

**GILBERT + TOBIN CENTRE OF PUBLIC LAW
CONSTITUTIONAL LAW CONFERENCE
13 February 2015**

*CONSTITUTIONAL LAW IN THE FEDERAL AND STATE COURTS IN 2014:
THE JUDICIARY AND THE LEGISLATURE*

John Basten*

Introduction

Putting to one side bills of rights, constitutions are about the institutional arrangements for the exercise of governmental power. A constitution creates institutions, identifies their functions and confers power on them. Inevitably, it provides the framework (whether by way of checks and balances, or by way of consultation and co-operation) by which they interact.

The Australian Constitution is often said to assume or reflect values of various kinds which it does not identify. One overarching value, or principle, is said to be the “rule of law”. Although it is used almost rhetorically in judgments, academic commentators have identified a number of values which appear to underlie the rule of law, which is not a “rule” in legal terms, but better understood as a description of a political system.

An important structural facet of the federal Constitution is the creation of separate institutions to legislate, to administer law and to resolve disputes, including disputes about the legality of the acts of the legislature and the executive. The courts identify the scope and operation of valid laws of the legislature. There are legal principles which inform that exercise: they are principles of statutory interpretation. In *Zheng v Cai*¹ the High Court described a ruling as to the meaning of legislation as an “expression” of the constitutional relationship between the arms of government.² Perhaps it is the principles of statutory interpretation which might be thought of as

* Judge of Appeal, New South Wales Court of Appeal. I am grateful to my 2014 clerk, Steven Gardiner, for his invaluable research for this paper and to Agnieszka Deegan for assistance in 2015.

¹ [2009] HCA 52; 239 CLR 446.

² See also *Wilson v Anderson* [2002] HCA 29; 213 CLR 401 at [8] (Gleeson CJ); *Singh v The Commonwealth* [2004] HCA 43; 222 CLR 322 at [19] (Gleeson CJ).

central to that relationship. Some of those principles are found in statutes; most are found in judgments of courts.

David Hume has recently suggested³ that the concept of the “constitutional relationship” between branches is “under theorized”.⁴ I take him to mean that lawyers (including judges) should think harder about their roles in the constitutional framework of government: I agree. One implication of this nudging is that we need to broaden our concept of constitutional law. The Australian Constitution is a document: it contains no reference to the principles of statutory interpretation, yet they govern the relationship between the courts and legislature. They are, in that sense, constitutional principles: they deserve recognition as such. Yet constitutional law texts tend to deal with principles of interpretation only as they affect the written Constitution itself; and even then with scant regard to their sources. The idea that such principles are but a subset of principles governing the interpretation of legal documents generally is a misconception: that principles of statutory interpretation have much in common with principles governing the construction of contracts, trusts and wills should not be allowed to obscure the particular constitutional status of principles governing the construction of statutes (and constitutions).

Mixed messages have emanated from recent High Court decisions on questions of statutory construction.⁵ However, there has been a growing recognition of the centrality of statutory construction to many aspects of public law, where there is also increasing emphasis on implied statutory obligations, to act reasonably as well as fairly.

³ D Hume, “The Rule of Law in Reading Down: Good Law for the ‘Bad Man’” (2014) 37 *Melb U L Rev* 620 at 630, footnote 44.

⁴ The term appears to have been derived from an article by Abbe R Gluck and Lisa Schultz Bressman, “Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I”, (2013) 65 *Stanford L Rev* 901 at 907, noting the authors’ aim “to illustrate how undertheorized the canons have been and to highlight the kinds of normative questions that arise from testing the connection between legal doctrine and legislative drafting practice.”

⁵ See, eg, JJ Spigelman, “The intolerable wrestle: Developments in statutory interpretation” (2010) 84 *ALJ* 822 at 828-831.

The cases

There were approximately 40 cases addressing constitutional issues decided in 2014 by State Supreme Courts and the Federal Court.⁶ Of these, half fell into two categories, namely challenges to state legislation said to impinge on the constitutional integrity of the courts (the *Kable* principle) and those addressing the implied freedom of political speech (the *Lange* principle). A somewhat startling 15 cases invoked *Kable*; seven cases (including some falling into both categories) invoked the implied freedom. By contrast, only four cases addressed apparent inconsistencies between federal and state laws (the s 109 paramountcy principle). This category, once famously referred to by the Hon Michael McHugh as “the running down jurisdiction” of the High Court, appears to have suffered the downgrading in importance which has attached to running down cases generally. Nevertheless, s 109 cases are potentially interesting because they can raise significant issues with respect to statutory interpretation; indeed inconsistency is commonly avoided by antecedent interpretation which removes the potential conflict.⁷

There were also some five cases involving compulsory acquisition on just terms under s 51(xxxi); three invoking the *Melbourne Corporation* principle, limiting the power of the Commonwealth to legislate in a manner which will interfere with state government activities, and three involving the scope of border protection under s 51(xix). While the focus of this paper is the class of *Kable* and *Lange* cases, it is proper to deal first with the *Melbourne Corporation* cases, the latest perhaps being the best written of the 2014 crop.

⁶ That figure includes an element of duplication in so far as some were heard at first instance and on appeal in the same year; there is also room, as in past years, for judgment as to which dealt with a live issue of constitutional law. A schedule is attached.

⁷ See, eg, *AGU v Commonwealth of Australia (No 2)* [2013] NSWCA 473; 86 NSWLR 348. In Victoria, Cavanough J construed a statute relating to the impounding and forfeiture of motor vehicles sufficiently broadly to avoid a *Kable* issue: *Overend v Chief Commissioner of Police* [2014] VSC 424. (The impetus for the constitutional challenge appeared to be deflated by the decision of the High Court in *Attorney-General (NT) v Emmerson* [2014] HCA 13; 88 ALJR 522.) See also the avoidance of a possible Ch III issue in *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 22; 218 FCR 461 at [4], [116] (Allsop CJ, Robertson and Griffiths JJ).

The *Melbourne Corporation* principle

The three cases all arose in the Federal Court, two in Victoria, and the last, determined in mid-December, in Western Australia. Dealing with them chronologically and in reverse order of importance, the first, *Lee v The Commonwealth*,⁸ involved a challenge to parts of the *Water Act 2007* (Cth) in relation to the provision of irrigation water in the Murray-Darling Basin. Various arguments were raised in testing the boundaries of co-operative federalism with respect to regulating the use of a resource shared by three states. It was an unpromising context in which to invoke a principle concerned with the capacity of states to function. The proceedings, brought by two horticultural farmers, named the Commonwealth and the Murray-Darling Basin Authority as the respondents. The respondents sought summary judgment on the basis that the claims, including the *Melbourne Corporation* claim, had no reasonable prospects of success.⁹ North J accepted that there should be judgment for the respondents on that aspect of the case.¹⁰ An appeal to the Full Court was unsuccessful;¹¹ the *Melbourne Corporation* issue was not raised on the appeal.¹²

The second case raised issues close to the heart of current *Melbourne Corporation* jurisprudence, namely the regulation of industrial relations, particularly in its effect on the public service. Proceedings were brought in the Federal Court in Melbourne by the United Firefighters' Union of Australia seeking to enforce the terms of an enterprise agreement entered into between the Union and the Country Fire Authority (Vic), a state government agency responsible for fire control in rural Victoria. The enterprise agreement took effect under the *Workplace Relations Act 1996* (Cth).¹³ Although the Authority had apparently entered into the agreement voluntarily, it sought to challenge the validity of particular provisions, calling in aid the *Melbourne Corporation* principle.

At trial, Murphy J concluded that, (a) the Authority was a trading corporation within s 51(xx) of the Constitution and (b) the enterprise agreement curtailed or impaired

⁸ [2014] FCA 432; 220 FCR 300 (North J).

⁹ Reliance was placed on the *Federal Court of Australia Act 1976* (Cth), s 31A.

¹⁰ *Lee* at [186], the discussion proceeding from [175]-[185].

¹¹ *Lee v Commonwealth of Australia* [2014] FCAFC 174 (Middleton, Barker and Griffiths JJ).

¹² *Ibid* at [22].

¹³ Since replaced by the *Fair Work Act 2009* (Cth).

the capacity of Victoria in the exercise of governmental functions and was therefore invalid and unenforceable.¹⁴ That judgment was subject to an appeal decided on 8 January 2015 and thus outside the chronological constraints imposed on this review.¹⁵ Nevertheless, it is worth noting that the Full Court upheld the trial judge's conclusion that the Authority was a trading corporation for the purposes of s 51(xx),¹⁶ but disagreed with the conclusion that, to the extent the enterprise agreement was supported by the *Fair Work Act*, it was invalid. The Full Court noted:¹⁷

“Although the primary judge observed that he had ‘some difficulty’ in treating the implied constitutional limitation as applicable to industrial agreements that were bona fide voluntarily entered into by a State and which, therefore may have no practical impact on its capacity to govern, he concluded that the *Melbourne Corporation* principle, as expressed in *AEU*,¹⁸ applied to the approved enterprise agreement whether or not it was voluntarily entered into by the State party.”

The Full Court noted that the *Fair Work Act* did not single out any State or its agencies and the relevant question was, therefore, whether its provisions imposed “some special disability or burden on the exercise of the powers and fulfilment of the functions of the State of Victoria or the CFA which curtailed the State's capacity to function as a government.”¹⁹ The “voluntary nature of the agreement” was said to be inconsistent with any significant element of impairment or interference.

Although intuitively correct, reliance on voluntariness was not without difficulties. The judgment acknowledged that a threat of strike action by a union, combined with s 415 of the *Fair Work Act* (which would render the union immune from civil suit if it took “protected industrial action”), might give rise to questions with respect to voluntariness.²⁰ Had any such factor arisen, the Court said that it would “raise a host of difficult issues.”²¹ The significance of these issues for the constitutional question may have been obscured in part by the fact that the case before the Court involved enforcement of a concluded enterprise agreement, rather than the operation of the Commonwealth Act before completion of such an agreement. Yet one potential

¹⁴ *United Firefighters' Union of Australia v Country Fire Authority* [2014] FCA 17; 218 FCR 210.

¹⁵ *United Firefighters' Union of Australia v Country Fire Authority* [2014] FCAFC 1 (Perram, Robertson and Griffiths JJ).

¹⁶ *United Firefighters'* at [133]-[139].

¹⁷ *United Firefighters'* at [151].

¹⁸ *Re Australian Education Union, Ex parte Victoria* [1995] HCA 71; 184 CLR 188: (citation added).

¹⁹ *United Firefighters'* at [207].

²⁰ *United Firefighters'* at [210].

²¹ *United Firefighters'* at [211].

effect of the agreement was to impose constraints on the State's free exercise of its powers with respect to the agency's workforce.

The third case, *Albrecht v Commissioner of Taxation*,²² commenced in the previous year; the appeal was determined in 2014. On 22 November 2013 Siopis J dealt with a claim that the WA Commissioner of Police, together with senior members of the State Police Force, were not liable under Commonwealth law to pay a superannuation surcharge in respect of constitutionally protected funds established under state legislation. The Commissioner succeeded; other senior officers failed. The appeal was heard by the same Court which later determined the *United Firefighters'* appeal, judgment being delivered on 19 December 2014.²³ The issue was whether the Commonwealth could validly impose a superannuation surcharge tax upon commissioned officers of the Western Australian Police Force.²⁴ Were senior police officers thus in an equivalent position to State Supreme Court judges²⁵ and State Parliamentarians?²⁶ The Commonwealth lacks the constitutional power to levy taxes on the property of a State and this, it was believed, would prevent the general surcharge tax from applying to a fund held by a State. Thus the legislation under review was designed to collect the same amount, not from a constitutionally protected fund, but from its members.

The Court noted that “[a]s a matter of general theory, the States are not immune from Commonwealth regulation. The federal nature of the Commonwealth has as its corollary, however, State immunity from Commonwealth legislation which significantly interferes with a State’s capacity to function as a government”.²⁷ The Court then remarked that “[t]he precise metes and bounds of the immunity have proved elusive but its central element strikes down Commonwealth legislation which restricts or burdens one or more of the States in the exercise of their constitutional powers”.²⁸ The Court stated of police officers generally:²⁹

²² *Albrecht v Commissioner of Taxation* [2013] FCA 1248, discussed by Leeming JA last year.

²³ *Albrecht v Commissioner of Taxation* [2014] FCAFC 176 (Perram, Robertson and Griffiths JJ).

²⁴ *Albrecht* at [1].

²⁵ See *Austin v Commonwealth* [2003] HCA 3; 215 CLR 185.

²⁶ *Clarke v Commissioner of Taxation (Cth)* [2009] HCA 33; 240 CLR 272.

²⁷ *Albrecht* at [11].

²⁸ *Ibid.*

²⁹ *Albrecht* at [19].

“It may be accepted that they do perform an important, indeed, critical role in the maintenance of peace and order in the State and this role may be described as having a constitutional aspect to it. However, apart from any effect the surcharge tax has upon the terms of and conditions of employment of the State’s high level officials (which is the subject of the appellants’ second argument ...), the tax has no impact upon the performance by the State of the policing function. It does not affect the number of police, the way in which their duties are performed, how they are supervised, what standards they are subject to or, indeed, policing in any way at all. ... Ultimately, the appellants conflate the constitutional prohibition against interference with important State constitutional functions with a blanket ban on legislating about such functions at all.”

The second argument referred to in that passage was not so much the effect of the tax on the terms and conditions of employment of the State’s high level officials, but whether commissioned police officers were “high level officials” for this purpose.

The Court determined the case by reference to the category accepted in *Re Australian Education Union*³⁰ which “has as its defining feature persons who either exercise constitutional functions of the State or who proffer advice directly to those who are involved in the performance of those functions.”³¹ On that approach, the Court varied the order made below, extending the immunity to officers holding the rank of deputy commissioner or assistant commissioner. The appeals were otherwise dismissed.³² The *Melbourne Corporation* principle is generally stated at a high level of generality; *Albrecht* provides a well-reasoned and therefore illuminating application to particular circumstances

The *Kable* cases

It is clear from a review of earlier papers in this series that there have been fluctuations in the subject matter dealt with by intermediate courts which tend to relate to uncertainty as to the scope of key judgments of the High Court. Although the High Court has sought to root its implied constraints on legislative power within the text and structure of the Constitution, what is in substance a structural implication may be without clear textual constraints. Thus, although the Court stated in *Lange v Australian Broadcasting Commission*³³ that the implied freedom of communication

³⁰ Above, fn 16.

³¹ *Albrecht* at [34].

³² *Albrecht* at [36].

³³ [1997] HCA 25; 189 CLR 520 at 561.

was “limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution”, the boundaries of that concept quickly frayed on the vagueness of what might constitute a relevant political “communication” and the imprecise content of that which might affect the election and operation of the federal government, given the interlocking nature of governmental and political matters in common discourse in Australia. No doubt a more constrained approach could have been adopted.

A similar uncertainty arises with respect to the institutional integrity of the courts. The combined effect of the decisions in *Kable*³⁴ and *Kirk*³⁵ is that a legislature (and in particular a state or territory legislature) can neither impose upon a court capable of exercising federal jurisdiction a function incompatible with its institutional integrity and independence, nor can the legislature remove from a State Supreme Court an essential characteristic of such a court. The indeterminacy of the governing concepts has left a wide scope for challenges to almost any variation on the traditional powers and jurisdictional limits of a Supreme Court and the traditional procedures by which it operates.

Not only is such uncertainty contrary to an underlying principle of the rule of law, but it increases unproductive social costs. Intermediate appellate courts have generally demonstrated a degree of restraint in applying these principles. Beginning with those cases in which the *Kable* principle was invoked in the criminal jurisdiction, the first case is *Rich v The Queen*.³⁶ *Rich* concerned retrospective legislation validating affidavits in circumstances where the deponent had not made the oath orally before the person authorised to administer an oath, or had not signed the affidavit in the presence of the person so authorised. It appears that in some circles in Victoria, including police officers seeking warrants to obtain documents, a more informal approach had been adopted. Mr Rich was convicted of the armed robbery and murder of a security officer. An important element of the prosecution case involved financial records demonstrating that he had obtained a large amount of cash shortly after the occurrence of the armed robbery. It was only after his conviction that the practice with respect to the affidavit on which the warrant was based became known.

³⁴ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51.

³⁵ *Kirk v Industrial Court of New South Wales* [2010] HCA 1; 239 CLR 531.

³⁶ [2014] VSCA 126; 286 FLR 251 (Nettle, Neave and Osborn JJA).

By the time of his appeal, a new statutory provision had declared, retrospectively, that an affidavit which would have been defective at the time it was allegedly made was to be treated as effective and any warrant issued on the basis of such an affidavit was not invalid only by reason of the failure of the affidavit to be duly sworn or affirmed.³⁷

Mr Rich argued that the legislative amendment deprived him of a fair trial and was thus inconsistent with the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Of greater potential benefit, he contended that the financial records were unlawfully obtained and therefore should have been rejected in the exercise of the Court's discretion, absent the amending retrospective legislation. The Court dismissed that argument stating:³⁸

“Logically, the applicant’s inability to contest the admissibility of the subject evidence is incapable of depriving him of a fair trial unless the admission of the subject evidence was productive of an unfair trial. Equally, the admission of the subject evidence could not have been productive of an unfair trial unless, as a matter of public policy or fairness, the subject evidence should have been excluded. In our view, neither public policy nor fairness, nor any other relevant legal consideration, required that the subject evidence be excluded.”

The Court noted a separate argument that the amending legislation infringed the *Kable* principle “because s 5 requires the court to ‘turn a blind eye to serious police impropriety’ and thereby ‘impairs the institutional integrity’ of the court in a manner which is inconsistent with the court’s role as a repository of federal jurisdiction.”³⁹ It undertook a careful comparison of the reasoning in *Nicholas v The Queen*⁴⁰ which dealt with an analogous provision in the *Crimes Act 1914* (Cth), s 15X, introduced to overcome the decision in *Ridgeway v The Queen*⁴¹ and requiring that the court disregard the role of a law enforcement officer in the importation of narcotics. The Court rejected the similar argument put forward by Mr Rich. In particular, the Court rejected the proposition that *Nicholas* could be distinguished because the leading judgments (of Brennan CJ and Hayne J) did not expressly refer to *Kable*. The Court

³⁷ *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 165 introduced by the *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* (Vic), s 5.

³⁸ *Rich* at [298] (citations omitted).

³⁹ *Rich* at [303].

⁴⁰ [1998] HCA 9; (1998) 193 CLR 173.

⁴¹ [1995] HCA 66; 184 CLR 19.

said⁴² that each of judge “expressly rejected any suggestion that s 15X impaired the integrity of the court’s processes or brought the administration of criminal justice into disrepute – which is tantamount to rejection of infringement of the *Kable* principle – while the other majority judgments were replete with references to *Kable*.” The Court further held:⁴³

“Once it is accepted, as it was in *Nicholas*, that it is competent for Parliament to provide that particular participants in a designated class of unlawful conduct shall be immunised from the consequences of its unlawfulness, and that there is no *Kable* impediment to the courts giving effect to a provision of that kind, there is plainly nothing unconstitutional or otherwise contrary to *Kable* in a provision like s 165(1) which requires a court to regard conduct which would otherwise have been unlawful as being and always having been lawful. If anything, so to provide stands significantly less chance of undermining public confidence in the courts than requiring the courts, as they were in *Nicholas*, not to exclude a limited and specifically defined class of unlawfully obtained evidence notwithstanding that it continued to be unlawfully obtained evidence at the time of its admission.”

A second case discussing a possible statutory constraint on the course of a criminal trial was *Application of the Attorney General (NSW)*.⁴⁴ In the course of a trial for murder of a child, the accused sought to obtain under subpoena reports provided to the relevant State authority with respect to a child at risk. The trial judge had required production of reports relating to the child and also to the mother of the child. (Portions which might identify the author of the reports were redacted.) The question on appeal was whether a statutory provision preventing a person being compelled to produce copies of such a report or otherwise disclose its contents prevented the trial judge making the relevant order.⁴⁵ The Court of Criminal Appeal held that s 29 should not be construed “so as to preclude the accused in a criminal trial from compelling, by subpoena, production of s 29 reports that are relevant to the issues at the trial.”⁴⁶

⁴² *Rich* at [314] (citations omitted).

⁴³ *Rich* at [316].

⁴⁴ *The Application of the Attorney General for New South Wales dated 4 April 2014* [2014] NSWCCA 251 (Macfarlan JA; Beazley P and Bellew J agreeing).

⁴⁵ See *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 29(1).

⁴⁶ *Application of the Attorney General* at [29].

Despite that finding, the Court proceeded to consider the constitutional argument, on the basis that s 29 *did* preclude an order for production of the reports.⁴⁷ Macfarlan JA, writing for the Court, rejected the constitutional argument saying:⁴⁸

“Clearly the State Parliament has authority to enact laws regulating the conduct of criminal trials within the State. Unquestionably, in respect of many issues, the Parliament must balance competing interests and objectives. Here the Parliament had to balance the undoubtedly desirable objective of encouraging reporting of issues affecting the safety, welfare or well-being of children and young persons with the objective of ensuring that accused persons receive fair trials. If ... the legislature considered not only the former but also the latter objective, it would be difficult to conclude that the institutional integrity of the Court was undermined unless Parliament's considered decision could be regarded as quite outside the bounds of a reasonable attempt to reconcile those competing objectives. In my view, the legislation in question here cannot be described as either arbitrary or manifestly disproportionate to the issues at stake As with the law in question in *Veitch*,⁴⁹ s 29(1)(e) does not 'deprive [an] accused of some source of information to which he is presumptively entitled' nor, bearing in mind the competing objectives which it attempts to attain, is it 'a law which would tend to bring the criminal trial process into disrepute'.⁵⁰

This passage assessed the reasonableness of the legislative balance between conflicting purposes. It did so with an eye on the potential interference with the institutional integrity of the court. Both this case and *Rich* illustrate that a distinction commonly drawn may be more porous than authority would suggest. *Kable* was concerned with the conferral on a State Supreme Court of a jurisdiction which did not, in its terms, conform to the traditional or conventional understanding of the judicial function. (Similar difficulties were asserted in the bikie association cases.⁵¹) *Kirk* was concerned with legislation which partly divests or restricts the jurisdiction of a Supreme Court, being a court having constitutional recognition. (Examples of such restrictive provisions include privative clauses protective of decisions of lower courts and specialized tribunals.⁵²) However, both this case and *Rich* dealt with provisions

⁴⁷ *Application of the Attorney General* at [46].

⁴⁸ *Application of the Attorney General* at [47].

⁴⁹ *KS v Veitch (No 2)* [2012] NSWCCA 266; 84 NSWLR 172.

⁵⁰ *Veitch* at [65].

⁵¹ *State of South Australia v Totani* [2010] HCA 39; 242 CLR 1; *Wainohu v State of New South Wales* [2011] HCA 24; 243 CLR 181; *Condon v Pompano Pty Ltd* [2013] HCA 7; 87 ALJR 458; *Pollentine v Bleijie* [2014] HCA 30; 88ALJR 796; *Kuczborski v Queensland* [2014] HCA 46; 89 ALJR 59.

⁵² As exemplified by *Kirk*, the Industrial Court being a court of limited statutory jurisdiction.

which vary or constrain in some manner the exercise of the traditional powers⁵³ or procedures⁵⁴ of a trial court. In neither *Kable* nor *Kirk* was the question formulated in terms of the reasonableness of the legislative judgment; it is doubtful whether such a formulation should apply in the third category, which is weaker than the other two. It would be a novel application of *Lange*-style reasoning if the court were to determine the scope of legislative power on the basis of its view as to the reasonableness or otherwise of the balance of policies adopted in a particular statute.

One further issue raised by *Application of the Attorney General (NSW)* is the manner in which courts may seek to construe legislation which is challenged as interfering with the conventional characteristics of a criminal trial. Thus, s 29 of the *Care and Protection Act* was read down, according to the “principle of legality”, as not precluding an accused obtaining a report in a criminal trial where the report was said to be “relevant” to the issues at the trial. There is some disconformity between the conclusions that (a) the legislature failed to express with sufficient clarity that the statute applied to a criminal trial, yet (b), if it did, its application was a reasonable resolution of conflicting policies. There is a question as to whether the uncertain operation of “the principle of legality” is leading courts to frustrate the operation of legislation which does not conform to the traditional judicial process.⁵⁵ This question invites attention to the relationship between the courts and the legislature, as revealed by principles of statutory construction.

Only one step away from the criminal trial process is the process for review of suspect convictions. *Kable* was invoked at yet another stage of the long-running saga involving the prosecution and conviction of Mr David Harold Eastman in the Australian Capital Territory.⁵⁶ The ACT Supreme Court (which has both a Full Court and a Court of Appeal) was required by relevant provisions in Part 20 of the *Crimes Act 1900* (ACT) to consider a report by a judge of the Court recommending that Mr Eastman’s conviction be quashed and that he be retried. The Full Court was required to consider the report and had power to confirm the conviction, quash the

⁵³ See, eg, *Pollentine*.

⁵⁴ See, eg, *Nicholas and Rich*.

⁵⁵ This is not a unique problem, at least in a system with no entrenched bill of rights: it mirrors the long judicial antipathy, ill-concealed, for privative clauses, before the resolution provided by *Kirk*.

⁵⁶ *Eastman v Director of Public Prosecutions* [2014] ACTSCFC 1; 9 ACTLR 163 (Rares and Wigney JJ and Cowdroy AJ).

conviction or quash the conviction and order a new trial.⁵⁷ However, the legislation prohibited the Supreme Court,⁵⁸ in considering the report, from hearing submissions from anyone, its consideration being deemed not to be a “judicial proceeding”.⁵⁹ The Full Court considered what was to be made of these somewhat curious provisions. Because the Full Court could either confirm or quash the conviction, it was common ground between the Director, Mr Eastman and the Attorneys for the ACT and the Commonwealth that the Court was exercising judicial power, the statutory declaration to the contrary notwithstanding. That was where agreement ended. The Director apparently wanted to engage in judicial review, asserting that the report was infected by jurisdictional error, an exercise which would, it was apparently submitted, involve a full consideration of the record of the trial which had extended over six months. Mr Eastman and the Territory Attorney argued that submissions had been made at a prior stage and the Full Court should proceed without further submissions from anyone. The Territory Attorney argued that the report was in the nature of a report by a referee for the benefit of a superior court: the Commonwealth disagreed.

The Full Court held that the terms of s 431 did not apply to an order under s 430(2), because s 431(1) operated when the Supreme Court was considering whether to make an order “under this Part about a report”, rather than when considering to make an order with respect to a conviction.⁶⁰

The Full Court considered that the provision limiting the material to be considered to the report and documents or things accompanying the report was valid, because the legislature “can enact a law that limits the factual substratum that a court is entitled to consider in the exercise of a power that the legislation gives to the Court”.⁶¹ By contrast, the Full Court held that the constraint on submissions was invalid, stating:⁶²

“It is impossible to conceive of a judicial proceeding, or the exercise of judicial power, that bears the character of being judicial, if the court cannot hear submissions under any circumstances from any person

⁵⁷ This is a paraphrase, sufficient for present purposes, of the *Crimes Act*, s 430(2).

⁵⁸ Presumably a reference to the Full Court, referred to in the previous section.

⁵⁹ s 431(1)(b) and (2).

⁶⁰ Section 431 has since been repealed: *Crimes Amendment Act 2014* (ACT), s 4.

⁶¹ *Eastman* at [39], referring to various passages in *Abebe v The Commonwealth* [1999] HCA 14; 197 CLR 510, although that was a somewhat different case, involving a limitation of the grounds on which the Federal Court (in contrast to the High Court) could set aside a decision with respect to a visa under the *Migration Act 1958* (Cth).

⁶² *Eastman* at [40].

affected. It is fundamental to the exercise of judicial power that a court be capable of hearing from the parties who may be affected by the exercise of that power under fair and proper procedures when exercising it.”⁶³

Although the legislation may have misfired in some manner, the fact that the Court was denied the entitlement to hear submissions from anyone was consistent with the very next sentence, in s 431(2), stating that the consideration being given by the Court, clearly referring to the consideration under subs (1), was “not a judicial proceeding.” The fact that the drafter had been internally consistent within s 431 did not, in the view of the Full Court, assist in resolving the dilemma because that would merely require the Full Court “to exercise a power that was inalienably judicial, namely, determining whether a conviction should be quashed or confirmed, using a procedure that was inherently antithetic to the judicial process.”⁶⁴ The final result was a declaration that the function of the Full Court involved an exercise of judicial power and that s 431, purporting to state that the function was non-judicial and that no submissions could be heard, did not apply.⁶⁵

In a second ACT case with criminal overtones, *Jacka v Australian Capital Territory*,⁶⁶ Mr Jacka challenged a decision of the Sentence Administration Board in the ACT cancelling a sentence of periodic detention and requiring that the sentence be served in fulltime detention. The primary argument was that such a variation in sentence involved an exercise of judicial power which should, in accordance with principles of the separation of powers, have been vested in a court and not an administrative body. If that argument failed, Mr Jacka contended that the powers exercised by the Board interfered with the institutional integrity of the courts, contrary to the *Kable* principle. At first instance, Refshauge J had held that (a) there was no exercise of judicial power, (b) that the ACT was not subject to the doctrine of separation of powers and (c) that the *Kable* principle was not offended.⁶⁷ In

⁶³ Reference was made to *Wainohu; Annetts v McCann* [1990] HCA 57; 170 CLR 596 and *Commissioner of Police v Tanos* [1958] HCA 6; 98 CLR 383.

⁶⁴ *Eastman* at [43].

⁶⁵ Because that result followed as a matter of statutory construction, regardless of the constitutional argument, the limitation on the evidence to be considered by the Full Court also did not apply.

⁶⁶ *Jacka v ACT* [2013] ACTSC 199 (Refshauge J).

⁶⁷ *Ibid* at [31]-[33].

dismissing the appeal, the Court of Appeal agreed with conclusions (a) and (c) and did not address (b) dealing with the separation of powers.⁶⁸

Writing for the Court, Gilmour J noted that the selection of a sentence, following conviction for an offence, is “an integral part of the administration of justice which cannot be committed to the executive”.⁶⁹ The sentence of the Court involved imprisonment for 10 months with a period of four months to be served by periodic detention: the balance of the sentence was suspended, subject to conditions. The applicant’s failure to attend to serve periodic detention resulted in the cancellation of the period of periodic detention and the requirement to serve the balance of the period in custody. By reference to the statutory scheme, the Court held that the decision of the Board did not involve a resentencing, but rather the exercise of “powers of an administrative character which give effect to the sentence imposed by the magistrate.”⁷⁰ Accordingly, the first basis for challenge was rejected. With respect to the separate argument based on the *Kable* principle, Gilmour J noted:⁷¹

“The appellant’s contention seeks to extend the *Kable* doctrine to the converse position where a Territory law conferring a power upon the executive may be invalid because it would be inconsistent with the institutional integrity of the ACT Supreme Court by removing from it or denying it a function intended by the Parliament to be the characteristic of a Supreme Court or, alternatively, it impermissibly directs, through the board’s decision, the exercise of judicial power by the court.”

Gilmour J concluded that both contentions assumed that the Board exercised judicial power. Having concluded that it did not, he rejected the *Kable* argument.

Although *Jacka* post-dated *Eastman*, the analogy with *Eastman* was not identified. In line with *Eastman*, the argument might have put in reverse. That is, the premise that the Board was in some way varying or interfering with the order of the court must have involved an exercise of judicial power, as affecting the legal statute of the conviction (including the sentence). No doubt the argument, if so phrased would have failed because the premise was not established.

⁶⁸ *Jacka v Australian Capital Territory* [2014] ACTCA 49 (Penfold and Gilmour JJ, Walmsley AJ).

⁶⁹ *Ibid* at [55], citing *Browne v The Queen* [2000] 1 AC 45.

⁷⁰ *Ibid* at [78] and [90].

⁷¹ *Ibid* at [101].

The next case involving a *Kable* challenge before an intermediate court of appeal, *Nguyen v Commissioner of the Australian Federal Police*,⁷² concerned the conferral of power on the Queensland Supreme Court to make orders under the *Proceeds of Crime Act 2002* (Cth). After a period in which *Kable* had had no positive application, it burst into new life in 2009 as a basis for setting aside the ex parte procedure in the Supreme Court of New South Wales permitting forfeiture of assets suspected of being derived from serious crime-related activity.⁷³ The argument in *Nguyen* was, however, somewhat removed from that procedure. Pursuant to the Commonwealth Act, the Commissioner was able to apply to a judge of the Supreme Court seeking an order for an examination to be undertaken by a Commonwealth officer. Contrary to the somewhat colourful submissions put on behalf of the applicant, the Commonwealth officer did not become a functionary of the State Supreme Court nor act on its behalf.⁷⁴ Various implications which were said to flow from the insertion of a Commonwealth officer into the structure of the Supreme Court fell away once it was concluded that the Commonwealth officer did not form part of the Court.

The *Kable* principle was relied on in a somewhat unusual way. As explained by Fraser JA,⁷⁵ the argument was based on the premise that *Kable* imposed a constraint on Commonwealth legislative power as well as on State legislative power.⁷⁶ The applicants submitted that the vesting of federal jurisdiction in the Queensland Court was designed to “manipulate an abdication by [sic] the Supreme Court of Queensland of its supervisory jurisdiction to ensure procedural fairness in the exercise of Commonwealth judicial power” and that “the Commonwealth has created an island of Federal power immune from scrutiny by the very court it invests with federal jurisdiction.” Fraser JA rejected these submissions in uncompromising terms:⁷⁷

“These arguments were again based upon the false premise that an examiner exercises the jurisdiction of the Supreme Court. They also

⁷² [2014] QCA 293 (Fraser, Holmes and Muir JJA).

⁷³ See *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49; 240 CLR 319, in relation to the *Criminal Assets Recovery Act 1990* (NSW), s 10.

⁷⁴ Compare *Le Mesurier v Connor* [1929] HCA 41; 42 CLR 481.

⁷⁵ With whom Holmes and Muir JJA agreed.

⁷⁶ *Nguyen* at [25], referring to a statement of Martin CJ in *Director of Public Prosecutions (Cth) v Kamal* [2011] WASCA 55; 206 A Crim R 397 at [9]. The correctness of that proposition was not determined.

⁷⁷ *Nguyen* at [26] (citations omitted).

assumed that it is a defining characteristic of the Supreme Court of the State that it has a supervisory jurisdiction over the exercise of Commonwealth executive power. That is incorrect. What *Kirk v Industrial Court of New South Wales* established in this respect is that it is a defining characteristic of the Supreme Court of the State that such a body exists and has a supervisory jurisdiction to enforce the limits on the exercise of State executive and judicial power. The applicants' arguments also overlook the supervisory jurisdiction of the High Court under s 75(v) of the *Constitution* and of the Federal Court under ss 39B(1) and 39B(1A)(c) of the *Judiciary Act 1903* (Cth)."

There is more than one proposition identified in the reasoning in *Kirk* which invites further analysis. In the meantime, intermediate appellate courts are bound to be faced with arguments which find their source in aphoristic statements. One such statement, relied upon in *Nguyen*, was that for a State to legislate to deprive its Supreme Court of part of its supervisory jurisdiction "would be to create islands of power immune from supervision and restraint."⁷⁸ However, it may also be said that a body which has power to decide a dispute as to facts and law has the power to decide it wrongly. Unless a jurisdictional error includes any error of law, the power of the tribunal may extend to misidentifying or misapplying a non-jurisdictional legal principle. It is necessary to identify which legal principles lie within its authority to determine and which do not, because the joint reasons in *Kirk* confirmed "the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context."⁷⁹

A number of steps in the reasoning in *Kirk* can be misused if taken out of context. For example, the joint reasons stated:⁸⁰

"If a court has limited powers and authority to decide issues of an identified kind, a privative provision does not negate those limits on that court's authority."

Such a proposition tends to obscure the difficulty in defining what those limits are and the role of a privative clause in identifying such limits.

In any event, colourful metaphors cannot avoid the need to make distinctions: a power to decide a matter wrongly *is*, in one sense, an island of power immune from supervision. However, as Fraser JA correctly noted, that statement in *Kirk* expressly

⁷⁸ *Kirk* at [99].

⁷⁹ *Kirk* at [100].

⁸⁰ *Kirk* at [55](g).

referred to the role of the supervisory jurisdiction to enforce “the limits on the exercise of State executive and judicial power”.

Four other cases raised *Kable* arguments in a civil context. *Australian National Car Parks Pty Ltd v State of New South Wales*⁸¹ involved a challenge to a statutory provision denying preliminary discovery of the names and addresses of owners of vehicles which had parked on the applicant’s premises without payment.⁸² The proceedings were commenced in the original jurisdiction of the High Court but were remitted to the NSW Court of Appeal. The section stated that “[Roads and Maritime Services] cannot be required by preliminary discovery to disclose any information about a registerable vehicle ... if the preliminary discovery is for the purpose of the recovery of private car park fees.” The plaintiff read the provision, not as precluding an order for preliminary discovery, but as immunising the government authority from the obligation imposed by the order. As a matter of construction, the Court accepted the State’s submission that the section was directed to the powers of the court and provided a legislative exception to the power to order production of documents. On that construction, the submission that the section “deprives the plaintiff of its fundamental common law rights before the law to sue a third party for alleged breaches of contract” was rejected.⁸³

The plaintiff’s submission adopted the language of French CJ in *State of South Australia v Totani*.⁸⁴ However, as the Court of Appeal noted, the modern procedure for preliminary discovery did not exist prior to rules of court promulgated in 1970 and earlier practice did not depend upon any common law power but the availability of a bill in equity.⁸⁵ An ambivalent concession on the part of the plaintiff that, if its point of statutory construction failed, the constitutional argument would fail, was accepted by the Court.

A similar argument was addressed, very late in the year, in *A v Independent Commission Against Corruption*.⁸⁶ The applicant had been served with a summons to produce documents to the Commission. Wishing to challenge the decision to

⁸¹ [2014] NSWCA 298; 287 FLR 448 (Basten, Gleeson and Leeming JJA).

⁸² *Road Transport Act 2013* (NSW), s 279.

⁸³ *Australian National Car Parks* at [17]-[20].

⁸⁴ *Totani*, above fn 51, at [68].

⁸⁵ *Australian National Car Parks* at [18].

⁸⁶ [2014] NSWCA 414 (Bathurst CJ, Basten and Ward JJA).

issue the summons, the applicant issued a notice to requiring production of the Commission's documents relating to that decision. In response, the Commission relied upon a statutory secrecy provision stating that a "person to whom this section applies" shall not be required to produce documents in the person's possession in the exercise of the person's functions under the Act.⁸⁷ There was an issue of statutory interpretation, the applicant arguing that the section only protected a "person" and not the Commission. That argument was rejected on the basis that the functions of the Commission, including answering notices to produce, could only be effected by an individual agent or officer: the Commission's documents were therefore protected by the section.

The constitutional challenge to the validity of the section was based on the proposition that without access to such internal documents, the ability of an affected party to challenge a decision of the Commission was diminished, as was the Court's ability to exercise its supervisory jurisdiction with respect to decisions of the Commission. The argument invoked the principles established in *Kirk* (although the secrecy provision fell far short of a comprehensive privative clause) and the principles addressed in *Nicholas* (although the limitation on the Court's powers arose with respect to the supervisory jurisdiction rather than a criminal trial).⁸⁸ *The Application of Attorney General (NSW)* was not cited to the Court, nor did the reasoning in *A v ICAC* involve any assessment of the reasonableness of the statutory constraint as a matter of legislative policy.

The third case, from South Australia, *Palace Gallery Pty Ltd v Liquor and Gambling Commissioner*,⁸⁹ concerned the effect of a code of practice forming a condition of the operation of licensed premises. This case bore some similarity to *Rich*, as it involved a challenge to legislation retrospectively validating what appeared to have been invalid executive action. Prior to the amendment, the *Liquor Licensing Act 1997* (SA) conferred on the Commissioner power to publish a "code of practice" including measures designed to promote identified purposes.⁹⁰ The applicant licensee, Palace Gallery Pty Ltd, challenged certain provisions in the code on the ground that they did

⁸⁷ *Independent Commission Against Corruption Act 1988* (NSW), s 111(3).

⁸⁸ See discussion in *A v ICAC* at [47]-[50] and at [177]ff.

⁸⁹ [2014] SASCFC 26; 118 SASR 567 (Kourakis CJ, Blue and Stanley JJ).

⁹⁰ Section 11A, set out in *Palace Gallery* at [15].

not fall within the specified purposes. The response of the government was to replace s 11A(2) with the broad statement that the code might include measures “that can reasonably be considered appropriate and adapted to the furtherance of the objects of this Act.”⁹¹ The amending Act then validated any code or provision of a code, purportedly in force on the commencement of the new provision, which would have been valid if valid under the new section.⁹²

The constitutional argument for the applicant, as summarised by the Court,⁹³ involved two limbs. The first was that Sch 1, cl 3 “directs this Court as to the exercise of its jurisdiction in this action.” The second limb, which appears to have been consequential on the characterisation relied on under the first limb, was that the law offended the judicial integrity principle established in *Kable*.

In a carefully reasoned judgment, the Court dismissed both limbs of the argument, stating the basic proposition succinctly at the outset:⁹⁴

“It is within the legislative power of Parliament to change the existing law in a way that has an effect on pending proceedings. What Parliament cannot do is direct a court as to the conclusions it is to reach in the exercise of its jurisdiction.”

As the Court noted, the first sentence in that statement was supported by a long line of authority.⁹⁵ The point of distinction raised by the second sentence was to be found in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,⁹⁶ in which a provision of the *Migration Act 1958* (Cth), prohibiting a court from ordering the release of a designated person from custody was invalid. The distinction was also supported by reference to *Australian Education Union v General*

⁹¹ *Liquor Licensing (Miscellaneous) Amendment Act 2013* (SA), s 6(1).

⁹² Sch 1, cl 3 of the amending Act.

⁹³ *Palace Gallery* at [32].

⁹⁴ *Palace Gallery* at [34].

⁹⁵ Reference was made to *Nelungaloo Pty Ltd v The Commonwealth* [1947] HCA 58; 75 CLR 495; *The Queen v Humby; Ex parte Rooney* [1973] HCA 63; 129 CLR 231; *Australian Building Construction Employees and Builders' Labourers Federation v Commonwealth* [1986] HCA 47; 161 CLR 88; *HA Bachrach Pty Ltd v Queensland* [1998] HCA 54; 195 CLR 547 and *Re Macks; Ex parte Saint* [2000] HCA 62; 204 CLR 158.

⁹⁶ [1992] HCA 64; 176 CLR 1.

*Manager of Fair Work Australia*⁹⁷ referring to the statements in the judgment of Gummow, Hayne and Bell JJ.⁹⁸

“At least in cases which are still pending the judicial system, it will be important to consider whether or to what extent the impugned law amounts to a legislative direction about how specific litigation should be decided. That is, as one author has written, a balance must be struck between the recognition that the Parliament may change the law in a way that has an effect on pending proceedings (a proposition that has been described as ‘the changed law rule’) and the recognition that the Parliament cannot direct the courts as to the conclusions they should reach in the exercise of their jurisdiction (a proposition that has been described as ‘the direction principle’).”

In *Palace Gallery*, the Full Court concluded that the circumstances fell squarely within the characterisation of a changed law or standard and not a direction to the court as to how to decide a particular case.

How *Kable* came to be relied upon in this context was not entirely clear. The Court said⁹⁹ that *Kable* and its sequelae (which were said to include *South Australia v Totani*) stood for the proposition that “the legislative power of a state does not extend to enacting a law which deprives a court of the state of one of its defining characteristics as a court or impairs one or more of those characteristics.” That proposition was supported by a reference to the judgment of French CJ in *Totani*,¹⁰⁰ but the passage focused on the proposition that the Commonwealth, in conferring a new jurisdiction upon a state court, “takes the court as it finds it”, a rather different point.¹⁰¹ The Full Court then stated that the protected characteristics of a Supreme Court “include the maintenance of the institutional integrity of a state court, which requires, inter alia, the decisional independence of that court.” That proposition, too, was sourced to French CJ in *Totani*, but in a passage which did not draw upon *Kable*.¹⁰² It may be that the thrust of the *Kable* argument was actually based upon statements in the Legislative Council in the course of debating the amending Act which referred specifically to the *Palace Gallery* proceedings, thus permitting an

⁹⁷ [2012] HCA 19; 246 CLR 117.

⁹⁸ *AEU* at [87] (citations omitted).

⁹⁹ *Palace Gallery* at [46].

¹⁰⁰ *Totani* at [67] and [68].

¹⁰¹ See *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander (Sawmillers' Case)* [1912] HCA 42; 15 CLR 308 at 313 (Griffiths CJ).

¹⁰² See *Totani* at [70]-[71]; cf [69].

argument (rejected) that this was *ad hominem* legislation.¹⁰³ This case illustrates the tendency to run together the reasoning in *Kable* (the State cannot confer on courts able to exercise federal jurisdiction functions incompatible with federal judicial power) and that in *Kirk* (the State cannot deprive its Supreme Court of an essential characteristic of its jurisdiction). *Palace Gallery* appears to have been argued on the basis that the legislation in question did both.

Finally, an apparently minor case should be noted. *Clement v Comcare*¹⁰⁴ involved the refusal of a claim for workers' compensation by a former Commonwealth public servant. Two constitutional arguments were identified by the Court: one concerned an alleged acquisition of property otherwise than on just terms; the other involved a challenge to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), limiting "appeals" to the Court to questions of law, thus rendering factual findings unreviewable. The Court found the answer to the latter challenge in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation*.¹⁰⁵ What Ms Clement sought to raise, it appears, was a point identified in *TNT Skypak*, but not necessary to be resolved in that case, there being no factual issue in dispute between the parties. Gummow J stated:¹⁰⁶

"However, after the exhaustion of the administrative processes before the tribunal, the parties may still be in controversy as to questions both of law and of fact. In such a case it might appear that the jurisdiction of this court was, on the face of s 44, limited to less than the whole of the controversy and thus less than the whole of the matter arising under federal law. This would be because the effect of the law made by the Parliament would be to excise from the matter so much of the claims made therein as did not constitute questions of law. In such cases questions may arise as to the extent of the validity of s 44 of the AAT Act."

Gummow J then noted that s 44 is concerned with "matters that arise under laws made by the Parliament."¹⁰⁷ He continued:

"It may be that with respect to matters which arise under a law made by the Parliament, it is for the Parliament to create the rights or obligations in question and in so doing to determine the content of

¹⁰³ *Palace Gallery* at [45]-[49].

¹⁰⁴ [2014] FCAFC 164 (Bennett, Katzmann and Wigney JJ).

¹⁰⁵ [1988] FCA 119; 82 ALR 175 (Gummow J).

¹⁰⁶ *TNT Skypak* at 181.

¹⁰⁷ Constitution, s 76(ii), jurisdiction in respect of such "matters" being conferred on the Federal Court pursuant to s 77.

matters arising under that law. In other words, the rights and obligations, which supply the foundation for the controversy which is the 'matter', would be provided by the statute. The statute itself thus would govern the content of that matter: *R v Quinn; Ex parte Consolidated Foods Corp.*¹⁰⁸ In this way, factual disputes might never be brought within the ambit of matters arising under the law in question. The only matter for the purposes of s 44 of the AAT Act which arose under the laws made by the Parliament would be questions of law; questions of fact effectively would be excluded from the matter in respect of which this Court is invested with jurisdiction."

This reasoning invites further consideration: reliance upon it, without elucidation in a case where the outcome turned upon it, is troubling. First, the distinction between fact and law is not readily drawn and provides a less than entirely satisfactory basis for resolution of a constitutional issue which does not expressly rely upon such a distinction. Secondly, it may involve a fiction to suggest that a dispute, controversy or "matter" can be divided so as to exclude particular elements.¹⁰⁹ *Quinn* itself considered whether a determination by the Registrar of Trademarks to remove a trademark from the register involved an exercise of judicial power within Ch III of the Constitution. The challenge failed¹¹⁰ on the basis that the rights and obligations deriving from the presence of a trademark on the register "spring from the statute which governs their creation and continuance", the administration of the statute being vested in the registrar whose decisions are administrative and not judicial.¹¹¹ The fact that the registrar "has to consider complicated facts and apply complex legal criteria" did not avail the prosecutor.¹¹² This leads to the third concern, namely that the concept of judicial power under the Constitution is to be identified by reference to the source of rights and obligations, namely whether they are to be found in the general law or under statute.¹¹³ This, perhaps curiously, seeks to locate the doctrine of separation of powers in historical practice rather than by reference specifically to the institutional structure of the Constitution, an approach at odds with the demand for a textual or structural basis for constitutional principles articulated in both *Lange* and in *Kirk*.

¹⁰⁸ [1977] HCA 62; 138 CLR 1 at 5, 10.

¹⁰⁹ It was a similar attempt to divide a single dispute as to rights and liabilities which caused Gummow J (with Hayne JJ and Gaudron) to dissent in *Abebe v The Commonwealth* at [165]ff, albeit the carve out was only with respect to questions of law.

¹¹⁰ WMC Gummow appearing for the unsuccessful prosecutor.

¹¹¹ *Quinn* at 10 (Jacobs J).

¹¹² See statement of argument, *ibid* at 2(6).

¹¹³ The distinction was applied in *Attorney General (Cth) v Breckler* [1999] HCA 28; 197 CLR 83 at [40] and [41].

This is not the place to pursue these issues: suffice it to say that the tentatively expressed views of Gummow J in *TNT Skypak* were given the authoritative support of the Full Court of the Federal Court in *Clement* without further consideration.

Freedom of political communication

Although there have been a number of cases involving the freedom of political communication, I propose to deal with them briefly. That is for two reasons: first, as noted by Leeming JA in the equivalent session last year, and quoting *Blackshield & Williams*, “the freedom will rarely avail the litigant who seeks to rely on it.”¹¹⁴ Secondly, Justice Leeming dealt with several such cases last year, including one the subject of an appeal in this year’s crop.

The Full Court of the Federal Court dealt with two of the Occupy protest cases, *O’Flaherty v City of Sydney Council*¹¹⁵ and *Kerrison v Melbourne City Council*.¹¹⁶

Exercising a power under s 632 of the *Local Government Act 1993* (NSW), the Sydney City Council had erected notices in Martin Place which prohibited certain activities in the area, including “camping or staying overnight”. Mr O’Flaherty was charged with a breach of that prohibition when, as part of “Occupy Sydney” he stayed overnight as a protest against “social and economic inequality and corruption of political systems.”¹¹⁷ Eschewing more traditional defences with a better record of success in public protest cases¹¹⁸ and eschewing state courts for the federal system, Mr O’Flaherty unsuccessfully challenged the power of the Council to erect the notice in question.¹¹⁹

Katzmann J accepted that staying overnight in Martin Place was “an act of political communication” because it was conduct intended by the protestors to draw attention to their cause. She also referred to the unchallenged evidence of Mr O’Flaherty that he spoke to members of the public and fellow protestors about issues of disparity in

¹¹⁴ G Williams, S Brennan and A Lynch, *Blackshield & Williams, Australian Constitutional Law & Theory* (6th ed, 2014) preface, p v.

¹¹⁵ [2014] FCAFC 56; 221 FCR 382 (Edmonds, Tracey and Flick JJ).

¹¹⁶ [2014] FCAFC 130; 203 LGERA 169 (Flick, Jagot and Mortimer JJ).

¹¹⁷ *O’Flaherty* at [2].

¹¹⁸ See, eg, *Director of Public Prosecutions v Priestley* [2014] NSWCA 25; 201 LGERA 1 (Beazley P, Emmett and Gleeson JJA).

¹¹⁹ *O’Flaherty v City of Sydney Council* [2013] FCA 344; 210 FCR 484 at [5] (Katzmann J).

power and wealth in Australian society” and thus engaged in political discourse whilst staying overnight in Martin Place. He failed under the second limb of *Lange* on the basis that the prohibition was appropriate and adapted to a legitimate governmental purpose. Because Mr O’Flaherty succeeded on the first limb of the *Lange* principle, and there was no cross-appeal, the somewhat fragile basis for that conclusion was not in issue in the Full Court. As the Full Court noted, “[i]t was common ground on the appeal that there was an ‘effective burden’ on the constitutionally guaranteed freedom of communication.”¹²⁰ Reference was then made to the conclusion of the primary judge that the effect on the freedom was “slight”.¹²¹ The narrowness of the territory covered by a prohibition which constituted a “slight” but “effective” burden was not explored.

The fact that the prohibition on camping was not directed at political communication, or communication of any kind, but was directed to public health and safety purposes common in urban areas across the globe, rendered it difficult to identify it as other than serving legitimate public purposes in an appropriate manner.

The second case, *Kerrison*, involved “Occupy Melbourne”. The “Occupy Melbourne” protest started in the Treasury Gardens in November 2011, later moving to the Flagstaff Gardens. Both were public places subject to control under the *Local Government Act 1989* (Vic). In particular, the Council was empowered to make “local laws” regulating behaviour in such places. The relevant local law prohibited camping in both Gardens without a permit. A person believed to be acting in breach of a prohibition could be directed to leave the public place.¹²² Similar provisions were to be found in regulations made under the *Crown Land (Reserves) Act 1978* (Vic). Various issues arose which need not be considered in this review, the constitutional issue not being reached until more than 100 paragraphs into the judgment.¹²³ With respect to the first limb of *Lange*, the primary judge had found that a prohibition against camping in tents “was a burden on a form of non-verbal communication which the implied freedom protects, and this effect was not slight nor

¹²⁰ *O’Flaherty* at [11].

¹²¹ *O’Flaherty* at [15].

¹²² Clause 14.12, set out in *Kerrison* at [30].

¹²³ *Kerrison* at [112].

insubstantial.”¹²⁴ The judge also found that the object of the statutory provisions was “to provide for the preservation, care, maintenance and equitable use of the gardens” that it was an object compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, findings which were not challenged on appeal.¹²⁵ In substance, it appears that the focus of the appeal was upon the enforcement provisions, rather than the substantive provisions. The Court dismissed the separation as artificial.¹²⁶

In *A v Independent Commission Against Corruption* the applicant challenged the validity of a statutory power (which allowed the Commission to summons individuals to produce documents or answer questions) on the basis that it had a chilling effect on political communication. The person whose records were sought from a media organisation, known only as A, was described as a political journalist. Although the applicant was not aware of the subject matter of the investigation at the time the proceedings were brought, the argument assumed that a valid investigation must relate to corruption in respect of governmental matters and could therefore extend to obtaining information from journalists as to such matters, including to disclosure of their sources. The issue was identified in the following terms:¹²⁷

“The submission was that as far as s 35 could be deployed to obtain access to a journalist's sources, it could have a chilling effect on the willingness of people to reveal to journalists information about the workings of government. If those with knowledge were to be discouraged from talking to journalists, the submission continued, public debate on matters of political importance would be inhibited.”

The Court accepted that the first limb of *Lange* was engaged and it was therefore necessary to address the second limb. The constitutional challenge failed at that stage, the Court noting that the end to which the compulsory disclosure provisions was directed was not merely a legitimate end and one compatible with the maintenance of representative government, but was itself directed squarely to that very purpose.¹²⁸

¹²⁴ *Kerrison* at [114].

¹²⁵ *Kerrison* at [115].

¹²⁶ *Kerrison* at [141].

¹²⁷ *A v ICAC* at [64].

¹²⁸ *A v ICAC* at [68] and [159]-[161].

Two further cases, brought in Queensland by litigants in person, sought to invoke the freedom of political communication as an individual right, rather than a constraint on legislative power. *Gallagher v McClintock*¹²⁹ involved the distribution by the applicant of provocative pamphlets attacking the theology of the respondent who was the pastor of the Yeppoon Wesleyan Methodist Church, and other members of the Church Board. The respondent sought to have the applicant excluded from church property. The applicant alleged this conduct infringed his right to speak freely in expressing his personal views. That freedom, subject to the laws of defamation, was not challenged by the respondents, except in so far as it was sought to be exercised whilst on church property. Flanagan J noted that the asserted right to freedom of speech was misconceived.¹³⁰ She noted that the written submissions also made reference to the implied freedom of political communication and *Lange*.¹³¹ Flanagan J dismissed the argument in the following passage:¹³²

“Even if one were to assume that the pamphlet, which the appellant wishes to distribute on Church property, constituted a communication that fell within the implied freedom, he simply has no legal or equitable right to be upon the land for the purpose of such distribution. Nor can it be said that the revocation of his licence to be upon Church land interferes with any asserted implied freedom. The Court is not dealing here with any proposed law which seeks to curtail the appellant’s right to express his opinions but simply with his rights (or lack thereof) to express those opinions on land from which he has been lawfully excluded.”

The second case, heard by Collier J in the Federal Court, was *Mbuzi v Griffith University*.¹³³ The dispute arose from an offer by the University to the applicant to enrol as a higher degree research candidate at the University. The University and the applicant were unable to identify a research topic acceptable to both which could be properly supervised by the University. The candidature was terminated. Collier J noted an allegation that “the decision to terminate his candidature arose from allegations of him being ‘aggressive’, ‘impolite’, ‘loudly speaking’ and using ‘offensive language’.”¹³⁴ The claim was dismissed on a number of bases, although a sufficient reason was that “the implied right of freedom of communication is a ‘shield’, not a

¹²⁹ [2014] QCA 224 (Holmes JA, Flanagan and Ann Lyons JJ).

¹³⁰ *Gallagher* at [31] (Holmes JA and Ann Lyons J agreeing).

¹³¹ *Gallagher* at [40].

¹³² *Gallagher* at [44].

¹³³ [2014] FCA 1323.

¹³⁴ *Mbuzi* at [57].

‘sword’, and can be invoked in circumstances where an existing law allegedly impacts on the freedom of the citizen.”¹³⁵ The claim was correctly dismissed as misconceived.

It is likely that, despite its limited operation, the implied freedom of political communication will continue to be raised in state and federal courts. Following the delivery of judgment, almost exactly two years ago, in *Wotton v State of Queensland*,¹³⁶ with the appearance that basic principles had been settled, doubts about that proposition followed a year later with the delivery on 27 February 2013 of *Attorney General for the State of South Australia v Adelaide City Corporation*¹³⁷ and *Monis v The Queen*.¹³⁸ *Monis*, dealt with a provision of the *Criminal Code* (Cth) prohibiting use of the postal service to make communications “that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive”: a six member Court split equally. The judgments in the two cases cover 124 pages in the Commonwealth Law Reports.

However, it is a particular feature of the Occupy cases which is likely to lead to continued disputation. Because the implied freedom constitutes a constraint on legislative power, its operation is not to be judged by reference to the circumstances of particular cases, but rather by reference to abstract questions of statutory construction and the practical operation of laws, considered at a largely abstract level. However, as lawyers well understand, difficult issues of statutory construction arise because the legislature cannot be expected to foresee all the circumstances in which the application of a particular law may arise. Accepting that (a) conduct may constitute a form of communication and (b) the implied freedom extends to laws which are not directed to speech or even communication in the broad sense, the operation of the constitutional principle will be unpredictable and contestable. Judgments are required about the extent to which a particular law is appropriate and adapted to its apparent purpose and the extent to which it is “compatible with” maintenance of the constitutionally prescribed system of representative and responsible government. This seems to be an area in which, rather than developing

¹³⁵ *Mbuzi* at [61].

¹³⁶ [2012] HCA 2; 246 CLR 1.

¹³⁷ [2013] HCA 3; 249 CLR 1.

¹³⁸ [2013] HCA 4; 249 CLR 92.

the case law on a cautious and constrained basis, the High Court has sought to articulate principles at a high level of abstraction and generality.

Conclusions

One must be duly timid in drawing conclusions from a review of 12 months' cases on constitutional law. In particular, returning to my opening theme, one would not expect immediate clarification of the relationship between the courts and legislatures. On the other hand, it appears that particular tensions are rising to the surface. Thus there is a need for a clearer methodology for identifying the kinds of characteristics of courts sought to be protected by *Kable* and *Kirk* principles. The scope of the protected supervisory jurisdiction (*Kirk*) is likely to grow in significance as Parliament imposes limitations on procedural rights and rights of appeal.

In relation to the freedom of political communication, it is possible to read down statutes according to the "principle of legality", also known as the clear statement principle. There is an attraction to protecting fundamental rights (including a broad-based freedom of speech) by imposing such a "manner and form" requirement on the legislature, rather than denying legislative power entirely. However, the clear statement principle does not engage with the weighing of conflicting purposes and principles identified in *Lange*.

The cases discussed are largely concerned with limiting either Commonwealth or State legislative power. Similar issues are raised by what may be seen as an expansionist view of judicial review of executive action, which moves the boundary between the judicial and executive arms of government. These changes raise tensions requiring to be addressed by the High Court in a manner which articulates a principled approach in a changing social and regulatory context.

ANNEXURE

NAME	CITE	DATE	TOPIC	STATUS
Full Federal Court of Australia				
<i>Congoo v Queensland</i>	[2014] FCAFC 9; 218 FCR 358	21/2/14	Just terms	Special leave granted
<i>NBNB v Minister for Immigration and Border Protection</i>	[2014] FCAFC 39; 220 FCR 44	9/4/14	s 51(xix)	
<i>O'Flaherty v City of Sydney Council</i>	[2014] FCAFC 56; 221 FCR 382	8/5/14	Implied freedom	Special leave refused: [2014] HCATrans 232
<i>Coshott v Prentice</i>	[2014] FCAFC 88; 221 FCR 450	23/7/14	Meaning of "matter" in Ch III	
<i>Jaffarie v Director General of Security</i>	[2014] FCAFC 102	18/8/14	Provision supported by head of power; Ch III	Special leave application filed
<i>Taniela v Minister for Immigration and Border Protection</i>	[2014] FCAFC 104	11/8/14	ss 51(xix) and (xxvii).	Special leave refused: [2014] HCASL 242
<i>Kerrison v Melbourne City Council</i>	[2014] FCAFC 130; 203 LGERA 169	3/10/14	Implied freedom	
<i>Batterham v Goldberg</i>	[2014] FCAFC 136	15/10/14	s 109	
<i>Clement v Comcare</i>	[2014] FCAFC 164	28/11/14	Just terms; Ch III	
<i>Lee v Commonwealth of Australia</i>	[2014] FCAFC 174	18/12/14	ss 92, 99, 100; <i>Melb Corp</i>	
<i>Albrecht v Commissioner of Taxation</i>	[2014] FCAFC 176	19/12/14	<i>Melb Corp</i>	
Federal Court of Australia				
<i>United Firefighters Union of Australia v Country Fire Authority</i>	[2014] FCA 17; 218 FCR 210	31/1/14	Section 51(xx); <i>Melb Corp</i>	

NAME	CITE	DATE	TOPIC	STATUS
<i>Knight v State of Victoria</i>	[2014] FCA 369; 221 FCR 561	11/4/14	Ch III - <i>Kable</i> ; s 90	
<i>Lee v Cth of Australia</i>	[2014] FCA 432; 220 FCR 300	2/5/14	ss 92, 99, 100; <i>Melb Corp</i>	Appeal dismissed: [2014] FCAFC 174
<i>Anderson v XLVII</i>	[2014] FCA 1089	10/10/14	s 51(xxix); Ch III - <i>Kable</i> ; s 80	
<i>Mbuzi v Griffith University</i>	[2014] FCA 1323	5/12/14	Implied freedom; "Constitutional right of due process"	
ACT - Court of Appeal; Full Court; Supreme Court				
<i>Jacka v ACT</i>	[2014] ACTCA 49	12/11/14	Ch III - <i>Kable</i>	
<i>Eastman v Director of Public Prosecutions</i>	[2014] ACTSCFC 1; 9 ACTLR 163	23/6/14	Ch III - <i>Kable</i>	
<i>Slipper v Magistrates Court of ACT</i>	[2014] ACTSC 85; 285 FLR 78	9/5/14	Parliamentary privilege	
<i>Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)</i>	[2014] ACTSC 165; 286 FLR 355	4/7/14	s 116	Application to appeal heard on 14/11/14.
NSW Court of Appeal				
<i>Australian National Car Parks Pty Ltd v New South Wales</i>	[2014] NSWCA 298; 287 FLR 448	29/8/14	Ch III - <i>Kable</i>	
<i>A v Independent Commission Against Corruption</i>	[2014] NSWCA 414	5/12/14	Implied freedom; Ch III - <i>Kable</i>	
NSW Court of Criminal Appeal				
<i>Application of the Attorney-General</i>	[2014] NSWCCA 251	6/11/14	Ch III - <i>Kable</i>	
NSW Supreme Court				
<i>'A' v Independent Commission Against Corruption</i>	[2014] NSWSC 1167	27/8/14	Implied freedom; Ch III - <i>Kable</i>	Appeal dismissed

NAME	CITE	DATE	TOPIC	STATUS
<i>Paphos Providores Pty Ltd v Constable Aziz Ladha</i>	[2014] NSWSC 1788	17/12/14	Just terms; s 51(xviii); Ch III - Kable	
Queensland Court of Appeal				
<i>Scriven v Sargent</i>	[2014] QCA 133; 309 ALR 191	6/6/14	Just terms	
<i>Gallagher v McClintock</i>	[2014] QCA 224	5/11/14	Implied freedom; parliamentary privilege	
<i>Nguyen v Commissioner of the Australian Federal Police</i>	[2014] QCA 293	21/11/14	Ch III - Kable	
Supreme Court of Queensland				
<i>Ngurampaa Ltd v Balonne Shire Council</i>	[2014] QSC 146	3/7/14	Sovereignty of Australia	
<i>Harvey v Commissioner of State Revenue</i>	[2014] QSC 183	12/8/14	Ch III - Kable	
<i>Attorney-General (Qld) v Williams</i>	[2014] QSC 192; 287 FLR 334	18/9/14	s 109	
<i>Flegg v Hallett</i>	[2014] QSC 278	7/11/14	Parliamentary privilege	
South Australia - Full Court; Supreme Court				
<i>Palace Gallery Pty Ltd v Liquor and Gambling Commissioner</i>	[2014] SASCFC 26; 118 SASR 567	4/4/14	Ch III - Kable	
<i>Re Estate of Tamburin</i>	[2014] SASC 58; 119 SASR 143	5/5/14	s 118	
Victoria - Court of Appeal; Supreme Court				
<i>Rich v R</i>	[2014] VSCA 126; 286 FLR 251	20/6/14	Ch III - Kable	
<i>Simpson v Andrew Maynard Architects</i>	[2014] VSC 365; 287 FLR 418	5/8/14	Privative clause; Kirk	
<i>Overend v Chief Commissioner of Police</i>	[2014] VSC 424	5/9/14	Ch III - Kable	

NAME	CITE	DATE	TOPIC	STATUS
Western Australia - Court of Appeal; Supreme Court				
<i>PT Bayan Resources TBK v BCBC Singapore Pte Ltd</i>	[2014] WASCA 178; 288 FLR 299	25/9/14	s 109	
<i>Gransch v Walker</i>	[2014] WASC 178	26/3/14	Implied freedom	
<i>White v Spiers Earth</i>	[2014] WASC 139; 99 ACSR 214	16/4/14	Just terms	Appeal pending