The High Court on Constitutional Law: The 2009 Term

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Introduction

On looking back through the papers delivered at this session since 2002, I perceived a somewhat different style as the decisions of each year were subjected to analysis by members of the practising profession, the judiciary and academia. Those emanating from academia have been, perhaps, more trenchant in their criticisms from time to time, but as a member of the profession, I propose to take Stephen Gageler’s wise advice in the first of these papers, “eschewing – if only for reasons of self-preservation – any robust critique of the recent judgments of the Court”.

I do, however, intend to rely upon the precedent set by the learned Solicitor-General for Victoria last year in taking a slightly more liberal approach to the interpretation of my topic. I will trespass slightly into the first term of 2010 and make mention of one of the decisions handed down at the start of this year.

I thought that I would start with a birds-eye view of the constitutional landscape during the previous year. In doing so, I am mindful that the sessions which follow today will focus on most of the significant decisions in the last term, including Wurridjal, Clarke, Lane v Morrison, and of course Pape.

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Nonetheless, it is perhaps with a measure of relief that I accepted the invitation not to stray too far into a discussion of cases that will be the subject of more extensive and, no doubt, more learned consideration, in later sessions today, and to focus instead upon judicial power. Decisions on the latter subject are also illustrative of a number of themes that I will develop.

I propose to conclude by engaging (somewhat bravely) in crystal ball gazing so as to identify a number of possible constitutional issues of significance in the next decade.

**Overview of the cases during the year: managing federal interactions**

It is clear that the judicial business of managing the federation under the Constitution has tended to focus upon the extent to which the various polities, and institutions of the various polities, can lawfully and validly interfere in, or supervise, each other’s operations. Managing relations between them can be a complex and controversial task. Over the last decade, it is true to say that there has been a particularly heavy focus in this regard on working through the implications of Ch III for the judicial review of federal executive action, spearheaded by developments in migration law. This focus is not so evident in the cases that have been decided by the High Court in the last term.

However, the spotlight has shone again upon implied limitations upon State power to make laws vesting powers in State courts with the resuscitation of the *Kable* doctrine\(^7\) in the *International Finance Trust* decision\(^8\) which I’ll discuss together with *K-Generation*\(^9\) shortly.

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\(^4\) *Clarke v Federal Commissioner of Taxation* (2009) 83 ALJR 1044.
\(^7\) *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
The spotlight also turned again on the application of the *Melbourne Corporation* doctrine\(^\text{10}\) in *Clarke v Federal Commissioner of Taxation*,\(^\text{11}\) with the Court holding invalid the Commonwealth’s surcharge on superannuation arrangements for State parliamentarians as an impermissible interference with the State’s capacity to function as a government. In so holding, the Court made it clear that, while not all of the considerations present in *Austin*\(^\text{12}\) featured here, nonetheless “the interest of the State in attracting, by the making of suitable remuneration, competent persons to serve as legislators, and thus as potential Ministers, is a long-standing constitutional value.”\(^\text{13}\)

Section 109 – the “bread and butter” work of constitutional law – featured unexceptionally in the *John Holland* cases\(^\text{14}\) concerning occupational health and safety law.

In *Wong and Selim*,\(^\text{15}\) the Court rejected the contention that certain provisions of the *Health Insurance Act 1973* (Cth) amounted to civil conscription beyond the power conferred by s 51(xxiiiA) of the Constitution to make laws with respect to medical and dental services. There was no practical compulsion to perform a service, but only to conform to professional standards in respect of any services provided.

The year 2009 then ended, and 2010 began, with the decisions arising out of arrangements between the Commonwealth and the States intended to return over-allocated or overused water systems to environmentally sustainable levels of extraction.\(^\text{16}\) The twin decisions in *ICM Agriculture Pty Ltd v*

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\(^\text{10}\) *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
\(^\text{11}\) (2009) 83 ALJR 1044.
\(^\text{13}\) (2009) 83 ALJR 1044, 1061 [69] (Gummow, Heydon, Kiefel and Bell JJ).
\(^\text{15}\) *Wong v Commonwealth; Selim v Lele* (2009) 236 CLR 573.
\(^\text{16}\) The original parties to the Intergovernmental Agreement on a National Water Initiative signed at the 25 June 2004 COAG meeting were the Commonwealth Government and the governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory. The Tasmanian and Western Australian Governments subsequently joined the Agreement in June 2005 and April 2006 respectively.
Commonwealth\textsuperscript{17} and Arnold \textit{v} Minister Administering the Water Management Act 2000\textsuperscript{18} arose from the cancellation of bore licences held by the plaintiffs for irrigation and their replacement by licences with significantly reduced entitlements under the \textit{Water Management Act 2000} (NSW). This in turn satisfied a condition of a Commonwealth funding agreement entered into under s 96.

In both cases, the Court upheld the validity of a Commonwealth law authorising entry into the funding arrangement with States,\textsuperscript{19} rejecting the proposition that there could have been an acquisition for the purposes of s 51(xxxi): “the groundwater … was not the subject of private rights enjoyed by [the plaintiffs]. Rather, … it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource.”\textsuperscript{20} However, while the other members of the majority did not express a view, French CJ, Gummow and Crennan JJ in their joint judgment considered that the Commonwealth’s legislative power under ss 51(xxxi) and 96\textsuperscript{21} did not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property otherwise than on just terms, confirming the correctness of \textit{P J Magennis Pty Ltd v Commonwealth}.\textsuperscript{22} Nor, given that s 96 was qualified by s 51(xxxi) of the Constitution, could the

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\textsuperscript{17} \textit{ICM Agriculture Pty Ltd v Commonwealth} (2009) 84 ALJR 87.
\textsuperscript{18} [2010] HCA 3.
\textsuperscript{19} In a nutshell, the plaintiffs submitted that the National Water Commission established by the Commonwealth was invalid insofar as it authorised entry into the funding agreement and its administration on the grounds that it provided for the acquisition of the licences otherwise than on just terms, and therefore the State laws were invalid.
\textsuperscript{20} \textit{ICM Agriculture Pty Ltd v Commonwealth} (2009) 84 ALJR 87, 104-105 [84] (French CJ, Gummow and Crennan JJ). Accordingly, their Honours found that it was unnecessary to determine whether there had been no acquisition on the ground that the bore licences were inherently defeasible: id at 104 [80].
\textsuperscript{21} Section 96 of the Constitution provides: “During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.”
\textsuperscript{22} (1949) 80 CLR 382; \textit{ICM Agriculture Pty Ltd v Commonwealth} (2009) 84 ALJR 87, 96-98 especially [46] (French CJ, Gummow and Crennan JJ), 109 [108], 117 [145] (Hayne, Kiefel and Bell JJ).
conferral of executive power in s 61 support entry into an intergovernmental agreement to facilitate such an acquisition.  

Finally, while the decision in *Arnold* left open a number of tantalising questions about the scope of s 100 of the Constitution in limiting the Commonwealth’s power to abridge the rights of a State or its residents to reasonable use of the waters of rivers, I will leave those to Professor Williams to address in his session after lunch.

**Developments in the *Kable* doctrine**

Like bookends, the two decisions on the *Kable* doctrine in the last year marked the start and the end of the term with opposite results – validity in *K-Generation* and invalidity in *International Finance Trust v NSW Crime Commission*, albeit by the narrowest of margins (4:3). Both concerned inroads into the fundamental principle of open justice and procedural fairness, and both were the latest in a series of cases challenging, on *Kable* grounds, measures directed against those engaged in, or suspected of engaging in, serious criminal activities or variations thereof. Other decisions in the same stream include *Gypsy Jokers*, *Silbert v DPP (WA)* and, of course, *Kable* itself. It is not surprising that this pattern should be evident as it is where issues of this kind are being addressed that the greatest pressure is likely to

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23 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87, 95 [29] (French CJ, Gummow and Crennan JJ) (stating that “the Commonwealth Solicitor-General correctly accepted that if … s 96 was relevantly qualified by s 51(xxxi), an agreement to facilitate such a grant which could not be authorised by s 96 would not be supported by s 61. In this way, limitations upon legislative power may indicate whether the ends of an agreement are consistent with the Constitution [and valid]”).

24 In particular, the decision left open the question of whether *Morgan v Commonwealth* (1947) 74 CLR 421 should be re-opened (it having been held in *Morgan* that the prohibition imposed by s 100 applied only to laws capable of being made under ss 51(i) and 98 of the Constitution and did not, for example, apply to the defence power): see [2010] HCA 3 [23] (French CJ), [53] (Gummow and Crennan JJ), [76] (Hayne, Kiefel and Bell JJ). Nor did *Arnold* decide whether an intergovernmental agreement could constitute a “law or regulation of trade or commerce”, or whether the term “right of … the residents” in s 100 “is used in a collective sense rather than as a reference to individual rights”: [24] (French CJ).


29 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
be brought to be bear upon fundamental human rights including, relevantly, the right to a fair trial by an independent and impartial tribunal. In the current climate, it is also likely that we will see more laws that test the boundaries both at Commonwealth and State level, and accordingly that these are issues that are likely to continue to arise in the foreseeable future.

In this regard, *International Finance Trust* shows that *Kable* is no longer “a constitutional guard-dog that [has barked] but once”. Nonetheless it does not bark often, and one should be loath to place too much faith in the doctrine as a guardian of human rights and, in particular, of the proper relationship between State courts and the other institutions of government. However, that statement should be qualified in two respects.

First, while *Kable* has had its critics, Heydon J pointed out in *International Finance Trust* that:

> “Whatever the force of their criticisms, there is no doubt that the decision has had extremely beneficial effects. In particular, it has influenced governments to ensure the inclusion within otherwise draconian legislation of certain objective and reasonable safeguards for the liberty and the property of persons affected by that legislation.”

Secondly, one of the ironies about these cases is that the “scent” of invalidity on *Kable* grounds may lead those at the “receiving end” of a law to argue for its most draconian construction, while it tends to be the case that those responsible for administering the law will contend for a moderate construction more consistent with human rights, and will do so notwithstanding strong statements arguably to the contrary by the legislators. That is not, of course, to say that such concessions will always avail the government authorities in defending the validity of the law, as *International Finance Trust* illustrates.

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32 The Commission had “conceded” that the law did not exclude general powers of the Court to permit an application to dissolve an ex parte interlocutory injunction but the majority did not consider that the concession was rightly made. In this regard, Heydon J made the self-evident point that “[i]t is not open to [the Commission] to advocate or accept particular constructions of the legislation in any fashion binding on this Court and thereby, as it were, to ‘concede’ the legislation under which it operates into constitutional validity by converting it into a statute which is different from the one actually enacted by the legislature”: *International Finance Trust v NSW Crime Commission* (2009) 84 ALJR 31, 67 [162].
**K-Generation: no impermissible interference with the State court**

The decision in *K-Generation*\(^{33}\) had its origins in an application for Sky Lounge KTV in Adelaide to be fitted out as a karaoke bar. Perhaps to the relief of its neighbours, the licence was not approved on the ground that persons holding positions of authority in *K-Generation* were not “fit and proper” persons. That decision was made (relevantly) by the Licensing Court of South Australia based upon information classified by the Commissioner of Police as criminal intelligence under the *Liquor Licensing Act 1997* (SA). As a result of that classification, the information was not disclosed to *K-Generation* or its representatives. Notwithstanding that the Act infringed upon essential aspects of the functioning of courts and, in particular, open justice and procedural fairness, the validity of the Act was unanimously upheld. The Court rejected the contention that the effect of the Act was to direct the Licensing Court to accept the Commissioner’s classification or to direct the Court as to the manner in which it was to exercise its jurisdiction. Rather, it remained open to the courts to decide whether the information had been properly classified, what steps might be necessary to preserve its confidentiality, whether the material should be admitted and what weight, if any, should be given to it.\(^{34}\) The process, in other words, remained subject to the supervision and discretionary control of the Court.

The case is also significant in a number of other respects. I will mention just two.

First, the Court held that the principle in *Kable* was not confined to State Supreme Courts. In particular, it was held to apply to the Licensing Court.\(^{35}\)

Secondly, it confirmed the principle in *Bradley*\(^{36}\) that Ch III of the Constitution requires that State and Territory courts must be, and must appear to be, independent and impartial, and must be constituted by persons who are, and


\(^{34}\) Id at 526-527 [73]-[79] (French CJ), 542-543 [144]-[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 580 [258] (Kirby J).

\(^{35}\) Id at 529 [85] (French CJ), 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 567 [234] (Kirby J).

who appear to be, impartial. The reason for this is to maintain public confidence in the judicial system and thereby to ensure the suitability of State courts as fit and proper vessels for the exercise of federal judicial power.\textsuperscript{37} These twin requirements of independence and impartiality also underpin the more stringent constitutional requirement of the separation of judicial power that applies to federal courts, and are cornerstones of the Australian legal system essential to the maintenance of a free and democratic society based on the rule of law.\textsuperscript{38} As Gleeson CJ observed in Bradley, "[t]he fundamental importance of judicial independence and impartiality is not in question."\textsuperscript{39} One need look no further than the events last year in Fiji to illustrate the point, with the sacking of the judiciary and purported abrogation of the Constitution following the Court of Appeal’s decision as to the illegality of the interim military government.\textsuperscript{40} These events have, of course, drawn condemnation

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\textsuperscript{37} K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, 543 [149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). As Gaudron J explained in Ebner v Official Trustee in Bankruptcy (in a passage approved subsequently in Bradley): “Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires, in accordance with Kable v Director of Public Prosecutions (NSW), that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction”: Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, 363 [81] (quoted with approval in Northern Aboriginal Legal Aid Service v Bradley (2004) 218 CLR 146, 163 [31] (Gleeson CJ)).

\textsuperscript{38} Mackin v New Brunswick (Minister of Finance) [2002] 1 SCR 405 at [34]; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island [1997] 3 SCR 3 at [9]-[10]. See also Art 10 of the Universal Declaration of Human Rights, adopted on 10 December 1948 (UN Doc A/811), which provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”; and Art 14 of the International Covenant on Civil and Political Rights, to which Australia is a party.

\textsuperscript{39} North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146, 152 [3] (Gleeson CJ). See also Johnson v Johnson (2000) 201 CLR 488, 501 [36]-[39] (Kirby J). Article 2.02 of the Universal Declaration on the Independence of Justice states that: “Judges individually shall be free, and it shall be their duty, to decide matters before the impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason” (as quoted in Mackin v New Brunswick (Minister of Finance) [2002] 1 SCR 405 at [35]).

\textsuperscript{40} Qarase v Bainimarama [2009] FJCA 9.
from the United Nations, the Pacific Islands Forum, and many nations, including Australia and the United States.

The point, however, that I want to make here is that, while it remains correct to say that the principle of the separation of judicial power does not apply to the States, ultimately it may be a question of degree. Both Kable and the requirement of the separation of judicial power have a common goal in the protection of the independence and impartiality, that is, in the separateness and perceived separateness, of the exercise of judicial power. On the one hand, however, the Kable principle focuses directly upon the impact of the law on the independence and impartiality of the Court and consequential impact on public confidence. On the other hand, while those considerations underpin the constitutional principle that non-judicial powers cannot be vested in federal courts save those that are incidental or ancillary to the exercise of the federal judicial power (the Boilermakers’ principle), the focus in this context is upon characterising the power in order to determine whether a particular power falls on the right side of the line – a process that can involve matters of considerable complexity and the drawing of fine distinctions.

This suggests that there may be lessons to be learnt from Kable which might assist in applying the constitutional requirement of the separation of judicial power. In other words, it may be of assistance in determining whether the

41 See, for example, the statement by the Spokesperson for UN Secretary-General Ban Ki-moon (10 April 2009) at 18 November 2009.

42 Final Communiqué (5-6 August 2009) Fortieth Pacific Islands Forum at 18 November 2009 [44]-[51].

43 Australia condemns unequivocally the abrogation of Fiji’s constitution and the postponement of election for at least five years,(16 April 2009) Australian Embassy and permanent Mission to the United Nations at 18 November 2009.


45 R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 (HC); (1957) 95 CLR 529 (PC). See also R v Davison (1954) 90 CLR 353 and R v Murphy (1985) 158 CLR 596. Equally, the Commonwealth Parliament has power only to invest State courts with the judicial power of the Commonwealth: see Queen Victoria Memorial Hospital v Thornton (1953) 87 CLR 144.
vesting of a particular power in a federal court infringes the constitutional requirement of a separation of powers to test the result expressly against the constitutional objective.\footnote{Perry, M, “Chapter III and the Powers of Non-Judicial Tribunals – Breckler and Beyond” in Adrienne Stone and George Williams (eds) The High Court at the Crossroads (2000), 148.}

\textbf{International Finance Trust Co: Kable applied}

The decision in \textit{K-Generation} having confirmed and settled certain fundamental aspects of the \textit{Kable} doctrine, the decision in \textit{International Finance Trust Co Ltd}\footnote{International Finance Trust v NSW Crime Commission (2009) 84 ALJR 31} at the end of the term revealed an apparent division among members of the bench as to how the test was to be applied.

At issue was s 10 of the \textit{Criminal Assets Recovery Act 1990} (NSW) which empowered the NSW Crime Commission to apply without notice to the Supreme Court for a restraining order in respect of the property of a person suspected of having committed a serious offence in aid of the Commission’s power to apply for forfeiture. French CJ observed that the use of civil assets forfeiture laws as a means of deterring serious criminal activity have “\textit{widespread acceptance}” in Australia and internationally,\footnote{Id, 41 [29].} and can be traced back for over 300 years to laws in the United States for the forfeiture of ships and cargoes deployed in customs offences, piracy and slave trafficking.\footnote{Id, 40 [27].}

Notwithstanding many similarities with such laws, the process prescribed by s 10 was held to fall foul of the Constitution. The law had a number of features that were relied upon by the appellant, including:

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  \item the application had to be heard ex parte, if an ex parte application was made by the Commission;
  \item the Court was required to make the order if it was supported by an affidavit of an authorised officer deposing to his suspicions and their grounds if it considered that, having regard to the matters in the affidavit, they were reasonable grounds; and
\end{itemize}
• a variation to a restraining order by an order so as to exclude certain property could be made only if the affected party showed on the balance of probabilities that the affected property was not illegally obtained.

In joining with the majority to hold that the law was invalid, French CJ focused upon the “quality of the Executive’s intrusion, sanctioned by the legislature, into the judicial function.”\textsuperscript{50} It was not, in his Honour’s view, a question of “engaging in a calculus of fairness”\textsuperscript{51} As his Honour explained:

\begin{quote}
Such a calculus will not accord sufficient significance to the quality of the intrusion upon the judicial function. An accumulation of such intrusions, each ‘minor’ in practical terms, could amount over time to death of the judicial function by a thousand cuts.\textsuperscript{52}
\end{quote}

The critical characteristic of the law from the Chief Justice’s perspective was the conferral on the Commission of power to choose, in effect, to require the Supreme Court to hear and determine an application for a restraining order without notice. As the Chief Justice held:

\begin{quote}
To require a court … not only to receive an ex parte application, but also to hear and determine it ex parte, if the Executive so desires, is to direct the court as to the manner in which it exercises its jurisdiction and in so doing to deprive the court of an important characteristic of judicial power. That is the power to ensure, so far as practicable, fairness between the parties.\textsuperscript{53}
\end{quote}

As such, he held that “[i]t is not to the point that the restriction is temporary, nor that the scope of the order may subsequently be varied by an exclusion order”.\textsuperscript{54}

This approach contrasts with that adopted by the remaining members of the majority. Gummow and Bell JJ in their joint judgment and Heydon J focused upon whether the law was “repugnant to the judicial process in a fundamental degree and thereby impermissibly trenches upon its appearance as a tribunal which stands apart from the Executive Branch of the

\begin{itemize}
\item Id, 47 [57] (emphasis added).
\item Id, 45 [48].
\item Id, 47 [57].
\item Id, 47 [55]; see also 36 [4] (French CJ).
\item Id, 36 [4].
\end{itemize}
government of the State and its instrumentalities”. That question in turn was determined by their Honour’s construction of the provision so as to exclude any application to dissolve the ex parte restraining order once the defendant had received notice of its grant. This was the point of construction that divided their Honours from Hayne, Crennan and Kiefel JJ in dissent. As Gummow and Bell JJ found:

“The Supreme Court is conscripted for a process which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.”

Heydon J’s reasons were to similar effect. Nonetheless, his Honour was at pains to emphasise the fundamental importance of according procedural fairness, pointing among other matters to the fact that “the practice of hearing both sides … respects human dignity and individuality. ‘[S]ince men can talk, they should be allowed to, and not just bundled about like chessmen.”

It may be that the apparent division between the approach adopted by French CJ and the remainder of the Court can be reconciled – that in some

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55 Id, 52 [87] (Gummow and Bell JJ) (emphasis added). See also id, 62 [140], 66 [159] (Heydon J).
56 Id, 52-53 [89]-[90] (Gummow and Bell JJ).
57 Id, 59-61 [126]-[135] (Hayne, Crennan and Kiefel JJ).
58 Id, 54 [97] (Gummow and Bell JJ).
59 In particular, his Honour first referred to three characteristics that he did not consider would have sufficed to establish invalidity, namely, the power to make restraining orders ex parte, the duty of the court to make the orders if certain conditions are satisfied, and the failure to give the Court power to consider whether circumstances are sufficiently extreme to grant the ex parte relief. His Honour then held: “The repugnance arises if the legislation ensures that there is no facility for the Court to entertain an application to dissolve an ex parte restraining order once the defendant has received notice of its grant pursuant to s 11(2). If that facility existed, the potential injustice flowing from the preceding three characteristics of s 10 would be nullified or mitigated. But if it does not exist, there is the potentiality for extreme injustice in a fashion repugnant to the judicial process in a fundamental degree”:
60 International Finance Trust v NSW Crime Commission (2009) 84 ALJR 31, 66 [159]. Accordingly, absent the failure to provide for an application to dissolve the ex parte order, Heydon J would not have considered that the other factors, including the fact that the Court was directed to hold the hearing ex parte at the Commissioner’s discretion, would have sufficed.
61 Id, 62 [141].
62 Id, 63 [144].
cases, it is the nature or quality of the intrusion that necessarily infringes the constitutional proscription, while in other cases, it may be the cumulative effect upon an essential aspect of the court’s functioning. Accordingly, the fact that this case was decided by applying different approaches does not necessarily mean that there is no room for both approaches.

Constitutional influences on principles of statutory construction
From a broader perspective, the decisions in *K-Generation* and *International Finance Trust* reaffirm the truth of Pamela Tate’s observation in her paper at last year’s conference as to “the High Court’s commitment to exhausting questions of statutory construction before validity.” However, whereas in *K-Generation* all members of the High Court were agreed on a construction that the apparent “direction” to the Licensing Court was in truth no direction at all and the law was valid, in *International Finance Trust* the division in the court as to the correct construction of the statutory provisions led to a division in result (leaving aside French CJ). While the principles of statutory construction applied were unexceptional, there are observations by French CJ in each case that I wish briefly to highlight.

First, in *K-Generation* French CJ reminded us that the presumption that Parliament did not intend to derogate from fundamental rights and freedoms can be seen as part of the principle of legality. As Lord Hoffman explained in the passage quoted by the Chief Justice:

“[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.”

Conversely, in *International Finance Trust* where French CJ declined to read down the words of the offending provision, his Honour cautioned against

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64 *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115, 131 (quoted in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 531, 520 [47] (French CJ)).
applying the presumption that Parliament intended to legislate within its powers and other presumptions so as to depart markedly from ordinary meaning. His Honour emphasised: “[t]o the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and accountability of Parliament to the electorate are diminished.” This caveat may indicate a pull-back to some degree from the primacy of context that is evident in decisions such as Project Blue Sky and CIC Insurance Ltd v Bankstown Football Club Ltd.

More relevantly, though, for present purposes, both points made by his Honour were founded in the nature of our democratic process. They highlight the relationship between the Constitution and the system of government it creates, on the one hand, and principles of statutory interpretation, on the other hand. Perhaps that point is self-evident as statutes are, after all, the product of our democratic processes, and their legitimacy, both state and federal, is ultimately sourced in the Constitution. Nonetheless, it is a significant point which may indicate that in the future we will see constitutional considerations having a more direct influence on approaches to statutory construction.

**Conclusion: Looking Forward**

At the start of a new decade with the appointment of a new Chief Justice to our highest court, it seems appropriate to conclude with some thoughts on those themes that may characterise constitutional cases in the High Court in the next decade.

If you were to look for characterising themes of the 1990s, one theme that might come to mind is the extent to which there was a readiness to test social justice and human rights issues in the High Court with cases such as the Stolen Generations case, many of the landmark native title cases, Croome

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66 Ibid.
and Toonan, and Kable. I have already mentioned one of the recurrent themes of the last decade – that of teasing out the implications from Ch III of the Constitution for judicial review of executive action.

As for the next decade, there are two potential themes that I would like to close on.

The first theme concerns legislative measures relating to the regulation of resources and the environment intended to mitigate and adapt to climate change, and to rationalise environmental law across the different jurisdictions. It may prove to be no coincidence that the previous decade ended, and the new decade began, with cases concerning the regulation of water resources.

The second theme intersects with the first, as the twin cases on water regulation I have referred to illustrate, even though it is not limited to that context. That theme relates to the way in which our constitutional system now operates. The processes of constitutional construction overall have led to a concentration of legislative power in the Commonwealth, including the broad construction given to the external affairs power, the corporations power and the Commonwealth’s exclusive power to levy duties of excise. This has clearly contributed to the increasing significance of the terms and conditions of Commonwealth grants under s 96 and intergovernmental agreements.

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74 *Ha v New South Wales* (1997) 189 CLR 465 which held invalid State taxes on tobacco and alcohol with consequences also for state imposts on petrol.

75 Note that in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 85 ALJR 87, French CJ, Gummow and Crennan JJ observed at 95-96 [32] with respect to nature of the terms or conditions which accompany a grant: “These may, as is the case here with the Funding Agreement, be expressed in terms of an agreement between the polities involved. Such agreements may take many forms, with some but not all of the characteristics of a contract...
(whether or not accompanying such grants) as a means of allocating legislative and executive responsibility between the various polities. This has given the Council of Australian Governments (“COAG”) an increasingly significant role in the Australian federal system, notwithstanding its extra-constitutional status. Other forces operating to contribute to this trend include ongoing moves to reduce duplication and inefficiencies within the federation, together with calls in various contexts for nationally consistent approaches.\textsuperscript{76} We are seeing in effect the evolution of a kind of “soft” constitutional law. These matters suggest that we are likely to see a greater testing of the limits of executive power in the future, the Commonwealth’s power to legislate with executive power, and the nature and limits of these kinds of co-operative arrangements and processes.

\textsuperscript{76} Climate change is one area where calls have recently been made for nationally consistent approaches. For example, the Senate Standing Committee on Climate Change, Water, Environment and the Arts report on \textit{Managing our Coastal Zone in a Changing Climate} (Oct 2009). The Committee considered that a cooperative approach to coastal zone management, which it proposed be achieved through an intergovernmental agreement endorsed by COAG, “is urgently required in the coastal zone due to the potentially severe impacts of climate change on the coast, the continuing environmental degradation of the coast, and the current complex and fragmented governance arrangements for the coastal zone”: at 244 [6.4]. See also 288-289 [6.133] and recommendation 44 at 290 [6.136]. The report can be found at \textit{http://www.aph.gov.au/house/committee/ccwea/coastalzone/report.htm} (viewed 3 March 2010).