The Federal and State Courts on Constitutional Law: The 2011 Term

Justice Alan Robertson - Federal Court of Australia

17 February 2012

Synopsis of Constitutional Cases Decided in the Federal and State Courts:

The 2011 Term
There was a prenuptial financial agreement in September 2005. The question was the constitutional validity of the *Federal Justice Systems Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) (“the Amendment Act”) which amended the *Family Law Act 1975* in light of the decision of the Full Court of the Family Court in *Black & Black* [2008] FamCAFC 7 where the Court held that for a financial agreement to be binding under s 90G there had to be strict compliance with those provisions.

There were two constitutional arguments raised on behalf of the husband. The first claimed that the Amendment Act "constituted a marked interference with the judicial process and circumscribed the judicial function and discretions incidental to it.": *R v Humby; ex parte Rooney* (1973) 129 CLR 231 at 250 per Mason J. The second argument was that the legislation offended s 51(xxxi) both with regard to the parties themselves and with regard to any actions the parties may have against their former solicitors.

As to the first of these arguments, that the Amending Act amounted to a substantial interference with the jurisdiction of the Family Court and was therefore inconsistent with Chapter III of the Constitution, it was accepted that the Commonwealth Parliament was able validly to make laws with retrospective effect. It was also not in issue that validating legislation did not infringe Chapter III. Benjamin J held that the Amending Act did not interfere with the Court’s ability to determine the proceedings that were before it: the amendment conferred a broad discretion and therefore did not tell the court how to deal with a particular matter and how to deal with particular parties. *Liyanage v The Queen* [1967] 1 AC 259 was distinguished.

The s 51(xxxi) argument also failed. Benjamin J held that essentially this was not an acquisition of property. Benjamin J also accepted the submission of counsel for the Commonwealth Attorney-General that because the marriage power gave the legislature power to make laws relating to the division of property and payment of maintenance between parties, s 51(xxxi) did not apply. Benjamin J seems also to have accepted a submission that the amendments were concerned with the adjustment of competing rights of parties to a marriage on dissolution of that marriage and reflected a further adjustment to the compromise reached by the Parliament as to when people should be allowed to arrange their affairs and deal with rights on dissolution as they saw fit in an agreement and when they should not and the jurisdiction of the courts to make “adjustive orders”.
This Full Court decision concerned Chapter III questions as to the validity of the *Child Support (Assessment) Act 1989* (Cth), Part 7, Divisions 3 and 4 and in particular whether those provisions conferred non-judicial powers on the Family Court.

In a joint judgment with which Thackray J concurred, Bryant CJ and Austin J dismissed an appeal by the father against orders made by the Federal Magistrates Court. That Court had heard and determined an application by the mother for departure from administrative assessments of child support for their daughter under s 117 of the Assessment Act.

The argument was that Parliament had intermingled the role of the Executive with the role of a Chapter III Court: what the court was doing when it made an order under s 118 of the Assessment Act was not making a departure order by way of appeal or correction of the tribunal or decision of the Child Support Registrar but rather exercising a role which bound it up with the departure application process and made it a mere adjunct to the departure process itself and thus taking an administrative action. The statutory provisions, it was submitted, conferred the same administrative powers to vary assessments on the Court and on the Child Support Registrar.

The Full Court considered *Luton v Lessels* (2002) 210 CLR 333 where the High Court had held that the functions of the Child Support Registrar did not involve the exercise of judicial power, in part because the courts could conduct a rehearing of the matter which had been decided by the Child Support Registrar.

The Full Court of the Family Court held that the powers were validly conferred, that is, that the functions and powers were an exercise of judicial power. The Full Court of the Family Court applied the well-known reasoning that there were some powers which may be treated as administrative when conferred on an administrative functionary but were judicial when conferred on a court.

A further argument was also rejected which was that the judicial process was impaired as a consequence of the Federal Magistrates Court consolidating and hearing the departure applications and the enforcement proceedings together. This argument was put as a matter of procedural fairness but, to the extent that the law permitted such an outcome, it was contended that the legislation conferring the power was invalid. The Full Court held that there was no unfairness.

An application for special leave to appeal to the High Court was filed on 16 September 2011 but was discontinued.
On 18 July 2008, the Federal Court made an order quashing the registration of the Australian Principals' Federation.

Section 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) provided:

Validation of registration

If:

(a) an Association was purportedly registered as an organisation under this Act before the commencement of this section; and

(b) the association's purported registration would, but for this section, have been invalid merely because, at any time, the association's rules did not have the effect of terminating the membership of, or protruding from membership, persons who are persons of a particular kind or kinds;

that registration is taken, for all purposes, to be valid and to have always been valid.

That section came into force on 1 July 2009.

The litigation raised the questions whether that section undid the quashing by order of the Federal Court of the registration of the Australian Principals’ Federation and, if so, did that involve an interference with or a usurpation of the judicial power of the Commonwealth.

In the Full Court of the Federal Court it was held that neither the operation of the Constitution, nor any question involving its interpretation was involved and s 78B of the *Judiciary Act* was not engaged. The Full Court applied *Nicholas v R* (1998) 193 CLR 173; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 and *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

An application for special leave to appeal to the High Court was considered on 2 September 2011 and referred in for hearing by a Full Court. It was heard by a Full Court of the High Court on 31 January 2012 under the name *Australian Education Union v General Manager of Fair Work Australia, Tim Lee*, judgment being reserved.

This was a s 109 case. In November 2004 a helicopter was being used for aerial locust detection for the New South Wales Department of Primary Industries at a property in New South Wales. The helicopter struck an electrical power line and crashed. Heli-Aust was the operator and the holder of an Air Operator’s Certificate which authorised aerial work operations, in particular aerial locust detection. The pilot and one of the passengers died in the accident and the other passenger was injured.

The General Secretary of the Public Service Association and Professional Officers’ Association of New South Wales commenced a prosecution in the Industrial Court of New South Wales alleging contravention of ss 8 and 10 of the Occupational Health and Safety Act 2000 (NSW).

Heli-Aust argued that the applicable provisions of the State law were invalid by virtue of s 109 in light of the Civil Aviation Act 1988 (Cth), together with the Civil Aviation Regulations 1988 and the Civil Aviation Safety Regulations 1998.

A Full Court exercised the original jurisdiction of the Federal Court.

In a joint judgment, Moore and Stone JJ held that the Civil Aviation Act and the Regulations were intended to regulate the safety of civil aviation in Australia comprehensively and were not intended to operate in conjunction with State legislative schemes directed to the same end, namely the safety of air navigation. Not only was the regulatory regime comprehensive but the safety of civil aviation was, by its very nature, one that cried out for one comprehensive regulatory regime. Their Honours then considered the first respondent’s submission that three provisions in the Civil Aviation Act demonstrated that it was not the Commonwealth intention to cover the field. In the result their Honours held there was a direct conflict between the State and Commonwealth legislative schemes and the State law, to the extent of the inconsistency, was invalid.

Flick J said that construed in their entirety the two sets of Commonwealth Acts and the two sets of regulations manifested an intention to "cover the field" of safety of air operations in Australia. The State Occupational Health and Safety Act intruded upon or altered, impaired or detracted from the Commonwealth legislative regime and to that extent was invalid. His Honour also found there was no relevant Commonwealth recognition of continued State laws.

Both judgments relied on the summary of principles in Dickson v The Queen (2010) 241 CLR 491 at [13]-[14].
This was a s 116 case. It concerned future act determinations made under the *Native Title Act 1993* (Cth). The National Native Title Tribunal determined under s 38(1) that the State of Western Australia was authorised to grant certain mining leases to FMG Pilbara Pty Ltd.

The appellants' claim was that ss 38 and 39 of the Act, which governed the making of determinations of the Tribunal, were beyond the power of the Commonwealth because they were laws for prohibiting the free exercise of the appellants' religion contrary to s 116.

The appellants' case was considered below on the basis that the appellants' use of ochre and sacred stones called *gandi* were religious practices. That approach was not contested by the State or FMG. Further, if the ochre and *gandi* sites were dug up in the process of mining iron ore, the appellants would be prevented from continuing to access the ochre and *gandi*. But the Full Court said that the future act determinations were but one of a number of necessary steps before that outcome would eventuate. The State had to exercise its power under the *Mining Act 1978* (WA) to grant the mining leases. State law also provided for a yet further step, namely an application under the *Aboriginal Heritage Act 1972* (WA) for authority to excavate or disturb an Aboriginal site. Only if FMG obtained authority to interfere with the ochre and *gandi* sites would the appellants be prevented from continuing to observe those religious practices. For these reasons the appellants’ argument accepted that ss 38 and 39 of the *Native Title Act* did not directly achieve a prohibition on the free exercise of religion.

The question therefore became whether s 116 operated to invalidate Commonwealth laws which had the indirect effect of prohibiting the free exercise of religion. The Full Court applied *Kruger v Commonwealth* (1997) 190 CLR 1 as establishing that the test for invalidity under s 116 was whether the Commonwealth law in question had the purpose of prohibiting the free exercise of religion. It was held that there was nothing on the face of ss 38 and 39 to suggest that they had the object of prohibiting the free exercise of religion. It followed that the appellants’ challenge to ss 38 and 39 could not succeed.

The Full Court identified two further obstacles to success. First the Tribunal had made a finding of fact that the free exercise of religion of the appellants would not be prohibited by the grant of the mining leases on condition. It followed that the construction argument under s 116 did not arise: there was simply no prohibition on the free exercise of the appellants’ religion. Finally, the Full Court agreed with the primary judge that s 116 applied to the making of laws by the Commonwealth: it did not apply to the determinations made by the Tribunal, to legislation enacted by State governments, or to actions of the State taken under State legislation.
This was a s 92 case, in its manifestation as s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) which provides that trade and commerce between the Territory and the States "shall be absolutely free". (To that extent it was also a s 109 case.)

Sportsbet held a licence issued under the *Racing and Betting Act 1983* (NT) to conduct the business of a sports bookmaker in the Northern Territory. Under that licence, the physical location of Sportsbet’s business and its servers was the Fanny Bay Racecourse. Sportsbet was not a registered bookmaker in Victoria.

Sportsbet accepted bets by telephone and over the internet from registered members situated throughout Australia, including Victoria. The contingencies on which registered players bet included races conducted in each State and Territory and sporting events conducted in each State and internationally.

In May 2010, Sportsbet installed a computer terminal or device ("betbox") at the Eureka Stockade Hotel in East Ballarat, Victoria. The betbox allowed a user, by means of a touchscreen, to communicate with Sportsbet’s servers located at its licensed premises in Darwin for the purpose of placing bets. The betbox was the means by which the bet was selected, placed and its acceptance notified. In July 2010, officers of the Victorian Commission for Gambling Regulation seized the betbox. The officers were empowered by the *Gambling Regulation Act 2003* (Vic) to seize any equipment if they considered it necessary to do so for the purpose of obtaining evidence of the commission of an offence.

The State and the Commission for Gambling Regulation contended that the installation and operation of the betbox at the Eureka Stockade Hotel was a contravention of sections 2.5.2 and 2.6.1 of the Victorian *Gambling Regulation Act* and of s 115 of the Victorian *Liquor Control Reform Act 1998* (Vic). Section 2.5.2 prohibited a person from opening, keeping or using a "betting house or place of betting". Section 2.6.1 prohibited a person from possessing an "instrument of betting" not authorised by the *Gambling Regulation Act*. Section 115 generally prohibited the holder of a licence under the Victorian *Liquor Control Reform Act* from allowing a person to bet on licensed premises ("the impugned provisions").

The applicants contended, relevantly, that the installation and operation of the betbox was not a contravention of the impugned provisions because those provisions were inconsistent with s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) in that they discriminated in a protectionist way against trade and commerce between the Territory and the States.
Gordon J held that the impugned provisions on their proper construction applied to the installation and operation of the betbox at the Eureka Stockade Hotel but that in that operation the impugned provisions were inconsistent with s 49 of the Northern Territory (Self-Government) Act because they burdened trade and commerce between the Territory and a State. The impugned provisions were a burden because in their legal and practical operation they established Tabcorp as a monopoly provider of off-course betting services in Victoria in what was a national market for the supply and acquisition of off-course betting services. It was not demonstrated that the impugned provisions were no more than an appropriate and adapted means to a legitimate end.

Gordon J held that discrimination resulted from the operation of s 2.5.2 in the context of the other provisions of the Gambling Regulation Act because the way in which Sportsbet (as an interstate trade) sought to conduct its business in Victoria (through a betbox) was prohibited. While the prospect of Sportsbet obtaining registration was not illusory, registration would, if granted, be futile because Sportsbet would not be permitted to conduct its business using the betbox. For example, Sportsbet would not be present at a racecourse in Victoria.

Similar reasoning applied to s 2.6.1 of the Gambling Regulation Act and to s 115 of the Liquor Control Reform Act.

As to whether the impugned provisions were appropriate and adapted to achieve objectives consonant with s 92, Gordon J held that: the evidence did not establish what was the necessary level of funding of the operation of the racing industry in Victoria, and whether that level of funding could only be secured by maintenance of the impugned provisions; the evidence did not address whether the level of funding contributed by Tabcorp was the necessary level of funding and whether the necessary level of funding could only be secured by maintenance of the impugned provisions; the submission that the public did not benefit from multiple, smaller pools failed because it was not shown that the objectives sought to be achieved could not be achieved without the impugned provisions; and the identified security and integrity concerns did not justify the blanket prohibition contained in the impugned provisions.

An appeal to the Full Court is listed for hearing on 20 February 2012.

This case involved s 109 and a Kable issue.

Birdon commenced proceedings in the Federal Court seeking to establish that it had no further obligations by way of payment for the hire of a dredge chartered to it by Houben Marine. Birdon also sought to restrain Houben Marine from pursuing an application to the second and third defendants for an adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW) (Security of Payment Act) in respect of monies which Houben Marine contended were owed to it under the terms of the charter of the dredge. Houben Marine contended that the charter agreement was a construction contract within the meaning of the Security of Payment Act.

Section 25 of the Security of Payment Act provided:

25 Filing of adjudication certificate as judgment debt
(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:
   (i) to bring any cross-claim against the claimant, or
   (ii) to raise any defence in relation to matters arising under the construction contract, or
   (iii) to challenge the adjudicator’s determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

Keane CJ said that s 25(1) did not deem an adjudication certificate to be a judgment of a court of competent jurisdiction for all purposes. Rather, it provided only that it may be “filed as a judgment” and was “enforceable” as if it were a judgment for a debt. It was also to be noted that s 25(4) did not speak to the court seized of the underlying dispute, if any, between the parties.
Section 32 provided as follows:

**32 Effect of Part on civil proceedings**

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

Keane CJ said s 32 acknowledged the essentially provisional nature of the adjudication process and that the Security of Payment Act was not concerned to give effect to the rights of the parties under the construction agreement. As was apparent from the terms of s 32(2), it expressly left the determination of those rights to the courts. The process for which the Security of Payment Act provided did not involve a determination, even of a provisional kind, of the actual rights of the parties under their construction contract. Section 23 contemplated an “assessment” by the adjudicator, and this assessment may be enforced as if it were a judgment of a court of competent jurisdiction but only insofar as a court had not determined, or did not determine, otherwise.

As to the Kable point, Birdon said that the scheme for the adjudication and enforcement of progress payments was contrary to the institutional integrity of courts mandated by Chapter III of the Constitution. Birdon contended that the certificate which s 25 of the Security of Payment Act made enforceable as a judgment of the court (which could be a judgment of the Supreme Court of New South Wales) was incompatible with the integrity, independence and impartiality of the Supreme Court of New South Wales as the court in which federal jurisdiction had been invested by s 77(iii) of the Constitution.

Keane CJ held that the Security of Payment Act did not purport to conscript the courts to do the work of the legislative or executive branches of government of the State of New South Wales. Section 25 did not require any court to undertake a non-judicial function much less a
court exercising the judicial power of the Commonwealth over maritime claims. There was nothing about the enforcement of the adjudication certificate as if it were a judgment of the court which was at odds with the fundamentals of the judicial process.

Buchanan J said that the Security of Payment Act established an administrative procedure for claiming, determining and recovering progress payments. It did so without disclosing any intention, or having any operative effect, of intruding upon the exercise of the jurisdiction of the Federal Court or the exercise of federal judicial power generally. Thus the Security of Payment Act did not interfere with the institutional integrity of courts upon which the judicial power of the Commonwealth may be conferred. There was no attempt by the Security of Payment Act to confer upon a relevant court a function incompatible with the exercise of federal judicial power. Neither was there a basis for concluding that the exercise of judicial power by any court was affected by the procedures established by the State Act.

Rares J, dissenting, held that the entry of an adjudication certificate as an enforceable judgment of a court arrived at by a process that was not at all judicial, with no judicial scrutiny, or even any opportunity for such scrutiny, was fundamentally inconsistent with the judicial process. It used the status and powers of the court to clothe the adjudication certificate in a judicial guise. It was a usurpation of the judicial authority of the court whose process was conscripted to give the appearance of a judicial determination – an enforceable judgment – to an unjudicial exercise.

As to the s 109 point, Birdon said the provisions of the Security of Payment Act relating to the enforcement of a statutory claim to progress payments were inconsistent with the federal jurisdiction invoked by Birdon under the Admiralty Act 1988 (Cth) and the Australian Consumer Law.

Keane CJ said it was not easy to identify any federal law which forbade what the Security of Payment Act allowed. No federal law required that there be no entitlement under State law for any party to seek progress payments on a provisional basis in respect of any claim which might be brought in Federal jurisdiction. Nor was it possible to identify a federal law which evinced an intention to enter upon, much less cover, the field occupied by the Security of Payment Act.

Buchanan J said that nothing done, or to be done in the adjudication procedure would alter, impair or detract from, or should be seen as reflecting a legislative attempt to alter, impair or detract from, the exercise of the jurisdiction of the Federal Court.

Rares J dissented on this issue as well. His Honour concluded that the relevant provisions of the Security of Payment Act were operationally inconsistent with the exercise of jurisdiction
in a matter under a law made by the Parliament, such as the provisions of the *Admiralty Act* and the *Australian Consumer Law*.

On 19 October 2011 Birdon filed an application for special leave to appeal to the High Court of Australia but that application was discontinued on 2 December 2011.
This case also concerned a *Kable* argument, this time in relation to the *Proceeds of Crime Act 2002* (Cth) and an ex parte restraining order made over the respondent’s property under s 18 of that Act.

A restraining order had been made ex parte by the Chief Judge of the District Court under s 18 of the Act relating to $30,000 cash seized from the respondent during the execution of a search warrant. Eaton DCJ set aside that restraining order and declared s 26(4) of the Act to be invalid on the basis that it infringed the restraints upon the legislative power imposed by Chapter III of the Constitution. That subsection provided "The court must consider the application without notice having been given if the DPP requests the court to do so." Section 26(5) provided that the court may, at any time before finally determining the application, direct the DPP to give or publish notice of the application to a specified person or class of persons. Section 42 provided that the person who was not notified of the application for a restraining order may apply to the court to revoke the order.

Ground one of the appeal was that s 26(4) was not to be construed as requiring a court to determine an application for a restraining order in respect of property without notice to the owner of the property because s 26(5) permitted the court, at any time before finally determining the application, to direct the DPP to give such notice.

Ground two of the appeal was that even if the Act required the court to determine an application for a restraining order in respect of property without notice to the owner of the property, s 26(4) was not invalid because the Act provided for a restraining order to be revoked on the application of the owner of the property following a contested hearing in a manner that was compatible with Chapter III.

Martin CJ upheld ground one of the appeal and considered it unnecessary and inappropriate to consider and resolve ground two. McLure P upheld ground two and dismissed ground one. Buss JA upheld ground one and found that it was unnecessary to deal with ground 2.
This decision of the Court of Appeal of the Supreme Court of Western Australia considered the question of whether s 115 of the *Sentence Administration Act 2003* (WA) was a privative clause and whether it was constitutionally invalid in light of *Kirk*.

The Board did not provide to Mr Seifert notice of and reasons for its decision to cancel his parole.

Section 115 provided that the rules known as the rules of natural justice (including any duty of procedural fairness) did not apply to or in relation to the doing or omission of any act, matter or thing under Parts 2 to 6 of the Act by the Governor, or the Minister, or the Board, or an authorised person, or the CEO.

Martin CJ held that because s 115 was a provision which created or defined the scope of the duties or powers conferred on the Board and others, the analogy with the reasoning in *Plaintiff S157/2002* broke down.

Similarly, the submission that s 115 was beyond the legislative competence of the Parliament of Western Australia, put on the basis that the principle in *Kirk* extended to and included indirect constraints upon jurisdiction as well as direct constraints, was rejected. Martin CJ held that, on the current state of authority in the High Court, s 115 did not in terms preclude judicial review nor did it operate in substance, directly or indirectly, to exclude judicial review by the Supreme Court of Western Australia.

McLure P and Murphy JA were in general agreement with the reasons of Martin CJ on this point.
This was another decision of the Supreme Court of Western Australia applying Kirk.

At issue was the proper construction of the privative clause in the *Workers' Compensation and Injuries Management Act 1981* (WA). Section 145E of that Act provided in subsection (6) that a determination by the Medical Assessment Panel was final and binding on the worker. Section 145E(9) then stated:

A decision of a medical assessment panel or anything done under this Act in the process of coming to a decision of a medical assessment panel is not amenable to judicial review.

Edelman J held that on the proper construction of the words "not amenable to judicial review", they should exclude only judicial review for non-jurisdictional error.

The first of the three reasons his Honour gave for that conclusion was that applying Kirk and *Plaintiff S157/2002* there was a clear conceptual distinction between judicial review of a decision for a non-jurisdictional error of law and judicial review of the purported decision for jurisdictional error. The second reason was that the construction of "not amenable to judicial review" as including only judicial review for non-jurisdictional error was consistent with the established approach of the High Court of reading down provisions containing words such as "decision" and "done under this Act" to mean only valid decisions and acts validly done.

Thirdly, all other things remaining equal, a construction of legislation which produced the result that the legislation was constitutional was to be preferred to one that would not. His Honour said that if the privative clause were construed to exclude judicial review for jurisdictional error then it would not be constitutional. In a considered obiter dictum in Kirk at [100], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said that the distinction between jurisdictional and non-jurisdictional error marked the relevant limit on State legislative power.

Mr Seddon's application was upheld on one of the grounds of jurisdictional error for which he had contended, namely that the Medical Assessment Panel acted beyond jurisdiction by making an impermissible determination of causation.

His Honour also noted that the extent of this obiter dictum in Kirk had recently been referred for the consideration of the Full Court of the High Court: *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* [2011] HCA Trans 149.
That matter was argued before the High Court on 29 November 2011: [2011] HCATrans 322. Judgment was reserved. It concerned s 206 of the *Fair Work Act 1994* (SA) which provided:

206—Finality of decisions
(1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.
(2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction.
This decision of the Full Court of the Supreme Court of South Australia applied *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Coleman v Power* (2004) 220 CLR 1 to hold that parts of a by-law under the *Local Government Act 1934* (SA) or the *Local Government Act 1999* (SA) were invalid.

The relevant clauses of the by-law provided that "No person shall without permission on any road:-“ either "preach, canvass, harangue…” or "give out or distribute to any by-stander or passer-by any handbill, book, notice or other printed matter…". 

The hearing before the District Court Judge was conducted on the factual basis that the respondents preached and handed out written material in the commercial and shopping precincts of Adelaide. The City of Adelaide had prosecuted a complaint in the Magistrates Court alleging that Samuel Corneloup and others in February 2009 preached and canvassed in the Rundle Mall without permission. Even though the defendants to the complaint were not charged with haranguing, the City of Adelaide contended that the respondents’ conduct, at least on some occasions, had constituted haranguing. It was also common ground that the respondents distributed printed material in association with their preaching.

A little more detail is to be found in the judgment of the District Court Judge, Stretton J: *Corneloup v Adelaide City Council* (2010) 179 LGERA 1, [3] – [4]:

The applicants are brothers aggrieved at this prohibition. Caleb Corneloup is president of an Incorporated Association called Street Church. The objects of that association are to preach and administer the gospel around the City of Adelaide including preaching on topics that are of a substantially political nature. Mr Corneloup also works on behalf a candidate who recently stood for election as a member of "The Christian Democratic Party", and he seeks to preach on issues relevant to the recent Federal election and politics generally to, as he puts it, "inform the public of the Biblical perspectives on Australian society and political candidates". . .

The other applicant, Samuel Corneloup says that he has been fined by the respondent on many occasions for preaching "the Gospel in the streets of Adelaide (CBD)". He says his preaching is political in nature as it touches upon political issues. . . He states he is "unwilling to apply for a permit because it is against my religious beliefs to ask others for permission to preach the Glorious Gospel of Jesus Christ".

Caleb Corneloup stated by affidavit at [8]:

I am the president of Street Church, which is an incorporated association. The objects of the association are to preach and minister the Gospel around the City of Adelaide (CBD). We believe our preaching can and does directly affect politics, including the current Federal election as we frequently preach on topics that are of a substantial political nature. We are also working closely with and on behalf of Joseph Stephen who is a candidate for "The Christian Democratic Party". Our religious beliefs and doctrines frequently attract public debate and have political consequences. We seek to preach on issues relevant to the Federal election to inform the public of the Biblical perspectives on Australian society and political candidates. Topics include abortion, same sex marriage,
Kourakis J, with whom Doyle CJ and White J agreed, said it could be accepted that the object of the regulation of preaching, being the convenience, comfort and safety of the residents of the city using its roads, was compatible with democratic and responsible government. However the liberty to preach to fellow citizens in public places on political matters, as and when they arose, without seeking permission from an arm of government was fundamental to the maintenance of the constitutional system of responsible and democratic government. Leaflet distribution was an equally fundamental form of political communication. The delay inherent in the requirement to obtain permission would in itself necessarily stifle political debate on contemporary issues. Compatibility with the Australian system of responsible government required that the legal and administrative burdens of any regulation of political speech fell on government and not the citizens who wished to engage in the political process. The court reached the same conclusion with respect to haranguing.

The Court said the validity of the by-law might also be considered, with the same result, from the perspective of its proportionality: the restriction of political speech in public places which merely inconvenienced other members of the public was not a legitimate end because it was incompatible with the constitutional freedom. There was no apparent justification for drawing the by-law that widely. It was for that reason that the by-law was a proportional exercise of the convenience power, considered in isolation, but imposed a disproportionate burden on constitutionally protected political communications. Thus the means adopted by the by-laws to advance the convenience of the inhabitants of the City of Adelaide on their terms were incompatible with the freedom of political communication.

As severed by the Court, the relevant by-laws read:

2. ACTIVITIES REQUIRING PERMISSION
No person shall without permission on any road:-

2.3 Preaching and Canvassing
preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to a designated area as resolved by the Council known as a “Speakers Corner” and any survey or opinion poll conducted by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum;

2.8 Distribute
give out or distribute to any bystander or passer by any handbill, book, notice, or other printed matter, provided that this restriction shall not apply to any handbill or leaflet given out or distributed by or with the authority of a candidate during the course of a Federal, State or Local Government Election or to a handbill or leaflet given out or distributed during the course and for the purpose of a Referendum;

An application for special leave to appeal to the High Court has been filed but the application has no hearing date.
This was one of three criminal cases in the Court of Appeal of the Supreme Court of Queensland which raised constitutional issues.

CAZ concerned Kable and s 80. The question was whether s 229B of the Criminal Code Act 1899 (Qld) was invalid as offending the principle in Kable and the decisions which have applied Kable.

Section 229B(1) provided: "Any adult who maintains an unlawful sexual relationship with a child under the prescribed age commits a crime." Subsection (2) provided that an unlawful sexual relationship was a relationship that involved more than one unlawful sexual act over any period. Subsection (3) provided that for an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence established that an unlawful sexual relationship with the child involving unlawful sexual acts existed. Subsection (4) was at the heart of the attack on validity. It provided:

(4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship—
   (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
   (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
   (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

The appellant argued that s 229B(4) offended Chapter III because (i) the jury could effectively return a non-unanimous verdict contrary to the requirements for trial by jury and a unanimous verdict under s 80; (ii) a unanimous verdict by a jury satisfied of the material facts beyond reasonable doubt on each element of the offence was an essential feature of a jury trial; and (iii) a District Court judge, as a repository of the power of the federal judicature, could not ensure an accused's right to a fair trial where the practical effect of s 229B(4) meant that there were no adequate protections or safeguards to protect the rights of the accused.

Fraser JA, with whom Chesterman and White JJA agreed, accepted that State legislation which denied to a State court in which federal jurisdiction was vested the power to order the prosecution to supply to the defendant particulars of an offence charged against State legislation which were necessary to fulfil the requirements of procedural fairness of a trial in
that court would be constitutionally invalid. Such legislation would require the court to conduct a trial which was "repugnant to the judicial process in a fundamental degree" [Wainohu v New South Wales (2011) 243 CLR 181 at [44]]. It would so distort the "institutional integrity" of the court that it "no longer exhibits in some relevant respect those defining characteristics which marked a court apart from other decision-making bodies". [Forge v Australian Securities and Investments Commission (2006) 228 CLR 45 at [63]].

The court said it was arguable that s 229B did depart to some extent from the common law requirements for particulars, but it did not on that account necessarily infringe the relevant principle derived from Chapter III of the Constitution.

The court referred to the particular circumstances which informed the legislative purpose underlying s 229B which were made clear in the explanatory notes to the 2003 amending Act. It followed that the underlying premise of the legislation justified some flexibility in the application of the common law requirement for particulars. Otherwise, the procedure might reasonably be perceived as skewed against child complainants to such an extent as ultimately might shake public confidence in the court’s ability to do justice in such cases.

Equally, any adaptation of the traditional requirements of procedural fairness must not go so far as to preclude the ability of the courts to ensure a fair trial for the defendant. Fraser JA said that in his opinion the section did not have that effect, even though plainly did make the prosecution's task easier than otherwise would be the case.

The appellant also sought support in s 80 of the Constitution. But to say that the State Supreme Court may not act in a manner inconsistent with the requirements of Chapter III did not convey that state courts must act in all respects in the same way as federal courts must act. The expressed limitation of s 80 as applying only to trials of offences "against any law of the Commonwealth" precluded any implication that the Constitution required a jury in trials in State courts of offences against State law. In any event, s 229B did not purport to dispense with trial by jury.

In summary it was held that s 229B did not work such a serious diminution upon the necessary extent of particularisation of the offence, the usual requirements for jury unanimity (or majority verdicts in certain cases), or other procedures designed to ensure a fair trial, as to justify the conclusion that the trial court no longer exhibited any of the defining characteristics which marked it apart from other decision-making bodies.
This decision of the Queensland Court of Appeal concerned s 80 in the context of pecuniary penalty orders under Part 2-4 of the *Proceeds of Crime Act 2002* (Cth) (the Act).

The primary judge had ordered Mr Hart to pay the Commonwealth Director of Public Prosecutions $14,757,287.35. This sum concerned first the alleged proceeds of $706,402.93 from nine offences against s 29D of the *Crimes Act 1914* (Cth) of which Mr Hart was convicted by a jury in a criminal trial.

The second element of the overall sum was a further amount of $18,850,884.42 from further alleged offences against s 29D and its successor which the DPP claimed Mr Hart had committed but of which he had not been convicted. There was credit of $4,800,000 which was the agreed value of forfeited property. These further alleged offences were "serious offences" under the legislation. Mr Hart did not dispute liability under the Act for the derived benefits arising out of the offences of which he was convicted but he contended that Part 2-4 of the Act was unconstitutional and offended against s 80 of the Constitution in so far as it permitted a court to impose a penalty in respect of serious crimes without any conviction for those crimes after a trial by jury on indictment.

McMurdo P said that the difficulty with Mr Hart’s argument was that proceedings under Part 2-4 were civil proceedings not criminal. It was clear from the scheme of Part 2-4 of the Act that an application for a pecuniary penalty order was not a trial on indictment. The determination of an application for a pecuniary penalty order, involving a determination on the balance of probabilities by a judge without a jury as to whether the person had committed a serious offence, did not contravene s 80. Her Honour also agreed with the reasons of Muir JA in this respect.

Muir JA held that a "trial on indictment" was a form of criminal prosecution by the Crown. The subject application was civil, not criminal, in nature, it did not expose the plaintiff to a term of imprisonment or other criminal sanction and the plaintiff was not obliged to enter an appearance and defend the proceeding. Parliament, by the terms of the Act, made it plain that proceedings for pecuniary penalty orders were to be civil proceedings in civil courts and, by necessary inference, that the trial of those proceedings would not be trial by jury on an indictment. The plaintiff had failed to demonstrate that Part 2-4 of the Act was invalid.

White JA agreed with Muir JA’s reasons and with the further observations of McMurdo P.

An application for special leave to appeal to the High Court has been filed but has no hearing date.
This case concerned s 80 but that part of it which provides "... and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes": the venue provisions.

The appellants were charged with conspiring together to defraud the Commonwealth contrary to s 86 and s 29D of the Crimes Act 1914 (Cth). One of the appellants Mr Henke was at the relevant times a resident of Victoria. He submitted that the trial against him ought to have been held in Victoria. Mr Huston and Mr Fox, two other appellants, contended that as the co-accused Henke was tried in Queensland contrary to s 80 and, as a consequence of the joint trial, evidence of Henke was admitted in the trial, a miscarriage of justice occurred. Their counsel submitted that if Henke's conviction was set aside on the venue ground, then their clients' convictions should also be set aside and they should be granted retrials. Counsel for the Crown agreed that Huston and Fox should be granted retrials if Henke’s conviction was set aside on that ground.

The court held that it was necessary to analyse the offence charged, that is, the particular conspiracy charged. Venue was necessarily to be determined at the outset of the trial. Thus it would be determined upon the basis of the matters alleged against a defendant rather than on the basis of what was ultimately proved against him. The court said that Henke was charged with a continuing offence committed over more than 22 months. In effect he was charged with committing the offence upon the performance of each of the overt acts. The overt acts were alleged to have been performed in more than one State and extraterritorially. Thus the offence charged was one "not committed within any State" within the meaning of the second venue provision of s 80. Therefore the relevant prescription was that in s 70A of the Judiciary Act 1903 and the trial was properly held in Queensland.

This ground of appeal failed.
Another s 51(xxxi) case, this one having an industrial law background, was John Holland. Were the relevant unions still under a contractual obligation not to engage in "protected industrial action"? The property claimed to have been acquired was a chose in action, being John Holland's contractual right against the relevant unions whereby those unions agreed not to take protected industrial action prior to a particular time.

There was a Deed of Settlement made in 2007 between John Holland and five unions, made following John Holland's purchase of Ansett Engineering from the administrators of Ansett to set up a new business, John Holland Aviation Services.

Clause 6 of the Deed provided that the Greenfields Agreement between the parties had a nominal expiry date of 31 March 2010 and either John Holland or the unions might elect in writing no later than the last working day on or before 1 January 2010 to extend the operation of the Agreement by either 12 months or 24 months. By clause 8, subject to John Holland meeting the provisions of, relevantly, clause 6, the unions "agree that they will not take, organise or encourage protected industrial action in support of any claim against John Holland in respect of [John Holland Aviation Services] before the new expiry date if John Holland, prior to the nominal expiry date, makes an election to extend the nominal expiry date of the Agreement."

On 22 December 2009, John Holland purported to elect to extend the nominal expiry date of the Greenfields Agreement under clause 6 of the Deed. However, by that time, the Workplace Relations Act 1996 (Cth) had been repealed and replaced by the Fair Work Act 2009 (Cth). There was also the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (Transitional Provisions Act).

The Transitional Provisions Act allowed existing agreements to continue to operate and permitted them to be varied (including by extending their term of operation) in particular circumstances. The unions claimed that the Transitional Provisions Act did not permit the agreement to be extended by the time John Holland had exercised its election. John Holland argued that if the Transitional Provisions Act released the unions from the obligation imposed by clause 8 of the deed and the relevant provision, item 9 in Part three of Schedule 3, was invalid. Item 9(1)(g) provided that a transitional instrument could not be varied except under
Part 3 of Schedule 2 which dealt with conduct before the WR Act repeal day, which was 1 July 2009.

The key was that the operation of clause 8 depended on the term of the Greenfields Agreement being capable of extinction under the procedures set out at that time in the *Workplace Relations Act*. It was held that on their proper construction clause 8 and clause 6 precluded the unions from engaging in industrial action after John Holland exercised its election to extend the agreement assuming that election was capable of taking effect under the *Workplace Relations Act*.

The Court of Appeal of the Supreme Court of Victoria, Nettle JA, Neave JA and Judd AJA concurring, held that item 9 was not a law with respect to the acquisition of property. The purpose of item 9 was not to acquire property (John Holland's contractual right against the unions), but to adjust the relations of employers and employees by providing for the phasing in of the new industrial relations regime created by the *Fair Work Act*. The Court applied *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307.
This was another Chapter III case.

The issue arose under the *Security Industry Act 1997* (NSW) (the Act) which provided for licences to carry on certain security activities. The Commissioner of Police revoked the respondents’ licences for the reason that the respondents were no longer fit and proper persons to hold a security licence.

The respondents sought review in the Administrative Decisions Tribunal (ADT) of the decision to revoke their licences. Sections 15(6), 15(7) and 29(3) of the Act created a non-disclosure regime for criminal intelligence reports or other criminal information relied upon by the Commissioner in his decision to refuse or to revoke a licence.

Section 29(3) provided that in determining an application for a review of any decision to refuse to grant a licence or to revoke a licence that was made on the ground of the applicant not being a fit and proper person, the ADT was to ensure that it did not, in the reasons for its decision or otherwise, disclose the existence or content of any criminal intelligence report or other criminal information referred to in s 15(6) without the approval of the Commissioner: in order to prevent the disclosure of any such report or other criminal information, the ADT was to receive evidence and hear argument in the absence of the public, the applicant for review, the applicant's representative and any other interested party unless the Commissioner approved otherwise.

The respondents submitted that s 29(3) required an inferior tribunal, namely the ADT, to publish misleading reasons for its decision, unless an executive officer of the State, namely the Commissioner, approved otherwise. The reasons would be misleading, it was argued, because the ADT would be prohibited from disclosing the true reasons which might, in particular cases, reveal jurisdictional error. It was said to follow that the subsection was capable of operating so as to prevent the Supreme Court exercising its supervisory jurisdiction to review jurisdictional error by the ADT and was therefore repugnant to the requirements of Chapter III of the Constitution.

Sackville AJA, with whom Allsop P and Handley AJA agreed, referred to *South Australia v Totani* (2010) 242 CLR 1 at [27], [195], [415] and [269] and held that there was nothing in s 29(3) of the Act, or any other provision of the Act, that denied the power of the Supreme Court.
Court to grant relief in respect of a jurisdictional error by the ADT (including by the Appeal Division). Neither the Act nor the ADT Act contained a privative clause which purported to render a decision of the ADT immune from judicial review. The difficulties facing an applicant wishing to invoke the supervisory jurisdiction of the Supreme Court to challenge a decision of the ADT based wholly or partly on criminal intelligence might prove substantial but they did not deny the Supreme Court power to grant relief in respect of jurisdictional error and did not substantially impair the exercise of that power. In each case, the court may draw such inferences as to the decision-makers’ reasons as were appropriate on the material before it. It could not be assumed that the Supreme Court would allow procedural requirements to frustrate the exercise of its jurisdiction to review the jurisdictional error.

The constitutional challenge failed.
This was another Chapter III case.

This appeal concerns a screening order in respect of some ASIO witnesses and whether the consequent impeachment upon the right to cross-examine was such as to undermine the institutional integrity of the Court and, accordingly, to render it a less effective vehicle for the exercise of federal jurisdiction. The applicant relied upon the strength of the principle that an accused had a right to confront the witness against him.

The applicant was to be retried on three counts each of which involved the charge that he did shoot at a police officer. The Crown proposed to call a number of witnesses who were or had been officers of ASIO. Two of them were eyewitnesses to the shooting. Orders were made with respect to the way in which the ASIO witnesses would give evidence. The contentious order was that their evidence be given in such a way that the witnesses could be seen by all those permitted to be present in the court, except for the applicant. Thus the judge, jury, court officers, legal representatives and Commonwealth and State officers, including police whose presence was required, could see the ASIO witnesses. The sole person present at the trial but excluded from the list was the applicant.

The New South Wales Court of Criminal Appeal, constituted by five judges, including the Chief Justice and the President of the Court of Appeal held that no constitutional issue arose in the case.


The constitutional issue was held not to arise. The question of whether the District Court had the implied power to make a screening order turned on the application of the test, stated at its highest, of what was necessary for the administration of justice. If any such implication had an effect of the kind summarised in the cognate formulations set out in [21] of the judgment, to the extent that the implication undermined the institutional integrity of the Court, then the test could not be satisfied and the implied power would be held not to exist.

The District Court judge held on the material before him no actual forensic disadvantage to the accused by the screening from him of the vision of the ASIO officers had been demonstrated and it was held that it was open to his Honour to reach that conclusion.
This appeal raised issues under s 116 of the Constitution in respect of Commonwealth funding and a similar challenge to State legislative power or legislation.

The apparent purpose of the proceedings was to prevent the construction and operation of a school and place of worship, on land owned by the Australian Federation of Islamic Councils Inc (the Federation) by Malek Fahd Islamic School Ltd (the School).

The other respondents to the proceedings were the Liverpool City Council (the consent authority), the State of New South Wales and the Commonwealth. Each of the defendants in the Equity Division, except the Liverpool City Council, filed a notice of motion to have the proceeding summarily dismissed and, at first instance, were successful on the basis that no reasonable cause of action was disclosed.

The facts were taken to be those alleged in the applicants' pleadings: nothing had yet been proved nor was there any documentary record yet in evidence.

The applicants alleged that funding for the development was obtained from the Commonwealth by way of a grant made under the Schools Assistance Act 2008 (Cth), to the State, for the purpose of providing funds to the School and the Federation. To the extent that such a grant was permitted by the Schools Assistance Act, that Act was alleged to be invalid as being in contravention of s 116. State legislation giving effect to the grant was also said to be invalid, because in contravention of s 116.

The Court of Appeal held that the appeal should be allowed in respect of the constitutional challenge to the Commonwealth legislation.

The question was whether the applicants could present a tenable argument for distinguishing current authorities on s 116 or suggesting that a supportable approach to Constitutional interpretation might achieve a different result in the present case. The Court held that the direct funding of a religious institution for religious purposes was not an issue raised in Attorney-General (Vic); Ex rel Black v Commonwealth of Australia (1981) 146 CLR 559 (Black). The pleading appeared to raise factual questions, including the extent of such funding and its relationship to religious purposes.
With respect to the establishment limb of s 116, the applicants had to confront the approach adopted in *Black* but there were two factors at least which would permit a contrary approach to be presented. First, as pleaded, the applicants' case alleged direct funding of a religious institution for religious purposes, a matter not in issue in *Black*. Secondly developments in constitutional law since *Black* was decided 1981 may allow submissions to be made supporting a more flexible approach to the constraints on legislative power expressly identified in s 116. For example, authority in relation to protection for freedom of political communication, an implied constraint on legislative power, demonstrated a willingness to derive greater assistance from the United States Supreme Court in respect of matters relevant to the structure and scope of government.

The proposition, if made out in fact, that the Commonwealth could pass a valid law permitting the funding of a religious institution for religious (not educational) purposes was a proper matter for challenge. This conclusion did not require reference to the second limb (imposing any religious observance) or the third limb (prohibiting the free exercise of any religion) however although *Kruger* was concerned with the third limb, the principles referred to could affect the construction of the section as a whole. Giving the provision a broad reading and reading the section as a coherent prohibition, may result in an arguable case that the Commonwealth may not make a law providing direct funding to religious bodies. For these reasons the primary judge was in error in striking out the challenge to the Commonwealth law supporting the grant in question.

The court said although there may be reason to doubt that the issue as pleaded would succeed at trial it was not on that basis that the respondents sought to strike out the proceedings. A critical factual issue was the scope and purpose of the grant of funding by the Commonwealth, through the State, for the purposes of the school. If it had such a clear religious purpose as the pleading suggested, it may fall outside the scope of the legislative scheme; if it fell within the scope of the legislative scheme such legislation was not squarely covered by *Black*; if the grant funding did not have such a scope, the case may fall squarely within *Black* and be dismissed on that basis. In any event, that part of the proceeding should not have been struck out when such questions remained unresolved.

In respect of the challenge to the validity of the state legislation, pursuant to which Commonwealth funds were distributed to the Federation and the School the Court held the arguments were untenable and the paragraphs of the pleadings which sought to raise those issues should properly have been struck out. No argument presented attracted any *Kable* analysis. Leave to appeal was refused in that respect.

The relevant question was the validity of s 471.12 of the *Criminal Code 1995* (Cth) which provided that a person was guilty of an offence if the person used a postal or similar service and the person did so in a way (whether by the method of use or the content of the communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

The challenge concerned the "offensive" offence.

The background was as follows, per Tupman DCJ in *R v Monis; R v Droudis* [2011] NSWDC 39 at [4] – [8]:

The accused Monis, faced 13 counts contrary to s471.12, all but one alleging that on various dates he used a postal service in an offensive way by sending letters to persons who were in each case either relatives of members of the Australia Defence Force who had been killed in combat in Afghanistan, or in the case of one of the counts, were relatives of an Austrade official who had been killed in the bombing of the Marriott Hotel in Jakarta on 17 July 2009. One of the 13 counts alleged that he used a postal services in an harassing manner by sending a letter to the relatives of a member of the ADF killed in combat in the war in Afghanistan.

The other accused, Droudis was charged under the same section with the remaining 8 counts in the indictment with aiding and abetting the co-accused's commission of 8 of the 13 counts against him. Thus for the accused Droudis, she faced 8 counts of aiding and abetting the co-accused's using the mail to send offensive letters to those nominated persons.

The accused Monis was committed to stand trial in the District Court of NSW at Sydney for the 13 charges against him alone on 7th July, 2010. He was due to stand trial commencing 1st November 2010. An application to vacate the trial date was ultimately granted, and the trial was listed to commence in the District Court on 11 April, 2011. In the meantime, the accused Droudis was committed for trial on the 8 charges against her from the Local court on 15 February, 2011. The Commonwealth Director of Public Prosecutions ("CDPP") then presented an indictment joining both accused and their joint trial was listed to commence in the District Court on 11 April, 2011.

Before the appointed trial date, the accused commenced proceedings seeking to remove the District Court proceedings into the High Court of Australia, to have the Constitutional issue tested. The accused filed Notices of Motion in the District Court seeking that the trial date of 11th April, 2011 be vacated and that the trial be stayed pending the High Court's determination of their applications to remove the proceedings. Their Notices of Motion were heard on 22nd March, 2011 and were dismissed. As I understand it, in the meantime, the applications to remove the District Court proceedings to the High Court of Australia were dismissed by that Court.
Thus the trial commenced in this court on Monday 11th April. The accused each filed Notices of Motion which, when ultimately amended by leave, seek the following substantive orders.

(1) That the following question be determined separately, namely whether S471.12 of the Criminal Code Act 1995 (Cth) is invalid (wholly or in part) on the ground that it infringes the implied constitutional freedom of political communication.

(2) That the indictment be quashed.

Thus the charges related to letters allegedly sent by Mr Monis to the wives and relatives of Australian military personnel killed while serving in Afghanistan. Copies of the letters were sent on occasions to various politicians including the Prime Minister, the Leader of the Opposition and the Minister for Defence. Whilst at one level the letters were critical of the involvement of the Australian Military in Afghanistan, they also referred to the deceased soldiers in a denigrating and derogatory fashion.

Ms Droudis was indicted on counts of aiding and abetting the commission of offences by Mr Monis.

The appellants moved the District Court to quash the indictments on the grounds that the provision infringed or was contrary to the implied constitutional freedom of political communication.

Bathurst CJ said that the first step in assessing the validity of the law was one of statutory construction. For the use of a postal service to be offensive within the meaning of s 471.12 it was necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances. It was not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person.

Next, the Chief Justice held that notwithstanding the meaning he had attributed to the word "offensive" in the section, the law did effectively burden freedom of communication about governmental and political matters. The restriction it imposed at least limited the nature of political and governmental communications through a wide variety of postal and similar services.

The remaining question was whether the law was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution. His Honour said the purpose of the section was first to protect
persons from being menaced by use of a postal service. Second it was to protect persons being harassed by the use of such a service. Third it was to protect persons from being subject to material that was offensive in the sense described. The legislature considered such protection necessary having regard to features unique to a postal service including first the fact that the post was generally sent to the persons home or business address and therefore personalised and second that material sent by post was often unable to be avoided in the ordinary course of things given it was the norm to open all the mail addressed to an individual. A recipient of material sent by post essentially was a captive audience.

His Honour noted the freedom was not absolute. Also, the question for the court was not whether some choice other than that made by Parliament was preferable or desirable but whether the Parliamentary choice was reasonable in light of the burden placed on the constitutional freedom of communication. Third, there was a distinction drawn between legislation the direct purpose of which was to restrict political communications and that which only incidentally restricted such communications.

His Honour held at that offensive communications of the nature he had described would be communications which could provoke retaliation and thus be legitimate for Parliament to prohibit. Further it was a legitimate end to protect recipients of postal articles from such material and such protection was compatible with the maintenance of the system of government prescribed by the Constitution. The only political or government communications which would be affected would be those calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all circumstances. Such a reasonable person would be aware of the robust nature of political debate and would not be offended in the sense described. Political and governmental communications would only be proscribed when they crossed that boundary. In those circumstances the legislation was reasonably appropriate and adapted to serve the end of protecting the post in a manner compatible with the system of government prescribed by the Constitution.

Allsop P said at that the character of the use, the way the postal service was used, was the question, by reference to an objective standard. His Honour held that the word “offensive” in the section should not extend to use of the character calculated to cause hurt or injury to feelings or even to wound. The seriousness and gravity of the notion of offensive in this context should be limited, at least, as the Chief Justice had said, to use of a character objectively calculated or likely to cause or arouse significant anger, significant resentment, disgust, outrage or hatred. His Honour said that the criminalising of conduct that was
objectively calculated or likely to cause or arouse significant anger, significant resentment, outrage, disgust or hatred might be seen to strike at a range of legitimate types of communications on political or governmental matters. But it was necessary to recognise that an important feature of the post was that it entered into the home or place of work or business of the recipient as an addressee. There may be seen to be a clear interest in prohibiting intrusion into the homes, workplaces and private domains of people of communications calculated to offend in the way described.

Allsop P was initially of the view that even so construed the criminalisation of conduct potentially within the scope of political or government communications meant that the provision was not compatible with the ends that the freedom sought to maintain. However his Honour concluded that although there was a not insignificant potential impact upon communications that could be on political or governmental matters, the considerations of the protection of the confidence of people using the postal services and the prevention of a sense of invasion into the lives of addressees or recipients of post, uncalled for and uninvited, through the postal services were such as to make the means compatible in the relevant respects called for. “Persons can offend in the way proscribed by s 471.12 without using the post.

McClellan CJ at CL held that the section would only be breached if reasonable persons, being persons who were mindful of the robust nature of political debate in Australia and who had considered the accepted boundaries of that debate, would conclude that the particular use of the postal service was offensive and thus the section was reasonably appropriate and compatible with the system of government prescribed by the Constitution.

An application for special leave to appeal to the High Court has been filed but no hearing date fixed.
Chevalley v Industrial Court of New South Wales [2011] NSWCA 357 (24 November 2011)

The applicants were directors of Hunter Quarries Pty Ltd. The company owned and operated Karuah Quarry. The company also owned two off-road dump trucks. On 14 June 2005, one of the trucks went over an embankment at the quarry killing the driver of the truck, Mr Darren Smith. Mr Smith was an employee of the company.

The company was charged and pleaded guilty to an offence under s 8(1) of the Occupational Health and Safety Act 2000 (NSW) ("the Act").

The first respondent applied for orders that certain officers of the company failed to ensure the health and safety at work of the company's employees, particularly Mr Smith, contrary to s 8(1) and that they were taken to have contravened that section by virtue of s 26(1).

The relevant provisions were:

8 Duties of employers
(1) Employees
An employer must ensure the health, safety and welfare at work of all the employees of the employer. That duty extends (without limitation) to the following:
(a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,
(b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,
(c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,
(d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,
(e) providing adequate facilities for the welfare of the employees at work.

26 Offences by corporations - liability of directors and managers
(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:
(a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
(b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.
(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.
(3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence against the provision is actually committed.
(4) In the case of a corporation that is a local council, a member of the council (in his or her capacity as such a member) is not to be regarded as a director or person concerned in the management of the council for the purposes of this section.
One of the grounds on which relief was sought was that s 26 of the Act was invalid because "it violated the principles that underlie Chapter III of the Constitution".

Each of the alternative submissions made by the applicants depended to a large extent on the construction given to s 26 of the Act and its associated sections.

Bathurst CJ, with whom Allsop P, Beazley and Basten* JJA and Sackville AJA agreed said that the scope of the defences provided for by s 26 were not illusory either as a matter of construction or as interpreted by the Industrial Court.

As to construction, the Court held that that even where the corporation has been convicted, the prosecutor in a separate case against the director was required to prove beyond reasonable doubt the contravention alleged for which the defendant was said to be liable by virtue of s 26. It followed that the directors would be entitled to challenge the detailed facts, challenge the contravention and in so doing rely on s 28 as a basis for rebutting the allegation that the corporation contravened the Act.

As to validity, consistent with the approach in Baker v R (2004) 223 CLR 513 at [22] citing HA Bachrach Pty Ltd v Queensland (1998) 195 CLR 547, it was convenient to consider whether the law would have been valid had it been a law of the Commonwealth conferring jurisdiction on a court created by Parliament under s 71 of the Constitution.

The applicants submitted that s 26 had the effect of conferring on a court a function repugnant to or incompatible with the institutional integrity of the court, in that it required the court in proceedings against the director or person concerned in management to presume guilt and limit its function to the imposition of a penalty. If in fact the legislation had that effect it would be invalid as requiring the court to exercise judicial power in a manner inconsistent with its nature.

However, as a matter of construction, the following matters were left for determination by the Court should the defendant choose to put them in issue.

(a) Whether the corporation contravened a relevant provision of the Act.

(b) Whether a defence under s 28 was available to the corporation.

(c) Whether the defendant was a director or person concerned in the management of the company.

(d) Whether the defendant was in a position to influence the conduct of the corporation in relation to the contravention.

(e) Whether the defendant used all due diligence to prevent the contravention by the corporation.
In these circumstances it was incorrect to say that the effect of the legislation was to require the court to presume the guilt of the defendant and to deprive it of the power to adjudicate on such guilt. The provisions were similar to those considered in *Hookham v The Queen* (1994) 181 CLR 450; they were designed to achieve the object of the Act by punishing persons complicit in the contravention. Having regard to the fact that the jurisdiction conferred on the Court included the determination of the question of whether there was a contravention and of matters relevant to complicity, the legislation did not require a court to exercise judicial power in a manner inconsistent with its nature.

It followed that s 26 of the Act was not invalid. Each summons was dismissed.

*Basten JA agreed with Bathurst CJ but said that there were risks in adopting the approach in *H A Bachrach Pty Ltd v State of Queensland* (above) at [14]. First, it was apt to lead to an erosion of the basic distinction between the two situations. Secondly, it distracted attention from the characteristics and jurisdiction of the State court in question. Thus, s 105, for example, did not confer any jurisdiction on the Supreme Court.

In the present case, as in *Baker v The Queen* (2004) 223 CLR 513, the real question raised by the applicants was whether the statutory scheme embodied in s 26 of the Act rendered the exercise of jurisdiction by the Court "a charade", wherein judicial procedure was used as a mask for a legislative decree.

The criteria to be found in s 26(1)(a) and (b) did not come close, in terms of vagueness and uncertainty, to a phrase such as "special reasons". No doubt the provisions may involve questions of construction, but they adopted relatively certain criteria. The provisions could be seen to give rise to questions of legal construction and questions requiring the determination of factual matters involving evaluative assessment. A criterion was not, for those reasons, devoid of content.

An application for special leave was refused on 10 February 2012.
This was another “just terms” case but from the Northern Territory. There was also a Kable argument.

The case concerned the *Criminal Property Forfeiture Act 2002* (NT) (the Act) in light of s 50 of the *Northern Territory (Self-Government) Act 1978* (Cth) which provides that the power of the Legislative Assembly in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

The background was as follows:

[1] On 12 August 2010 the appellant pleaded guilty to the possession of a commercial quantity of cannabis and to the unlawful cultivation of a commercial quantity of cannabis contrary to the *Misuse of Drugs Act*. In the sentencing proceedings it was accepted that the cannabis was possessed for the personal use of the appellant and not for commercial gain. The appellant was sentenced to imprisonment for 13 months and two weeks with the sentence being fully suspended upon him entering into a home detention order for a period of six months.

[2] On 27 July 2009 a Judge of the court made an order under the *Criminal Property Forfeiture Act* restraining as crime-used property, 9.1 ha of freehold land registered in the name of the appellant and of his father as joint tenants (“the land”). On 28 September 2009, pursuant to the terms of the Act, the appellant and his father filed objections to the restraint of the land. The father died on 24 March 2010.

[3] On 8 October 2010 the Director of Public Prosecutions applied for the forfeiture of the land on the ground that it was crime-used property. By subsequent order the Northern Territory of Australia became a respondent to the objection proceedings…

There were grounds of objection to the land being restrained and the trial Judge:

(a) allowed the appellant’s objection in relation to the interest in the land of his deceased father on the ground that the father was an innocent party for the purposes of the Act; and

(b) allowed the objections in so far as they related to the forfeiture offence of cultivation of cannabis; and

(c) in relation to the forfeiture offence of possession of cannabis, ruled that the appellant’s objection based on the provisions of s 11(1)(a) and (b) of the Act should be allowed; however

(d) concluded that the appellant had not shown in relation to that forfeiture offence that the offending fell outside the terms of s 11(1)(c) of the Act and, therefore, ruled that the objection must be dismissed.

In the course of the judgment the trial Judge addressed and rejected two constitutional challenges to the validity of the legislative regime and found that there must be an order for forfeiture.
In dismissing the appeal in relation to the two constitutional issues Riley CJ, with whom Southwood and Kelly JJ agreed, said:

_In relation to acquisition of property:_

[57] The issue of whether a law is appropriate, adapted or proportionate to the exercise of legislative power has no application in the Northern Territory. In the Northern Territory, where the subject matter of a law is such that the notion of fair compensation for the taking of property effected by the law would be incongruous or irrelevant, the restriction will have no application. The submission of the appellant to the contrary is misconceived.

[58] By reference to authorities relating to s 51(xxxi) of the Constitution the Solicitor-General pointed out that it is well established that not every acquisition of property effected by legislation falls within the scope of the constitutional guarantee. The acquisition of property will fall outside the scope of the constitutional guarantee:

(a) where the property is “inherently susceptible” to variation or termination; (b) where the acquisition is such that, by its very nature and object, concepts of compensation are irrelevant or incongruous; and (c) where the law is not one for the acquisition of property as such, but is rather part of and incidental to a general regulatory scheme aimed at the adjustment of competing rights and liabilities.

Riley CJ referred to _Burton v Honan_ (1952) 86 CLR 169 at 190 and _Re Director of Public Prosecutions; ex parte Lawler_ (1994) 179 CLR 270 at 279, 289 and 294 for the proposition that a law which effects or authorises forfeiture of property in consequence of its use in the commission of an offence against the laws of the Commonwealth stands outside s 51(xxxi) even where the owner of the property was not involved in its use in an unlawful activity. Riley CJ then said:

[62] Similar observations apply in relation to s 50(1) of the _Self-Government Act_ and a law of the Territory: _Australian Capital Territory v Pinter_ (2002) 121 FCR 509 at [93] - [94], [201], [250], [269]. It follows that a law which effects an acquisition of property was not necessarily a law with respect to the acquisition of property for the purposes of s 50(1) of the _Self-Government Act._

[63] The _Criminal Property Forfeiture Act_ is not by its nature and object a law to which the guarantee of just terms applies. It is an Act providing for the forfeiture of property used in or derived from unlawful activity. Its purpose includes punishing and deterring criminal activity by preventing the illicit use of property by imposing an economic penalty and, in respect of “innocent parties”, by enlisting the owner's participation in ensuring the observance of the law and precluding future use of the thing forfeited in the commission of crime.

[64] It is important to bear in mind that the fact that the legislation may operate harshly in a particular case, or that the legislation itself can be described as draconian, is a matter within the exclusive province of the legislature and is not a matter to be addressed by the courts.

In this last respect Riley CJ referred to _Burton v Honan_ (1952) 86 CLR 169 at 179.

As to _Kable v Director of Public Prosecutions (NSW)_ (1996) 189 CLR, the Court of Appeal accepted that the Supreme Court of the Northern Territory exercised the judicial power of the
Commonwealth and was subject to the principles discussed in *Kable*. Thus legislation which purported to confer powers and functions upon the Supreme Court which substantially impaired the institutional integrity of the Court, and which were therefore incompatible with its role as a repository of federal jurisdiction, was invalid: *Forg v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [40]. The institutional integrity of the Court required both the reality and appearance of independence and impartiality: *South Australia v Totani* (2010) 242 CLR 1 at [69].

The Court then outlined the appellant’s arguments that s 96 of the *Criminal Property Forfeiture Act* (NT) and the other provisions in support of the section were invalid on the grounds that they breached the *Kable* principles.

Section 96 provided:

Crime-used property

(1) A court that is hearing an application under section 95 in relation to property restrained on suspicion the property was crime-used must order that the property is forfeit to the Territory if the court is satisfied that it is more likely than not that the property is crime-used.

(2) A court must order forfeiture of property under subsection (1) despite that no person has been identified as the owner or controller of the property.

The appellant argued that the Act required the Court to effect a forfeiture of innocently generated property in circumstances where the breadth of the provisions did not allow the Court choice. The Court was required to order forfeiture regardless of whether or not the forfeiture would be manifestly unjust. It was submitted that the operative decision to order forfeiture was made by the executive and not by the courts.

Riley CJ said:

[71] In my opinion his Honour was correct in determining the legislation does not infringe the *Kable* principles. The Court is required to undertake a judicial process consistent with its judicial character. The functions required of the Court are not incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. An application for a forfeiture order can only be made where there is a valid restraining order in place. The Court has an unfettered discretion (to be exercised judicially) whether to grant or refuse a restraining order and, once such an order has been made, an application for forfeiture cannot be made until the objection period has expired and any objection has been heard and determined. To make a forfeiture order the Court must be satisfied that the basis for making such an order has been established on the balance of probabilities. The rules of evidence apply. Hearings are conducted in public and in accordance with the ordinary judicial process. The Court determines the issues on the basis of the evidence placed before it and by reference to the definition sections of the legislation. It is for the Court to determine the outcome based upon its merits. There are rights of appeal at each stage of the process.

[72] In *Director of Public Prosecutions v George* (2008) 102 SASR 246 Doyle CJ observed:
(112) ... It is not uncommon for legislation to provide that, if in proceedings before a court specified matters are established, a particular consequence will follow or a particular order must be made. This feature of s 95 is of no particular significance. The failure to interpose a judicial discretion, or a judicial decision, between the establishment of the criteria and the making of the order is not problematic.

(113) Nor has Parliament “clothed” a forfeiture with the appearance of a judicial process. The judicial process is a reality. The Court does not act at the dictation of the DPP. The DPP must satisfy the requirements of s 95(1). It is the decision of the Court on those matters that determines whether or not a PPO is to be made. There is no merit in the suggestion that the process under s 95 is not a “real judicial process”, involving the exercise of a “real judicial discretion”. That submission merely treats the absence of a judicial decision or discretion as inconsistent with the exercise of a judicial power. There is no basis for doing so.

[73] The exercise of judicial function often involves the making of orders upon determining that a particular fact status exists: Fardon v Attorney-General Queensland (2004) 233 CLR 575 at [34] per McHugh J. In my opinion there is no impermissible interference with the judicial function. Contrary to the submission of the appellant the legislation does not require the Court to act as a mere instrument of Government policy.