HIGH COURT OF AUSTRALIA

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

DEREK JAMES WAINOHU PLAINTIFF

AND

THE STATE OF NEW SOUTH WALES DEFENDANT

Wainohu v New South Wales [2011] HCA 24
23 June 2011
S164/2010

ORDER

Order that the questions stated in the special case be answered as follows:

Question 1: Is the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) or any provision or part of it invalid on the grounds that:

a. it undermines the institutional integrity of the Supreme Court of New South Wales; or

b. it is outside the legislative powers of the Parliament of the defendant?

Answer: *The* Crimes (Criminal Organisations Control) Act *2009 (NSW) is invalid.*

Question 2: Who should pay the costs of the special case and/or of the proceedings?

Answer: *The defendant is to pay the costs of the plaintiff of the special case.*

Representation

M A Robinson with W Baffsky and B J Tronson for the plaintiff (instructed by Hardinlaw Solicitors)

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

S J Gageler SC, Solicitor-General of the Commonwealth with C C Spruce 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 and R M Mitchell SC with C S Bydder intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

W Sofronoff QC, Solicitor-General of the State of Queensland with G P Sammon and A D Scott intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

M G Hinton QC, Solicitor-General for the State of South Australia with L K Byers intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

P J Hanks QC with K E Foley intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Wainohu v New South Wales

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Institutional integrity of State courts – Non-judicial functions conferred upon judges of State courts – Section 5 of *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("Act") provided that Attorney-General may, with consent of judge, declare judge of Supreme Court to be an "eligible Judge" for purposes of Act – Section 6(1) provided that Commissioner of Police ("Commissioner") may apply to eligible Judge for declaration that particular organisation is a "declared organisation" for purposes of Act – Section 9(1) provided that eligible Judge may make declaration if satisfied members of particular organisation "associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity", and that organisation "represents a risk to public safety and order" – Section 13(2) relevantly provided that eligible Judge not required to provide "any grounds or reasons" for making declaration – Part 3 of Act empowered Supreme Court to make, on application by Commissioner, control order against member of particular "declared organisation" – Whether function conferred by Act upon eligible Judge to make declaration without requirement to provide grounds or reasons repugnant to or incompatible with institutional integrity of Supreme Court – Whether substantial impairment of institutional integrity of Supreme Court.

Words and phrases – "incompatibility", "institutional integrity", "persona designata", "reasons".

Constitution, Ch III.
Crimes (Criminal Organisations Control) Act 2009 (NSW), ss 5, 6(1), 9(1), 12, 13(2), 14, 19.

FRENCH CJ AND KIEFEL J.

Introduction

1 On 6 July 2010, the Acting Commissioner of Police for New South Wales applied to a judge of the Supreme Court of New South Wales for a declaration under Pt 2 of the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the Act") in respect of the Hells Angels Motorcycle Club of New South Wales ("the Club"). The declaration sought is an administrative, not a judicial act. The judge from whom it is sought is an "eligible judge" so designated under the Act by the Attorney-General of New South Wales.

2 If the eligible judge makes the declaration which is sought then, under Pt 3 of the Act, the Supreme Court will be empowered, on the application of the Commissioner of Police, to make control orders against individual members of the Club[1]. A member against whom such an order is made is called a "controlled member"[2]. It is an offence for controlled members to associate with one another[3]. They are also barred from certain classes of business and occupation[4].

3 The plaintiff, Derek Wainohu, is a member of the Club and has been a member for 20 years. If the Club is declared as an organisation under the Act, he is at risk of being made subject to a control order. He has commenced proceedings in this Court seeking a declaration that the Act is, or particular provisions of it are, invalid. He challenges the Act's validity on the basis that it confers functions upon eligible judges and upon the Supreme Court which undermine the institutional integrity of that Court in a way that is inconsistent with the national integrated judicial system for which Ch III of the Constitution of the Commonwealth provides. He also contends that the Act infringes the freedom of political communication and political association implied from the Constitution.

4 The State of New South Wales filed a defence to the claim. The parties agreed a special case pursuant to r 27.08.1 of the High Court Rules. On 15 October 2010, Heydon J referred the special case to the Full Court.

---

1 The Act provides for "interim control orders" and "control orders": ss 14 and 19.

2 Act, s 3(1).

3 Act, s 26(1).

4 Act, s 27.

5 The Act creates two important functions, both of which are exercised by judges of the Supreme Court of New South Wales. It was not in dispute that a declaration under Pt 2 made by an eligible judge is an administrative act. Nor was it disputed that a control order under Pt 3 is a judicial act. Although the two functions are linked as part of the one statutory scheme, the making of a declaration under Pt 2 is neither an incident nor an element of the judicial function of making a control order under Pt 3.

6 An eligible judge may make a determination under Pt 2 upon information and submissions, without regard to the rules of evidence[5], partly based on information and submissions not able to be disclosed to the organisation or its members[6], and with no obligation to provide reasons for the determination which is made[7]. The Act thus provides for the enlistment of judges of the Supreme Court to determine applications for declarations using processes which, if adopted by the Court itself, would be repugnant to the judicial function.

7 The making of a declaration by an eligible judge is a necessary condition for the exercise by the Court of its jurisdiction to make a control order. It is well established that a State legislature, untrammelled by a doctrine of separation of powers derived from the Constitution of the State, can confer administrative functions on a court of the State or on judges of the court. It cannot confer administrative functions on a court which are incompatible with the court's essential and defining characteristics as a court and thereby with its place in the national integrated judicial system for which Ch III of the Constitution provides. Nor, as is explained in these reasons, can a State legislature confer upon judges of a State court administrative functions which substantially impair its essential and defining characteristics as a court. The Act effects such an impairment. It does so because it provides, in effect, that the jurisdiction of the Supreme Court to make control orders against members of an organisation will be enlivened by a decision of a judge of the Court, after an adversarial proceeding, on complex and important matters of fact, for which the Act provides that no reasons need be given. The Act also creates an impression of a connection between the performance of a non-judicial function and the following exercise of judicial power, such that the performance of that function may affect perceptions of the judge, and of the court of which he or she is a member, to the detriment of that court. The plaintiff's challenge to the validity of the Act should succeed.

---

5 Act, s 13(1).

6 Act, ss 8, 28 and 29.

7 Act, s 13(2).

An overview of the Act

8 The object of the Act, as appears from its long title, is "to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members". It is an object which has been pursued in the long history of laws restricting the freedom of association of certain classes, groups or organisations of persons involved or likely to be involved in the planning and execution of criminal activities[8]. It is an object legitimised by the incidence and sophistication of what is generally called "organised crime". It is nevertheless an object which must be pursued within the framework of the Constitution so as to maintain the integrity, independence and authority of the courts that may be required to determine whether persons charged with offences under federal, State or Territory laws are guilty of those offences, and to punish them if they are.

9 Under Pt 2 of the Act the Attorney-General may declare judges of the Supreme Court of New South Wales, who give their prior written consent, to be eligible judges for the purposes of Pt 2[9]. The Commissioner may apply in writing[10] to an eligible judge for a declaration under Pt 2 that an organisation is a declared organisation for the purposes of the Act[11]. The application must specify, inter alia, the names of any persons that the Commissioner has reasonable grounds to believe are members of the organisation[12]. It must set out the grounds upon which the declaration is sought and the information supporting those grounds[13]. The application must be supported by an affidavit from the Commissioner, or affidavits from senior police officers, verifying its contents[14].

10 Members of an organisation the subject of an application for a declaration, and other persons who may be directly affected by its outcome, must be invited, by public notice, to make submissions to the eligible judge at a hearing to be held

---

8 *South Australia v Totani* (2010) 242 CLR 1 at 30-35 [32]-[41] per French CJ; [2010] HCA 39.

9 Act, ss 5(2) and 5(3).

10 Act, s 6(2)(a).

11 Act, s 6(1).

12 Act, s 6(2)(d).

13 Act, s 6(2)(e) and (f). The term "information" is not defined.

14 Act, s 6(2)(h).

on a date determined by the eligible judge and specified in the notice[15]. Members of the organisation who are specified in the application[16] have a right to make submissions at the hearing. Other members, and persons who may be directly affected by the outcome of the application, may also be present and make submissions with the leave of the eligible judge[17].

11 The Commissioner can object to persons being present during any part of the hearing in which information classified by the Commissioner as "criminal intelligence" is disclosed[18]. The eligible judge must take steps to maintain the confidentiality of information that he or she considers to be properly classified by the Commissioner as criminal intelligence[19]. They include receiving evidence and hearing argument about the information in private, in the absence of the parties to the proceedings, their representatives and the public[20].

12 A member of the organisation or any other person who may be directly affected by the outcome of the application, and who has reasonable grounds to believe that he or she may be subjected to action comprising or involving injury, damage, loss, intimidation or harassment in reprisal for making a submission,

---

15 Act, s 7. Notice of the application must be published in the Gazette and in a newspaper circulating in the State of New South Wales.

16 Act, s 8(1).

17 Act, s 8(2). Neither of the terms "directly affected" and "submission" is defined.

18 Act, s 8(3). "Criminal intelligence" is defined in s 3(1) as information relating to actual or suspected criminal activity (whether in the State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement, or to endanger a person's life or physical safety.

19 Act, s 8(5) read with s 28. The terms of s 28 and the definition of "criminal intelligence" are similar to provisions of the *Liquor Licensing Act* 1997 (SA) considered in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [2009] HCA 4. If the judge considers the information cannot properly be classed as criminal intelligence, he or she must ask the Commissioner whether the Commissioner wishes to withdraw the information from consideration – see Act, s 28(4).

20 Act, s 28(3).

may make a "protected submission"[21]. An eligible judge is required to take steps to maintain the confidentiality of a protected submission[22].

13 The power of the eligible judge to make a declaration in relation to a particular organisation is conferred by s 9(1):

> "If, on the making of an application by the Commissioner under this Part in relation to a particular organisation, the eligible Judge is satisfied that:
>
> (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and
>
> (b) the organisation represents a risk to public safety and order in this State,
>
> the eligible Judge may make a declaration under this Part that the particular organisation is a declared organisation for the purposes of this Act."

"Serious criminal activity" is a defined term. It extends to obtaining material benefits from conduct that constitutes a serious indictable offence, or from conduct engaged in outside New South Wales that, if it occurred in that State, would constitute a serious indictable offence. It includes committing a "serious violence offence". That term is defined as an offence punishable by imprisonment for life or a term of 10 years or more, where the conduct constituting the offence involved loss or serious risk of loss of a person's life, serious injury or serious risk of serious injury to a person, or serious damage to property in circumstances endangering the safety of any person, or perverting the course of justice in relation to conduct that, if proved, would otherwise constitute a serious violence offence[23].

14 The eligible judge may make a declaration if satisfied that only some of the members of the organisation associate for the purpose of serious criminal activity provided he or she is satisfied that they constitute a significant group within the organisation in terms of their numbers or their capacity to influence the organisation or its members[24]. A declaration remains in force for three years

---

21 Act, ss 8(4) and 8(7).

22 Act, s 8(6) read with s 29.

23 Act, s 3(1).

24 Act, s 9(4)(a).

unless sooner revoked or renewed[25]. It may be revoked by an eligible judge on the request, in writing, of the Commissioner or on application by a member of the organisation[26]. A declaration creates no rights or liabilities. It is, however, a necessary condition for the exercise by the Supreme Court of the jurisdiction conferred on it by Pt 3 of the Act to determine applications for control orders against members of a declared organisation.

15 The rules of evidence do not apply to the hearing of an application for a declaration[27]. The eligible judge in making a declaration or a decision under Pt 2 is not required to provide any grounds or reasons for the declaration or decision[28]. There is no appeal from the judge's decision. A broadly expressed privative clause purports to prevent a decision by an eligible judge from being challenged in any proceedings, including proceedings for prerogative relief[29]. It was not in dispute, however, that the decision of this Court in *Kirk v Industrial Court (NSW)*[30] has the effect that the section would not prevent a person from seeking prerogative relief in the Supreme Court of New South Wales on the ground of jurisdictional error[31].

16 Part 3 of the Act deals with the control of members of declared organisations. It empowers the Supreme Court to make interim control orders and control orders against such persons. The Act provides for an appeal to the Court of Appeal by the Commissioner or by a member to whom a control order applies[32]. The appeal lies as of right on a question of law and with leave on a

---

25 Act, s 11(2).

26 Act, s 12(1).

27 Act, s 13(1).

28 Act, s 13(2). The eligible judge is nevertheless subject to an obligation to provide reasons, upon request, to a person conducting a review under s 39 of the Act. Section 39, as amended in December 2010, requires the Ombudsman to report four years after the commencement of the Act on the exercise of powers by police officers under it. The section does not use the word "review".

29 Act, s 35.

30 (2010) 239 CLR 531; [2010] HCA 1.

31 (2010) 239 CLR 531 at 580-581 [98]-[99] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

32 Act, s 24(1).

question of fact[33]. The Court of Appeal may confirm, vary or reverse the decision the subject of the appeal and make any consequential or ancillary order[34]. A person to whom a control order or interim control order applies is referred to in the Act as a "controlled member".

17 Section 26 of the Act makes it an offence for controlled members of a declared organisation to associate with each other. A controlled member must not recruit another person to become a member of the declared organisation[35]. Controlled members are barred from applying for, or holding, authorisation to conduct certain kinds of businesses or activities[36].

18 Any question of fact to be decided in proceedings under the Act is to be decided on the balance of probabilities[37]. That standard of proof does not apply in relation to proceedings for an offence against the Act[38].

19 The Act purports to have effect beyond the limits of New South Wales[39]. The question whether the Supreme Court of New South Wales would be exercising federal jurisdiction pursuant to s 39 of the *Judiciary Act* 1903 (Cth) in the event that a control order was sought against a person resident in another State was not explored by the parties or the interveners.

---

33 Act, s 24(2).

34 Act, s 24(5).

35 Act, s 26A.

36 Act, s 27. Relevant authorisations include those of casino operators and certain casino employees, pawnbrokers, commercial agents, private inquiry agents, tow truck operators, motor dealers, motor repairers and bookmakers. The prohibition extends to security activities under the *Security Industry Act* 1997 (NSW), carrying on certain activities in connection with the racing industry, selling or supplying liquor, and possessing or using firearms and carrying on business as a firearms dealer.

37 Act, s 32(1).

38 Act, s 32(2).

39 Act, s 4.

The challenge to validity

20 The plaintiff attacks the validity of the Act by reference, inter alia, to:

- the functions it confers on eligible judges including the provisions for private hearings in relation to criminal intelligence and protected submissions; and

- the functions it confers on the Supreme Court in relation to the making of interim control orders and control orders and particularly the obligation to maintain, as against the person affected by such applications, the confidentiality of criminal intelligence and protected submissions.

Those functions are said to undermine the institutional integrity and independence of the Court. The plaintiff also claims that the Act infringes implied constitutional freedoms of political communication and political association.

Judges exercising administrative functions – historical context

21 There is no general constitutional prohibition against the appointment of judges to non-judicial offices or to carry out non-judicial functions. As an extensive literature on the subject demonstrates, there is a considerable history of such appointments in Australia[40]. There has nevertheless long been debate about whether it is appropriate for judges to engage in such activities and, if so, under what circumstances and conditions[41]. The same debate has taken place in other

---

40 eg Hallett, *Royal Commissions and Boards of Inquiry*, (1982) at 57-74; McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985); Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge", (1992) 21 *Federal Law Review* 48; Wheeler, "Federal Judges as Holders of Non-judicial Office", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System*, (2000) 442.

41 An historical overview of the debate appears in McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985). See also Holmes, "Royal Commissions", (1955) 29 *Australian Law Journal* 253 and comments thereon especially by Menzies QC at 264-267, Sir John Latham at 267-268 and Sir Owen Dixon at 272; Connor, "The Use of Judges in Non-Judicial Roles", (1978) 52 *Australian Law Journal* 482; McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities", (1978) 52 *Australian Law Journal* 540; Brennan, "Limits on the Use of Judges", (1978) 9 *Federal Law Review* 1; Reid, "The Changing Political Framework", (1980) 24 (January-February) *Quadrant* 5; Winterton, "Judges as

(Footnote continues on next page)

common law countries[42]. The question whether such activities are appropriate for a judge to undertake is not the same as the question whether they fall within limits imposed by the Constitution. Nevertheless, the existence of the debate and the historical practice are consistent with the absence of bright-line rules defining those limits.

22 The involvement of judges in non-judicial activities in or on behalf of the executive government was an unremarkable feature of government in the Australian colonies prior to Federation. The constitutions under which colonial legislatures, executives and judiciaries were established, and which continued and evolved as the Constitutions of the States, did not require separation of judicial from legislative and executive powers[43]. What Dr Twomey has written of New South Wales is generally true for other Australian States[44]:

> "From the very beginning of responsible government in New South Wales, it was not considered inappropriate for judges to perform non-judicial tasks or offices."

Evatt J said in *Medical Board of Victoria v Meyer*[45]:

> "Under the State Constitutions, where there is no provision which suggests any separation of powers between executive and judiciary, there is no reason why judges of the Supreme Court or any other court cannot be employed for the purpose of exercising administrative functions although such judges usually exercise judicial power."

Royal Commissioners", (1987) 10 *University of New South Wales Law Journal* 108; Sherman, "Should Judges Conduct Royal Commissions?", (1997) 8 *Public Law Review* 5.

42 See McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985) at 34-50 in relation to the United Kingdom, New Zealand, Canada and the United States; Mason, "Extra-Judicial Work for Judges: The Views of Chief Justice Stone", (1953) 67 *Harvard Law Review* 193; Calabresi and Larsen, "One Person, One Office: Separation of Powers or Separation of Personnel?", (1994) 79 *Cornell Law Review* 1045.

43 See generally Carney, *The Constitutional Systems of the Australian States and Territories*, (2006) at 344-349. A durable example is the appointment from time to time of Chief Justices of the States as Lieutenant-Governors.

44 Twomey, *The Constitution of New South Wales*, (2004) at 747.

45 (1937) 58 CLR 62 at 106; [1937] HCA 47.

A long-standing example, the use of State magistrates to carry out administrative functions, is "one of the best-known features of Australian legal history"[46], although it must be viewed in light of the evolution of the magistracy from functionaries subject to the executive government into an independent judiciary[47].

23 Judges of federal and State courts have from time to time been appointed by executive governments, sometimes acting pursuant to specific legislation, to conduct Royal Commissions[48]. Principled opposition to such appointments was expressed by the Chief Justice of Victoria, Sir William Irvine, in a letter sent to the Attorney-General of Victoria in 1923[49]. The focus of the letter was upon the limits of the judicial function and the risk to the Bench of "being drawn into the region of political controversy." While successive Chief Justices of Victoria generally adhered to that position, occasionally judges of the Supreme Court did accept appointment as Royal Commissioners in areas of inquiry calculated to give rise to political debate[50]. The practice in other States varied, but over the

---

46 *O'Donoghue v Ireland* (2008) 234 CLR 599 at 616 [18] per Gleeson CJ; [2008] HCA 14.

47 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 82 [82] per Gummow, Hayne and Crennan JJ; [2006] HCA 44 and see generally *South Australia v Totani* (2010) 242 CLR 1 at 39-41 [53]-[57] per French CJ.

48 Such Commissions, established by executive governments, whether under prerogative or by statutory authority to inquire and to report to government, are non-judicial in character: *Clough v Leahy* (1904) 2 CLR 139; [1904] HCA 38; *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 84 per Latham CJ, 100-101 per Dixon J; [1940] HCA 6; *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 180-181 per Fullagar J; [1954] HCA 31; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 147-158 per Brennan J; [1982] HCA 31; *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 642-643 [43] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; [2007] HCA 4.

49 The text of the letter, often referred to as the "Irvine Memorandum", appears in McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985) at 11.

50 Sir Charles Lowe was appointed as a Royal Commissioner pursuant to the *Royal Commission (Communist Party) Act* 1949 (Vic), requiring him to inquire into the activities of the Communist Party in Victoria. Herring CJ, Gavan Duffy J and Martin J sat briefly as the Royal Commission into Allegations of Improper Conduct in respect of a No Confidence Motion moved in the Victorian Legislative Assembly in September 1952: McInerney, Moloney and McGregor, *Judges as*

(Footnote continues on next page)

past 100 years or so there have been a significant number of cases in which serving judges have sat as Royal Commissioners[51].

24 Striking examples of the use of judges for executive functions requiring their fulltime absence from judicial duties included the wartime ambassadorial appointments of Sir John Latham and Sir Owen Dixon[52]. Sir Owen also acted during the war as Chairman of the Central Wool Committee, the Australian Shipping Control Board and the Marine War Risks Insurance Board[53]. These might be regarded as anomalous occurrences in unusual circumstances[54]. Nevertheless, there have been a number of judges, particularly in the second half of the 20th century, appointed to fulltime executive offices while continuing in

---

Royal Commissioners and Chairmen of Non-Judicial Tribunals, (1985) at 13-17. Barber J was appointed Chairman of the West Gate Bridge Royal Commission pursuant to the *West Gate Bridge Royal Commission Act* 1970 (Vic): McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985) at 18-19.

51 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 31-34 per Kirby J; [1996] HCA 18.

52 Sir John was appointed as Minister Plenipotentiary for the Commonwealth to Japan in 1940 and Sir Owen to the United States in 1942. These appointments were supported by statute: *Judiciary Act* 1940 (Cth), *Judiciary (Diplomatic Representation) Act* 1942 (Cth). See generally Connor, "The Use of Judges in Non-Judicial Roles", (1978) 52 *Australian Law Journal* 482.

53 McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985) at 33.

54 Under the designation "Australian Minister to the United States", Sir Owen Dixon addressed the American Foreign Law Association in 1942 on "The Separation of Powers in the Australian Constitution", (1942) 24 *American Foreign Law Association Proceedings* 3. Many years later he said "I do not wish it to be thought that, looking in retrospect, I altogether approve of what I myself did": (1955) 29 *Australian Law Journal* 272.

judicial office[55]. In 1977, Fox J of the Federal Court was appointed as Ambassador-at-Large to promote the cause of nuclear non-proliferation[56].

25 Statutes establishing administrative tribunals in four of the States provide for their presidencies to be held by, and their membership to include, judges of the Supreme, District or County Courts[57]. Similar provisions require the presidencies of the Administrative Appeals Tribunal, the Australian Competition Tribunal, the Copyright Tribunal and the Defence Force Discipline Appeal Tribunal to be held by judges[58]. Each of these offices is currently held by a serving Federal Court judge. It is perhaps salutary in this context to recall the observation made by Sir Owen Dixon at his swearing in as Chief Justice of this Court in 1952[59]:

> "There is in Australia a large number of jurisdictions and a confusion in the public mind as to the functions the jurisdictions possess. The character of the functions is misunderstood and the public do not maintain the distinction between the administration of justice according to law and the very important functions of industrial tribunals."

26 Relevantly to the present case, judges on federal, State and Territory courts have for many years undertaken executive functions in relation to the issue of an array of statutory warrants or authorities[60]. A significant number of the

---

55 Prominent examples included the appointments of serving judges to the office of Director-General of Security in 1949 and 1976, and as Chairman of the National Crime Authority in 1984 and 1990.

56 An appointment supported by the *Judiciary (Diplomatic Representation) Act* 1977 (Cth): McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985) at 33.

57 *Administrative Decisions Tribunal Act* 1997 (NSW), ss 4(1), 12(1) and 17(1); *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), ss 3, 10(1) and 11(2); *Queensland Civil and Administrative Tribunal Act* 2009 (Q), ss 175(1) and 176(1); *State Administrative Tribunal Act* 2004 (WA), ss 107, 108(3) and 112(3).

58 *Administrative Appeals Tribunal Act* 1975 (Cth), s 7(1); *Competition and Consumer Act* 2010 (Cth), s 31(1); *Copyright Act* 1968 (Cth), s 140(1); *Defence Force Discipline Appeals Act* 1955 (Cth), s 8(1).

59 (1952) 85 CLR xi at xvi.

60 Relevant federal statutes include: *Australian Security Intelligence Organisation Act* 1979 (Cth), s 34AB; *Criminal Code* (Cth), s 105.2; *Customs Act* 1901 (Cth),

(Footnote continues on next page)

judges of the Supreme Court of New South Wales have been appointed, with their consent, as "eligible" judges to carry out such functions under State laws[61]. In November 2010, 31 of the judges (including two acting judges) were eligible judges under the Act[62].

27 Debate about the desirability of conferring administrative functions on serving judges has more than one dimension. There are questions of principle relating to the independence and impartiality of the courts and the need for an appropriate distance from executive government, even if that distance only accords with convention and falls short of a separation of powers in the constitutional sense. Concerns have been expressed about embroiling judges in political controversies[63]. A practical consideration is the extent to which a judge discharging extraneous administrative duties (even if only on a part-time basis) is diverted from judicial work. Some functions, such as those relating to the issue of statutory warrants, may involve only a minor imposition on judicial time. Others may be considerably more burdensome. The issues to be determined on an application for a declaration under Pt 2 of the Act indicate that it falls into the latter category. The application to the eligible judge in the present case was accompanied by 35 volumes of material, some of which was said to be "criminal intelligence". A closed preliminary hearing was held before his Honour in the absence of any representative of the Club, in order that his Honour could determine whether the asserted criminal intelligence was "properly classified" as such within the meaning of s 28 of the Act. That hearing concluded on 27 September 2010 and was adjourned for further mention. It is clear that if the application proceeds it will occupy a significant amount of the judge's time.

---

ss 183UD and 219RA; *Telecommunications (Interception and Access) Act* 1979 (Cth), s 6D.

61 See eg *Law Enforcement and National Security (Assumed Identities) Act* 2010 (NSW), ss 11(1), 12 and 14(1); *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), ss 46B, 46C(2), 46D(2) and 48; *Surveillance Devices Act* 2007 (NSW), ss 5, 16(1), 30, 33 and 35; *Terrorism (Police Powers) Act* 2002 (NSW), ss 27B and 27K.

62 As appears from a list of eligible judges provided to the Court by the State of New South Wales.

63 See eg the Irvine Memorandum, in McInerney, Moloney and McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals*, (1985) at 11.

28 Professor Gordon Reid, writing in 1978 about the use of judges in executive roles, said[64]:

> "Modern developments in Australian national government give the impression that the conventional political institutions – Parliament, Executive and Judiciary – are being treated by policy-makers as inconvenient differentiations of a single activity – government."

His comment concerned trends in government at the Commonwealth level in the 1970s, but has contemporary relevance.

29 By way of contrast, the opinion has been expressed that an unduly restrictive approach to the functions which it is appropriate for judges to undertake outside the judicial role carries with it a risk of loss of institutional "relevance" for the judiciary. In the same year that Professor Reid wrote, Brennan J, who was then a judge of the Federal Court of Australia and President of the Administrative Appeals Tribunal, acknowledged that there was a risk of a loss of public confidence in the judiciary proportionate to the disparity between functions proposed for performance by a judge and the functions traditionally performed by the courts. He said, however[65]:

> "But the risks must be run, or the institution of the judiciary may lose its relevance or, at the least, fall short of discharging fully the functions which the community would commit to it."

One of the risks to be balanced against apprehended loss of "relevance" is the erosion of the "inconvenient differentiation" between the judiciary and other branches of government, and relegation of the judicial branch to the status of one among a number of agencies charged with governmental functions.

30 Debates about the appropriateness of conferring non-judicial functions on judges do not directly engage the constitutional question whether such offices and activities are compatible with the judicial functions of federal, State and Territory courts under Ch III of the Constitution. What the debates indicate is that questions of compatibility which require evaluative judgments are unlikely to be answered by the application of precisely stated verbal tests. As Gummow J said in *Fardon v Attorney-General (Qld)*[66]:

---

64 Reid, "The Changing Political Framework", (1980) 24 (January-February) *Quadrant* 5 at 14.

65 Brennan, "Limits on the Use of Judges", (1978) 9 *Federal Law Review* 1 at 14.

66 (2004) 223 CLR 575 at 618 [104]; [2004] HCA 46.

> "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes."

That conclusion is consistent with the imprecise scope of the judicial power[67], which historically was not limited to the determination of existing rights and liabilities in the resolution of controversies between subject and subject, or between subject and the Crown[68]. It is also consistent with the shifting characterisation of the so-called "chameleon" functions as administrative or judicial according to whether they are conferred upon an authority acting administratively or upon a court[69]. Assessments of constitutional compatibility between administrative and judicial functions are not to be answered by the application of a Montesquieuan fundamentalism. As Cardozo CJ said in this context[70]:

> "The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed".

31 Consideration by this Court of the constitutional validity of laws conferring non-judicial functions on designated serving judges has been confined

---

67 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; [1991] HCA 58; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267 per Deane, Dawson, Gaudron and McHugh JJ; [1995] HCA 10.

68 *R v Davison* (1954) 90 CLR 353 at 368-369 per Dixon CJ and McTiernan J, Fullagar J agreeing at 375, 382 per Kitto J, 387-388 per Taylor J; [1954] HCA 46; *Gould v Brown* (1998) 193 CLR 346 at 385-386 [28]-[29] per Brennan CJ and Toohey J; [1998] HCA 6; *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at 505-508 [37]-[46] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; [2006] HCA 17.

69 *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12] per Gleeson CJ, Gaudron, McHugh and Gummow JJ; [2002] HCA 3; *Thomas v Mowbray* (2007) 233 CLR 307 at 326-327 [10]-[12] per Gleeson CJ; [2007] HCA 33.

70 *In re Richardson* 160 NE 655 at 657 (1928) quoted in *Hilton v Wells* (1985) 157 CLR 57 at 82 per Mason and Deane JJ; [1985] HCA 16 and in *Grollo v Palmer* (1995) 184 CLR 348 at 364 per Brennan CJ, Deane, Dawson and Toohey JJ; [1995] HCA 26.

to cases involving federal judges[71]. Apart from dicta, it has not extended to a consideration of State laws conferring administrative functions on the judges of State courts. Before embarking upon that consideration, it is necessary to refer to the principles enunciated by this Court in relation to the use of federal judges for such purposes.

Non-judicial appointments of federal judges

32 The decisions of this Court in relation to the extent of Commonwealth legislative power to confer non-judicial functions on federal judges require compatibility between those non-judicial functions and the functions of the courts of which the judges are members. That requirement was engendered by the decision of this Court in *R v Kirby; Ex parte Boilermakers' Society of Australia*[72]. The majority in that case held that the judicial power of the Commonwealth could not be conferred on a "body established for purposes foreign to the judicial power, notwithstanding that it is organized as a court and in a manner which might otherwise satisfy ss 71 and 72"[73]. Their Honours also held that "Ch III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it."[74] A mechanism adopted to avoid the stringency of that constraint was the appointment of judges in a non-judicial capacity as "personae designatae" to carry out non-judicial functions not ancillary or incidental to the exercise of the judicial power of the court of which they were members. The incompatibility condition was attached to that mechanism.

33 The idea that a non-judicial function could be conferred on a judge persona designata emerged early in the judgments of this Court[75]. Dixon J

---

71 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

72 (1956) 94 CLR 254; [1956] HCA 10.

73 (1956) 94 CLR 254 at 296 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

74 (1956) 94 CLR 254 at 296 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, a proposition foreshadowed in obiter remarks of Latham CJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 566-567, Rich J agreeing at 573; [1938] HCA 10, and reproduced in the majority judgment in the *Boilermakers' Case* at 293-294.

75 *Holmes v Angwin* (1906) 4 CLR 297; [1906] HCA 64; *C A MacDonald Ltd v South Australian Railways Commissioner* (1911) 12 CLR 221 at 230 per Griffith CJ, 236 per O'Connor J; [1911] HCA 14.

considered the distinctions which that idea imported to be "distinctions without differences."[76] Nevertheless he did not reject the idea. The device that followed from it became entrenched[77].

34 The term "persona designata" means "[a] person pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character."[78] Its use in England in connection with judicial power developed significantly in the second half of the 19th century. That development was attributed by D M Gordon to "the building of railways, and the consequent creation of new statutory tribunals to deal with compensation claims."[79] It was used to characterise the capacity in which taxing masters of the Court of Exchequer exercised specific statutory functions in relation to costs assessed by non-judicial bodies[80]. It was also used in cases concerned with the construction of wills[81]. The concept did not put down roots in many common law jurisdictions. It flourished for a time in Canada. However, the terminology, along with the distinction it conveyed, was academically denounced[82] and twice judicially interred[83] many years ago.

35 The concept found new life in Australia at about the time it was first dispatched in Canada. That new life corresponded with the growth in the 1970s in the use of judges of the Federal Court of Australia in administrative roles. It was invoked in 1979 to answer a challenge to the appointment of a judge of the Federal Court as a member of the Administrative Appeals Tribunal. The

---

76 *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 97 per Dixon J.

77 (1937) 58 CLR 62 at 72 per Latham CJ, Starke J agreeing at 81, 80-81 per Rich J, 104-105 per Evatt J; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144; [1953] HCA 11.

78 *Jowitt's Dictionary of English Law*, 3rd ed (2010) at 1700.

79 Gordon, "Persona Designata", (1927) 5 *Canadian Bar Review* 174 at 178.

80 *Re Sheffield Waterworks Act 1864* (1865) LR 1 Ex 54.

81 eg *Dimond v Bostock* (1875) LR 10 Ch App 358; *In re Stansfield* (1880) 15 Ch D 84.

82 Gordon, "Persona Designata", (1927) 5 *Canadian Bar Review* 174 at 184-185.

83 *Herman v Deputy Attorney General (Canada)* [1979] 1 SCR 729; *Minister of Indian Affairs and Northern Development v Ranville* [1982] 2 SCR 518.

challenge was rejected in *Drake v Minister for Immigration and Ethnic Affairs*[84]. The Full Court of the Federal Court held that the judge was appointed persona designata. Bowen CJ and Deane J, with whom Smithers J agreed, found nothing in the Constitution to preclude a judge of a federal court "from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature."[85] No suggestion was made in that case of a limiting principle based upon a requirement that any such appointment of a federal judge be compatible with the judge's judicial office.

36 The challenge rejected in *Drake* was revisited in 1985 in relation to the *Telecommunications (Interception) Act* 1979 (Cth) in *Hilton v Wells*[86] with the same result. That Act, as it then stood, conferred on all Federal Court judges the power to issue warrants authorising interception of telephonic communications. It was common ground that the function was administrative. The majority held that the power was conferred "on the judges individually as designated persons" and was therefore validly conferred[87]. The minority, Mason and Deane JJ, based their dissent on the interpretation of the statute. They required "a clear expression of legislative intention" that the functions conferred were to be exercised by the judges in their personal capacities, detached from the court of which they were members[88]. They found that "clear expression" to be wanting. An important point made by their Honours related to the appearance of the connection between a judge on whom a non-judicial function is conferred and the court of which that judge is a member. They said[89]:

---

84 (1979) 24 ALR 577.

85 (1979) 24 ALR 577 at 584 per Bowen CJ and Deane J, Smithers J agreeing at 592.

86 (1985) 157 CLR 57.

87 (1985) 157 CLR 57 at 69-73 per Gibbs CJ, Wilson and Dawson JJ.

88 (1985) 157 CLR 57 at 81-82.

89 (1985) 157 CLR 57 at 83-84. Leave to argue that *Hilton v Wells* was wrongly decided was refused by six members of the Court in *Jones v The Commonwealth* (1987) 61 ALJR 348; 71 ALR 497 on the basis, inter alia, that the relevant legislation had been amended to provide that the judges authorised to issue warrants were designated judges who had consented to that designation. The authority of *Hilton v Wells* was therefore confined to the provisions with which it had been concerned.

> "Another reason for adhering to a strict application of settled principle is that when a function is entrusted to a judge by reference to his judicial office the legislators and the community are entitled to expect that he will perform the function in that capacity. To the intelligent observer, unversed in what Dixon J accurately described – and emphatically rejected – as 'distinctions without differences', it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade." (reference omitted)

The point made by Mason and Deane JJ translates to this case. An eligible judge under the Act is appointed to discharge a substantial non-judicial function. An application for a declaration in relation to an organisation will ordinarily require that there be placed before him or her an extensive array of "information" and "submissions", none of which need be admissible in a court of law. The hearing of the application will yield a decision which is closely linked to the exercise of jurisdiction conferred on the Supreme Court by the Act. It is very likely to involve the use of the facilities and services of that Court.

37 No argument was advanced in *Hilton v Wells* that the use of the "persona designata" mechanism was subject to a limitation based upon a requirement that non-judicial functions be compatible with the judge's office. Nevertheless, the majority considered the possibility of incompatibility. They said[90]:

> "If the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial functions, the principle underlying the *Boilermakers' Case* would doubtless render the legislation invalid."

38 The applicability of the persona designata mechanism to federal judges was accepted in *Grollo v Palmer*[91]. The Justices in the plurality used the term[92]:

> "as a shorthand expression of a limitation on the principle of *Boilermakers*, acknowledging that there is no necessary inconsistency with the separation of powers mandated by Ch III of the Constitution if

---

90 (1985) 157 CLR 57 at 73-74 per Gibbs CJ, Wilson and Dawson JJ.

91 (1995) 184 CLR 348.

92 (1995) 184 CLR 348 at 363 per Brennan CJ, Deane, Dawson and Toohey JJ.

non-judicial power is vested in individual judges detached from the court they constitute."

Their Honours, however, identified two necessary conditions, derived from the judgments in *Hilton v Wells*, on the use of the mechanism[93]:

- "no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent"; and

- "no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power".

The latter condition was designated the "incompatibility condition". Incompatibility was said to arise if[94]:

- the commitment to the performance of non-judicial functions were "so permanent and complete" that further performance by the judge of his or her judicial functions would not be practicable;

- the non-judicial function were such that the capacity of the judge to perform his or her judicial functions with integrity would be compromised or impaired; or

- the non-judicial function were of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the judge to perform his or her judicial functions with integrity would be diminished.

In the event, their Honours rejected the submission that the conferring of power upon designated judges of the Federal Court to issue warrants under the *Telecommunications (Interception) Act* infringed the incompatibility condition.

39 McHugh J, who dissented in the result, described the incompatibility condition as a "necessity"[95]. He said[96]:

---

93 (1995) 184 CLR 348 at 364-365.

94 (1995) 184 CLR 348 at 365.

95 (1995) 184 CLR 348 at 376.

96 (1995) 184 CLR 348 at 377.

> "In determining whether incompatibility exists, the appearance of independence and impartiality is as important as its existence … The greater the association between the judicial status of the persona designata and the executive functions that he or she performs, the greater is the likelihood that the judicial and non-judicial functions of that person will seem to be fused. In that situation, it is likely that members of the public will fail to distinguish between the judicial functions of the judge and the executive functions of that person as persona designata and will conclude that the judge is neither independent of the executive government nor impartial when dealing with actions between the citizen and the government and its agencies."

That reasoning was unaffected by the differences between his Honour and the majority judges. Although applied to federal judges and federal courts, it is apposite in the determination of the question whether a non-judicial function conferred on a State judge impairs the institutional integrity of the court of which that judge is a member by impairing the reality or appearance of its independence and impartiality.

40 In *Hilton v Wells* and *Grollo*, the judicial office of the persons empowered to issue interception warrants was a necessary qualification of their authority, albeit that authority was conferred upon them as personae designatae. The incompatibility condition applies also to a non-judicial function conferred upon someone who is a federal judge even though that person's judicial office is not a qualification for the exercise of the function. That was the case in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[97].

41 In *Wilson*, a judge of the Federal Court was nominated by the Minister under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) to prepare a report in relation to an area for which a group of Aboriginal people was seeking statutory protection by way of ministerial declaration. In their joint judgment, Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ pointed to features of the role of the nominated judge which led them to conclude that her appointment was incompatible with her work as a federal judge. They included:

- the report prepared by the judge was no more than a condition precedent to the exercise of ministerial power and was an integral part of the process of its exercise[98];

---

97 (1996) 189 CLR 1.

98 (1996) 189 CLR 1 at 18.

- the reporter lacked the usual judicial protections and was in a position equivalent to a ministerial advisor[99];

- there was nothing to prevent the Minister giving directions to the reporter and the reporter deciding to comply with those directions[100]; and

- the report involved the preparation of an advisory opinion on questions of law, a function alien to the exercise of the judicial power of the Commonwealth[101].

The particular procedures adopted by the judge to reflect her independence from the executive were held to be irrelevant to the question of the validity of her appointment[102]:

> "The Constitution is concerned not with the conduct of a judge who exercises his or her discretion to maintain independence from the Legislature or the Executive Government but with the limits on legislative and executive power that might be exercised to confer a function bridging the separation of the Judiciary from the Legislature and the Executive Government."

That is to say, the way in which a judge chooses to exercise a non-judicial function does not determine whether that function complies with the standard set by the constitutional incompatibility condition.

42 The Court in *Grollo* and *Wilson* was concerned with the application of the incompatibility condition to the appointment of a federal judge to carry out a non-judicial function. That condition is derived from the separation of powers doctrine.

43 The incompatibility condition has been said to indicate standards which may be sufficient to ensure that a State law conferring a non-judicial function on State judges is consistent with the requirements of Ch III[103]. As will be

---

99 (1996) 189 CLR 1 at 19.

100 (1996) 189 CLR 1 at 19.

101 (1996) 189 CLR 1 at 19-20.

102 (1996) 189 CLR 1 at 20.

103 Consistently with the reasoning of the plurality in relation to functions conferred upon State courts in *Baker v The Queen* (2004) 223 CLR 513 at 534 [51] per

(Footnote continues on next page)

discussed, requirements of compatibility may also be seen as present in the *Kable*[104] doctrine, although the source of that doctrine is not the separation of powers. Of the *Kable* doctrine, the plurality in *Baker v The Queen* said[105]:

> "The doctrine in *Kable* is expressed to be protective of the institutional integrity of the State courts as recipients and potential recipients of federal jurisdiction. If the State law in question confers jurisdiction of a nature which would meet the more stringent requirements for the exercise by the Supreme Court of judicial power under investment by federal law, there is no occasion to enter upon the question of whether the less stringent requirements of *Kable* are met." (footnote omitted)

State courts and the national integrated court system

44 Decisions of this Court, commencing with *Kable*, establish the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system[106]. The term "institutional integrity", applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality[107]. Other

---

McHugh, Gummow, Hayne and Heydon JJ; [2004] HCA 45. See also *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; [1998] HCA 54; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 9.

104 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24.

105 (2004) 223 CLR 513 at 534 [51].

106 (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J, 116-119 per McHugh J, 127-128 per Gummow J; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14]; *Baker v The Queen* (2004) 223 CLR 513 at 519 [5] per Gleeson CJ; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ.

107 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 77 [66] per Gummow, Hayne and Crennan JJ.

defining characteristics are the application of procedural fairness[108] and adherence, as a general rule, to the open court principle[109]. As explained later, it is also a defining characteristic of a court that it generally gives reasons for its decisions. In the case of the Supreme Courts of the States, that characteristic has a constitutional dimension by reason of the appellate jurisdiction conferred on this Court by s 73 of the Constitution.

45 The principle was described by Kirby J in *Baker v The Queen* as[110]:

> "one of general operation, derived from the *Constitution*; from the integrated character of the Judicature, federal and State; from the peculiar arrangement for the vesting of federal jurisdiction in State courts; and from the role of this Court at the apex of the entire system." (footnote omitted)

It is not within the power of a State legislature to enact a law conferring upon courts which have or can have federal jurisdiction conferred upon them functions incompatible with the role of such courts under Ch III of the Constitution as repositories of federal jurisdiction[111]. A function conferred upon a court which substantially impairs the institutional integrity of the court has that effect. In *Kable*[112], Gaudron J reasoned that:

- there is nothing anywhere in the Constitution to suggest that it permits different grades or qualities of justice depending on whether judicial power is exercised by State courts or federal courts created by the Parliament; and

- State courts, when exercising federal jurisdiction, "are part of the Australian judicial system created by Ch III of the Constitution and, in

---

108 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470 per Mason CJ, Dawson and McHugh JJ; [1992] HCA 29; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354-355 [55] per French CJ, 379-380 [141] per Heydon J; [2009] HCA 49.

109 *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; [1976] HCA 23.

110 (2004) 223 CLR 513 at 543 [82].

111 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102 per Gaudron J.

112 (1996) 189 CLR 51 at 103.

> that sense and on that account, they have a role and existence which transcends their status as courts of the States"[113].

Gummow J applied Gaudron J's rationale in *Fardon v Attorney-General (Qld)*[114]. The *Kable* principle does not have its source in the doctrine of the separation of powers. Hayne J made the same point in *South Australia v Totani*[115]:

> "*Kable* dealt with one respect in which the Constitutions of the States are affected by the federal *Constitution*: the legislative powers of the States are not unlimited. The relevant limitation is not one which follows from any separation of judicial and legislative functions under the Constitutions of the States. Rather, it is a consequence that follows from Ch III establishing, in Australia, 'an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth'." (footnotes omitted)

46 A State legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State[116] or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State[117]. Application of the *Kable* principle has the result that the State legislatures cannot validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a court[118]; which would authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with that court's

---

113 The quoted words were taken from *Leeth v The Commonwealth* (1992) 174 CLR 455 at 498-499.

114 (2004) 223 CLR 575 at 617 [101].

115 (2010) 242 CLR 1 at 81 [201].

116 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 per Gaudron J, 111 per McHugh J, 139 per Gummow J; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 543-544 [151]-[153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

117 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

118 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

institutional integrity[119]; or which would confer upon any court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction[120].

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

48 The existence of a limitation on the extent of the power of State legislatures to confer executive functions on State judges was foreshadowed by McHugh J in his judgment in *Kable*[121]:

> "although nothing in Ch III prevents a State from conferring executive government functions on a State court judge as persona designata, if the appointment of a judge as persona designata gave the appearance that the court as an institution was not independent of the executive government of the State, it would be invalid. No doubt there are few appointments of a judge as persona designata in the State sphere that could give rise to the conclusion that the court of which the judge was a member was not independent of the executive government."

The incompatibility to which those obiter remarks were directed may arise where there is a substantial impairment of the essential curial characteristics of independence and the appearance of independence from the executive government.

49 It is not necessary, in order to support the validity of a law conferring administrative functions (not incidental to judicial functions) on State judges, that

---

119 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J. See also at 92-93 [236] per Hayne J.

120 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

121 (1996) 189 CLR 51 at 117-118.

they be conferred persona designata. There is much to be said against the invocation of that device in the State sphere if it be unnecessary. Sir Anthony Mason, reflecting the sentiments expressed by Dixon J in *Meyer*[122], wrote in 1996 that[123]:

> "The concept of *persona designata* has a distinctly artificial flavour about it. The concept, which would have appealed to mediaeval schoolmen, has been criticised on the ground that it contemplates the judge acting in his character at large, detached from the court of which he is a member. The concept has little to commend it. Rationality would be advanced if the concept were jettisoned and replaced by the incompatibility test." (footnote omitted)

50 A legislatively prescribed detachment of a State judge from his or her court when performing a non-judicial function may weigh in the balance against a finding of impairment of the institutional integrity of the court. Such a detachment may make it less likely that the exercise of the non-judicial function undermines the reality or the appearance of the court as an institution independent of the executive government of the State. But so long as that function is conferred upon the judge by virtue of his or her office as a judge, the distinction is difficult to grasp and the fact that the function is conferred persona designata should not be given great weight. It would generally not be determinative of the question of compatibility[124].

---

122 (1937) 58 CLR 62 at 97.

123 Mason, "A New Perspective on Separation of Powers", (1996) 82 *Canberra Bulletin of Public Administration* 1 at 5. For arguments tending to favour a more formalist and less functionalist approach see Walker, "Persona Designata, Incompatibility and the Separation of Powers", (1997) 8 *Public Law Review* 153. See also Campbell, "An Examination of the Doctrine of Persona Designata in Australian Law", (2000) 7 *Australian Journal of Administrative Law* 109; Wheeler, "The rise and rise of judicial power under Chapter III of the Constitution: A decade in overview", (2001) 20 *Australian Bar Review* 283; Meyerson, "Extra-Judicial Service on the Part of Judges: Constitutional Impediments in Australia and South Africa", (2003) 3 *Oxford University Commonwealth Law Journal* 181.

124 See eg *Love v Attorney-General (NSW)* (1990) 169 CLR 307; [1990] HCA 4, which concerned a power to issue warrants conferred on a State court which was neither ancillary to the exercise of its judicial power, nor conferred upon its judges as personae designatae. The Court in that case held that the power conferred upon the Supreme Court of New South Wales to issue warrants to the Australian Federal Police under the *Listening Devices Act* 1984 (NSW) was not inconsistent, under

(Footnote continues on next page)

51 It was submitted for the State of Victoria that State legislatures are not limited in the functions which they can confer on judicial officers as personae designatae. A function conferred on a judge, other than in that person's capacity as a State judge, would not, it was submitted, affect the State court of which that judge is a member. That submission should be rejected. The fact that a judge discharges a statutory function as a persona designata does not logically exclude the possibility, which may arise in a variety of ways, that the exercise of that function substantially impairs the institutional integrity of the court by impairing, for example, the reality or appearance of its independence from the executive government. Victoria's alternative submission was that the principle derived from *Kable* only prevents a State legislature from conferring a function on a State judge as a persona designata if the function is incompatible with the exercise by the judge's court of the judicial power of the Commonwealth. That submission can only be accepted if it is understood to mean that the enactment of any State law which is incompatible with the role of the State court as a repository or potential repository of federal jurisdiction is precluded. Laws precluded by that principle, as explained earlier, extend to laws which substantially impair the institutional integrity of the State court.

52 It is a logical extension of the remarks of McHugh J in *Kable*, quoted above, that a function conferred upon a judge of a State court is incompatible with the role of the court under Ch III if the conferral and exercise of the function substantially impairs the institutional integrity of the court. It is, however, important that the requirement of compatibility within the *Kable* doctrine, which is functionalist rather than formalist in character, be approached with restraint. The principle does not apply so as to infringe the freedom that State legislatures enjoy with respect to the organisation and arrangements of their courts[125]. It is not a surrogate for the application of a separation of powers doctrine to the States. Allowance must be made in assessing incompatibility for the long history in the States of the appointments of judges to extra-judicial roles, a history which predates Federation. It is necessary to bear in mind the caution issued by the late Professor Enid Campbell[126]:

---

s 109 of the Constitution, with a statutory prohibition under the *Customs Act* 1901 (Cth).

125 *South Australia v Totani* (2010) 242 CLR 1 at 46 [67]-[68] per French CJ.

126 "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 421.

> "While the incompatibility doctrine is meant to be protective of judicial institutions, it has the potential of being applied by courts in ways that some might regard as over-protective of those institutions and insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform."

53 Before considering the effects of the functions conferred on the eligible judge under the Act, it is necessary to have regard to the express exclusion by s 13(2) of any obligation on the judge to give reasons for a declaration decision. A declaration decision, as appears from s 9 of the Act, requires factual findings of a wide-ranging and complex nature, as well as the important evaluative judgment that the organisation "represents a risk to public safety and order". There is also a discretion to be exercised in the light of such findings. The jurisdiction of the Supreme Court that can be invoked after a declaration has been made can lead to the imposition of significant restrictions on the freedoms of individuals, including individuals who have not engaged in any criminal activity, and are not likely to do so. The statutory exclusion of a duty on the part of the eligible judge to provide reasons for his or her decisions under Pt 2 contrasts sharply with the general duty of judges of the Supreme Court to give reasons for their judicial decisions. It also means that the basis of the eligible judge's satisfaction as to a necessary condition for the exercise by the Supreme Court of its jurisdiction to make a control order or interim control order may be unexplained to that Court or to anybody else.

Reasons for decision and the essential characteristics of a court

54 The centrality, to the judicial function, of a public explanation of reasons for final decisions and important interlocutory rulings has long been recognised. In a passage from the first edition of *Broom's Constitutional Law*, published in 1866, the author said[127]:

> "A public statement of the reasons for a judgment is due to the suitors and to the community at large – is essential to the establishment of fixed intelligible rules and for the development of law as a science … A judgment once delivered becomes the property of the profession and of the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it."

---

127 As quoted in *De Iacovo v Lacanale* [1957] VR 553 at 557-558 per Monahan J.

That passage was said in the Supreme Court of Victoria to have "general application to all persons exercising judicial functions."[128] Its universality was qualified in *Public Service Board of New South Wales v Osmond*[129] by Gibbs CJ, who said that there was no "inflexible rule of universal application" that reasons be given for judicial decisions. His Honour, however, accepted that the requirement to give reasons is "an incident of the judicial process"[130].

55 The duty upon judges to give reasons for their decisions has often been linked to the availability of rights of appeal against those decisions[131]. A wider rationale, foreshadowed in the passage quoted from Broom, can be derived from the nature of the judicial function. In *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd*[132], Mahoney JA, after referring to the importance of reasons for decision to the effective exercise of appeal rights, said[133]:

> "But, in my opinion, the requirement that reasons be given should not be limited to cases where there is an appeal. There is as yet no finally authoritative decision on this question. I think that the requirement should be seen as an incident of the judicial process."

The proposition that the provision of reasons for decision is an aspect of the judicial function has been supported by other decisions of the Supreme Courts of New South Wales, Victoria and Queensland[134].

---

128 [1957] VR 553 at 558 per Monahan J.

129 (1986) 159 CLR 656; [1986] HCA 7.

130 (1986) 159 CLR 656 at 666-667, quoting Mahoney JA in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386.

131 *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382 per Asprey JA, 388 per Moffitt JA, Manning JA agreeing at 384; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257-258 per Kirby P, 268-273 per Mahoney JA, 277-281 per McHugh JA; *Fox v Percy* (2003) 214 CLR 118 at 126 [23]-[24] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22.

132 [1983] 3 NSWLR 378.

133 [1983] 3 NSWLR 378 at 386.

134 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 269 per Mahoney JA, 278-279 per McHugh JA; *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 19 per Gray J; *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 170 per Mahoney JA, 186 per Handley JA; *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R

(Footnote continues on next page)

56 Gummow J in *Grollo* described the essential attributes of the judicial power of the Commonwealth in familiar terms by reference to the resolution of justiciable controversies by ascertainment of the facts, application of the law and the exercise where appropriate of judicial discretion, adding "which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning."[135] Heydon J in *AK v Western Australia*[136] described the duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings as "well-established". His Honour adopted as a summary of the objectives underlying that duty an extra-curial statement by Gleeson CJ[137]:

> "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."

The duty does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision.

57 The connection between the duty to give reasons and the nature of the judicial power enunciated in *Grollo*, and the objectives which that duty serves, explained in *AK*, marks the duty as an incident of the judicial function whether or not the court making the relevant decision is subject to appeal. In the case of the Supreme Court of a State, the duty has a constitutional character. That

---

462 at 483 per McPherson and Davies JJA; *Crystal Dawn Pty Ltd v Redruth Pty Ltd* [1998] QCA 373.

135 (1995) 184 CLR 348 at 394.

136 (2008) 232 CLR 438; [2008] HCA 8.

137 (2008) 232 CLR 438 at 470 [89], citing Gleeson, "Judicial Accountability", (1995) 2 *The Judicial Review* 117 at 122.

constitutional character derives from the jurisdiction of this Court under s 73 of the Constitution to hear appeals from all judgments, decrees, orders and sentences of the Supreme Courts of the States.

58 The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.

59 Section 13(2) of the Act exempts an eligible judge from any duty to give reasons for making or refusing to make a declaration, save for the purposes of a review by the Ombudsman under s 39 of the Act[138]. That exemption marks a significant difference, among a number of significant differences, between the functions conferred upon the judge and those conferred on the court of which he or she is a member. The existence of that difference and the statutory context in which it arises are relevant to the question whether the function conferred upon the eligible judge impairs the institutional integrity of the Supreme Court of New South Wales.

The functions of the eligible judge under the Act

60 The plaintiff's submissions require a consideration of the nature of the functions conferred on an eligible judge under Pt 2 of the Act. A general overview of those functions has been provided earlier in these reasons. Attention should now be directed to particular aspects, including provisions of Pt 2, relevant to the independence of such judges.

61 The parties differed on whether the appointment of a judge of the Supreme Court as an "eligible judge" was an appointment of the judge as a persona designata. The plaintiff contended that persons appointed as eligible judges are simply judges of the Supreme Court who have agreed to perform additional executive functions under a statute. The submissions by the State of Victoria were directed largely to that question. They were linked to its proposition, discussed and rejected above, that State parliaments are not limited in their power to confer functions on judicial officers as personae designatae because a function conferred on a person in that way "does not affect the State court of which the

---

138 We agree for the reasons given in the judgment of Gummow, Hayne, Crennan and Bell JJ that s 13(2) cannot be construed pursuant to s 31 of the *Interpretation Act* 1987 (NSW) to abrogate that exemption.

person is a member." Once that submission is rejected, the significance of the classification of an eligible judge's appointment as a persona designata is diminished. Whether or not an eligible judge acts persona designata under Pt 2 or as a member of the Supreme Court, requirements of compatibility direct attention to the functions conferred upon the judge, the extent to which they are connected to or integrated with the exercise of the Court's jurisdiction, and the degree of decisional independence enjoyed by the judge in the exercise of those functions.

62 It is necessary now to turn to the substantive, as distinct from taxonomical, aspects of the functions conferred upon the eligible judge. A starting point is the judge's decisional independence from the executive government.

63 The declaration of a judge as an eligible judge attracts statutory protections. An eligible judge cannot be removed from that office by the Attorney-General. The office ends when the judge ceases to be a judge of the Supreme Court of New South Wales. Otherwise it can only be ended by the judge's revocation of his or her consent to be an eligible judge, or by a notification from the Chief Justice of New South Wales to the Attorney-General that the judge should not continue to be an eligible judge[139]. A particular judge cannot be selected by the Attorney-General or by any Minister to carry out a particular function under Pt 2. Nor can any eligible judge be controlled and directed by the Attorney-General or any other Minister in the discharge of a function under Pt 2[140]. The eligible judge has, in relation to the exercise of his or her functions, the same protection and immunity as a judge of the Supreme Court has in relation to proceedings in the Court[141]. The position of the judge in these respects differs significantly from the position of the Federal Court judge in *Wilson*.

64 There are obvious analogies between the statutory mechanisms supportive of the decisional independence of an eligible judge under the Act and those protective of the independence of a judge of the Supreme Court. Those mechanisms are compatible with the role of an eligible judge as a judge of the Supreme Court[142]. Their absence would be indicators of incompatibility – if, for

---

139 Act, s 5(6).

140 Act, s 5(7).

141 Act, s 5(4).

142 See the reference in *Wilson* to the independence of federal judges appointed as Royal Commissioners or as part-time Presidential Members of the Administrative Appeals Tribunal: *Wilson v Minister for Aboriginal and Torres Strait Islander*

(Footnote continues on next page)

example, they left the Attorney-General free to revoke the appointment of an eligible judge at will, or to direct that a particular eligible judge hear a particular application. Their presence, however, is not determinative. These proceedings will be determined upon a consideration of the nature of the functions conferred on eligible judges and the relationship of those functions to the exercise of the jurisdiction and powers of the Supreme Court.

65 The principal function of an eligible judge is to hear and determine applications for declarations under Pt 2 of the Act. Such hearings have the following important features:

- the requirement of public notice to members of the organisation, together with the provision for submissions to be made by members and by other persons who may be directly affected by an application for a declaration, mark the hearing as an adversarial proceeding involving the determination of issues of law and fact, likely to be contested;

- the nature of the proceedings on an application for a declaration indicates, as evidenced by the application presently pending before the eligible judge, that such applications are likely to involve lengthy hearings which, subject to certain exceptions, will be conducted in public;

- the rules of evidence do not apply[143];

- the judge may "have regard to" a number of matters including information suggestive of a link between the organisation the subject of the application and serious criminal activity[144], the criminal convictions of current or former members of the organisation[145] and any information "suggesting" that current or former members of the organisation have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions)[146];

Affairs (1996) 189 CLR 1 at 17-18 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

143 Act, s 13(1).

144 Act, s 9(2)(a).

145 Act, s 9(2)(b).

146 Act, s 9(2)(c).

- the judge may "have regard to" submissions made by the Attorney-General or others in accordance with the Act, and any other matter the judge considers relevant[147];

- information constituting criminal intelligence and protected submissions may have to be received in private and in the absence of parties to the proceedings[148];

- the judge is not required to provide any grounds or reasons for his or her decision[149];

- a declaration may be made whether or not any members of the organisation specified in the application or any other persons are present or make submissions[150];

- a declaration can only be revoked upon application to the eligible judge who made it or to any other eligible judge if the judge who made the declaration has died, has ceased to be an eligible judge, or is absent[151]; and

- there is no appeal against the judge's decision[152] although it is amenable to judicial review for jurisdictional error.

66 Underlying the "persona designata" characterisation discussed earlier in these reasons is the idea of detachment of a judge from the court of which the judge is a member. That detachment enables non-judicial functions conferred on

---

147 Act, s 9(2)(e) and (f).

148 Act, ss 8, 28 and 29.

149 Act, s 13(2) – although there is nothing to prevent the judge from providing reasons. As noted earlier, the eligible judge is subject to an obligation to provide reasons, upon request, to a person conducting a review under s 39 of the Act.

150 Act, s 9(3).

151 Act, s 12. A declaration may be revoked on the Commissioner's written request, or on application by a member of the organisation. The eligible judge may only accede to a member's application if satisfied that there has been such a substantial change in the nature or membership of the organisation that the members no longer associate for listed purposes related to criminal activity, and that the organisation no longer represents a risk to the State.

152 Act, ss 24 and 35.

a federal judge to be exercised by that judge without infringing the separation of powers doctrine. The separation of powers doctrine does not prevent non-judicial functions from being conferred on a State judge. In this case, however, the non-judicial function conferred by the Act on the eligible judge is closely connected to the exercise of the jurisdiction conferred by the Act on the Supreme Court. A declaration under Pt 2 is a condition precedent to the exercise of the Court's jurisdiction to make control orders and interim control orders under Pt 3. If attention is directed to matters of substance rather than form, the appearance of the eligible judge would differ little from that of a judge of the Court exercising precisely the same function under Pt 2 in his or her capacity as a judge.

67 Under the scheme of the Act, a judge of the Supreme Court of New South Wales, appearing to all the world as a judge of the Court sitting as such, hears and determines a substantial, contested application on "information" and "submissions" the nature and provenance of which is not limited by any statutory definition. If a declaration is made under Pt 2 by the eligible judge, it must reflect his or her satisfaction that:

(a) members of the organisation the subject of the application associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and

(b) the organisation represents a risk to public safety and order in the State of New South Wales.

Such findings are of major adverse significance to any organisation and its members. The members of the organisation are thereafter exposed to the possibility that applications will be made to the Supreme Court of New South Wales to seek the imposition of significant restrictions upon their liberties, and specifically their freedom of association and their entitlement to engage in a variety of lawful occupations. No reasons are required to explain what "information" or "submissions" the judge relied upon or rejected, how he or she used or relied upon them to arrive at the requisite findings of fact or, in particular, how the judge arrived at a conclusion on the question whether the organisation the subject of the application represented a risk to public safety and order in the State.

68 The question whether, absent the exclusion by s 13(2) of any obligation to provide grounds or reasons for the eligible judge's decision, the common law would supply such obligation, or whether it might otherwise be implied from the Act, does not have to be answered for present purposes. To the extent that the statute effectively immunises the eligible judge from any obligation to provide such reasons, it marks the function which that judge carries out as lacking an essential incident of the judicial function. At the same time, however, the Act creates a connection between the non-judicial function conferred upon an eligible

judge by Pt 2 of the Act and the exercise of jurisdiction by the Supreme Court under Pt 3 of the Act. This has the consequence that a judge of the Court performs a function integral to the exercise of jurisdiction by the Court, by making the declaration, but lacks the duty to provide reasons for that decision. The appearance of a judge making a declaration is thereby created whilst the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the Court, to the detriment of the Court.

69 The declaration which may result from an application is a necessary foundation for an application in the Supreme Court for a control order under Pt 3 of the Act. Subject to the limited scope for judicial review on the grounds of jurisdictional error, significantly narrowed by the absence of reasons for decision (if they are not provided), the declaration itself would be effectively unexaminable in the proceedings in the Supreme Court. A critical element of the Court's power to make an interim control order or a control order would necessarily be unexplained and unable to be explained by the Court. The fact that the eligible judge might choose to provide reasons for his or her decision to make a declaration does not answer the constitutional question raised by the Act. To apply what five Justices of this Court said in *Wilson* to the circumstances of this case, the Court is not concerned with the conduct of the judge, but with the limits on legislative power[153].

70 The provisions of Pt 2 whose validity is directly affected by these conclusions are s 9, relating to the making of declarations, and s 13, relating to the conduct of hearings of applications for declarations. The vice of s 13(2) in relation to the provision of reasons is not to be assessed in isolation from the other provisions of Pt 2 to which attention has been directed. No question of severance arises. Nevertheless, the problem to which s 13 gives rise may, as suggested in the reasons of Gummow, Hayne, Crennan and Bell JJ, be overcome by the imposition of an obligation on an eligible judge to provide reasons for the decision to make or refuse to make a declaration, or to revoke a declaration.

71 As stated in the judgment of Gummow, Hayne, Crennan and Bell JJ[154], the operation of Pt 3 assumes the valid operation of Pt 2. The other parts of the Act necessarily fall with the substantive provisions in Pts 2 and 3.

---

153 (1996) 189 CLR 1 at 20 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

154 Reasons of Gummow, Hayne, Crennan and Bell JJ at [115].

72 For the reasons set out in the judgment of Gummow, Hayne, Crennan and Bell JJ[155], we agree that other arguments advanced by the plaintiff attacking the validity of the Act on the basis of the provisions of Pt 3 and the nature of the jurisdiction they confer on the Supreme Court should not be accepted. We agree also that the challenge to the validity of control orders, on the basis that they exceed the constraint upon State legislative power derived from the implied freedom of political communication and freedom of association, should not succeed.

Conclusion

73 We agree with the orders proposed in the judgment of Gummow, Hayne, Crennan and Bell JJ.

---

155 Reasons of Gummow, Hayne, Crennan and Bell JJ at [110]-[111].

74 GUMMOW, HAYNE, CRENNAN AND BELL JJ. The plaintiff was born in 1957. He is a member of an unincorporated association known as the "Hells Angels Motorcycle Club in New South Wales" ("the Club"), which he joined as a full member on 3 November 1989. He has been a member since that date and is a former President of the Sydney Chapter of the Club. The plaintiff regularly associates with other members and supporters of the Club.

75 By action commenced in the original jurisdiction of this Court, the plaintiff seeks a declaration that the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the Act") is invalid. The long title to the Act is: "An Act to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members; to make related amendments to various Acts; and for other purposes." The Act has been amended on several occasions, most recently with effect 7 December 2010[156].

76 There is before the Full Court a special case pursuant to r 27.08 of the High Court Rules 2004 filed on 5 October 2010. The special case poses the question whether the Act or any part of it is invalid on the grounds that it undermines the institutional integrity of the Supreme Court of New South Wales or otherwise is beyond the legislative power of that State. The submissions of the State in support of validity were accompanied by those made upon interventions by the Commonwealth, Victoria, South Australia, Queensland, Western Australia and the Northern Territory.

Appointment of a judicial officer *persona designata*

77 In significant respects the Act relies for its operation upon the exercise by a Judge of the Supreme Court of powers conferred *persona designata* and without the conferral of jurisdiction in that regard upon the Supreme Court itself. In *Hussain v Minister for Foreign Affairs*[157] the Full Court of the Federal Court referred to criticism of such use of judicial *personae designatae* as a device and a fiction, whilst acknowledging its acceptance, with limitations, in numerous authorities. The question here, as in earlier authorities, turns upon those limitations but in the context of a State court, not a court created by the Parliament. The limitations which do appear from the authorities considered later in these reasons suggest that there remain unsettled matters of constitutional

---

156 *Courts and Crimes Legislation Further Amendment Act* 2010 (NSW).

157 (2008) 169 FCR 241 at 279.

doctrine concerning the consequences of appointments of judicial officers to offices (albeit not offices of profit) under the Crown and provided for by statute.

78 In *Hilton v Wells*[158], Mason and Deane JJ, when considering the position of judges of federal courts, said:

> "There are compelling reasons why the Court should strictly maintain and apply established principle by insisting upon a clear expression of legislative intention before holding that functions entrusted to a judge of a federal court are exercisable by him personally. The ability of Parliament to confer non-judicial power on a judge of a Ch III court, as distinct from the court to which he belongs, has the potential, if it is not kept within precise limits, to undermine the doctrine in the *Boilermakers' Case*[159]. One may ask: what is the point of our insisting, in conformity with the dictates of the *Boilermakers' Case*, that non-judicial functions shall not be given to a Ch III court, if it is legitimate for Parliament to adopt the expedient of entrusting these functions to judges personally in lieu of pursuing the proscribed alternative of giving the functions to the court to which the judges belong?"

79 In *Medical Board of Victoria v Meyer*[160], Evatt J observed:

> "Often the State Parliaments select a judge as a special tribunal *only because they repose confidence in the individual holding the office* and not at all because they are intending to resort to the court as the executants of judicial power so as to lay the ground for permitting further appeal and the delay and possible mischief thereby occasioned." (emphasis added)

The emphasised passage invites attention to the causes for that reposing of confidence in judges and the limits upon the uses to which it may be utilised by provisions such as those now challenged in this Court.

---

158 (1985) 157 CLR 57 at 81-82; [1985] HCA 16.

159 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10; *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529; [1957] AC 288.

160 (1937) 58 CLR 62 at 106; [1937] HCA 47.

The "eligible Judge"

80 Part 2 (ss 5-13) of the Act is headed "Declared organisations" and makes provision respecting certain Judges of the Supreme Court. Section 6 of the Act provides that the Commissioner of Police ("the Commissioner") may apply to an "eligible Judge" of the Supreme Court for a declaration that a particular organisation is a "declared organisation" for the purposes of the Act. Section 5(2) provides that by instrument in writing a Judge of the Supreme Court may consent to be the subject of a declaration by the Attorney-General under sub-s (3) that the Judge is an "eligible Judge" for the purposes of Pt 2. That consent may be revoked by the Judge (s 5(5)). Section 5(7) states:

> "To avoid doubt, the selection of the eligible Judge to exercise any particular function conferred on eligible Judges is not to be made by the Attorney General or other Minister of the Crown, and the exercise of that particular function is not subject to the control and direction of the Attorney General or other Minister of the Crown."

The eligible Judge, in the exercise of functions conferred by Pt 2, has the same protection and immunity as that Judge has in relation to Supreme Court proceedings (s 5(4)).

81 Part 3 (ss 14-27) of the Act is headed "Control of members of declared organisations". It provides for the making of "interim control orders" in Div 1 (ss 14-18) and "control orders" in Div 2 (ss 19-25). In both cases jurisdiction to make the orders is conferred upon the Supreme Court. This distinguishes Pt 3 from Pt 2 of the Act.

82 Interim control orders and control orders are made under Pt 3, upon application by the Commissioner, with respect to persons that the Supreme Court is satisfied are members of a particular declared organisation, or former members with ongoing involvement in the organisation and its activities. Interim control orders take effect when notice thereof is personally served (s 15) and the notice must state the date, fixed by the Court under s 14(5), for the hearing of an application for a control order (s 16(2)(e)). Section 26 is directed to "a controlled member" (being a person to whom either a current interim control order or control order applies (s 3(1))); it creates offences with respect to association with another controlled member.

The Part 2 application

83 On 6 July 2010 the New South Wales Crown Solicitor, on behalf of the Acting Commissioner, filed, apparently in the registry of the Supreme Court, a

document instituting an application under Pt 2. It was entitled "Application to an eligible Judge for a declaration under [the Act]". The application lists 47 members of the Club (including the plaintiff), their criminal records and their asserted involvement in serious criminal activity within the meaning of s 3(1) of the Act. The application was supported by an affidavit of a senior police officer and by 35 volumes of material. These set out information as to the nature of the Club and its distinguishing characteristics, and information evidencing alleged serious and other criminal activity that some members are alleged to have planned, facilitated, supported or engaged in, together with similar information relating to members of interstate or overseas chapters or branches of the "Hells Angels".

84 Section 31 of the Act obliges the Commissioner to notify the Attorney-General of any application made under Pt 2 (or Pt 3) and the Attorney-General "is entitled to be present and to make submissions at the hearing of the application".

85 The present application under Pt 2 was listed before an eligible Judge and two hearings were conducted in an open court room in the Supreme Court premises in Sydney before that eligible Judge. Further hearings took place in closed session on 5 August 2010 and again on 27 September 2010, whereupon the matter was adjourned for further mention at a date after the hearing of this special case.

86 The rules of evidence do not apply to the hearing of an application for a declaration under Pt 2 (s 13(1)). A member of the organisation specified in a Pt 2 application may be present at the hearing of the application and make submissions in relation to the application (s 8(1)); so also (but only with leave of the eligible Judge) may any other person who may be directly affected (whether or not adversely) by the outcome of the application (s 8(2)). However, in either situation the Commissioner may object to the presence of the person in question during any part of the hearing in which information classified by the Commissioner as "criminal intelligence" is disclosed (s 8(3)), and the eligible Judge is to take steps to maintain the confidentiality of information the eligible Judge considers to be properly classified by the Commissioner as "criminal intelligence" (s 28(3)).

87 A declaration may be made whether or not any persons referred to in s 8 are present or make submissions (s 9(3)). A declaration remains in force for three years unless sooner revoked or renewed (s 11(2)). Section 12 empowers an eligible Judge, on request by the Commissioner or on application by a member of the organisation the subject of the declaration, to revoke the declaration.

88 Section 9(1) provides that the eligible Judge may make a declaration if satisfied that:

> "(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and
>
> (b) the organisation represents a risk to public safety and order in this State".

In considering whether to make a declaration under s 9(1), the eligible Judge may have regard to any of the matters in pars (a)-(f) of s 9(2). These are:

> "(a) any information suggesting that a link exists between the organisation and serious criminal activity,
>
> (b) any criminal convictions recorded in relation to current or former members of the organisation,
>
> (c) any information suggesting that current or former members of the organisation have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions),
>
> (d) any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity,
>
> (e) any submissions made in relation to the application by the Attorney General or as referred to in section 8,
>
> (f) any other matter the eligible Judge considers relevant."

The structure of Part 2

89 Section 35 of the Act purports to exclude the jurisdiction of the Supreme Court in respect of judicial review of declarations made by an eligible Judge under Pt 2. The effectiveness of that exclusion is denied by the decision in *Kirk v Industrial Court (NSW)*[161].

---

161 (2010) 239 CLR 531; [2010] HCA 1.

90 Several further points respecting the structure of Pt 2 should be made here. The first is that the subsistence of a declaration under Pt 2 of an organisation is the factum upon which are engaged the provisions in Pt 3 for the making by the Supreme Court of interim control orders and control orders against particular persons.

91 Secondly, as the Solicitor-General of the Commonwealth submitted, similar functions to those of the eligible Judge under Pt 2 could be susceptible of exercise under federal law by a Ch III court[162].

92 Thirdly, were that the case, the Ch III court would quell the controversy by the giving of reasons, this being a hallmark distinguishing substantive judicial decisions from arbitrary decisions; the same would be so had Pt 2 conferred jurisdiction upon the Supreme Court, as has been done with Pt 3[163]. In preparing its reasons, the Supreme Court, as indicated in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[164], could take steps to maintain the confidentiality of what had been properly classified as "criminal intelligence". Further, even if Pt 2 had entrusted the hearing and determination of applications thereunder to an administrator who was not a judge, there would be much to be said for the view that, in the absence of a contrary provision in Pt 2, this was one of those instances identified by Deane J in *Public Service Board of NSW v Osmond*[165] where there was to be discerned a statutory intent that the decision-maker was obliged to give reasons.

93 Fourthly, the provision made by par (b) of s 5(6) should be noted. This revokes the declaration of a Judge as an eligible Judge upon notification by the Chief Justice of the Supreme Court to the Attorney-General "that the Judge should not continue to be an eligible Judge". This may meet the point made in the joint reasons in *Grollo v Palmer*[166] that incompatibility might arise from "so

---

162 *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12]; [2002] HCA 3.

163 See *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279-280; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 83-84 [25]-[26]; [2001] HCA 49.

164 (2008) 234 CLR 532 at 560-561 [40]-[44], 596-597 [183]-[191]; [2008] HCA 4.

165 (1986) 159 CLR 656 at 676; [1986] HCA 7.

166 (1995) 184 CLR 348 at 365; [1995] HCA 26.

permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable".

94 Finally, in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[167], Gaudron J made three relevant statements of principle, with which we agree. Her Honour resolved the issues posed earlier in these reasons by reference to the statement of Evatt J in *Meyer*, by saying[168] that the confidence reposed in judicial officers

> "depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are[169]. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process."

Gaudron J then said[170]:

> "In general terms, a function which is carried out in public, save to the extent that general considerations of justice otherwise require, [and which is] manifestly free of outside influence and *which results in a report or other outcome which can be assessed according to its own terms*, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government." (emphasis added)

Her Honour added that

> "there may be functions (for example, the issuing of warrants such as those considered in *Hilton v Wells*[171] and in *Grollo*) which do not satisfy these criteria but which, historically, have been vested in judges in their

---

167 (1996) 189 CLR 1; [1996] HCA 18.

168 (1996) 189 CLR 1 at 22.

169 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; [1970] HCA 8.

170 (1996) 189 CLR 1 at 25-26.

171 (1985) 157 CLR 57.

> capacity as individuals and which, on that account, can be performed without risk to public confidence. However, history cannot justify the conferral of new functions on judges in their capacity as individuals if their performance would diminish public confidence in the particular judges concerned or in the judiciary generally."

These statements of principle are determinative of the issue of the validity of s 13(2), the provision of the Act which is of critical importance.

Section 13(2)

95 The plaintiff submits that the language in which s 13(2) is expressed is intractable and its invalidity brings down Pt 2 and therefore Pt 3 of the Act.

96 Section 13(2) states:

> "If an eligible Judge makes a declaration or decision under this Part [ie Pt 2], the eligible Judge is not required to provide any grounds or reasons for the declaration or decision (other than to a person conducting a review under section 39 if that person so requests)."

Section 39 provides for the Ombudsman to scrutinise the exercise of powers conferred on police officers under the Act and to furnish reports to the Attorney-General and the Commissioner.

97 Counsel for the Northern Territory correctly urged upon the Court in its consideration of the validity of s 13(2) what was said in the joint reasons of six members of the Court in *Residual Assco Group Ltd v Spalvins*[172]:

> "Moreover, legislation 'must not be read in a spirit of mutilating narrowness'[173]. If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open. Courts in a federation should approach issues of statutory construction on the basis that it is a fundamental rule of construction that the legislatures of the federation intend to enact legislation that is valid and not legislation

---

172 (2000) 202 CLR 629 at 644 [28]; [2000] HCA 33. See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11].

173 *United States v Hutcheson* 312 US 219 at 235 (1941) per Frankfurter J.

that is invalid[174]. Here there are two competing constructions – one spells invalidity, one does not. That being so, we should adopt the construction that saves the section and reject the construction upon which the defendants rely."

98 Section 13(2) is addressed to a "declaration" and a "decision" of an eligible Judge under Pt 2. The term "declaration" is used in s 9, the terms of which have been given above. The Act also provides for other decision-making activities by an eligible Judge. Some will be made in the course of a hearing, such as decisions under s 8(2) to grant leave to be present and make submissions, decisions upon objections by the Commissioner under s 8(3), and decisions under s 28 to receive evidence and hear argument in private respecting "criminal intelligence". It may be accepted that, if given by a court, not all of such decisions would require the giving of reasons[175]. However, other decisions – declarations under s 9 and decisions upon applications to revoke a declaration under s 12 – are substantive rather than procedural in nature.

99 Section 13(2) is readily construed as conferring a power upon an eligible Judge to provide grounds or reasons in respect generally of decisions and declarations under Pt 2. However, the sub-section goes further by denying any *requirement* to provide any grounds or reasons. There is one exception. This is to provide grounds or reasons for a declaration or decision if requested to do so by a person acting pursuant to s 39.

100 The New South Wales Solicitor-General, in the course of oral argument, was prepared to accept that, in the case of a contested application for a declaration, s 13(2) effectively gave rise to a duty to provide some reasons. That concession would, however, appear not to extend to applications where there was no effective contest, but the eligible Judge nevertheless was required to reach the stage of satisfaction stated in s 9(1) upon the information accompanying the application by the Commissioner under s 6(2).

---

174 *Davies and Jones v The State of Western Australia* (1904) 2 CLR 29 at 43; [1904] HCA 46; *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 180; [1926] HCA 58; *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 267; [1945] HCA 30; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14; [1992] HCA 64.

175 See *Evans v The Queen* (2007) 235 CLR 521 at 595-596 [246]; [2007] HCA 59.

101 In any event, the terms in which s 13(2) is expressed ("is not required ... other than") are too intractable to accommodate as reasonably open a reading which couples the power to provide grounds or reasons, with a duty to do so in an instance other than that arising under s 39.

102 The question then is whether s 13(2) may be read down, pursuant to s 31 of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act"), in effect by extending the obligation to provide grounds or reasons beyond response to a request pursuant to s 39. To do so would be beyond the operation of s 31 of the Interpretation Act; it would expand the provision in s 13(2) of the Act rather than limit it to one or more of various operations otherwise encompassed by general words[176], and would involve rewriting the sub-section. Further, in the joint reasons in the *Industrial Relations Act Case*[177] reference was made to authorities indicating that an invalid provision is not to be read down unless the remaining parts of the law remain unchanged, and the provision is not to be read down if it appears that the law is intended to operate fully according to its terms or not at all. The evident legislative intention is that s 13(2) play a central part in the scheme of Pt 2, and that there be only the specified, limited requirement for the eligible Judge to provide reasons.

103 The significance to be attached to the Act's denial of a duty to give reasons for deciding whether to make or revoke a declaration is not reduced by attempting some prediction of whether, despite the language of s 13(2), judges would nonetheless be likely to give reasons. Because there is no duty to do so, the possibility that a declaration would be made or revoked and no reasons given for the decision is not to be dismissed from consideration as some remote or fanciful possibility.

Conclusions respecting s 13(2)

104 The result is that the Act imposes no duty upon the eligible Judge to provide reasons or grounds when deciding applications to make or revoke a

---

176 *Smith v The Queen* (1994) 181 CLR 338 at 346-347; [1994] HCA 60; *Coleman v Power* (2004) 220 CLR 1 at 55-56 [108]-[110]; [2004] HCA 39; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 93-94 [248]-[251]; [2009] HCA 23.

177 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56.

declaration under Pt 2, and for that reason Pt 2 is invalid. We turn to explain why this is so.

105 The Commonwealth Solicitor-General correctly submitted that the reasoning in the decisions in *Wilson*[178] and *Kable v Director of Public Prosecutions (NSW)*[179], delivered respectively on 6 and 9 September 1996, share a common foundation in constitutional principle. That constitutional principle has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State. The principle applies throughout the Australian integrated court system because it has been appreciated since federation that the Constitution does not permit of different grades or qualities of justice[180]. It follows that repugnancy to or incompatibility with that institutional integrity may be manifested by State (and Territory)[181], as well as federal, legislation which provides for the conferral of functions upon a judicial officer *persona designata*. The submissions by Victoria to the contrary should be rejected.

106 In *Hilton v Wells*[182], Mason and Deane JJ observed that:

> "when a function is entrusted to a judge by reference to his judicial office the legislators and the community are entitled to expect that he will perform the function in that capacity. To the intelligent observer, unversed in what Dixon J accurately described – and emphatically rejected – as 'distinctions without differences' (*Meyer*[183]), it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the

---

178 (1996) 189 CLR 1.

179 (1996) 189 CLR 51; [1996] HCA 24.

180 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617-618 [101]-[102]; [2004] HCA 46; *South Australia v Totani* (2010) 242 CLR 1 at 37-39 [48]-[51]; [2010] HCA 39.

181 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[29]; [2004] HCA 31.

182 (1985) 157 CLR 57 at 83-84.

183 (1937) 58 CLR 62 at 97.

assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade."

107 With those words in mind, the immediate question is whether s 13(2) displays in its practical operation within the scheme of the Act repugnancy to or incompatibility with the institutional integrity of the Supreme Court. Such questions, as Gleeson CJ emphasised in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[184], do not arise in the abstract; they present concrete, practical issues, resolution of which may be assisted by regard to what other course was available to the legislature.

108 Another course readily available in the present case would be to cast s 13(2) in a form which, at least with respect to declarations under s 9 and revocations under s 12, required as well as permitted the provision of grounds or reasons. As indicated earlier in these reasons with reference to what was said in *Gypsy Jokers*, in the preparation of reasons for decisions under s 9 and s 12 of the Act, steps could be taken to maintain the confidentiality of material properly classified as "criminal intelligence" within the meaning of s 3(1) of the Act.

109 The vice in s 13(2) as it presently stands is that s 9 and s 12 confer new functions on Supreme Court Judges in their capacity as individuals with the result that an outcome of what may have been a contested application cannot be assessed according to the terms in which it is expressed. This is unlike the outcome under Pt 3 of the Act. The opaque nature of these outcomes under Pt 2 also makes more difficult any collateral attack on the decision, and any application for judicial review for jurisdictional error. The effect of Pt 2 is to utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under s 9 and s 12.

Other submissions by the plaintiff

110 The plaintiff submitted a range of further arguments as to why the Act was invalid, in particular by reference to the provisions of Pt 3 and the exercise of jurisdiction thereunder by the Supreme Court. These submissions should not be accepted, noting in particular the following.

---

184 (2004) 218 CLR 146 at 158 [14].

111 First, the conferral of jurisdiction on the Supreme Court under Pt 3 by ss 14(1) and 14(3) is to be understood as bringing with it the usual incidents of the exercise of jurisdiction by the Supreme Court[185] and these are not excluded by a "distinct regime" of the nature considered in *International Finance Trust Co Ltd v New South Wales Crime Commission*[186]. Secondly, an eligible Judge who has made a declaration under Pt 2 may be recused from the subsequent exercise of the jurisdiction of the Supreme Court under Pt 3. Thirdly, while the Act does not attempt to prescribe what might be "sufficient grounds" for the making of a control order (s 19(1)(b)), these must be ascertained by regard to the subject, scope and purpose of the Act including the consequences of the making of an interim control order or control order; there are numerous authorities establishing that the conferral of curial powers by reference to such criteria nevertheless may be susceptible to the exercise of judicial power[187]. Fourthly, the regime created by Div 2 of Pt 3 for the making of control orders significantly differs from the provision in s 14(1) of the South Australian legislation held invalid in *South Australia v Totani*[188]: there is no obligation imposed upon the Supreme Court to make an order upon the basis of the anterior declaration made by an eligible Judge.

112 The plaintiff also attacked the validity of the Act for exceeding the constraint upon State legislative power said to be derived from implications in the Constitution respecting political communication and freedom of association. Any freedom of association implied by the Constitution would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply[189].

---

185 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 555 [19].

186 (2009) 240 CLR 319 at 350 [44], 360-361 [79]-[80], 387-388 [162]-[165]; [2009] HCA 49.

187 *Baker v The Queen* (2004) 223 CLR 513 at 532 [42]; [2004] HCA 45; *Thomas v Mowbray* (2007) 233 CLR 307 at 331-334 [20]-[28], 344-348 [71]-[82], 350-351 [88]-[92], 507-508 [596]; [2007] HCA 33.

188 (2010) 242 CLR 1.

189 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148]; [2004] HCA 41.

113 Further, the Act is not directed at political communication or association. With respect to control orders, special provision for exemption is made by the Act. If in the opinion of the Supreme Court the circumstances of the case require, a person may be exempted from the prohibition upon association imposed by s 26 to the extent and subject to the conditions specified in the control order pursuant to s 19(7). The provision in s 19(7) permits the restriction of control orders so as not unreasonably to burden freedom of political communication; the power of the Supreme Court to make a control order should be construed conformably with the implied freedom so as to render reviewable for error any particular order which exceeded the limit of the implied freedom. No provision for exemption is made for interim control orders; but, as the Commonwealth submitted, even if the result was in some circumstances to burden the implied freedom, the question would then be whether the Act nevertheless in this respect served a legitimate end of protection against the activities of criminal organisations and their members.

114 These conclusions make it unnecessary to enter here upon consideration of the submission by the Commonwealth and Western Australia that the implied freedom applies as a restraint upon legislative power only with respect to communication in relation to politics or government "at the Commonwealth level".

Order

115 As indicated earlier in these reasons, the operation of Pt 3 assumes the valid operation of Pt 2. Part 1 (ss 1-4) is headed "Preliminary" and Pt 4 (ss 28-40) "Miscellaneous". These parts must fall if the substantive provisions in Pts 2 and 3 are invalid. The effect of invalidity of s 13(2) cannot be avoided by severance, as explained earlier in these reasons.

116 The result is that the first question presented in the special case should be answered: "The *Crimes (Criminal Organisations Control) Act* 2009 (NSW) is invalid". The second question should be answered: "The defendant is to pay the costs of the plaintiff of the special case".

117 HEYDON J. The questions in the special case should be answered adversely to the plaintiff and the proceedings should be dismissed with costs.

The structure of the issues

118 Two principal questions arise about the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the Act"). The first is whether it is constitutionally invalid on any ground advanced by the plaintiff. The second is whether the fact that s 13(2) absolves an eligible Judge from any obligation to give any reasons for making a Pt 2 declaration, whether taken alone or in combination with other factors, brings about invalidity.

119 The plaintiff's written submissions mentioned s 13(2) occasionally, but usually only as part of a compendious reference to the powers and functions of eligible Judges provided for in Pt 2 (ss 5-13). The plaintiff contended that any or all of ss 9, 14, 19 and 26 were invalid, and that the rest of the Act was invalid because the remaining provisions had no work to do. The plaintiff did not, however, advance any argument that s 13(2) considered by itself was invalid, or that any invalidity in s 13(2) caused the entire Act to be invalid.

120 In oral argument, after s 13 had been drawn to his attention, counsel for the plaintiff said that the absence of a duty to give reasons, "which is the antithesis of what judges do", was "the smallest reason … to regard this work of an eligible [Judge as] not something that a Supreme Court justice ought to be engaged in." But he also said: "[w]e certainly do not challenge [the] validity" of s 13. He did not contend that s 13 brought down Pt 2 and therefore Pt 3 of the Act.

121 Apart from counsel for the Attorneys-General for the Commonwealth, New South Wales and Queensland, the primary efforts of the many counsel who opposed the plaintiff were not directed to explicit refutation of the plaintiff's submissions. Instead they took the understandable course of attacking objections to validity other than those formulated by the plaintiff – objections, perhaps, which they anticipated might be raised by the Court. Very little attention was paid to difficulties associated with s 13(2). Observations indicating concern about s 13(2) were made by members of the Court during argument. But those supporting validity, apart from the Attorney-General for the State of Western Australia, cannot be said to have revealed a consciousness that s 13(2) might be the crucial part of the battlefield, to which all intellectual forces should be rushed.

122 There is thus incomplete contact between the grounds on which the plaintiff is to succeed, the arguments which he advanced and the arguments which his opponents advanced.

The plaintiff's submissions: the *Kable* doctrine

123 *The plaintiff's submissions: general.* The plaintiff submitted that the Act was invalid because its key provisions undermined the institutional integrity and independence of the Supreme Court of New South Wales.

124 He stressed various features of the Act which operated onerously against persons in the position of the plaintiff. He stressed, in particular, features which were said to make it even more onerous from that point of view than the legislation struck down in *South Australia v Totani*[190]. Thus, he said, the Act had no equivalent to the objects provision in s 4(2) of the *Totani* legislation[191]:

> "[I]t is not the intention of the Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action."

He pointed out that the Act omitted a provision in the *Totani* legislation permitting persons who were the subject of control orders to associate, if they were members of a registered political party, at an official meeting of the party or a branch of the party (Serious and Organised Crime (Control) Regulations 2008 (SA), reg 6(3)(b)). And he complained that while the *Totani* legislation was to expire after five years, the Act has no expiry date. These complaints are unconvincing. The first two are matters of legislative choice, insubstantial and innocuous in themselves. The third could not invalidate legislation which was otherwise valid.

125 Some of the plaintiff's submissions centred on ss 6-13, dealing with what eligible Judges could do. Thus it was said that ss 6-13 required the eligible Judge "to undertake the work of the executive in a court room and in secret session with regard to 'criminal intelligence' and 'protected submissions' of third parties not available to the organisation concerned and in the presence of the Commissioner of Police and the Attorney General of New South Wales."

126 A second group of submissions centred on ss 14-23, dealing with the role of a member of the Supreme Court (not sitting as an eligible Judge) in determining applications for interim control orders and control orders. Those provisions, it was said, enabled the Supreme Court to sit "in secret session with regard to 'criminal intelligence' not available to the person to be the subject of the interim control order or the control order." This was said to restrict "civil

---

190 (2010) 242 CLR 1; [2010] HCA 39.

191 *Serious and Organised Crime (Control) Act* 2008 (SA).

liberties and freedom of movement of Australians in a fashion not appropriate to a constitutional Court that is part of the Federal judicial system of courts."

127 These somewhat generalised submissions were backed up by more detailed arguments. The two groups of criticisms are best considered successively.

128 *The plaintiff's submissions: eligible Judges.* The plaintiff's first criticism was that while there was a right for a member of the organisation to appear on any hearing of the Commissioner's application, it was only a limited right to "be present and make submissions in relation to the application" (s 8(1)): no right to be legally represented or to adduce evidence was expressly granted. But s 8 does give a right to a hearing, subject to the need to protect criminal intelligence. There is nothing to exclude, and no reason to suppose that eligible Judges will hamper, either legal representation or the capacity to adduce evidence.

129 Then it was said that the definition of "member" in s 3(1), which was similar to that appearing in the legislation struck down in *South Australia v Totani*, was "impossibly wide", so that a Pt 2 declaration might affect a large number of people. But why the width was impermissible was not developed.

130 The plaintiff then advanced submissions centring on the provisions which attempt to protect criminal intelligence. Section 8(3) gives the Commissioner power to object to the presence of members of an organisation, or any person who had been given leave to be present and make submissions, and, subject to s 28, the eligible Judge is obliged to uphold the objection. The eligible Judge is forbidden to release various types of confidential material. The plaintiff complained of the confidentiality surrounding protected submissions. However, given the subject with which the Act deals, the provisions relating to criminal intelligence do not affect validity, and similar provisions have already been held valid by this Court[192].

131 The plaintiff then complained about various provisions relating to evidence. The plaintiff pointed out that the rules of evidence do not apply to a hearing before an eligible Judge (s 13(1)). The plaintiff said that the eligible Judge, in deciding whether or not to make a declaration pursuant to s 9, was required to have regard to "information suggesting" certain things, as opposed to having regard to evidence that established conclusions. The plaintiff contrasted the standard of proof under the Act generally – the balance of probabilities (s 32) – with s 9, and suggested that this resulted in a lower standard of proof in relation to the making of declarations.

---

192 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 539-543 [135]-[149]; [2009] HCA 4.

132 The answer to these submissions is as follows. While it is difficult to exaggerate the value and utility of the rules of evidence in preserving the rule of law so far as it is enforced in litigation, many statutes modify or limit the application of the rules of evidence without being at risk under the *Kable* doctrine. And it is common for the rules of evidence not to apply where a member of the judiciary is performing an administrative function as a designated person. For example, judges of the Federal Court of Australia can be members of the Administrative Appeals Tribunal[193], and it is not bound by the rules of evidence. Further, s 13(1) does not forbid application of the rules of evidence. Eligible Judges are likely to apply them, since they are familiar tools of their daily trade. Section 9(2) operates in a fashion similar to much circumstantial evidence, for while individual items of circumstantial evidence may only "suggest" certain conclusions, taken together they can establish matters of fact on either the balance of probabilities or beyond reasonable doubt.

133 Finally, the plaintiff complained that s 9(2) required the eligible Judge to take into account several matters that were said to be plainly irrelevant to the core determination in s 9(1). These matters were: criminal convictions relating to former members of the organisation (s 9(2)(b)); information suggesting that former members had been involved in serious criminal activity (s 9(2)(c)); and information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity (s 9(2)(d)). It is not, however, true that s 9(2) requires the eligible Judge to have regard to irrelevant matters. Section 9(2) does no more than entitle the eligible Judge to take them into account. It does not require that they be taken into account. Sometimes they may be irrelevant, sometimes relevant.

134 *The plaintiff's submissions: interim control orders and control orders.* The plaintiff submitted, first, that there was a risk that the eligible Judge could also be the member of the Supreme Court allocated to hear the application for an interim control order. The answer to this submission is that the Supreme Court can adopt a practice minimising the risk[194]. If, despite that practice, the risk materialises, it would be open to a person against whom an application for an interim control order is made to seek the disqualification of the member of the Supreme Court to whom the application was made, and the circumstances would support the conclusion that there was an appearance of bias.

---

193 *Hilton v Wells* (1985) 157 CLR 57 at 68-69; [1985] HCA 16.

194 *Grollo v Palmer* (1995) 184 CLR 348 at 366; [1995] HCA 26.

135 The plaintiff next submitted that the Act permitted the making of an interim control order in the absence of, and without prior notice to, the member of the organisation (s 14(4)), did not provide for prior service of an application for an interim control order, and did not provide for any right on the part of the person against whom the application was made to advance submissions or adduce evidence at the hearing of the application. However, the making of an interim control order ex parte is permissible – not compulsory. An interim control order, even if made ex parte, does not take effect until service (s 15), must be served within 28 days (s 16(1)), and can be revoked (s 19(2)). It is the general duty of the Supreme Court to ensure that all persons against whom relief is sought may call evidence and make submissions after receiving proper notice of the evidence and submissions of other parties. Nothing in the Act excludes that duty.

136 Then the plaintiff complained that, while the member against whom an application for an interim control order is made is to be given a statement of grounds and a supporting affidavit, these documents are not to contain criminal intelligence, and this is a factor tending to render the legislation invalid. This submission is inconsistent with prior authority[195].

137 The plaintiff contended that an interim control order or control order might last forever. There is no statutory basis for this. The plaintiff relied on s 23, but that provides only that a control order remains in force until it is revoked, and s 25 provides for revocation on proof of a substantial change in the relevant circumstances. The hearing of an application for a control order confirming the interim control order can be expedited on the application of the person against whom the interim control order has been made (s 18). On that hearing, the Supreme Court may either make the control order or revoke the interim control order (s 19(2)). In addition, if a declaration made under Pt 2 is revoked (s 12) or ceases to have effect because three years have passed since it took effect (s 11(2)), any interim control order or control order founded on that declaration will necessarily also cease to have effect (s 12(6)). That is so, inter alia, because the orders only prohibit or render criminal the conduct of a "controlled member of a declared organisation" (s 26(1) and (1A), s 26A(1) and s 27(1) and (4)) and a "declared organisation" is an organisation in respect of which a declaration is in force (s 3(1)). Once the declaration ceases to be in force, ss 26-27 cannot operate.

---

195 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 539-543 [135]-[149]; *South Australia v Totani* (2010) 242 CLR 1 at 36 [44], 60-61 [121]-[125] and 153 [416]. See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 551-552 [7], 558-561 [30]-[44] and 597-598 [192]; [2008] HCA 4.

138 The plaintiff then submitted that the material before the Supreme Court was likely to consist only of the material supplied by the Commissioner, particularly material that was before the eligible Judge; that the Pt 2 declaration meant that "most of the work [had] already been done by the eligible Judge"; that accordingly the Supreme Court could give no meaningful consideration to the requirement in s 19(1)(b) that "sufficient grounds exist" for the making of a control order; and that an application for an interim control order was "almost certain to have a predestined result" because of the "steering" of the Supreme Court to a certain outcome.

139 Those submissions are radically flawed. There is no reason why an application inter partes for an interim control order cannot be adjourned if the person against whom it is sought seeks an adjournment to prepare evidence or submissions. It follows that whether the evidence before the Supreme Court is entirely or largely that tendered by the Commissioner depends on the steps which the person against whom the application is made wishes to take. The Supreme Court is not precluded from giving meaningful consideration to whether sufficient grounds exist for making the control order. The result is not predestined. The expression "sufficient grounds" in s 19(1)(b) is undefined, but its meaning may be inferred from the structure and functions of the Act and from the serious consequences which can flow from control orders. The Solicitor-General of the Commonwealth correctly submitted that the factors relevant to what were "sufficient grounds" included any involvement by the defendant in any past criminal conduct; the likelihood of the defendant engaging in criminal conduct in the future; any past or present association between the defendant and any person who has engaged in criminal conduct; the effect that the making of an interim control order or control order would have on the defendant, including the effect on the social and economic wellbeing of the defendant; and the degree to which that effect is outweighed by the benefit to public safety in making the order. The Supreme Court's independence from the Executive is not impaired.

140 The plaintiff submitted that the goal of the Act was to ensure fulfilment of the Executive's desire that interim control orders be made, and that this gave rise to an appearance of the Supreme Court acting as an instrument of the political arm of government. This is fallacious. The Executive commonly desires to prevent or punish crime: the conduct by the courts of criminal trials does not cause them to act as instruments of the political arm of government.

141 The plaintiff submitted that the provisions for making control orders led to constitutional invalidity because the orders could be made where an interim control order had not been physically served on the relevant member of a declared organisation, where there was no provision for the original application seeking a declaration against the organisation to be put before the Supreme Court, where the hearing seeking a control order could be conducted in the absence of the person against whom the application for it was made, where that

person bore the onus of proof of establishing "a good reason" as to why he or she should be allowed to associate with a particular controlled member, and where the material put before the Supreme Court might include criminal intelligence that had never been seen by the person against whom the application for a control order was made.

142 It is true that a control order may be made even though an interim control order has not been physically served, but only in the sense that orders for substituted service may be made under s 16A. But the goal of those orders is to bring what is served to the attention of affected persons, and those orders can only be made after "all reasonable steps possible" to effect personal service have been taken: s 16A(2). Substituted service is a common feature of procedure in conventional litigation. So is the conduct of the hearing in the absence of the person in relation to whom substituted service has been effected. And it is possible – undesirable and exceptional though this may be – for ordinary litigation to be conducted without one party being able to see some of the material relied on. Further, the reversal of burdens of proof is also both possible and common in conventional litigation. None of these features is fatal to constitutional validity. Nor is the absence of a provision requiring the application for a Pt 2 declaration to be placed before the Supreme Court when an application for a control order is made.

The meaning of s 13(2)

143 It is necessary now to turn to s 13(2).

144 The Solicitor-General for the State of New South Wales submitted, and thus purported to concede, that at least in contested applications, s 13(2) "effectively gives rise to a duty" to give reasons for a declaration made under Pt 2.

145 It is not possible to construe s 13(2) as creating a duty to give reasons. Nor is it possible to find that there is any duty to give reasons independently of s 13(2). First, there is a key linguistic contrast. On the one hand, there are the words of s 13(2): "the eligible Judge *is not required* to provide any grounds or reasons for the declaration or decision" (emphasis added). On the other hand, there are the words of s 39(2), which operates as an express exception to s 13(2): for the purpose of keeping under scrutiny the exercise of powers conferred on police officers under the Act, "the Ombudsman *may require* [an eligible Judge] to provide information about the exercise of those powers" (emphasis added). Secondly, even if independently of s 13(2) the circumstances of a particular hearing could be described as "special" or "exceptional" within the doctrine described by Deane J in *Public Service Board of New South Wales v Osmond*[196],

---

196 (1986) 159 CLR 656 at 676; [1986] HCA 7.

and even if that doctrine is correct, the implied statutory duty to which the doctrine refers is excluded by s 13(2).

146 Those conclusions involve rejecting the purported concession of the Solicitor-General for the State of New South Wales that s 13(2) created a duty to give reasons in relation to a contested application for a declaration. A legislature cannot recite itself into validity. And an executive cannot, so to speak, "concede into validity" the legislation it has introduced into the legislature. Legislation means what its words say. It does not mean what legal representatives "concede" it means as they seek to steer their vessels so as to avoid a constitutional shipwreck, or as they search for life-belts which will help them save something from that shipwreck. No doubt a construction of legislation which is favourable to validity can be preferred to a construction which would produce invalidity, but only if the former construction is open on the language and not inconsistent with it.

Section 13(2) and invalidity: the likely behaviour of eligible Judges

147 *Relevant factors.* Statute apart, administrators have no duty to give reasons for their decisions[197]. And there are many judicial orders that may not have to be supported by reasons. Some are very important and highly contested – rulings on the admissibility of evidence, rulings on interlocutory procedural applications, decisions to grant or refuse interlocutory injunctions, decisions to stay or not to stay final orders. But where reasons are requested on very important and highly contested matters, and even where they are not, they will in the ordinary course be provided unless the court thinks that the course of argument has made the reasons for the order sufficiently clear, unless considerations of urgency preclude this, or unless there is no possibility of an appeal and hence no point in providing reasons so as to enable proper appellate consideration of the order to be given. Thus members of the Supreme Court tend to give reasons habitually and routinely.

148 Alexis de Tocqueville observed that lawyers "if they prize freedom much … they generally value legality still more"[198]. He also spoke of the judge as "a lawyer who [has] the taste for regularity and order that he has contracted in the study of law"[199]. The eligible Judges to whom the Act applies – members of the Supreme Court of New South Wales – certainly have a long experience of seeking to vindicate legality, regularity and order. That experience enables them

---

197 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

198 *Democracy in America*, Bradley ed (1945), vol 1 at 275.

199 *Democracy in America*, Bradley ed (1945), vol 1 at 278.

to exercise a sound judgment about when to give reasons and when not. Their actual impartiality as between the government and the governed has never been questioned – not even by the plaintiff. In that respect they have the touchy pride of Castilian aristocrats. Their whole professional life, before and after appointment to the bench, has been spent in arguing, in seeking to persuade, in giving reasons why some things should be done and other things should not be done, in explaining why some conclusions follow and others do not. And commonly they find it impossible to reach clear conclusions without assembling, often on paper, particular chains of detailed reasoning. In this respect, if they err, they tend to err by being garrulous, not taciturn.

149 The conduct of eligible Judges is open to judicial review. In *Public Service Board of New South Wales v Osmond*[200] Deane J said:

> "There was a time when the ordinary prescript of prudence for an administrative decision-maker who was anxious to avoid litigation was to decline to give reasons for the discretionary exercise of a statutory power in a manner which would adversely affect the property or rights of another."

Even if some public officials who are members of the Executive may still share that thinking, to the extent that modern legislation permits it, it is doubtful whether eligible Judges do. The conduct of an eligible Judge will be examined on judicial review by another member of the Supreme Court. Eligible Judges will appreciate that to take refuge in silence will not increase the esteem in which other members of the Supreme Court – not to mention the profession – hold them. They will also appreciate that the silence of an eligible Judge is likely to strengthen the determination of the Supreme Court judge in conducting the judicial review to scrutinise what has happened with the greatest possible intensity.

150 *Power, not duty, to withhold reasons.* Let it be assumed for present purposes that Gaudron J's three statements of principle, quoted in the reasons for judgment of Gummow, Hayne, Crennan and Bell JJ[201] from *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[202], are correct, and applicable to State judges who are designated persons. A provision which compelled eligible Judges not to give reasons for the declarations and decisions they might make under Pt 2 might well fall within her Honour's language. The function performed, it might be said, would not be one which "results in [an] outcome

---

200 (1986) 159 CLR 656 at 675.

201 See [94].

202 (1996) 189 CLR 1 at 22 and 25-26; [1996] HCA 18.

which can be assessed according to its own terms"[203]. The provision might also be described as one which prevented them from "acting openly" and "in accordance with fair and proper procedures"[204]. But s 13(2) does not compel eligible Judges not to give reasons. A key question is how far it will result in them not giving reasons.

151 *Exclusion of extreme possibilities.* The breadth of a constitutional power is not to be restricted by hypothesising a reprehensible law and concluding that the power cannot be construed as permitting the enactment of that law[205]. Thus it is wrong to take into account any "grim spectre conjured up"[206], any mere "exercise in imagination"[207], any "preposterous suggestion"[208], any "absurd possibility"[209], any "distorting possibility"[210], any "distorting or alarming possibility"[211], or any "extreme examples"[212]. Arguments which are no more than "in terrorem" are to be rejected[213]. It is wrong to "postulate a chamber of legislative horrors, unlikely to be enacted"[214].

---

203 (1996) 189 CLR 1 at 26.

204 (1996) 189 CLR 1 at 22.

205 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 117-118 [187]-[188]; [2006] HCA 52.

206 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271 per Mason J; [1975] HCA 46.

207 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271 per Mason J.

208 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275 per Jacobs J.

209 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275 per Jacobs J.

210 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275 per Jacobs J.

211 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 549 [39] per Gummow, Hayne and Crennan JJ; [2006] HCA 25.

212 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ; [2003] HCA 72. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380 [87] per Gummow and Hayne JJ; [1998] HCA 22.

213 *Sue v Hill* (1999) 199 CLR 462 at 480 [26] per Gleeson CJ, Gummow and Hayne JJ; [1999] HCA 30.

214 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 646 [128] per Kirby J; [2008] HCA 28.

152 Similarly, it is wrong to approach an allegation that a particular legislative provision is invalid by identifying an operation of that legislative provision which may be theoretically possible but in fact is extremely unlikely. An example is a provision which is innocuous if not abused, but dangerous if abused: it is not to be assumed that the holder of a power "will act improperly or venally."[215] Another example relates to the power to appoint Acting Judges to the Supreme Court of New South Wales[216]:

> "It is possible to imagine extreme cases in which abuse of the power … could so affect the character of the Supreme Court that it no longer answered the description of a court or satisfied the minimum requirements of independence and impartiality. It is, however, a basic constitutional principle that the validity of the conferral of a statutory power is not to be tested by reference to 'extreme examples and distorting possibilities'[217]. Possible abuse of power is rarely a convincing reason for denying its existence."

153 That reasoning extends a principle developed in relation to express constitutional powers, and the validity of legislation examined against express constitutional powers, to constitutional doctrines not resting directly and explicitly on the ipsissima verba of the Constitution. It is constitutional doctrines of the latter kind to which the plaintiff appeals. It is clear, then, that the validity of s 13(2) is to be assessed bearing in mind practical realities and likelihoods, not remote or fanciful possibilities.

154 *The likely effect of s 13(2).* Section 13(2) does not prohibit eligible Judges from giving reasons. It only denies a duty on them to do so. In view of their traditions, customs and habits, there is every reason to suppose that they will give reasons wherever the interests of justice require it, and thus act "openly" and "in accordance with fair and proper procedures" in arriving at an "outcome which can be assessed according to its own terms". Unlike, perhaps, public officials who form part of the Executive, and who have been moulded by different traditions, there is no reason to believe that, except in isolated instances, eligible Judges will preserve secrecy about their reasoning processes in cases where they

---

215 *Egan v Willis* (1998) 195 CLR 424 at 505 [160] per Kirby J; [1998] HCA 71 (discussing a standing order of the New South Wales Legislative Council).

216 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 69 [46] per Gleeson CJ; [2006] HCA 44.

217 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].

ought to be revealed. The risk that there will be isolated instances of secrecy is insufficient to invalidate the legislation. That is one reason why s 13(2) is valid.

Section 13(2) and invalidity: non-derogation from the common law

155 The Solicitor-General of the Commonwealth submitted: "There is no general rule of the common law or principle of natural justice that requires reasons to be given for administrative decisions, even those made in exercise of a statutory discretion and liable to affect adversely the interests of others[218]." The submission is sound. The decision of an eligible Judge as a designated person is an administrative decision. Section 13(2) thus does no more than reflect the common law. That is another reason why s 13(2) is valid.

Section 13(2) and invalidity: Gaudron J's tests

156 There is a third reason why s 13(2) is valid.

157 In one of her three statements of principle in *Wilson's* case Gaudron J said[219]:

> "In general terms, a function which is carried out in public, save to the extent that general considerations of justice otherwise require, which is and which is manifestly free of outside influence and which results in a report or other outcome *which can be assessed according to its own terms*, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government."

In another, her Honour said of the designated person's duty to report in that case[220]: "As the report need not be made public, it cannot be *judged according to its own terms*." The Attorney-General for the State of Western Australia submitted that those statements were not advancing a criterion of validity. Rather they were pointing to elements in her Honour's conclusion that the role of the designated person in that case generated a perception that she lacked independence from the Executive. That perception arose from her duty to report in secret and her lack of control over whether the report would be carried into effect. These matters caused the designated person to have the appearance of acting as the servant or agent of the relevant Minister. It was the impact on the perception of independence, not secrecy in itself, which was the criterion of validity.

---

218 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

219 (1996) 189 CLR 1 at 25-26 (emphasis added).

220 (1996) 189 CLR 1 at 26 (emphasis added).

158 The submission of the Attorney-General for the State of Western Australia is correct. Gaudron J's approach was similar to that of the plurality, who said[221]: "The separation of the Ch III judge acting as reporter from the Minister has been breached." In contrast to the position in *Wilson's* case, here there is no duty to report only in secret (ie no duty not to give reasons), and the outcome is not in the hands of a Minister. What the eligible Judge does cannot be controlled by a Minister, and the making of an interim control order or control order, though the Commissioner applies for it, depends on the view of a Supreme Court judge.

159 In *Fardon v Attorney-General (Qld)*[222], McHugh J said that the relevant question in relation to State legislation investing a State court with particular powers is whether those powers compromise the institutional integrity of the court to the extent that they affect the court's capacity to administer federal jurisdiction impartially and according to federal law. He also said that State legislation requiring the courts to act in ways "inconsistent with the traditional judicial process" is only invalid if in all the circumstances "the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government." The present case does not concern State legislation investing a State court with particular powers, but legislation designating a person who is a member of the Supreme Court as the holder of particular powers. The plurality in *Wilson's* case said that several questions had to be asked about legislation of that kind in relation to a federal judge. Analogous questions arise in the present case.

160 The first question is "whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government."[223] That question here must be answered in the negative. As the Attorney-General for the State of Western Australia submitted, unlike the position in *Wilson's* case, the making of a declaration by an eligible Judge is not a step in an administrative process of the Executive Government. The making of a declaration is a first step which may lead to the making of a control order by the Supreme Court and the prosecution of a defendant by a court exercising criminal jurisdiction under s 36. While the Executive may instigate the later processes by making an application for a control order or initiating a prosecution, it is the courts which determine the outcome of those proceedings.

---

221 (1996) 189 CLR 1 at 20.

222 (2004) 223 CLR 575 at 600-601 [41]-[42]; [2004] HCA 46.

223 (1996) 189 CLR 1 at 17. In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245 at 285 [145]-[146] Wheeler JA (dissenting) raised an issue, which need not be decided now, whether a negative answer to the first question was determinative.

161 The second question is:

> "whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law … If an affirmative answer does not appear, it is clear that the separation has been breached."[224]

The answer here is affirmative. Section 5(6) provides that the Attorney-General, having declared a judge to be an eligible Judge under s 5(3), cannot revoke the declaration. And s 5(7) provides:

> "To avoid doubt, the selection of the eligible Judge to exercise any particular function conferred on eligible Judges is not to be made by the Attorney General or other Minister of the Crown, and the exercise of that particular function is not subject to the control and direction of the Attorney General or other Minister of the Crown."

As the Attorney-General for the State of Western Australia submitted, the function of making a declaration is required to be performed independently of any instruction, advice or wish of the legislature or the Executive Government, other than a law or an instrument made under a law.

162 The third question is: "Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?"[225] The answer is in the negative. As the Attorney-General for the State of Western Australia submitted, the function of the eligible Judge is not carried out on political grounds, but rather depends on the eligible Judge's satisfaction of the matters prescribed by s 9(1).

163 Finally, the plurality in *Wilson's* case said[226]:

> "In considering these questions, it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests."

---

224 (1996) 189 CLR 1 at 17 (footnote omitted).

225 (1996) 189 CLR 1 at 17.

226 (1996) 189 CLR 1 at 17.

As the Attorney-General for the State of Western Australia submitted, the eligible Judge is required to act in accordance with the requirements of procedural fairness, except so far as those requirements are validly qualified by ss 8(5) and (6), 28 and 29. There has not been any suggestion of bias on the part of eligible Judges.

164 In short, since the crucial issue is the independence and impartiality of the judges who act as designated persons, the question is whether the absence of a duty to give reasons impairs it. Taken with other factors, that absence did lead to invalidity in *Wilson's* case. But an exclusion of any duty to give reasons is not determinative, for in *Grollo v Palmer*[227] legislation was upheld despite the fact that no reasons were given for the conduct of federal judges in issuing telecommunication interception warrants.

165 Further, the failure to give reasons for making Pt 2 declarations, even after a hard-fought contested application, is a matter of considerably less significance than failing to give reasons for the result of a trial affecting the rights of litigants. A Pt 2 declaration does not affect rights. It does no more than leave a person who is a member of a declared organisation open to an application being made for that person to be the subject of an interim control order and a control order. As the Attorney-General for the State of Western Australia submitted, it is merely a precondition to the making of those orders. The probative significance of the declaration in relation to Pt 3 is nil, unless it is supported by admissible evidence, and even then it is the evidence which matters, not the mere fact of the declaration. As stated above[228], the factors which the Supreme Court judge takes into account in assessing whether there are "sufficient grounds" under s 19(1)(b) to make a control order concentrate on a wide range of matters turning on substantive factual detail about the organisation and the member. The making of a declaration by itself says nothing about the details of the organisation or the member. A failure to give reasons for making a declaration with that limited significance is not a ground of invalidity.

Section 13(2) and invalidity: does the *Kable* doctrine apply to the appointment of State judges as designated persons?

166 A fourth reason for the validity of s 13(2) arises from a submission advanced on behalf of the Attorney-General for the State of Victoria. It was contended that the *Kable* doctrine had never been applied, and ought not to be applied, to the appointment of State judges as designated persons.

---

227 (1995) 184 CLR 348.

228 See [139].

167 *Are eligible Judges appointed as designated persons?* So far it has been assumed that eligible Judges are appointed as designated persons. It is now necessary to decide the correctness of that assumption. The distinction is between the conferral of power on a judge as a judge, and the conferral of power on a judge "as an individual who, because he is a judge, possesses the necessary qualifications to exercise it."[229] There is authority[230] for the distinction predating the *Boilermakers'* case[231].

168 The plaintiff submitted that eligible Judges were not designated persons but were appointed as members of the Supreme Court who agreed to perform particular additional executive functions under the Act. The submission is not correct for the following reasons. The powers granted under Pt 2 are granted to an "eligible Judge", not to the "Supreme Court" or "the Court". In the Act the terms "eligible Judge" and "the Court" are not used interchangeably. They are used in distinct senses. Thus Pt 2 confers functions on eligible Judges, while Pt 3 confers other functions on the Court. The Pt 2 procedures of eligible Judges are in certain respects not the procedures ordinarily followed by the Supreme Court. Some members of the Supreme Court may not be appointed as eligible Judges. Although appointment as an eligible Judge depends on the consent of the appointee (s 5(2)), the appointee can revoke that consent (s 5(5)). The powers conferred by Pt 2 of the Act are conferred only on select judges who consent, not on all the judges as judges by virtue of their judicial offices. Those powers are administrative; they are not incidental to the exercise of judicial power; and this points to their recipients as being designated persons[232].

169 *Victoria's argument.* Victoria's argument was as follows.

(a) The *Kable* doctrine is that State legislation cannot confer on a *State court* a function (or require the exercise by a *State court* of a function in a manner) that is incompatible with that *State court's* status as a recipient of the judicial power of the Commonwealth, or would otherwise impair the *State court's* integrity or independence[233].

---

229 *Hilton v Wells* (1985) 157 CLR 57 at 72 per Gibbs CJ, Wilson and Dawson JJ.

230 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 152; [1953] HCA 11.

231 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10.

232 *Hilton v Wells* (1985) 157 CLR 57 at 73.

233 Counsel cited *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103, 109, 116 and 127-128; [1996] HCA 24.

(b) The *Kable* doctrine is concerned primarily with the conferral of functions on *State courts as institutions*, not the conferral of functions on *persons* who happen to be members of State courts[234].

(c) Chapter III of the Constitution requires the separation of judicial power from other powers at the Commonwealth level. That separation of powers is why Ch III prevents the Commonwealth Parliament from conferring on federal judges as designated persons functions inconsistent with the exercise of judicial power, such as executive functions. Thus Gaudron J said in *Kable v Director of Public Prosecutions (NSW)*[235]:

> "The prohibition on State legislative power which derives from Ch III is not at all comparable with the limitation on the legislative power of the Commonwealth enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia*[236]. The *Boilermakers'* doctrine, as it is sometimes called, prevents the Parliament of the Commonwealth from conferring judicial power on bodies other than courts and prevents it from conferring any power that is not judicial power or a power incidental thereto on the courts specified in s 71 of the Constitution. It also prevents the Parliament from conferring functions on judges in their individual capacity if the functions are inconsistent with the exercise of judicial power in the sense explained in *Grollo v Palmer*[237]. The limitation on State legislative power is more closely confined and relates to powers or functions imposed on a State court, rather than its judges in their capacity as individuals, and is concerned with powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth."

And Gibbs CJ, Wilson and Dawson JJ said in *Hilton v Wells*[238] that, in the case of federal judges, the *Boilermakers'* doctrine would apply to render

---

234 Counsel cited *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 152; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103-104; *South Australia v Totani* (2010) 242 CLR 1 at 47-48 [69] and 82 [205] (citing *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101]).

235 (1996) 189 CLR 51 at 103-104.

236 (1956) 94 CLR 254.

237 (1995) 184 CLR 348.

238 (1985) 157 CLR 57 at 73-74. See also at 81 per Mason and Deane JJ. See further *Grollo v Palmer* (1995) 184 CLR 348 at 365 and 392.

invalid legislation if "the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial functions".

(d) But, unlike the Commonwealth Constitution, the constitutions of the Australian States do not require the separation of judicial power[239].

(e) The *Kable* doctrine does not import a separation of judicial power into the State judicial systems[240].

(f) The limitation on State legislative power that flows from the *Kable* doctrine does not flow from any separation of judicial function under the State constitutions preventing *individual judges acting as members* of the Executive – only from the establishment by Ch III of an integrated *court* system.

(g) Therefore it does not follow from the application of the *Kable* doctrine to State *courts* that it applies to State judges when they are not acting as members of State *courts*, but as *designated persons*.

(h) No decision of this Court has held that it does follow. All the authorities on designated persons relate to federal judges[241]. None of the authorities in which the *Kable* doctrine has been successfully invoked in relation to State judges were designated persons cases[242], although there are dicta of Gaudron J opposing the extension to designated persons and of McHugh J favouring it[243].

(i) To decide for the plaintiff would involve a new step – a merger between the *Grollo v Palmer* principle limiting the activities of federal judges as

---

239 Counsel cited *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 319; [1990] HCA 4; *South Australia v Totani* (2010) 242 CLR 1 at 86 [221].

240 Counsel cited *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598 [37], 614 [86] and 655-656 [219].

241 *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

242 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49; *South Australia v Totani* (2010) 242 CLR 1.

243 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 104 and 117-118 respectively.

designated persons, and the *Kable* doctrine limiting the functions of State *courts*, and an extension of it to State judges as designed persons.

170 The Attorney-General for the State of Victoria also advanced a submission that, if there were any limit on the validity of legislation providing for the appointment of State judges as designated persons, it was a narrower one which the Act did not offend.

171 *The Commonwealth's argument.* The Solicitor-General of the Commonwealth put the following submissions.

(a) Chapter III of the Constitution did not admit of different grades or qualities of justice depending on whether judicial power was being administered in a State court or a federal court[244].

(b) It followed that Ch III did not admit of two grades or standards of independence and impartiality.

(c) To confer a function on a judge as a designated person would be invalid if it "undermines the integrity of the Judicial Branch"[245].

(d) That principle was merely an application of the *Kable* doctrine.

(e) It therefore applied to State judges as much as federal judges.

172 *The application of the Kable doctrine.* These submissions of the Solicitor-General of the Commonwealth do not explain how the carrying out by persons who are judges of State courts of non-judicial functions would cause the justice administered in those courts to be of inferior grade or quality, or would entail lower standards of independence and impartiality, or would undermine integrity. Nor do they deal with the submission advanced on behalf of the Attorney-General for the State of Victoria to the effect that a stricter doctrine applies to federal judges appointed as designated persons because of the federal separation of powers, which does not exist at State level. To take the step which the Commonwealth's submissions entail is not to apply the *Kable* doctrine, but to move a step beyond it. They do not explain why that step should be taken, or how it could be taken. The submissions advanced on behalf of the Attorney-General for the State of Victoria are correct. So far as the opinion of

---

244 He cited *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101].

245 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9, quoting *Mistretta v United States* 488 US 361 at 404 (1989).

Mason and Deane JJ in *Hilton v Wells*[246] may be to the contrary, it was a dissenting opinion; the case is an authority for what the majority said, not the minority; no application was made to overrule the case; and no suggestion arose in argument that it should be overruled.

"Public confidence"

173 In *Wilson's* case Gaudron J said[247] that "the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts", and said that that depends on the matters listed in the first passage quoted in the reasons for judgment of Gummow, Hayne, Crennan and Bell JJ. She also spoke in the third passage of what was a "risk to public confidence" and what "would diminish public confidence"[248].

174 The existence and meaning of tests turning on "public confidence"[249] depend in part on what the "public" is. One is reminded of William F Buckley's statement: "a huge swell of public opinion is developing – I think he's an Assistant Professor at Berkeley." Are selected journalists the public? Those who speak for trade unions and trade associations? Politicians? Lord Denning MR's "silent majority of good people who say little but view a lot"[250]? Or is it the case that to say of a provision that "it will damage public confidence in the courts" is merely a veiled way of saying "I dislike it", and that it must therefore be

---

246 (1985) 157 CLR 57 at 83-84.

247 (1996) 189 CLR 1 at 22.

248 See above at [94].

249 Was what Gaudron J said in *Wilson's* case an aspect of the doctrine emanating from *Kable's* case? *Kable's* case was argued five months after *Wilson's* case and decided three days after it. *Wilson's* case did not mention *Kable's* case, but *Kable's* case mentioned *Wilson's* case. In particular, in *Kable's* case Gaudron J (at 107 and 108) referred to the "maintenance of public confidence" in the courts, citing *Wilson's* case. If what was said in *Wilson's* case is an aspect of the *Kable* doctrine, the references to damaging "public confidence" must not now be seen as a criterion of invalidity, merely an indication of it: see *South Australia v Totani* (2010) 242 CLR 1 at 95-96 [245].

250 *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629 at 652.

constitutionally invalid? Does "public confidence" have any more meaning than expressions like "social justice" or "value to society"[251]?

175 Another difficulty is that some are types of confidence which sections of the public have in public institutions which reflect credit neither on the sections of the public nor on the public institutions[252]. And it is often the duty of courts to resist conduct which would increase the confidence in them of some sections of the public. That is true of the courts in both their non-constitutional roles and their roles in administering constitutions. The function of the courts is often to protect individuals and minorities against the larger public.

176 Assuming these difficulties are put aside, what generates public confidence? What is a risk to public confidence? What diminishes public confidence? Each of these questions is an empirical question. It has not been empirically demonstrated that the possibility of an occasional failure of eligible Judges to give reasons for their decisions and declarations in Pt 2 proceedings would result in unsatisfactory answers to these questions.

177 Invalidation of the Act on the ground that Pt 2 is to be administered by eligible Judges from whom the obligation to give reasons cannot be removed may be compared with legislation in which the place of eligible Judges is taken by personages who are much less "impartial", much less "accustomed to the dispassionate assessment of evidence" and much less independent of the enforcement agencies of the Executive[253]. Of course it is necessary to put up with any inconvenience which the Constitution causes. But which model is more damaging to public confidence?

Other aspects of the *Kable* doctrine

178 Does the Act enlist Supreme Court judges to determine applications for Pt 2 declarations using processes containing three integers which, if adopted by the Supreme Court itself, would be repugnant to the judicial function, namely processes (a) not involving the rules of evidence, (b) requiring certain information to be kept secret from the organisation or its members, and (c) not requiring reasons for the determination? If so, is it invalid on that ground?

---

251 Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice*, (1976) at 78-100.

252 *South Australia v Totani* (2010) 242 CLR 1 at 95-96 [245] n 391.

253 *Grollo v Palmer* (1995) 184 CLR 348 at 367 per Brennan CJ, Deane, Dawson and Toohey JJ.

179 Judges commonly think that the conduct of court proceedings is a matter best left to the courts and not to the legislature. It is certainly true that legislatures do not often make provision for the conduct of court proceedings except through delegated legislation in the form of rules of court, over which judges as a group have considerable control, and except through aspirational statements about speed and cost. But that legislative abstention rests on prudence, not on a fear of invalidity. Sometimes legislatures think that court conduct is too important a matter to be left to the courts.

180 The legislative abolition of the rules of evidence in curial proceedings is very unlikely to be invalid. Rules of evidence can be, and over the last 200 years have been, radically modified by statute both for interlocutory hearings and for trials. A few thinkers have advocated their complete abolition. But it has never been suggested, however unsatisfactory it would be to abolish them, that it would be impossible to do so on constitutional grounds.

181 Turning to the second integer, the restrictions in relation to criminal information apply as much to Pt 3 hearings in the Supreme Court as to Pt 2 hearings before an eligible Judge (see ss 16(3)-(5), 21(2)-(4), 28, 29 and 31), but the authority of this Court is that that alone does not affect validity[254].

182 What of the third integer – the absence of an obligation to give reasons? It is at least arguable that legislative abolition of the common law "duty" for courts to give reasons would be constitutionally valid even though it might be foolish. The "duty" is important. But it has only been closely examined in recent years. Its precise formulation is diffuse and controversial. It is riddled by exceptions. Whether it exists, or has been breached, in a particular case depends on many factors, including the nature of the proceedings, the extent to which there was full argument extensively participated in by the court, and any need for urgency. There are other rules affecting the conduct of trials – for example, rules relating to the burden and standard of proof in criminal prosecutions – which are even more important than the duty to give reasons. The authority of this Court is against any suggestion that a reversal of the burden of proof is constitutionally impossible[255]. If a change of that significance can validly be made, why not the lesser change in relation to the duty to give reasons?

183 If it is constitutionally impossible to abolish a duty to give reasons, is it constitutionally impossible for the legislature to regulate other aspects of the

---

254 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 539-543 [135]-[149].

255 See the cases cited in *South Australia v Totani* (2010) 242 CLR 1 at 107-108 [277] n 441.

judicial task? Is it precluded from forbidding dissenting judgments? Or requiring that judgments be delivered within a certain period? Or requiring that they be delivered ex tempore? Or requiring that they not exceed a certain length?

184 Could legislation abolishing the duty of a court to give reasons be said to prevent it from answering the description of "Supreme Court" and "court" in s 73 of the Constitution as those expressions were understood in 1900? To compel a Supreme Court to make only ex parte orders is inconsistent with its description in 1900 (and indeed at all later times), because the role of a Supreme Court is to decide disputes between litigants, and, ex hypothesi, that can only be performed in inter partes hearings[256]. In 1900 the duty to give reasons may have been different from what it is now. Reasons were almost always much briefer than they are now. They were much more often delivered ex tempore. In the case of the Privy Council, it was forbidden to give reasons in support of dissenting opinions.

185 So much for the three integers in conventional litigation. What is their application when judges are acting as designated persons? It was concluded above[257] that s 13(1), rendering the rules of evidence inapplicable in Pt 2 hearings, is not damaging to validity. It was also concluded above[258] that the criminal information provisions are not damaging to validity. And it was concluded above[259] that s 13(2), denying any duty to give reasons for Pt 2 declarations, is not fatal to validity. Even if a combination of those three integers – no rules of evidence, secrecy of criminal information and no duty to give reasons – or any of them taken singly is repugnant to the judicial function in conventional litigation, why would it render invalid legislation providing not for the exercise of a judicial function in conventional litigation, but for designated persons to carry out an administrative function independently of the Executive in accordance with procedures having those three integers?

Implied right to political association

186 The plaintiff also submitted that there was in the Constitution an implied right to political association, or an implied right to association for the purpose of political communication. For that submission many authorities were cited. None of them supported it. There is no general freedom of political communication in

---

256 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 379-388 [141]-[165].

257 At [132].

258 At [181].

259 At [165].

the Constitution beyond that necessary for the effective operation of the system of representative and responsible government provided for in ss 7, 24, 64 and 128 of the Constitution[260]. That qualification was present in statements on which the plaintiff relied[261]. The Act is not concerned with political communication, but with preventing serious criminal activity. Even if the rights claimed by the plaintiff to exist did exist, there is no necessary impairment of them because s 19(7)(a) permits the Supreme Court, on making a control order, to make an order permitting the person against whom the order is made to associate with a controlled member of a declared organisation where there is "good reason" for this. And s 25 permits the Supreme Court to vary a control order.

---

260 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561, 567 and 571; [1997] HCA 25.

261 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 232; [1992] HCA 45; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 115; [1997] HCA 27.