HIGH COURT OF AUSTRALIA

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

K-GENERATION PTY LIMITED & ANOR APPELLANTS

AND

LIQUOR LICENSING COURT & ANOR RESPONDENTS

K-Generation Pty Limited v Liquor Licensing Court
[2009] HCA 4
2 February 2009
A12/2008

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation

S C Churches for the appellants (instructed by Starke Lawyers)

Submitting appearance for the first respondent.

M J Hinton QC with S A McDonald and T D McLean for the second respondent (instructed by Crown Solicitor for South Australia)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with

C D Bleby intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell SC intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

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

P M Tate SC, Solicitor-General for the State of Victoria with S P Donaghue 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 G P Sammon and G J D Del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law Queensland)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

K-Generation Pty Ltd v Liquor Licensing Court

Constitutional law (Cth) – Chapter III – Judicial power – Vesting of federal jurisdiction in State courts – Licensing Court of South Australia established under *Liquor Licensing Act* 1997 (SA) ("Licensing Act") – Licensing Court constituted by District Court judge – Whether Licensing Court "court of a State" within meaning of s 77(iii) of Constitution – Whether Licensing Court invested with federal jurisdiction by s 39(2) of *Judiciary Act* 1903 (Cth) ("Judiciary Act") – Significance of absence of express power of punishment for contempt.

Constitutional law (Cth) – Chapter III – Judicial power – Vesting of federal jurisdiction in State courts – Integrity of State courts – Requirement of impartiality and independence for repository of federal jurisdiction – Licensing Act, s 28A required Licensing Court to take steps to maintain confidentiality of information classified by Commissioner of Police as "criminal intelligence" in proceedings under Licensing Act – Steps included receipt of evidence and argument in absence of parties – Whether s 28A invalid for denying Licensing Court character of independent and impartial tribunal.

Statutes – Interpretation – Licensing Act, s 28A – "Criminal intelligence" defined to include information which "could reasonably be expected" to prejudice criminal investigations – Whether classification by Commissioner of Police of information as "criminal intelligence" amenable to review by Licensing Court – Whether mandatory for Licensing Court to hear evidence and argument in absence of parties.

Constitutional law (Cth) – Chapter III – Judicial power – Vesting of federal jurisdiction in State courts – Integrity of State courts – Whether consequence of impairment of integrity is that Licensing Court no longer "court of a State" to which s 77(iii) of Constitution applies – Whether s 39(2) of Judiciary Act ambulatory and would cease to apply – Whether States may establish "court of a State" then subsequently deprive court of independence and impartiality.

Constitutional law (Cth) – Chapter III – Judicial power – Nature of judicial power – Whether exercise by Licensing Court of judicial or administrative power.

Practice and procedure – Interveners – Procedure where interveners seek remedy and assert arguments opposed by immediate parties.

Words and phrases – "could reasonably be expected", "court of a State", "criminal intelligence".

Constitution, Ch III, s 77.
Judiciary Act 1903 (Cth), s 39.
Liquor Licensing Act 1997 (SA), s 28A.

FRENCH CJ.

Introduction

1 K-Generation Pty Ltd ("K-Generation") is trustee for the K-Generation Unit Trust. Genargi Krasnov is the sole director of the company. He holds 100 units as trustee of the Krasnov Family Trust, of which he and Adeline Tay are beneficiaries.

2 On 20 October 2005, K-Generation made an application to the Liquor and Gambling Commissioner under the *Liquor Licensing Act* 1997 (SA) ("the Act") for an entertainment venue licence. The licence was sought in respect of premises located in the basement and part of the ground floor of 362-366 King William Street, Adelaide to be known as Sky Lounge KTV. It was proposed to fit out the premises as a karaoke venue.

3 The Commissioner of Police for South Australia gave notice of intervention in the proceedings on 28 July 2006. The stated purpose of his intervention was to introduce evidence or make representations on any question before the Liquor and Gambling Commissioner and, in particular, on whether:

> "It would be contrary to the public interest if Mr Genargi Krasnov and Ms Adeline Tay were to be approved as fit and proper persons."

4 The application was heard by Liquor and Gambling Commissioner Pryor. A police officer tendered information which had been classified by the Commissioner of Police as criminal intelligence pursuant to s 28A of the Act. In reliance upon that section the information was not disclosed to the representative of K-Generation nor to Mr Krasnov. On 17 January 2007, acting upon that information, Commissioner Pryor refused the application on the ground that to grant it would be contrary to the public interest.

5 K-Generation sought review of Commissioner Pryor's decision in the Licensing Court of South Australia. The Court was invited by the parties to determine whether, on the criminal intelligence information alone, the decision of Commissioner Pryor would be upheld.

6 On 12 February 2007, the Court, after having considered the criminal intelligence information, announced its agreement with the view of Commissioner Pryor and made an order affirming his decision.

7 K-Generation and Mr Krasnov ("the appellants") instituted proceedings in the Supreme Court of South Australia. They named as defendants the Licensing Court and the Commissioner of Police. They sought a declaration that s 28A of the Act was invalid insofar as it impermissibly interfered with the exercise by the Licensing Court of the judicial power of the Commonwealth. They also sought a

declaration that the Court, in affirming the decision of Commissioner Pryor, had failed to observe the requirements of procedural fairness and that the decision of the Court was void and of no effect. They sought orders in the nature of certiorari and mandamus, quashing the decision of the Licensing Court and directing the Court to consider K-Generation's appeal from Commissioner Pryor according to law.

8 On 8 May 2007 Kelly J made an order, by consent, referring the application to the Full Court of the Supreme Court. On 30 August 2007, the Full Court of the Supreme Court by a majority (Duggan and Vanstone JJ) refused the application for the declarations and dismissed the application for judicial review. Gray J dissented.

9 On 23 May 2008, the appellants were granted special leave to appeal to this Court from the judgment and orders of the Supreme Court of South Australia.

10 Section 28A infringes upon the open justice principle that is an essential part of the functioning of courts in Australia. It also infringes upon procedural fairness to the extent that it authorises and effectively requires the Licensing Court and the Supreme Court to consider, without disclosure to the party to whom it relates, criminal intelligence information submitted to the Court by the Commissioner of Police. However, it cannot be said that the section confers upon the Licensing Court or the Supreme Court functions which are incompatible with their institutional integrity as courts of the States or with their constitutional roles as repositories of federal jurisdiction. Properly construed the section leaves it to the courts to determine whether information classified as criminal intelligence answers that description. It also leaves it to the courts to decide what steps may be necessary to preserve the confidentiality of such material. The courts may, consistently with the section, disclose the material to legal representatives of the party affected on conditions of confidentiality enforced by undertaking or order. It leaves it open to the courts to decide whether to accept or reject such material and to decide what if any weight shall be placed upon it.

11 The constitutional objections to s 28A are not made out and the appeal should be dismissed with costs.

The decision of the Liquor and Gambling Commissioner

12 The decision of Commissioner Pryor was preceded by a hearing on 20 December 2006 at which K-Generation was represented by Mr Hoban and the Police Commissioner was represented by Sergeant Jakacic. Mr Krasnov gave evidence and was cross-examined. No transcript of that proceeding has been reproduced. Sergeant Jakacic tendered two "Police Commissioner Office files", containing information which had been classified as criminal intelligence pursuant to s 28A of the Act. The files were "admitted into evidence at the

hearing". Their contents were not disclosed to K-Generation. Commissioner Pryor did not read the files during the hearing. Counsel representing K-Generation did not ask him to provide a summary of the criminal intelligence at any time.

13 Sergeant Jakacic also tendered material relating to a known associate of Mr Krasnov. This was received by consent. Statutory declarations testifying to Mr Krasnov's good character were received.

14 In his reasons for decision dated 17 January 2007, Commissioner Pryor referred to s 56 of the Act. That section imposes the criterion that any person occupying a position of authority in an entity applying for a licence must be a fit and proper person to occupy such a position. Mr Krasnov occupied such a position with respect to K-Generation.

15 The Commissioner referred to s 28A(1) of the Act and to the definition of "criminal intelligence". He said he had considered the criminal intelligence together with the statutory declarations and submissions made at the hearing. He then set out the terms of s 28A(2) and concluded, without further elaboration, by saying:

> "Accordingly, I refuse the application on the ground that to grant the application would be contrary to the public interest."

The review hearing in the Licensing Court

16 At the commencement of the hearing in the Licensing Court on 8 February 2007, counsel for K-Generation told the Court that the hearing before Commissioner Pryor had been on a "preliminary point" as to whether Mr Krasnov was fit and proper and that the Commissioner had found against Mr Krasnov on the basis of s 28A of the Act.

17 Counsel sought review on the preliminary point only and proposed that the most satisfactory way of proceeding would be to place the criminal intelligence material which had been before Commissioner Pryor, before the Licensing Court. He said:

> "If you decide there is a foundation in the Commissioner's decision, then you find against Mr Krasnov and that will be, effectively, the end of the matter. However, if after looking at material you take a different view, then it may well be that we put further materials before you in the sense of a hearing or re-hearing as to the merits of the application in order to seek to persuade that notwithstanding the section 28A material, the man ought to be found to be fit and proper."

Counsel said that he was satisfied that procedurally the criminal intelligence material had been "properly before the Commissioner". He conceded that he would have no opportunity to comment on it or to take instructions or put further evidence before the Court in relation to it. He eschewed, on the basis of economy, a suggestion that the Court should read the transcript of proceedings before Commissioner Pryor as well as the criminal intelligence material. His Honour, Rice DCJ, sitting as the Licensing Court, said he would proceed in stages if necessary. He would read the criminal intelligence material but would not read any transcript unless it had already been prepared.

18 The review hearing resumed before the Licensing Court on 12 February 2007. After hearing further from the parties, his Honour expressed his understanding of their common submission that if he agreed with Commissioner Pryor about his use of the criminal intelligence and came to the same conclusion, then he would indicate that to the parties and they could decide where they went from there. If his review of the intelligence material inclined him to think that he would or may not have come to the same conclusion, he would indicate that and the parties could then decide whether they wanted to go to a full rehearing.

19 After adjourning for 20 minutes, his Honour came back, having read the intelligence material which also related to Mr Krasnov's associate and said:

> "I think, in a nutshell, my view is that I would reach the same view as the Commissioner reached, to put it as simply and as quickly as I could. I have looked at the material the Commissioner looked at and quite frankly I would come to the same view."

The order of the Licensing Court

20 On 12 February 2007, the Licensing Court made the following orders:

> "1. The decision of the Liquor and Gambling Commissioner is affirmed and, to the extent that it is necessary his Honour confirms that he makes the same decision.
>
> 2. The matter is to be adjourned indefinitely."

The judgment of the Full Court

21 The judgment of the majority dismissing the application was delivered by Duggan J, with whom Vanstone J agreed[1]. In holding that *Kable v Director of*

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1 *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58.

Public Prosecutions (NSW)[2] did not apply to invalidate s 28A, his Honour held inter alia:

(i) The Licensing Court is a "court" of the State of South Australia for the purposes of s 77(iii) of the Constitution

(ii) The Court could have federal jurisdiction conferred upon it.

(iii) Section 28A reflected a legislative intention to make inroads into the requirements of procedural fairness.

(iv) Legislative inroads into procedural fairness do not necessarily impose a role on the Court incompatible with its constitutional function as a repository of federal jurisdiction.

(v) The Court can determine what weight is to be given to criminal intelligence information by reference, inter alia, to the fact that it has not been tested in any way.

(vi) Section 28A does not generate a closer connection between the Court and the executive, nor does it introduce a procedure of a political nature or political bias calculated to influence the discretion of the Court.

22 His Honour acknowledged that by limiting access to information, s 28A would place the applicant for a licence at a disadvantage and might prevent the Court from giving full reasons for its decision. While such departures from established rules of fairness were of concern, it remained the duty of the Court to assess the matter objectively and subject classified material to scrutiny as part of the process.

23 His Honour concluded[3]:

> "In summary, therefore, I am of the view that the enactment does not impose on the Licensing Court a procedure which is constitutionally incompatible with its status as a court which is a potential repository of federal jurisdiction. Furthermore, the legislation does not require a District Court judge to perform a non-judicial function. Even if the function could be described as non-judicial, it is not of such a nature as to be constitutionally incompatible with the role of a District Court judge."

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2 (1996) 189 CLR 51; [1996] HCA 24.

3 (2007) 99 SASR 58 at 78 [73].

His Honour held the same reasoning to apply to the situation where the Supreme Court was required to consider an appeal from a decision of a judge of the Licensing Court.

24 Gray J in dissent held, inter alia:

(i) The usual duty to inform applicants of the case against them is excluded by s 28A to the extent that that duty would have required the Licensing Court to disclose the criminal intelligence.

(ii) Even information derived from the criminal intelligence which did not identify either the source or a police operation could not be disclosed.

(iii) Although the appellants accepted in the Licensing Court that they were not entitled to natural justice in respect of the criminal intelligence they did not thereby waive their entitlement.

(iv) If there had been a breach of natural justice the Supreme Court would have the power to grant judicial review and to make an order in the nature of certiorari.

(v) While judicial review of a classification decision in respect of criminal intelligence might be possible, the party seeking review would not be able to gain access to the material or have any information about its content.

(vi) Legislation which requires a court invested with federal jurisdiction to exercise federal judicial power without affording a party an opportunity to respond to adverse claims is inconsistent with the integrated federal judiciary established by Ch III of the Constitution.

(vii) The fact that it is a District Court Judge who holds the position as the Licensing Court and that the Full Court of the Supreme Court has no option under the legislation but to uphold the Licensing Court's breach of natural justice, results in s 28A being constitutionally invalid.

The ground of appeal

25 The single ground of appeal was:

"The Full Court erred in law in finding that s 28A of [the Act] is valid insofar as it requires the Liquor Licensing Court to hear and determine a review pursuant to section 23 of [the Act] without disclosing to the applicant information classified as 'criminal intelligence', relied on by the Liquor Licensing Commissioner in refusing an application for a licence."

Statutory framework – *Liquor Licensing Act* 1997 (SA) – general provisions

26 The two principal decision-making bodies under the Act are the Liquor and Gambling Commissioner and the Licensing Court. The term "licensing authority" is defined in s 4 to mean:

> "(a) in relation to a matter that is to be decided by the Court under this Act – the Court;
>
> (b) in relation to any other matter – the Commissioner".

27 The Licensing Court, whose existence pre-dated the Act, is continued in existence[4]. It is declared to be a court of record[5]. The court comprises "the Licensing Court Judge" or some other serving or former District Court Judge "with authority to exercise the jurisdiction of the Court"[6].

28 The Governor is empowered to designate by proclamation a District Court Judge as the Licensing Court Judge or to confer on other District Court Judges, or former District Court Judges, authority to exercise the jurisdiction of the Court[7]. The Governor may also vary or revoke such a proclamation under the section. Where a proclamation so provides it lapses at the end of a specified period[8]. The Court has the jurisdiction conferred on it by the Act or any other Act[9].

29 The Act divides responsibilities between the Liquor and Gambling Commissioner and the Licensing Court[10]. The Commissioner is to determine all non-contested matters except those required under some other provision of the Act to be determined by the Licensing Court. The Commissioner is also required

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4 Section 12.

5 Section 13.

6 Section 14.

7 Section 15(1).

8 Section 15(2).

9 Section 16. For example the Court has jurisdiction under s 69 of the *Gaming Machines Act* 1992 (SA) to hear appeals against decisions of the Liquor and Gambling Commissioner. Sections 12 and 70A of that Act replicate s 28A of the Act.

10 Section 17.

to endeavour to achieve agreement between parties by conciliation in respect of certain classes of contested application and then either to determine the application or to refer the matter for hearing and determination by the Court[11].

30 In proceedings under the Act or any other Act, the Court is required to act without undue formality. It is not bound by the rules of evidence but may inform itself on any matter it thinks fit[12]. A similar provision applies to the Liquor and Gambling Commissioner[13].

31 The Commissioner may refer questions for hearing and determination by the Court[14]. The Commissioner's decision may be reviewed by the Court[15] save for subjects on which the Commissioner has "an absolute discretion"[16]. A review is in the nature of a rehearing[17]. The Court may affirm, vary or quash the decision, substitute its own decision or refer a matter back to the Commissioner for rehearing or reconsideration[18].

32 There is an appeal from orders and decisions of the Licensing Court to the Supreme Court subject to the permission of the Supreme Court[19]. Such appeals are to be heard and determined by the Full Court[20]. No appeal lies against an order or decision of the Licensing Court made on a review of a decision of the Commissioner or against an order or decision of the Licensing Court excluded from appeal under a provision of the Act or some other Act[21].

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11 Section 17(1)(b).

12 Section 23.

13 Section 18.

14 Section 21.

15 Section 22(1).

16 Section 22(2).

17 Section 22(4).

18 Section 22(5).

19 Section 27(1).

20 Section 27(4).

21 Section 27(2).

33 The Act prohibits the sale of liquor without a licence[22]. The various classes of licence are set out in the Act and include an entertainment venue licence[23]. Mandatory conditions apply to every licence. Licensing authorities may also impose conditions that they consider appropriate[24].

34 Every application for a licence, other than categories which are irrelevant for present purposes, is to be given to the Commissioner of Police[25]. The Commissioner of Police is required thereafter to make available to the Liquor and Gambling Commissioner information about criminal convictions and other information to which the Commissioner of Police has access and which is relevant to whether the application should be granted[26].

35 The powers of a licensing authority to grant or refuse an application for a licence are set out in s 53:

> "(1) Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).
>
> (1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest."

36 An applicant for a licence must satisfy the licensing authority that the applicant is a fit and proper person to hold the licence. If the applicant is a trust or corporate entity, it must satisfy the licensing authority that each person who occupies a position of authority in the entity is a fit and proper person to occupy such a position in an entity holding a licence of the class sought in the application[27]. In determining whether a person is fit and proper a licensing authority is to take into account the reputation, honesty and integrity (including

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22 Section 29.

23 Section 31(2)(d) and s 35.

24 Sections 42 and 43.

25 Section 51A.

26 Section 51A(3).

27 Section 56(1).

the creditworthiness) of the person and the reputation, honesty and integrity of people with whom the person associates[28].

37 The Commissioner of Police may intervene in proceedings before a licensing authority on questions before the authority including the question whether a person is a fit and proper person or whether to grant the application would be contrary to the public interest[29].

38 There is a general right of objection to the grant of a licence[30].

39 Part 8 of the Act provides for disciplinary action against licensees. The Commissioner may deal with disciplinary matters by consent[31]. A complaint may be lodged with the Licensing Court by the Liquor and Gambling Commissioner or by the Commissioner of Police[32]. The Court, if satisfied on the balance of probabilities that there is proper cause for taking disciplinary action, may make one of a variety of dispositions including reprimanding the licensee or imposing a fine. It may disqualify a person from being licensed or approved under the Act[33]. An order imposing a fine may be registered in the Magistrates Court or the District Court and enforced as an order of the court in which it is registered[34].

40 The section at the centre of the present appeal is s 28A entitled "Criminal intelligence". It must be read with the definition of "criminal intelligence" in s 4 of the Act. The text of the section and of the definition are set out in the other judgments.

The contentions

41 Key propositions to emerge from the written submissions filed on behalf of the appellants were:

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28 Section 55(1).

29 Section 75A.

30 Section 77.

31 Section 119A.

32 Section 120.

33 Section 121(1).

34 Section 121(6).

1. The Licensing Court is a court upon which federal jurisdiction may be conferred by laws made under Ch III of the Constitution. The Solicitor-General for South Australia, on behalf of the Commissioner of Police (SA), made the same submission.

2. Section 28A mandates the acceptance by the Court of evidence tendered by the executive.

3. Section 28A mandates unfair procedures, ie consideration of such evidence in the absence of a party.

The substance of the argument founded on these propositions was that s 28A conferred a function upon the Licensing Court and upon the Supreme Court incompatible with their status as courts of a State in which federal jurisdiction could be invested under s 77(iii) of the Constitution.

42 The Solicitor-General, on behalf of the Commissioner of Police, advanced the following propositions, inter alia:

1. The duty imposed upon the Licensing Court under s 28A(5) does not arise unless the Court is satisfied that the information has been lawfully classified as criminal intelligence.

2. The Court is free to accept or reject the information as it sees fit and may allow for the fact that it has not been fully tested. It can take steps to ameliorate unfairness that may result.

3. The duty imposed upon the Licensing Court by s 28A(5) of the Act is not inconsistent with its character as a "court of a State" within the meaning of Ch III of the Constitution and is not otherwise inconsistent with Ch III.

43 The intervening parties generally supported the South Australian position. The Attorney-General for Queensland submitted that, given the nature of its functions and the absence of security of tenure for its members the Licensing Court could not be regarded as a "court of a State" for the purposes of receiving federal jurisdiction pursuant to s 77(iii) of the Constitution. The Attorney-General for Victoria submitted that the Licensing Court, in carrying out a review under s 22, was discharging an administrative function. There is, it was submitted, no constitutional principle to prevent State parliaments from modifying rules of procedural fairness in relation to such functions when carried out by State judges.

44 The Attorney-General for Western Australia submitted that if s 28A were found to be inconsistent with the Licensing Court having the character of a court for constitutional purposes, the consequence would be that the Licensing Court would not be a court of a State capable of being invested with federal jurisdiction

pursuant to s 77(iii) of the Constitution. Nor would it be one of the "several Courts of the States" invested with federal jurisdiction by s 39(2) of the *Judiciary Act* 1903 (Cth).

45 The point of departure for consideration of these submissions must be the interpretation of s 28A.

The approach to interpretation

46 It is a necessary first step in this appeal to consider what if any limitations s 28A places upon the Licensing Court and the Supreme Court in the exercise of their respective jurisdictions. Before the constitutional validity of a statute is considered its meaning and operation must be ascertained. The point of departure in that exercise is the ordinary and grammatical sense of the words having regard to their context and legislative purpose. Interpretation is also to be informed by the principle that the parliament, whether of the State or the Commonwealth, did not intend its statute to exceed constitutional limits[35]. It should be interpreted, so far as its words allow, to keep it within constitutional limits[36]. That is a principle of general application. It is also an approach mandated by the *Acts Interpretation Act* 1915 (SA)[37].

47 There is also a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law[38]. That is to say, there is a presumption against a parliamentary intention to infringe upon such rights and freedoms[39]. That presumption has been described

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35 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; [1926] HCA 58.

36 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267 per Dixon J; [1945] HCA 30; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14 per Mason CJ; [1992] HCA 64; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 161 [355]; [2006] HCA 52; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

37 Section 22A(1).

38 *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 436-437; [1994] HCA 15.

39 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587 per Lord Steyn.

in the United Kingdom as an aspect of a "principle of legality" governing the relationship between parliament, the executive and the courts. It was explained by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*[40]:

> "[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

Gleeson CJ described the presumption as "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted". He added, "[t]he hypothesis is an aspect of the rule of law"[41].

48 It is an aspect of the rule of law that courts sit in public and that they accord procedural fairness. The importance of these two principles requires a conservative approach to the interpretation of statutes affecting them.

49 The open court principle is of long historical standing and well established in all common law jurisdictions. It was enunciated by the House of Lords in *Scott v Scott*[42] and affirmed by this Court in *Dickason v Dickason*[43]. It was discussed in *Russell v Russell*[44] which was concerned with the question whether a provision of the *Family Law Act* 1975 (Cth), requiring that State courts exercising jurisdiction under that Act sit in private, was valid. The provision was held invalid on grounds not material to this appeal. It was held not to be an exercise of the constitutional power to invest State courts with federal jurisdiction. Relevantly to this case, however, the open court principle in relation to State courts was affirmed as "an essential aspect of their character"[45].

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40 [2000] 2 AC 115 at 131.

41 *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40.

42 [1913] AC 417.

43 (1913) 17 CLR 50; [1913] HCA 77.

44 (1976) 134 CLR 495; [1976] HCA 23.

45 (1976) 134 CLR 495 at 520 per Gibbs J.

Established exceptions to the general rule were recognised, as was the power of the Parliament to extend the categories of such exceptions[46]. The exceptional character of departure from the open court principle was emphasised by the observation of Stephen J[47]:

> "To require that a Supreme Court, possessing all the attributes of an English court of justice, should sit as of course in closed court is, I think, in the words of Lord Shaw, to turn that Court into a different kind of tribunal and involves that very intrusion into its constitution and organization which s 77(iii) does not authorize."

A statute which affects the open court principle by requiring a court to hear certain classes of evidence or argument in private is thus to be construed, where constructional choices are open, so as to minimise its impact upon the principle and to maximise the power of the court to implement the statutory command conservatively.

50 A question also arises in this case about the use which can be made of the Second Reading Speech for the Bill which led to the enactment of s 28A. If the Act were a Commonwealth statute, that Second Reading Speech could be considered pursuant to s 15AB of the *Acts Interpretation Act* 1901 (Cth). The South Australian *Acts Interpretation Act* does not contain any equivalent of s 15AB or the similar provisions of other States and Territories. Section 15AB permits consideration of extrinsic materials to determine the meaning of a provision of an Act when the provision is ambiguous or obscure or its ordinary meaning would lead to a result that is manifestly absurd or unreasonable.

51 The question whether extrinsic materials may be considered in South Australia and in what circumstances they may be considered as an aid to statutory interpretation is to be answered by the common law. The answer at common law is that such materials can be considered to determine, inter alia, the mischief to which an Act is directed. This Court has referred to Hansard in aid of its interpretation of South Australian statutes[48]. In 1996 the Full Court of the Supreme Court of South Australia referred to a minister's Second Reading Speech in order to identify the purpose of a statutory provision[49].

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46 (1976) 134 CLR 495 at 520 per Gibbs J.

47 (1976) 134 CLR 495 at 532. See also at 505 per Barwick CJ.

48 *Gerhardy v Brown* (1985) 159 CLR 70 at 104 per Mason J, 111 per Wilson J; [1985] HCA 11; *Hoare v The Queen* (1989) 167 CLR 348 at 360-361; [1989] HCA 33.

49 *Owen v South Australia* (1996) 66 SASR 251 at 256-257 per Cox J, 257 per Prior J; see also *Nemer v Holloway* (2003) 87 SASR 147 at 166-167 per Vanstone J and

(Footnote continues on next page)

52 At common law it is not necessary before entering upon a consideration of such material to surmount a threshold of ambiguity, obscurity or possible absurdity. Statutory interpretation requires the court to have regard to the context in which the words to be interpreted arise and also their statutory purpose. Context includes "the existing state of the law and the mischief which, by legitimate means … one may discern the statute was intended to remedy"[50].

53 The relevant extrinsic material is the Attorney-General's Second Reading Speech introducing the amendments which led to the enactment of s 28A. This material may be considered to determine the purpose of the section as an aid to its construction. That does not mean that the words of the Attorney-General can be substituted for its text[51]. That caution is apposite in the present case.

The purpose of s 28A

54 Section 28A was introduced into the Act by the *Statutes Amendment (Liquor, Gambling and Security Industries) Act* 2005 (SA). In his Second Reading Speech the Attorney-General referred to the infiltration by organised crime of the liquor and hospitality industries and, in particular, a significant level of involvement by outlaw motor cycle gangs. He pointed out that the liquor, gambling and security industries are attractive to and susceptible to infiltration by organised crime. Although this is reflected in regulatory regimes using various tests of fitness and propriety, existing licensing regimes had proved not sufficiently robust to combat infiltration.

55 The Attorney-General referred to the following factors contributing to the ineffectiveness of the existing licensing regime in this respect:

1. Organised crime typically legitimises involvement in industries through members without criminal convictions or "cleanskin" associates.

2. Law enforcement agencies possess intelligence that they are reluctant to disclose because it could prejudice current or future investigations or legal proceedings and could put the welfare of persons such as informants at risk.

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generally, in relation to South Australia, Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 70-71 [3.6].

50 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

51 *Re Bolton; Ex parte Bean* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; [1987] HCA 12.

3. Liquor licensing legislation as it then stood did not allow for intelligence to be presented without challenge for consideration by the licensing authority.

The Bill was said to address these problems by, inter alia, facilitating the use of police intelligence by protecting the confidentiality of that intelligence.

56 Significantly, the Attorney-General said:[52]

> "It is this last aspect of the Bill that is perhaps the most significant. The Bill amends the SIAA [*Security and Investigation Agents Act* 1995 (SA)], LLA [*Liquor Licensing Act* 1997 (SA)] and GMA [*Gaming Machines Act* 1992 (SA)] to facilitate the use of police intelligence in licensing decisions. The Bill provides that where police intelligence is used in any proceedings under those Acts, including in determinations of applications and disciplinary proceedings that can lead to cancellation of a licence or approval, that information or intelligence must not be disclosed, including to the applicant/licensee/approved person or his or her representatives. Where the licensing authority makes a determination of an application on the basis of this police information classified as criminal intelligence, it will not be required to provide reasons for that determination other than that to grant the application would be contrary to the public interest. A court hearing an appeal against a licence refusal or a disciplinary action against a licensee or approved person must hear the information in a court closed to all, including the applicant/licensee/approved person and that person's representatives."

The provisions concerning confidentiality of criminal intelligence were said to be modelled on those enacted in the *Firearms Act* 1977 (SA) by the *Firearms (COAG Agreement) Amendment Act* 2003 (SA)[53].

57 The Second Reading Speech incorporated an explanatory section covering each of the new provisions being introduced by the Bill. It referred in particular to s 28A but did little more than repeat the substance of the relevant parts of that section.

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52 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 9 December 2004 at 1295.

53 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 9 December 2004 at 1295.

The interpretation of s 28A

58 Section 28A(1) imposes a general prohibition on disclosure of information "provided by the Commissioner of Police" to the Liquor and Gambling Commissioner. The generality of that prohibition is qualified by exceptions permitting disclosure to the Minister or a court or a person to whom the Commissioner of Police authorises its disclosure. It is a necessary condition of the prohibition that the information "is classified by the Commissioner of Police as criminal intelligence".

59 The function conferred on the Commissioner of Police by use of the word "classify" is subject to the minimum constraint applicable to the exercise of any statutory power namely that it must be exercised in good faith and within the scope and for the purposes of the statute[54].

60 If the word "classify" were to be read merely as "designate" it is arguable that there would be little more than that minimum constraint upon the Police Commissioner's function. However, its ordinary meaning is[55]:

"To arrange or distribute in classes according to a method or system".

The process of classification is therefore to be informed by some selection principle. In this case the selection principle is disclosed by the definition of "criminal intelligence" in s 4 of the Act.

61 The definition requires that for material to be classified as criminal intelligence it must satisfy a number of conditions. The subject matter of the classification must be "information". It must have the character of information "relating to" actual or suspected criminal activity[56]. Criminal activity means, at least, the commission of offences against the criminal law and could include incidental conduct. The activity must be "actual" or "suspected". The latter term does not require formation of a suspicion on the part of the Commissioner about

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54 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; [1947] HCA 21. See also *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [22] per Gaudron and Gummow JJ; [1998] HCA 11.

55 *The Oxford English Dictionary*, 2nd ed (1989), vol 3 at 283.

56 The expression "relating to" denotes a connection between two subject matters, the nature and closeness of which depends upon context: *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 per McHugh J; [1990] HCA 16. In this context it may be equated, without further elaboration, to information "about" or "concerning" criminal activity.

activity. It will suffice that the person providing the information has the relevant belief or suspicion. Whether these conditions are satisfied may be determined upon inspection of the information by reference to its content and sources.

62 The information must also be such that its disclosure could reasonably be expected to prejudice criminal investigations or enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement. That criterion is objective. It is not satisfied merely by the formation of the Commissioner's opinion to that effect. It is a criterion requiring a non-trivial risk of prejudice or discovery. Given that the Police Commissioner has the non-delegable function of classification, it may be taken that he or she must make the relevant risk assessment. But the objective language of the criterion indicates that the assessment must be reasonably open having regard to the content and sources of the information.

63 The information on the face of it must satisfy the criteria set out in the definition of "criminal intelligence". There must be a basis for the view that it could reasonably be expected that disclosure would have the effect referred to in the definition. A court presented with information classified as criminal intelligence could decide that the information did not, on its face, satisfy one or other of the criteria in the definition. This does leave a margin of appreciation for the Police Commissioner's assessment of the effect of disclosure subject to there being an objective foundation for that assessment.

64 The prohibition in s 28A(1) is expressed in the passive sense. It is concerned with "information provided by the Commissioner of Police to the [Liquor and Gambling] Commissioner". It is thus directed to the Liquor and Gambling Commissioner. It does not prohibit disclosure to a court. The question is whether the prohibition applies further to prevent the relevant court from disclosing the information to any other person.

65 As a general rule, absent clear words, a statute should not be construed so as to confine the way in which a court exercises its jurisdiction, including the way in which it accords procedural fairness. No such words appear from s 28A(1). Indeed it has nothing to say on that matter. The provision affecting the way in which a court may deal with criminal intelligence is s 28A(5).

66 Section 28A(5) lies at the heart of the appellants' case. It is in terms a direction to the Commissioner, the Licensing Court and to the Supreme Court about how they are to deal, in proceedings under the Act, with information classified as criminal intelligence.

67 The primary direction is to "take steps to maintain the confidentiality of [the] information". That direction is not absolute because it is conditioned upon "the application of the Commissioner of Police". The existence of that condition

reinforces the conclusion that s 28A(1) does not itself prevent a court from making disclosure to the parties of classified criminal intelligence information.

68 The purpose of the confidentiality, mandated by s 28A(5), can be discerned from the definition of "criminal intelligence". It is to avoid prejudice to criminal investigations and/or the discovery of the existence or identity of a confidential source of information relevant to law enforcement. That purpose was also reflected in the Attorney-General's Second Reading Speech as serving the larger purpose of more effectively preventing infiltration of the liquor industry by organised crime. The level of confidentiality to be maintained is not specified in s 28A. It is not absolute for the information will be known to the representatives of the Commissioner of Police before the Liquor and Gambling Commissioner. It will be known to the Liquor and Gambling Commissioner and to the judge or judges of the Licensing Court or of the Supreme Court before whom the relevant proceedings are brought.

69 Sub-section (5) requires the Court to take steps to maintain confidentiality "including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives". This raises the question whether the Court is required to take the steps expressly specified or whether they are steps which it is authorised, but not obliged, to take in order to meet the obligation of confidentiality.

70 The Attorney-General's assertion in the Second Reading Speech that the Court "must hear the information in a court closed to all, including the applicant … and that person's representatives" was a statement of his intention. It is not a substitute for the actual words of s 28A(5). Nor does it require those words to be interpreted so as to mandate exclusion of legal representatives of an applicant from a hearing in which evidence is received and argument entertained about criminal intelligence.

71 The submission of the Solicitor-General for South Australia did not support a construction of s 28A(5) which would mandate exclusion of legal representatives. The Solicitor-General was no doubt conscious of the risk of invalidity associated with too prescriptive an interpretation. And it was no doubt for that reason that counsel for the appellants argued for the more draconian view of the provision which accorded with the Attorney-General's own proposed construction.

72 The risk associated with excessively directive statutes was highlighted by the observations in the joint judgment in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[57]:

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57 (2008) 234 CLR 532 at 560 [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." (footnote omitted)

73 The better view, which is permitted by the language of the statute, is that the Court is authorised but not required to exclude legal representatives from that part of the proceedings in which it receives evidence or hears argument about the classified information. That constructional choice applies the conservative interpretive approach consistent with the principle of legality referred to earlier. There is here no inevitable undermining of the legislative purpose enunciated in the Attorney-General's Second Reading Speech. For it may be that the Court would be less likely in some cases to feel confident about acting on information classified as criminal intelligence where it has not had the assistance of argument on both sides of the question about its classification, whether it should be received at all and, if so, what weight should be attached to it.

74 As a practical matter it may be highly unlikely that relevant confidentiality could be assured if information were to be disclosed to an applicant adversely affected by it. The same level of risk may not apply to disclosure of information to a legal representative who is prepared to give a formal undertaking to the Court or submit to a prohibition by way of court order against disclosure of the information to the affected party or anyone else. Breach of such an undertaking to or order by the Supreme Court would be punishable as a contempt of that Court. Breach of an undertaking to or an order made by the Licensing Court would be punishable by the Supreme Court as a contempt committed in relation to an inferior court subject to its supervisory jurisdiction[58]. Breach of such an undertaking or order could also expose the legal representative to disciplinary action by the relevant professional regulatory body.

75 The Court could nevertheless decide that disclosure to legal representatives, even when subject to undertakings or orders as to confidentiality, would carry too high a risk. Still, s 28A(5) contemplates that the Court may hear "argument" about the information in private in the absence of the parties and their legal representatives. It impliedly accepts that the Court may itself inquire into the classification of the information. It may also wish to decide what weight it should give to it. Evidence "about the information" might relate to the reliability of the sources from which the information has been obtained or the risk of prejudice were it to be disclosed.

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58 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 360; [1955] HCA 12 and see generally Campbell, "Inferior and Superior Courts and Courts of Record", (1997) 6 *Journal of Judicial Administration* 249 at 251-252.

76 Properly construed s 28A(5) gives the Licensing Court and the Supreme Court a degree of flexibility in the steps to be taken to maintain the confidentiality of criminal intelligence. It tends to support the conclusion that the Court can decide, no doubt after hearing argument from at least the Police Commissioner, if not the legal representatives of the applicant, whether the information has been correctly classified as criminal intelligence and, if so, what weight should be given to it. There is nothing in the Act to prevent the Court from taking into account the fact that the information has not been able to be tested by or on behalf of the applicant, in assessing its weight.

77 Contrary to the submission on behalf of the appellants, which was directed to the most draconian construction, there is nothing in s 28A requiring the Licensing Court to accept or act upon information submitted to it by the Commissioner of Police even if the Court is satisfied that the information is properly classified as "criminal intelligence". In deciding whether to accept or reject or simply not to rely upon such information, the Court may have regard to:

(i) its relevance to the question it has to decide;

(ii) its reliability – a judgment which may be made by considering the nature of the sources from which the information has been obtained and the extent to which it is supported from more than one source;

(iii) its weight – if, for example, the information offers little more than suspicion or innuendo relating to an applicant or associated persons, the Court may decide that it should not act upon it. In this context the Court may have regard to the fact that the information has not been able to be tested by cross-examination.

78 There is nothing to prevent an applicant faced with unseen "criminal intelligence" from tendering comprehensive evidence about his or her own good character and associations. To the extent that the Commissioner of Police seeks to maintain the confidentiality of criminal intelligence provided to the Court, that confidentiality may limit the extent to which such character evidence may be tested by cross-examination.

79 The Court's capacity to accept or reject or not rely upon criminal intelligence is not affected by the fact that it is not bound by the rules of evidence and may inform itself on any matter as it thinks fit. That provision, which is in familiar terms, does not excuse the Court from the duty to act lawfully, rationally and fairly[59].

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59 *Wajnberg v Raynor* [1971] VR 665 at 677-679 per McInerney J.

The nature of the Licensing Court

80 There was no dispute between the principal parties to this appeal that the Licensing Court is a court of the State of South Australia, capable of being invested with federal jurisdiction pursuant to s 77(iii) of the Constitution and actually invested with such jurisdiction pursuant to s 39(2) of the *Judiciary Act*.

81 The Attorney-General (Qld), intervening, contended that the function of the Licensing Court in the granting or withholding of licences, in reviewing the Liquor and Gambling Commissioner's decisions and even in the exercise of its disciplinary jurisdiction, are administrative in nature. He pointed to the broad policy considerations which it may apply, reflected, inter alia, in the "public interest" criteria under the Act. On that basis the Licensing Court was said not to be a court of a State for the purposes of s 77(iii) of the Constitution. It would follow that no question of the effect of s 28A on its fitness as a repository of federal jurisdiction could arise. Section 28A would therefore be valid.

82 There is no doubt that various classes of decision which the Licensing Court is authorised to make may be informed by public policy and public interest considerations and to that extent have a polycentric character about them. That is particularly so in relation to the grant or withholding of licences. But the application of public interest criteria has a long history as part of the judicial function[60]. And the intrusion of policy considerations in its decision making does not necessarily deprive a tribunal of the character of a court[61]. The Licensing Court is not bound by the rules of evidence and may inform itself as it sees fit. This can be an indicator of an administrative rather than a judicial body, but it is not determinative. It does not negate the requirement that the Court act lawfully, rationally and fairly. Many important rules of evidence will arise as a consequence of the application of those criteria to the decision-making process.

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60 In the 19th century public benefit could be a defence to nuisance actions arising out of partial obstruction of navigable waterways by riparian owners: *R v Russell* (1827) 6 B & C 566; [108 ER 560]; *Attorney-General v Terry* (1874) 9 LR Ch App 423. And public interest is to be taken into account in determining the enforceability of covenants in restraint of trade: *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 at 565; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126; [2001] HCA 45.

61 *Attorney-General v Alinta Ltd* (2008) 233 CLR 542 at 551 [5] per Gleeson CJ, 553 [14] per Gummow J, 560 [37] per Kirby J, 597 [168] per Crennan and Kiefel JJ; [2008] HCA 2.

83 The South Australian Parliament has established the Court as a court of record. It has provided for it to be headed by a serving judge of the District Court and otherwise comprised of serving and former judges. It has conferred upon it powers of the kind that are exercised by a court. While non-contested applications are heard by the Liquor and Gambling Commissioner, save where specifically required to be heard by the Court, contested matters are generally referred for hearing and determination by the Court. It has also conferred upon it a disciplinary function under Pt 8 which involves a judicial process even though it is the kind of chameleon function that could be carried out by an administrative body.

84 Characterisation of a court as a court of a State for the purposes of s 77(iii) does not require that it possess the attributes necessary for a federal court created under Ch III of the Constitution. As McHugh J observed in *Fardon v Attorney-General (Qld)*[62]:

> "It is a serious constitutional mistake to think that either *Kable* or the *Constitution* assimilates State courts or their judges and officers with federal courts and their judges and officers. The *Constitution* provides for an integrated court system. But that does not mean that what federal courts cannot do, State courts cannot do. Australia is governed by a federal, not a unitary, system of government."

85 In my opinion and particularly having regard to its designation as a court of record by the State legislature, the Licensing Court of South Australia should be regarded as a "court of a State" for the purposes of receiving federal jurisdiction under s 77(iii) of the Constitution.

86 I also respectfully agree with and adopt the reasons given in the joint judgment for coming to the same conclusion.

The validity of s 28A

87 Under the Constitution the courts of the States "are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power"[63]. Since the abolition in 1986 of appeals from State courts to the Judicial Committee of the Privy Council that integrated

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62 (2004) 223 CLR 575 at 598 [36]; [2004] HCA 46.

63 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 114, 115 per McHugh J.

national court system is subject to "final superintendence" by the High Court thus ensuring the unity of the common law throughout Australia[64].

88 The Parliament of the Commonwealth must, of course, take the courts of the States as it finds them. There is, consistently with the constitutional scheme for the exercise of the judicial power of the Commonwealth, a degree of institutional and procedural flexibility on the part of the parliaments of the States, which may travel beyond the limits permissible in federal courts created by the Parliament. That flexibility does not extend to conferring powers on State courts which are "repugnant to or incompatible with the exercise of the judicial power of the Commonwealth"[65]. Incompatibility with institutional integrity may exist where a power or function conferred upon a court is "apt or likely … to undermine public confidence in the courts exercising that power or function"[66].

89 In *Forge v Australian Securities and Investments Commission*[67] in the joint judgment of Gummow, Hayne and Crennan JJ, their Honours referred back to *Kable* and identified the "relevant principle" emerging from it and authorities which came after it, in the following terms[68]:

> "But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)*[69] and *North Australian Aboriginal Legal Aid Service Inc v Bradley*[70], 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."

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64 (1996) 189 CLR 51 at 138 per Gummow J.

65 (1996) 189 CLR 51 at 104 per Gaudron J, quoted with approval in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, Hayne J agreeing at 648 [198].

66 (2004) 223 CLR 575 at 617 [102] per Gummow J.

67 (2006) 228 CLR 45; [2006] HCA 44.

68 (2006) 228 CLR 45 at 76 [63].

69 (2004) 223 CLR 575.

70 (2004) 218 CLR 146 at 164 [32]; [2004] HCA 31.

90 It is important to bear in mind, as Gummow J pointed out in *Fardon*[71] that the principle derived from *Kable* is a constitutional doctrine not framed in terms apt to dictate future outcomes:

> "Reflection upon the range of human affairs, the scope of executive and legislative activity, and the necessity for close analysis of complex and varied statutory schemes will indicate that this may be a strength rather than a weakness of constitutional doctrine."

The question whether functions, powers or duties cast upon a court are incompatible with its institutional integrity as a court will be answered by an evaluative process which may require consideration of a number of factors. The evaluation process required is not unlike that involved in deciding whether a body can be said to be exercising judicial power.

91 There are some similarities between this case and *Gypsy Jokers*[72]. Under the *Corruption and Crime Commission Act* 2003 (WA) the Supreme Court of Western Australia was empowered to review decisions by the Commissioner of Police to issue fortification removal notices in relation to fortified premises thought to be associated with organised crime. It was a condition of the power to issue such a notice that the Commissioner reasonably believed that the subject premises were heavily fortified and habitually used by people reasonably suspected to be involved in organised crime[73]. The Commissioner was also authorised to "identify" information provided to the Court upon a review as confidential "if its disclosure might prejudice the operations of the Commissioner of Police". If the information were so identified it was to be "for the court's use only and … not to be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way"[74].

92 The joint judgment in *Gypsy Jokers* cited the requirement that a court capable of exercising the judicial power of the Commonwealth be, and appear to be, an independent and impartial tribunal[75]. The joint judgment acknowledged "the impossibility of making an exhaustive statement of the minimum

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71 (2004) 223 CLR 575 at 618 [105].

72 (2008) 234 CLR 532.

73 *Corruption and Crime Commission Act*, s 72(2).

74 *Corruption and Crime Commission Act*, s 76(2).

75 (2008) 234 CLR 532 at 552 [10], citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29].

characteristics of such an independent and impartial tribunal"[76]. Their Honours observed however that the conditions necessary for courts to administer justice according to law could be inconsistent with some forms of external control of the courts appropriate to the exercise of authority by public officials and administrators[77].

93 Importantly in *Gypsy Jokers* the power conferred on the Commissioner to "identify" information as "confidential" was not conditioned upon his opinion. It was a matter for the Supreme Court to decide whether the disclosure of the information might have the prejudicial effect underpinning the Police Commissioner's identification of it as confidential.

94 In the present case, the Licensing Court and the Supreme Court can look behind the Police Commissioner's classification of information as criminal intelligence to determine whether it meets the objective criteria upon which that classification must be based.

95 The reviewability of the Police Commissioner's classification means that upon the Commissioner making an application to the Court under s 28A(5) the representatives for the affected party may make submissions to the Court about the validity of that classification. It may be that those representatives will be precluded by the Court from having access to the information for the purpose of making their submissions. Even then, they can assist the Court by drawing its attention to the relevant criteria. They could even cross-examine the Commissioner about the way in which he or she arrived at the classification albeit it must be accepted that the scope of the cross-examination would be confined by their lack of access to the information.

96 The legal representatives of an applicant affected by criminal intelligence may apply to the Court to be given the right to inspect the information under non-disclosure undertakings or orders. Such procedures are not unusual particularly in cases involving claims for the confidentiality of documents produced in commercial proceedings. In some commercial cases a party may issue subpoenas requiring production of documents by non-parties who are competitors with the party issuing the subpoena. Production of such documents may be ordered on the basis that they can only be inspected by the legal representatives of the party issuing the subpoena and then only subject to undertakings not to disclose the contents of the documents to their clients.

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76 (2008) 234 CLR 532 at 553 [10].

77 (2008) 234 CLR 532 at 553 [10].

97 Of course the Court may decide that disclosure to legal representatives would carry too high a risk of prejudice to criminal investigations or confidential sources of information. But that decision is a matter in the discretion of the Court. The maintenance of "confidentiality" mandated in s 28A(5) does not require confidentiality to be maintained in a particular way. Under that rubric the Court may, in an appropriate case, be able to provide a summary of the conclusions or inferences offered or arising from the criminal intelligence without disclosing its detailed content or sources.

98 The terms of s 28A(5) do not subject the Licensing Court or the Supreme Court to the direction of the executive or an administrative authority. The sub-section does not require them to receive or act upon criminal intelligence classified as such by the Commissioner of Police. It does not deprive the Court of discretion as to how confidentiality is to be maintained. Nor does it mandate a general exclusion in all circumstances of legal representatives from access to the information.

99 Section 28A(5) does not undermine the institutional integrity of either court. It does not render them unfit repositories for the exercise of federal jurisdiction. I should add that I agree with the observations in the joint judgment rejecting the submission by Queensland and Western Australia that if s 28A(5) had the effect on the Licensing Court contended for by the appellants it would have caused that Court to cease to be a "court of a State" which might exercise federal jurisdiction.

Conclusion

100 For the preceding reasons the appeal should be dismissed with costs.

101 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. The second appellant Mr Genargi Krasnov is the sole Director of the first appellant ("K-Generation"). K-Generation is trustee of the K-Generation Unit Trust in which Mr Krasnov has an interest. K-Generation applied for an entertainment venue licence under s 35 of the *Liquor Licensing Act* 1997 (SA) ("the Act") in respect of premises at 362-366 King William Street, Adelaide. These were to be known as "Sky Lounge KTV". The Act was amended by the *Statutes Amendment (Liquor, Gambling and Security Industries) Act* 2005 (SA) ("the 2005 Act"). This appeal is concerned with the provisions made in the 2005 Act with respect to "criminal intelligence", particularly by the insertion into the Act of s 28A. That provision will be set out later in these reasons.

102 Section 56 of the Act requires an applicant for an entertainment venue licence to be "a fit and proper person" to hold it. If the applicant, as in the present case, is a trust or corporate entity, the section requires that each person who occupies a position of authority in the entity be "a fit and proper person to occupy such a position in an entity holding a licence of the class sought in the application". Section 51A(2) requires the Liquor and Gambling Commissioner ("the Liquor Commissioner") (an office provided for in s 8 of the Act) to furnish a copy of the application to the Commissioner of Police. The Police Commissioner then must make available to the Liquor Commissioner "information about criminal convictions" and may make available "other information to which the Commissioner of Police has access" being, in either case, information which is "relevant to whether the application should be granted" (s 51A(3)).

103 The application was advertised, as required by s 52 of the Act. An objection under s 77 of the Act by Wright Street Chambers was settled by conciliation. Section 77 gives a right of objection to applications, on one or more of the grounds laid out in s 77(5). Section 76 gave to Adelaide City Council a right to intervene and it did so but that dispute also was resolved.

The litigation

104 The litigation which has reached this Court stems from the exercise by the Commissioner of Police of the right of intervention conferred by s 75A of the Act. This states:

> "The Commissioner of Police may intervene in proceedings before a licensing authority for the purpose of introducing evidence, or making submissions, on any question before the authority and, in particular, may,

if the proceedings are in connection with an application under this Part, intervene on the question of –

(a) whether a person is a fit and proper person; or

(b) whether, if the application were to be granted, public disorder or disturbance would be likely to result; or

(c) whether to grant the application would be contrary to the public interest."

105 It should be noted immediately that an intervener or an objector becomes a "party" to the relevant proceedings by reason of the definition of "party" in s 4 of the Act. Thus, for example, a Commonwealth statutory authority occupying premises in the vicinity of the proposed entertainment venue might, as an objector, become a party to proceedings under the Act.

106 The purpose of the intervention by the Commissioner of Police was to introduce evidence and make representations on the question of whether Mr Krasnov and another interested party in K-Generation, Adeline Tay, were fit and proper persons to occupy positions of authority in that proposed licence. On 17 January 2007, the Liquor Commissioner refused the application on the ground that to grant it would be contrary to the public interest. An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest (s 53(1a)). The Liquor Commissioner refused the application after the Police Commissioner had provided what was classified as "criminal intelligence" within the meaning of s 28A of the Act.

107 An application for a review of the decision of the Liquor Commissioner was made to the Licensing Court of South Australia ("the Licensing Court"), constituted by Judge Rice of the District Court of South Australia. His Honour affirmed the decision of the Liquor Commissioner on 12 February 2007. K-Generation and Mr Krasnov then sought from the Supreme Court of South Australia a declaration that s 28A of the Act was invalid, together with orders for judicial review in the nature of certiorari quashing the decision of the Licensing Court made on 12 February 2007 and in the nature of mandamus compelling that Court to consider according to law the review sought by K-Generation of the decision of the Liquor Commissioner made on 17 January 2007. The Supreme Court proceedings were referred to the Full Court for hearing. The Full Court (Duggan and Vanstone JJ, Gray J dissenting)[78] dismissed the proceedings.

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78 *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58.

The appeal to this Court

108 The appeal is brought to this Court by special leave. The sole ground on which special leave was given is that the Full Court erred in law in finding s 28A of the Act to be valid notwithstanding that it required the Licensing Court to hear and determine the review without disclosing to K-Generation information classified as "criminal intelligence" which had been relied upon by the Liquor Commissioner in refusing the application for an entertainment venue licence.

109 The respondents to the appeal are the Licensing Court, which has entered a submitting appearance, and the Police Commissioner, for whom the South Australian Solicitor-General was leading counsel. The Attorneys-General for the Commonwealth, New South Wales, Victoria, Queensland and Western Australia intervened in the appeal. As will appear, the Attorneys-General differed between themselves in their submissions and some submissions were not adopted by either the appellants or the Police Commissioner.

110 Section 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") is enacted in the exercise of the power of the Parliament to make laws "investing any court of a State with federal jurisdiction": Constitution s 77(iii). The sub-section invests federal jurisdiction in "the several Courts of the States ... within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise ...". The appellants' submissions began with the proposition that the Licensing Court is such a court. The Police Commissioner accepts that this is the case.

111 However, the appellants rely upon the principle identified with the decision in *Kable v Director of Public Prosecutions (NSW)*[79]. They contend that the effect of s 28A of the Act is to deprive the Licensing Court of the reality or appearance of independence or impartiality that is essential to its position as the object of an exercise of power by the Parliament manifested in s 39(2) of the Judiciary Act. It was said in the joint judgment of McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[80] that to be capable of exercising judicial power of the Commonwealth a court must be, and appear to be, an independent and impartial tribunal. The consequence, on the case presented by the appellants, would be

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79 (1996) 189 CLR 51; [1996] HCA 24.

80 (2004) 218 CLR 146 at 163 [29]; [2004] HCA 31.

that s 28A was invalid and the review by the Licensing Court should be reheard without regard to s 28A.

112 On that formulation of the issues in this Court, the subject of debate would be the discernment of the relevant minimum characteristics of an independent and impartial Licensing Court. Their Honours in *Bradley*[81] said that "[n]o exhaustive statement of what constitutes that minimum in all cases is possible".

Is the Licensing Court a "court of a State"?

113 Queensland took a different position from that of the appellants and the Police Commissioner. It maintained that the Licensing Court did not answer the description of a court of the State of South Australia within the sense of s 39(2) of the Judiciary Act and s 77(iii) of the Constitution. The consequence would be that there is no occasion to apply the proposition in *Bradley* set out above, and no footing on which s 28A might be considered invalid.

114 That submission by Queensland should be rejected. For the reasons which follow, the Licensing Court is a court of the State of South Australia within the sense of s 77(iii) of the Constitution and s 39(2) of the Judiciary Act.

115 Part 2 Div 2 (ss 12-16) of the Act makes provision for the Licensing Court. Section 12 states that the Court "continues in existence". The Act repealed the *Liquor Licensing Act* 1985 (SA) ("the 1985 Act"). Section 10 of the 1985 Act had stated "[t]here shall be a court entitled the 'Licensing Court of South Australia'". Section 13 of the Act provides that the Licensing Court is a court of record. It is constituted by the Licensing Court judge, being a District Court judge designated by the Governor or by some other District Court judge or former District Court judge on whom the Governor confers authority to exercise jurisdiction of the Court (ss 14-15).

116 The Governor may vary or revoke a proclamation designating the Licensing Court judge or conferring authority on other District Court judges or former District Court judges (s 15(1)(c)). Further, if it so provides, a proclamation designating the Licensing Court judge or conferring such authority may lapse at the end of a specified period (s 15(2)). However, as the Commonwealth correctly submitted, there is no scope for purely arbitrary removal by the Executive. This is because variation or revocation under

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81 (2004) 218 CLR 146 at 163 [30].

s 15(1)(c) would itself be an administrative decision susceptible to challenge in the Supreme Court for bad faith or improper purpose[82].

117 Section 16 of the Act states "[t]he Court has the jurisdiction conferred on it by this Act or any other Act". Significant jurisdiction is conferred on the Licensing Court by Pt 6 (ss 69-70A) of the *Gaming Machines Act* 1992 (SA) ("the Gaming Machines Act"). In particular, Pt 2 Div 4 (s 12) deals with the classification of "criminal intelligence" and s 70A is drawn in terms resembling those of s 28A(5) of the Act[83].

118 The Licensing Court is required by s 17 to determine all matters referred by the Liquor Commissioner for hearing and determination under the obligation imposed by that section where certain disputes are not resolved by conciliation. The Licensing Court is also obliged to determine matters which under some provision of the Act other than s 17 are to be determined by the Licensing Court (s 17(1)(c)).

119 The Liquor Commissioner also may refer for hearing and determination by the Licensing Court proceedings involving questions of substantial public importance or a question of law or any other matter which should, in the public interest or the interests of a party to the proceedings be determined by the Licensing Court (s 21).

120 A party (within the sense of the definition to which reference has been made above) to proceedings before the Liquor Commissioner who is dissatisfied with the decision may apply to the Licensing Court for a review in the nature of a rehearing (s 22(1), (4)). However, a decision made in the exercise of "an absolute discretion" conferred upon the Liquor Commissioner "is not reviewable by the [Licensing Court]" (s 22(2)).

121 A party to proceedings before the Licensing Court may appear personally or by other representatives including counsel (s 25(1)). The Court may require the attendance of the person before it and the production of records and require the taking of an oath or affirmation verifying evidence given, or to be given, and

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82 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 171 [59].

83 Sections 12 and 70A of the Gaming Machines Act were inserted by the 2005 Act, ss 6, 23.

may require any person appearing before it to answer questions (s 24(1)). Failure to comply with these requirements is an offence (s 24(2)), but jurisdiction to try such offences is not given to the Licensing Court.

122 The Licensing Court may refer a question of law for determination by the Full Court of the Supreme Court (s 28). With the permission of the Supreme Court, a party to proceedings before the Licensing Court may appeal to the Full Court of the Supreme Court, but no appeal lies against an order or decision of the Licensing Court in various instances, including orders or decisions on a review of a decision of the Liquor Commissioner (s 27).

123 The Supreme Court also has jurisdiction with respect to judicial review of the proceedings of the Licensing Court. This was invoked in the present litigation and its scope was explained by Gray J in his reasons[84].

124 Section 23 of the Act states:

> "In proceedings before the [Licensing Court] (under this Act or any other Act) the Court –
>
> (a) must act without undue formality; and
>
> (b) is not bound by the rules of evidence but may inform itself on any matter as it thinks fit."

125 It was said in *Sue v Hill*[85] of provisions of this type that they are not inimical to the exercise of judicial power:

> "They do not exonerate the Court from the application of substantive rules of law and are consistent with, and indeed require the application of, the rules of procedural fairness[86]."

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84 (2007) 99 SASR 58 at 82.

85 (1999) 199 CLR 462 at 485 [42]; [1999] HCA 30.

86 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422 at 438-441; [1925] HCA 4; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 36, 46, 47; [1943] HCA 13.

Consequently, s 23 does not assist the case put by Queensland that the Licensing Court is not a "court of a State" within the meaning of s 77(iii) of the Constitution and s 39(2) of the Judiciary Act.

126 However, something more should be said respecting the provisions as to tenure of the members of the Licensing Court. In *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*[87], Kenny J remarked that "the long-standing acceptance of the capacity of courts of summary jurisdiction to receive federal jurisdiction emphasises the role of history, and institutional and governmental arrangements, in the assessment of constitutional institutional independence". Her Honour went on to refer to the remarks by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*[88] that both before and long after federation courts of summary jurisdiction, constituted by Justices of the Peace or by stipendiary magistrates, forming part of the colonial or State public service and thus not enjoying Act of Settlement tenure, had been considered fit objects for the investing of federal jurisdiction.

127 The linking of the membership of the Licensing Court to tenure as a District Court judge is significant in this regard. It serves to answer criticisms made by Queensland. The *District Court Act* 1991 (SA) ("the District Court Act") provides that judges of that Court cannot be removed from office except on an address from both Houses of Parliament praying for removal (s 15(1)), and that their salary cannot be reduced by subsequent determination of the Remuneration Tribunal (s 13(2)).

128 The Licensing Court of the present case was constituted by a District Court judge. There was no material before this Court indicating any current conferral of authority on former District Court judges pursuant to s 15(1) of the Act. It would be inappropriate in that setting further to consider the effect the making of such appointments might have on the constitutional character of the Licensing Court and in particular whether any consequent invalidity of the Act might entail severance of provisions respecting former District Court judges.

129 Queensland also emphasised the apparent absence in the Licensing Court of a contempt power. Section 13 constitutes the Licensing Court as "a court of

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87 (2008) 169 FCR 85 at 141.

88 (2006) 228 CLR 45 at 82 [82]; [2006] HCA 44.

record"[89]. Subject to any particular provisions which might be found in the Act, that expression, if it stood alone, would carry with it a power to punish by fine or imprisonment any contempt committed in the face of the Licensing Court[90], but would carry no broader contempt power. Further, as remarked above, whilst the powers of the Licensing Court with respect to witnesses and evidence are supported by the offence provision in s 24(2), jurisdiction to try those offences is not conferred on the Licensing Court.

130 The situation in the Licensing Court may be contrasted with that of the District Court and the Magistrates Court. By force of s 48 of the District Court Act, the District Court has the same power to deal with contempt as does the Supreme Court with respect to contempts of the Supreme Court. The Magistrates Court of South Australia is created as a court of record by s 5 of the *Magistrates Court Act* 1991 (SA) and ss 45 and 46 make express provision for the punishment by it of contempts in face of the Court. The Act makes no such provision for the Licensing Court. The upshot is that there may be substance in the contention by Queensland that contempts of the Licensing Court would fall within the general supervisory function of the Supreme Court with respect to the administration of justice by the inferior courts of the State[91].

131 However, if that be the situation of the Licensing Court with respect to contempt, this could not deny to it the character of a court of a State within the meaning of s 77(iii) of the Constitution. Reference has been made to the long history of inferior courts in Australia, extending back to the period before federation. They may well have lacked a power such as that conferred by s 48 of the District Court Act but that must have been within contemplation when s 77(iii) was formulated.

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89 See, as to the distinction between inferior and superior courts and courts of record, Campbell, "Inferior and Superior Courts and Courts of Record", (1997) 6 *Journal of Judicial Administration* 249. Professor Campbell (at 257) refers to the "dubious" practice in some State laws of designating as a "court of record" what otherwise is no more than a statutory tribunal.

90 *In re Dunn* [1906] VLR 493 at 499-500 per Cussen J.

91 See *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; [1955] HCA 12.

The nature of the jurisdiction of the Licensing Court

132 Queensland (with qualified support from Victoria) directed attention to the nature of the jurisdiction conferred upon the Licensing Court. This is a matter conceptually distinct from the structure and organisation of the Licensing Court. The submission from Queensland appeared to be that, save for *de minimis* exceptions, the Licensing Court exercised purely administrative functions under the legislation as it now stands.

133 In particular, Queensland contended that the authority of the Licensing Court with respect to the review by way of rehearing of decisions of the Liquor Commissioner on licensing applications was of an administrative nature. The Licensing Court was said not to be adjudicating by binding decision disputes as to rights or obligations arising from the operation of the law upon past events or conduct[92]; rather, the processes here were concerned with the creation of rights or obligations by grant of a licence.

134 It is unnecessary to consider further this line of argument. Both the Act and the Gaming Machines Act provide in various instances for the exercise by the Licensing Court of authority which appears plainly judicial in nature. For example, as the Commonwealth emphasised in its submissions, s 121 of the Act confers jurisdiction in disciplinary action matters; an order may be made imposing a fine[93]. Further, s 133 provides for the Licensing Court on application by the Liquor Commissioner to assess the amount of financial advantage gained by the contravention of, or non-compliance with, the Act or the condition of a licence; the amount so assessed then becomes a debt due to the Crown in right of South Australia.

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92 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268; [1995] HCA 10; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358 [16], 360-362 [25]-[29]; [2007] HCA 23.

93 The Licensing Court order may be registered in the Magistrates Court or the District Court and enforced as an order of the court of registration (s 121(6)), but that does not deny the exercise of judicial power by the Licensing Court in making the order; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

Section 28A

135 It is now convenient to return to the principal ground of dispute between the appellants and the second respondent, namely the alleged invalidity of s 28A of the Act. Section 28A comprises Div 6 of Pt 2. It was inserted by the 2005 Act and is headed "Criminal intelligence". That term is defined in s 4 in a form taken from an amendment made to the *Firearms Act* 1977 (SA) by the *Firearms (COAG Agreement) Amendment Act* 2003 (SA). The definition reads:

> "***criminal intelligence*** means information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which *could reasonably be expected* to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement". (emphasis added)

The Commissioner of Police is not to delegate, "except to a Deputy Commissioner or Assistant Commissioner of Police", the function of classifying information as criminal intelligence (s 28A(6)). These provisions, as a matter of necessary implication, confer the function of making that classification upon these officers[94].

136 The phrase "could reasonably be expected" is significant. Where the term "criminal intelligence" supplies a factum for the operation of a provision of the Act, then upon judicial review it would be for the Licensing Court to be satisfied that facts existed sufficient to found that expectation[95]. The South Australian Solicitor-General readily accepted this construction of the Act. The Commonwealth Solicitor-General put the point somewhat differently, submitting that to be a valid classification, the classification must be "objectively correct", and accepting that this imposed a higher standard.

137 Section 28A(1) operates upon information made available to the Liquor Commissioner by the Commissioner of Police under s 51A(3) (to which

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94 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 169 [52].

95 *George v Rockett* (1990) 170 CLR 104 at 112-113; [1990] HCA 26; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 557-558 [28]; [2008] HCA 4; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police [No 2]* [2008] WASC 166 at [78]-[92].

reference has been made), if that information has been classified by the Commissioner of Police as "criminal intelligence". Section 28A(1) states:

> "No information provided by the Commissioner of Police to the [Liquor] Commissioner may be disclosed to any person (except the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure) if the information is classified by the Commissioner of Police as criminal intelligence."

138 Sub-sections (2) and (3) of s 28A are directed to a "licensing authority" which is defined so as to include both the Liquor Commissioner and the Licensing Court in relation to a matter to be decided by it under the Act. If the Commissioner of Police lodges an objection to an application because of "criminal intelligence", the Commissioner of Police is not obliged to notify the applicant, but the licensing authority must notify the applicant that the Commissioner of Police has objected on the public interest ground (s 28A(3)). If, as in the present case, the licensing authority refuses a licence application because of information classified as "criminal intelligence", the authority is not required to provide any grounds or reasons other than that to grant it would be contrary to the public interest (s 28A(2)).

139 The relief sought by the appellants includes a declaration of the invalidity of s 28A, but the principal attack by the appellants in oral submissions was directed to the validity of s 28A(5) and it was to this that the opposing arguments responded.

Section 28A(5) reads:

> "In any proceedings under this Act, the [Liquor] Commissioner, the Court or the Supreme Court –
>
> (a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and
>
> (b) may take evidence consisting of or relating to information classified by the Commissioner of Police as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent."

140 At the hearing before the Liquor Commissioner, Mr Krasnov gave evidence and was cross-examined, but not with respect to the "criminal intelligence" material. Five statements or references were tendered in his support. There was no evidence led by the Police Commissioner.

141 At the hearing before the Licensing Court on 8 February 2007, counsel for the appellants said of the licence application:

> "It went before the Commissioner on a preliminary point as to whether the applicant, Mr Genargi Krasnov was fit and proper and the Commissioner found against Mr Krasnov on the basis of the new section 28A of [the Act] which deals with criminal intelligence.
>
> The review is sought then on this preliminary point, as to whether Mr Krasnov is fit and proper and it occurred to me that the most satisfactory way of dealing with the application would be for that material which was before the Commissioner to be placed before you. If you decide there is a foundation in the Commissioner's decision, then you find against Mr Krasnov and that will be, effectively, the end of the matter. However, if after looking at material you take a different view, then it may well be that we put further materials before you in the sense of a hearing or re-hearing as to the merits of the application in order to seek to persuade that notwithstanding the section 28A material, the man ought to be found to be fit and proper."

142 Judge Rice said that he had looked at the material before the Liquor Commissioner and that "quite frankly I would come to the same view". He added "I think that this is criminal intelligence" and went on:

> "The [Liquor] Commissioner has refused the application, the approvals, because of criminal intelligence. He has indicated his reasons that it would be contrary to the public interest or he said, I should say:
>
> > *I refuse the application on the ground that to grant the application would be contrary to the public interest.*
>
> That is a view with which I agree but not only agreeing with him, I make my own independent assessment, that is the view that I would come to as well and indeed have come to."

143 It is convenient now to turn to matters of construction of s 28A(5), which arose in the course of submissions to this Court. There are seven points to be made at the threshold. First, s 28A(5) imposes a requirement upon not only the

Liquor Commissioner, but also upon the Licensing Court and the Supreme Court. Secondly, it does so only in any proceedings under the Act. Thirdly, the requirement is enlivened only upon the application of the Commissioner of Police. Fourthly, the subject matter of the maintenance of confidentiality must be information classified by the Police Commissioner as "criminal intelligence". Fifthly, the definition of "criminal intelligence" in s 4, is so drawn that had a challenge been presented by the appellants it would have been for the Licensing Court to be satisfied that facts existed sufficient to found the expectation of the prejudicial consequences spelt out in the definition; or, that the classification was "objectively correct". Sixthly, it is unnecessary for present purposes to decide which construction should be preferred respecting this "trigger" to the operation of s 28A(5). Finally, nothing in s 28A at this stage modifies the powers conferred upon the Licensing Court by s 24 with respect to witnesses and evidence or the provisions of s 25 for legal representation.

144 In this way, the decision of the Commissioner of Police to classify material involved in this litigation as "criminal intelligence" would have been open to "collateral attack" by the appellants in the Licensing Court[96]. Accordingly, it is not correct, as the appellants would have it, that the Licensing Court had been obliged to accept the information classified by the Commissioner as "criminal intelligence".

145 If the decision of the Commissioner of Police to classify material as "criminal intelligence" withstands such a collateral attack, then the trigger to the operation of s 28A(5) remains effective.

146 Thereafter, and upon application by the Commissioner of Police, the Licensing Court is required to take steps towards a particular outcome. That outcome is the maintenance of the confidentiality of the information. The Licensing Court is not directed as to which particular steps may be taken, nor is it denied the assistance of submissions by the legal representatives of parties other than the Police Commissioner as to what those steps should be. The steps taken may be provisional in the sense that they may be varied, added to or subtracted from, as the exigencies of the litigation in the Licensing Court progressively appear and as submissions are made to the Licensing Court.

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96 See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 108 [36], 131 [94]; [1999] HCA 28.

147 The steps which are taken may go so far as to involve the reception of evidence and the hearing of argument by the Licensing Court in private and in the absence of the parties and their representatives. However, the phrase "including steps" in par (a) of s 28A(5) does not mandate the taking of such steps. Rather, the phrase appears in s 28A(5) to mark out the limits of the range within which the Licensing Court may act in particular cases when determining how to maintain the confidentiality of the information.

148 Further, the Licensing Court is not bound to accept in its terms the "criminal intelligence" upon which the Police Commissioner relies. The Court itself may question the evidence in closed session. Evidence led by other parties, and any limited form of cross-examination on the affidavits supplied under par (b) of s 28A(5), must be taken into account. The potential that the s 28A(5) procedure has for injurious effects is reduced by the fact that a decision by the Police Commissioner to make a s 28A(5)(a) application itself may greatly reduce the chance of the "criminal intelligence" being decisive, because, in at least some cases, the Licensing Court may feel disinclined to place weight on material which the Police Commissioner's application has prevented the applicant for a licence being able to test, or even see.

149 The result is that s 28A(5) did not operate to deny to the Licensing Court the constitutional character of an independent and impartial tribunal in the sense considered in *Bradley*. The majority of the Full Court was correct in dismissing the appellants' case.

The contrary outcome

150 What would have been the consequences for the operation of the Act and the constitutional status of the Licensing Court if s 28A(5) did render the Licensing Court a body which was not an independent and impartial tribunal in the exercise of its jurisdiction in this litigation?

151 Two possibilities were canvassed in submissions. They are so markedly different in the view they represent of the operation of the Constitution that the subject should not pass unremarked.

152 Queensland and Western Australia submitted that the consequence would be that the changes made by the 2005 Act would have so altered the character of the Licensing Court as to render it no longer a "court of a State" which might exercise federal jurisdiction. They submitted first that s 39(2) of the Judiciary Act is ambulatory in character and would thereafter (presumably until the repeal of the 2005 Act) cease to apply to the Licensing Court. Queensland and Western

Australia accepted that references to the Supreme Court of the States expressly made in s 73 of the Constitution indicated that those courts must always be within the phrase a "court of a State" as it appears in s 77(iii) of the Constitution; the legislation of New South Wales considered in *Kable* had been directed to its Supreme Court. But in other respects, the submissions continued, the Parliaments of the States might abolish courts they had created and, that being so, the States were not obliged by the Constitution to maintain courts upon which federal jurisdiction might be conferred.

153 The submissions to the contrary, particularly those of the Commonwealth, are to be preferred. There is no doubt that, with respect to subject matter outside the heads of federal jurisdiction in ss 75 and 76 of the Constitution, the State legislatures may confer judicial powers on a body that is not a "court of a State" and that in respect of a body that is a "court of a State", they may confer non-judicial powers. However, consistently with Ch III, the States may not establish a "court of a State" within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court. The effect of acceptance of the submissions by Queensland and Western Australia would be to weaken the effectiveness of the distinctive feature of Australian federalism represented by the general words of s 77(iii) of the Constitution.

154 The consequences of a measure which has the constitutional vice attributed by the appellants to s 28A(5) are quite different. The appellants, the Police Commissioner, and the Commonwealth correctly submitted that the provision would be invalid and questions of severance from the remainder of the Act might arise, but the Licensing Court would retain its character as a "court of a State".

Conclusions

155 If accepted, the submissions by Queensland and Western Australia would call for a remedy not sought by the appellants and, indeed, opposed by them. They seek a declaration of invalidity of s 28A of the Act, whereas these interveners accept the validity of s 28A but, as a corollary, would have this Court decide that the Licensing Court does not answer the constitutional description of a "court of a State". In future cases in this Court, whether in the appellate or original jurisdiction, where it becomes apparent that interveners assert arguments not accepted by the immediate parties, directions may be given by the Court for a procedure analogous to the notice of contention provided by r 42.08.5 of the High Court Rules 2004.

156 The appeal should be dismissed with costs.

157 KIRBY J. This appeal, from a divided decision of the Full Court of the Supreme Court of South Australia[97], concerns the application of this Court's holding in *Kable v Director of Public Prosecutions (NSW)*[98]. That case decided that State courts enjoy certain minimum standards of institutional independence and integrity, necessary to ensure that they are suitable recipients for the vesting of federal jurisdiction[99] as envisaged by the Constitution[100]. The requirement is implied from the provisions of Ch III of the Constitution.

158 Only one case has been decided by this Court in which State legislation has been held invalid by the *Kable* principle. That was the New South Wales Act[101] considered in *Kable* itself. Only one intermediate court decision has invalidated a State law by reference to the *Kable* principle[102]. These reasons will demonstrate that, once again, the invocation of *Kable* fails. However, they will also show that several arguments presented by the States, intervening to contest the ambit of the *Kable* principle or to resist its application to the present case, should be rejected.

159 The appeal presents issues similar in some ways to those decided by this Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[103]. As will be demonstrated, the legislation impugned in this appeal reserves to the relevant courts functions that are proper to the judiciary. It respects the institutional independence and integrity of the courts. It is not, therefore, invalid.

The facts

160 *Licensing authorities in South Australia*: Since at least the 16th century, legislation in England has provided for the regulation of outlets that sell alcoholic beverages[104]. So it has also been in Australia since colonial times, including in

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97 *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58.

98 (1996) 189 CLR 51; [1996] HCA 24.

99 *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), s 39(2).

100 Constitution, s 77(iii).

101 *Community Protection Act* 1994 (NSW), s 5(1).

102 *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40 (special leave to appeal from this decision was not sought).

103 (2008) 234 CLR 532; [2008] HCA 4.

104 See, for example, 5 & 6 Edward VI c 25.

South Australia. In 1839, South Australia enacted colonial legislation to regulate the sale of "wines, spirits, and other fermented liquors"[105]. It conferred functions on Resident Magistrates and Justices of the Peace of each statutory district[106].

161 The *Liquor Licensing Act* 1997 (SA) ("the Act") presently governs such matters. It continues the office of the Liquor and Gambling Commissioner[107] ("the Liquor Commissioner") who has primary responsibility as a licensing authority for outlets under the Act and, subject to the relevant Minister[108], for the administration of the Act. The Act also provides for the continuance of the Licensing Court of South Australia ("the Licensing Court")[109]. That Court replaced the Licensing Bench of Justices provided for in earlier legislation[110].

162 The Licensing Court was first established by that name in 1932[111]. It then comprised Special Magistrates[112]. The Court was re-established in 1967[113] and comprised a chairman, deputy chairman and Licensing Court Magistrates[114]. The chairman, who was "eligible for appointment as a Local Court Judge"[115], had tenure[116]. From 1976 it comprised a "Licensing Court Judge" with tenure, special magistrates and Licensing Court Magistrates, who collectively constituted the Licensing Court[117]. In 1985, it was re-established again in the name of the

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105 *Licensed Victuallers' Act* 1839 (SA), preamble. The earlier Act No 4 of 1837, which had dealt with the same subject matter, had previously been disallowed.

106 See, for example, *Licensed Victuallers' Act* 1839 (SA), s 23.

107 The Act, s 8(1).

108 The Act, s 8(2).

109 The Act, s 12.

110 See *Licensed Victuallers' Act* 1863 (SA), s 22; *Licensing Act* 1908 (SA), s 5.

111 *Licensing Act* 1932 (SA), s 6(1).

112 *Licensing Act* 1932 (SA), s 6(3).

113 *Licensing Act* 1967 (SA), s 5(1).

114 *Licensing Act* 1967 (SA), s 5(2).

115 *Licensing Act* 1967 (SA), s 5(3).

116 *Licensing Act* 1967 (SA), s 5(4).

117 *Licensing Act Amendment Act (No 2)* 1976 (SA), s 4(2), (4).

Licensing Court of South Australia[118]. It comprised a "Licensing Court Judge" or other District Court Judge who was invested with relevant authority[119]. The 1997 Act, still in force, continued this Licensing Court, but enlarged its composition to allow the inclusion of former judges of the District Court[120].

163 *Application for a licence*: In October 2005, K-Generation Pty Ltd and its sole director Mr Genargi Krasnov ("the appellants") applied to the Liquor Commissioner for an entertainment venue licence under s 35 of the Act. The application related to premises in the central business district of Adelaide. Objections of neighbouring premises and of the Adelaide City Council were settled by agreement. However, as required by the Act[121], the application was served on the Commissioner of Police of South Australia ("the Police Commissioner"), who is the second respondent to these proceedings. The Act requires that an applicant for a licence, or someone occupying a "position of authority" in an entity seeking a licence, must be a "fit and proper person"[122]. The Police Commissioner intervened before the Liquor Commissioner to present evidence and make representations on the issue of whether Mr Krasnov was a fit and proper person.

164 The Act requires the Police Commissioner, following receipt of an application, to provide the Liquor Commissioner with information about any relevant criminal convictions[123]. The Police Commissioner is also authorised to provide the Liquor Commissioner with "other [relevant] information to which the [Police Commissioner] has access"[124]. This is what the Police Commissioner did. In an affidavit filed in the Supreme Court of South Australia, the relevant officer of South Australia Police deposed that he had filed a notice of intervention before the Liquor Commissioner in July 2006. This led, in December 2006, to a contested hearing of the appellants' application.

165 At that hearing a police officer tendered two Police Commissioner's Office files, "both of which contained information which had been classified as

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118 *Liquor Licensing Act* 1985 (SA), s 10.

119 *Liquor Licensing Act* 1985 (SA), s 12(1).

120 The Act, ss 14(1)(b), 15(1)(b).

121 The Act, s 51A.

122 The Act, s 56(1).

123 The Act, s 51A(3)(a).

124 The Act, s 51A(3)(b).

criminal intelligence pursuant to s 28A of the Act". These files were admitted into evidence. Their contents were "not disclosed to the other parties". According to the police affidavit, the Liquor Commissioner "did not read the material contained within those files at any stage during the hearing"; nor did counsel then appearing for the appellants ask the Liquor Commissioner "to provide a summary of the criminal intelligence at any time during the contested hearing".

166 On 17 January 2007, the Liquor Commissioner published his decision and order rejecting the appellants' application for an entertainment venue licence[125]. After setting out relevant references to the requirements of s 28A of the Act (reproduced below[126]), the Liquor Commissioner stated[127]:

> "The [Police Commissioner] has provided criminal intelligence PCO File No 2006/003522 and 003523 in support of his intervention. …
>
> I have considered the criminal intelligence together with the submissions made at the hearing on 20 December 2006 including the Statutory Declarations of [named persons] and the submission signed and dated by me 17 January 2007 (copy on file) …
>
> Accordingly, I refuse the application on the ground that to grant the application would be contrary to the public interest."

167 The criteria for the grant or refusal of a licence required the Liquor Commissioner, as the relevant "licensing authority"[128], to consider the objects of the Act[129]. These objects include the regulation and control of "the sale, supply and consumption of liquor for the benefit of the community as a whole"[130]. The Act gives the licensing authority "an unqualified discretion to grant or refuse an application … on any ground, or for any reason, the licensing authority considers

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125 Order of the Liquor and Gambling Commissioner, W A Pryor, *Application for an Entertainment Venue Licence*, Application No 69891, Premises: Sky Lounge KTV (17 January 2007) ("the Decision of the Liquor Commissioner").

126 See below, these reasons, at [191].

127 Decision of the Liquor Commissioner at 2-3.

128 The Act, s 4 ("licensing authority").

129 The Act, s 3(2).

130 The Act, s 3(1).

sufficient"[131]. The licensing authority, however, "is not to take into account an economic effect on other licensees in the locality affected by the application"[132]. Of primary importance is that an "application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest"[133].

168 From the sequence of events described in the police affidavit, the published decision of the Liquor Commissioner and the stated reliance on s 28A of the Act, a clear inference arises. The adverse "public interest" determination against the appellants' application arose out of the contents of the undisclosed "criminal intelligence" files provided by the Police Commissioner.

169 *Licensing Court powers*: The appellants applied to the Licensing Court under the Act for a review of the Liquor Commissioner's decision[134]. According to the Act, such a review is "in the nature of a rehearing"[135].

170 On the review, the Licensing Court is authorised to[136]:

> "(a) affirm, vary or quash the decision subject to the review;
>
> (b) make any decision that should, in the opinion of the [Licensing] Court, have been made in the first instance;
>
> (c) refer a matter back to the [Liquor] Commissioner for rehearing or reconsideration;
>
> (d) make any incidental or ancillary order".

171 By the Act, the Licensing Court is instructed to proceed "without undue formality" and is "not bound by the rules of evidence but may inform itself on any matter as it thinks fit"[137]. The Licensing Court is authorised to exercise various powers, including to summon persons to give evidence or to produce

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131 The Act, s 53(1).

132 The Act, s 53(1).

133 The Act, s 53(1a).

134 The Act, s 22(1).

135 The Act, s 22(4).

136 The Act, s 22(5).

137 The Act, s 23.

records; to inspect and take copies of records; to administer oaths or affirmations verifying evidence; and to require a person appearing before it to answer questions[138]. A person who does not comply with such a request of the Licensing Court is guilty of an offence punishable by fine[139]. A party may appear before the Licensing Court personally, or may be represented, including by counsel[140]. A party may, "with the permission of the Supreme Court, appeal against any order or decision of the [Licensing] Court"[141]. The Licensing Court can also "refer a question of law to the Supreme Court" which must then be "determined by the Full Court" of the Supreme Court[142].

172 *Licensing Court proceedings*: The proceedings were heard by the Licensing Court on 8 and 12 February 2007. For the hearing, the Licensing Court was constituted by Judge Rice, designated under the Act as the Licensing Court Judge[143]. His Honour is also a judge of the District Court of South Australia. Counsel then appearing for the appellants told the Licensing Court that review was "sought … on this preliminary point, as to whether Mr Krasnov is fit and proper", against the background of the recently enacted requirements of s 28A of the Act[144].

173 The appellants' counsel suggested that the "criminal intelligence" material be provided to Judge Rice and submitted to him that:

> "If you decide there is a foundation in the [Liquor] Commissioner's decision, then you find against [the appellants] and that will be, effectively, the end of the matter. However, if after looking at material you take a different view, then it may well be that we put further materials before you in the sense of a hearing or re-hearing as to the merits of the

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138 The Act, s 24(1).

139 The Act, s 24(2).

140 The Act, s 25(1).

141 The Act, s 27(1).

142 The Act, s 28.

143 See the Act, s 15(1)(a).

144 Sections 28A, 51A, 53(1a) and 55 were inserted or amended by the *Statutes Amendment (Liquor, Gambling and Security Industries) Act* 2005 (SA), ss 27-30. See South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 17 February 2005 at 1134.

> application in order to seek to persuade that notwithstanding the section 28A material, the [appellants] ought to be found to be fit and proper."

174 This course was not opposed by the representative of the Police Commissioner. Judge Rice asked whether he should "read all the material" that the Liquor Commissioner had read. The appellants' counsel indicated that he could not be privy to it, nor could his client, and stated:

> "[W]e can't assist your Honour or make any submissions. It is a matter of the police putting material before you. I think we were satisfied that procedurally it was properly before the [Liquor] Commissioner. It is just that the Star Chamber era that we live in, we just don't get an opportunity to comment on it or take instructions or put further evidence before you in relation to it. …
>
> [T]here is no point us putting other material before you that might seek to persuade you if, indeed, you are going to uphold the [Liquor] Commissioner's decision which was based on that material under section 28A."

175 The Police Commissioner's representative mentioned that other "evidence was given at the hearing" and suggested that a transcript of the proceedings before the Liquor Commissioner be obtained. The appellants' counsel did not invite Judge Rice to adopt that course. He accepted that:

> "[I]f the s 28A material that you would read is fatal to the [appellants], then that is the end of the matter and … it would be an uneconomical use of the [Licensing] Court's time for you to look into those other matters of evidence that might have been led before the [Liquor] Commissioner".

176 Judge Rice decided to hear the proceedings, if necessary, in stages. He adjourned the matter to 12 February 2007 and indicated that he would read all of the subject material. The prospect was raised of presenting character evidence, noting the six character statements that had been tendered before the Liquor Commissioner.

177 Judge Rice asked if the appellants wished to provide any additional evidence. The Police Commissioner's representative confirmed that evidence from certain witnesses had been tendered before the Liquor Commissioner, but "no questions [were] put to Mr Krasnov with respect to any of the criminal intelligence information that was relied upon".

178 Judge Rice described the s 28A procedure as "odd". He emphasised the fact that the Police Commissioner, his representative and the Liquor Commissioner were privy to the "criminal intelligence" material; Mr Krasnov presented himself for cross-examination but was not cross-examined about that

material; and the resulting decision was substantially based on that material. He summarised the course that both parties had invited him to undertake:

> "If my review of that intelligence material inclines me to say I would not have come to the same conclusion or may not have come to the same conclusion, then I would indicate that to you and you can decide then whether you wanted to almost go to what I would call a full re-hearing."

179 *Licensing Court decision*: Both parties agreed to the course proposed. Judge Rice then adjourned for 20 minutes. He resumed the hearing and announced that he would reach the same view as the Liquor Commissioner. He repeated the Liquor Commissioner's statement that he had refused the application because to grant it would be "contrary to the public interest". He repeated what the Liquor Commissioner had stated and added:

> "That is a view with which I agree but not only agreeing with him, I make my own independent assessment, that is the view that I would come to as well and indeed have come to. …
>
> [I]t seems to be draconian legislation … but that is what Parliament has said and I am stuck with it. …
>
> [B]earing in mind the wording of subsection (5) of section 22, I affirm the decision subject to the review and to the extent that it is necessary I confirm that I make the same decision."

180 The order of the Licensing Court was made in the terms previously stated. The appellants then applied to the Supreme Court seeking judicial review of that order[145].

The proceedings in the Supreme Court

181 *Application and affidavits*: To support the proceedings before the Supreme Court, Mr Krasnov filed an affidavit on behalf of the appellants. He cited earlier liquor licences that he had been granted under the Act and his objective to operate a karaoke bar as licensed premises. He referred to the repeated efforts of his solicitor to obtain from South Australia Police particulars of any objections to the issue of a licence. According to Mr Krasnov, the only response he received was that it would be "contrary to public interest" for such a licence to be granted.

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145 Pursuant to rr 199 and 200 of the Supreme Court Civil Rules 2006 (SA). See (2007) 99 SASR 58 at 82 [90]-[92] per Gray J.

182 By a further affidavit filed in the Supreme Court, Mr Krasnov identified the grounds upon which review was sought. He complained that the Licensing Court, in affirming the decision of the Liquor Commissioner, had failed to afford him the requirements of natural justice. Specifically, the Licensing Court had omitted to consider whether the allegations in the relevant "criminal intelligence" material, provided to the Licensing Court by the Police Commissioner, were "capable of being summarised in such a manner that the provision of such a summary … would not contravene s 28A" of the Act. Further, it had failed to give the appellants the "opportunity to rebut or qualify by providing further information, and comment by way of submission, upon that summary". In the alternative, Mr Krasnov sought review on the basis that s 28A of the Act contravened the *Kable* principle.

183 *Decision of the Supreme Court*: The review proceedings were heard by a Full Court of the Supreme Court. It divided. The Court unanimously agreed in the conclusion of Gray J that, in the way the proceedings had developed and in light of the course just described, the appellants had not waived any entitlements that they enjoyed at law[146]. The Full Court also agreed that, on its true meaning, the Act denied the appellants access to the evidence classified as "criminal intelligence"[147]. However, the judges divided over whether, in the circumstances, the Act breached the *Kable* principle. Gray J held that it did. Duggan J (with whom Vanstone J agreed) held that it did not.

184 Gray J concluded that s 28A of the Act offended the implied requirements of Ch III of the Constitution. He rested his conclusion on the basis of the involvement of the independent judicial branch in the denial of natural justice to a person before a State court[148]; that the legislation forced that court to "act as an arm of the executive[149]" or as "an instrument of executive government policy"[150]; and that it dictated to the judiciary conduct that was procedurally unfair which "cuts deep into judicial integrity and independence"[151]. His Honour said that

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146 (2007) 99 SASR 58 at 92-94 [136]-[140] per Gray J. See also at 62 [1] per Duggan J (Vanstone J concurring with Duggan J at 114 [213]).

147 (2007) 99 SASR 58 at 77 [67]-[68] per Duggan J, 112 [206] per Gray J (Vanstone J concurring with Duggan J at 114 [213]).

148 (2007) 99 SASR 58 at 112-113 [207].

149 (2007) 99 SASR 58 at 113 [207].

150 (2007) 99 SASR 58 at 113 [209] citing *Kable* (1996) 189 CLR 51 at 124 per McHugh J.

151 (2007) 99 SASR 58 at 113 [211].

these features of s 28A amounted to an "impermissible intrusion into judicial integrity"[152].

185 For the majority, Duggan J distinguished *Kable* and the only other case in which its principle has been applied, *Re Criminal Proceeds Confiscation Act 2002*[153]. He stated that the legislation invalidated in those two cases had "left almost no room for the application to be determined in the course of an appropriate exercise of judicial power". By contrast, in this case he found that s 28A of the Act involved "no such interference with the judicial function"[154].

186 Duggan J was clearly influenced by the reasoning of the majority of the Court of Appeal of Western Australia in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[155]. The Full Court's decision in the present case was reached before the publication of this Court's reasons in the further appeal in *Gypsy Jokers*. Another consideration that clearly influenced Duggan J was the longstanding common law rule, observed by Australian courts, that protected criminal and like investigative intelligence. That rule had recently been upheld and applied by this Court in its unanimous decision in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[156]. Duggan J said[157]:

> "Despite the fact that classified information cannot be tested or addressed by the other party, it is within the power of the licensing authority to determine its weight and, in appropriate cases, have regard to the fact that it may be unreliable suspicion or hearsay. It would also be entitled to have regard to the fact that the material has not been tested in any way. In these respects the authority acts in an independent manner. There is nothing in the procedure which leads to the creation of a close connection between the licensing authority and the executive. Nor is any inroad made into the independence of the licensing authority when

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152 (2007) 99 SASR 58 at 113 [211].

153 [2004] 1 Qd R 40.

154 (2007) 99 SASR 58 at 76 [62].

155 (2007) 33 WAR 245.

156 (2005) 225 CLR 88 at 99-100 [28]-[29] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; [2005] HCA 72. See also (2007) 99 SASR 58 at 77 [67].

157 (2007) 99 SASR 58 at 78 [71].

> determining the merits of an application resulting from 'any instruction, advice or wish of the Legislature or Executive Government'.[158]"

187 Duggan J also expressed his opinion that, even if the function imposed on the Licensing Court "could be described as non-judicial", it was not "constitutionally incompatible" with the status of the Licensing Court which had to be constituted by present or past judges, of whom Judge Rice was one[159]. Vanstone J agreed with Duggan J's reasons without elaboration[160].

188 *Appeal by special leave*: The Full Court dismissed the appellants' application. By special leave, the appellants now appeal to this Court against that order. Special leave was granted on one ground: that the Full Court had erred in law in finding that s 28A of the Act was valid so far:

> "as it requires the [Licensing Court] to hear and determine a review pursuant to section 23 of the [Act] without disclosing to the applicant information classified as 'criminal intelligence', relied on by the [Liquor Commissioner] in refusing an application for a licence".

Thus, the only issue in the appeal to this Court is the legal question concerning the ambit and application of the *Kable* principle in the circumstances of the appellants' case.

The legislation

189 Many of the provisions of the Act relevant to the determination of this appeal have already been described. However, a number of further provisions need to be mentioned.

190 Section 27 of the Act enables a party before the Licensing Court, "with the permission of the Supreme Court, [to] appeal against any order or decision of the [Licensing] Court"[161]. No such "appeal" lies (relevantly) against "an order or decision of the [Licensing] Court made on a review of a decision of the [Liquor] Commissioner under this or some other Act"[162].

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158 Citing *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17; [1996] HCA 18.

159 (2007) 99 SASR 58 at 78 [73].

160 (2007) 99 SASR 58 at 114 [213].

161 The Act, s 27(1).

162 The Act, s 27(2)(a).

191 Section 28A, "Criminal intelligence", is the crucial provision of the Act. It is ultimately determinative of the outcome of this appeal. It lies in Pt 2 Div 6 of the Act which is also titled "Criminal intelligence". The section provides, relevantly:

> "(1) No information provided by the [Police Commissioner] to the [Liquor] Commissioner may be disclosed to any person (except the Minister, a court or a person to whom the [Police Commissioner] authorises its disclosure) if the information is classified by the [Police Commissioner] as criminal intelligence.
>
> (2) If a licensing authority –
>
> (a) refuses an application for a licence … ; and
>
> (b) the decision to do so is made because of information that is classified by the [Police Commissioner] as criminal intelligence,
>
> the licensing authority is not required to provide any grounds or reasons for the decision other than that to grant the application would be contrary to the public interest, or that it would be contrary to the public interest if the person were to be … licensed or approved …
>
> (3) If the [Police Commissioner] lodges an objection to an application under Part 4 because of information that is classified by the [Police Commissioner] as criminal intelligence –
>
> (a) the [Police Commissioner] is not required to serve a copy of the notice of objection on the applicant; and
>
> (b) the licensing authority must, at least 7 days before the day appointed for the hearing of the application, advise the applicant in writing that the [Police Commissioner] has objected to the application on the ground that to grant the application would be contrary to the public interest.
>
> (4) If the [Liquor] Commissioner or the [Police Commissioner] lodges a complaint under Part 8 in respect of a person because of information that is classified by the [Police Commissioner] as criminal intelligence, the complaint need only state that it would be contrary to the public interest if the person were to be … licensed or approved.

(5) In any proceedings under this Act, the [Liquor] Commissioner, the [Licensing] Court or the Supreme Court –

(a) must, on the application of the [Police Commissioner], take steps to maintain the confidentiality of information classified by the [Police Commissioner] as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and

(b) may take evidence consisting of or relating to information classified by the [Police Commissioner] as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

(6) The [Police Commissioner] may not delegate the function of classifying information as criminal intelligence for the purposes of this Act except to a Deputy Commissioner or Assistant Commissioner of Police."

192 According to the evidence before the Supreme Court, the files containing the "criminal intelligence" were described as "Police Commissioner Office files". An affidavit of Assistant Commissioner Madeleine Glynn of South Australia Police was filed in the Supreme Court. It deposed that she had "classified" the information contained in the files as "criminal intelligence within the meaning of the Act". This satisfied the evidentiary requirements that govern the "classification" of the information in issue in these proceedings, as set out in s 28A(5)(b) and (6) of the Act.

193 Section 4 of the Act provides three relevant definitions:

"*criminal intelligence* means information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement;

…

licensing authority means –

(a) in relation to a matter that is to be decided by the Court under this Act – the Court;

(b) in relation to any other matter – the [Liquor] Commissioner;

…

party includes –

(a) an intervener or an objector."

194 "Party" is significant because it relates to the entitlement of the Police Commissioner, under s 75A of the Act, to intervene in proceedings before a "licensing authority", and hence before the Licensing Court. When the Police Commissioner intervenes in that way, this definition of "party" makes him a "party" to the proceedings before the Licensing Court on "whether a person is a fit and proper person"[163] and "whether to grant the application would be contrary to the public interest"[164].

195 Also relevant here is the fact that s 76(3) affords a broad general power of intervention in proceedings before the Licensing Court. That provision enacts that any body or person that is given notice of an application may intervene to introduce evidence or make representations. Likewise, ss 77 and 78 afford a wide right of objection. These provisions potentially enliven the exercise of federal jurisdiction by the Licensing Court.

196 The Commonwealth, as a possible neighbour with relevant interests, could clearly become a "party" as an intervener or objector before the Licensing Court. Likewise, a resident of a different State. Such possibilities exist, as does the prospect of these or other parties raising questions under the Constitution or involving its interpretation. There is thus a real prospect that the Licensing Court could, from time to time, exercise federal jurisdiction in deciding matters before it[165]. Subject to what follows, in such circumstances any "appeal" on a question of law from, or reference of a question of law by, the Licensing Court, or application for judicial review directed to the Licensing Court, would enliven the exercise of federal jurisdiction by the Licensing Court and also by the Supreme Court.

197 In addition, Pt 8 of the Act contains detailed "Disciplinary action" provisions. It enables the Liquor Commissioner to deal with disciplinary matters with the consent of the person liable[166]. Mandatory jurisdiction is conferred on the Licensing Court in that respect[167]. The Act relevantly empowers the Licensing Court to impose sanctions on a person found liable to disciplinary

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163 The Act, s 75A(a).

164 The Act, s 75A(c).

165 The Constitution, ss 75(iii), 75(v), 76(1); Judiciary Act, s 39(2).

166 The Act, s 119A(1).

167 The Act, s 120.

action. Such sanctions extend to the imposition of a fine on the person not exceeding $15,000[168]. The relevance of such provisions will be explained.

The entitlement of the interveners to raise issues

198 The contesting respondent, the Police Commissioner, was represented in this Court by the Solicitor-General of South Australia (hereafter, described as "the respondent"). He disputed the appellants' submissions. In addition, the Attorney-General of the Commonwealth and the Attorneys-General of New South Wales, Victoria, Queensland and Western Australia intervened pursuant to s 78A of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). They did so in support of the interests of the respondent.

199 Substantially, the submissions of the Commonwealth and New South Wales supported those advanced by the respondent. However, the Attorneys-General for Victoria, Queensland and Western Australia advanced their own submissions which, in material respects, were different from those of the parties. When this Court questioned the consequences of that course, those Attorneys-General relied on the entitlement afforded to them by the Judiciary Act. Where the actual parties define the "matter" in controversy brought before this Court, can other persons (essentially interveners and parties only by statute) enlarge the "matter", if that is what their interventions seek to do? Can they raise arguments that are wider than, and different from, those presented by the parties?

200 This is not the occasion to resolve those issues. No party raised any objection to the course that the Attorneys-General of Victoria, Queensland and Western Australia adopted. Likewise, the Attorney-General of New South Wales and the Attorney-General of the Commonwealth did not object. On one view, the course is available under the Constitution and the Judiciary Act. This Court may be assisted on the accurate application of the Constitution in matters that may impinge upon governmental parties affected by its interpretation[169]. Further, it would certainly be open to a State to present a constitutional argument in a matter of which it has been given notice and where it might later be affected by the outcome. That is what occurred in this case.

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168 The Act, s 121(1)(c)(ii). Cf *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.

169 See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 446-447 [195], 453-454 [220]; [2002] HCA 16; cf Walker, "The Bishops, The Doctor, His Patient and the Attorney-General: The Conclusion of the *McBain* Litigation", (2002) 30 *Federal Law Review* 507 at 525-526.

201 Self-evidently, all of the States of the Commonwealth have an interest in the correct exposition, and application, of the *Kable* principle. It is therefore appropriate in this appeal to address the contentions advanced by the States. Specifically, it is appropriate to do so in a preliminary way. Each submission of the States effectively offered a forensic short-cut to avoid the necessity of further elaboration and application of the *Kable* principle. If the distinctive arguments of Victoria, Queensland and Western Australia were accepted, that principle would not apply at all to the circumstances of this case. The parties' arguments could be rejected as misconceived and the appeal brought to a peremptory conclusion.

The issues

202 *The issues of the interveners*: Leaving aside the entitlement and consequences of the Attorneys-General of Victoria, Queensland and Western Australia proceeding as they did, the arguments urged by the States presented the following four preliminary issues:

(1) *The Supreme Court issue*: Western Australia argued, first, that the *Kable* principle applied only to the purported imposition, by State law on a Supreme Court of a State, of functions incompatible with the exercise by *that* court of federal jurisdiction. Secondly, that in the present case there was no relevant imposition on the Supreme Court of South Australia of any function of such a kind. Thirdly, in terms of other courts within a State, it was sufficient that the Parliament of that State should establish and maintain a system of State courts. This is what the Parliament of South Australia had indubitably done. Western Australia submitted that such other courts were not themselves subject to the *Kable* principle;

(2) *The non-court issue*: Queensland submitted that, upon a proper analysis, the Licensing Court was not a "court" for the purposes of Ch III of the Constitution. What the Parliament of South Australia had enacted about the title and designation of the Licensing Court was not determinative of its constitutional character. The *Kable* principle did not apply to it. The parties' opposing assumption or assertion was misconceived in law and should be rejected;

(3) *The administrative jurisdiction issue*: Victoria submitted that, if the Licensing Court were a "State court" for the purposes of Ch III of the Constitution, it was nonetheless permissibly deployed during the appellants' proceedings. Victoria argued that the Licensing Court was exercising an administrative and not a judicial decision-making function. Any departure from judicial functions derived from Ch III, as an implication from the requirements governing a State court's capacity to receive federal jurisdiction, therefore had to be evaluated in that light. Such departure could not be judged by a criterion equivalent to that applicable to federal courts or to the performance by federal judges as

personae designatae of functions that are incompatible with the concurrent exercise of the jurisdiction of federal courts. By the less rigid standard applicable to State courts[170], there was no offence to the *Kable* principle when a State court performed an administrative, not a judicial, function, as had occurred here; and

(4) *The consequence of invalidity issue*: Western Australia submitted that, if s 28A(5) of the Act were held to impose jurisdiction on a State court inconsistent with the postulate that it was a suitable recipient of federal jurisdiction, this did not invalidate s 28A of the Act. Neither did it invalidate the State court concerned. It only made that court incapable of receiving federal jurisdiction. That court would still validly exercise State jurisdiction, but would be bound to refuse any attempt (if that were to occur) to oblige it to exercise federal jurisdiction.

203 *The issues of the parties*: Depending upon the resolution of the foregoing issues, presented by Victoria, Queensland and Western Australia, the parties propounded three issues for decision by this Court:

(5) *The Gypsy Jokers' issue*: There were obvious similarities between the legislation of South Australia in issue and the Western Australian legislation considered by this Court in *Gypsy Jokers*[171]. The Full Court of the Supreme Court of South Australia did not have this Court's decision available to it when deciding this case. Consequently, it was submitted that this Court should dismiss the present appeal by simply applying the reasoning and conclusion expressed by this Court in *Gypsy Jokers*;

(6) *The ambit of s 28A issue*: Does s 28A(5) of the Act and the residual functions reserved under that provision to the Licensing Court (and on appeal, reference or review in the Supreme Court) impose upon either court (or, if relevant, upon the District Court of which the primary judge was a member) the actuality or appearance of functions in such courts incompatible with the exercise of federal jurisdiction as forbidden by *Kable*?

(7) *The relief issue*: Assuming that the *Kable* principle could be invoked successfully, would the proper relief be: (a) the invalidation of the Act, in so far as it provided for the receipt by the Licensing Court of "criminal intelligence", on the basis that this function could not be severed from the

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170 *Wilson* (1996) 189 CLR 1 at 9.

171 (2008) 234 CLR 532.

Act under principles of severance[172]; or (b) the invalidation and severance of s 28A from the Act; or (c) the withholding of the exercise of federal jurisdiction from the Licensing Court?

The *Kable* principle applies beyond State Supreme Courts

204 *Western Australian submission*: Western Australia submitted that the foundation of the *Kable* principle lay in the particular requirement of Ch III of the Constitution. State Supreme Courts must continue to answer to the constitutional description of a "Supreme Court of a State" in respect of which this Court exercises appellate jurisdiction[173]. Further, they must continue as a "court of a State" in which the Federal Parliament could invest federal jurisdiction[174]. Western Australia relied in this respect on this Court's decision in *Forge v Australian Securities and Investment Commission*[175]. A defining characteristic of such a court was that it should be, and appear to be, an independent and impartial tribunal[176].

205 The argument that the *Kable* principle should be confined to the State Supreme Courts rested on the fact that such courts were the only courts that existed in every colony at the time of Federation. South Australia[177] and Western Australia[178], for example, first established their District Courts after Federation. Queensland abolished its District Court in 1921[179] and revived it in 1958[180]. Tasmania has never established a District or County Court.

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172 *Pidoto v Victoria* (1943) 68 CLR 87 at 109-111; [1943] HCA 37; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485; [1991] HCA 29; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339; [1995] HCA 16; see also *R v Hughes* (2000) 202 CLR 535 at 556-557 [43]; [2000] HCA 22.

173 Constitution, s 73.

174 Constitution, s 77(iii).

175 (2006) 228 CLR 45 at 67-68 [41], 76 [63]-[64]; [2006] HCA 44.

176 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; [2004] HCA 31.

177 *Local and District Criminal Courts Act* 1969 (SA); *District Court Act* 1991 (SA), s 4.

178 *District Court of Western Australia Act* 1969 (WA), s 7(1).

179 *Supreme Court Act* 1921 (Q), s 3(1).

180 *District Courts Act* 1958 (Q), s 6(1).

206 Western Australia thus argued that no constitutional implication could be derived, of necessity, that particular courts, as later created by legislation, must conform to a defined national standard. A State court of general jurisdiction might exist, then be abolished and subsequently reinstated. Western Australia argued that this demonstrated that no constitutional quality was imprinted upon such statutory courts except the Supreme Courts which had firm foundations in the Constitution itself[181]. The Supreme Court is mentioned in the Constitution and is thus preserved from abolition. This demonstrated that there would always be a potential repository of federal jurisdiction in each State and thus always a court susceptible to a principle such as that expressed in *Kable*, namely the State Supreme Court.

207 In support, Western Australia emphasised that no decision of this Court had held that the *Kable* restriction applied to State courts below the Supreme Court. Earlier decisions of State courts might have assumed such a restriction[182]; likewise a decision of this Court in respect of a Northern Territory court[183]. However, such assumptions did not form part of the binding rule of any decision of this Court. Whilst the Constitution may have implied the existence of "courts of the States" other than Supreme Courts[184], it was enough that a system of such courts should be created, as envisaged. There was no requirement that they should meet any particular federal standard.

208 *Kable and the Judicature*: The foregoing submission should be rejected. An important feature of the Australian Constitution which distinguishes it from federal arrangements in other countries is that it creates an integrated Judicature. This is envisaged in Ch III, entitled "The Judicature". It intends that State and federal courts will be susceptible to appellate and other superintendence, ultimately by this Court[185]. There are standards to be observed by federal courts, federal judges and the Parliament when creating federal courts or providing for their creation[186]. These are derived from the special role that such courts, like

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181 Constitution, s 73.

182 See, for example, *R v Granger* (2004) 88 SASR 453 at 460-462 [20]-[28] per Doyle CJ; *Osenkowski v Magistrates Court of South Australia* (2006) 96 SASR 456 at 471 [48] per Doyle CJ (Nyland and Anderson JJ concurring).

183 *Bradley* (2004) 218 CLR 146 at 163 [29].

184 See Constitution, ss 51(xxiv) (service and execution of process); 77(iii) (federal jurisdiction).

185 Under the Constitution, ss 73, 75(v).

186 Constitution, s 72.

this Court, play in a federal system of government. Moreover, the *Kable* principle is implied from a unique provision which empowers the Federal Parliament to make laws investing "any court of a State" with "federal jurisdiction".

209 If the Constitution had meant to restrict integration to investing only the State Supreme Courts with federal jurisdiction, it could have said so. Instead, the constituent parts of the integrated Judicature were extended to include other courts, indeed "any" court of a State. If, therefore, a tribunal within a State qualifies as a "court" and is able to be invested with federal jurisdiction, it must meet the *Kable* requirements.

210 *Kable applies beyond Supreme Courts*: The submission that the *Kable* principle extends only to State Supreme Courts is rejected. It is inconsistent with the language of the Constitution and with the constitutional purpose of the *Kable* principle[187]. That principle effectively assures Australian litigants that basic institutional standards will be observed, whether in federal or State courts, and also in Territory courts as this Court accepted in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[188]. This is implicit in the membership of all such courts, continued or created, in the one integrated Judicature of the Commonwealth.

The Licensing Court is a "court of a State"

211 *Queensland submission*: As an alternative, Queensland submitted that the Licensing Court of South Australia was not a "court of a State" within the meaning of s 77(iii). Thus, it was not subject to compliance with the *Kable* principle and the appeal should be dismissed.

212 Queensland acknowledged the earlier concession of the respondent to the contrary and the assumption upon which all other arguments of the parties had been based. However, it contended that that concession and these arguments had been made upon an incorrect reading of the Constitution. Queensland correctly submitted that the mere description of a body as a "court", even by the legislature of a State, would not foreclose argument about the proper application of the Constitution to that body. Conceivably, a tribunal might be a court-like body for particular State purposes but not for federal constitutional purposes.

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187 This conclusion is also compatible with the references to "the State courts" or "a State court" in the reasons of the majority in *Kable* (1996) 189 CLR 51 at, for example, 110, 111, 114, 115.

188 (2004) 218 CLR 146 at 163 [29].

213 So much may be accepted for present purposes. However, in addition to the designation by a State Parliament of that body as a "court", Parliament has assigned to it certain traditional court-like functions. Further, Parliament has provided for the appointment to the body of persons expressly described in the legislation as "judge" and who are members (or former members) of an undoubted court (the District Court of a State). These facts render the argument by Queensland difficult to accept. If s 77(iii) attaches the Constitution to "*any* court of a State", on the face of things that attachment would ordinarily be held to apply to a body described in law as a "court" of a State. This is especially so as the State Parliament is entitled to describe its "courts" as it decides and it did so here. Self-evidently, serious consequences can flow from such a description[189].

214 The Queensland submissions on this issue began by citing several decisions that held that, in certain circumstances, a body designated by a State Parliament as a "Commission" or a "Tribunal" was nonetheless a "court" for particular purposes[190]. So much may be allowed. But does the opposite follow in a constitutional setting?

215 Queensland argued that this Court must consider the real functions of the court in question before concluding about the constitutional character of the body. Those functions were expressed by reference to such vague and generalised criteria that it was clear, so Queensland said, that the supposed "court" was not a "court" of the character envisaged as part of the integrated Judicature of the Commonwealth. It was thus not subject to the *Kable* principle.

216 Queensland noted the functions of the Licensing Court in South Australia as stepping into the shoes of the Liquor Commissioner and using a very wide discretion[191] to grant, or to refuse, liquor licences as the "licensing authority"[192]. It may exercise its powers "on any ground, or for any reason, the licensing authority considers sufficient"[193]. Finally, it makes particular decisions about

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189 *Ammann v Wegener* (1972) 129 CLR 415 at 442; cf at 436; [1972] HCA 58.

190 *Australian Postal Commission v Dao [No 2]* (1986) 6 NSWLR 497 at 513; *Hughes v Clubb* (1987) 10 NSWLR 325 at 334; *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173 at 185, 192; *Reid v Sydney City Council* (1995) 35 NSWLR 719 at 725; see also *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351 at 386, 390; cf *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77 at 87 [48]-[52].

191 The Act, s 53(1).

192 The Act, s 53. See also ss 4 ("licensing authority"), 17(1)(b)(ii).

193 The Act, s 53(1).

whether to grant or refuse licences by reference to the criterion of whether to do so "would be contrary to the public interest"[194]. These open-ended policy considerations were said to indicate a "non-judicial process of decision-making"[195]. Queensland thus classified the Licensing Court for constitutional purposes as an administrative tribunal or "licensing authority", not as a "court of a State".

217 Various features of the Act were invoked to reinforce this submission. In particular, Queensland cited the large power of the Licensing Court to receive evidence[196]; the alteration of the Act to repeal the former security of tenure of the judges appointed to the Licensing Court[197]; the inclusion amongst those "judges" of former judges of the District Court[198]; and the essential function of the Licensing Court which was to create new rights and obligations rather than to decide controversies by reference to pre-existing facts and already applicable law.

218 *The Licensing Court is a court*: Queensland persisted with the submission even though the respondent, representing the State primarily concerned, asserted and conceded that the Licensing Court fell within the provisions of s 75(iii) and was subject to the strictures of the *Kable* principle. Queensland's submission to the contrary should be rejected.

219 Whilst the appellation used in the Act may not be conclusive, it is a very strong consideration. It warrants this Court's taking the State Parliament's description at face value. Controversies over statutory descriptions of tribunals in Australia have usually occurred where a body, held to be a "court" for particular purposes, was differently described. Various constitutional and statutory provisions apply to "any State court". No doubt this partly explains why State Parliaments in Australia use the word "court" sparingly and why they generally deploy "judges" only to bodies that are "courts" for constitutional purposes. There is insufficient reason to doubt the accuracy and applicability of the title assigned to the Licensing Court in this instance.

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194 The Act, s 53(1a).

195 cf *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 597 [168] per Crennan and Kiefel JJ; [2008] HCA 2.

196 The Act, ss 23(b), 24(1).

197 The Act, s 15(1)(c).

198 The Act, s 15(1)(b).

220 A series of inquiries has been held in respect of the Licensing Court and its predecessors. Those conducting such inquiries have turned their attention to whether that Court[199]:

> "having all the normal judicial attributes of being a court of record, presided over by a Judge or equivalent, dealing with questions before it upon sworn testimony in open hearings, exercising discretions according to judicial practices, and subject in appropriate cases to appeals to higher Courts"

should be designated by the Act as a court. The report of the inquiry into the present Licensing Court expressly concluded that[200]:

> "a court structure with a judge experienced in the jurisdiction is required. This view is supported by the majority of submissions and by the Liquor Licensing Commissioner".

221 The statutory designation of the Licensing Court as "a court of record"[201] is to be understood in this light. Likewise the appointment to the Licensing Court of "judges" and former judges of the District Court, and further, the specific provisions for an "appeal" to the Supreme Court against orders other than those made on review of a decision of the Liquor Commissioner[202]. These features of the constitution and supervision of the Licensing Court tend to affirm its constitutional status as a "court of a State".

222 Also, whilst Queensland would not concede this point, there can be no real doubt that the Licensing Court may exercise federal jurisdiction. This follows from the particular provisions of the Constitution, reflected in the Judiciary Act, by which a court of a State may be vested with federal jurisdiction[203]. Queensland submitted that the Commonwealth could not be a "party" to proceedings before the Licensing Court. However, that submission was destroyed when attention was drawn in argument to the extended definition of "party" in the Act. If the Licensing Court could exercise jurisdiction over such a

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199 South Australia, *Report of the Royal Commission Into the Law Relating to the Sale, Supply and Consumption of Intoxicating Liquors and Other Matters*, (1966) at 17.

200 South Australia, T R Anderson QC, *Report of the Review of the South Australian Liquor Licensing Act, 1985*, (October 1996) at 62, par 4.1.

201 The Act, s 13.

202 The Act, s 27(1), (2).

203 Constitution, ss 71, 77(iii); Judiciary Act, s 39(2).

"party" and determine controversies placed before it by the Commonwealth, subject to what follows, it would undoubtedly be exercising federal jurisdiction. It is therefore far from hypothetical that the Commonwealth, as a major land owner in South Australia and a potential neighbouring property owner, might object, or seek to intervene, in particular proceedings.

223 Several of the criteria applied by the Licensing Court in reaching its decisions are expressed in very general language. However, it by no means follows that a decision of the Licensing Court that involves consideration of "the public interest" and whether an applicant is a "fit and proper person", for example, places the decision-making body outside the "State courts" that might be invested with federal jurisdiction. Such criteria are commonly applied by undoubted courts, including disciplinary cases involving members of the legal, medical and other professions. The criteria may be expressed in general terms. They are not, however, insusceptible to judicial decision-making or incapable of being decided by "courts", properly so called, both for statutory and constitutional purposes.

224 *Submission rejected*: It would be contrary to basic principle to read s 77(iii) narrowly or to apply its provisions to particular tribunals with undue strictness. This is so because of the unique language of s 77(iii) of the Constitution that enables *any* State court to be invested with federal jurisdiction; the utility and efficiency of that provision for the good government of the Commonwealth; and the potential advantages that it affords to litigants to avoid disparity of jurisdiction in the courts of the national Judicature. The Constitution leaves it to the State Parliaments to create their own courts, except for the Supreme Court whose continuance is envisaged. It is then left to the Federal Parliament to "utilize the judicial services of State Courts [recognising] in the most pronounced and unequivocal way that they remain 'State Courts'"[204]. The Queensland submission would tend to deny these beneficial features of the Constitution. In the circumstances of this case, that submission should be rejected.

The jurisdiction of the Licensing Court is judicial

225 *Victorian submission*: Victoria accepted that the Licensing Court was a "court" for the purposes of Ch III of the Constitution and, as such, subject to the requirements of *Kable*. However, it submitted that the *Kable* principle had to adapt to the fact that, consistently with the Constitution, State courts can and do

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204 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452 per Isaacs J; [1916] HCA 58.

exercise administrative power[205], and State judges in such courts can and do perform non-judicial functions that might be forbidden to federal judges[206]. Further, in performing functions as *personae designatae* under State law, State judges sometimes perform duties that might not be undertaken by federal judges[207]. Victoria, like Queensland, urged caution before extending the *Kable* principle to State courts in a way that might impose on them the rigidities previously accepted only in relation to federal courts and federal judges.

226 Building on the submissions earlier advanced by Queensland, Victoria argued that the functions performed by Judge Rice in the Licensing Court should be characterised as involving the proper exercise of administrative power. Substantially, this was because of the broad policy considerations involved in deciding whether, as a licensing authority, an applicant was a "fit and proper person to hold a licence"[208]. It did not involve the determination of pre-existing legal rights and obligations. Consequently, it was an administrative function akin to others previously classified as such by this Court[209].

227 Once the non-judicial nature of the decision was demonstrated, Victoria argued that established law recognised the entitlement of legislation, by clear provision, to override any requirements of natural justice and procedural fairness. In could therefore exclude, for example, the requirement to give notice to a person whose interests were likely to be affected by an adverse decision not

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205 *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49; [1982] HCA 13.

206 For example, acting as Lieutenant Governor or as Acting Governor of a State. See *Kable* (1996) 189 CLR 51 at 118 per McHugh J.

207 For example, the Chief Justice of Western Australia at one time served as one of the Electoral Distribution Commissioners under the *Electoral Distribution Act* 1947 (WA), s 2(1)(a) (repealed by the *Electoral Amendment and Repeal Act* 2005 (WA)). See also *Electoral Act* 1907 (WA), s 16B(1)(a); cf *Wilson* (1996) 189 CLR 1 at 20.

208 Under the Act, s 56(1). See also s 53.

209 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 376 per Kitto J; [1970] HCA 8; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 414 [48]; [1999] HCA 5; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 550-551 [4], 553-554 [14], 561 [40]-[42], 569 [71], 592-593 [153]; cf *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191; [1991] HCA 58.

revealed to that person[210]. In its true character, s 28A of the Act was to be seen as modifying only administrative decision-making, enacted in this instance by a State Parliament in full conformity with the Constitution. It could not be subject to any implied constitutional principle, based on *Kable* or anything else, that would purport to prevent a State Parliament from conferring on State judges administrative functions[211].

228 Victoria submitted that the "incompatibility condition" that attaches to the assignment of judicial functions to federal judges as *personae designatae* did not "provide a safe guide to the non-judicial functions that can be conferred on State judges". Ultimately, Victoria argued that, without an express constitutional prohibition on the conferral of non-judicial functions on State courts, there was "simply no foundation for the direct or strict application of the incompatibility condition to State judges"[212].

229 *Kable applies to the Licensing Court*: There is substance in the submission advanced by Victoria regarding the well-established principle that State courts and judges are not subject to all of the separation of powers requirements as have been held to apply to federal courts and judges. Any statement of the *Kable* principle therefore needs to reflect appropriately that differentiation. Nevertheless, it is unnecessary to explore this question further as there is no escape from the requirements of *Kable* in the present circumstances. There are three reasons for this conclusion.

230 First, as previously indicated, in considering the "fit and proper person" criterion for a licence under the Act, the Licensing Court was not performing purely administrative and non-judicial functions. Despite the generality of the criteria, the Act relevantly conferred on the Licensing Court an exercise of judicial power as a State court, one susceptible to judicial determination. This is another way of expressing the "chameleon doctrine". To some extent, the character of the functions performed by a decision-making body may take their

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210 *Kioa v West* (1985) 159 CLR 550 at 582 per Mason J, 615 per Brennan J; [1985] HCA 81.

211 cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 [104] per Gummow J; [2004] HCA 46; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at 702 [41] per Spigelman CJ.

212 Referring to *Kable* (1996) 189 CLR 51 at 103-104 per Gaudron J, 117-118 per McHugh J; cf Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 414, 421.

colour and their constitutional identity from the body to which those functions are assigned – whether a court or administrative tribunal[213].

231 It follows that, whatever might be the position in another case, the argument for a qualification of the *Kable* principle, as advanced by Victoria, does not arise here. In the present case, it is ultimately a decision by a commissioned judge in a court of a State upon a matter that is susceptible to judicial resolution. The circumstances that gave rise to the enunciation of the *Kable* principle apply. As an institution of that character, the Licensing Court was bound to observe the *Kable* standards.

232 Secondly, no textual differentiation is made in s 77(iii) of the Constitution between the several "courts of a State". Once a body is so characterised, it is part of the integrated Judicature of the Commonwealth. That feature as a court attracts the *Kable* standards to protect the litigants who invoke its jurisdiction. The inclusion of a State court amongst the "courts" of the integrated Judicature of the Commonwealth could possibly mean that some functions that might earlier have been included within the jurisdiction of a colonial court (uncontrolled by Ch III) could not be conferred on a State court after federation. It is unnecessary to explore that question in the present case. The jurisdiction exercised by the Licensing Court in respect of the appellants was judicial. It addressed a justiciable issue presented by contesting parties, namely the appellants and the Police Commissioner.

233 Thirdly, and in any case, the scheme of the Act allows for an appeal in some circumstances against an order of the Licensing Court to the Supreme Court of the State[214] and for review by that Court. The appellants invoked this provision in these proceedings. It means, at least potentially, that the performance by the Supreme Court of the State (incontestably a constitutional court) of its jurisdiction might be affected or impaired by the requirements of s 28A(5) of the Act, if that provision were constitutionally infirm.

234 These are reasons why it is appropriate to consider *Kable* in this case, and not to re-express or confine the *Kable* principle so that it does not apply to judges of State courts who are obliged to perform non-judicial, administrative functions in the course of their duties. That was not the case in the circumstances of the appellants' complaint. Accordingly, the ambit of the *Kable* principle, as

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213 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18; [1977] HCA 62; *Pasini v United Mexican States* (2002) 209 CLR 246 at 267 [59]; [2002] HCA 3; *Thomas v Mowbray* (2007) 233 CLR 307 at 413 [303]; [2007] HCA 33.

214 The Act, s 27.

applicable to purely administrative functions performed in State courts by State judges, does not need to be determined in this appeal.

Continuance of an invalid court is not to be inferred

235 *A further submission*: Western Australia made an alternate submission as a variation of the themes considered under the last two issues. A State Parliament is constitutionally entitled to create courts with functions deemed appropriate by the State Parliament. This can include, if so chosen, the exercise of administrative and non-judicial jurisdictions susceptible to the legislative exclusion of natural justice. As a consequence of this, State law would not be invalid, despite what was previously assumed following *Kable*. Instead, the State court in question would cease to be a court for s 77(iii) purposes. In effect, it would not be made available by the State to the Federal Parliament for the conferral of federal jurisdiction under s 77(iii) of the Constitution.

236 Western Australia argued that, in this way, the State Parliament could fulfil its constitutional objectives in accordance with State legislative power. It would be untrammelled by the strict separation of powers applicable to the Federal Parliament in respect of federal courts and judges. In conferring federal jurisdiction on State courts, the Federal Parliament would simply have to eliminate from the courts available to receive federal jurisdiction any court considered or held to be an institution incapable of exercising such federal jurisdiction.

237 *Invalidation of compromised integrity*: There are several reasons why this argument must be rejected.

238 First, it is self-referential. Effectively, a State Parliament could decide conclusively the consequences of invalidation derived from the language and implications of the federal Constitution. This would particularly affect s 77(iii) which envisages that federal jurisdiction might be conferred on "any" State court by a law made by the Federal Parliament. Such an approach would effectively invalidate or read down s 39(2) of the Judiciary Act by reference to the presumed intention of a State Parliament as evidenced from time to time in particular State legislation. To accept this would be to turn considerations of constitutional invalidation on their head.

239 Secondly, one of the purposes of s 77(iii) is to afford "a very convenient means of avoiding the multiplicity and expense of legal tribunals"[215]. The paragraph enables implementation of the unique scheme envisaged by s 71 of the

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215 *Kable* (1996) 189 CLR 51 at 110 citing *The Commonwealth v Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69 at 90; [1924] HCA 50.

Constitution by which "[t]he judicial power of the Commonwealth" may be vested in "such other courts as [the Parliament] invests with federal jurisdiction". In his reasons in *Kable*, McHugh J pointed to the fact that s 77(ii) and (iii) "would be rendered useless and the constitutional plan of a system of State courts invested with federal jurisdiction, as envisaged by Ch III, would be defeated" if a State Parliament could abolish its court system "by the simple expedient of abolishing its courts and setting up a system of tribunals that were not courts"[216]. The State Parliaments may have the power to abolish, modify, rename or reinstitute particular State courts from time to time, other than Supreme Courts. However, it is doubtful that the Constitution intended that a State Parliament could defeat the exercise of the grant of power by the Federal Parliament under s 77(iii) by the even simpler expedient of leaving State "courts" intact but with compromised institutional integrity.

240 Thirdly, s 28A(5) is expressed to apply to the Licensing Court, the Liquor Commissioner and the Supreme Court of South Australia. The Supreme Court cannot be abolished or eliminated from the requirements expressed by *Kable*[217]. Thus the hypothesis of maintaining the Licensing Court as a State court that could not be invested with federal jurisdiction does not respond to the totality of the appellants' complaint in this case. The jurisdiction of the Supreme Court under the Act remains alive, potentially attracting the *Kable* requirements.

241 There are other severe impracticalities in this hypothesis. If a particular State law conferred non-judicial jurisdiction on a State court of general jurisdiction (such as the District Court), the capacity of that court in the vast range of other cases applicable to it, by which that court could receive and exercise federal jurisdiction, would potentially be imperilled. This would be the consequence should the legislation in a particular case result in an outcome that the District Court could not exercise federal jurisdiction generally. Such a consequence could be drastic and extremely inconvenient.

242 Fourthly, and in any event, on the face of the Act, there is a possibility, or likelihood, that a continuing State law could, of its own force, exclude the exercise of federal jurisdiction where federal law otherwise so provided for it. Such an hypothesis would ignore the provisions of s 109 of the Constitution.

243 Fifthly, there is no need to postulate such a heterodox constitutional theory which, in practical terms, would make the *Kable* principle impotent. The appellants and the respondent agreed (with the support of the Commonwealth)

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216 (1996) 189 CLR 51 at 111.

217 (1996) 189 CLR 51; see also *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.

that, if the *Kable* principle applied, the correct response would be to sever "the Court or the Supreme Court" from s 28A(5). This would leave the requirements of that sub-section applicable to the Liquor Commissioner, an administrative officer, but not to a "court of a State". That approach would respond to the objective addressed by *Kable*, namely protecting the integrity of the State courts as institutions that can perform their functions within the integrated Judicature of the Commonwealth. It would uphold the implication derived from s 77(iii) of the Constitution that State courts, as such, must always be in a suitable condition to be vested with federal jurisdiction.

244 *Kable doctrine applies*: All of the arguments deployed in this case to defeat the application of the *Kable* doctrine therefore fail.

The *Gypsy Jokers* decision is not determinative

245 *Gypsy Jokers argument*: The respondent and some of the interveners[218] argued that the central legal question decided by this Court's decision in *Gypsy Jokers*[219] was determinative, in law, of the constitutional question tendered to this Court by the *Kable* principle.

246 Whilst the legislation under consideration in *Gypsy Jokers*[220] was in some respects different from the provisions of the Act in issue here, any such differences are inevitable in the specificities of legislation. The implied constitutional doctrine expressed in *Kable* requires that a consistent path of principle should be followed. Thus care should be taken to avoid (especially within a very short interval) the re-opening and re-examination of issues that have substantially been decided by earlier decisions in closely analogous circumstances.

247 As in *Gypsy Jokers*, a question arises under the Act as to the role of a State court in the face of restrictive legislation; the extent to which that court can still perform its functions with the necessary constitutional features of independence and integrity; and the degree to which external decisions by a State Police Commissioner could, in law or effect, control the decision of the State court so as to be, or to appear to be, "dictation" to the court concerning the way in which it would perform its functions[221].

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218 Such as Victoria.

219 (2008) 234 CLR 532.

220 *Corruption and Crime Commission Act* 2003 (WA), s 76(2).

221 cf *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ.

248 In *Gypsy Jokers*, when deciding the *Kable* issue, the majority expressly compared the decision made by the Supreme Court on the review of the Police Commissioner's determination and the traditional function observed by a court under the common law in deciding an application that invoked the principles of public interest immunity[222]. Duggan J, writing for the majority in the Supreme Court in the present matter, also considered this factor but did not then have the advantage of the reasons of this Court in *Gypsy Jokers*[223].

249 The majority in *Gypsy Jokers* decided that, notwithstanding the legislation challenged in that case, the *Corruption and Crime Commission Act* 2003 (WA) ("the WA Act"), the Supreme Court could conduct a review based on materials that had been before the Police Commissioner. This review would not permit or require that Court to engage in any process of balancing competing public interests. However, if the restricted information were in fact information the disclosure of which might, in that Court's opinion, prejudice the operations of the Police Commissioner, the resulting inquiry would not necessarily deprive that Court of its character as a constitutional "court of a State". It would not otherwise be inconsistent with Ch III of the Constitution. Likewise, it would not subject the court concerned to the "dictates" of the legislature or of the Executive. It would remain for that court to determine for itself whether the information could objectively justify the Commissioner's belief.

250 In this appeal, the respondent submitted that the same was true of the examination by the Licensing Court under the Act of the "criminal intelligence" relied on by the Police Commissioner. The function performed here involved the consideration of facts and circumstances that were not materially different from the task to be performed in *Gypsy Jokers*.

251 On the other hand, Western Australia argued that there were some distinguishing features. The provisions of the WA Act would still be valid even if the South Australian provisions were invalid. In Western Australia, in respect of liquor licensing, the former Liquor Licensing Court has been abolished[224]. It has been replaced by a Liquor Commission which has no judicial membership[225].

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222 (2008) 234 CLR 532 at 556 [23]-[24] and 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ, 596 [183] per Crennan J (Gleeson CJ concurring).

223 *K-Generation* (2007) 99 SASR 58 at 77 [67].

224 *Liquor and Gaming Legislation Amendment Act* 2006 (WA), s 11, which repealed Pt 2 Div 2 of the *Liquor Licensing Act* 1988 (WA).

225 *Liquor Licensing Act* 1988 (WA), ss 8, 9B, as amended by *Liquor and Gaming Legislation Amendment Act* 2006 (WA), s 11.

The submission distinguishing the current liquor legislation of Western Australia from that of South Australia was forensically understandable. However, it does not address the suggested analogy between the legislation considered in *Gypsy Jokers* and that in the present appeal which the respondent argued obliged the same outcome.

252 *Features of the South Australian legislation*: Obviously, there are common features between the legislation considered in *Gypsy Jokers* and that of the present case. However, there are sufficient differences from the WA Act to oblige a fresh consideration of the *Kable* principles as measured against the requirements of the South Australian legislation. The decision in *Gypsy Jokers* is not determinative.

253 It is first essential to construe s 28A of the Act. To do so, the many and varying expressions by members of this Court in earlier decisions about the content of the *Kable* principle must be understood; some of the considerations mentioned at the earliest phase of the emergence of the doctrine (including in *Kable* itself) must be eliminated[226]; it has to be remembered that the principle addresses institutional considerations that affect the court concerned[227]; and it must be appreciated that institutional independence is not the only consideration defended by *Kable*, but also institutional integrity[228]. The latter restrains any attempted conferral upon courts in the integrated Judicature of the Commonwealth of functions that might damage the capacity of such a court to manifest the "defining characteristics which mark a court apart from other decision-making bodies"[229].

254 *Appellants' interpretation*: It is first helpful to explain the interpretations of s 28A(5) of the Act urged by the appellants:

- First, the appellants emphasised the use of the imperative verb "must" in s 28A(5)(a). Relevantly, the command is addressed to "the Court or the Supreme Court". The appellants contrasted that provision with s 76(5) of the WA Act considered in *Gypsy Jokers*. That provision provided that:

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226 Such as the suggested damage to the public perception of the independence of the courts. See *Kable* (1996) 189 CLR 51 at 108 per Gaudron J, 118-119 per McHugh J, 133 per Gummow J; cf *Fardon* (2004) 223 CLR 575 at 593 [23] per McHugh J, 617-618 [102] per Gummow J, 629-630 [144] of my own reasons.

227 *Forge* (2006) 228 CLR 45 at 76 [63].

228 *Fardon* (2004) 223 CLR 575 at 591 [15], 595 [32], 598-599 [37], 617-618 [100]-[102], 648 [198], 653 [213].

229 *Forge* (2006) 228 CLR 45 at 76 [63].

"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". The stated latitude there reserved to the court was an important consideration in the conclusion of the majority in *Gypsy Jokers*. It was held that the Supreme Court retained a genuinely judicial function of scrutinising, by reference to an objective standard, the reasonableness of the belief of the Police Commissioner. Under the South Australian legislation, the appellants argued that such a latitude had effectively been removed by requiring the Licensing Court to act in the way specified. The appellants submitted that this was tantamount to permitting an agency of the Executive Government, external to the Licensing Court, by its own actions, to control the outcome of the decision of the Licensing Court. Further, it could impose a procedure that involved a "private" hearing without the parties, something alien to the ordinary conduct of proceedings before the courts of the Australian Judicature. In this respect, it was submitted that the legislation considered in this appeal was akin to the legislation invalidated by the Queensland Court of Appeal in *Re Criminal Proceeds Confiscation Act 2002*[230];

- Secondly, the appellants emphasised that the imperative duty imposed on the Licensing Court or the Supreme Court was, in terms of the paragraph, addressed to information "classified by the [Police Commissioner] as criminal intelligence". It was not addressed to "information" that could be objectively determined to be "criminal intelligence". By s 28A(1) of the Act, "classification" by the Police Commissioner as "criminal intelligence" immediately prevented disclosure other than as provided. The majority in *Gypsy Jokers* decided that review, according to such an objective standard, was still possible. However, review here was excluded by the present Act. The Police Commissioner had the stated power to perform the "classification" of the information. That classification then had the restrictive consequence of binding the Licensing Court or the Supreme Court, irrespective of whatever that Court might objectively decide. Upon this interpretation, *Gypsy Jokers* was distinguishable and the offence to judicial independence and integrity was demonstrated;

- Thirdly, it might be contended that an objective function was reserved to a court, namely the judicial review of the confidential information classified by the Police Commissioner as "criminal intelligence". However, the appellants argued that, in practice, any such review was illusory. This was partly because the Police Commissioner (or delegate), by reason of office, was effectively in a position to classify the information in a way that a court could not sensibly challenge. Moreover, there was a statutory

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230 [2004] 1 Qd R 40.

command to maintain the confidentiality of the information so classified by the Police Commissioner and to receive evidence and hear argument about the information in private, without the parties and their representatives. This effectively meant that the usual facilities available to a court to scrutinise, question and test the evidence were withheld in this case. Unassisted by the excluded parties and their representatives, the Licensing Court was deprived of the normal court-like means for reaching an objective decision on the evidence, different from that involved in the "classification" by the Police Commissioner;

- Fourthly, the appellants contrasted the procedure mandated in the sub-section with the procedures that had been upheld in earlier decisions involving the *Kable* principle or in other procedures reflecting the approach of the common law. The appellants submitted that this comparison made clear the impact of s 28A(5) upon the independence and integrity of the courts. Thus, the appellants disputed the supposed analogy to the decision of this Court in *Fardon*[231]. In that case, the majority envisaged that a prisoner, affected by the adverse decision, would be given full disclosure of all relevant material so that he or she could contest the suggested foundation for the decision that was adverse to the prisoner. In the present case, any adverse decision would follow a procedure that effectively forbade the person affected from receiving, or knowing about evidence or hearing arguments about critical information. Likewise, the representatives of the persons affected would be excluded. Instead, the Licensing Court would meet in private with representatives of the Executive Government in a "closeting", as it was put, between the agencies of the Executive and the judges, allegedly not seen since the reign of James II[232]. Indeed, events during that unhappy King's reign and the personal pressure he placed upon the judges led to the Commons' demand in England for a guarantee of the independence and integrity of the judges. This resulted in the *Act of Settlement*[233];

- Fifthly, the appellants rejected the supposed analogy to *ex parte* hearings involving police and judicial officers, anterior to the grant of search and

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231 (2004) 223 CLR 575 at 656 [221].

232 See Bradley, "Relations between Executive, Judiciary and Parliament: an Evolving Saga?", [2008] *Public Law* 470 at 470-472 citing *Godden v Hales* (1686) 2 Show KB 475 [89 ER 1050]; cf *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J; [1986] HCA 39.

233 *Act of Settlement* 1700 (Imp) 12 & 13 Will III c 2, s 3; see also 1 Geo III c 23, s 1; Blackstone, *Commentaries on the Laws of England*, vol 1 (1765) at 258.

arrest warrants[234]. They pointed out that the procedure in s 28A(5) of the Act applied to "any proceedings under the Act" including before the Licensing Court or the Supreme Court. Accordingly, it governed *final* determinations of the merits of an application. This was thus markedly different from the conduct of a proceeding before a judicial officer which determines finally no substantive rights or duties, only *earlier* ancillary decisions;

- Sixthly, it was put against the appellants that an applicant for a liquor licence, confronted with "criminal intelligence", could always adduce his or her own character evidence to cast doubt on the unknown contents of the police file. The appellants responded in terms of the decision of the Supreme Court of Canada in *Charkaoui v Canada (Citizenship and Immigration)*[235]. There, in relation to legislation bearing some similarities to the present, McLachlin CJ, for the Court, observed[236]:

  "[S]ince the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. …

  Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?"

  The Canadian legislation in *Charkaoui* was invalidated by the Supreme Court as contravening the *Canadian Charter of Rights and Freedoms*[237]. However, the Court rejected another argument for the objector that the legislation "compromise[d] the perceived independence and impartiality of the designated judge" or was contrary to "the unwritten constitutional principle of judicial independence"[238]. Such arguments, more closely analogous to those of the appellants in the present appeal, were not accepted; and

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234 See *George v Rockett* (1990) 170 CLR 104 at 112; [1990] HCA 26.

235 [2007] 1 SCR 350.

236 [2007] 1 SCR 350 at 388-389 [63]-[64].

237 [2007] 1 SCR 350 at 419 [139].

238 [2007] 1 SCR 350 at 381-382 [46]-[47].

- Seventhly, the appellants understandably drew attention to the dangers of legislation that requires, or permits, courts to act, in final dispositions, upon the testimony of secret witnesses. The person affected is not then afforded a proper opportunity to challenge such evidence or even to know the gist or substance of the assertions[239]. The appellants argued that the law recoils from allowing police and other officials to place a "thumb on the scales" of justice in courts of law[240]. This was particularly so where the procedures permitted the use of secret testimony. Such materials often provide "a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected"[241]. The appellants cited numerous instances of serious wrongs occasioned by decision-makers acting upon criminal intelligence that could allegedly not be disclosed to the person most immediately affected[242]. By borrowing the independent courts to throw an apparent vestige of acceptability over such evidence, the appellants argued that s 28A(5) of the Act undermined the integrity of the courts. It spent the reputational capital of the courts in a way that the *Kable* principle was intended to prevent. The appellants suggested that, effectively, if the State Parliament and Executive wished to institute procedures such as those in s 28A(5) of the Act, they should, like the law-makers in Western Australia, be obliged to do so without involving the courts and risking their hard-won reputation for performing their functions with an assurance of basic justice to all parties.

255 As in most cases where *Kable* has been invoked, the legislation under consideration here involves unusual and atypical features. It contains apparent departures from rules normally observed in legislation affecting Australian courts of law. However, the question for the courts in such cases is not whether that

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239 cf *R v Davis* [2008] 1 AC 1128 at 1170-1171 [91], [94] citing the dissenting reasons of Judge Stephen in *Prosecutor v Tadic*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-1-T, 10 August 1995. That dissenting opinion was preferred by the majority in *Prosecutor v Blaskic*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-95-14-T, 5 November 1996; cf *R (Roberts) v Parole Board* [2005] 2 AC 738.

240 *R v Lodhi* [2006] NSWSC 586.

241 *Knauff v Shaughnessy* 338 US 537 at 551 (1950) per Jackson J (in dissent).

242 See *Davis* [2008] 1 AC 1128 at 1171 [93], referring to *Prosecutor v Tadic*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-1-T, 10 August 1995. See also Note, "Secret Evidence in the War on Terror", (2005) 118 *Harvard Law Review* 1962 at 1980.

legislation is desirable or even ultimately effective in departing from previously settled ways. The only question is whether the departure is of such a character and to such a degree as to attract the implied constitutional prohibition expressed in *Kable*.

256 Since *Kable*, no other case has been found by this Court to attract the application of the principle[243]. This may be partly because, from the outset, the judges in the majority in *Kable* recognised that successful invocations of the principle would be extremely rare[244]. It may partly be so because elected governments and parliaments in Australia rarely depart from such basic norms in the legislative deployment of judges and the courts. Whatever the explanation, the engagement of the *Kable* principle is clearly reserved to attempts by legislation to impose upon courts functions that are seriously repugnant to, or incompatible with, the institutional independence and integrity of such courts[245]. Is the present such a case?

257 *Interpretation of s 28A(5)*: When a court is required to apply a constitutional principle to legislation, it is normally first necessary to construe the legislation in issue[246]. The respondent, the Commonwealth and a number of the States argued that, upon its proper interpretation, s 28A(5) of the Act did not have the drastic and exceptional consequences alleged by the appellants.

- The implied power of the Police Commissioner to "classify" information as "criminal intelligence" is the starting point for the operation of s 28A(5) of the Act. However, attention must be drawn to several features of the

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243 See, for example, *Nicholas v The Queen* (1998) 193 CLR 173 at 203 [57]; [1998] HCA 9; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14]; [1998] HCA 54; *McGarry v The Queen* (2001) 207 CLR 121 at 163-164 [133]-[134]; [2001] HCA 62; *Silbert v Director of Public Prosecutions for Western Australia* (2003) 217 CLR 181 at 186 [9]-[11], 194 [39]; [2004] HCA 9; *Baker v The Queen* (2004) 223 CLR 513 at 534-535 [51]; [2004] HCA 45; *Fardon* (2004) 223 CLR 575 at 593 [23], 601-602 [43], 621 [118], 658 [234]; *Forge* (2006) 228 CLR 45 at 86 [93]; *Gypsy Jokers* (2008) 234 CLR 532.

244 cf *Kable* (1996) 189 CLR 51 at 98 per Toohey J, 134 per Gummow J; *Fardon* (2004) 223 CLR 575 at 601 [43] per McHugh J.

245 cf *Forge* (2006) 228 CLR 45 at 76 [63].

246 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; [1948] HCA 7; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; [2000] HCA 33; *Gypsy Jokers* (2008) 234 CLR 532 at 553 [11], 569 [72].

sub-section which the appellants' submissions appeared to overlook or to misread.

- In classifying information as "criminal intelligence", the Police Commissioner is required to form an opinion as to whether such information falls within the definition of that expression in s 4 of the Act. That opinion must be formed reasonably upon material that was before the Police Commissioner (or the Commissioner's delegate) at the time. The Licensing Court and the Supreme Court are entitled to scrutinise the "classifications" made against an objective standard. The court concerned must judge for itself, with complete independence and impartiality, whether objectively the information is reasonably capable of meeting the statutory description[247];

- This approach to the function of the courts, outlined in the Act, is reinforced when the definition of "criminal intelligence" is considered. That definition explicitly requires that disclosure of the information "could *reasonably* be expected" to prejudice certain activities or persons. It also provides express criteria by which the court concerned might judge whether the information has been "classified" lawfully within a protected category. Amongst the criteria which the common law has accepted as giving rise to particular protections, two are identified for the purpose of s 28A of the Act. First, whether the disclosure of the information might prejudice criminal investigations or secondly, whether it would enable the discovery of the existence or identity of a confidential source[248]. Imposing restrictive protections to such information is not alien to the judicial process. On the contrary, in applying the common law, judges have long accorded specific protections to evidence of that character[249];

- Section 28A of the Act, specifically sub-ss (5)(b) and (6), establishes procedures that must be observed to protect the Police Commissioner's "classification" of information as "criminal intelligence". The court before which s 28A(5) is invoked is entitled, and obliged, to demand a demonstration that all such procedural preconditions have been met. In doing so, the independence and impartiality of the courts concerned are unaffected. Moreover, courts nowadays generally have access to the

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247 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36].

248 See, for example, *Conway v Rimmer* [1968] AC 910 at 966.

249 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650-657 [126]-[147]; [1999] HCA 21; *Gypsy Jokers* (2008) 234 CLR 532 at 558 [33].

information in respect of which confidentiality is required. This principle is also reflected in s 28A(1). Prohibition of the provision of the "classified" information does not extend to "the Minister, *a court* or a person to whom the [Police Commissioner] authorises its disclosure"[250]. In this way, legal developments over the past 60 years[251] are adequately reflected in the statutory provisions;

- The verb "must" in s 28A(5)(a) is addressed to the Licensing Court and to the Supreme Court. However, any offensiveness of the use in that word of the imperative mood obviously depends on what the court "must" actually do. The command is softened somewhat by requiring that the court must "take steps" to maintain the classified information. This expression falls short of a universal obligation to "maintain the confidentiality of information" in every case. Had that been the intended obligation, there would have been no need to include the duty to "take steps" for the purposes identified.

  The submission of Victoria should be accepted that the "taking of steps" is not rigid or prescriptive language but, instead, allows for incremental action. Not being absolute, it permits appropriate steps to be taken that would not compromise the confidentiality of the information. These steps could afford an opportunity to a party, or to its legal representative, to have an expurgated and anonymised summary of evidence. That, in turn, would provide the party with a real chance to defend and advance its interests, consistent always with upholding the objectives of the classification.

  The respondent accepted that the "steps" could include those required to ensure that the court could adequately evaluate, and where appropriate, make effective use of, the information whilst maintaining its confidentiality. In this sense, contrary to the submission of the appellants, the language of s 28A(5) begins to approximate, in important respects, more than in *Gypsy Jokers*, the traditional facility available to Australian courts at common law. Thus, the respondent accepted that, consistently

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250 The Act, s 28A(1) (emphasis added). See *VEAL* (2005) 225 CLR 88 at 99-100 [28]-[29]; *Thomas v Mowbray* (2007) 233 CLR 307 at 358 [124].

251 cf *Sankey v Whitlam* (1978) 142 CLR 1 at 42, 43-44, 61; [1978] HCA 43; *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624 at 633-634, 638; *Conway* [1968] AC 910 at 966-967, 987.

with s 28A(5), the courts retained an implied or inherent jurisdiction to ensure that the proceedings before them were fair[252].

Where appropriate, the court could therefore exclude confidential evidence in the exercise of its discretion if the admission of that evidence would be seriously unfair to an applicant, beyond the unfairness necessarily inherent in the s 28A procedures. Moreover, a court could make it clear that it would refuse to act on information unless a particular witness was called to give oral evidence before it. The court itself is empowered to test that evidence by cross-examination. In any event, the use that is made of the "criminal intelligence" is left to the court. Acting independently, the court could give little weight to "classified" evidence if, for example, it was unpersuasive, untested, remote or hearsay. Likewise, if it ought to be discounted by reference to considerations of the kind mentioned by Dixon J in *Briginshaw v Briginshaw*[253];

- The appellants expressed the strongest objection to the requirement of s 28A(5) that the court should receive evidence and hear argument about the information *in private*, without the parties or their representatives. However, this obligation is likewise softened by the repetition of the introductory phrase "take steps". The hearing of argument in private is included amongst the "steps" which the court is required to take to maintain the confidentiality of the classified information. If such "steps" were not necessary for that purpose, their inclusion in the court procedures would not be mandatory. It should be noted that, in the appellants' case, Judge Rice actually received the file of evidence and heard argument in public, although, as can now be seen, the argument did not then address the true interpretation of s 28A of the Act as closely as it should have;

- When confronted by the tender of "criminal intelligence", an applicant for a liquor licence is not entirely excluded from taking steps to challenge or to attempt to rebut information classified as "criminal intelligence". Invariably, under the Act, any material so classified must bear on the question of whether the applicant is a "fit and proper person" to hold a licence of the kind sought. As attempted to some degree in the present case, the applicant could adduce evidence to rebut an inference that he or she was not a fit and proper person. Such evidence would necessarily be of a general kind although by no means at large. A court, called upon to

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252 *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; [1944] HCA 5; *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; [1956] HCA 22.

253 (1938) 60 CLR 336 at 361-362; [1938] HCA 34.

weigh any such evidence, including any character evidence submitted, would have to take into account the forensic disadvantages facing the applicant.

The appellants complained that generalised character evidence could never effectively rebut specific but undisclosed allegations contained in "criminal intelligence". However, even at common law, "criminal intelligence", as defined in s 4 of the Act, would ordinarily be protected from disclosure. The point of differentiation in the Act lies in the provision to the Police Commissioner of a facility for prior "classification". Likewise, to require the court to take "steps" to maintain the confidentiality of the information so classified. The error of the appellants, before the Liquor Commissioner and before the Licensing Court, was to read s 28A(5) too absolutely. They failed to apply to it the close scrutiny required by the ordinary principles of administrative law. Such principles are further reinforced by a general principle of statutory interpretation. Provisions, such as s 28A(5) of the Act, are always read strictly, in so far as they appear to derogate from the ordinary protections afforded by the law for basic civil rights[254]; and

- The last-mentioned approach is reinforced by consideration of the reasons of Blaxell J in the Supreme Court of Western Australia in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police [No 2]*[255]. That decision was given upon the return of *Gypsy Jokers* to that Court, following the decision of this Court. The majority of this Court concluded that the WA Act afforded a continuing, objective and acceptable judicial role for the courts, notwithstanding the legislative provisions designed to protect the confidentiality of "criminal intelligence". Attached to the reasons of Blaxell J is a schedule that identifies particular items of information provided to the Court; which information was designated as confidential; the existence of evidence to support the claim to confidentiality; the relevant paragraphs of the police evidence; the evidence in respect of which some disclosure had been agreed; the determination of the residual claim for confidentiality; and the resulting orders. The schedule shows that confidentiality was upheld for several parts of the affidavits examined by the Court. However, an order was made that other parts of the paragraphs be disclosed. In short, the Court in that case performed a court-like function, apparently in the normal and regular way.

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254 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 562-563 [43], 577 [90], 592-593 [134] and cases there cited; [2002] HCA 49.

255 [2008] WASC 166.

> Operating within the limitations of legislation of the kind applicable in *Gypsy Jokers* and the rather more facultative legislation applicable in the present case, the facility of judicial protection is undoubtedly restricted. It is confined beyond what might have been available in an evaluation of a claim to privilege at common law. The remedies generally available on judicial review are notoriously narrower than those available in an ordinary trial hearing or in an appeal on the merits. However, review of such a kind by judges remains a conventional and familiar judicial function in Australia. *Gypsy Jokers [No 2]* demonstrates, in a particular case, that such a review is not, in the result, without real and substantive judicial content. There is no reason to believe that the position under s 28A(5) of the South Australian legislation would be different. Indeed, the South Australian legislation contains provisions that indicate more clearly that the courts retain a substantive reviewing function.

258 *Conclusion: s 28A(5) is valid*: The result of this analysis is that the provisions of s 28A(5) of the Act, properly construed, do not offend the *Kable* principle. As was intended, the provision diminishes the role of a court to decide claims to privilege with respect to "criminal intelligence". However, it does not involve the State Parliament or the Police Commissioner impermissibly "instructing" a court on a particular case. It does not prevent a court from performing traditional judicial functions. It does not diminish the integrity and independence of a court in a constitutionally impermissible way.

259 The complaint that s 28A(5) of the Act is constitutionally invalid is therefore rejected. It follows that it is unnecessary to decide in this case whether, had it been otherwise, the proper remedy would have been severance of the offending portions of the Act or invalidation of all or part of the Act. Such questions do not now arise for decision.

Order

260 The appeal should be dismissed with costs.