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Abstract

This article analyses the Kable principle through the lens of one of the High Court's more recent Kable pronouncements, Attorney General (Northern Territory) v Emmerson — in which a territory law providing for forfeiture of property owned or controlled by a convicted person was held to be valid — and assesses the significance of this case as a bellwether indicator of possible future challenges to state and territory laws based on Kable.

Keywords

Kable principle, criminal confiscation laws, independence of State courts

THE HIGH COURT, *KABLE* AND THE CONSTITUTIONAL VALIDITY OF CRIMINAL PROPERTY CONFISCATION LAWS: *ATTORNEY GENERAL (NORTHERN TERRITORY) V EMMERSON*

PETER JOHNSTON*

ABSTRACT

This article analyses the Kable principle through the lens of one of the High Court's more recent Kable pronouncements, Attorney General (Northern Territory) v Emmerson — in which a territory law providing for forfeiture of property owned or controlled by a convicted person was held to be valid — and assesses the significance of this case as a bellwether indicator of possible future challenges to state and territory laws based on Kable.

I INTRODUCTION

Prior to 12 September 1996, when the High Court decided *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'),¹ it was generally understood that state parliaments were free to order state judicial systems as they saw fit. This included conferring upon state parliaments non-judicial functions in a way that was not constitutionally possible for the Commonwealth, such conferrals being restricted by the *Boilermakers'* principles in relation to federal courts.² According to these principles, Chapter III of the *Constitution* mandates a strict separation of the Commonwealth judiciary from the executive and legislative arms of government, including an implied limitation on Commonwealth courts exercising non-judicial powers. It was virtually a correlative article of faith that state courts were not, under state constitutions, subject to any equivalent doctrine of separation of powers.³ Hence, until *Kable*, there appeared to be

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¹ (1996) 189 CLR 51.

² Enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' case*') (1956) 94 CLR 254, 26 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

³ See *Clyne v East* (1967) 68 SR (NSW) 385, 395, 400; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381, 400, 407, 410, 419-420; *Nicholas v Western Australia* [1972] WAR 168, 175; *Gilbertson v South Australia* (1976) 15 SASR 66, 85; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Collingwood v Victoria (No 2)* [1994] 1 VR 652; *S (A Child) v The Queen* (1995) 12 WAR 392.

no limitation, express or implied, on the power of state legislatures to interfere with the independence of state courts, including their Supreme Courts; nor were state parliaments prevented from the ultimate legislative intervention of abolishing these courts.

Kable reversed this assumption; it held that state parliaments could not legislate to impose certain non-judicial functions upon state Supreme Courts or to affect their composition and procedures in such a way as to impair their independence from the other two arms of state government. Revolutionary as it was at the time,⁴ later history has shown *Kable* to have waned and waxed in terms of its application to legislation that changes the composition and functions of state, and now also territory, courts,⁵ invalidating some alterations to their judicial systems while upholding others. This creates difficulties for state and territory governments in predicting whether various kinds of changes to their court structures and jurisdictions may be held to be unconstitutional. This article briefly traces the jurisprudential shifts in the *Kable* doctrine over a period now approaching almost two decades and examines that jurisprudence through the lens of one of the High Court's more recent *Kable* pronouncements, *Attorney General (Northern Territory) v Emmerson ('Emmerson')*.⁶ To this end, *Emmerson* is located on the spectrum of territory and state laws validly providing for forfeiture of property owned or controlled by a convicted person. The article then assesses the significance of the case as a bellwether indicator of possible future challenges to state and territory laws based on *Kable*. It also explores, as secondary issues, the majority's decision that the confiscation did not constitute an unjust acquisition of property under territory law,⁷ and the ramifications of the decision regarding the constitutional constraints, if any, on the exercise of *prosecutorial discretion* in instituting applications for the confiscation of criminal property.

The article concludes that *Emmerson* represents a fairly conservative upholding, consistent with prior *Kable* decisions, of criminal property confiscation laws. It provides a template for future confiscation laws to ensure likely survival in the event

⁴ Some idea of just how revolutionary *Kable* was can be gained by a reading the transcript of argument in: Transcript of Proceedings, *Kable v Director of Public Prosecutions for New South Wales* [1995] HCATrans 430 (7 December 1995), particularly the interchanges between Sir Maurice Byers QC, counsel for *Kable*, and Dawson J.

⁵ See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 6, 15 ('*Bradley*').

⁶ (2014) 307 ALR 174.

⁷ French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; Gageler J dissented in part.

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of a constitutional challenge. *Emmerson* does not preclude, however, the invocation and possible success of *Kable* challenges to state or territory laws that are in other respects egregiously unfair and draconian by imposing functions or adopting procedures that are widely out of line with the traditional adversarial curial process.

With respect to unjust acquisition of property, the article concludes that the decision is compatible with current jurisprudence concerning s 51(xxxi) of the *Constitution*. Regarding the majority decision upholding the exercise of prosecutorial discretion, it suggests that there is a largely unexplored precept of constitutional 'arbitrariness' that may be developed to render certain unregulated executive discretionary decisions vulnerable to invalidation.

II THE AUSTRALIAN JUDICIAL STRUCTURE

When the *Commonwealth Constitution* was drafted in the 1890s the founders, in their wisdom, expended considerable effort in formulating the structure of the federal judiciary in Chapter III. At the apex of this federal judiciary they provided for the creation of the High Court and empowered the Commonwealth Parliament to create other federal courts.⁸ The High Court, to a large extent replicating the Supreme Court of the United States, was seen to have a particular role and function as adjudicative umpire, standing apart from the Commonwealth executive and legislature, settling disputes (otherwise termed 'controversies')⁹ between those two institutions and the individual citizens who comprise the 'people of the Commonwealth'. A second, equally important function of the High Court was to determine disputes of a federal nature between the Commonwealth and states. Again, the assumption was that the High Court would act independently of the Commonwealth executive and legislature.

While there was no express provision in the *Constitution* mandating the independence and impartiality of the High Court and other federal courts, a set of principles emerged in the middle of the 20th century, referred to above, that collectively became known as the *Boilermakers'* doctrine.¹⁰ In essence, these principles require that only courts constituted under Chapter III can exercise 'the judicial power of the Commonwealth' and that such courts cannot exercise non-judicial powers. This ensures a strict separation between the High Court and other federal courts on the one hand, and the other two arms of government on the other, ensuring that

⁸ *Constitution* s 71.

⁹ *Huddart, Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 357-8 (Griffith CJ).

¹⁰ See *Boilermakers' case* 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) for the governing principles and their foundation.

those courts maintain their impartiality, autonomy and integrity in order to perform their function of constitutional umpires. Because it was not necessary to address the constitutional situation of state courts (which already existed under colonial constitutions), those courts rate barely a mention in Chapter III. There are, however, two notable exceptions: First, under s 73 of the *Constitution*, the High Court is given *appellate jurisdiction* to hear *appeals* from *State Supreme Courts*; and second, under s 77(iii), the Commonwealth Parliament is authorised to vest 'the judicial power of the Commonwealth' (commonly known as federal jurisdiction) in state courts. The latter measure reflects a degree of pragmatism on the part of those who drafted the *Constitution*. They were aware that after Federation occurred in 1901 it would be a substantial and expensive task in a country as vast as Australia to establish a separate set of Commonwealth courts dealing solely with Commonwealth matters. The founders therefore empowered Parliament to vest Commonwealth jurisdiction in what were previously colonial courts and which were readily available geographically throughout Australia.¹¹

The position of territory courts under Chapter III of the *Constitution* is more obscure and ambiguous.¹² To start with they are not expressly recognised in the Chapter. Secondly, unlike state courts, there were no pre-existing courts established under Commonwealth or territory authority in those territories. Such courts that were established after Federation were therefore entirely statutory. They did not inherit an inherent jurisdiction or prerogatives traceable to British courts at Westminster. The relationship between the Commonwealth's plenary power to legislate for territories under s 122 of the *Constitution* and the territory's power to make laws under the *Northern Territory (Self-Government) Act 1978* (Cth) ('*Self-Government Act*'), and the relationship of each with Chapter III, are not clearly established.¹³ Conundrums abound, such as: is there a 'judicial power of the Territory' of the same kind and

¹¹ See *South Australia v Totani* (2010) 242 CLR 1, 37-38 (French CJ) ('*Totani*').

¹² In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 331 ('*Eastman*') Gleeson CJ, McHugh and Callinan JJ adverted to 'a problem of interpretation of the *Constitution*' that has 'vexed judges' since Federation, namely, the relationship between Chapter III and s 122.

¹³ Some aspects are explored in *Northern Territory v GPAO* (1999) 196 CLR 553, 576-583 [40]-[62] (Gleeson CJ and Gummow J) ('*GPAO*'); see also Hon Mark Leeming, 'The Federal and State Courts in Constitutional Law: the 2013 term' (Paper presented at the Gilbert +Tobin 2014 Constitutional Law Conference, Art Gallery of New South Wales, 14 February 2014), 22-23 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2014_con_law_conf_papers_justice_leeming.pdf>.

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quality as that exercisable by state courts, and does the Territory inherit any judicial power derivatively from the former colony of South Australia?¹⁴

Certainly, courts exercising jurisdiction of one kind or another in federal territories can be created by the Commonwealth, under s 122 of the *Constitution*, or by the Northern Territory Legislative Assembly, pursuant to the *Self-Government Act*.¹⁵ Further, any court established in the Territory can be invested with federal jurisdiction pursuant to s 77(iii) of the *Constitution*.¹⁶

Accordingly, a 'territory court' may not be a federal court for the purposes of s 71 of the *Constitution* yet may be capable of exercising federal jurisdiction. This can create difficulties concerning whether in a given instance such a court is exercising federal or territory non-federal jurisdiction.¹⁷ In particular, it prompts questions as to the extent to which a court established under s 122 of the *Constitution* is free from constraints of the kind applicable to s 71 courts under Chapter III.¹⁸

For present purposes, it is sufficient to recognise that courts such as the Supreme Court of the Northern Territory are not necessarily 'disjoined'¹⁹ from other state and federal courts; such courts are capable of exercising the judicial power of the Commonwealth and constitute part of an integrated Australian judicial system.²⁰

¹⁴ This may depend on implications about whether the Territory Supreme Court, which owes its existence solely to statute, inherits similar characteristics to those of the State Supreme Courts based on their 'inherent jurisdiction' as superior courts, and whether the continuation of South Australian law under s 7 of the *Northern Territory Acceptance Act 1910* (Cth) and s 5 of the *Northern Territory (Administration) Act 1910* (Cth) incorporates into territory judicial power pre-existing constitutional constraints applicable to South Australian colonial courts.

¹⁵ See *GPAO* (1999) 196 CLR 553, 576-578 [40]-[44] (Gleeson CJ and Gummow J). For an extensive discussion of the problems see *GPAO* (1999) 196 CLR 553, 596-605 [108]-[133] (Gaudron J).

¹⁶ *Spratt v Hermes* (1965) 114 CLR 226, 5 (per Windeyer J); see Christopher Horan, 'Section 122 of the Constitution: A "Disparate and Non-Federal" Power' (1997) 25 *Federal Law Review* 97.

¹⁷ *GPAO* (1999) 196 CLR 553, 596 [107] (Gaudron J).

¹⁸ This possibility was described by Barwick CJ in *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 598 as 'the doctrine of the duality of judicial power'.

¹⁹ The term 'disjoined' is used in *GPAO* (1999) 196 CLR 553, 600-601 [119] (Gaudron J) and 618-619 [173] (McHugh and Callinan JJ) regarding the possible relationship of territory courts to other Australian courts.

²⁰ See *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174, 185 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Emmerson*'); see also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81] (Gaudron J); *Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Totani* (2010) 242 CLR 1, 49

Each of the above features, that is, the ‘integrated judicial system’ whereby state Supreme Courts were written into the *Constitution* as conduit pipes through which appeals to the High Court were to be channelled, and the use of state and territory courts as a means through which jurisdiction in Commonwealth matters could be provided on a local basis, are the twin pillars on which the *Kable* principle is based.

III THE COMING OF *KABLE*

As noted above, until *Kable* state Supreme Courts were thought not to be subject to any requirements of independence under state constitutions.²¹ This was reaffirmed in *Kable*.²² Similarly, no implied guarantee of state judicial independence was considered to flow from the *Commonwealth Constitution*.²³ The ground for a reconsideration of the latter proposition was prepared in *Grollo v Palmer*,²⁴ where the Court recognised that certain non-judicial activities performed by federal judges may be ‘incompatible’ with their judicial functions, on the basis that these functions undermine their independence from the Commonwealth executive. *Grollo* presaged the Court’s subsequent decision in *Kable* in which a bare majority of the Court held invalid provisions of the *Community Protection Act 1994* (NSW) that required judges of the New South Wales Supreme Court to review on very broad political grounds the continuing detention of Mr Wayne Kable.

Kable had been convicted of the manslaughter of a close relative and was regarded notoriously as a dangerous person likely to reoffend. The New South Wales Act singled him out for a special regime of preventive detention justified as necessary for the public protection against a singularly violent man. Relevantly, the New South

[72] (French CJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 65-67 [36]-[40] (Gleeson CJ), 119-120 [186] (Kirby J) (*‘Forge’*).

²¹ See generally Gerard Carney, *The Constitutional Systems of the Australian States and Territories*, (Cambridge University Press, 2006) 344-349; *Totani* (2010) 242 CLR 1, 45 [66] (French CJ).

²² Strictly speaking, those denials of separation of powers were confined to the situation of the New South Wales Supreme Court under Part 9 of the *Constitution Act 1902* (NSW) whereby a guarantee of fixed judicial tenure was entrenched by s 7B of that Act. That holding does not necessarily extend to other state constitutions where constitutional review by the Supreme Courts is entrenched; see, eg, s 73(6) of the *Constitution Act 1889* (WA).

²³ Regarding the possibility that the *Commonwealth Constitution* might mandate state judicial independence a year before *Kable* the Full Supreme Court of Western Australia, in *S (A Child) v The Queen* (1995) 12 WAR 392, dismissed a constitutional challenge to ‘three strikes’ legislation requiring juvenile offenders to be kept in continuing detention, rejecting a contention that, contrary to the *Constitution*, the legislation conferred upon the Supreme Court an administrative function of a political kind that compromised its independence.

²⁴ (1995) 184 CLR 348.

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Wales Supreme Court was required to conduct a periodic review process disregarding normal procedural and evidentiary rules. The High Court declined to hold the legislation invalid as contravening any separation of powers under the *Constitution Act 1902* (NSW). Four Justices of the High Court, for varying but broadly similar reasons, held the scheme invalid as repugnant to Chapter III of the *Constitution*. One needs to recognise, however, that this conclusion did not represent a wholesale importation of the *Boilermakers'* doctrine into state constitutional law.²⁵

As summarised in *State of New South Wales v Kable* ('*Kable No 2*'),²⁶ the Act was held to be beyond the legislative power of the State and contrary to Chapter III of the *Constitution* by conferring on the Supreme Court functions not previously known to common law courts that were incompatible with the Court's 'institutional integrity'. That incompatibility was identified as requiring the Supreme Court to act institutionally as if it were a court while performing a non-judicial preventive function not appropriate for the judicial branch of government. Ostensibly, the Court was misleadingly presented as a 'court' while exercising powers that departed in serious respects from normal judicial process. This was described as being subjected to 'a legislative plan' that conscripted the Court to prolong *Kable's* imprisonment for political purposes.

Three singular analytic features can be discerned from *Kable*: The first is a sense of constitutional fraud in which state courts could be draped cosmetically with the institutional trappings of a court so as to preserve popular acceptance of and confidence in its impartiality.²⁷ This may be called the *Mistretta* theme after the US

²⁵ As carefully articulated by McHugh J in *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 598-599 ('*Fardon*');

The doctrine of the separation of powers, *derived from Chs I, II and III of the Constitution*, does not apply as such in any of the States, including Queensland. Chapter III of the *Constitution*, which provides for the exercise of federal judicial power, invalidates State legislation that purports to invest jurisdiction and powers in State courts *only in very limited circumstances*. (Emphasis added)

²⁶ (2013) 87 ALJR 737, 742-743 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). For an analysis see Steven Churches, '*Kable No 2: Orders of a Superior Court 1, False Imprisonment 0*' (2013) 36 *University of New South Wales Law Journal* 894.

²⁷ The notion of constitutional 'fraud' is akin to that of 'evasion' of high constitutional purposes by resort to subtle distinctions, notably expressed by Dixon J in *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263, 304 and further developed by Mason J in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 630-631, addressing state attempts to skirt the prohibition in s 90 of the *Constitution* against levying excise duties by adopting subterfuges that *formally* appear to fall outside the prohibition but which in substance contravene it.

Supreme Court case that has been adopted as a metaphor or analogue in *Kable* and subsequent decisions.²⁸

The second is a sense of constitutional abuse founded on the notion that a court can be manipulatively 'recruited', 'enlisted' or 'borrowed' to provide a veneer of respectability while acting at the behest, direction or under the influence of the state executive or legislature. The vice perceived here is institutional alliance with, or subordination to, the executive (*Grollo*-type incompatibility) or legislative dictation of outcome (usurpation). *Kable* prescribes a notional antidote to such distortions of adjudicative process by providing, in effect, for a 'constitutionalised' form of the *nemo iudex in sua causa* (bias) rule of natural justice, forbidding collusion with, or coercion of, the judicial arm by the other two arms of government.

The third is the yardstick of 'incompatibility' expressed as either incompatible with the institutional integrity of the court or, as later refined, especially in the context of Supreme Courts, with the essential characteristics of a state 'court'. This standard of incompatibility shares a provenance with similar terms such as 'inconsistency' and 'repugnancy'. As noted by McHugh J in *Fardon*,²⁹ however, terms such as 'repugnant' are incapable of functioning as a reliable constitutional benchmark. Incompatibility can arise both functionally and procedurally where the adjudicative process is markedly distorted by the imposition of inordinately restrictive rules of evidence or procedures that impede a respondent's ability to challenge government action depriving them of liberty or property. The same is true of features that rob proceedings of the requisite degree of procedural fairness, which, though variable according to circumstances, is the hallmark of the common law adversarial system. *Kable* and some of its successor cases seek to address this latter concern by prescribing a quasi-constitutional standard akin to the fair hearing principle, *audi alteram partem*.³⁰ For present purposes it is enough to recognise that incompatibility is itself an elastic concept that is not susceptible to precise application.

A *The fragile logical foundations of Kable*

The *logical bases* underpinning the *Kable* principle are, first, that in order to function as suitable vessels into which the holy oil of the Commonwealth judicial power can be poured (through vesting federal jurisdiction under s 77(iii) of the *Constitution*) state courts must exhibit a *minimal standard of independence and impartiality* from state governments and parliaments. State legislatures cannot therefore require state courts

²⁸ See *Mistretta v United States*, 48 US 361, 407 (1989).

²⁹ (2004) 223 CLR 575, 601 [43].

³⁰ This is further discussed *infra*.

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to perform functions, judicial or non-judicial, in a way that compromises their independence or integrity.

The second limb of the *Kable* principle derives from the fact that s 73 of the *Constitution*, by providing for *appeals* from state Supreme Courts to the High Court, entrenches those Courts as an 'integral part' of the Australian judicial hierarchy.³¹ The consequence is that in each state there must be a court that matches the description of 'the Supreme Court' and in turn such a Court must retain traditional characteristics of an independent adjudicative body according to well-established notions of the adversarial common law system. These strands were brought together somewhat spectacularly in the High Court's ground-breaking decision in *Kable*.

Notably, therefore, the *Kable* doctrine is derived by *implication* from specific provisions in the text and structure of Chapter III of the *Constitution* that limits the kind of administrative functions that state and now territory legislatures can impose on their Supreme Courts.

Since it was decided, however, the decision has attracted considerable scrutiny, not always approving, in academic commentary.³² In the main this has focused on the rather fragile nature of the implications drawn in *Kable*. The test of 'institutional integrity' that has emerged as the core criterion is at best a vague and imprecise

³¹ While s 73 does not expressly refer to territory courts, it confers appellate jurisdiction on the High Court regarding judgments of 'any court exercising federal jurisdiction', elliptically embracing such courts. Although not Federal courts, the Commonwealth has legislative power to authorise appeals to the High Court from territory courts; see *Porter v R; Ex parte Chin Man Yee* (1926) 37 CLR 432, 466 (Higgins J), 448 (Rich J), 449 (Starke J).

³² For a variety of analyses, including sceptical criticism, see Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175; Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305; Brendan Gogarty and Benedict Bartl, 'Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts Following *Kable v DPP* (NSW) and Why it Matters' (2009) 32 *University of New South Wales Law Journal* 75; Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227; Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216; Peter Johnston, 'State Courts and Chapter III of the Commonwealth Constitution: Is *Kable's Case* Still Relevant?' (2005) 32 *University of Western Australia Law Review* 211; Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 160-65; Tarsha Gavin, 'Extending the Reach of *Kable*: *Wainohu v New South Wales*' (2012) 34 *Sydney Law Review* 395.

measuring-rod of constitutional validity. Similarly, to apply a test based on whether a state law distorts or impairs the essential characteristics of a 'Supreme Court' presents a test of indeterminate categorisation that leaves considerable leeway to judicial discretion when the High Court is called upon to apply *Kable* standards. Finally, the notion of incompatibility is itself susceptible of differences in judicial application. Its shifting and fuzzy border makes prediction of High Court determination difficult and uncertain. These inherent problems have set the scene for later divergences of outcome in post-*Kable* cases.

1 *The uneasy travails and chequered history of Kable over the last 18 years*

As noted in later commentary, after its startling entry onto the Australian constitutional stage, *Kable* initially suffered a regressive relapse.³³ For about a decade, the High Court failed to apply it, instead denying a series of *Kable*-based challenges. Successively, in cases like *Fardon*,³⁴ *Baker v The Queen* ('*Baker*'),³⁵ *Forge v Australian Securities and Investments Commission* ('*Forge*'),³⁶ *APLA Limited v Legal Services Commissioner (NSW)*,³⁷ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* ('*Gypsy Jokers*')³⁸ and *K-Generation Pty Ltd v Liquor Licensing Court* ('*K-Generation*'),³⁹ the High Court upheld state legislation and rejected arguments that such laws compromised the institutional integrity of state Supreme Courts and their judges. As a contemporary appraisal, in *Fardon*, a Queensland case concerning a carefully tailored scheme of continuing preventive detention of dangerous prisoners, clearly drafted to take into account and avoid flaws exposed in *Kable*, McHugh J stated that *Kable* was likely to be a one-off case confined to its own peculiar and extraordinary circumstances.⁴⁰

2 *Identifiable invalidating 'Kable' factors*

In *Fardon*, McHugh J drew a number of distinctions between the Queensland and New South Wales laws that have become significant differentiating signposts in later *Kable* cases. He noted that the legislative scheme declared invalid in *Kable* was

³³ See, eg, HP Lee, 'The *Kable* Case: A Guard-Dog that Barked But Once' in George Winterton (ed) *State Constitutional Landmarks* (Federation Press, 2006) 390.

³⁴ (2004) 223 CLR 575.

³⁵ (2004) 223 CLR 513.

³⁶ (2006) 228 CLR 45.

³⁷ (2005) 224 CLR 322.

³⁸ (2008) 234 CLR 532.

³⁹ (2009) 237 CLR 501.

⁴⁰ (2004) 223 CLR 575, 601-602 [43].

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'extraordinary' firstly by providing, unlike the Queensland Act, for the preventive detention of a single person, Mr Kable (*ad hominem*). Secondly, although 'dressed up' as legal proceedings (albeit far removed from normal judicial process) the New South Wales legislative plan had been enacted for the political purpose of ensuring that he remained in prison when his sentence expired. In contradistinction, the Queensland Act was consistent with normal judicial process, including determination according to the normal rules of evidence. Thirdly, the Queensland Supreme Court was presented with a real justiciable issue for adjudication, leaving it to the Court to determine whether or not to make an order for continuing detention. In contrast, the New South Wales Act constrained the judicial outcome so as to give effect to the intention of the executive government. Fourthly, the Queensland legislation authorised its Supreme Court to select in its discretion between appropriate custodial orders from among a range of possible orders, unlike the virtual direction to the New South Wales Supreme Court not to release Mr Kable. Fifthly, the object of the Queensland legislation was clearly designed, in terms of its stated purposes, to protect the community against certain classes of dangerous convicted offenders. And, finally, picking up the *Mistretta* theme, there was nothing in the Queensland law or the surrounding circumstances suggest that the jurisdiction conferred was a 'disguised substitute' for an executive function, or which might lead to the perception that the Supreme Court was acting in conjunction with, and not independently of, the Queensland legislature,⁴¹ further suggested that the only *Kable* challenges that were likely to succeed would be those where a state parliament interfered with the composition and constitution of state courts rather than situations where courts were required to perform functions of a kind that might be considered to impair their independence.⁴²

These various elements, namely the nature of the function conferred, the presentation of a *controversy* open to normal independent adjudication by the Court, the stipulation of basically fair evidentiary standards and procedures for its determination, the kind of orders open to the Court, and the overall absence of features that while cosmetically maintaining a semblance of independence are in reality disguised as executive or legislative control of the outcome, constitute and continue to provide a framework for evaluating the validity of later state legislation.

⁴¹ Ibid 595-597 [33]-[34] (McHugh J).

⁴² Ibid 601-602 [43]; Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 100; see *Fardon* as a retrogressive narrowing of the application of *Kable* concerning criminal detention, giving a green light to State parliaments to enact harsher non-punitive measures.

3 'Kable' marking time 1996-2007 and the 'break out' in 2009

The fact that, for more than a decade after it was decided, *Kable* was not applied to strike down any state laws led to it being colourfully described by Kirby J as a 'guard-dog that only barked once'.⁴³ However, following the appointment of French CJ in 2008, the High Court reinvigorated the *Kable* principle with remarkable alacrity in a series of cases that drew from Sir Anthony Mason the epitaph of *Kable* as a 'ferocious mastiff'.⁴⁴ These include *International Finance Trust Company Limited v The NSW Crime Commission* ('*International Finance*'),⁴⁵ *Totani*⁴⁶ and *Wainohu v New South Wales* ('*Wainohu*').⁴⁷ In each of these cases, state laws imposing restrictions on the way state courts could decide contentious criminal matters were struck down as inconsistent with Chapter III of the *Constitution*.

Yet just when it appeared that the current High Court was giving free rein to the *Kable* doctrine, the mastiff seems to have been put back on its leash. In *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*')⁴⁸ the Court declined to strike down a Queensland law that required the Queensland Supreme Court to exclude from proceedings everyone but certain listed persons when hearing secret criminal intelligence evidence. This requirement was considered not to infringe *Kable* fair procedure standards. *Pompano* accordingly provides a model on which state parliamentary counsel can draw when tailoring legislation aimed at suppressing 'bikie-groups', reducing the extent to which normal rules of procedural fairness apply.

It is evident from these apparent vacillations that any attempt at a generalisation of the *Kable* principle is likely to prove elusive. Each new challenge must be approached on a case-by-case basis.⁴⁹ It is in that context of variable waning, then waxing, and now apparently waning, that the case of *Emmerson* was expected to provide something of a weathervane about the current status of *Kable*.⁵⁰

⁴³ *Baker v The Queen* (2004) 223 CLR 513, 535 [54].

⁴⁴ Sir Anthony Mason, 'Delivering Administrative Justice: Looking Back with Pride, Moving Forward with Concern' (2010) 64 *AIAL Forum* 4, 6.

⁴⁵ (2009) 240 CLR 319.

⁴⁶ (2010) 242 CLR 1.

⁴⁷ (2011) 243 CLR 181.

⁴⁸ (2013) 87 ALJR 458.

⁴⁹ HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd edition, 2013) 63-64.

⁵⁰ (2014) 307 ALR 174.

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B *Taxonomy of Kable cases*

Before addressing *Emmerson* it is instructive to attempt to classify the various kinds of cases in which *Kable* has been raised into some basic categories.⁵¹

Starting with *Kable* itself the first group concern state laws that attempt to use Supreme Courts as instruments for continuing what can be described as ‘preventive detention’ of dangerous prisoners in the public interest. These include also *Fardon*, *Baker* and now *Pollentine v Bleijie* (‘*Pollentine*’).⁵²

A second category involves some claimed interference with the way that a court is constituted that renders the judicial officers of the court more susceptible to executive influence. This category includes *Forge*⁵³ (where the claim was that the use of a large number of part-time appointments to the bench diluted the integrity of the New South Wales Supreme Court) and *Bradley*⁵⁴ (where the complaint was that a Northern Territory law authorising the employment of the Territory’s chief magistrate on a contract made him more prone to executive influence).

The third group of cases are largely directed to suppressing the criminal activities of ‘bikie gangs’ or persons with criminal associations. These cases often involve the use of non-traditional judicial procedures, such as restricting respondent access to secret evidence while allowing it to be presented by the police or a crime commission to the judge in a closed hearing. This may then result in court orders severely affecting the liberties of subjects (including associating with other named persons) and deprivation of access to, or destruction of, the property of gang members. These cases include *Gypsy Jokers*,⁵⁵ *K-Generation*,⁵⁶ *Totani*,⁵⁷ and *Wainohu*.⁵⁸

⁵¹ Ratnapala and Crowe, above n 32, argue that *Kable* decisions can be placed into four interrelated categories; the first dealing with the ‘*Constitution*’ of state courts in the strict sense of the term; the second concerning *impermissible grants of powers or jurisdiction* to state courts or judges as *personae designatae*; the third, dealing with *impermissible withdrawal of jurisdiction* from state courts, and the fourth concerning lack of *procedural and fairness guarantees*. Arguably these categorisations are variations within a similar theme.

⁵² [2014] HCA 30.

⁵³ (2014) 307 ALR 174.

⁵⁴ (2004) 218 CLR 146; see Patrick Keyzer, ‘Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter III of the Constitution?’ (2004) 32 *University of Western Australia Law Review* 30.

⁵⁵ (2008) 234 CLR 532.

⁵⁶ (2009) 237 CLR 501.

⁵⁷ (2010) 242 CLR 1.

⁵⁸ (2011) 243 CLR 181.

The final category features state laws that provide for the forfeiture of crime-related or crime-derived property; these include *International Finance*,⁵⁹ *Silbert v DPP (WA)*⁶⁰ and now *Emmerson*.

As an example of cross-matching between categories, considerable argument in *Emmerson* was directed to whether *Totani* provided an appropriate analogy.⁶¹ It should be recognised, however, that these groupings, although useful for inter-decisional comparison and aiding explanation, are incapable of analytically determining whether particular state legislation infringes the *Kable* doctrine. As observed previously, ‘incompatibility’ and ‘integrity’ have indeterminate boundaries.⁶² In the end, the focus must remain on whether a particular provision practically impairs the capacity of state or territory courts to perform their judicial tasks independently of the other two arms of government.

C *The statutory forfeiture scheme in Emmerson*

The relevant Northern Territory legislation constitutes a scheme composed of two Acts; the *Misuse of Drugs Act 1990* (NT) (*‘Drugs Act’*) and the *Criminal Property Forfeiture Act 2002* (NT) (*‘Forfeiture Act’*). These Acts operate interactively to produce an outcome whereby a judge of the Territory Supreme Court is required to make a declaration that all the property of a person convicted of three serious drug-related offences specified in the *Drugs Act* is forfeit to the Crown. At the time of its enactment the legislation was one of the most severe of the criminal property confiscation schemes adopted by the Commonwealth, states and territories.⁶³

The scheme first provides that the Director of Public Prosecutions (‘DPP’) ‘may’ apply to the Supreme Court under s 36A of the *Drugs Act* to have a person, convicted within a period of the previous 10 years of three qualifying offences specified in that Act, declared a ‘drug trafficker’. The Court by virtue of s 36A(2) ‘must declare a person to be a drug trafficker’ if those conditions are satisfied. Upon or in expectation of such a declaration the DPP can seek, under s 44, an interim preservative order freezing any property owned or controlled by the drug trafficker.

⁵⁹ (2009) 240 CLR 319.

⁶⁰ (2004) 217 CLR 181.

⁶¹ These arguments are considered in further detail below.

⁶² Gogarty and Bartl, above n 32, 97-98.

⁶³ See *Emmerson* (2014) 307 ALR 174, 200-201 [104]-[106] (Gageler J); see also Natalie Skead, ‘Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far’ (2013) 37 *Criminal Law Journal* 296.

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A further consequence of the Court making a 'drug trafficker' declaration is that under s 94(1) of the *Forfeiture Act* all property owned or controlled by the declared person subject to such a restraining order 'is forfeited to the Territory'. That is, the *Forfeiture Act* of its own force, rather than as a consequence of any judicial order, effects a legislative confiscation of the person's property to the Crown. The process is completed by ss 94(3) and (4) of the *Forfeiture Act* under which the DPP is empowered to apply to the Court for a declaration that the relevant property has been forfeited. If the Court finds the property has been forfeited, it must make a declaration to that effect; it has no general discretion to decline to make the declaration or make an order mitigating the extent of the forfeiture.

The legislative scheme thus operates cumulatively to extinguish and appropriate the property rights of convicted persons. It is a composite measure commencing with the decision by the DPP to apply for a drug-trafficking declaration and culminating in the second declaration that the drug-trafficker's property is forfeit. Crucial to it is the power vested in the DPP to instigate the proceedings. It lies solely in his or her power to decide to initiate the process. Once commenced, if the offender has the requisite convictions, the scheme necessarily requires the Supreme Court to make the two relevant declarations that result in forfeiture.

Significantly, the discretion of the DPP under s 36A is not regulated by reference to any criteria stipulating the factors that the DPP is required to take into account in determining whether to make an application. Absent any express legislative direction, the DPP's discretion is completely unregulated with respect to individual persons. This being so, an important question is whether the several stated purposes underpinning the forfeiture procedure impliedly disclose a framework guiding the exercise of the DPP's discretion. If unrestrained, the element of executive selectivity is arguably open to potentially random, inconsistent application. It can be deployed in an arbitrary and capricious manner in circumstances where the Court has no power to resist forfeiture.

The general objective of the scheme is set forth in s 3 of the *Forfeiture Act*; namely, to target the proceeds of drug-related crime in order 'to prevent unjust enrichment of persons involved in criminal activities'. Section 10(2) expands upon this by stating that forfeiture of criminal property is 'to compensate' the Territory community for the costs of deterring, detecting and dealing with those criminal activities, while s 10(3) brings those various motifs together by declaring that property is forfeit so as to deter criminal activity and prevent unjust enrichment of persons engaged in crime. Hence, one of the characteristics of the scheme is the derivation of a financial benefit to the Territory by sequestering property to defray government expenditure. If the

DPP is to have regard to these general objectives as indices of the legislation's scope and purpose (so far as one can plausibly give them content)⁶⁴ one could argue that the DPP must always seek confiscation in order to reimburse the Territory's consolidated revenue for its expenditure on law enforcement.

D Critical features of the Northern Territory confiscation scheme

Statutory criminal property forfeiture in Australia is essentially a form of civil proceeding involving civil rules of evidence and standard of proof.⁶⁵ Although penal forfeiture, both statutory and at common law, has a long legal history, criminal property forfeiture laws are of relatively recent provenance in Australia. As recognised in the majority judgment in *Emmerson*, forfeiture of property, as a form of deterrence, provides not only a drastic sanction encouraging observance of criminal laws, it also deprives criminals of profits and prevents accumulation of significant assets resulting from criminal activity, while providing a source of Crown revenue.⁶⁶

In *Emmerson*, Gageler J perceptively notes two features of the Northern Territory scheme that distinguish it from historical forfeiture precedents. First, unlike common law forfeiture, which applied universally to the property of all felons, whether the property of a convicted person becomes liable to confiscation under the Territory scheme depends entirely on whether the DPP applies for a drug trafficker declaration. Secondly, while forfeiture under confiscation schemes enacted by almost all the other Australian states and the Commonwealth applies to property connected with or derived from criminal conduct, under the Territory scheme there need be no connection with the offender's criminal activity.⁶⁷ These features peculiar to the Territory scheme led his Honour to hold that the scheme operated invalidly to

⁶⁴ Consistently with *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492. The majority in *Emmerson* (2014) 307 ALR 174, 191 [65] noted that the stated objectives might cast light on the application of the scheme but that it was not necessary to resolve that issue.

⁶⁵ *Emmerson* (2014) 307 ALR 174, 178-180 [15]-[19] (majority).

⁶⁶ *Ibid* 181 [22], 183-184 [35]-[36], 194 [78], 195 [83] (majority), 199 [100] (Gageler J).

⁶⁷ *Ibid* 199-200 [102]-[105]. Just how far the definition of 'property' in the *Forfeiture Act* extends is problematic, being ambulatory in its application. Whether it embraces legal or equitable interests of *innocent third parties* is not clear although the majority observed that the *Forfeiture Act*, as part of the adjudicative process, provides for objection proceedings that could be invoked by 'innocent persons' whose property may be in jeopardy of seizure; see 182-183 [30]-[31]. This is a matter arguably requiring clarification in future confiscation legislation.

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acquire property in excess of that which was crime-related without just compensation.

1 *Facts and issues in Emmerson*

Between August 2007 and September 2011 Mr Emmerson was convicted on three occasions of drug-related offences. In 2012 a single judge in the Territory Supreme Court declared him a drug trafficker under the *Drugs Act*. Prior to that declaration, a freezing order had been made under s 44 of the *Forfeiture Act* restraining all of his property. This was despite the fact that the vast bulk of it was not related to his criminal conduct. Consequently, upon the trafficker declaration all his property became forfeited to the Territory. Emmerson first challenged the constitutional validity of the legislative scheme unsuccessfully in the Supreme Court. He then appealed to the Northern Territory Court of Appeal.

Mr Emmerson's primary argument was that the forfeiture scheme effectively 'conscripted' the Supreme Court to perform an incompatible executive function while cloaking that process in neutral 'judicial' colours. He also contended that the scheme implemented an acquisition of property otherwise than on just terms, contrary to s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) ('*Self-Government Act*'). Section 50(1) replicates the guarantee in s 51(xxxi) of the *Constitution*.

By majority, the Court of Appeal declared the scheme invalid on the first ground but not the second. Two members of the Court upheld Emmerson's submission that, in making a confiscation order, the Court was virtually acting under the control of the DPP who has an unfettered discretion whether to institute proceedings for forfeiture. Those characteristics were held to contravene the principle in *Kable's* case. In essence the Court of Appeal held the scheme invalid because it required the Supreme Court to act as an instrument of the executive government in a manner incompatible with its institutional integrity.⁶⁸ The Attorney General for the Northern Territory appealed to the High Court.

2 *The issues in contention on appeal*

The appellant argued first that the Court of Appeal majority had misapplied the *Kable* principle in holding that the inter-operation of the two Acts compromises the

⁶⁸ *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1. Kelly J giving the principal majority judgment, [64], [71], [78] and [87]-[90], characterised the DPP's discretion as 'unfettered' and accordingly in need of some basis of assessment discriminating between individual circumstances, concluding that the Court's role in the forfeiture process is merely 'ministerial' (citing Kourakis CJ in *Bell v Police* [2012] SASC 188 [10]).

independence of the Supreme Court by enlisting it to perform a function on behalf of the executive. The Attorney General contended that the role of the Court was to exercise its declaratory power in accordance with ordinary judicial process. Further, relying on the authority of *Palling v Corfield* ('*Palling*')⁶⁹ and *Magaming v The Queen* ('*Magaming*')⁷⁰ he maintained that there was nothing exceptional about the role of the DPP. The decision to institute an application engages a normal kind of prosecutorial discretion, such as where prosecutors decide whether to lay charges and which offences should be selected, including choosing between offences carrying different penalties. The Attorney also submitted that the discretion conferred on the DPP is distinguishable from the kind of functions vested in the South Australian Attorney General under the legislation considered in *Totani*.⁷¹ He also supported the holding of the Court of Appeal that there was no unjust acquisition of property.

Mr Emmerson, as respondent, made submissions which operated both separately and in combination.⁷² Basically, he contended that, upon a correct analysis, the making of a forfeiture declaration by the Supreme Court was not a real exercise of independent judicial discretion; rather, it was the automatic result of a process initiated by the DPP as an officer of the executive government. Once set in motion, the process was inevitably consummated by the declaration that the judge had to make certifying forfeiture. The result was therefore predetermined by the legislation and the Supreme Court was 'enlisted' as the instrument of the executive to provide, *à la Mistretta*, an aura of a judicial sanctification to an executive process.

This first limb of the respondent's invalidity argument was based on a variant of the *Kable* principle. It concerned the nature of the 'discretion' exercised by the Supreme Court when making a drug-trafficker declaration. The objection was that in

⁶⁹ (1970) 123 CLR 52.

⁷⁰ (2013) 87 ALJR 1060, 1068-1069 [34]-[38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) citing in support *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100. Arguably, a key difference with *Magaming* is that in *Emmerson* neither the DPP nor the Supreme Court has *any discretion* to vary the *severity of sanction*. That, however, is true of any mandatory sentence.

⁷¹ Under the South Australian legislation the Attorney General was authorised to declare a particular group or association an unlawful organisation. That declaration was preclusive; the South Australian court could not question or judicially review it. It effectively predetermined an issue that the court had to give effect to in its ultimate determination.

⁷² The following analysis of the respondent's argument is drawn from; Reginald William Emmerson, First Respondent's Written Submissions, Submission in *Attorney-General (Northern Territory) v Emmerson*, D5/2013, 6 December 2013, [8.2]-[8.3], [10.2], [18]-[19], [20]-[21], [23], [25.3], [29]-[30]; *Emmerson* (2014) 307 ALR 174 [49]-[55].

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determining that the factual conditions necessary to support the declaration existed the Court is simply involved in a formal rather than substantive task. Although conducted 'judicially', it is little more than an administrative, non-judicial function dressed up as 'judicial'. The Court's function entails no real adjudication in which it performs an evaluative process of balancing substantive matters or choosing between different conflicting considerations. In essence, it entails a task of quantitative verification akin to a clerical ticking of boxes amounting to a process of minimal substantive content. Invoking the *Mistretta* theme it was claimed that this constituted an illusory 'dressing-up' of the function, ostensibly as judicial, but which should properly be characterised as ministerial. As a matter of causality, the minor contribution the Court makes in the overall scheme is ancillary and subordinate to that of the DPP.

The second limb concerned the nature of the DPP's discretion to make an application under s 36A of the *Drugs Act*. Mr Emmerson contended that s 36A was 'unconstitutional' both considered in its own right and, further, having regard to its part in the whole scheme on a *Kable* basis.

Mr Emmerson maintained that the DPP engages in an incontestable exercise of prerogative authority, equivalent to the kind of 'pretended' executive dispensations from prosecution or forfeiture that were exercised by the Stuart monarchs.⁷³ This was outlawed after the Glorious Revolution in 1688 by articles I and II of the *Bill of Rights 1689* (UK).⁷⁴ These principles are deeply rooted in Australian constitutional law and mandate the regular and consistent application of legal standards to prevent the unregulated use of executive power to impose oppressive and inconsistent outcomes affecting citizens' liberty and property.

⁷³ The Stuart Kings' practice of prerogative dispensation from fines and forfeiture (see *Trial of the Seven Bishops* in (1688) 12 Howell's State Trials 183) was one factor giving rise to the English Civil War and ultimately to the overthrow of King James II by English parliamentary forces led by Prince William of Orange at the Battle of the Boyne in 1688.

⁷⁴ The *Bill of Rights* forms part of the Australian constitutional fabric subjecting the Executive to parliamentary control, see *Sillery v R* (1994) 180 CLR 353, 11 (Gibbs CJ); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 30-34 (French CJ); *Port of Portland Pty Ltd v Victoria* ('Portland') (2010) 242 CLR 348, 357-359 [9]-[12] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). It precludes the levying of taxation without statutory authority (*Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 433-434 (Knox CJ and Gavan Duffy JJ)) and restrains the Executive from *dispensing* with the law (*Portland* (2010) 242 CLR 348, 357-359 [9]-[12] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Williams v Commonwealth* (2012) 248 CLR 156, 232 (Gummow and Bell JJ) citing Lord Hoffmann in *Higgs v Minister of National Security* [2000] 2 AC 228, 241-242).

Mr Emmerson asserted that s 36A should be read as permitting the DPP to institute the forfeiture process on an entirely un-examinable basis due to the absence of any sufficiently certain and reviewable criteria. However, the expressed purpose of forfeiture was to supplement the Territory government's fiscal resources and was therefore equivalent to levying taxation.⁷⁵

Accordingly, the power is large and capable of exercise in a way that is constitutionally 'arbitrary' in the sense originally articulated in the seminal decision of *Giris Pty Ltd v Federal Commissioner of Taxation*,⁷⁶ and subsequently used in *MacCormick v Federal Commissioner of Taxation*⁷⁷ and *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd*.⁷⁸ This is because it is open to *inconsistent and discriminatory* application. The DPP can choose either to instigate or decline to proceed to confiscation entirely at discretion, thereby determining whether a particular person's property should be escheated to raise public revenue to defray Crown expenses. That potential for *inconsistent and indiscriminate treatment*, treating subjects *unequally*, is notionally equivalent to the arbitrary exercise of the 'regal power' of *dispensation* from law exercised by the Stuart Kings that was proscribed under of the *Bill of Rights 1689* (UK).⁷⁹

⁷⁵ The contention was that as an emanation of the Commonwealth under the *Self-Government Act*, the Northern Territory cannot *raise revenue* otherwise than by sufficiently clear statutory authorisation; see s 44 of the *Self-Government Act*. This principle of parliamentary supremacy over taxation is enshrined in article IV of the *Bill of Rights* and in ss 81 and 83 of the *Commonwealth Constitution*.

⁷⁶ (1969) 119 CLR 365. In this case the Commissioner of Taxation had discretion to choose which of two specified rates of taxation could be applied to certain kinds of trusts. It was objected that this was arbitrary because particular trusts could be subject to a higher or lower rate of tax depending on the Commissioner's unchallengeable opinion. The High Court held that the exercise of discretion was not at large insofar as the relevant Tax Act set boundaries within which the Commissioner had to exercise his discretion.

⁷⁷ (1984) 158 CLR 622, 639-641 (Gibbs CJ, Wilson, Deane and Dawson JJ).

⁷⁸ (1985) 158 CLR 678; see also *Perron v Federal Commissioner of Taxation* (1972) 128 CLR 595; *WR Carpenter Holdings Pty Limited v Federal Commissioner of Taxation* (2008) 237 CLR 198; *Vestey v Inland Revenue Commissioners* [1980] AC 1148, 1172, 1174, 1176 (Lord Wilberforce).

⁷⁹ The principle that executive prerogative (known in the 17th century as 'regal power') is insufficient to impose taxation is discussed by Kirby J in *O'Donoghue v Ireland* (2008) 234 CLR 599, 653 [177]-[179]. He observes that as part of the historical underpinning of the *Constitution* inherited from Great Britain, the exercise of 'regal authority' to *suspend or dispense with enacted laws*, without the consent of Parliament, was declared illegal in the *Bill of Rights*.

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Arguably, a *pretended* application of coercive executive power (such as levying a fine or extracting revenue) attracts invalidity if a statutory provision permits dispensation by failing to prescribe certain ascertainable limits within which the power is to be exercised. Such a provision cannot be characterised as ‘law’ since its content is indeterminate and uncertain. Because 36A establishes no legislative limits within which the prosecutorial discretion is to be exercised there is no rule or standard to determine whether the DPP acts ‘in accordance with law’.

The respondent also submitted that *Kable* was infringed having regard to the total procedure for forfeiture, including the role of the DPP. Invoking *Totani*, the respondent argued that the inherent systemic vice in the forfeiture scheme occurs at the front end of the process where the DPP determines, effectively by prerogative fiat, which persons are subject to extra punishment by expropriation of property. The respondent claimed that this operated similarly to the vice identified in *Totani* where a state court was required to make a control order imposing restrictions on a defendant’s freedom of association if satisfied that the person was a member of an unlawful organisation. Whether an organisation was unlawful was pre-emptively preordained, without the possibility of review, in the first instance by the State Attorney General.⁸⁰ Mr Emmerson submitted that the South Australian Act at least left some residual scope for adjudicative evaluation to the court, whereas under the Northern Territory scheme the Supreme Court was compelled to act as an automaton giving effect to the decision of the DPP.

Mr Emmerson also advanced a separate constitutional challenge that s 50(1) of the *Self-Government Act* required just compensation to be paid for the Northern Territory government’s ‘acquisition’ of his property. He claimed that the forfeiture scheme, in confiscating all his property, went beyond the legitimate purpose of depriving a drug trafficker of property either derived from or used in pursuit of criminal activities. It was contended that to the extent that there was an excess of property seized over that which was crime-related, the Northern Territory was required to pay compensation for the acquisition of non-crime related property.

IV THE HIGH COURT’S DECISION IN *EMMERSON*

The majority upheld the Territory’s appeal and ruled that the relevant legislation was *not unconstitutional* on any of the grounds advanced by the respondent. Gageler J dissented, holding the scheme unlawful as contravening the Territory’s just compensation requirement. In analysing the workings of the Northern Territory

⁸⁰ *Totani* (2010) 242 CLR 1 [27] (French CJ), [126]-[128] (Gummow J), [191]-[195] (Hayne J), [268]-[272] (Heydon J).

scheme in considerable detail, His Honour was especially sensitive to the *interrelationship between the executive and judicial arms of government*. Specifically, he read the provisions empowering the DPP to institute proceedings as vesting in a government officer a significant capacity to effectuate the ultimate forfeiture.

A *The Kable ground*

Relevantly, the majority held that the *Kable* principle was not applicable to render the Territory laws unconstitutional. Crucial to its reasoning the majority noted that there was nothing exceptional about laws that result in forfeiture of property used in connection with crimes, even if the forfeiture is particularly drastic.⁸¹ Forfeiture of property has been known to English common and statutory law for centuries.

Secondly, the majority saw the three-stage application process by the DPP — first for a drug-trafficker declaration, then for an interim freezing order over an accused person's property, and then for a forfeiture declaration — as one entailing real judicial evaluation of evidence and interpreting law according to normal judicial processes.

Specifically, the majority held that the function conferred on the Supreme Court under s 36A is judicial in nature. In finding that the 'convictions requirement' is satisfied the Court is settling a 'controversy' by adjudication of rights and liabilities as between the convicted person and the Crown. The Court can only make a declaration by reference to evidence sufficient to satisfy the civil standard of proof respecting the requisite number of past convictions. Other 'trappings' of normal adversarial process are required to be observed, such as a hearing in open court, the right of an affected person to legal representation, and to be provided with reasons for the decision. The majority recognised that the task of verifying the relevant number of convictions is something that could easily be achieved. But that did not detract from its judicial character. The proceedings instituted by the DPP therefore engaged 'orthodox adjudicative processes involving the hearing of evidence and the making of a determination'.⁸² From this it can be inferred that so long as some, even minimal, vestige of an adjudicative process is observed, the legislation is unlikely to contravene *Kable*.

⁸¹ *Emmerson* (2014) 307 ALR 174, 195-196 [81]-[85] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁸² *Ibid* 189-192 [56]-[69]. In their opinion the drug-trafficker declaration results in the *creation of a legal status* and the application for a restraining order, involving the hearing of evidence, requires a genuine judicial assessment of the merits and exercise of discretion.

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Finally, the majority rejected the contention that the Supreme Court was required by the statutory scheme to act at the behest of the DPP to give effect to government policy. The legislation did not give a veneer of judicial sanctity to what would otherwise be a form of executive confiscation. Summarily distinguishing *Totani*, they held that it could not be said that the Supreme Court was being 'enlisted' in a puppet-like mode to give effect to a pre-determined executive decision.⁸³ The Court therefore was not deprived of its capacity to decide the issues in an independent way.

Gageler J did not find it necessary to decide whether the relevant legislation was invalid on *Kable* grounds; he dismissed the appeal on the alternative ground that the making of a drug-trafficker declaration was unlawful as it resulted in the unjust acquisition of property contrary to s 50(1) of the *Self-Government Act*.⁸⁴ However, it is reasonably arguable, implicitly from his Honour's reasons, that involving the Supreme Court in the scheme of unjust acquisition of property would amount to an impairment of the Court's institutional integrity and thereby contravene *Kable* standards.

B Prosecutorial discretion

The majority held that the DPP's discretion to initiate proceedings, ultimately leading to the property forfeiture, is no different in nature from the kind of discretion exercised on a day-to-day basis when deciding whether to prosecute a person for one specific offence as against another.⁸⁵ The relevant prosecutorial discretion is similar to that upheld in *Magaming*.⁸⁶ Further, the discretion is restrained by 'traditional considerations' of fairness, developed from rules of practice over the years, directed at ensuring that an accused has a fair trial. It is subject to the inherent power of the Supreme Court to prevent an abuse of process if exercised unfairly.⁸⁷

Notably, Gageler J also dissented on this point. He held that there was a clear distinction between the discretion vested in the DPP under s 36A and the different kinds of prosecutorial discretion exercised in cases like *Palling*.⁸⁸ The discretion in the

⁸³ Ibid 192 [69].

⁸⁴ Ibid 207 [141]. The majority held, as had the Court of Appeal below, that s 50(1) of the *Self-Government Act* did not require payment of just compensation for the expropriation of any part of the offender's property.

⁸⁵ Ibid 190 [61].

⁸⁶ (2013) 87 ALJR 1060.

⁸⁷ *Emmerson* (2014) 307 ALR 174, 190-191 [61]-[64], 192 [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁸⁸ Ibid 207 [137].

latter case was triggered by the conviction of a conscientious objector for failing to attend a medical examination for the purposes of compulsory military service. The prosecutor had an option to request the convicting magistrate to seek an assurance from the defendant that he would attend such an examination and, if refused, the prosecutor could move the magistrate to impose a sentence of imprisonment. Gageler J held that the latter discretion was appropriate and adapted to securing, after conviction, a legitimate purpose, namely the defence of the Commonwealth. That was not the case under s 36A where the DPP was authorised to commence proceedings as he or she saw fit in order to secure fiscal compensation for the government by acquisition of property not limited to that connected with the offender's criminal activities.

C Acquisition of property

The majority held that, although s 50(1) of the *Self-Government Act* is a statutory guarantee, unlike its counterpart in s 51(xxxi) of the *Constitution*, decisions relating to the latter were instructive. Hence, the character of certain exactions of government, such as levying taxation or imposing fines, penalties or forfeitures is incompatible with the notion of 'acquisition'. Forfeiture, in the instant case, is a legitimate mode of punishment and deterrence, serving different purposes consistent with suppressing criminal conduct. Those objectives go beyond any mere goal of compensating the Territory for costs of law enforcement. Hence there is no room for applying notions of proportionality to the scheme by reference to the amount recovered. However harsh the forfeiture, that is a matter of political assessment for legislature's determination.⁸⁹

Again, Gageler J dissented. His Honour saw s 50(1) of the *Self-Government Act*, which has an operation corresponding with s 51(xxxi) of the *Constitution*, as abstracting from the legislative power of the Territory's Legislative Assembly any law that does not provide just compensation for an acquisition of property.⁹⁰

⁸⁹ Ibid 195-196 [85].

⁹⁰ Ibid 201 [107], 203 [116]-[118].

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The purpose of those provisions is to prevent 'arbitrary acquisition'. His Honour was on common ground with the majority in accepting that where the primary purpose is imposing a penalty for breach of the norm of conduct it should not be characterised as an acquisition of property within s 51(xxxi) or s 50(1) so long as the sanction provided by the law was appropriate and adapted to achieving that primary objective.⁹¹

His Honour found, nevertheless, that the sole legislative purpose of the law was 'to compensate the Territory community for the costs of deterring, detecting and dealing with the [person's] criminal activities'.⁹² Such sweeping forfeiture laws extending forfeiture to property not criminally acquired or related are not consistent with the constitutional or statutory purpose of preventing arbitrary acquisition, not being appropriate and adapted to achieving the compensatory goal. The Supreme Court is not engaged in a process of adjudication directed to that end. Rather, its function is to sanction an executive expropriation of the offender's entire property at the discretion of the DPP. As his Honour states:

Sections 44(1)(a) and 94 of the *Forfeiture Act* and s 36A of the *[Drugs] Act* do not have the characteristics of laws which acquire property for a purpose and by a means consistent with the underlying purpose of the just terms condition to prevent arbitrary acquisitions ... They are laws with respect to the acquisition of property otherwise than on just terms.⁹³

Observing that forfeiture does not occur solely by virtue of the legislation but rather occurs at the DPP's discretion, he added, 'the conferral of executive discretion of that nature is not a necessary or characteristic feature of penal forfeiture'.⁹⁴

V CRITIQUE OF DECISION

A *The nature of the judicial discretion: reality and substance*

In dismissing the respondent's objection that the Court contributes no real evaluation of its own, the majority affirmed that the Court's verification process addresses substantively a real issue in contention between the parties. Further, the majority

⁹¹ Ibid 204 [120]-[121]; 206 [132]. His Honour intriguingly commented at [121] that the appropriate and adapted test applies more stringently in the case of a *constitutional guarantee* than may be the case in determining whether a Commonwealth *law* is otherwise within power.

⁹² Ibid 206 [132]-[135].

⁹³ Ibid 207 [140].

⁹⁴ Ibid 207 [139].

pointed to an additional, albeit very limited, capacity in the Court's inherent jurisdiction to avoid injustice by restraining any abuse of process by the DPP. It is on this point that the decision is arguably open to question. How that could be done if the DPP simply follows the statutory process under s 36A is not made clear. Certainly, there is no residual discretion in the Court to make a restraining order over less property than that sought by the DPP simply on the basis of unfairness or disproportionality.

Clearly, state and territory parliamentary counsel now have a clear template to construct future confiscation legislation. Based on *Emmerson*, a court can be required to do little more than certification of prior convictions in order to present a 'controversy'.⁹⁵ It is not necessary to confer any independent function of determining whether confiscation should occur. The evaluative function performed by the Court may therefore be fairly minimal and incidental. This would provide no basis for invalidation provided the function is not negligible.

B Non-contravention of Kable: comparison with Totani

A central consideration in determining whether the *Kable* doctrine was infringed is whether the Supreme Court was free to decide the case before it and make the requisite declaration 'independently of the executive government'.⁹⁶

The majority shortly dispatched the attempted analogue with *Totani*, stating:

Nothing in the detail of the statutory scheme supports the first respondent's submission that the scheme requires the Supreme Court to act at the behest of the Executive — the DPP — or to give effect to government policy without following ordinary judicial processes.⁹⁷

The lesson for state and territory legislators is that any compromising association between the judiciary and the executive arm of government, capable of impairing the institutional 'integrity' of the court, can be avoided so long as the role of the DPP is

⁹⁵ Note, however, that ease of proof and the fact that making a forfeiture declaration is practically inevitable does not detract from the validity of the process; see *Totani* (2010) 242 CLR 1, 51-51 [79] (French CJ).

⁹⁶ The idea advanced here, similarly to *Totani* (2010) 242 CLR 1 is that the inexorable forfeiture ensues only by virtue of *executive predetermination* of an essential pre-requisite to the whole process. The question is: does the court maintain its judicial *decisional independence* (the criterion identified by French CJ in *Totani* (2010) 242 CLR 1, 20-21 [1], 43 [62], 48 [70]).

⁹⁷ *Emmerson* (2014) 307 ALR 174, 192 [69] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

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confined to the instigation of the confiscatory process and insulated from substantive involvement in the adjudicative process apart from making applications and presenting evidence.

C The ambit of prosecutorial discretion

Although the nature of the prosecutorial discretion under s 36A was not the subject of extensive consideration by the majority,⁹⁸ it is hard to see the High Court revisiting its equation of that discretion with other initiating powers available to prosecutors under criminal legislation. Prior authorities such as *Palling*⁹⁹ and *Magaming*¹⁰⁰ are now likely to be extended beyond the role of prosecutors in adversarial criminal proceedings concerned with determining guilt and imposition of penalties. Prosecutorial decisions relating to instituting proceedings for property forfeiture and fiscal cost recovery now appear largely immune from judicial scrutiny.

This goes beyond assimilating the nature of the DPP's discretion to, for example, the prerogative power of an Attorney General issuing an *ex officio* indictment, where there are traditional common law constraints on the exercise of discretion.¹⁰¹ It is implicit in the majority's reasons that there is no need for confiscatory legislation to provide explicit guidelines concerning when a DPP should decide whether the property of a particular offender is to be forfeited.

D Whether the DPP's discretion contravenes a constitutional proscription of unregulated, unreviewable and potentially 'arbitrary' operation

Neither the majority,¹⁰² nor Gageler J specifically addressed the respondent's contention that the DPP's function is effectively equivalent to an *incontestable exercise* of prerogative authority akin to the impermissible dispensation from forfeiture outlawed by the *Bill of Rights* (UK).¹⁰³ So far as it featured in the majority opinion, the vesting of an undefined and unreviewable discretion in a Commonwealth statutory officer could at most constitute an absence of legislative power under s 51 of the

⁹⁸ In terms of either distinguishing or matching corresponding features between the kinds of *prosecutorial functions* in the cases cited to it.

⁹⁹ (1970) 123 CLR 52.

¹⁰⁰ (2013) 87 ALJR 1060.

¹⁰¹ Cf *Barton v R* (1980) 147 CLR 75; *Jago v District Court of New South Wales* (1989) 168 CLR 23.

¹⁰² *Emmerson* (2014) 307 ALR 174, 188-189 [53] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁰³ Admittedly, the argument was not extensively developed in the respondent's submissions.

Constitution, mainly in relation to taxation measures.¹⁰⁴ No encouragement was given to developing a theory about constitutional restraints on arbitrary executive or prerogative powers derived from the English ‘Constitution’. This leaves unanswered the residual issue: whether, and in what sense, arbitrariness of executive action could be held to contravene an implied constitutional restraint. It remains to be seen whether in attempting to give greater substantive content to the rule of law and exercise stricter restraint over the executive the High Court may in future be more receptive to such arguments.¹⁰⁵

E *Emmerson: its predictive value: holding the line on *Kable* or marking time?*

In this writer’s opinion *Emmerson* is a rather conventional and unexceptional, if somewhat reticent, application of *Kable* as it has developed to this point in time. It represents a conservative consolidation of the reasoning characteristic of cases decided in the decade after *Kable*, and to which the Court has apparently reverted in *Pompano* and *Pollentine*, which strongly favours a *construction* of the relevant legislation that avoids constitutional invalidity.¹⁰⁶ The paramount consideration for states and territories will now be to preserve at least a modicum of judicial discretion. That, however, does not necessarily represent a contraction of the boundaries established by the High Court in the later trilogy of *International Finance Trust*, *Totani* and *Wainohu*.¹⁰⁷

¹⁰⁴ *Emmerson* (2014) 307 ALR 174, 188-189 [53] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁰⁵ That ‘administrative arbitrariness’ is of concern to the High Court is evident from *Pollentine v Bleijie* [2014] HCA 30 [21]-[22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (*‘Pollentine’*). The Court observed that indeterminate punishments, in the absence of legal control, run the risk of weakening the basic principle of individual liberty.

¹⁰⁶ This is a well-established prudential rule of construction: see *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 180 (Isaacs J); *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 28 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), referring to *United States v Huteson* 312 US 219 (1941), 235 (Frankfurter J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 504 (Gaudron, McHugh, Gummow, Kirby JJ; Gleeson CJ and Callinan J concurring) (*‘Plaintiff S157/2002’*); *Gypsy Jokers Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 553 (Gleeson CJ).

¹⁰⁷ Nor does it necessarily represent a further convergence between the imposition on state courts of standards of independence in accordance with the *Kable* doctrine and those affecting Federal courts under the *Boilermakers’* principles in the *Boilermakers’ Case* (1956) 94 CLR 254, contemplated in Stephen McLeish ‘The nationalisation of a State Court system’ (2013) 24 *Public Law Review* 252.

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In that regard, *Kable* will continue to flash a cautionary orange light at any attempts by state or territory legislatures to impose extraordinary and egregiously unfair or executively dictated procedures upon state courts. The contemporary operation of *Kable*, as revealed by *Emmerson*, allows considerable leeway for state parliaments to impose restrictive obligations on their courts provided they are carefully tailored to attain the ends to which they are directed and not grossly and disproportionately oppressive. That leaves open the prospect that if a State government is prepared to run the orange light and enact quite unprecedented legislation, which makes drastic inroads on the way courts are required to enforce laws by imposing extraordinary restrictions on individuals' freedoms, the *Kable* hound may bark again.¹⁰⁸

It remains to be seen if the High Court will continue to explore the logical bases on which *Kable* is founded and perhaps move away from relying on general implications derived from s 77(ii) of the *Constitution* in vesting state courts with federal jurisdiction. The same may be said regarding the criterion of the institutional integrity of state and territory courts by reference to the *essential characteristics* of colonial courts operating under different circumstances in the 19th century. Those rationales may simply fade away. Instead there may be much greater focus on the *ways* in which the independence and impartiality of Supreme Courts can be affected by the *imposition of processes open to direction, influence or manipulation by the executive and legislative arms of government*.

Alternatively, the High Court could distil from Chapter III of the *Constitution* underlying principles *akin to the traditional rules of natural justice*.¹⁰⁹ This would permit reference to whether a particular state or territory law is open to constructive bias in forging too close a relationship between the executive and the judiciary. To the same end, such laws could be closely scrutinised to see if they are consistent with the principle of legality,¹¹⁰ that they do not contravene some basic inherent standard of

¹⁰⁸ The decision awaited in *Kuczborski v Queensland* [2014] HCATrans 187 may be auspicious in indicating how far state laws directed against organised 'criminal' associations can go before traversing the blurred borders of *Kable*.

¹⁰⁹ Regarding assimilation of the common law bias rule and the principles of *neutrality, impartiality and independence* under the *Constitution* see *International Finance* (2009) 240 CLR 319, 354-355 [54]-[57] (French CJ).

¹¹⁰ See *Coco v The Queen* [1994] (1994) 179 CLR 427 (Gleeson CJ); *Potter v Minahan* (1908) 7 CLR 277, 304 (Griffith CJ); *Plaintiff S157/2002* (2003) 211 CLR 476, 492 (Gleeson CJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 582-583 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Hon James Spigelman, 'The principle of legality and the clear statement principle' (2005) 79 *Australian Law Journal* 769; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

procedural fairness. It may be that these early glimmerings could be developed further to produce a more coherent *Kable* jurisprudence. This is not, however, the place or occasion to pursue this analysis.

F After thoughts: The unmentionable dragon that waits to be slain

Of course, behind this façade lurks a greater problem that dares not whisper its name. The twin pillars supporting the *Kable* principle, namely vesting federal jurisdiction in state courts and the entrenched position of State Supreme Courts as part of an integrated Australian courts system, puts state courts at the centre of the matrix. *Kable*, as presently interpreted, appears incapable of application to state laws that provide for preventive detention or forfeiture of property *by* executive fiat, outside the court system. One may object that ‘that way madness lies’. Placing individuals outside the protection of the judicial system is a fairly grim prospect.

The constitutional validity of executive detention, punitive or preventive, may depend on whether its imposition, duration and legality is *wholly determined* by the executive. A relevant factor could be whether imprisonment and release is at the unconfined discretion of the executive or instead conditioned on the criteria of judicial review. It is evident from the High Court's decision in *Kirk v Industrial Commission (NSW)* that the function of judicial review of unlawful executive determinations cannot be removed from State Supreme Courts.¹¹¹ In *Pollentine*, the High Court held that there was no delegation of the judicial task of determining guilt and primary punishment to the executive where the State Governor, advised by Cabinet, was empowered to terminate indeterminate detention according to statutory criteria based on danger to the community if a person with dangerous propensities should be released.¹¹²

Another possible answer to this conundrum proceeds from a recognition that, fundamentally, criminal punishment is judicial in character and cannot be removed from the prevailing courts systems built on long-standing inherited constitutional principles deeply rooted in common law.¹¹³ This is consistent with maintaining the

¹¹¹ (2010) 239 CLR 531.

¹¹² *Pollentine* [2014] HCA 30 [43]-[48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹¹³ Stretching back to *Dr Bonham's Case* (1610) 77 ER 646, cited in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 420-422 [44]-[49] (Gaudron, McHugh, Gummow and Hayne JJ) in the context of State parliamentary sovereignty. See also French CJ in *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283, 300-301 [32]-[34] regarding impartiality as an essential characteristic of courts and the common law proscription of judicial bias.

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High Court's function of enforcing the 'rule of law' by keeping the other two arms of government within lawful bounds. Relevantly, Gageler J has reasserted the High Court's primary role of subjecting unlawful executive action to judicial restraint in accordance with the principle of *Marbury v Madison*.¹¹⁴

VI CONCLUSION

Emmerson concerned a scheme that effectively merges executive and legislative power to achieve a predetermined result of forfeiture using the Supreme Court to perform a relatively minor role. The decision offers some assurance even to state or territory governments seeking to pass harsh laws (for example, to strike at bikie gangs) that, so long as the laws provide for evidence to be given in the normal way, with adequate notice and some judicial regulation of disclosure of evidence to affected parties (subject to appropriate restrictions in the case of secret criminal intelligence), the law should pass muster, especially if the courts retain a capacity to exercise some measure of confirmatory 'discretion'.

As a matter of policy, however, it is submitted that to avoid *Kable* complications altogether a constitutionally compliant, reformulated model would be preferable where criminal property forfeiture is effected by executive order of the Attorney General (or his delegate, the DPP) on the basis of specified criteria.¹¹⁵ This would abstract from the present scheme any infusion of a judicial element apt to create an illusion of normative judicial power. It would not only be more transparent in its essential operation, it would place the onus for accountability, consistently with democratic process, squarely on the Attorney General as responsible to the legislature. By incorporating appropriate statutory criteria it would also render the decision more readily amenable to judicial review.

In any event, given the very serious and drastic consequence of forfeiture proceedings, if the *Emmerson* model is adhered to safeguards upon the DPP's exercise of discretion in the form of statutory guidelines should be written into the legislation. These could be conditioned on the satisfaction or opinion of the DPP, if considered desirable, putting the onus on the DPP to justify why a particular application is made. In such a way the *Kable* dogs of war may be put back on their leashes.

¹¹⁴ 5 US 137 (1803); see *Kable (No 2)* (2013) 87 ALJR 737 [50]-[52] (Gageler J).

¹¹⁵ The *Emmerson* scheme might be less constitutionally objectionable if in the case of outright legislative forfeiture (as under s 106A of the *Fisheries Management Act 1991* (Cth) considered in *Olbers Co Ltd v Commonwealth* (2004) 143 FCR 449, 25-27) where a statutory opportunity is provided to allow application to a court to test whether a forfeiture has occurred consistently with the statutory conditions.