

## THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2010 TERM

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### I INTRODUCTION

2010 was an unusually successful year in the High Court for litigants prepared to take on government. Major victories were won, and the Commonwealth and the States suffered corresponding losses. The resulting judgments brought about important new developments in Australian constitutional law, often with the effect of protecting human rights and vindicating the rule of law. What is most apparent though is that the decisions preserved the judicial function and brought about greater reach for the exercise of judicial power. This made 2010 a good year for the High Court and the Australian judicial system in general.

Not so long ago, High Court decisions like those of 2010 that guaranteed asylum seekers access to the courts or struck down legislation in favour of political rights attracted sharp criticism. There were frequent attacks on the Mason and Brennan Courts of the 1990s, with new constitutional developments and native title decisions attracting the opprobrium of commentators and politicians. It was during this period that the High Court was described<sup>1</sup> as an ‘unfaithful servant of the Constitution’, a ‘pathetic ... self-appointed [group of] Kings and Queens’, ‘gripped ... in a mania for progressivism’ or said to be guilty of ‘plunging Australia into the abyss.’<sup>2</sup> These and other terms of censure were applied when politicians, academics, or sections of the media perceived a High

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1 These are just a few of the examples collected in Michael Kirby, ‘Attacks on Judges: A Universal Phenomenon’ (1998) 72 *Australian Law Journal* 599, 601.

2 Of course, this is not to say that intemperate criticism was limited to this period. There have been equally fierce attacks on the Court in other eras. For example, the decision in *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 produced a Sydney Sun editorial on 13 April 1935 that wrote of the need for a ‘gallant champion to rid’ people of ‘this pestilent Court’: see *R v Dumbabin; Ex parte Williams* (1935) 53 CLR 434.

Court decision to be ‘activist’, a pejorative term of little content which acts as a statement that a judge has stepped outside the proper bounds of their role.

By contrast, the French Court managed to sidestep such criticism in 2010, despite engaging in a year of undoubted constitutional creativity. This is not to say that it escaped notice. In fact, to the contrary, commentary on the High Court’s 2010 constitutional law decisions was often effusive with praise. In particular, this came in response to the handing down of a significant trio of decisions on Armistice Day, 11 November: *South Australia v Totani*,<sup>3</sup> *Plaintiff M61/2010E v Commonwealth*,<sup>4</sup> and *Commissioner of Taxation v Anstis*<sup>5</sup> (a tax law decision which permitted deductions for study expenses for people in receipt of Youth Allowance to study full-time). All produced a setback for government and a major win for groups out of favour with sections of the community, namely bikies, asylum seekers, and university students.

The *Sydney Morning Herald*’s Richard Ackland declared 11 November 2010 ‘a big day for justice, freedoms and rights’, before arguing that *Totani* and *Plaintiff M61* were ‘an emphatic statement ... [that] ministers ignore the law and the judges at their peril’.<sup>6</sup> In the same newspaper, David Marr concluded that *Plaintiff M61*, in contrast to the ‘embarrassing low point’ of the *Al-Kateb* decision in 2004,<sup>7</sup> meant that ‘governments of all persuasions are on notice that the court now takes far more seriously its traditional role as guardian of liberty’.<sup>8</sup> Monash University law academic Melissa Castan also declared that ‘[i]n Australia this year we celebrated a “Rule of Law” day on 11 November’.<sup>9</sup> Although dominant, such perspectives were not universally shared, with the editorial of *The Australian* stating of *Plaintiff M61* that, ‘by allowing judicial reviews of procedural fairness, the High Court has opened the lid on a honeypot of court-clogging litigation which activist lawyers will be hungry to exploit’.<sup>10</sup> Similarly, former Federal Attorney-General Philip Ruddock labelled the decision in *Plaintiff M61* as ‘diabolical’.<sup>11</sup>

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3 (2010) 242 CLR 1 (*‘Totani’*).

4 (2010) 272 ALR 14 (*‘Plaintiff M61’*).

5 (2010) 241 CLR 443.

6 Richard Ackland, ‘A Great Day for Freedom As Gavel Falls on Government’, *Sydney Morning Herald* (Sydney), 12 November 2010, 17.

7 *Al-Kateb v Godwin* (2004) 219 CLR 562.

8 David Marr, ‘As One, Judges Show They Safeguard Liberty’, *Sydney Morning Herald* (Sydney), 12 November 2010, 8. On the same day, Julian Burnside SC also hailed that decision in *The Age*: Julian Burnside, ‘A Victory for Basic Rights’, *The Age* (Melbourne), 12 November 2010, 19.

9 Melissa Castan, ‘Remembering the Rule of Law’ (2010) 35 *Alternative Law Journal* 233, 233.

10 Editorial, ‘If This Is a Victory, Who Exactly Are the Winners?’, *The Australian* (Sydney), 12 November 2010, 17.

11 Julian Burnside, ‘A Victory for Basic Rights’, *The Age* (Melbourne), 12 November 2010, 19.

The generally positive reaction to these cases was but a culmination of earlier outbreaks of praise.<sup>12</sup> The very first case of the year, *Kirk v Industrial Court of New South Wales*,<sup>13</sup> led then New South Wales Chief Justice Spigelman to say that: 'It is not always the case that, when the High Court overturns one of my own decisions, I respond with unmitigated admiration. That is, however, the case with *Kirk*.'<sup>14</sup> The decision, which involved judicial review and state industrial law, rather than asylum seekers, also received unqualified enthusiasm from *The Australian*, with its editorial declaring it 'a hefty blow for fairness and the rule of law' and a victory for 'common sense and decency.'<sup>15</sup> There was of course more than a little irony in this lauding of the decision by the *The Australian*, and not a little contradiction, given its later damning of *Plaintiff M61*. Former Federal Court judge Ronald Sackville QC has pointed out the inconsistency of 'organs vehemently opposed to a national charter of rights', commenting so favourably upon *Kirk* without any qualms as to the 'novelty of the reasoning that allowed the High Court to change dramatically the respective spheres of authority of the courts and State Parliaments', or 'the willingness of the Court to use creative reasoning to frustrate the will of democratically-elected State legislatures.'<sup>16</sup>

Both the setbacks delivered to government and the generally positive commentary that greeted last year's High Court constitutional law decisions invite a question: has the Court under French CJ struck out in some new direction, or adopted a fresh approach? Or were the decisions it handed down in 2010 ones which, at least as a matter of substance, largely followed on from the groundwork laid in preceding years? For instance, there are obvious parallels between two of the decisions and those of the Gleeson Court, that is, *Plaintiff M61* in respect of *Plaintiff S157/2002 v Commonwealth*<sup>17</sup> and *Rowe* in regard to *Roach v Electoral Commissioner*.<sup>18</sup> These are, of course, big questions for which an examination of the cases of a single calendar year provides only a limited reference point. But even acknowledging this, the exercise is undoubtedly worthwhile. When commentary on the Court suggests so soon after key personnel changes that it is behaving differently, it is valuable to subject the Court's decisions to scrutiny so as to assess whether this is in fact the case.

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12 The announcement of the result in *Rowe v Electoral Commissioner* (2010) 273 ALR 1 ('*Rowe*') before the federal election in August, for instance, was described as 'a great victory for democracy', though one which Claire Bongiorno argued in *The National Times* demonstrated the 'need for greater constitutional protection of human rights': Claire Bongiorno, 'Get Up! Exposes Human Rights' Gap', *The Age* (Melbourne), 16 August 2010. The Director of the Human Rights Law Resource Centre, Phil Lynch, also described *Rowe* as a 'landmark win' that affirmed the 'sovereignty of the people, not the politicians': see James Evers, 'High Court Lays Down the Law on Right To Vote', *Australian Financial Review* (Melbourne), 16 December 2010, 7.

13 (2010) 239 CLR 531 ('*Kirk*').

14 Chief Justice JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77.

15 Editorial, 'State-Based Star Chambers Reined in by High Court', *The Australian* (Sydney), 10 February 2010, 13.

16 Ronald Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters' (2011) 18 *Australian Journal of Administrative Law* 67, 77.

17 (2003) 211 CLR 476 ('*Plaintiff S157*').

18 (2007) 233 CLR 162 ('*Roach*').

## II THE 2010 DECISIONS

There were relatively few constitutional law decisions by the High Court last year, but those that were handed down were often of large import. All up, there were nine such matters,<sup>19</sup> which, in order of delivery by the Court, were:

- *Kirk v Industrial Court of New South Wales*;
- *Arnold v Minister Administering the Water Management Act 2000*;<sup>20</sup>
- *R v LK*;<sup>21</sup>
- *Cadia Holdings Pty Ltd v New South Wales*;<sup>22</sup>
- *Dickson v The Queen*;<sup>23</sup>
- *South Australia v Totani*;
- *Plaintiff M61/2010E v Commonwealth*;
- *Port of Portland Pty Ltd v Victoria*;<sup>24</sup> and
- *Rowe v Electoral Commissioner*.

Our focus is upon *Kirk*, *Totani*, and *Plaintiff M61*, each of which deals with the jurisdiction of the courts and the scope of judicial power. However, we first note significant developments in constitutional law in the other 2010 cases.

The most ‘tantalising’<sup>25</sup> case of 2010 was *Arnold* because it appeared to hold out the prospect of the Court re-examining the constitutional prohibition in section 100 on the abridging, ‘by any law or regulation of trade or commerce, ... the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation’. That limitation had not arisen in the 2009 water rights case of *ICM Agriculture Pty Ltd v Commonwealth*<sup>26</sup> but special leave was granted in *Arnold* to add it as a further ground of appeal. Common to both cases was a claim that a reduced entitlement to extract groundwater brought about by the ‘replacement’ of bore licences with aquifer access licences (effected by a proclamation under the *Water Management Act 2000* (NSW), but made pursuant to a Funding Agreement between that State and the Commonwealth authorised by the *National Water Commission Act 2004* (Cth)) was a compulsory acquisition of property without just terms as required by section 51(xxxi) of the *Constitution*. The argument was rejected 6:1 in *ICM Agriculture*, and, in *Arnold*, this was applied to reach the same result.

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19 Constitutional law concepts and doctrines are also mentioned in passing in other 2010 decisions that, for the purposes of this article, are not classified as constitutional decisions. See example, and *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 555–6.

20 (2010) 240 CLR 242 (*‘Arnold’*).

21 (2010) 241 CLR 177.

22 (2010) 269 ALR 204 (*‘Cadia Holdings’*).

23 (2010) 241 CLR 491 (*‘Dickson’*).

24 (2010) 272 ALR 449 (*‘Port of Portland’*).

25 Melissa Perry, ‘The High Court on Constitutional Law: The 2009 Term’ (Speech delivered at the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, Sydney, 19 February 2010)

<[http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/644\\_MelissaPerry.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/644_MelissaPerry.pdf)>.

26 (2009) 240 CLR 140 (*‘ICM Agriculture’*).

When it came to section 100, the New South Wales Court of Appeal had held that the provision did not apply to assist Arnold because none of the statutes or intergovernmental agreements underpinning the replacement of the bore licences met the necessary description of a ‘law or regulation of trade or commerce.’<sup>27</sup> That section 100 was limited to laws passed under the Commonwealth’s trade and commerce power in section 51(i) had been decided by the High Court in 1947 in *Morgan v Commonwealth*,<sup>28</sup> a decision that the appellants sought to reopen. Although special leave was granted (with Heydon J dissenting) to allow an appeal from the Court of Appeal’s finding on section 100, the case was dismissed as an inappropriate vehicle for re-examination of the provision. The appellants argued that the Commonwealth had abridged their right to the reasonable use of the ‘waters of the State including ... ancient underground rivers’, but the Court did not accept that the bore licences were within scope of ‘the waters of rivers’ in section 100.<sup>29</sup> Those latter words, clearly narrower than ‘waters of a State’, needed to be understood in light of the history of section 100 as a ‘compromise ... to the conflicting interests of the colonies ... with respect to the Murray-Darling river system’,<sup>30</sup> and also as an express restraint upon recognition in section 98 of the Commonwealth’s power to make laws on trade and commerce that extend to ‘navigation and shipping’.<sup>31</sup> According to French CJ, there was ‘no plausible basis for construing the limitation as applying to underground water in aquifers’.<sup>32</sup> There was, however, a regretful tone in the majority opinions that review of the decision in *Morgan*, acknowledged by Mason J in *Commonwealth v Tasmania*<sup>33</sup> to suffer from a degree of artificiality, and ‘further questions’ – including whether the ‘rights’ recognised in section 100 are individual as well as collective and whether corporations are included within the reference to ‘residents’ – would have to wait for another day.<sup>34</sup>

In *Rowe*, the Court was able to get to the nub of the constitutional question. At issue were changes to the *Commonwealth Electoral Act 1918* (Cth) made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) that prevented the Electoral Commissioner from considering: (1) claims for enrolment lodged after 8pm on the date of issue of the writs for an election, and (2) claims for transfer from one divisional roll to another lodged after 8pm on the third working day after the date of issue of the writs. Before the amendments, people had been accorded seven days after the writ was issued before the electoral roll was closed. At the 2010 election, the

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27 *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196, 217–8.

28 (1947) 74 CLR 421 (‘*Morgan*’). The case more directly concerned the meaning of ‘law or regulation of trade, commerce and revenue’ in s 99 of the *Constitution*, but the joint judgment was clear that ‘similar considerations’ applied to the meaning of ‘law or regulation of trade and commerce’ in s 100: at 455.

29 *Arnold* (2010) 240 CLR 242, 258 (French CJ), 264 (Gummow and Crennan JJ), 269 (Hayne, Kiefel and Bell JJ).

30 *Ibid* 264 (Gummow and Crennan JJ).

31 *Ibid* 256–7 (French CJ).

32 *Ibid* 258.

33 (1983) 158 CLR 1, 154.

34 See *Arnold* (2010) 240 CLR 242, 257 (French CJ), 264 (Gummow and Crennan JJ).

Australian Electoral Commission estimated that the new provisions would prevent some 100 000 people from voting.

The provisions were challenged by two of the excluded voters, backed by the advocacy organisation GetUp!, who argued that the change breached the requirement in sections 7 and 24 of the *Constitution* that members of the Federal Parliament be ‘directly chosen by the people’. These words had been applied by the Gleeson Court in *Roach* to strike down a voting ban imposed by the same 2006 statute upon all prisoners serving a sentence of full-time detention. In *Rowe*, by 4:3 (French CJ, Gummow, Crennan, and Bell JJ, with Hayne, Heydon and Kiefel JJ dissenting), these words were again applied to strike down the early closing of the electoral roll.

According to French CJ: ‘An electoral law which denies enrolment and therefore the right to vote to any of the people who are qualified to be enrolled can only be justified if it serves the purpose of the constitutional mandate.’<sup>35</sup> This was determined by asking ‘[i]f the law’s adverse legal or practical effect upon the exercise of the entitlement to vote is disproportionate to its advancement of’ that mandate.<sup>36</sup> In *Rowe*, the majority held that the removal of the seven-day period, with the effect of disenfranchising some 100 000 people, could not be justified by any of the purposes underlying the change. In particular:

there was nothing to support a proposition ... that the impugned provisions would avert an existing difficulty of electoral fraud. Nor was there anything to suggest that the [Australian Electoral Commission] had been unable to deal with late enrolments. Indeed, it had used the announcement of an election, coupled with the existence of the statutory grace period, to encourage electors to enrol or apply for transfer of enrolment in a context in which its exhortations were more likely to be attended to and taken seriously than at a time well out from an election.<sup>37</sup>

The main point of dissent was that the *Commonwealth Electoral Act 1918* (Cth), as amended, provided adequate opportunities for electors to enrol, and indeed mandated that they do so in a timely fashion. The dissenters found that a lack of enrolment or updating of details spoke of a failure of personal responsibility rather than any constitutional problem. As Heydon J stated, the plaintiffs were the ‘authors of their own misfortunes.’<sup>38</sup> He concluded that it was not possible to invalidate ‘an electoral system which works satisfactorily in relation to those who are not inefficient, apathetic, or conscientiously indisposed to participate.’<sup>39</sup>

*Rowe* is an important decision in the ongoing development by the High Court of the words ‘directly chosen by the people’ in sections 7 and 24 of the *Constitution*. It establishes that the *Constitution* has implications for Australian electoral law beyond the question of who may or may not vote. The *Constitution* applies to a range of other matters, beginning with enrolment. The fact that any

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35 *Rowe* (2010) 273 ALR 1, 4.

36 *Ibid.*

37 *Ibid* 26 (French CJ).

38 *Ibid* 73.

39 *Ibid* 74. Justice Heydon noted that ‘[i]f there were any burden on anyone, it was a burden which those who bore it placed on their own shoulders.’

protected feature of the system may not have been part of federal electoral law in 1901 is beside the point. *Rowe* again demonstrates the interplay between statute law and the *Constitution* in this area, and how the evolution of the latter is driven in large part by standard-setting in the former (and not, as had been suggested in *Attorney-General (Cth) ex rel McKinlay v Commonwealth* by ‘the common understanding of the time’).<sup>40</sup> By this means, a statutory innovation can become an entrenched constitutional principle in the years to come.

It is hard to see where the limits of this lie. As French CJ stated: ‘all laws of the Commonwealth Parliament providing for enrolment and for the conduct of elections must operate within the constitutional framework defined by the words “directly chosen by the people”’.<sup>41</sup> It is not such a big step to suggest that aspects of how ballots are cast, and in particular the secret ballot, may be constitutionally entrenched. It may also be that the constitutional expression ‘the people’ will be a source of further development. For example, does the constitutional protection of the right to vote of ‘the people’ negate restrictions imposed by the *Commonwealth Electoral Act 1918* (Cth) on the voting rights of Australian citizens living overseas?

*R v LK* concerned section 107 of the *Crimes (Appeal and Review) Act 2001* (NSW), which provides for an appeal by the State Attorney-General or the Director of Public Prosecutions against the acquittal of a person ‘by a jury at the direction of the trial Judge’. It was argued that this section could not extend to a Commonwealth indictable offence because this would breach the right to a trial by jury in section 80 of the *Constitution*. The breach was said to arise because an essential characteristic of a trial by jury is that a jury’s acquittal is final. The High Court rejected this argument because such a characteristic has neither a normative or historical foundation, nor any basis in precedent. According to French CJ:

It not being part of the function of a jury to exercise any discretion in the face of a direction to acquit, it is no interference with their function, other than in a strictly formal sense, for the law to provide for an appeal against a verdict of acquittal where delivered in inevitable obedience to the judge’s direction.<sup>42</sup>

While the case of *Dickson* does little to further understandings of section 109 of the *Constitution*, the manner in which that section was applied has major ramifications for state and federal criminal law. Kevin Dickson was convicted in the Victorian Supreme Court under section 321(1) of the *Crimes Act 1958* (Vic) for conspiracy to steal a quantity of cigarettes which were the property of the Commonwealth. Dickson argued that his conviction should be quashed because the provision was rendered invalid under section 109 due to inconsistency with similar, but narrower, offences in sections 11.5 and 131.1 of the *Criminal Code Act 1995* (Cth). In a single unanimous judgment, the High Court upheld his argument, finding that there was a direct inconsistency between the two

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40 (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ). See *Roach* (2007) 233 CLR 162, 174 (Gleeson CJ), 218–9 (Hayne J).

41 *Rowe* (2010) 273 ALR 1, 9.

42 *R v LK* (2010) 241 CLR 177, 197.

provisions, as section 321 ‘alters, impairs or detracts from the operation of the federal legislation and so directly collides with it’.<sup>43</sup> In particular, the Court stated: ‘What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant “areas of liberty designedly left [and which] should not be closed up”’.<sup>44</sup> The finding of direct inconsistency meant not only that the Victorian offence was rendered invalid, but that it was beyond the scope of federal law to provide that the two could operate concurrently. It is not yet clear how this decision might apply in the large range of other areas where federal and state criminal law overlap. Consequently, *Dickson* may prove to have major implications for the state justice systems. The High Court has already been given the opportunity to clarify its ruling, with the decision in *Dickson* a central point of argument in the February 2011 High Court hearing in *Momcilovic v The Queen*.<sup>45</sup>

Finally, in not one but two cases last year, legislation passed in the aftermath of England’s Glorious Revolution of 1688 bore upon the resolution of commercial disputes. *Port of Portland* raised questions about what amounts to an unconstitutional executive dispensation of a statutory burden. In a single unanimous judgment the High Court affirmed the reception into Victorian law of the English *Bill of Rights 1688*, 1 Wm & M sess 2 c 2 (*‘Bill of Rights’*), section 12 of which outlawed such dispensations in response to King James II’s provocative use of them during his short reign. The *Bill of Rights* is one of the ‘transcribed enactments’ set out in section 8 of the *Imperial Acts Application Act 1980* (Vic) and by force of section 3 thereof continues ‘to have in Victoria ... such force and effect, if any, as [it] had at the commencement of this Act’. The Court said, however, that the ‘preferable view is that these provisions in the Victorian statute at best serve only to reinforce what are settled constitutional principles ... In Australia the absence of a power of executive dispensation of statute law, what Dixon CJ called a “general constitutional principle”, became an aspect of the rule of law’.<sup>46</sup> The Court accordingly held that ‘[s]uch a power is absent from the Constitutions of the States’.<sup>47</sup> In any event, the principle had not been offended as the executive action in question was held merely to be an ‘adjustment in the price for sale of public assets’, and not a dispensation from land tax legislation.<sup>48</sup>

The dispute in *Cadia Holdings* turned on the effect of the *Royal Mines Act 1688*, 1 Wm & M sess 1 c 30 (*‘Royal Mines Act’*). The case concerned the scope of the prerogative of the Crown in right of the State of New South Wales in

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43 *Dickson* (2010) 241 CLR 491, 506. See also *Dickson* (2010) 241 CLR 491, 504.

44 *Ibid* 505.

45 See Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 15 (8 February 2011); Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 16 (9 February 2011); Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 17 (10 February 2011).

46 *Port of Portland* (2010) 272 ALR 449, 453–4.

47 *Ibid* 454.

48 *Ibid*.



respect of ‘publicly owned minerals’ under the *Mining Act 1992* (NSW). The appellants’ mine contained intermingled gold and copper, and it was unclear whether the latter attracted a royalty under the Act to the State as ‘a mineral that is owned by, or reserved to, the Crown’.<sup>49</sup> The Crown’s prerogative rights of ownership to gold and silver mines had been recognised by the English courts in 1568 in the *Case of Mines*,<sup>50</sup> but private ownership of intermingled base-metals was later protected by statute, specifically section 3 of the *Royal Mines Act*. The Court found that this provision, to which the joint judgment accorded a ‘constitutional’ status, even while cautioning that to do so might have consequences under section 106 of the *Commonwealth Constitution*, had been received into the law of the State and saved by the *Imperial Acts Application Act 1969* (NSW).<sup>51</sup> However, the enactment had already ‘done its work long before’, so that the prerogative received in New South Wales with the common law before or on 25 July 1828 was not that as recognised in the 1568 case but as abridged by section 3.<sup>52</sup> Accordingly, the copper mined by the appellants was a privately owned mineral under the *Mining Act 1992* (NSW) and outside the scope of the prerogative. The appellants were therefore not liable to pay the royalty attaching to ‘publicly owned minerals’ on their copper.

### A *Kirk v Industrial Court of New South Wales*

Of the High Court’s 2010 constitutional law decisions, *Kirk* has the greatest implications for the future use of judicial power.<sup>53</sup> *Kirk Group Holdings Pty Ltd* was the owner of a farm near Picton in New South Wales. After the manager of that farm overturned a vehicle and died, Mr Kirk and the company were convicted by the Industrial Court of New South Wales under sections 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW).

On appeal to the High Court, Kirk argued that the Supreme Court of New South Wales should have quashed the convictions for jurisdictional error. It was argued that the Supreme Court retained supervisory jurisdiction over the Industrial Court despite a seemingly ironclad privative clause in section 179(1) of the *Industrial Relations Act 1996* (NSW), which provided that a decision of the Industrial Court ‘is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal’.

The New South Wales government had every reason to believe section 179 to be effective. In *Darling Casino Ltd v New South Wales Casino Control*

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49 See *Mining Act 1992* (NSW) Dictionary (definition of ‘publicly owned minerals’).

50 (1568) 1 Plowd 310; 75 ER 472.

51 See *Cadia Holdings* (2010) 269 ALR 204, 220, 221 (French CJ), 229, 231–2 (Gummow, Hayne, Heydon and Crennan JJ).

52 Ibid 232 (Gummow, Hayne, Heydon and Crennan JJ).

53 See generally John Basten, ‘The Supervisory Jurisdiction of the Supreme Courts’ (2011) 85 *Australian Law Journal* 273; John Gilmour, ‘*Kirk*: Newton’s Apple Fell’ (2011) 34 *Australian Bar Review* 155; Wendy Lacey, ‘*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*’ (2010) 34 *Melbourne University Law Review* 641.

*Authority*<sup>54</sup> in 1997, Gaudron and Gummow JJ expressed the commonly held view that ‘a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle’.<sup>55</sup> Similarly, New South Wales Solicitor General Michael Sexton QC was able to conclude in 2003 that ‘not only does a State legislature have the power to preclude *all* avenues of judicial review but that there are important policy considerations that should favour judicial deference to legislative intent’.<sup>56</sup>

In a landmark decision, the High Court in *Kirk* turned these understandings on their head.<sup>57</sup> The Court was unanimous, in one joint judgment and a concurring judgment by Heydon J, in holding that a state legislature is not constitutionally competent to deprive a State Supreme Court of its supervisory jurisdiction to grant relief on the ground of jurisdictional error in respect of a decision by an inferior court or tribunal (and also, as now confirmed in *Totani*, of a decision by ‘the executive government of the State, its Ministers or authorities’).<sup>58</sup> *Kirk* is a good example of how quickly the prevailing orthodoxy can change. What was constitutionally improbable is now accepted by most as a desirable and natural part of Australia’s system of constitutional law.

The foundation for this outcome was provided by the reference to State Supreme Courts in section 73 of the *Constitution*:

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences  
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(ii) Of any other federal court, or court exercising federal jurisdiction; or of the *Supreme Court of any State*, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council: ...

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the *Supreme Court of a State* in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

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54 (1997) 191 CLR 602.

55 Ibid 634.

56 Michael Sexton and Julia Quilter, ‘Privative Clauses and State Constitutions’ (2003) 5 *Constitutional Law & Policy Review* 69, 69 (emphasis in original).

57 Chief Justice Spigelman has further argued that *Kirk* was remarkable in the sense that there had been ‘no judicial or academic commentary doubting the ability of a State Parliament to restrict review for jurisdictional error ... by means of a properly drafted privative clause’: Spigelman, above n 14, 81.

58 *Totani* (2010) 242 CLR 1, 27 (French CJ).

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the *Supreme Courts of the several States* shall be applicable to appeals from them to the High Court.<sup>59</sup>

The logic underpinning *Kirk* is that section 73 establishes the ‘Supreme Court of a State’ as a constitutionally entrenched concept. As a consequence, the *Constitution* requires that there be a body fitting this description, including as to its essential characteristics. The joint judgment thus found that it is ‘beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description’.<sup>60</sup>

In *Kirk*, the High Court held that a ‘defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of’ prohibition, mandamus and certiorari on the ground of jurisdictional error.<sup>61</sup> Section 179 was construed to permit this, thereby defeating what appeared to be its primary object.

*Kirk* adds an important piece to the picture of an integrated system of federal and state constitutional and administrative law. In doing so, it mirrors for the State Supreme Courts the entrenched jurisdiction of the High Court provided for by section 75(v) of the *Constitution*, as had been spelt out in *Plaintiff S157*.

The intersection of administrative and constitutional law in Australia centres on the nebulous concept of jurisdictional error, which was the subject of extended treatment in *Kirk*. In a discussion that may send a shiver down the spine of federal and state legislators and drafters, the judgment found that: ‘It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error’.<sup>62</sup> As a result, the discussion of jurisdictional error in *Craig v South Australia*<sup>63</sup> was ‘not to be seen as providing a rigid taxonomy of jurisdictional error’, but only a series of ‘examples’ that ‘are not to be taken as marking the boundaries of the relevant field’.<sup>64</sup> This obviously leaves open the possibility of further judicial development. The categories of jurisdictional error are not closed, despite it representing a fundamental dividing line between the types of errors that are, and are not, the subject of protected judicial review. What is clear is that jurisdictional error, although nowhere mentioned in the *Constitution*, is a constitutional concept of the first order of importance. It will undoubtedly be the subject of many decisions in the years to come, and it will be interesting to see how the new constitutional dimension to what had been an administrative law concept will reframe understandings of the term and its application.

The decision in *Kirk* should be welcomed from the perspective of ensuring appropriate judicial review of lower court, tribunal and executive decisions.

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59 (Emphasis added).

60 *Kirk* (2010) 239 CLR 531, 566.

61 *Ibid.*

62 *Ibid* 573.

63 (1995) 184 CLR 163.

64 *Kirk* (2010) 239 CLR 531, 574.

There is no sound policy basis for such decisions at the state level to be shielded from review when like federal decisions are subject to supervision under section 75(v) of the *Constitution*. In this respect, *Kirk* is consistent with basic rule of law principles and in particular the notion that, to quote the joint judgment, there should not be ‘islands of power immune from supervision’.<sup>65</sup>

However, a sound policy basis does not necessarily equate to a convincing constitutional outcome. We do not deny that the outcome in *Kirk* was open to the Court, but do suggest that the reasoning of the joint judgment is not entirely convincing. First, the decision places too much weight upon the term ‘Supreme Court of a State’ in section 73. The context of that section implies a narrower perspective than that applied in *Kirk*. It suggests defining the term from the point of view of ensuring the possibility of appellate review to the High Court. The High Court must have jurisdiction to hear appeals from the State Supreme Courts, but it does not necessarily follow that this protects State Supreme Court review of inferior court or tribunal decisions infected with jurisdictional error. This is a lot to read into the concept given its context. The result might have been buttressed by a broader set of constitutional principles, in particular the fact that Chapter III has created an integrated judicial system, and a national system of common law, with the High Court as its apex. In this regard, there is merit in Professor Leslie Zines’ argument that these principles, as more expansively aired in *Kable v Director of Public Prosecutions (NSW)*<sup>66</sup> and accepted in later cases, could have provided a stronger basis for the decision.<sup>67</sup>

Second, despite the Court in *Kirk* affirming the view espoused in *Forge v Australian Securities and Investment Commission*,<sup>68</sup> it remains questionable whether the reference to ‘Supreme Court of a State’ in section 73 really is sufficient to mandate the existence of such a body. It is arguable that section 73 guarantees the High Court appellate jurisdiction from any State Supreme Court in existence, rather than guaranteeing that such a Court must exist, that being a matter for the constitutions of the States. The High Court’s finding in *Kirk* sits uncomfortably with the fact that an even more unqualified statement about the existence of a constitutionally prescribed body has long been ignored. Section 101 of the *Constitution* states that ‘[t]here shall be an Inter-State Commission ...’, but of course such a body has not existed for some time, in large part because it was emasculated by the High Court in *New South Wales v Commonwealth*.<sup>69</sup> It is interesting to speculate about what relief might be sought in regard to this body. Is it perhaps the case that the actions taken to abolish the

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65 Ibid 581.

66 (1996) 189 CLR 51 (*Kable*).

67 Leslie Zines, ‘Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of NSW* and *SA v Totani*’ (Speech delivered at the Centre for Comparative Constitutional Studies/Australian Association of Constitutional Law Seminar, Melbourne, 26 November 2010).

68 (2006) 228 CLR 45.

69 (1915) 20 CLR 54. See Michael Coper, ‘The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission’ (1989) 63 *Australian Law Journal* 731.

Commission are invalid, and that the Commission is still in existence in accordance with the *Constitution*?

Third, in finding that an essential characteristic of a State Supreme Court is its ability to review lower court and tribunal decisions for jurisdictional error, the joint judgment in *Kirk* was, to use the description of Zines, ‘somewhat bare of authority’.<sup>70</sup> The judgment relied upon the Privy Council decision in *Colonial Bank of Australasia Ltd v Willan*<sup>71</sup> to assert that ‘accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision’.<sup>72</sup> However, both Zines and Sackville have pointed out that this is quite an extrapolation.<sup>73</sup> The possibility of a sufficiently strong or wide privative clause enacted to curtail that jurisdiction was distinctly feasible.

### B *South Australia v Totani*

*Totani* was the second case in 2010 which involved judicial power at the state level. In question was section 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) (*‘SOCC Act’*). The stated object of the Act is the disruption and restriction of organisations involved in serious crime so as to protect the public from the violence associated with such organisations. In his second reading speech, Attorney-General Michael Atkinson acknowledged that the law was intended to target motorcycle clubs (or ‘bikie gangs’).<sup>74</sup> However, and perhaps understandably given the difficulty of drafting a definition of such clubs, the *SOCC Act* does not limit the types of organisations to which it might be applied.<sup>75</sup> The Act merely contains a caveat in section 4(2) that it is not Parliament’s intention that the Act ‘be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action’.

The organisations to which the *SOCC Act* is actually applied is a matter for the executive rather than judicial arm of government. Under section 10(1) the Attorney-General is, on the making of an application by the Commissioner of Police, empowered to make a declaration to this end if satisfied of two criteria:

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70 Zines, above n 67.

71 (1874) LR 5 PC 417.

72 *Kirk* (2010) 239 CLR 531, 580.

73 Zines, above n 67; Sackville, above n 16, 22.

74 See South Australia, *Parliamentary Debates*, Legislative Council, 21 November 2007, 1805 (Michael Atkinson, Attorney-General).

75 During debate in Parliament, Leader of the Liberal Opposition (then Member for Heysen) Isobel Redmond asked then Attorney-General Michael Atkinson why the Serious and Organised Crime (Control) Bill 2007 (SA) was worded without reference to the ‘so-called outlaw motorcycle gangs’ at which the legislation was directed. The Attorney-General replied that both sides of government ‘know who they are’, but that they could not address the legislation specifically towards the gangs as this would have amounted to a ‘bill of attainder which does not operate generally’. He also stated that the government had ‘no wish to cast any legal disabilities on people because they like motorcycles, like riding them, and like riding in formation’: see South Australia, *Parliamentary Debates*, Legislative Council, 26 February 2008, 2145.

‘(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and (b) the organisation represents a risk to public safety and order in this State’. Under section 10(4), it is no impediment to the Attorney-General being satisfied of the improper purpose for which members of an organisation associate if only some, rather than all, do so for that purpose. So long as the Attorney-General finds that those members ‘constitute a significant group within the organisation, either in terms of their numbers or in terms of their capacity to influence the organisation or its members’, then the organisation as a whole can satisfy the criteria.

Section 13 states that the Attorney-General need not provide reasons for his or her decision, and is prohibited from disclosing any ‘criminal intelligence’ provided by the Commissioner of Police for the making of the decision.<sup>76</sup> The South Australian Full Court of the Supreme Court regarded the Attorney-General’s decision to declare an organisation as ‘unreviewable’ due to the formidable breadth of a privative clause found later in the *SOCC Act*.<sup>77</sup> However, by the time *Totani* reached the High Court, the result in *Kirk* ensured that this was no longer the case and so, accepting the existence of ‘very large’ practical difficulties,<sup>78</sup> the Supreme Court could not be denied supervisory jurisdiction to review the Attorney-General’s declaration for jurisdictional error.

The effect of the Attorney-General’s declaration is not to outlaw an organisation, nor to render membership of it a criminal offence. Instead, it serves to identify persons in respect of whom the Commissioner of Police may seek a control order from the Magistrates Court of South Australia on the basis of their connection with the declared organisation. Section 14(1) provided that the Court ‘must’ make a control order ‘if the Court is satisfied that the defendant is a member of a declared organisation’. ‘Member’ is defined very broadly in section 3 of the *SOCC Act* and includes prospective members and persons who are treated by the organisation as if they are members. Under section 14(5)(b), a control order has a minimum content, namely that it ‘must prohibit the defendant’ from associating with other members of any declared organisation. Breach of the conditions of a control order is an offence punishable by five years imprisonment.<sup>79</sup>

The Finks Motorcycle Club was the subject of a declaration made by the Attorney-General under section 10(1) of the *SOCC Act*. On 25 May 2009, the Magistrates Court issued a control order on an *ex parte* application by the Commissioner of Police in respect of Donald Hudson, a member of the Finks, prohibiting him from associating with other members except under strict conditions. A later application made by the Commissioner for a control order in respect of Sandro Totani was adjourned pending resolution of proceedings

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76 Section 3 defines ‘criminal intelligence’ in the same terms made familiar by *Liquor Licensing Act 1997* (SA), as considered in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (‘*K-Generation*’).

77 *Totani v South Australia* (2009) 105 SASR 244, 280 (Bleby J).

78 *Totani* (2010) 242 CLR 1, 79 (Hayne J).

79 *SOCC Act* s 22.

initiated in the Supreme Court. In September 2009, the Full Court of the Supreme Court held section 14(1) invalid by 2:1 as impairing the institutional integrity of the Magistrates Court of South Australia, contrary to the requirements of Chapter III of the *Constitution* or, in other words, as infringing the *Kable* doctrine.<sup>80</sup>

The appeal to the High Court by the South Australian government was dismissed by 6:1, with Heydon J dissenting. The majority view is encapsulated in the following statement by French CJ:

Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action. That executive action involves findings about a number of factual matters including the commission of criminal offences. None of those matters is required by the SOCC Act to be disclosed to the Court, nor is the evidence upon which such findings were based. In some cases the evidence, if properly classified as ‘criminal intelligence’, would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function.<sup>81</sup>

In rejecting the allocation of decision-making between the Attorney-General and the Magistrates Court provided for by the *SOCC Act*, the majority judges were keen to highlight that this was not based merely on a comparison of the respective size or complexity of the respective tasks, but rather ‘the nature of the relationship that the legislation establishes between the two branches of government’.<sup>82</sup> What was crucial was that the findings of the Attorney-General determined ‘for all practical purposes the outcome of the control order application’ heard by the Magistrates Court.<sup>83</sup> This meant that the Magistrates Court was made available by section 14(1) to implement decisions of the executive in a manner incompatible with that Court’s institutional integrity.

Of the majority, Hayne J couched the problem slightly differently, finding that the Act required the Court to ‘create new norms of conduct’<sup>84</sup> applying to a particular member of a class of persons chosen by the executive. He declared that ‘it is not the business of the courts, acting at the behest of the executive, to create such norms of conduct without inquiring about what the subject of that norm has done, or may do in the future’.<sup>85</sup>

Two observations may be made about the reasoning of the majority in *Totani*. First, it was notable that French CJ, in a statement reminiscent of Justice McHugh’s complaints about ‘top-down’ reasoning in the early-implied freedom of political communication cases, insisted that:

one does not look first to overarching principles of constitutionalism as a source of the limitations on State legislative power which have been expounded under the general rubric of the ‘*Kable* doctrine’. Rather, it is necessary to focus upon the text

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80 See *Totani v South Australia* (2009) 105 SASR 244.

81 *Totani* (2010) 242 CLR 1, 52.

82 *Ibid* 81 (Hayne J).

83 *Ibid* 52 (French CJ).

84 *Ibid* 88 (Hayne J).

85 *Ibid* 89.

and structure of Ch III and the underlying historically based assumptions about the courts, federal and State, upon which the judicial power of the Commonwealth can be conferred. It is in the need for consistency with those assumptions that the implied limitations find their source.<sup>86</sup>

The Chief Justice's opinion in *Totani* is constructed along these lines, although it is fair to say that the application of the *Kable* doctrine necessarily reflects less about the text and structure of the *Constitution* than a set of historical and contemporary assumptions about courts. Indeed, it was significant in this respect that that French CJ felt the need to insist that the *Kable* doctrine is 'not a judicially generated imposition'.<sup>87</sup> The problem of course is that the text of the *Constitution* says little that might give rise to such a doctrine (it certainly lacks any foundation like that for the implied freedom of political communication found in the words 'directly chosen by the people' in sections 7 and 24). In addition, it is not clear that the structure of the *Constitution* provides much assistance. The *Kable* doctrine is arguably the least well-founded of the constitutional implications reached by the Mason and Brennan Courts, something that newfound enthusiasm for the doctrine cannot easily overcome.

It is open to question whether Chief Justice French's resort to 'underlying historically based assumptions about the courts' eases or deepens misgivings about the legitimacy of the *Kable* doctrine. It certainly does not have any effect of containment. As the Chief Justice himself acknowledged, it is not possible to codify the limits of state legislative power with respect to state courts, for reasons that Gummow J had articulated in *Fardon v Attorney-General (Qld)*.<sup>88</sup> The consequence for state legislators is a need for what French CJ referred to as 'a prudential approach' to the creation of laws 'directing courts on how judicial power is to be exercised ... [or] authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings'.<sup>89</sup> The *SOCC Act* displays many characteristics, but it can hardly be said, especially when it is contrasted with the approach adopted in the anti-bikie laws of other states, that 'prudence' is one of them. In many ways, it represented an easy case for the application of the *Kable* doctrine.

In *Baker v The Queen*,<sup>90</sup> Kirby J suggested that *Kable* might be 'a constitutional guard-dog that would bark but once'. The High Court's decision in 2009 in *International Finance Trust Co Ltd v NSW Crime Commission*<sup>91</sup> disproved that possibility. The decision in *Totani* suggests something further again. It reveals not only a willingness to apply the doctrine, but to continue its development in a way that will give state legislatures and drafters further need for thought.

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86 Ibid 38.

87 Ibid 49.

88 (2004) 223 CLR 575; *ibid* 47.

89 *Ibid* 47–8.

90 (2004) 223 CLR 513, 535.

91 (2009) 240 CLR 319 ('*International Finance Trust*').



Second, when it comes to the role of the judiciary in the project of preventative justice, *Totani* provides an interesting comparison with the earlier High Court consideration in *Thomas v Mowbray*<sup>92</sup> of another scheme of control orders restricting the freedom of persons who need not have been convicted or charged with any crime. Of course the anti-terrorism provisions at issue in that case were found in Commonwealth law and conferred functions on the federal judiciary, while *Totani* involved a question at state level. Nevertheless, all members of the majority in *Totani* sought to contrast the scheme in *Thomas*,<sup>93</sup> while Heydon J insisted doggedly they were essentially the same.<sup>94</sup> Neither portrayal was completely convincing: the latter by Heydon J because of the absence of any scope in the *SOCC Act* for the Magistrates Court to inquire into the personal conduct of the affected individual; the former by the majority because the Commonwealth's control order scheme countenances the making of control orders against individuals regardless of their not having any personal involvement in terrorist activity so long as the order can be shown to protect the community.<sup>95</sup> This focus on consequences rather than individual conduct as the basis for an exercise of judicial power is what was truly novel about the provisions upheld in *Thomas* – and also what underscores a degree of similarity with the *SOCC Act*.

That said, as both Hayne and Kiefel JJ emphasised in *Totani*, at least the scheme in *Thomas* provided a statutory test of proportionality for the judicial imposition of specific conditions under the control order, thereby ensuring that the purpose of protecting the public was in each case 'related directly to the defendant'.<sup>96</sup> That represents a significant difference in terms of the ability of the judiciary to tailor the order in accordance with its assessment of the risk presented by the particular individual. By contrast, the *SOCC Act* prescribed the minimum content of the order issued by the Court, with an assessment of the individual's criminal propensity only relevant to the making of any additional conditions.

On the issue of preventive justice more generally, the lesson from the two cases is reasonably clear: the use of law to establish mechanisms of control not dependent upon past acts of individual wrongdoing is clearly acceptable, even quite traditional on some views, but the courts are not to be dealt out of the equation. Although there were legitimate doubts about whether the powers conferred on the federal judiciary in the legislation considered in *Thomas* were strictly judicial in character, these were allayed by the view that sufficient discretion was left to the courts and that the powers were capable of 'strictly

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92 (2007) 233 CLR 307 ('*Thomas*').

93 See *Totani* (2010) 242 CLR 1, 33–4 (French CJ), 65 (Gummow J), 87 (Hayne J), 158–9 (Crennan and Bell JJ) and 171–2 (Kiefel J).

94 *Ibid* 135.

95 A point explicitly acknowledged by Gummow and Crennan JJ in that case: *Thomas* (2007) 233 CLR 307, 352 [97].

96 *Totani* (2010) 242 CLR 1, 87 (Hayne J). See also *Totani* (2010) 242 CLR 1, 171–2 (Kiefel J).

judicial application' in their exercise.<sup>97</sup> In the *SOCC Act*, the legislature did not leave this door open, but instead shut the judiciary out of playing a real role in the preventative justice project. Intervening in *Totani*, Western Australia submitted that this might have been done more completely and that the legislature could have validly vested both the functions of declaring organisations and making control orders in the executive of South Australia. Chief Justice French and Gummow J declined to be drawn on the substance of that claim beyond noting that it could not be an answer to constitutional difficulties presented by section 14(1).<sup>98</sup>

This was, however, an issue that Heydon J in dissent raised at the outset of his judgment. Echoing the comments of Gleeson CJ in *Thomas*, Heydon J cautioned that invalidating section 14(1) was 'likely to tempt' states into enacting legislation 'less likely to be congenial to civil liberties than legislation employing the courts'.<sup>99</sup> That concern cannot be dismissed, and indeed the direction that the South Australian government will now head in its pursuit of bikies may yet bear out this prophecy. But even so, there must, as the majority in *Totani* made clear, be a limit to what role the courts are prepared to accept merely to stay in the game. If the preventative scheme impacts negatively upon the actual or perceived independence of the judicial system from the executive and, as one might expect, at the same time the capacity to protect individual freedom is severely constrained, then an aversion to invalidity on policy grounds is misplaced.

While the majority in *Totani* was at pains to distinguish the *SOCC Act* from the control order regime considered in *Thomas*, there may be implications for another important component of Australia's anti-terror laws. Under the *Criminal Code Act 1995* (Cth), an organisation can be designated as a 'terrorist organisation' by regulation, with the courts then left with the task under section 102.3 of applying a criminal sanction to its members (including 'informal' members).<sup>100</sup> Under this aspect of the federal proscription regime, the status of membership is the sole issue for the court to determine. The threshold question of whether the organisation 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or 'advocates the doing' of such an act is left to the satisfaction of the executive in determining whether to make a regulation (which if made is then open to disallowance by Parliament).<sup>101</sup> There are significant differences with the regime struck down in *Totani*, including this being a federal rather than a state law and that a court is involved in adjudging criminal responsibility rather than making of a control order. Nonetheless, questions can be raised about whether the proscription regime breaches the *Constitution* on the basis that a prior key question is resolved by the executive, with the courts then enlisted to impose penalties upon members of the organisations so declared.

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97 See *Thomas* (2007) 233 CLR 307, 334 [28] (Gleeson CJ), 352 [95] (Gummow and Crennan JJ).

98 *Totani* (2010) 242 CLR 1, 50–1 (French CJ), 66–7 (Gummow J).

99 *Ibid* 97.

100 See *Criminal Code Act 1995* (Cth) s 102.1 (definition of 'member').

101 *Criminal Code Act 1995* (Cth) s 102.1(2).

### C *Plaintiff M61/2010E v Commonwealth*

The third case in 2010 to involve major questions about judicial power was *Plaintiff M61*. Plaintiffs M61 and M69 were Sri Lankan citizens who had entered Australia seeking asylum. They were thus considered to be unlawful non-citizens under section 189(3) of the *Migration Act 1958* (Cth) (*'Migration Act'*). Neither was permitted to apply for a protection visa under the Act because each was also an 'offshore entry person' due to having arrived by boat on Christmas Island, an 'excised offshore place' under the *Migration Act*.<sup>102</sup> Section 46A of this Act states:

- (1) An application for a visa is not a valid application if it is made by an offshore entry person who:
  - (a) is in Australia; and
  - (b) is an unlawful non-citizen.
- (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
- (3) The power under subsection (2) may only be exercised by the Minister personally.
- ...
- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

The section thus precluded the plaintiffs from applying for protection visas, while at the same time (in combination with section 195A of the *Migration Act*) providing a pathway by which they might do exactly this. In order to determine whether he should exercise his powers under section 46A(2), the Minister directed that offshore entry persons be the subject of a 'Refugee Status Assessment' ('RSA'), with the option of a further 'Independent Merits Review' ('IMR'). In the case of both plaintiffs, the Minister did not exercise his power after these processes found that neither was a person to whom Australia owed protection obligations under the *Convention Relating to the Status of Refugees*.<sup>103</sup>

In the High Court, the plaintiffs argued that they had not been afforded procedural fairness during the two reviews, and that the reviewers had made errors of law, including by not treating themselves as bound to apply the *Migration Act*. Plaintiff M69 also argued that section 46A was invalid.

The High Court delivered a single unanimous judgment in which it carefully unpicked the series of legal fictions underlying the case. These included: (1) that

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102 See *Migration Act* s 5 (definition of 'excised offshore place').

103 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (*'Refugees Convention'*).

certain land and water within the borders of Australia are not actually parts of the nation when it comes to applying the normal principles and practices of Australian law;<sup>104</sup> and (2) that the Minister plays no role in the initial determination of whether someone arriving at such a place attracts Australia's protection obligations under the *Refugees Convention* (despite the Minister considering whether to exercise his power under section 46A 'in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations').<sup>105</sup>

The High Court rejected the attack on the validity of section 46A, and subsection (7) in particular. Plaintiff M69 had asserted that the federal Parliament cannot confer a statutory power where consideration of whether to exercise that power cannot be enforced. The Court held that 'neither section 46A as a whole, nor section 46A(7) in particular, is a provision which is of so little content as not to constitute an exercise of legislative power or to be a "law" as a rule of conduct or a declaration as to power, right or duty'.<sup>106</sup> It also noted that this is 'not a form of grant of power unknown to the federal statute book'.<sup>107</sup> As a result, the section did not 'clash' with section 75(v) of the *Constitution* because '[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise'.<sup>108</sup> Of course, if such a power is actually exercised, section 75(v) can be applied to enforce the limits of that power so that there can be no 'island of power' immune from review.<sup>109</sup>

The Court also addressed the nature of the powers being exercised during the plaintiffs' detention. Rather than being held, as the Commonwealth contended, in exercise of a non-statutory executive power under section 61 of the *Constitution*, the detention was found to be undertaken in conformity with the *Migration Act*.<sup>110</sup> Indeed, despite regarding the detention as non-statutory, the departmental manual for those carrying out a RSA indicated that some provisions of the *Migration Act* were to be applied (while at the same time stating that these were 'not binding authorities').<sup>111</sup> The result was that the continued detention of the plaintiffs was 'lawful only because the relevant assessment and review were directed to whether powers under either section 46A or section 195A could or should be exercised'.<sup>112</sup> This meant in turn that the RSA and IMR processes needed to comply with the *Migration Act*.<sup>113</sup> Ultimately, it was found that there were errors in the way that the processes have been conducted, including that the

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104 See *Plaintiff M61* (2010) 272 ALR 14, 21–3.

105 See *ibid* 17, 29, 31.

106 *Ibid* 27.

107 *Ibid* 28.

108 *Ibid*.

109 See *ibid*.

110 See *ibid* 28–31.

111 *Ibid* 25.

112 *Ibid* 29.

113 See *ibid* 35.

provisions of the *Migration Act* had not been treated as binding, and both plaintiffs received a declaration to that effect.<sup>114</sup>

*Plaintiff M61* is of undoubted importance in providing for ordinary principles of law to operate in what was supposedly a migration law-free zone. In doing so, the Court upheld the capacity of the judiciary to act as a check upon the exercise of executive power, and thus an important aspect of the rule of law. While, as a consequence, the decision is also an important victory for individual liberty, and in particular the right even of non-citizens to the proper exercise of governmental power, some of the reactions to the case have been overblown. The High Court did not strike down any part of the scheme, even if it confounded the assumptions of successive governments as to its operation. In fact, the Court recognised that the stripping away of legal entitlements from certain asylum seekers is valid under the *Constitution*. The result is that Parliament may create a two-tiered system of processing asylum claims. What Parliament cannot do is to deny the jurisdiction of the Courts to enforce the proper limits of whatever system of processing Parliament creates.

It must also be remembered that the constitutional argument in *Plaintiff M61* failed, and that the plaintiff's victory rested upon interpretation of a statute made by Parliament. This opens up the possibility for amendments to the *Migration Act* to further limit the procedural and other rights of those seeking asylum (such as to remove the right to a fair hearing). There is every indication that Parliament can bring this about so long as it does not seek also to remove the courts from the picture.

### III CONCLUSION

The constitutional law decisions of 2010 tell us much about the approach and methodology of the French Court. Members of the Court were often at pains to emphasise the orthodox nature of their reasoning and, particularly in contentious areas, to point out how their decision-making was directed by the 'text and structure'<sup>115</sup> of the *Constitution*, or by the need to give meaning to a particular constitutional expression.<sup>116</sup> Though they at times have the feel of a ritual incantation, such statements are of course not rhetorical. They express the primary approach of the Court to constitutional law decision-making. However, they rarely acknowledge that the text and structure of the *Constitution* may just

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114 See *ibid* 34–7.

115 This expression was central to the unanimous reasons which secured the implied freedom of political communication in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, and largely quelled controversy over the development of that principle.

116 Spigelman, above n 14, 80, has said in regard to the term 'Supreme Court of a State' in s 73 as applied in *Kirk*:

The concept of a 'constitutional expression' provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence. That aura dissipates when the Court undertakes the unavoidably creative task of instilling substantive content to the constitutional dimension of a constitutional expression by identifying its 'essential' features or characteristics.

be a helpful starting point that can take a judge only so far. Beyond such assistance, value judgements and questions of policy and degree necessarily arise. It is by engaging with this aspect of constitutional doctrine that cases such as *Kirk* and *Totani* have pushed forward the frontiers of the law.

The Mason and Brennan Courts demonstrated how reference to extra-constitutional matters such as questions of policy can lead to harsh, and sometimes unfair, public criticism, even where regard to such material is an inevitable component of the judicial decision-making process. Since then, High Court justices have been careful to portray the orthodox nature of their deliberations – in part through the repeated invocation of the ‘text and structure’ of the *Constitution*. 2010 demonstrates the benefits of such an approach. While emphasising the traditional nature of its reasoning, the French Court was still able to deliver novel and innovative judgments. Indeed, the year contained constitutional law decisions that would have made members of the Mason and Brennan Courts proud, and yet the French Court was lauded rather than derided as a cabal of illegitimate, out-of-control decision makers. By making this comparison, we do not mean to suggest that the French Court has been disingenuous. Our point is only that careful attention to the method of reasoning and emphasising its orthodox foundations can have a major effect upon how a decision is received.

Members of the Gleeson Court were also careful to reference their reliance upon constitutional text and structure. What is different is that, within this framework, the French Court has to date been more prepared to apply and develop constitutional doctrine. The difference is most apparent when it comes to the threshold issue of whether the constitutional question in a particular case is reached at all. In considering the 2008 term, the last year of Gleeson Court, former Victorian Solicitor-General Pamela Tate SC commented on ‘the High Court’s commitment to exhausting questions of statutory construction before validity’.<sup>117</sup> We made a similar point in our paper on that year’s High Court statistics.<sup>118</sup> In commenting on the 2009 cases of the French Court, Melissa Perry QC noted how at least two of the constitutional cases, *K-Generation* and *International Finance Trust*, ‘reaffirm[ed] the truth of ... Tate’s observation’.<sup>119</sup> In the 2010 cases, the propensity to favour statutory construction over the application of constitutional principle was much less evident. The Court still has as its initial, and often primary, task the construction of the legislation in question, but it now appears less likely to adopt what might be regarded as strained or otherwise less than compelling constructions in order to seemingly avoid ever reaching the constitutional point.

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117 Pamela Tate, ‘The High Court on Constitutional Law: The 2008 Term’ (2009) 32 *University of New South Wales Law Journal* 169, 170.

118 Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2008 Statistics’ (2009) 32 *University of New South Wales Law Journal* 181. We noted that this, as one aspect of the Court’s cautious approach to constitutional doctrine, was a reason why the ‘Gleeson Court is unlikely to be remembered as a leading era in the development of Australian constitutional jurisprudence’: at 193.

119 Perry, above n 25.

This meant that in 2010 the French Court was more willing to grasp the nettle and answer the constitutional question. This may well have been a function of the cases heard last year, or might suggest a longer term change of approach. It is too early to tell, though we suspect that it does reflect a greater comfort in dealing with constitutional issues. What can be said is that this shift was accompanied by other positive changes. The 2010 decisions were, we suspect to the relief of many, characterised by greater clarity, and, due in part to more agreement, greater brevity. In these areas, French CJ has led the way. His decisions on constitutional law tend to be clear and cogent, and avoid the problem of over length suffered by too many High Court judgments of the last decade. It is also worth noting that, by the end of 2010, French CJ had not yet issued a dissent.<sup>120</sup>

The 2010 cases suggest not only a greater readiness to reach the constitutional issue, but to press forward in the development of constitutional doctrine in a way that protects the judicial role to the detriment of the policy aspirations of the legislature and executive. *Kirk*, *Totani* and *Plaintiff M61* are all examples of this. Collectively, they suggest that the French Court will be robust in its defence of the judicial sphere, and that governments and parliaments need to take a more 'prudential' approach to constitutional considerations in the drafting and passage of laws. It is not difficult to discern legislative or executive overreach in at least *Totani* and *Plaintiff M61*.

The willingness of the Court to engage in constitutional development is most marked, as it has been for some years, in the area of judicial power and the judicial function. This reflects the strong commitment of the judges of the Court to the 'rule of law', something that was adverted to repeatedly in the cases of 2010,<sup>121</sup> and also a desire to safeguard the judicial sphere from legislative and executive intrusion.<sup>122</sup> It is also significant that constitutional development in this area is widely accepted and seen as legitimate by the public, the media, political leaders and the legal community in a way that gives the Court more room to move without exceeding its perceived institutional boundaries. Interpretive approaches and decisions that might attract criticism if they had been applied to political or other freedoms can conversely attract resounding support.<sup>123</sup> As a result, the scope for implication and further constitutional development seems much larger when it comes to Chapter III of the *Constitution* than other fields. Whatever the reason, it remains the case that a litigant's best chances for victory

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120 Chief Justice French, after sitting on 94 matters, finally found himself in the minority in the case of *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

121 Indeed, 15 times in *Totani* alone.

122 By contrast, with the retirement of Kirby J, international and domestic human rights concepts and reasoning are rarely applied, except in those cases where one of the few human rights in the *Constitution* is directly invoked in the High Court. Otherwise, any reference is unusual and often oblique. In 2010, for example, the High Court in *Dickson* made reference to the earlier statement by Gibbs CJ and Deane J in *University of Wollongong v Metwally* (1984) 158 CLR 447 that s 109 operates 'not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies': *Dickson* (2010) 241 CLR 491, 503–4.

123 George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) ch 9.

are likely to arise if they can cast a law as an attack on the power and role of the courts. Such arguments won the day every time they were put in 2010.

This has transformed Chapter III into the closest that Australia comes to having a constitutional Bill of Rights. It is a reservoir of sometimes surprising, and often potent, limitations upon legislative and executive power. As Sackville has stated: 'Chapter III jurisprudence has developed apace, creating new implied constitutional rights and safeguards that had almost entirely escaped attention in the first 90 years of Federation'.<sup>124</sup> In respect of *Kirk*, he concluded that it 'represents the culmination ... of the High Court's determination to discern in the general language of Ch III constitutional guarantees of the rule of law and individual freedoms'.<sup>125</sup>

But does this mean, to return to the questions we posed at the outset, that the French Court's decisions in 2010 were not so much a break from past approaches as simply the logical progression of the fertile Chapter III jurisprudence of the last 20 years? Although there has been something of a change in style, the constitutional creativity of the Mason and Brennan Courts does not belong to a past era when it comes to Chapter III. The High Court has demonstrated over many years, and in 2010 with particular alacrity, that it is willing to deploy old and new constitutional principles to resist incursions into the jurisdiction and role not only of itself, but of other courts as well. That this resistance has also had the benefit of protecting individual rights may well be a by-product of these decisions rather than a driving force, but it is welcome nonetheless.

There is also a danger in seeing the 2010 cases concerning Chapter III as emblematic of the Court's decisions more generally. *Rowe* was the most significant consideration of a Chapter I issue and, although the result was consistent with other pro-individual rights decisions of the year, it did owe a significant debt to the 2007 case of *Roach*. Only time will tell whether the High Court is willing or able to bridge the gap that exists between its regular engagement and creativity in the interpretation of Chapter III, and its usually more constrained approach to the other Chapters of the *Constitution*.

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124 Sackville, above n 16, 75.

125 Ibid 77.