

**THE FEDERAL AND STATE COURTS
ON CONSTITUTIONAL LAW:
THE 2017 TERM**

JUSTICE PAMELA TATE¹

2018 Constitutional Law Conference
Gilbert & Tobin Centre of Public Law, UNSW Sydney
23 February 2018²

Much to the irritation of academic commentators, courts typically limit their judgments to the issues that require resolution in the individual case. Courts are acutely aware that they may not have heard full argument on an issue that is raised, or is lurking, in a proceeding but is not determinative. Nevertheless, there are occasions when a court will be tempted to make some observations on an issue that does not bear on the disposition of the case. This is especially so where an intermediate appellate court is applying High Court doctrine in a complicated area. In that context judges of the appellate court may sometimes take the opportunity to signal to the High Court that there is a gap in its jurisprudence or uncertainty about the scope of a doctrine. The appellate court may seek to alert the High Court to an unresolved issue, to point out to it, and to other courts and the profession, that there is still work to be done in an area. Identifying and analysing unresolved complex issues that one day the High Court will have to grapple with is perhaps one of the central functions of an intermediate appellate court. There is no more important area for this to occur than in Constitutional law.

In reviewing the 2017 term for Federal and State Courts on Constitutional Law I wish to focus primarily upon two key cases where an appellate court has engaged in what I describe as signalling to, or communicating with, the High Court. The first is the Full Federal Court's decision in *Chief of the Defence Force v Gaynor*³ where particular difficulties were identified with applying the methodology of the implied freedom of

¹ Court of Appeal, Supreme Court of Victoria, Australia.

² I wish to express my gratitude to my associate, Paige Darby, for her assistance with the research. I also wish to thank my colleagues, Justice Stephen McLeish, Justice Richard Niall, and Justice Karin Emerton, for discussing this paper with me. Any remaining errors are mine.

³ (2017) 246 FCR 298 (*'Gaynor'*).

political communication. The other case is a decision of the New South Wales Court of Appeal, *Kaldas v Barbour*,⁴ where the Court expressed uncertainty about the scope of the application of the *Kirk*⁵ doctrine.

My second, quite separate, topic will be to examine some cases concerned with the pre-trial compulsory examination of criminal accused about the subject matter of their offending. These are *Commissioner of Australian Federal Police v Elzein*,⁶ and *D151 v New South Wales Crime Commission*.⁷ The challenges were framed, for State laws, in *Kable*⁸ terms, and, for Commonwealth laws, either as inconsistent with Chapter III, being based on an interference with the accusatorial nature of the criminal process, or as a contravention of s 80 of the *Constitution*, the right to trial by jury. In this context of criminal offending I also consider *Lazarus v Independent Commission Against Corruption*.⁹

My third topic is to examine some cases dealing with the constitutional validity of legislation, both Commonwealth legislation under specific heads of power and State legislation in so far as it does, or does not, contravene a constitutional prohibition. These include two cases concerned with the scope of the taxation power: *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation*¹⁰ and *Keris Pty Ltd v Deputy Commissioner of Taxation*.¹¹ Another is a single judge decision, by Perry J, in *Rowley v Chief of Army*¹² to the effect that the defence power extends to sentencing members to imprisonment and concurrently dismissing them from the Australian Defence Force. I also examine a decision by the Western Australian Court of Appeal, *Eclipse Resources Pty Ltd v Minister for Environment [No 2]*,¹³ that upheld the finding of the primary judge that a levy on waste is not an excise.¹⁴

⁴ (2017) 350 ALR 292 ('*Kaldas*').

⁵ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ('*Kirk*').

⁶ (2017) 345 ALR 446 (NSW Court of Appeal) ('*Elzein*').

⁷ (2017) 321 FLR 281 (NSW Court of Appeal) ('*D151*').

⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51.

⁹ (2017) 94 NSWLR 36 ('*Lazarus*').

¹⁰ (2017) 251 FCR 40 (Full Court of the Federal Court).

¹¹ [2017] FCAFC 164.

¹² [2017] FCA 1119.

¹³ (2017) 223 LGERA 313.

¹⁴ The first instance decision was discussed in last years' address.

My final topic will be to make some brief remarks on some other constitutional matters heard by the Federal and State courts, including cases on inconsistency and, given the federal focus on electoral matters in 2017, I will discuss an electoral redistribution case heard in South Australia by a five-member bench.

I UNRESOLVED ISSUES

A *Chief of Defence Force v Gaynor – the implied freedom*

Turning then to *Chief of Defence Force v Gaynor* and the implied freedom.

This is a case about comments on social media. Gaynor was an officer in the Army Reserve of the Australian Defence Force ('the ADF').¹⁵ He made public statements on a blog which was part of his private website. The statements were repeated on Gaynor's Twitter and Facebook pages. The statements opposed the tolerance and support given by the ADF to gay and to transgender officers. Gaynor said it was wrong for the Chief of the Defence Force to have given permission for members of the ADF to march in uniform at the Sydney Mardi Gras. He also linked the practice of Islam historically and currently to a culture of violence. In the statements Gaynor could be readily identified as an officer of the ADF. He was warned by his superiors and ordered to remove the material insofar as it could be linked to his military service because it directly contravened ADF values.

The ADF had, over a number of years, engaged in a process of cultural change towards greater diversity and gender equality. It established policies to prevent and eliminate unacceptable behaviour of disrespect or intolerance. The policies on social media were unequivocal:¹⁶

... Defence personnel *must not* post material that is offensive towards any group or person based on any personal traits, attributes, beliefs or practices that exploit, objectify or are derogatory of gender, ethnicity or religion.

¹⁵ He had previously served in the Regular Army. Officers in the Army Reserve were still officers within the Australian Army as a whole in accordance with the definition of 'officer' in s 4 of the *Defence Act 1903* (Cth). Reservists can be called up at any time: *Defence Act* s 50(1)(b); *Gaynor* (2017) 246 FCR 298, 320 [97].

¹⁶ The policies were made pursuant to statutory authority: *Defence Act* s 9A(2).

Gaynor did not remove the material and in fact issued press releases incorporating material from his website. Unsurprisingly, his service was terminated. This was done pursuant to a power conferred by regulation, namely, reg 85 of the *Defence (Personnel) Regulations 2002* (Cth).¹⁷ Regulation 85, which loomed large in the case, permits the termination of the service of an officer where the relevant Chief is satisfied that the officer's retention is not in the interest of the Defence Force, especially for reasons that relate to the officer's behaviour.¹⁸

Gaynor brought judicial review proceedings in the Federal Court and challenged the termination decision made under reg 85 as a contravention of the implied freedom of political communication. At first instance he succeeded. The primary judge held that members of the ADF, when not on duty and not in uniform, are, in substance, 'private citizens', and in his view, 'their freedom of political communication cannot be burdened at those times'.¹⁹

The primary judge set out the two-limbed test from *Lange*.²⁰ He asked first, does the law effectively burden freedom of communication about government or political matters? Secondly, if so, is the law reasonably appropriate and adapted to serve a legitimate end compatible with the system of responsible and representative government prescribed by the *Constitution*? Having answered 'yes' to the first question, he answered the 'reasonably appropriate and adapted' question by considering the three elements of proportionality distilled in *McCloy*,²¹ namely, whether the law has a rational connection to its purpose, whether there is a less restrictive means of achieving its purpose, and whether there is an adequate balance between achieving the purpose and the negative effect of the limits the law places on political communication.²² The primary judge considered that the third element of proportionality in *McCloy* was not satisfied. He held that the response of the ADF was, as he put it:

not 'adequate in its balance' having regard to the fact that the [officer's]

¹⁷ The regulations were made pursuant to s 124 of the *Defence Act*.

¹⁸ Reg 85(1)(d) and (1A)(b).

¹⁹ *Gaynor* (2017) 246 FCR 298, 305 [25] (emphasis added).

²⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

²¹ *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

²² *Ibid* 194-5 [2]. See *Fraser v County Court of Victoria* [2017] VSC 83 [29]-[31].

conduct involved the expression of political opinion, effectively as a private citizen. A contrary view would accept that *ADF members have lost that freedom of political expression*, even when not serving in any active capacity, nor likely to do so again.

In my view, the burden on the exercise by the [officer] of *his freedom of political communication* was considerable by reason of its consequence ... I cannot accept that that the right to exercise that freedom was *lost* only because the [officer] remained a member of the ADF.²³

According to the primary judge, Gaynor was not subject to the military regime because he was acting in his private capacity. Therefore, his right to political communication should be free from interference by the military. Being an ADF member should not result in him losing his right to political communication or being at risk of dismissal.

The Full Federal Court (Perram, Mortimer and Gleeson JJ) held that the primary judge adopted the wrong approach.²⁴ The error was that in substance he had treated the implied freedom as a personal right rather than a restraint on legislative power. He treated the implied freedom as something attached to individuals, reflecting the personal right of the First Amendment in the United States Constitution. He considered that Gaynor had a constitutional right to express his political opinion and by terminating his service the ADF infringed that right. Such an analysis is not supported by the authorities.

This mistake of treating the implied freedom as giving rise to individual rights, rather than as acting as a restraint on legislative power, has been repeatedly identified²⁵ as the very kind of mistake to be avoided. But, you might ask, 'Why precisely did it matter?'

²³ *Gaynor* (2017) 246 FCR 298, 305 [25], the Full Court quoting from the primary judge (emphasis added). In the primary judge's eyes, the termination decision wrongly interfered with the 'right of the [officer] to communicate on political matters': *Gaynor* (2017) 246 FCR 298, 312 [55].

²⁴ *Gaynor* (2017) 246 FCR 298. An application for special leave was dismissed: [2017] HCATrans 162. The more recent High Court decision of *Brown v Tasmania* (2017) 349 ALR 398 had not yet been delivered when the Full Court delivered judgment. This was delivered on 18 October 2017, *Gaynor* was delivered on 8 March 2017.

²⁵ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150 (Brennan J) and reinforced in *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36], 572 [111] and *McCloy* (2015) 257 CLR 178, 202–3 [30].

The Full Court held that, because the judge treated the freedom as a personal right, he looked at the constitutional arguments through the wrong prism.²⁶ It held that the primary judge applied the *Lange/McCloy* test to the individual exercise of power under reg 85 and not to the regulation itself. In other words, the judge applied the *Lange/McCloy* test to the particular exercise of discretion under reg 85, namely, the termination decision, the particular reasons for it, and its effect on Gaynor, when what he should have done is to apply the *Lange/McCloy* test to determine the validity of the legislative instrument, reg 85. The Court held that the primary judge considered the implied freedom ‘at the wrong level’.²⁷ He mistakenly assumed that, in the case of a discretionary power, each exercise of that power must be tested against a *Lange/McCloy* test rather than testing the power itself.²⁸

The Full Court acknowledged that the primary judge had not been invited to adopt the approach to discretionary powers endorsed in *Wotton*.²⁹ On this approach, so long as a statute complies with the implied freedom, any exercise of a discretionary power conferred by the statute is not a question of Constitutional law, but is, rather, an administrative law question as to whether the exercise is authorised by the statute, a question of *ultra vires*.³⁰ Instead, Gaynor had *directly* challenged the termination decision on the ground that it infringed the implied freedom,³¹ and the judge agreed.

The Full Court applied its own analysis at the correct level to the legislative instrument, and concluded that reg 85 does not infringe the implied freedom.³² It recognised the three steps in the *McCloy* test and accepted, first, that reg 85, in its

²⁶ *Gaynor* (2017) 246 FCR 298, 310 [47].

²⁷ *Gaynor* (2017) 246 FCR 298, 309 [39], 310 [47]. See also *Monis v The Queen* (2011) 256 FLR 28, 40-41 [46]-[52] (Bathurst CJ).

²⁸ *Gaynor* (2017) 246 FCR 298, 303 [20], 309 [41].

²⁹ *Wotton v Queensland* (2012) 246 CLR 1, 9-10 [9]-[10], 13-14 [21]-[24], see also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613-4. See further, *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, and James Stellios ‘*Marbury v Madison: Constitutional Limitations and Statutory Discretions*’ (2016) 42 *Australian Bar Review* 324.

³⁰ *Gaynor* (2017) 246 FCR 298, 315-317 [73]-[80]. There were other administrative law challenges but no ground of review asserting *ultra vires*.

³¹ *Ibid* 303 [17].

³² The Court understood from *Murphy v Electoral Commissioner* (2016) 334 ALR 369 that the *McCloy* test is not mandatory but applied it in the circumstances of the case: *Gaynor* (2017) 246 FCR 298, 319 [92]. The Court accepted the summary of the test for the infringement of the implied freedom as articulated by Gageler J in *McCloy* (2015) 257 CLR 178, 230-2 [125]-[132] but took that not to depart from the plurality’s summary until the analysis of the justification of the restriction on the freedom began.

operation and effect, is capable of burdening the implied freedom³³ because it is 'capable of restricting political communication not only between members of the ADF but also between officers of the ADF and the broad Australian community'.³⁴

It then inquired whether the purposes of reg 85 were compatible with the system of government prescribed by the *Constitution*. Those purposes were held to include maintaining objectively appropriate standards of behaviour and effective discipline within the defence force. They also included ensuring that there is a high level of confidence that officers will operate within the hierarchy and advancing the cohesion of the armed forces. It upheld the relevant compatibility.

It considered the question of proportionality. The Full Court held that there was a rational connection between reg 85 and the need to preserve control of membership of the officers of the ADF. The test of necessity was satisfied by the use of broad discretions covering a multiplicity of circumstances designed to leave judgments on the merits of each case for the repository of power. The Court considered that there was an adequate balance between the purposes of reg 85 and its focus on addressing suitability of individuals to remain as ADF officers, including suitability of character, within a context in which respect and tolerance is insisted upon. Its focus was not on restricting the holding, expressing or communicating of a political opinion. The Court considered that the power of termination is likely to be triggered not by particular subject matter of communications but by the tone and attributes of those communications and by contraventions of instructions or policies of the ADF, assessed within the context of a judgment of suitability. The risk of harm to the freedom was held to be 'commensurately lower'³⁵ because any restriction on the freedom was likely to be confined to extreme conduct and behaviour, such as that exhibited by Gaynor, especially by his refusal to comply with orders.

The decision is, in my view, a useful illustration of the importance of avoiding the mistake of treating the freedom as a personal right. But it goes further. In the course of emphasising the significance of adopting the correct level of analysis and

³³ *Gaynor* (2017) 246 FCR 298, 323 [105].

³⁴ *Ibid* 322 [104].

³⁵ *Ibid* 324 [110].

applying the *Lange/McCloy* test to the legislative instrument that confers the power and not to the decision made under it, the Court raised the hypothetical and unresolved question of what approach should be adopted by a court when the relevant decision is made not as an exercise of legislative power but as an exercise of executive power. The High Court has repeatedly stated since *Lange* that the implied freedom is a constraint on both legislative and *executive* power.³⁶ The question arises, when there is *an exercise of non-statutory executive power*, will it be necessary to apply the *Lange/McCloy* test to the individual exercise of power? Will that bring about erroneous determinations as occurred here?

The Full Court made the following remarks, very politely. It said:

While there are references in the authorities to the implied freedom being a *restriction on executive power as well as a restriction on legislative power ... they tend to be general propositions, which have not yet been squarely confronted and teased out* in a case where there was *no statutory source* for the impugned power.

...

Whether ..., in circumstances of an exercise of executive power, sourced for example only in s 61 of the *Constitution*, and not owing its authority to statute, *the implied freedom operates as a limit on an individual exercise of such a power* is a question that need not be addressed in this appeal.³⁷

In other words, putting civility to one side, there are gaps in the High Court's jurisprudence in this area. There are unanswered questions: what analysis is to be

³⁶ See *Lange* (1997) 189 CLR 520, 560: '[Sections] 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power': (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, and Kirby JJ) (emphasis added). See also *McCloy* (2015) 257 CLR 178, 206 [42]: 'As this Court said in *Lange*, ss 7, 24, 64, and 128 of the *Constitution*, and related provisions, necessarily imply a limitation on legislative and executive power in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors' (French CJ, Kiefel, Bell and Keane JJ) (emphasis added). See further *McCloy* (2015) 257 CLR 178, 227 [114], where Gageler J explained '[t]he necessity for the implication of the constitutional freedom [to be] a limitation on legislative and executive power'. See also *McCloy* (2015) 257 CLR 178, 263 [240] where Nettle J approved statements of Brennan CJ in *Levy v Victoria* (1997) 189 CLR 579, at 594-5 to the effect that the implied freedom denies legislative or executive power to restrict freedom of communication about government or politics of the Commonwealth. See *McCloy* (2015) 257 CLR 178, 280 [303] (Gordon J).

³⁷ *Gaynor* (2017) 246 FCR 298, 314-5 [68], 315 [71] (emphasis added).

adopted when a decision is made pursuant to a non-statutory executive power? How can we apply the *Lange/McCloy* test when there is no statute or regulation to assess; no express identification of purposes or objects? What do we do when all we have is the particular decision that was made and its effect on an individual? Will the focus not become the specific circumstances in which the power is exercised, the reasons for the conduct, and the effect on the individual – those factors which the primary judge here erroneously focused upon? Will this not look a lot like the protection of personal rights? These issues remain unresolved following *Brown v Tasmania*.³⁸ These are significant questions and the Full Federal Court has seriously signalled to the High Court that more guidance is necessary; general propositions to the effect that the implied freedom is a restraint on executive as well as legislative power are not enough. There is scope for further principled development.

B *Kaldas v Barbour – the Kirk doctrine*

Another example of rigorous and exacting reasoning is to be found in the decision of the New South Wales Court of Appeal in *Kaldas*.³⁹ Bathurst CJ, Basten and Macfarlan JJA were faced with determining the validity of a privative clause that was argued to oust the jurisdiction of the NSW Supreme Court to judicially review findings contained in a report of the NSW Ombudsman.

The report was prepared by the Ombudsman after the largest investigation undertaken by an Ombudsman in Australia, ‘Operation Prospect’. The Ombudsman had investigated allegations about certain operations of the NSW Crime Commission and of the Police Integrity Commission. He inquired into the use of false and misleading information in applications for warrants for listening devices and telephone intercepts. He also inquired into the improper targeting of individuals, mishandling of informants, unlawful dissemination of material and the making of false statements. He made adverse findings in his report against Nick Kaldas, the former deputy commissioner of the NSW police force. These findings related to

³⁸ (2017) 349 ALR 398.

³⁹ (2017) 350 ALR 292.

Kaldas failing to report that he anonymously received certain NSW Crime Commission and NSW police documents⁴⁰ and giving evidence to the Ombudsman which might amount to the offence of giving false and misleading testimony.⁴¹

In the Supreme Court Kaldas sought declarations, the removal of the report from the Ombudsman's website and the redaction of certain matters.⁴² He alleged that the report was *ultra vires* insofar as it included findings against him, that there was a breach of natural justice, and that the decision to take evidence from him was invalid because of apprehended bias. These were jurisdictional errors.

The defendants included the office of the Ombudsman.⁴³ The Ombudsman argued that the Supreme Court did not have jurisdiction to hear the claims, relying on a privative or ouster clause, s 35A of the *Ombudsman Act 1974* (NSW). The heading to s 35A is 'Immunity of Ombudsman and others'. It relevantly provides that:

The Ombudsman shall not ... be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

The Court of Appeal addressed by way of preliminary separate questions the issue of whether, because of *Kirk*, the privative clause was invalid, in whole or in part, or should be read down. You will recall that in *Kirk* the High Court held that legislation that purported to remove from a State Supreme Court the jurisdiction to grant relief on the basis of jurisdictional error was invalid. The High Court held that at Federation, each of the of the State Supreme Courts had that jurisdiction which the Court of Queen's Bench had in England to grant prerogative relief, including

⁴⁰ They also included requesting or receiving NSW Police information.

⁴¹ This would be in contravention of the *Royal Commissions Act 1923* (NSW). The coercive powers conferred under the *Royal Commissions Act* are conferred on the Ombudsman pursuant to s 19(2) of the *Ombudsman Act 1974* (NSW).

⁴² *Kaldas* (2017) 350 ALR 292, 328 [150].

⁴³ Bruce Barbour was the first defendant who was the Ombudsman throughout much of the investigation, the office of the Ombudsman was the second defendant and a former Deputy Ombudsman was the third defendant who was in charge of the investigation for a significant period. Basten JA held that the first and third defendants should be removed from the proceedings as it was inappropriate to name specific individuals and they no longer had official capacities.

certiorari, for jurisdictional error.⁴⁴ It held that this supervisory jurisdiction was a defining characteristic of a State Supreme Court. The purpose of the jurisdiction was to determine and enforce the limits on the exercise of State judicial and executive power by persons and bodies other than the Supreme Court.

Kaldas contended that it was a consequence of *Kirk* that the privative clause could not validly preclude the Supreme Court from exercising its supervisory jurisdiction over the Ombudsman's findings. He submitted that if s 35A was to be construed as precluding review for jurisdictional error, it was invalid. He submitted that if the Court could not review exercises of power by the Ombudsman this would improperly create 'an island of power immune from [judicial] supervision and restraint'.⁴⁵

The Chief Justice and Basten JA held that the privative clause was intended to confer a general immunity from suit extending to an immunity from the supervisory jurisdiction of the Supreme Court⁴⁶ and this was consistent with pre-existing authority.⁴⁷ That is, for reasons of construction, the privative clause could not be read down to oust all proceedings except those for jurisdictional error. The question was: if read as conferring a general immunity was it still valid after *Kirk*? That is, did *Kirk* make a difference?

The Ombudsman submitted that *Kirk* was decided in the context of a court with a limited jurisdiction, namely, the Industrial Court of New South Wales.⁴⁸ He argued that expanding *Kirk* to non-judicial bodies must be treated with caution.⁴⁹ Moreover, importantly, the nature of the relief sought in *Kirk* was different. *Kirk* was not concerned with the grant of bare declarations and injunctive relief as was sought

⁴⁴ *Kirk* (2010) 239 CLR 531, 580 [97].

⁴⁵ *Kaldas* (2017) 350 ALR 292, 314 [64].

⁴⁶ In particular, they found that s 35B dealt with jurisdictional error in a somewhat limited fashion and that would be rendered otiose if there was a right to bring proceedings for jurisdictional error irrespective of s 35A: *Kaldas* (2017) 350 ALR 292, 323 [125], 326–7 [144]–[146], 365 [317].

⁴⁷ See, for example, *Ainsworth v Ombudsman (NSW)* (1988) 17 NSWLR 276, *Commissioner of Police v Ombudsman* (unreported, NSW Supreme Court, Sackville AJ, 9 September 1994).

⁴⁸ See *Kirk* (2010) 239 CLR 531, 583 [106] where the Court said that the designation of the Industrial Court as a 'superior court of record' did not affect the availability of certiorari because it was a court of limited jurisdiction.

⁴⁹ *Kaldas* (2017) 350 ALR 292, 317 [87]. See *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268 where Basten JA (with whom Macfarlan and Meagher JJA agreed) noted that *Kirk* 'was not, in terms, concerned with decisions of non-judicial bodies' (at 280 [46]).

here.⁵⁰ (A bare declaration is one that is sought not as consequential on the grant of other coercive relief).⁵¹ The Attorney-General, intervening, supported the view that it would be a mistake to equate the constitutionally entrenched supervisory jurisdiction to grant prerogative relief, such as certiorari, mandamus and prohibition, with a jurisdiction in which forms of relief such as a declaration can be made against the Crown at the suit of a private party.⁵² The Ombudsman further submitted that *Kirk* does not preclude the ouster of the Supreme Court's power to review decisions that have no effect on legal rights and obligations.

These last two points turned out to be the lynchpin of the case: the nature of the relief sought and the lack of effect on rights.

There was a recognition by both Bathurst CJ and Basten JA that the powers of the Ombudsman are fundamentally different from decisions of courts or administrative tribunals or other administrative decision-makers because there is no determination of rights or liabilities. Indeed, there is no determination at all. The office of Ombudsman takes its place in a scheme whereby the Ombudsman, as an independent officer, can only make recommendations that will be considered in further executive processes and are subject to detailed scrutiny by a Joint Committee of the Parliament.⁵³ The recommendations themselves have no legal force and rights are not affected.⁵⁴

This was a point of distinction with the facts of *Kirk* because there the Industrial Court was undoubtedly dealing with the rights of both Mr Kirk and his company and the jurisdiction was criminal. But it was also a point of distinction with the foundation of the *Kirk* principle because, as I have mentioned, *Kirk* was explicitly grounded in the prerogative relief that could be granted at the time of Federation. Basten JA observed,

⁵⁰ See *Kaldas* (2017) 350 ALR 292, 372 [349] (Basten JA).

⁵¹ Lord Woolf and Jeremy Woolf, *Zamir & Woolf, The Declaratory Judgment*, (Sweet & Maxwell, 4th ed, 2011) 5 [1-11].

⁵² *Kaldas* (2017) 350 ALR 292, 321 [112]. Bathurst CJ noted (at 334 [186]): 'It is important to bear in mind that this power [to grant declarations] is of a different nature to the power to grant relief by way of the prerogative writs: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 ... at [17]–[18]. As Gaudron J pointed out in that case, equitable remedies are available because of the inadequacy of the prerogative writs and it is not incongruous that equitable relief should be available, although prerogative relief is not: at [58].'

⁵³ *Kaldas* (2017) 350 ALR 292, 315 [70]–[71], 323 [128].

⁵⁴ For Basten JA the adverse impact on reputation was nevertheless important.

the 'prerogative writs did not in 1901, and still do not, provide a basis for reviewing decisions of statutory authorities which do not affect legal rights or interests'.⁵⁵ He concluded that

there is no historical basis for the proposition that an essential characteristic of a State Supreme Court, in 1900, was to grant any form of relief with respect to conduct of an administrative officer which did *not* affect legal rights or impose legal liabilities ...⁵⁶

For him, it was for that reason that *Kirk* did not apply and the ouster clause validly precluded all of the claims brought by Kaldas. Macfarlan JA relevantly agreed with Basten JA.

Bathurst CJ adopted a similar approach but raised the hypothetical issue that prohibition might have been available in advance of publication of the report, even if no legal rights were affected, because the report diminished a person's reputation.⁵⁷ However, prohibition had not been sought here. For him the critical question related to the nature of the relief that had been sought: was the power to make a bare declaration in the exercise of a Supreme Court's supervisory jurisdiction a defining characteristic of the Supreme Court which cannot be denied by a statutory ouster clause? In his view it was not.⁵⁸ He doubted whether at the time of Federation the Supreme Court even had the power to make *bare* declarations of right.⁵⁹ He observed that 'the power to grant a declaration as a public law remedy is a power to grant a remedy separate and distinct from the power to grant relief by way of the prerogative writs'.⁶⁰ He said:

[Kaldas] acknowledged that what he contended for amounted to an extension of *Kirk*. That is correct in at least two respects. First, by extending the principle to bodies which do not directly affect rights and, second, by extending the principle to cases where relief other than relief in the nature of the prerogative

⁵⁵ *Kaldas* (2017) 350 ALR 292, 372 [349].

⁵⁶ *Ibid* 373 [353] (emphasis added).

⁵⁷ *Ibid* 331-2 [169]-[175].

⁵⁸ *Ibid* 332 [176]-[177].

⁵⁹ *Ibid* 334 [187]. He noted that in England the power to grant bare declarations was conferred by Order 25 rule 5 of the *Supreme Court Rules 1883* (UK) but that the equivalent power was not conferred in New South Wales until 1924 (by an amendment to s 10 of the *Equity Act 1901* (NSW) by s 18 of the *Administration of Justice Act 1924* (NSW)).

⁶⁰ *Ibid* 335 [194].

writs is sought.⁶¹

He considered that it was not for the Court of Appeal to lay down an extension of the *Kirk* doctrine. He then went further and raised, by way of inquiry, how precisely is a court to be faithful to the principle underpinning *Kirk* yet avoid arriving at conclusions that have an uncertain foundation. He said:

It does not seem to me appropriate for an intermediate Court of Appeal to take this step, particularly having regard to the uncertainty of the Court's power to grant such relief at the time of Federation. It also may be said that *this is contrary to the principle which underpinned Kirk*, namely, *that the Court's power to grant relief for jurisdictional error should not be constrained ...*. It may be thought anomalous that whilst prohibition may have been granted prior to the issue of the report, s 35A precludes relief after its issue. Notwithstanding these considerations, which are powerful, I do not think the Court should extend the principle in *Kirk* to apply in the present situation.⁶²

What is apparent from *Kaldas* is that there are significant questions left unresolved by *Kirk* about the scope of the doctrine. While some of those questions have been resolved in New South Wales by the Court of Appeal in *Kaldas*, for now, in a limiting fashion, the Court has also signalled that there will be real questions to answer in the future. As Bathurst CJ observed, and described as a powerful consideration, the general principle underlying *Kirk* appears to be that the Court's power to grant relief for jurisdictional error should not be constrained. It might be thought that, if that principle was wholly accepted, there would be a respectable argument that the fact that the range of relief for judicial review is wider now is irrelevant. What is critical is the nature of the error being reviewed, namely, that it is a jurisdictional error of law. In *Kirk* this is expressed in very general terms as ensuring the supervisory jurisdiction of the Court to enforce the limits on the exercise of State executive and judicial power. It is said to reveal why there is a need in the Australian constitutional context to preserve the distinction between jurisdictional and non-

⁶¹ Ibid 335 [195].

⁶² Ibid 335–6 [196] (emphasis added). See also 375 [361] (Basten JA). The Chief Justice considered that certiorari would probably not have been available because no rights were affected (at 329–31 [160]–[168]) although he noted that in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, at 358 [100], the High Court expressly left open whether it was correct that certiorari would not go to quash a decision or recommendation prior to the final exercise of a discretion that directly affects legal rights unless the decision or recommendation must be taken into account by the ultimate decision-maker.

jurisdictional error of law; indeed, the proposition is expressed that '[that] distinction marks the relevant limit on State legislative power'.⁶³ Any encroachment on that proposition might be thought to diminish or undermine the force of *Kirk*.

This was implicitly acknowledged by Bathurst CJ, who yet concluded that the generality of the underlying principle must confront significant questions about the nature of the body exercising the executive power of the State and the nature of the relief sought. These are serious and difficult issues. No one would wish to see a return to the tyranny of the Forms where a failure to choose the proper form of action could result in a claim being thrown out of court,⁶⁴ nor a reintroduction of procedural technicalities for seeking relief over administrative action.⁶⁵ What *Kaldas* has signalled for the future is that the High Court may need to refine the general principle underlying *Kirk* to guide its principled application either by embracing its breadth or identifying its limits.

II COMPULSORY PRE-TRIAL QUESTIONING OF CRIMINAL DEFENDANTS

I want to consider more briefly a series of 2017 cases concerning the questioning of criminal defendants about the offending with which they were charged. These come at the end of a line of High Court authority which was almost inevitably destined to confront a constitutional challenge. In this context attempts were made to navigate the earlier High Court cases of *X7*,⁶⁶ *Lee v NSW Crime Commission*⁶⁷ and *Zhao*.⁶⁸

This line of authority begins with statements by the majority of the High Court in *X7*⁶⁹ to the effect that compulsorily examining a person charged with, but not yet

⁶³ *Kirk* 239 CLR 531, 581 [100]; see also 580–1 [96]–[100].

⁶⁴ Until they were abolished by the *Judicature Acts 1873–75* (UK), failure to choose the proper common law form of action (eg real actions, mixed actions, or personal actions) could result in a proceeding being nonsuited. An example is *White v Great Western Railway Co* (1957) 2 CB NS 7; 140 ER 312.

⁶⁵ Modern administrative law (especially statutory forms of judicial review) has sought to overcome the complex and technical rules governing relief.

⁶⁶ *X7 v Australian Crime Commission* (2013) 248 CLR 92 ('*X7*').

⁶⁷ (2013) 251 CLR 196 ('*Lee*').

⁶⁸ *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 ('*Zhao*').

⁶⁹ (2013) 248 CLR 92.

tried for, a Commonwealth indictable offence, about the subject matter of that offending would depart from the accusatorial nature of the process of criminal justice. This would be so even if the answers could not be used directly against the accused, and were to be kept secret, because the accused could no longer decide what course to take at trial solely based upon the strength of the prosecution case. Statutory authorisation would need to use words of ‘irresistible clearness’⁷⁰ and the relevant legislation, the *Australian Crime Commission Act 2002* (Cth), did not.⁷¹

The majority in *X7* (Hayne, Kiefel and Bell JJ) found themselves in the minority in *Lee*.⁷² In *Lee* the Court held that NSW confiscation legislation⁷³ empowered the Court to make an order for the examination of a person charged with criminal offences about conduct that was the subject of those criminal charges. This was so despite the legislation being expressed in very general terms empowering the Court to order the examination on oath of a person ‘concerning the affairs of the affected person’.⁷⁴ Hayne J observed that the principles underlying *X7* applied with equal force in *Lee*⁷⁵ and quoted Gibbs J who had said that

[n]o Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court (emphasis added).⁷⁶

Later in *Zhao*⁷⁷ the High Court unanimously upheld the Victorian Court of Appeal’s decision⁷⁸ that a civil proceeding for the forfeiture of proceeds of crime ought be stayed because it related to the same, or substantially the same, issues as a pending criminal trial. The risk of prejudice to the accused was seen as plain.

⁷⁰ *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J).

⁷¹ The relevant statutory provision was s 28(1) of the *Australian Crime Commission Act 2002* (Cth) (‘the ACC Act’). As Hayne and Bell JJ said, there was ‘no express reference, anywhere in the ACC Act, to examination of a person who has been charged with, but not tried for, an offence about the subject matter of the pending charge’: *X7* (2013) 248 CLR 92, 131 [83].

⁷² (2013) 251 CLR 196.

⁷³ Section 31D(1)(a) of the *Criminal Assets Recovery Act 1990* (NSW).

⁷⁴ *Lee* (2013) 251 CLR 196, 231 [59].

⁷⁵ *Ibid* 231 [62].

⁷⁶ *Ibid* 231-2 [63], quoting from *Queensland v Commonwealth* (1977) 139 CLR 585, 599.

⁷⁷ (2015) 255 CLR 46.

⁷⁸ *Zhao v Commissioner of the Australian Federal Police* (2014) 43 VR 187 (Nettle, Tate and Beach JJA).

A constitutional challenge came before the NSW Court of Appeal in 2017 in the form of *Commissioner of Australian Federal Police v Elzein*.⁷⁹ By then s 319 of the *Proceeds of Crime Act 2002* (Cth) had been amended to overcome the perceived effects of *Zhao*.⁸⁰ As amended, it provides that the court must not stay the confiscation proceedings on the ground that a criminal prosecution has been commenced against the defendant even where the circumstances pertaining to the two proceedings may be the same or substantially the same. A court is still permitted to stay a proceeding if it is in the interests of justice to do so and can take into account whether orders could be made to address any prejudice.

Elzein, who had been ordered to provide sworn statements under the *Proceeds of Crime Act* (Cth) about his property interests, was charged the next day under the *Customs Act 1901* (Cth) and the *Criminal Code* (Cth) with unlawfully importing tobacco with intent to defraud the Commonwealth. Separate questions were formulated and the proceeding removed into the Court of Appeal. The questions included these: does the legislation permit an order for sworn statements, or an examination order, against a defendant in 'concurrent' criminal proceedings in relation to a related subject matter? If so, would that contravene Ch III as an impermissible interference with alleged essential features of the judicial power of the Commonwealth, namely the adversarial nature of a criminal trial as described in *X7*? Alternatively, would there be a contravention of s 80 of the *Constitution* because this would impermissibly alter a fundamental feature of trial by jury? In addition, do the limitations imposed on the grant of a stay under s 319 render the scheme invalid?⁸¹

The Court held, on statutory construction, that there was a sufficiently clear intention in the legislation that it authorised a person subject to criminal charges to be examined on matters related to those charges, in circumstances where the person enjoys no privilege against self-incrimination.⁸² On the question of constitutional validity, Basten JA (with whom Beazley ACJ and Simpson JA agreed) accepted the

⁷⁹ (2017) 345 ALR 446 ('*Elzein*').

⁸⁰ Ibid 462 [67].

⁸¹ Ibid 451 [25], 453 [31].

⁸² Ibid 459 [54]–[55], 466–7 [89].

statement by Gageler J in *Condon v Pompano Pty Ltd*⁸³ that a procedural scheme that constituted a substantial interference with the fairness of a criminal trial would not be constitutionally valid.⁸⁴ This is not a guarantee that can be derogated from by statutory language of irresistible clarity or otherwise; it is not a question of the application of the principle of legality. Rather, Gageler J said, '[p]rocedural fairness is an immutable characteristic of a court'.⁸⁵ Basten JA acknowledged that there was a real constitutional issue in the case and the case could not be decided by resort to the principles of statutory interpretation, including the principle of legality, as X7 and *Lee* had been.

Basten JA held that the legislation was constitutionally valid. This was primarily because the court could take steps to protect the integrity of the criminal process. These included the power of a court, while refusing to stay the confiscation proceeding, to impose conditions on the examination of an accused, particularly a condition prohibiting the disclosure of information to the prosecution during the criminal proceeding.⁸⁶ Indeed disclosure was now permitted under the Act only where 'a court has *not* made an order prohibiting the disclosure of the information'.⁸⁷ Basten JA considered that the concern that compulsory questioning 'might affect [an accused's] defence' could be removed, or at least greatly reduced, if the order preventing disclosure to the prosecution also included a prohibition on disclosure to all police involved with the investigation, prosecution or trial of the offender.⁸⁸ Accordingly, the integrity of the court's jurisdiction to protect an accused is unimpaired. The Commonwealth Parliament has thus not overstepped the constitutional boundaries of its legislative power.

The companion case to *Elzein* is *D151 v New South Wales Crime Commission*,⁸⁹ where the same bench upheld the validity of State legislation, the *Crime Commission Act 2012* (NSW) against a *Kable* challenge to the compulsory questioning of a criminal

⁸³ (2013) 252 CLR 38, 110 [194].

⁸⁴ *Elzein* (2017) 345 ALR 446, 476 [128], 471 [114].

⁸⁵ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 110 [194].

⁸⁶ *Proceeds of Crime Act 2002* (Cth) s 266A. This had been foreshadowed by Gleeson JA in *Commissioner of the Australian Federal Police v Cacu* [2017] NSWCA 5.

⁸⁷ Section 266A(2)(b) (emphasis added). This was included in the post-*Zhao* amendments.

⁸⁸ *Elzein* (2017) 345 ALR 446, 469 [100].

⁸⁹ (2017) 321 FLR 281 (NSW Court of Appeal).

accused about the subject matter of the offences with which he or she had been charged. The *Crime Commission Act* had been amended to expressly permit such questioning but did so by way of a qualified prohibition.⁹⁰ The Act prohibited the Commission from questioning an offender about the subject matter of the offence but conferred a power upon the Supreme Court to grant leave for this form of questioning if satisfied that any prejudicial effect likely to arise in the person's trial was outweighed by the public interest in using the Commission's powers to ensure that a matter was fully investigated. The Court held that for the Supreme Court to exercise this function was not incompatible with the essential characteristics of a court in which federal jurisdiction is vested. This was because whether leave is to be granted is in the discretion of a judge, which is a conventional exercise of judicial power.⁹¹ I note that, although there is no mention in *D151* of the guarantee embraced in *Condon v Pompano Pty Ltd*, presumably if a judge considered that the questioning would substantially interfere with the fairness of the criminal trial, leave would be (and would have to be) refused.⁹²

*Lazarus v Independent Commission Against Corruption*⁹³ concerned the retrospective legislative validation of past unlawful acts. Leeming JA (with whom McColl and Simpson JJA agreed) held that State legislation,⁹⁴ the *Validation Act*, which

⁹⁰ Ibid 286 [15].

⁹¹ Ibid 292 [41]. Another *Kable* case was *Kamm v NSW [No 4]* (2017) 322 FLR 385 (NSW Court of Appeal) where the *Crimes (High Risk Offenders) Act 2006* (NSW) was held not to deny an essential characteristic of a court of a State because the discretionary supervision orders it empowered a court to make post-sentence were for a protective purpose and were not a step in the adjudication or punishment of guilt. The legislation contained many of the safeguards identified as relevant in *Fardon v A-G (Qld)* (2004) 223 CLR 575. The High Court dismissed an application for the removal to it of the constitutional issue. *Wainohu v New South Wales* (2011) 243 CLR 181 was distinguished: *Kamm NSW* (2017) 322 FLR 385, 393 [40], 403-4 [103], 406 [116], 409 [137], 411 [147]-[148].

⁹² In the Queensland case of *R v Sander* (2017) 347 ALR 677 the Queensland Court of Appeal (Gotterson, Morrison and McMurdo JJA) held that where there had been an unlawful examination by the Australian Crime Commission of accused persons on the subject matter of a charge against them this did not inevitably prejudice a criminal trial so as to give rise to a miscarriage of justice. In obiter remarks the Court held that to demonstrate injustice it was necessary for the accused to reveal the case (if any) which they might have asked the jury to consider at the trial had it not been for the ACC questioning. There was no constitutional challenge in this part of the case; there was a constitutional challenge to s 184A(5) of the *Customs Act 1901* (Cth) as not supported by the external affairs power which was rejected.

⁹³ (2017) 94 NSWLR 36.

⁹⁴ The *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) ('the *Validation Act*').

retrospectively validated an unauthorised investigation by ICAC⁹⁵ did not interfere with the judicial function of the Supreme Court in a manner which compromised or was repugnant to the institutional integrity of the Court. The *Validation Act* did not infringe *Kable*.⁹⁶ This was so even though the effect of the *Validation Act* was to remove a basis for the discretionary exclusion of evidence of one accused in her criminal trial on the charge of making false instruments and false statements to obtain money.⁹⁷ The Court concluded that the circumstances could not be distinguished from *Nicholas v The Queen*⁹⁸ where the High Court upheld the validity of a federal law that directed a State court in pending criminal proceedings to disregard for all purposes the law enforcement officers' criminality in importing narcotics.⁹⁹

With respect to a second accused, the effect of the *Validation Act* was to have denied her an entitlement to an acquittal. She had been convicted of the offence of giving false and misleading evidence at a compulsory examination or public inquiry conducted by ICAC.¹⁰⁰ If the investigation was unlawful it removed an element of the offence. Nevertheless, the Court upheld the *Validation Act* as constitutionally valid because the *Validation Act* did not deal directly with the ultimate issues of guilt or innocence; all the factual elements of the offence still had to be proved beyond reasonable doubt – all that had changed was the legal characterisation of those facts and that did not usurp the judicial process.¹⁰¹ Indeed, the appellate process itself often involves changing the legal characterisation of conduct from what appeared to be legally impeccable to unlawful conduct.¹⁰²

⁹⁵ It was common ground that the investigation was unauthorised on the same basis as that found to be unauthorised in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 after which the *Validation Act* was passed.

⁹⁶ See, for example, *Kable* (1996) 189 CLR 51, *Fardon v A-G (Qld)* (2004) 223 CLR 575, *Wainohu v New South Wales* (2011) 243 CLR 181.

⁹⁷ *Lazarus* (2017) 94 NSWLR 36, 52 [64].

⁹⁸ (1998) 193 CLR 173.

⁹⁹ *Lazarus* (2017) 94 NSWLR 36, 62-3 [113]-[119].

¹⁰⁰ *Ibid* 39 [3]. The High Court had already determined that the *Validation Act* was valid in its application to pending civil litigation challenging the validity of what would otherwise be unauthorised findings by ICAC: *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83.

¹⁰¹ *Lazarus* (2017) 94 NSWLR 36, 64-5 [129]-[132]. See *Kuczborski v Queensland* (2014) 254 CLR 51.

¹⁰² *Lazarus* (2017) 94 NSWLR 36, 66 [133].

III VALIDITY OF LEGISLATION

My third topic is the validity of legislation.

In *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation*¹⁰³ the Full Court of the Federal Court (Allsop CJ, Perram and Pagone JJ)¹⁰⁴ held that the retrospectivity of div 815A of the *Income Tax Assessment Act 1997* (Cth) did not mean that the tax imposed was arbitrary and incontestable and therefore outside the scope of the taxation power under s 51(ii) of the *Constitution*.

Relevantly, Chevron Australia Holdings Pty Ltd ('Chevron') challenged assessments made by the Commissioner of Taxation with respect to the 2006 to 2008 years. Although inserted in 2012, div 815A was made to apply to income years starting on or after 1 July 2004. The assessments were made in substance on the basis that the interest paid by Chevron, an Australian company, to a United States subsidiary, was greater than it would have been if there had been an arm's length dealing between independent parties. The constitutional challenge was to the effect that div 815A was beyond the Commonwealth Parliament's constitutional power. It was accepted that the Commonwealth Parliament had power to enact tax legislation with some retrospective effect but it was argued that Division 815-A was constitutionally invalid because it imposed an arbitrary and incontestable tax. Chevron submitted that in the 2007 and 2008 years it did not know, and could not have known, that it would come to be taxed by reference to criteria in legislation enacted in 2012. It also argued that the criteria of liability were not ascertainable because they were to be determined by reference to documents including OECD guidelines and international conventions.

Pagone J drew upon what was said in *Deputy Federal Commissioner of Taxation v Brown*,¹⁰⁵ *MacCormick v Federal Commissioner of Taxation*¹⁰⁶ and *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation*¹⁰⁷ to the effect that an inability of a taxpayer to

¹⁰³ (2017) 251 FCR 40 ('*Chevron*').

¹⁰⁴ Allsop CJ relevantly agreed with Pagone J. Perram J agreed with Pagone J.

¹⁰⁵ (1958) 100 CLR 32.

¹⁰⁶ (1984) 158 CLR 622.

¹⁰⁷ (2011) 244 CLR 97.

challenge an earlier liability was not found to make the tax either arbitrary or incontestable. He observed:

Subdivision 815-A does not impose an arbitrary or incontestable tax in the sense contemplated by the authorities. It can be accepted ... [that Chevron] could not have been aware of the criteria of liability in respect of those years which came only to be imposed by the subsequent enactment, with retrospective application, of Subdiv 815-A. That circumstance, however, is inherent in the nature of retrospective legislation ... That a person may not be aware at an earlier point in time what the criteria of liability may subsequently be made to apply to that earlier point in time does not make the legislation arbitrary or incontestable in the sense considered in *Brown, MacCormick, and Roy Morgan*.¹⁰⁸

He also held that the criteria imposed for liability required factual and objective determinations to be made and that the direction to consider various documents is for the purpose of interpretation and did not render the relevant criterion uncertain.

Another decision by the Full Federal Court on the scope of the taxation power is *Keris Pty Ltd v Deputy Commissioner of Taxation*.¹⁰⁹ In *Keris Greenwood, McKerracher and Moshinsky JJ* examined a law, s 255-100 of the *Taxation Administration Act 1953* (Cth), that conferred power on the Commissioner of Taxation to require the giving of security in the form of a mortgage of real estate for the 'due payment of an 'existing or future tax-related liability'. *Keris Pty Ltd* submitted that as the power related to a future tax-related liability it allowed the Commissioner to guess at a taxpayer's future intentions and hypothetical transactions and that is beyond the legislative power of the Commonwealth. The quantum of the security was argued to be selected arbitrarily with no regard to actual taxable events having occurred and this rendered it incontestable. It was also submitted that the demand for the grant of a proprietary interest over specific property with potential criminal consequences for non-compliance was an acquisition of property on other than just terms and this infringed the constitutional guarantee under s 51(xxxi) of the *Constitution*.

In joint reasons, the Court rejected those submissions and held that s 255-100 was a valid law of the Commonwealth as a provision for the recovery of tax where there is a risk arising from the nature of the business being undertaken, or from other

¹⁰⁸ *Chevron* (2017) 251 FCR 40, 84 [144].

¹⁰⁹ [2017] FCAFC 164 ('*Keris*').

circumstances, that the liability for tax will not be met. Moreover, the power was not 'at large'. As such it was a law with respect to the power conferred by s 51(ii) of the *Constitution* to make laws with respect to taxation because s 51(ii) covers what is incidental to the imposition and collection of taxation. The Court also held, applying *Mutual Pools & Staff Pty Ltd v Commonwealth*,¹¹⁰ that because s 255-100 is properly characterised as a law with respect to taxation, it falls outside of the operation of s 51(xxxi):

The point of all this is simply that a law with respect to the giving of security for the due payment of an 'existing or future tax-related liability' operating as a collection and protection measure is a law 'with respect to' taxation as an incident of or ancillary to the power to impose tax upon citizens, and the law is not rendered beyond or outside the power conferred by s 51(ii) because at the moment in time when the power is exercised by the Commissioner, there are no foundation facts upon which a present assessment could be made of the objectively ascertainably correct amount of the future tax-related liabilities.

Of course, once the relevant law falls within s 51(ii), as it does here, it necessarily falls outside s 51(xxxi).¹¹¹

*Rowley v Chief of Army*¹¹² involved a constitutional challenge to the validity of s 68(1)(b) of the *Defence Force Discipline Act 1982* (Cth) on the ground that it was beyond the power of the Commonwealth to make laws with respect to defence under s 51(vi) of the *Constitution* as it authorises a punishment, namely, the imposition of a sentence of imprisonment to be served in a civilian correctional facility, concurrently with dismissal from the Australian Defence Force ('ADF') during peacetime. The challenge was also based upon the absence of any provision for an appeal as to sentence. Rowley had been convicted of two offences of dishonesty, one being a dishonest act in relation to his living address committed for the purpose of maximising his rental allowance from Defence Housing Australia and the other being dishonest acts submitted to the ADF seeking recognition of a relationship in relation to his living address.

Perry J dismissed the challenge. She observed that the defence power is purposive, being referable to 'aims or objectives' rather than subject matter, and this

¹¹⁰ (1994) 179 CLR 155.

¹¹¹ *Keris* [2017] FCAFC 164 [146]–[147].

¹¹² [2017] FCA 1119 ('*Rowley*').

may require, as recognised by Dawson J in *Leask v Commonwealth*,¹¹³ an inquiry into whether the law goes further than is necessary to achieve the purpose of defence, ‘an exercise in proportionality’.¹¹⁴ She accepted that, although the scope of the power is affected by whether the Commonwealth is in a time of peace or war, the defence power must be broadly construed, consistently with the other heads of power, even in times of peace. It is well established both that laws for the imposition of military discipline and establishment of courts martial fall within the scope of the defence power and that military tribunals can impose sentences of imprisonment without infringing Chapter III as they do not exercise the judicial power of the Commonwealth. As military tribunals do not exercise the judicial power of the Commonwealth, the absence of an appeal right to a court did not invalidate the power and, in any event, judicial review is available pursuant to s 39B of the *Judiciary Act 1903* (Cth) because those constituting service tribunals are officers of the Commonwealth.

Perry J rejected the submission that the connection between imprisonment and the head of power in s 51(vi) is broken once the person subject to disciplinary action is dismissed, the person no longer being a member of the ADF and serving their sentence as a civilian rather than a defence member. Perry J identified the defence purpose of making available to a service tribunal the power to impose a sentence of imprisonment as lying in the general deterrence effect it can have on the remaining members of the ADF. For the sentence to be accompanied by dismissal no doubt increases the general deterrent effect. This was supported by an understanding of pre-Federation history where imprisonment together with dismissal was part of military discipline and justice. Moreover, she observed, an offence of dishonesty potentially affects the trust between members of the ADF and the chain of command. Section 68(1)(b) was thus clearly proportionate to the imposition and maintenance of discipline within the ADF.¹¹⁵

A challenge to the validity of State legislation was raised in *Eclipse Resources Pty Ltd v Minister for Environment* [No 2].¹¹⁶ There the Western Australian Court of

¹¹³ (1996) 187 CLR 579.

¹¹⁴ Ibid 606.

¹¹⁵ *Rowley* [2017] FCA 1119 [113].

¹¹⁶ (2017) 223 LGERA 313.

Appeal (Buss P, Newnes and Murphy JJA) upheld a determination by the primary judge to the effect that a levy imposed on waste disposed of as landfill is not a duty of excise. Section 90 of the *Constitution* confers exclusive power on the Commonwealth to impose duties of customs and of excise. To be an excise the tax must be levied upon goods.

Eclipse Resources Pty Ltd ('Eclipse') carried out a business relating to land use and resource recovery operations. As part of its operations it received materials from third parties and deposited and compacted some of those materials in voids created by quarrying activities conducted on the sites in question. The Western Australian Parliament enacted the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA) ('the Levy Act') which enabled regulations to be made prescribing an amount by way of levy to be payable relevantly when waste is accepted for burial at premises and disposed of to landfill. The levy applied to Eclipse's operations at its sites.

The primary judge held that the levy is not an excise. It was significant that, in form and substance, the levy was only imposed to the extent that the waste was disposed of to landfill and no tax was imposed unless and until waste was disposed of to landfill. He had also found that the materials were of no value to the parties supplying them and nor was he satisfied that the materials were of value, or could be sold, to any other party. Eclipse was paid for the service of taking the materials away thereby enabling Eclipse to fulfil its contractual obligations and obligations under local government approvals in order for it to conduct its activities on the sites.

On appeal it was submitted that the primary judge erred in failing to find that the relevant materials were a valuable commodity or article of commerce, given the breadth of the concept of a tax on goods or commodities. The Court of Appeal rejected that submission on the basis that the usefulness of the material received by Eclipse was that it could and would be buried as landfill, that is, deposited in the voids and compacted and covered over, and nothing indicated that it was a 'thing', let alone an article of commerce, or was, or was capable of being, the subject of trading or commercial transactions.¹¹⁷ Furthermore, there was no cogent evidence that there was

¹¹⁷ Ibid 388 [285].

a market for the particular types of waste materials buried by Eclipse, or that those materials were saleable.¹¹⁸ Nor was there any evidence that the levy entered into the costs of other products, directly or indirectly. The Court approved the observations of the primary judge:

To be an excise, a tax must bear a close relation to the production of goods. In this case, there is not a sufficiently close relation between the levy and the production of the Products [water-retention soil and structural fill relevant to one of the sites] to sustain a characterisation of the levy as, in substance, a tax on that production. When waste is disposed of to landfill, by definition it is not then being used to make Products. When the materials were put into the ground, that reflected Eclipse's decision that, from its perspective, that was the most efficient and productive use of them at that time. *The materials were compacted on the basis that they would be 'treated as permanent fill and therefore placed and compacted accordingly'.* *Compacted materials may or may not be re-mined, depending on later economic circumstances and the materials available to Eclipse at later times.* The existence of that possibility does not sustain a conclusion that the levy bears a close connection to the production of Products that may or may not, at some uncertain subsequent time, be produced from materials disposed of to landfill during the return period in question. The disposal of materials to landfill in these circumstances is not an essential or natural step in the production of the Products from that material.¹¹⁹

The Court held that there was no commodity, no step in production, no production, and, in any event, no tax on any of those things.

An application for special leave was dismissed.¹²⁰

IV BRIEF REMARKS — INCONSISTENCY AND ELECTORAL REDISTRIBUTION

By way of final brief remarks, there were, during the 2017 term, some other cases of significance. Those interested in cases on inconsistency will find that the Northern Territory Court of Appeal held in *Outback Ballooning Pty Ltd v Work Health Authority*¹²¹ that Commonwealth civil aviation law is a complete statement of the law governing the safety of air navigation. This includes on-ground loading of passengers onto a hot air balloon. The result is that a prosecution could only be brought under

¹¹⁸ Ibid 388 [287].

¹¹⁹ Ibid 391 [294], quoting from the primary judge (emphasis added on the appeal).

¹²⁰ [2017] HCASL 234.

¹²¹ [2017] NTCA 7 (*'Outback Ballooning'*) (Southwood, Blokland and Riley JJ).

the federal scheme and not under local health and safety legislation.¹²² In *Longley v Chief Executive Department of Environment and Heritage Protection*¹²³ Jackson J of the Queensland Supreme Court applied the almost intractable roll-back provisions of the *Corporations Act* to hold that a State Environmental Protection Order prevailed.¹²⁴

On electoral matters, the Full Court of the Supreme Court of South Australia, in *Martin v Electoral Districts Boundaries Commission*,¹²⁵ held that the Commission, in making a redistribution, was not required to pursue the objective of achieving a redistribution in which each electoral district had an equal number of electors. Just as in *McGinty v Western Australia*,¹²⁶ the principle ‘one vote one value’, which looms large in the United States jurisprudence, was not seen as an essential requirement of representative democracy.¹²⁷ Representative government in Australia, including in

¹²² The issue of inconsistency was between the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) and Commonwealth civil aviation acts and regulations: *Outback Ballooning* [11], [59], [61], [99].

¹²³ (2017) 318 FLR 262.

¹²⁴ It was accepted that s 568 of the *Corporations Act 2001* (Cth) and ss 358 and 361 of the *Environmental Protection Act 1994* (Qld) were directly inconsistent. Jackson J held that s 5G of the *Corporations Act* applied with the effect that the Queensland provisions prevailed since they operated prior to the enactment of the *Corporations Act*, pursuant to s 9(1) of the *Corporations (Ancillary Provisions) Act 2001* (Qld). The liquidators of Linc Energy Ltd (in liq) were therefore not justified in causing the company not to comply with an Environmental Protection Order: *Longley* (2017) 318 FLR 262, 284 [133], 285–6[143], 288 [153]. Another case of interest is *Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191 (‘Wing’) where it was common ground that ss 21 and 22 of the *Defamation Act 2005* (NSW), which provide that a party can elect to be tried by jury and, if so, the jury is to determine whether the publication is defamatory and whether a defence has been established and the judge is to assess damages, is directly inconsistent with s 39 of the *Federal Court of Australia Act 1976* (Cth), which provides that in the ordinary case and without an order of the court, a civil action is tried by a judge without a jury, and s 40, which confers a broad discretionary power to direct the trial with a jury of any issue of fact in the civil action. The issue was whether the Court, in exercising its power under s 40, could have regard to ss 21 and 22 of the New South Wales *Defamation Act*. The Full Court of the Federal Court (Allsop CJ, Rares and Besanko JJ) held that it could not. An inconsistency decision mentioned in last year’s address was *Secretary to the Department of Health and Human Services v AA* (2017) 318 FLR 383 412 [62], 431–39 [142]–[159], especially 433 [146], 433–34 [149], where Cavanough J of the Victorian Supreme Court held that there was no inconsistency between ss 241, 267 and 280 of the *Children, Youth and Families Act 2005* (Vic) (as they applied to orders for the emergency care, protection and accommodation of an unlawful non-citizen) and section 197AB of the *Migration Act 1958* (Cth).

¹²⁵ (2017) 127 SASR 362 (‘*Martin*’) (Kourakis CJ, Kelly, Blue, Bampton and Hinton JJ).

¹²⁶ (1996) 186 CLR 140.

¹²⁷ The Court rejected the view that the principle of ‘one vote one value’ was an implication derived from s 77(1) of the *Constitution Act 1934* (SA) which governs the basis on which an electoral redistribution is to be made to the effect that the number of electors comprised in each electoral district must not vary from the electoral quota by more than the permissible tolerance (10 per cent). The only implication to be drawn from s 77(1) was substantial equality as expressed by the range of tolerance prescribed: *Martin* (2017) 127 SASR 362, 410 [200].

the State of South Australia, accommodates significant deviation from the ideal of equal representation.¹²⁸ The desirability of numerical equality was nevertheless a factor to which the Commission could have regard.¹²⁹

V *BURNS V CORBETT* — DIVERSITY JURISDICTION

One last comment.¹³⁰ I have said nothing about the significant case of *Burns v Corbett*¹³¹ as that is to be the subject of a separate session. Suffice it to say here that the New South Wales Court of Appeal (Leeming JA, with whom Bathurst CJ and Beazley P agreed) held that a State tribunal that exercises State judicial power does not have jurisdiction to hear and determine matters between residents of two States, diversity jurisdiction. Part of the controversy was to identify the source of that limitation, either as derived from a negative implication from Chapter III or by reason of a s 109 inconsistency between the State tribunal's empowering Act and s 39(2) of the *Judiciary Act 1903* (Cth). Further plot development must await the separate

¹²⁸ *Martin* (2017) 127 SASR 362, 395-6 [150].

¹²⁹ *Ibid* 413 [215]. The Commission was entitled to have regard to any other matters it thinks relevant. The Full Court of the South Australian Supreme Court, in *Construction Industry Training Board v Transfield Services (Australia) Pty Ltd* (2017) 128 SASR 475, also entertained a question about whether land owned by an incorporated company wholly owned by the Commonwealth constituted a place 'acquired by the Commonwealth for public purposes' under s 52(i) of the *Constitution*. It held that it did.

¹³⁰ There were three additional matters of note. In *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 Flick J held that a corporation that was established as a mere repository of intellectual property was a 'trading corporation', within the meaning of s 51(xx) of the *Constitution*, because it was established with the intention to achieve a commercial realisation of the research in the future. In *In the matter of OneSteel Manufacturing Pty Ltd (admin apptd)* (2017) 93 NSWLR 611 Brereton J held that s 267 of the *Personal Property Securities Act 2009* (Cth), whereby an unperfected security interest vested in the company upon the company being wound up, was not an acquisition of property within s 51(xxxi) of the *Constitution* because s 267 was directed towards a genuine adjustment of competing rights. The third matter consisted of about 18 related appeals heard by the Full Federal Court (Kenny, Robertson and Griffiths JJ) in relation to an application made by the Commonwealth Department of Infrastructure for the termination of residential tenancy agreements with tenants living around the proposed site of the Sydney West airport. The Full Court held that s 10AA of the *Federal Circuit Court of Australia Act 1999* (Cth) validly conferred jurisdiction on the Federal Circuit Court to hear Commonwealth tenancy disputes. The fact that a State tribunal had formerly dealt with Commonwealth tenancy disputes did not demonstrate that non-judicial (administrative) power had been conferred on the Federal Circuit Court: see, for example, *Kenney v Commonwealth* (2017) 249 FCR 293. Special leave was sought for four of these matters but they were each dismissed.

¹³¹ (2017) 316 FLR 448.

session. The appeal was heard by the High Court in December 2017.¹³²

It would not be surprising if the High Court's determination of the questions in *Burns v Corbett* may leave further unresolved issues — indisputably fascinating issues — for other courts, especially intermediate appellate courts, to identify and grapple with in the overall development of constitutional doctrine.

¹³² [2017] HCATrans 247(5 December 2017), HCATrans 249 (6 December 2017).