

## Update on *Kable* etc. in light of *Totani* and Other Decisions

Ian Beale

### Summing up: The current state of play of the *Kable* doctrine. Warning bells and lessons for legislative drafters

#### 1. The nature of the *Kable* doctrine:

- The doctrine is functionalist and not formalist. Whether State legislation impugns a State court's institutional integrity is one of substance and not form. Providing an adjudicative process means little in itself. The laws invalidated in *Kable*, *International Finance Trust Co*, *Totani* and *Wainohu* were invalidated even though there was an adjudicative process. It is the quality of the adjudicative process that counts.
- The majority of the High Court in *Wainohu* confirmed 2 things: First, unlike the Commonwealth, the States are not subject to a strict separation of powers doctrine. The *Kable* doctrine is a consequence of Chapter 3 of the Constitution. Chapter 3 creates an integrated Australian legal system consisting of the Supreme courts and other State courts, with the High Court at its apex. A Thomas Cromwell amongst today's State legislators could still, in theory, propound a Bill for an Act that directly tries and punishes individuals. As His Honour has pointed out, a State legislature could establish an executive body to do the work of the invalid *Communist Party Dissolution Act 1951* (Cwlth).
- In *Wainohu*, the High Court confirmed that Chapter 3 therefore places limits on State legislative power. A State Supreme court cannot be abolished. Nor can a State law remove its Supreme Court's jurisdiction to review official decisions on the basis of jurisdictional error. No matter how well drafted, a privative clause will not work to oust this jurisdiction.
- The High Court in *K-Generation* took a broad view of what State courts are potential repositories of federal jurisdiction. The test is whether the body possesses all of the essential characteristics of a court. The lesson for drafters is that giving such a body a title other than that of a 'court' will not stop it being a State court.
- The core question in considering the doctrine is: Does the proposed legislative scheme, as a whole:
  - (a) mean that the State court is doing the executive's bidding; or
  - (b) take away the essential characteristics of a court?

#### 2. The first limb: What is an impermissible executive intrusion?

- *Wainohu* confirmed that the test is whether the jurisdiction conferred is incompatible with the exercise of judicial functions. The device used in that case of enlisting a NSW Supreme Court judge as a *persona designata*, **did not, by itself, stop the High Court from considering the incompatibility test.**

- **The majority held that enlisting a judge as a *persona designata*** is an ‘artificial’ concept. If the legislative scheme gives the appearance that the jurisdiction of the judge identified in person differs little from the judge’s jurisdiction as a member of the judge’s court, the *Kable* doctrine is capable of being applied. If the conferred jurisdiction as a whole has the appearance of being a court, then it is a court.
- The performance of non-judicial functions does not, by itself, mean that there is an impermissible intrusion. Historically, State judiciaries have exercised non-judicial functions that were permissible. In *Wainohu*, the deciding factor was the closeness of the connection with the ‘eligible judge’s’ role as a judge proper.
- In *Wainohu*, the section immunising a so-called ‘eligible judge’ from any duty to give reasons for the decision to declare a criminal organisation was the impugned ‘vice’. However, that section could not be looked at in isolation. A declaration under that section was a necessary precondition to the Supreme Court’s jurisdiction to make control orders. The whole legislative scheme could not work without the impugned jurisdiction. Therefore, the whole Act was invalid.
- The drafting lesson therefore is not to rely on the fall-back of a court severing a questionable provision.

### 3. The second limb: What are the essential characteristics of a court?

#### (a) *The duty to give reasons:*

- *Wainohu* decided that the duty to give reasons is an essential incident of the exercise of judicial power, as part of the ‘open court principle’. For State Supreme courts, the duty is a constitutional one because s 73 of the Constitution gives the High Court jurisdiction to hear appeals from them.
- The primary reason for this duty is to facilitate appeals. Findings of fact and law, need to be crystallised and not subject to vacillation. However, the duty does not depend on the existence of an appeal right. Its rationale is that the duty encourages good judicial decision-making and public scrutiny.
- In *Wainohu*, the section immunising the ‘eligible judge’ from giving reasons was incompatible with this duty. Importantly, from a drafting viewpoint, it did not matter that the power to give reasons was not excluded so that an eligible judge could still choose to give reasons. The limits imposed by the legislative power are the important thing, not any actual judicial conduct.
- The duty is not absolute. It only applies for final decisions and what the court called ‘important interlocutory decisions’.
- An instruction that could interfere with this duty is a warning bell for drafters. As the duty is a constitutional one that cannot be cast off, in drafting legislation about State courts, it is best to say nothing about the duty.

#### (b) *Natural justice:*

- Another aspect of the ‘open court principle’ is the *audi alteram partem* rule.
- Excluding notice or a right of audience to a party with an interest in a case means that the court lacks an essential judicial characteristic. *Re Criminal Proceeds Confiscation Act* and *International Finance Trust Co* both concerned proposed interim ‘freezing’ orders under crime-proceeds legislation. In the first, the exclusion of notice and in the second a power of the executive to, in effect, choose whether to hear *ex parte* was fatal. Even though the applications were interlocutory ones, substantial rights were still affected.
- An instruction to totally exclude the right to be heard is a warning bell. The drafter needs to ascertain what mischief really to be addressed. As His Honour has pointed out, working out whether a provision constitutes a breach of procedural fairness is a question of proportionality.

- *Gypsy Jokers* and *K-Generation* confirm that State laws can, to an extent, modify the rules of procedural fairness without necessarily meaning that the court is doing the executive's bidding. Accessibility to all aspects of evidence is not absolute. In those cases, provisions tailored to keep particular evidence confidential were valid. They didn't exclude the court itself from examining the evidence and making a genuine judicial determination on it.

#### 4. **The major lesson for drafters: Focus on appropriate discretions rather drafting to tell the court what to do.**

- A power to hear *ex parte* with criteria that are appropriate to the policy considerations and the interests of the parties will probably withstand a *Kable* challenge. A legislative command to deny a right of appearance will not.
- I was one of the drafters for the Queensland version of the criminal organisation Acts considered in *Totani* and *Wainohu*. Fortunately, we had the benefit of the Full Court's decision in *Totani* and the High Court's decision in *K-Generation*.
- Accordingly, the *Criminal Organisation Act 2009* (QLD) has the following key differences from the impugned South Australian and NSW provisions:
  - Applications for criminal organisation declarations are made to the Supreme Court as such
  - There is no mention of reasons for decision: They are a given.
  - For declaration applications and control order applications, there are provisions about notice and submissions by the organisation concerned
  - The court's power to make such orders is couched in discretionary rather than mandatory terms.
  - Criminal intelligence is declared by a judicial process, but with a closed hearing. Such hearings must take place separately from and before the determination of any substantive application at which the evidence to be relied on.
  - There is to be a special closed hearing to consider the declared criminal intelligence during the substantive application.
  - A public interest monitor is appointed to protect the public interest and appear at the closed hearings.