide proper reasons for its decision where such reasons would, in any way, disclose information designated by the Commissioner as "confidential", renders nugatory the engagement of the constitutional right to appeal from a judgment or order of a State Supreme Court. It has been suggested that the Supreme Court can continue to perform effective judicial review in the face of the provisions of s 76(2) of the Act. But this argument collapses when it is recognised that it is the Commissioner's act of identification (not the quality of the information) that, in accordance with the sub-section, attracts the imperative requirement of non-disclosure.

109 *Assuming the alternative construction*: If the interpretation of s 76(2) of the Act favoured in the majority reasons is adopted, the offence to the "judicial process" is reduced. However, it is by no means eliminated. The words of the sub-section cannot be effaced from the Act. The Commissioner, as the repository of statutory power, still has the power to "identify … information provided to the court". The Commissioner still has a right to designate any such information as "confidential". When the Commissioner (rather than the Supreme Court) so identifies "information", it is the Commissioner's decision that has the consequences stated in the sub-section. Not the Supreme Court's, applying a stated legal norm.

110 The judicial process is compromised regardless of whether or not there is a review process that the trial judge is entitled to undertake in relation to the basis upon which the Commissioner has directed the Supreme Court that particular information is "confidential". The interpretation now adopted by the majority does not overcome the denial of equal justice implicit in affording a power of identification to one party to proceedings before the Supreme Court. It does not cure, or permit that Court to repair, the inability of the complaining party, when information is withheld from it, to make meaningful submissions, effectively to object to or answer evidence of which it is not informed, to provide meaningful reasons in support of a decision and to engage the constitutional right to appeal.

111 This Court should not salve its conscience about a provision such as s 76(2) with the false hypothesis that a hitherto unnoticed construction of s 76(2)

will render the "review" available under s 76 a real and effective adjudication between the parties. I deprecate defining constitutional problems out of existence.

112 *Irrelevant considerations*: Many irrelevancies were raised by the respondent and the interveners in defending the orders of the Court of Appeal. I will respond to some of these.

113 Victoria urged that the Act obliged the Commissioner to receive and consider submissions from the recipient of a "fortification warning notice" prior to issuing a "fortification removal notice"[127]. This meant, so it was said, that failure to provide such a person with at least some particulars of the basis for the Commissioner's asserted belief at this initial stage would leave it open to the Supreme Court, in conducting a later review, to conclude that that belief could not reasonably have been held. In effect, then, the Commissioner would be forced to provide the subject of a "fortification warning notice" with sufficient information (including in respect of "confidential" material) to permit the making of responsive submissions. Even assuming that this understanding of the Act is correct, the fact that there might in practice be scope for the Supreme Court to reason (in a circuitous manner) towards an amelioration of some of the harsher consequences of s 76(2) does not cure the essential constitutional defect manifested in the sub-section. It does not alter the fact that the Commissioner's "identification" of information is conclusive and binding on the Supreme Court. Nor does it alter the fact that, should the Supreme Court for whatever reason decline to intervene, the applicant for review will be subjected to profound procedural disadvantages[128].

114 It was said that the appellant was better off with the scheme of review established under s 76, including sub-s (2), than with nothing. There are shades of this "small mercies" submission in the proposition urged on the Court in *Thomas v Mowbray* concerning counter-terrorism legislation[129]. At least, so it was argued, s 76 secured a form of judicial "review". The appellant had an assurance that an independent judge had examined the information designated as "confidential" by the Commissioner. But if s 76(2) were invalid and severable, the appellant would retain a "review" as s 76 provides. The exclusion of "confidential" information would then be subject, as in the normal course of judicial review, to public interest immunity and confidentiality claims, but determined by the Supreme Court, not by the very party that is subject to the review.

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127 See the Act, ss 69 and 72.

128 See above these reasons at [110].

129 See *Thomas v Mowbray* [2006] HCATrans 661 at 104 [4517].

115 It was next said that all that the Act required was that the appellant should put all of its evidence before the Supreme Court, even if it did not know, and could not be told, the confidential details of the case presented against it, and said to justify the exceptional interference with the enjoyment of its property rights. The appellant had indeed tendered a video film and invited the judge to undertake a view of its premises for himself. However, in a review before a State Supreme Court, a party would not normally be obliged to present all of its evidence without knowing (even perhaps only in general terms) the case it had to meet. In the defence of its property rights, it is not ordinarily the case in Australia that a party must participate in an adjudication before a Supreme Court where important matters that may be in contest are decided by a government official who is the subject of the review and may not be disclosed to the affected party, in whatever way, so as to ensure a true contest susceptible to independent, public resolution by the judicial process.

116 In his submissions, the Commissioner also emphasised the fact that no questions of personal liberty were raised in the appeal, simply the property rights of the appellant. However, conventionally, our legal system has been vigilant in the defence of the property rights of individuals, as well as of their liberties[130]. It has protected the quiet enjoyment of such rights as an attribute of constitutional government. To allow governmental or other intrusions upon such rights, clear authority of law is conventionally required.

117 It was then said that it would have been open to the Parliament of Western Australia to exclude judicial review altogether in connection with the issue of notices[131]. Assuming, without deciding, that this is so, the fact remains that the Parliament of Western Australia has provided for review. Moreover, it has committed that review to the Supreme Court of the State, necessarily attracting *Kable* scrutiny.

118 It was next said that State judges are often required to perform Executive functions. That may be so. However, it is not the case, in Australia, that State Supreme Courts, as such, are ordinarily assigned Executive functions. Particularly so where, performing a task, described as a "review" and involving characteristics in many ways very similar to the judicial review of administrative

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130 *George v Rockett* (1990) 170 CLR 104 at 110-111; *New South Wales v Corbett* (2007) 81 ALJR 1368 at 1372-1373 [16]-[22], 1382-1383 [87]-[88]; 237 ALR 39 at 42-44, 57-58.

131 cf *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631-634.

decisions, the Supreme Court must do so under conditions controlled (or greatly influenced) by the very party that is the subject of the review.

119 The respondent then argued that it was a mistake to regard the judicial obligation to provide reasons for decisions as absolute. On this view, any impediment to the Supreme Court's capacity to explain its reasons was immaterial. This is not correct.

120 It is true that it was noted in *Public Service Board of NSW v Osmond*[132] that the provision of reasons is a normal but not universal requirement of the judicial process in Australia. In many other contexts, where issues of confidentiality, secrecy and public interest immunity arise, the law of Australia has evolved so that the courts are entrusted to frame their reasons so as to protect confidences, immunities and secrets but at the same time provide, so far as is possible, the facilities of a genuine adjudication and an appellate process.

121 The logical consequence of the respondent's submission is that it would be competent for a State Parliament, either generally or in particular cases, to forbid the Supreme Court giving *any* reasons for its decisions. Yet this would involve a most serious departure from the normal features of the judicial process as it has existed in Australia since colonial times. It would involve a grave frustration of the effectiveness of the right of appeal to this Court envisaged by the Constitution. It demonstrates the exceptional nature of a statutory provision that affords jurisdiction and power to a Supreme Court to conduct a "review" but then usurps from that Court the power and entitlement to express its reasons in a manner conformable with legal norms rather than as subject to the *fiat* of an officer of the Executive Government of the State whose determination is itself the very focus of the review.

122 Next, it was asserted that courts, including State Supreme Courts, have, for a very long time, complied with restrictions in respect of what Brennan J called the "problem of confidentiality"[133]. So much may be granted. However, until now, at least in the State Supreme Courts of this country, that has been done in accordance with specific statutory criteria or by the exercise of the Supreme Court's own inherent or implied jurisdiction. It has not been done, as such, by force of a decision of a member of the Executive Government, acting under statutory power. Least of all has it been done in circumstances where the member of the Executive is the subject and object of the judicial review.

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132 (1986) 159 CLR 656 at 666-667.

133 The expression is used by Brennan J in *Kioa v West* (1985) 159 CLR 550 at 629. See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 100 [29].

123 An earlier attempt to impose a blanket rule of secrecy on State courts was struck down by this Court as inconsistent with the requirements of the Constitution[134]. The rule does not become more tolerable because it is administered individually by an officer of the Executive under State legislation in proceedings where that officer is one of the parties, and thereby acquires lop-sided control over the levers of judicial decision-making.

124 Finally, it was argued that Parliaments in Australia enjoy a general power to enact laws of evidence and other laws that restrict the information that may be received in judicial proceedings, federal and State. So much may be true as a general proposition. However, such laws typically reserve rulings on such matters to the courts themselves, uncontrolled in law or in substance by decisions made by a party to those proceedings. Thus, it is the courts that are conventionally entrusted with decisions on matters of confidentiality, legal immunity and secrecy. The provisions of s 76(2) of the Act are the more remarkable because they are so unusual. Neither the parties nor interveners could cite any provision equivalent to s 76(2), in any Australian legislation, despite the wealth of legal talent assembled in that common interest. With all respect, that is another factor that causes me to be vigilant in this appeal.

125 *Conclusion: Kable is engaged*: The result of the foregoing analysis is that the *Kable* principle is enlivened. Section 76(2) of the Act impairs the institutional integrity of the Supreme Court in the ways that I have identified. Being incompatible with the Constitution, s 76(2) of the Act is invalid and of no effect. This Court should allow the appeal and decide the question referred to the Court of Appeal accordingly.

The invalid provision of s 76(2) is severable

126 *The issue of severability*: The issue of severability was not decided by the Court of Appeal. It was unnecessary for the majority to consider it, given their conclusion.

127 Wheeler JA held back from deciding the issue as her orders did not govern the outcome. However, her Honour expressed a preference for the view that s 76(2) was severable. She considered that only this conclusion would give effect to s 7 of the *Interpretation Act* 1984 (WA). That section, in familiar form, reverses the common law presumption that legislation is designed by Parliament to operate in its entirety and is indivisible. The section provides:

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134 *Russell v Russell* (1976) 134 CLR 495 at 507, 520, 532-533; cf at 536, 555.

> "Every written law shall be construed subject to the limits of the legislative power of the State and so as not to exceed that power to the intent that where any enactment thereof, but for this section, would be construed as being in excess of that power, it shall nevertheless be valid to the extent to which it is not in excess of that power."

128 The respondent argued that s 76(2) of the Act was an integral part of a package which was intended to operate as a whole. He submitted that it could not be assumed that Parliament would have enacted the review provisions of s 76 without the restriction imposed by s 76(2), protective of the Commissioner's ultimate entitlement to have the last word in respect of the use of information he has judged to be confidential.

129 *Conclusion: s 76(2) is severable*: The principles to be applied in deciding questions of severability were recently discussed in this Court, at some length, in the *Work Choices Case*[135]. It is unnecessary to repeat the governing rules which I take into account in resolving this last issue.

130 In my opinion, the factors that caused Wheeler JA to express a tentative preference for the severability of s 76(2) from the balance of s 76, and from the remainder of Pt 4 of Div 6 of the Act, are persuasive. If s 76(2) were excised from the Act, this would not leave the Commissioner unprotected in respect of claims of public interest immunity, confidentiality and secrecy necessary to protect any such information presented as evidence to the Supreme Court. There is a well established body of common law that could be invoked on this issue. It is understood by the judiciary, including by the Supreme Court.

131 The consequence of a conclusion of non-severability would be to eliminate completely the review provisions from s 76. Wheeler JA was fortified in her conclusion that Parliament had the purpose of providing a form of independent judicial review by "numerous references in the Parliament Debates to the existence of a right of review, and the importance which those members who participated in the debate apparently placed upon the existence of that right"[136].

132 Excision of s 76(2) of the Act would not amount to rewriting the statute. Nor would it involve this Court intruding into the proper province of the legislature. It would reflect the object of minimising the impact on the statute as a whole of the conclusion that a particular provision of a State statute is

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135 *NSW v The Commonwealth* (2006) 229 CLR 1 at 237-243 [584]-[605], 383-384 [912].

136 (2007) 33 WAR 245 at 290 [164].

unconstitutional. It would preserve the overall scheme and operation of the Act. Yet it would do so under conditions that committed to the Supreme Court of the State a function of review that would fall to be performed in accordance with the settled features of the judicial process as it is normally observed in Australia.

133 This conclusion would remove the sub-section that exhibits the constitutional defects that I have identified. It would eliminate a unique, and happily so-far uncopied, provision. It would retain full legal protection for the information whose confidentiality was necessary to the operations of police. But it would do so in the way that is normal to the judicial process of this country – by the decision of judges, relevantly of the State Supreme Court. Not, in effect, by the decision of the Commissioner of Police.

Orders

134 The appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of Western Australia should be set aside. In place of those orders, this Court should order that Question (b) of the questions referred to the Court of Appeal, which reads "[i]s sub section 76(2) of the *Corruption and Crime Commission Act 2003* (WA) valid?" be answered: "No". This Court should declare that the remainder of s 76 is valid. The proceedings should be remitted to the Supreme Court of Western Australia to be tried in a manner conformable with the foregoing answer and declaration. The respondent should pay the appellant's costs in this Court and in the Court of Appeal.

135 CRENNAN J. The appellant is an incorporated association which owns premises described as its club house at 10 Lower Park Road, Maddington, in the City of Gosnells, Western Australia. On 12 February 2004 the Commissioner of Police of Western Australia ("the Commissioner")[137] applied to the Corruption and Crime Commission ("the Commission") for the issue of a fortification warning notice in respect of the club house of the appellant.

136 Application for a fortification warning notice is an early step in a process provided in Pt 4, Div 6 of the *Corruption and Crime Commission Act* 2003 (WA) ("the Act") which can culminate in compulsory removal of fortifications from certain premises. In support of the application, the Commissioner swore and filed an affidavit with 29 annexures and two exhibits, one of which was a videotape of the fortifications on surrounding premises.

137 The application was heard and a fortification warning notice was issued on 31 March 2004. The notice referred to the Commission's satisfaction that there were reasonable grounds for believing two matters of fact: first, that the club house was "heavily fortified", and secondly, that it was "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".

138 The notice went on to state that unless the Commissioner was satisfied that matters had been rectified within 14 days a fortification removal notice might be issued.

139 On 14 April 2004, solicitors instructed by the appellant responded by letter to the fortification warning notice. That the club house was heavily fortified was not denied. Three matters were explained in the letter. First, the Maddington industrial area, in which the premises are located, was described as "an area of a high crime rate in particular for criminal offences of burglary and motor vehicle theft". Secondly, it was stated that the fortifications had received all necessary approvals. Thirdly, the fortifications were said to be necessary to ensure that "approximately 10 customised Harley Davidson Big Twin motorcycles", said to be valuable and regularly stored at the club house, were secured against theft. A key to the club house was provided to permit the Commissioner to enter the club house when "entitled to do so by Law". The letter did not address the Commission's belief that the club house was used by members of a class of persons who might reasonably be suspected of being involved in organised crime.

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137 The Commissioner of Police delegated his powers and duties relating to fortification removal under Pt 4 of the *Corruption and Crime Commission Act* 2003 (WA) to an Assistant Commissioner.

140 On 5 May 2004 the Commissioner issued a fortification removal notice which indicated to the appellant that removal or modification of specified fortifications would need to occur before the Commissioner would be satisfied that the premises were no longer heavily fortified. The following items at the club house were identified for removal:

- the front concrete perimeter wall;
- the access gates attached to the front concrete perimeter wall;
- surveillance/security cameras and monitors; and
- an internal door which leads from the bar area to the office area and bedrooms and hinges from that internal doorway.

141 The notice also referred to modification of timber doors at the rear of the club house, a steel door on the right side of the club house and a steel door leading into a storeroom at the rear of the club house.

142 On 12 May 2004, the appellant applied to the Supreme Court of Western Australia for review of the Commissioner's decision to issue the fortification removal notice. The Commissioner swore and filed an affidavit in the proceeding, in which he identified certain items of information as "confidential … on the basis that their disclosure might prejudice the operations of the Commissioner of Police".

The Act

143 The main purposes of the Act are stated in s 7A:

> "(a) to combat and reduce the incidence of organised crime; and
>
> (b) to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector."

144 The term "organised crime" is defined in s 3 to mean:

> "… activities of 2 or more persons associated together solely or partly for purposes in the pursuit of which 2 or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organisation".

145 Schedule 1 lists various offences under the *Criminal Code* (WA) including murder (s 279), wilful murder (s 278), causing an explosion likely to do serious injury to property (s 454) and the making or possession of explosives under suspicious circumstances (s 557). Offences under the *Misuse of Drugs Act* 1981 (WA), (s 32A(1)(b)) are also Sched 1 offences.

146 Section 7B establishes how the Act's purposes are to be achieved:

> "(1) The Act's purposes are to be achieved primarily by establishing a permanent commission to be called the Corruption and Crime Commission.
>
> (2) The Commission is to be able to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organised crime."

147 Part 4, Div 6 of the Act, entitled "Fortifications", establishes a regime for the compulsory removal of fortifications from premises in certain circumstances. Section 67(1) states:

> "'fortification' means any structure or device that, whether alone or as part of a system, is designed to prevent or impede, or to provide any other form of countermeasure against, uninvited entry to premises".

148 Section 67(2) provides:

> "Premises are heavily fortified if there are, at the premises, fortifications to an extent or of a nature that it would be reasonable to regard as excessive for premises of that kind."

149 The Commissioner may apply, without giving notice to any person, to the Commission for the issue of a fortification warning notice (s 68(1)), as happened here. If satisfied on the balance of probabilities that there are reasonable grounds for suspecting the premises are heavily fortified, and habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime, the Commission may issue a fortification warning notice (s 68(2)). Section 69 specifies a number of matters to be included in a fortification warning notice. A person to whom such a notice is given has 14 days within which to make a submission to the Commissioner that a fortification removal notice should not be issued (ss 67(1) and 69(2)(b) which define the "submission period"). Section 73 specifies the contents of a fortification removal notice and ss 74 and 75 provide respectively for the giving and enforcing of a fortification removal notice. After certain conditions were satisfied, the Commissioner had a statutory power to remove or modify the fortifications.

150 Under s 72(2), after the submission period has elapsed, the Commissioner cannot issue a fortification removal notice unless, after considering each submission, he or she:

> "… reasonably believes that the premises are –
>
> (a) heavily fortified; and

(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."

151 Section 76, entitled "Review of fortification removal notice", relevantly states:

"(1) If a fortification removal notice relating to premises has been issued, the owner or an interested person may, within 7 days after the day on which the notice is given to the owner of the premises, apply to the Supreme Court for a review of whether, having regard to the submissions, if any, made before the submission period elapsed and any other information that the Commissioner of Police took into consideration, the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice.

(2) 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.

(3) …

(4) …

(5) The court may decide whether or not the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice.

(6) …

(7) The decision of the court on an application for review under this section is final ..."

152 Section 83, which is in Pt 4, Div 7 of the Act, limits ordinary judicial review under s 16 of the *Supreme Court Act* 1935 (WA) as follows:

"(1) Except with the consent of the Parliamentary Inspector[138] a prerogative writ cannot be issued and an injunction or a declaratory

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138 Established by Pt 13 of the Act.

judgment cannot be given in respect of the performance of a function for the purposes of this Part and proceedings cannot be brought seeking such a writ, injunction, or judgment.

(2) Subsection (1) does not apply after the completion of the investigation that it was being sought to facilitate by performing the function."

153 The ground upon which the appellant sought a review of the Commissioner's decision to issue the notice was that the Commissioner could not have reasonably had the belief required by s 72(2) when issuing the notice.

154 In the proceedings before Blaxell J in the Supreme Court of Western Australia, the Commissioner relied on the provisions of s 76(2) and provided a redacted version of the affidavit (a complete copy of which was also provided to the Court) containing the information which the Commissioner took into consideration when making the decision to issue the fortification removal notice. The appellant only received the redacted version of the Commissioner's affidavit in which information identified by the Commissioner as confidential was blacked out. The balance of information in the affidavit identified 59 members of the appellant, all but one of whom the Commissioner alleged had criminal records, and included details of some 130 charges, with which the Commissioner alleged members or associates of the appellant had been charged. Of those charges, 17 were for Sched 1 offences. That information related to the second matter of which the Commissioner had to be satisfied under s 72(2)(b). This conveyed, in broad terms, some information which the Commissioner took into consideration when he issued the notice. It can be noted that the appellant did not take any issue with non-disclosure, by the Commissioner, of a police informant's name, which is covered by well-established rules[139].

155 In response to receiving only a redacted version of the affidavit, the appellant challenged the validity of s 76(2). Pursuant to s 43 of the *Supreme Court Act* 1935 (WA) two questions were referred to the Court of Appeal:

"(a) Is section 76 of the *Corruption and Crime Commission Act 2003* (WA) valid? and

(b) In the alternative, is sub section 76(2) of the *Corruption and Crime Commission Act 2003* (WA) valid?"

156 By a majority (Martin CJ and Steytler P; Wheeler JA dissenting) the Court of Appeal rejected the appellant's submission that s 76(2) of the Act so affected

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139 Heydon, *Cross on Evidence*, 7th Aust ed (2004) at 887-888 [27130]. See also *Evidence Act* 1995 (Cth), s 130(4)(e).

the institutional integrity, by detracting from the independence and impartiality of the Supreme Court, that it ceased to meet the constitutional requirements of Ch III of the Constitution.

157 In its Notice of Appeal to this Court the appellant asks this Court to substitute "No" as the answer to question (b) referred to the Court of Appeal. It was accepted that questions of whether the whole of s 76 is invalid, or whether severance of s 76(2) would be possible, will only arise if s 76(2) is found to be invalid.

The question

158 The question in this appeal is whether s 76(2) of the Act is a valid exercise of the legislative power of the Western Australian Parliament. Invalidity was alleged on the basis that s 76(2) substantially impaired the institutional integrity of the Supreme Court of Western Australia contrary to requirements of Ch III of the Constitution as determined in *Kable v Director of Public Prosecutions (NSW)*[140] ("*Kable*") and was incompatible with the Supreme Court's role under the Constitution as a potential repository of federal jurisdiction.

159 In *Forge v Australian Securities and Investments Commission*[141] ("*Forge v ASIC*") Gleeson CJ said of the principle in *Kable*:

> "… since the *Constitution* established an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid."

160 It was explained in *Forge v ASIC* that the principle established in *Kable* is founded on the constitutional description of State Supreme Courts in Ch III of the Constitution: "Supreme Court of [a] State" in respect of which the High Court exercises appellate jurisdiction (s 73(ii)), or a "court of a State" in which the Commonwealth Parliament invests federal jurisdiction (s 77(iii)).

161 It exceeds the legislative power of a State to alter the constitution or character of a Supreme Court of a State so as to impair its institutional integrity, an important element of which is minimum requirements of independence and

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140 (1996) 189 CLR 51.

141 (2006) 228 CLR 45 at 67 [40] per Gleeson CJ; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ.

impartiality because to do so would preclude that court from answering the constitutional description "Supreme Court of [a] State"[142].

162 While ss 73(ii) and 77(iii) do not identify minimum requirements of independence and impartiality, it is clear that courts as institutions forming part of Australia's integrated court system must have the "capacity to administer the common law system of adversarial trial"[143].

163 Unlike the legislation in *Kable's* case, the provisions in respect of fortifications do not involve the Supreme Court making any orders for any interference with personal liberty. Such interference as may be permitted under the Act is interference with property habitually used by persons reasonably suspected of being involved in organised crime and that interference is limited to requiring the removal of heavy fortifications from the property of such persons.

164 The Act replaced the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act* 2002 (WA) ("the 2002 Act"), substantially reproducing its provisions. On the Second Reading Speech in respect of the Bill for the 2002 Act, the Premier of Western Australia identified the mischief to be addressed and said[144]:

> "It has been recognised in Australia and many overseas countries that highly organised crime cannot be investigated and prosecuted by relying on ordinary police powers of investigation.
>
> …
>
> Members may be aware that premises owned or used by criminal gangs are often heavily fortified. The effect of this fortification is to prevent the police from obtaining access to these premises. The result is that investigations are hindered because searches cannot be conducted or cannot be conducted in a timely manner. These heavily fortified premises become a safe haven for organised criminals and their activities. In order

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142 *Forge v ASIC* (2006) 228 CLR 45 at 67 [41] per Gleeson CJ, 76 [63] and 86 [93] per Gummow, Hayne and Crennan JJ; see also 121 [192] per Kirby J, 138 [244]-[245] per Heydon J; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J.

143 *Forge v ASIC* (2006) 228 CLR 45 at 76 [64] per Gummow, Hayne and Crennan JJ.

144 Western Australia, Legislative Assembly, *Parliamentary Debates,* (Hansard), 6 November 2001 at 5038, 5041.

> to carry out successful investigations and obtain evidence, the police must be able to obtain entry to these premises. The Government recognise that occasionally this will require demolition of existing fortifications. The Bill sets out the process and circumstances in which these fortifications can be removed."

165 Such matters put the legislation in context, which is important when questions of construction are raised[145].

The appellant's case

166 In reliance upon the principle established in *Kable* and in support of a general submission that s 76(2) was "repugnant to the judicial process in a fundamental degree"[146], the appellant contended that the procedure established by s 76(2), whereby information identified as confidential by the Commissioner could not be disclosed to an applicant for judicial review, constituted a denial of procedural fairness. That procedure was said to compromise the ability of the Supreme Court to ascertain the facts and to constitute a derogation from its constitutional obligation to act as a court operating in accordance with Ch III of the Constitution. Secondly, it was contended that the terms of s 76(2) vested the decision of what information may be disclosed to an applicant for review exclusively in the Commissioner. This was characterised as improper interference by the executive in the judicial process. Thirdly, the prohibition on disclosure of confidential information to the public was said to preclude the Court from giving proper reasons for judgment. Finally, it was contended that there were no safeguards in place which may have mitigated those aspects of the procedure said to impair the Supreme Court's institutional integrity.

167 It was contended, alternatively, that the procedure under s 76(2) was incompatible with the Supreme Court's exercise of federal judicial power, in the sense described in *Grollo v Palmer*[147] and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[148], because the powers conferred on the Court were heavily constrained by the executive.

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145 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

146 *Kable* (1996) 189 CLR 51 at 132 per Gummow J.

147 (1995) 184 CLR 348.

148 (1996) 189 CLR 1.

Section 76(2) and the role of the Commissioner

168 The appellant's attack on s 76(2) was framed in terms of the principle of separation of powers and included reference to a statement in an Opinion of the Supreme Court of the United States in *Mistretta v United States*[149]:

> "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action."

169 The appellant's specific allegations that s 76(2) provides for improper interference by the executive in the judicial process of the Supreme Court depended on construing the words of s 76(2) as empowering the Commissioner to instruct or command the Supreme Court to carry out its review (s 76(1)) and its function (s 76(5)) on the basis of an unexaminable opinion of the Commissioner that disclosure of the information identified as confidential might prejudice his operations.

170 The respondent's answer to this submission was that compliance with the condition which had to be satisfied to prevent disclosure, namely that the information might prejudice the operation of the Commissioner, was an issue of fact to be determined by the judge. That should be accepted.

171 Section 76(1) requires that the information which the Commissioner took into consideration when issuing the notice must be placed before the Court on an application for review.

172 Section 76(2) permits the Commissioner to identify any of the information placed before the Court pursuant to s 76(1) as "confidential". Thus the Commissioner makes a claim to have this information exempted from disclosure. Section 76(2) identifies a specific public interest, namely avoiding prejudice to the operations of the Commissioner, as the basis for that exemption from disclosure.

173 There is nothing in s 76 which suggests that an applicant for judicial review is not able to contest matters of fact bearing on the question which the Court must determine under s 76(5), including the question of whether the information identified by the Commissioner as confidential should be exempted from disclosure. The condition in s 76(2) merely operates to identify a basis upon which the statutory exemption from disclosure, in the second part of s 76(2), will apply.

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149 488 US 361 at 407 (1989).

174 Section 76(2) does not expressly or impliedly dictate a procedure to be followed. Nor does it authorise the Commissioner, according to his opinion, to give directions to the Court, or to determine for the Court the satisfaction of the condition, or basis, for exemption from disclosure. The second part of s 76(2) will only operate to exempt information from disclosure if the judge is satisfied as to the condition or basis upon which the Commissioner's claim of confidentiality rests. It is for the judge to determine conclusively whether disclosure of the information might prejudice the operations of the Commissioner. If the judge is not conclusively satisfied that disclosure might prejudice the operations of the Commissioner, the information will lose its confidential character, for the purposes of exemption from disclosure, even though the Commissioner's initial identification of the information as confidential was made properly, but erroneously. There is no difficulty in reconciling s 76(2) with constitutional principle.

Section 76 and procedural fairness

175 In *Kable*, Gaudron J spoke of the power of indefinite detention, based on an opinion that a person is more likely than not to commit a serious act of violence in the future, as "the antithesis of the judicial process"[150]. Six members of this Court described what is involved in judicial process in *Bass v Permanent Trustee Co Ltd*[151]:

> "Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them." (footnotes omitted)

176 The setting in which s 76(2) is to be judged is the Supreme Court's role under s 76(1) and (5), and in any exemption of information from disclosure to an applicant for review. A relevant point is made in de Smith, Woolf & Jowell[152]:

> "Openness is a vital ingredient in the structuring of discretion and information is an important weapon in litigation about the lawful exercise of power."

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150 (1996) 189 CLR 51 at 106.

151 (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

152 *Judicial Review of Administrative Action*, (1995), 5th ed at 61 [1-121].

177 In accordance with s 76(1) and (5) the Supreme Court is only required to decide whether or not "the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice". The majority of the Court of Appeal correctly noted the limitations of the review[153]:

> "[The Supreme Court's] function is not that of deciding whether or not, at the time of the review, there are reasonable grounds for the formation of the belief referred to by s 72(2). Rather, its task is only that of determining whether, having regard to the submissions made by the applicant and to whatever information was taken into account by the Commissioner in forming his belief, *the Commissioner* could have reasonably had the required belief *when issuing the notice*: s 76(1)."

178 That limited review is the context in which the Commissioner may make a claim, that information is confidential so as to exempt it from disclosure. The applicant for review does not canvass the merits of the Commissioner's decision to issue the fortification removal notice. The procedure for exemption has some similarity to a claim for public interest immunity, the common law exclusionary rule of evidence by which information is immune from disclosure in litigation, if disclosure would injure a State interest.

179 Commonly, claims by a member of the executive to confidentiality or public interest immunity involve balancing the public interest in the administration of justice and the disclosure of all relevant material against the need to exempt certain information from disclosure so as to avoid some particular injury or prejudice to a specified public interest[154] such as national security, or as here, combating and reducing the incidence of organised crime (s 7A(a)).

180 In ruling on a claim for public interest immunity, a court may look at information in documents which is not revealed to a party seeking them[155], and a court may resolve a claim finally without one of the parties being shown certain material relied on for determination of a proceeding[156].

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153 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245 at 277 [110] per Steytler P (with whom Martin CJ generally agreed). (original emphasis)

154 *Sankey v Whitlam* (1978) 142 CLR 1; *Alister v The Queen* (1984) 154 CLR 404. See also *Conway v Rimmer* [1968] AC 910; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394.

155 *Sankey v Whitlam* (1978) 142 CLR 1 at 46 per Gibbs ACJ, 110 per Aickin J.

156 *Alister v The Queen* (1984) 154 CLR 404 at 469-470 per Gibbs CJ, Wilson, Brennan and Dawson JJ.

181 Here, under statutory provisions permitting a claim not unlike a claim for public interest immunity, the Supreme Court, but not the appellant had produced to it, for inspection by it, all of the material relied on by the Commissioner.

182 The appellant's particular complaints alleging a want of procedural fairness were that it did not have access to material adverse to it and the Court was deprived of the benefit of its submissions on such material. Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is "sufficient indication"[157] that "they are excluded by plain words of necessary intendment"[158]. Whether the obligation to accord procedural fairness is satisfied will always depend on all the circumstances. For example, in a joint judgment of five members of this Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[159], it was recognised, by reference to *Sankey v Whitlam*[160] and *Alister v The Queen*[161], that courts "mould their procedures to accommodate what has become known as public interest immunity"[162].

183 The statutory modification of procedural fairness achieved by s 76(2) (including any effect on the giving of reasons) is indistinguishable from the modification of procedural fairness which can arise from the application of the principles of public interest immunity.

184 Patent cases can raise special issues of confidentiality in personal, private or proprietary information attracting the equitable principles for protecting confidential information. Confidential information may only be provided to parties and legal advisers and published in reasons in a manner ensuring confidentiality[163].

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157 *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 per Dixon CJ and Webb J (Taylor J agreeing).

158 *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24] per Gleeson CJ.

159 (2005) 225 CLR 88.

160 (1978) 142 CLR 1.

161 (1984) 154 CLR 404.

162 (2005) 225 CLR 88 at 98 [24] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

163 *Aktiebolaget Hassle v Commissioner of Patents (No 2)* (1989) 96 FLR 175.

185 In circumstances where confidential material is part of the material before a court, but is not available to a party or cannot be published at large, a judge's reasons can be formulated in general terms so as to "convey an adequate account of the litigation and the reasons underlying the orders"[164]. There is no reason that approach could not be adopted in this case.

186 It is not necessary for the determination of this appeal to decide whether the Commonwealth Parliament could validly enact legislation analogous to s 76(2). However, two examples of federal legislation bearing on the completeness of evidence in judicial proceedings can be noted.

187 Section 130(1) of the *Evidence Act* 1995 (Cth) provides that a court may direct that information or a document not be adduced as evidence, if the information or document relates to matters of State and the public interest in admitting the information or document into evidence is "outweighed by the public interest in preserving secrecy or confidentiality". Section 130(4)(c) provides that information or a document may be taken to relate to "matters of state" if adducing it as evidence would "prejudice the prevention, investigation or prosecution of an offence".

188 In a more specific context s 94 of the *Patents Act* 1952 (Cth), now repealed, provided that a prescribed court could order the extension of the term of a patent or order the grant of a new standard patent (s 94(1)) even though the patentee "does not present to the court a complete account of his receipts and expenditure as patentee if the court is nevertheless satisfied that the patentee has been inadequately remunerated by the patent" (s 94(2)). It was recognised that providing all relevant material could cause enormous expense and inconvenience[165].

189 Reference is made to these two examples of federal legislation only to illustrate that the availability and accessibility of all relevant evidence in judicial proceedings is not absolute.

Safeguards

190 Finally, in contending that the Act, particularly s 76(2), lacked safeguards which would obviate any modification to procedural fairness resulting from the application of s 76(2), the appellant drew attention to the provisions for a closed hearing and non-disclosure in the *National Security Information (Criminal and*

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164 *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 300-301 per Street CJ.

165 *Re Montecatini's Patent* (1973) 47 ALJR 161 at 169 per Gibbs J.

Civil Proceedings) Act 2004 (Cth). Reference was also made to *Charkaoui v Canada (Citizenship and Immigration)*[166], a decision of the Supreme Court of Canada, and to provisions in the United Kingdom[167] which provided for employment of special counsel, separate from a party's legal representative, as a safeguard in certain contexts calling for an exercise of a discretion to balance national security considerations against procedural fairness.

191 The fact that the requirements of procedural fairness may be satisfied differently in other situations, including those arising in different constitutional settings, does not mean that any modification to procedural fairness resulting from the application of s 76(2) constitutes a departure from the standards of independence and impartiality necessary to meet the abovementioned constitutional descriptions.

Conclusions

192 In providing for the exemption of certain information from disclosure, s 76(2) does not so affect the character of the Supreme Court of Western Australia that it does not satisfy the minimum requirements of independence from the executive, and impartiality, which are founded upon the constitutional description "Supreme Court of [a] State" in Ch III. Nor does s 76(2) create any incompatibility with the Supreme Court's role under the Constitution as a potential repository of federal jurisdiction.

193 The decision of the majority of the Court of Appeal was correct. For the reasons set out above, the challenge to the validity of s 76(2) fails, and question (b) referred to the Court of Appeal enquiring whether s 76(2) is valid should be answered "Yes", rendering it unnecessary to answer question (a).

Orders

194 I agree with Gummow, Hayne, Heydon and Kiefel JJ that the appeal should be dismissed. The appellant must pay the respondent's costs.

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166 [2007] 1 SCR 350.

167 Section 6(1) of the *Special Immigration Appeals Commission Act* 1997 (UK) and r 35 of the Special Immigration Appeals Commission (Procedure) Rules 2003.