THE RESURGENCE OF THE *KABLE* PRINCIPLE: *INTERNATIONAL FINANCE TRUST COMPANY*

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I. Introduction

In *International Finance Trust Company Limited v New South Wales Crime Commission*[1] the High Court applied the obscure *Kable v Director of Public Prosecutions (NSW)*[2] principle to invalidate legislation enacted by the New South Wales Parliament. *IFTC* is only the second case in which the High Court has applied the *Kable* principle, the first being *Kable* itself. In *Re Criminal Proceeds Confiscation Act 2002*[3] the Queensland Court of Appeal applied the *Kable* principle so as to invalidate State legislation similar to that which was the subject of the *IFTC* High Court appeal. Similarly the South Australia Supreme Court applied the *Kable* principle to invalidate control order legislation in *Totani v South Australia.*[4] The *Kable* principle restricts a State Legislature's powers to confer responsibilities on State courts vested or capable of being vested with federal jurisdiction, especially State Supreme Courts, as would be incompatible with the exercise of that federal jurisdiction.[5] The Court in *IFTC* held (per French CJ, Gummow and Bell JJ and Heydon J with Hayne, Crennan and Kiefel JJ dissenting) that s 10 of the *Criminal Assets Recovery Act 1990* (NSW) (the Act) was invalid because it offended the judicial function,[6] or the judicial process.[7] This

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1 (2009) 261 ALR 220 (*IFTC).*

2 (1996) 189 CLR 51 (*Kable).*

3 [2004] 1 Qd R 40.

4 (2009) 259 ALR 673 (*Totani).*

5 *Kable* (1996) 189 CLR 51, 117 per McHugh J.

6 *IFTC* (2009) 261 ALR 220, [57]–[58] per French CJ.

7 Ibid [97]–[98] per Gummow and Bell JJ; [152] per Heydon J.

case note will commence with an overview of the evolving *Kable* principle. It will also explain the facts and decisions of the majority and minority judges in *IFTC*. It will then discuss some of the implications of the decision before making some concluding remarks.

II The Evolving *Kable* Principle

Kable concerned legislation enacted by the New South Wales legislature, which authorised the Supreme Court of New South Wales to potentially detain indefinitely Gregory Wayne Kable, who was sentenced to five years' imprisonment for the manslaughter of his wife. The Court found in *Kable* that the legislation in question was constitutionally invalid because it was incompatible with the vesting of the judicial power of the Commonwealth in the New South Wales Supreme Court. The underlying rationale for this finding was the determination that Australia had an integrated court system.[8] This was supported in various ways by the judges of the Court. McHugh J opined that:

> While nothing in Ch III prevents a State from conferring non-judicial functions on a State Supreme Court in respect of non-federal matters, those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State.[9]

Toohey J similarly found the legislation incompatible with the exercise of federal jurisdiction because it diminished public confidence in the integrity of the judiciary as an institution.[10] Gaudron and Gummow JJ also found the legislation incompatible with the exercise of federal jurisdiction, in part, on the basis of public confidence.[11]

In respect of the integrated court system, McHugh J said that '[s]tate courts exercising State judicial power cannot be regarded as institutions that are independent of the administration of the law by this court or the federal courts created by the Parliament of the Commonwealth.'[12] Gaudron J made a similar point, finding that Australia had an integrated court system because Chapter III does not permit 'different grades or qualities of justice'.[13]

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8 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 101 per Gaudron J.

9 Ibid 117 per McHugh J.

10 Ibid 96–99.

11 Ibid 107 per Gaudron J, 131–5 per Gummow J.

12 Ibid 114 per McHugh J.

13 Ibid 103 per Gaudron J.

The effect of the decision in *Kable* was to remove part of the supremacy of the New South Wales Parliament over the Supreme Court; that is, Parliament's ability to confer a non-judicial function on the Supreme Court which would result in a loss of public confidence in the Supreme Court which exercised federal jurisdiction under Ch III of the *Constitution.*[14]

The first case to successfully invoke the *Kable* principle was *Re Criminal Proceeds Confiscation Act 2002,*[15] in which Williams JA in the leading judgement held, after reviewing the *Kable* decision and relying upon the judgement of Gaudron J[16] and Gummow J,[17] that:

> [T]he direction or command to the judge hearing the application to proceed in the absence of any party affected by the order to be made is such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. Then, because the Supreme Court of Queensland is part of an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth, such a provision is constitutionally invalid.[18]

This decision was consistent with *Kable,* but not with the refined *Kable* principle, which the High Court subsequently created.

Since the original decision and its application in *Re Criminal Proceeds Confiscation Act 2002*, the *Kable* principle has been refined, and the idea of public confidence, which found favour in other aspects of the judgement, is no longer a prominent justification for the separation of State courts exercising federal jurisdiction. The refined *Kable* principle is that legislation will only be found constitutionally invalid if it purports to confer jurisdiction on State courts that compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction independently.[19] The focus on independence and institutional integrity in the context of a capacity

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14 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 95–99 per Toohey J; 103 per Gaudron J; 109, 105–6 per McHugh J; 131–5, 137–9, 142–3 per Gummow J.

15 [2004] 1 Qd R 40.

16 *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, [52] per Williams J with White J and Wilson J agreeing.

17 Ibid [53] per Williams J with White J and Wilson J agreeing.

18 Ibid 15 per White JA with White J and Wilson J agreeing.

19 See, *Fardon v Attorney-General* (2004) 223 CLR 575; *Baker v The Queen* (2004) 223 CLR 513; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

to exercise federal jurisdiction began in *Fardon v Attorney-General*[20] and *Baker v the Queen*[21]. In each case the Court discussed whether the legislation would be unconstitutional with reference to the notions of independence and institutional integrity of the Court.[22] The refinement of the *Kable* principle is most evident in the judgement of McHugh in *Fardon.* His Honour held, notwithstanding his dicta from *Kable* above, that '*Kable* is a decision of very limited application.'[23] His Honour went further in limiting the potential effect of *Kable* when he said that State legislation that 'attempts to alter or interfere with the working of the federal judicial system'[24] or 'compromises the institutional integrity of the State courts'[25] would offend Chapter III of the *Constitution.* This refinement has been rightly noted to be a movement from the expansive and generous interpretation of Chapter III in *Kable.*[26]

The refined *Kable* principle also found favour with the Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[27] where Gummow, Hayne, Heydon and Kiefel JJ found that 'legislation which purport[s] to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals.'[28]

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[20] (2004) 223 CLR 575 (*Fardon*).

[21] (2004) 223 CLR 513 (*Baker*).

[22] P de Jersey, *Aspects of the evolution of the judicial function*, (2008) 82(9) Australian Law Journal 607, 610; 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) 75 University of New South Wales Law Journal 75, 91. See generally, Oscar Roos, *Baker v The Queen and Fardon v Attorney General for the State of Queensland* (2005) 10(1) Deakin Law Review 271.

[23] *Fardon* (2004) 223 CLR 575, 601 per McHugh J. This statement was made notwithstanding McHugh J's earlier comments in *Kable* which were referred to above.

[24] Ibid 598.

[25] Ibid. See also, 655 Callinan and Heydon JJ; 618 Gummow J.

[26] David Bennett and Graeme Hill, *Scope of the Kable Principle,* Litigation notes 29 November 2005, 14, 16; Peter Johnston, *State courts and Chapter III of the Commonwealth Constitution: is Kable's case still relevant?* University of Western Australia Law Review, 32 (2) December 2005, 211, 231; P de Jersey, above n 22, 609.

[27] (2008) 234 CLR 532 (*Gypsy Jokers).*

[28] Ibid 560 per Gummow, Hayne, Heydon and Kiefel. See also, Anthony Gray, *Due process, natural justice, Kable and organizational control legislation* (2009) 20 Public Law Review 290, 300.

This refined principle was further elucidated in *K-Generation Pty Ltd v Liquor Licensing Court*[29] where the Court unanimously rejected an appeal that sought to rely on the *Kable* principle. In dismissing the appeal the Court found that the legislation did not direct the Supreme Court as to the exercise of its jurisdiction.[30]

In the recent South Australian Supreme Court decision of *Totani*,[31] the majority found that the legislation in question essentially directed the Court as to the manner of the exercise of its jurisdiction.[32] Specifically, Bleby J of the majority held that:

> [i]t is the unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government, which destroys the court's integrity as a repository of federal jurisdiction.[33]

The decision appears to apply the refined *Kable* principle by focusing on the legislation's effect on the independence and institutional integrity of the Court with reference to the exercise of federal jurisdiction. *Totani* is the subject of a High Court Appeal. Special leave was granted on 12 February 2010.[34] The case was heard on 20 April 2010[35] and 21 April 2010.[36] The Court reserved judgement.[37]

The Court has refined the *Kable* principle by shifting the basis of determining the constitutional validity of State legislation from incompatibility with an integrated court system to the conferral of jurisdiction which compromises the institutional integrity of the courts and affects their capacity to exercise federal jurisdiction independently. However, the High Court has not invalidated legislation by applying the refined principle.[38]

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29 (2009) 237 CLR 501 (*K-Generation).*

30 Ibid 527 per French CJ; 542 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; 580 per Kirby J.

31 (2009) 259 ALR 673.

32 Gray, above n 28, 301–2.

33 *Totani* (2009) 259 ALR 673, 708 per Bleby J.

34 *The State of South Australia v Totani* [2010] HCATrans 22 (12 February 2010).

35 The State of South Australia v Totani [2010] HCATrans 95 (20 April 2010).

36 The State of South Australia v Totani [2010] HCATrans 96 (21 April 2010).

37 The State of South Australia v Totani [2010] HCATrans 96 (21 April 2010).

38 P de Jersey, above n 22, 609; Hugo Leith, Turning Fortifications into Constitutional Bypasses: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) Federal Law Review 251, 251.

III International Finance Trust Company

A Background Facts

Section 10 of the Act conferred on the New South Wales Crime Commission (the Crime Commission) standing to apply to the New South Wales Supreme Court (the Supreme Court), *Ex parte,* for a restraining order in respect of some or all of the interests in property of a person suspected of committing a 'serious crime related activity'. The restraining order provisions allowed the Crime Commission to apply to the Court for seizing of relevant property.[39]

In the Second Reading Speech on the Bill for the Act, the Premier stated *inter alia* that '[t]he most innovative and controversial aspect of this legislation is that it will create a scheme of asset confiscation that will operate outside and completely independent of the criminal law process.'[40]

On 13 May 2008 the New South Wales Crime Commission commenced

[39] Section 10 of the Act required the Supreme Court to hear and determine, without notice to the persons affected, applications for a restraining order made *Ex parte* by the Crime Commission. Section 12 of the Act allowed the Supreme Court to make any ancillary order the Court considered appropriate, either when it made a restraining order or at any later time. Section 12(1) in particular provided that the power to make ancillary orders extended to an order varying the interests in property to which the restraining order related and an order for examination on oath of the owner of an interest in property that was subject to the restraining order. Section 22 of the Act provided for assets forfeiture orders to be made on application by the Commission. The party seeking a s 22 order must give notice to the person to whom the application relates. The person to whom the application relates may hear and adduce evidence at the hearing for the s 22 order. Section 25 of the Act allowed a person whose interest in property was the subject of an assets forfeiture order to apply to the Supreme Court for an 'exclusion order', excluding the interest from the s 10 order. The exclusion order could only be made if the property was not fraudulently or illegally acquired property. The onus of proof was on the applicant seeking the order. The applicant was required to give the Crime Commission notice of the application and notice of the grounds on which the exclusion order was sought. If the Crime Commission proposes to contest the application, it must give the applicant notice of the grounds on which the application is to be contested.

[40] New South Wales Laws, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990, 2528–2529.

Supreme Court proceedings against unnamed defendants described as 'The beneficial owners of various bank and share trading accounts'. Hoeben J made *Ex parte* orders pursuant to s 10 of the Act with respect to approximately 50 bank accounts.[41] On 26 and 27 August 2008, the Court of Appeal of New South Wales heard the appellants' appeal against the Hoeben J orders. Judgement was reserved by the Court of Appeal and was delivered on 6 November 2008.

Meanwhile on 25 October 2008, while judgement remained reserved in the Court of Appeal, the Commission applied *Ex parte* to the Supreme Court (Hislop J) for further restraining orders pursuant to s 10. The property that was the subject of the new orders had also been the subject of the Hoeben J orders. Hislop J made these further restraining orders on 25 October 2008.[42] Heydon J stated in his judgement that 'it is an abuse of process to institute proceedings for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff, which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'[43] This point was perhaps directed at the fact the Crime Commission sought the Hislop J orders whilst the Court of Appeal had reserved its judgement.

On 6 November 2008 the Court of Appeal delivered judgement in the First Appeal.[44] The Court by majority (McClellan CJ at CL dissenting) set aside all the Hoeben J orders and ordered the Commission to pay the appellants' costs.[45] The appellants' challenge to the Hoeben J orders on constitutional grounds failed.[46] The Court's orders had no effect on the Hislop J restraining orders.

On 12 November 2008 the appellants filed a summons and a draft Notice of Appeal seeking leave to appeal to the Court of Appeal against the validity of the Hislop J orders on constitutional and evidentiary grounds.

On 13 March 2009 the appellants sought and were granted special leave

41 *IFTC* (2009) 261 ALR 220, [17] per French CJ.

42 Ibid [19] per French CJ.

43 Ibid [147] per Heydon J.

44 *International Finance Trust Company Limited v New South Wales Crime Commission* (2008) 251 ALR 479.

45 Ibid [55] per Allsop P; [56] per Beazley JA; [146] per McClellan CJ at CL.

46 Ibid at [2] per Allsop P; [56] per Beazley JA; [101] per McClellan CJ at CL.

to appeal to the High Court of Australia against the Court of Appeal's judgement in the First Appeal upholding the constitutional validity of s 10 of the Act.[47] On 26–27 May 2009 the High Court of Australia heard the appellants' appeal against the constitutional validity of s 10 of the Act. Judgement in the High Court Appeal was reserved and delivered on 12 November 2009.

There were three submissions made by the appellants. First, that s 10(3) of the Act was invalid and repugnant to the judicial power of the Commonwealth under Chapter III of the *Constitution.*[48] Secondly, that s 22(2)(b) amounted to a bill of pains and penalties.[49] Heydon J identified a final submission put by the appellants, which sought to suggest that s 22 undermines the protection that ought to be granted in a criminal trial.[50] His Honour found that s 22 does not undermine the protection of a criminal trial.[51] The Court unanimously rejected the appellants' submission that s 22(2)(b) was a bill of pains and penalties.[52] This case note will focus on the finding of the majority that s 10(3) of the Act was invalid and repugnant to the judicial power of the Commonwealth under Chapter III of the *Constitution*. *IFTC* is important because it is the first case since *Kable* where state legislation has been found constitutionally invalid by applying the *Kable* principle.

The refined *Kable* principle underlies the decision of French CJ in *IFTC.*[53] However, *IFTC* can be distinguished from the majority of cases that sought to invoke *Kable* in so far as the refined principle did not underlie the judgements of the Puisne Justices. In the joint judgement of Gummow and Bell JJ,[54] the judgement of Heydon J[55] and the judgement of the

47 *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCATrans 47 (13 March 2009).

48 *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCATrans 107 (26 May 2009).

49 Ibid.

50 *IFTC* (2009) 261 ALR 220, [168] per Heydon J.

51 Ibid [168]–[169] per Heydon J.

52 Ibid [60] per French CJ; [99] per Gummow and Bell JJ; [167] per Heydon J; [137] per Hayne, Crennan and Kiefel JJ; [166]–[167]. A bill of pains and penalties is legislation that punishes (everything but the death penalty) individuals or a group of individuals for their past conduct without the benefit of a judicial trial. See generally, *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 685 per Toohey J.

53 *IFTC* (2009) 261 ALR 220, [50] per French CJ.

54 Ibid [97] per Gummow and Bell JJ.

55 Ibid [165] per Heydon J.

minority,[56] the constitutional validity of the legislation was determined with reference to the concept of repugnance to the judicial process. The idea of repugnance to the judicial process derives from the *Kable* principle itself and in particular from the judgement of Gummow J:

> I have referred to the striking features of this legislation. They must be considered together. But the most significant of them is that, whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt. Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.[57]

In essence the Gummow proposition is that punitive detention that is not consequent upon criminal guilt is non-judicial and its conference on a court exercising the judicial power of the Commonwealth is repugnant to the judicial process. In *IFTC* the Puisne Justices sought to rely on the Gummow proposition, in so far as the judgements determined the constitutional validity of the Act, by determining whether the Act was repugnant to the judicial process. Indeed their Honours identified civil aspects of the judicial process that were violated by the Act.

B The Majority

1 *Chief Justice French*

(a) Statutory Interpretation

Chief Justice French held that where there is a choice in interpreting a statute, and one interpretation would place the statute within constitutional power and the other would not, the former interpretation is to be preferred.[58] His Honour went further by adding a caveat to

[56] Ibid [136] per Hayne, Crennan and Kiefel JJ.

[57] *Kable* (1996) 189 CLR 51, 132 per Gummow J. Hereafter referred to as 'the Gummow proposition'.

[58] *IFTC* (2009) 261 ALR 220, [41] per French CJ. His Honour relied upon the *Interpretation Act 1987* (NSW), s 31(1); *Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237, 267 per Dixon J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 14 per Mason CJ; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 161; *Gypsy Jokers* (2008) 234 CLR 532, 553; *K-Generation* (2009) 237 CLR 501, 519.

this conventional idea by stating that '[t]he court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity.'[59] In light of the conclusions in previous cases that sought to invoke *Kable*, this point implies that there is a threshold of artificiality or marked departure from ordinary meaning. His Honour's statement provides practical guidance as to the limits of reading down legislation. Indeed, it appears to be a qualification of s 31 of the *Interpretation Act 1987* (NSW).

(b) Minor Intrusions

Applying this rule of statutory interpretation his Honour found that s 10 deprived the Supreme Court of its institutional integrity; this conclusion involved his making a judgement about the quality of the executive's intrusion, sanctioned by the legislature, into the judicial function.[60] His Honour found that s 10 allowed the New South Wales Crime Commission to apply *Ex parte* with discretion about the provision of notice to the affected party.[61] Further, his Honour found that s 10(3) required an officer of the Crime Commission to depose to a reasonable suspicion 'if the application is heard *Ex parte* there will be no-one before the Court to question the existence of that suspicion.'[62] Ultimately, his Honour found that '[a]n accumulation of such intrusions, each "minor" in practical terms, could amount over time to the death of the judicial function by a thousand cuts.'[63] It is important to note that his Honour suggested that 'a facility for the party affected to seek discharge or variation of the restraining order within a short time would have been sufficient to save s 10 from invalidity.' His Honour agreed with the reasons of the joint judgement of Gummow and Bell JJ that s 25 is not a facility for discharge or variation of a restraining order.[64] His Honour held in the alternative, that he agreed with the reasoning and orders proposed in the joint judgement of Gummow and Bell JJ.[65]

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[59] *IFTC* (2009) 261 ALR 220, [42] per French CJ.
[60] Ibid [57] per French CJ.
[61] Ibid [43]–[44] per French CJ.
[62] Ibid [46] per French CJ.
[63] Ibid [57] per French CJ.
[64] Ibid [58] per French CJ.
[65] Ibid [58]–[61] per French CJ.

(c) Institutional Integrity

French CJ found that s 10 deprived the Court of its institutional integrity. He found that s 10 deprived the Supreme Court of the power to determine whether procedural fairness had been afforded;[66] and did so with reference to whether notice had to be given to the party affected before an order was made.[67] His Honour found that s 10 deprived the Court of an essential incident of the judicial function, without identifying the incident, and thus directed the Court as to the manner of the exercise of its jurisdiction, distorting the institutional integrity of the Court and affecting its capacity as a repository of federal jurisdiction.[68] His Honour's judgement is consistent with the refined *Kable* principle; however, this conservative approach differs from the proposition adopted by the remainder of the majority, who relied upon *Kable* itself.

2 *Justice Gummow and Justice Bell*

(a) Repugnance to the Judicial Process

An important aspect of the joint judgement was the focus on the Gummow proposition,[69] the application of which led to the invalidation of s 10 of the Act.

Consideration of the *Kable* principle arose in the context of the validity of *Ex parte* orders.[70] Their Honours distinguished the *Ex parte* interim control orders that were the subject of *Thomas v Mowbray*[71] from *Ex parte* restraining orders, 'which have a life which follows the pendency of an assets forfeiture application'.[72] They highlighted that the *Ex parte* interim control orders provided in the very short term for a contested confirmation hearing and this was not the case with *Ex parte* restraining orders. This distinction was considered in the in light of the reasoning of Crennan J in *Gypsy Jokers Motorcycle Club Inc v Commissioner*

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66 Judged by reference to practical considerations of the kind usually relevant to applications for interlocutory freezing orders.

67 *IFTC* (2009) 261 ALR 220, [56] per French CJ. His Honour relied on *Leeth v The Commonwealth* (1992) 174 CLR 455, 470 per Mason CJ, Dawson and McHugh JJ.

68 *IFTC* (2009) 261 ALR 220, [56] per French CJ.

69 See above.

70 *IFTC* (2009) 261 ALR 220, [85]–[98] per Gummow and Bell JJ.

71 (2007) 233 CLR 307.

72 *IFTC* (2009) 261 ALR 220, [89] per Gummow and Bell JJ.

of Police,[73] who quoted from *Bass v Permanent Trustee Co Ltd*[74] that 'the judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them'.[75] The distinction between *Thomas v Mowbray* and the facts of *IFTC* was supported by interpretation of the Act. The proposition from *Kable* provided a framework for determining constitutional invalidity.

(b) Statutory Interpretation

The joint judgement turned their attention to the interpretation of s 10 of the Act. Their Honours considered the civil nature of proceedings brought under s 10, and generally the validity of the conscription of the Supreme Court, particularly the statutory requirements to release the s 10 order.

The joint judgement commenced by noting that the Act gave more importance to the Commission obtaining and retaining a restraining order than on providing remedial flexibility.[76] Their Honours then stated that proceedings on a restraining order application were not criminal;[77] this is important insofar as the Gummow proposition developed in the context of criminal sanctions. The implication of proceedings on a restraining order application not being criminal was that the legislature was to take the Court as it found it. On this point the joint judgement ultimately found that the legislation established a distinct regime and consequently did not take the Supreme Court as it found it.[78]

Their consideration of the validity of the legislation concerned whether s 12(1), which allowed the Court to make ancillary orders that the Court considered appropriate, would support an interpretation of s 10 that would save it from invalidity. In this task their Honours relied on the interpretation of the Act by the Court of Appeal in *New South Wales Crime Commission v Ollis* (2006) 65 NSWLR 478.[79] In *Ollis* the

[73] *Kable v Director of Public Prosecutions (NSW)* (2008) 234 CLR 532.

[74] (1996) 189 CLR 51.

[75] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 594 per Crennan J quoting *Kable* (1996) 189 CLR 51, 106 per Gaudron J. See, *Bass v Permanent Trustee Co Ltd* (1996) 189 CLR 51, 106.

[76] Ibid [70] per Gummow and Bell JJ. See generally, [68]–[70].

[77] IFTC (2009) 261 ALR 220, [78] per Gummow and Bell JJ.

[78] Ibid [78]–[80] per Gummow and Bell JJ.

[79] *IFTC* (2009) 261 ALR 220, [90] per Gummow and Bell JJ.

Court of Appeal held that a separate proceeding or appeal needed to be brought in order to make ancillary orders. Importantly their Honours found that:

> [i]t is not consistent with [the] scheme of the Act that, when a restraining order is made, there can be a further hearing at which the same judge or another judge can be asked to determine on the same material whether there are reasonable grounds for the suspicion; nor that there can be a further hearing at which further material is put before the same judge or another judge by the defendant and the judge is asked to determine on the enhanced material whether are reasonable grounds for the suspicion.[80]

This interpretation of the Act was accepted by the joint judgement. In addition their Honours found that there was an absence of a clear means of curial supervision of the duty to disclose material facts on *Ex parte* applications and that this duty was important in the administration of justice.[81] Their Honours ultimately concluded that exclusion orders available under s 25 of the Act were controlled by the imperative terms of s 25(2).

(c) Release from s 10 of the Act

The onerous requirements for setting aside a s 10 order were the basis of the finding of invalidity by the joint judgement. Their Honours noted that the ability of an affected person to discharge a s 10 order required the applicant to prove that it was more probable than not that the interest in property for which exclusion was sought was not illegally acquired property.[82] Their Honours noted that the:

> Supreme Court is conscripted for a process which requires in substance the mandatory *ex parte* sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on *ex parte* application. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.[83]

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80 *IFTC* (2009) 261 ALR 220, [90] per Gummow and Bell JJ quoting *New South Wales Crime Commission v Ollis* (2006) 65 NSWLR 478, 493 per Basten JA, 486–7 per Giles JA with Mason P agreeing.

81 *IFTC* (2009) 261 ALR 220, [93] per Gummow and Bell JJ.

82 *IFTC* (2009) 261 ALR 220, [95] per Gummow and Bell JJ, with Heydon J agreeing [161].

83 Ibid [97] per Gummow and Bell JJ.

On this basis Gummow and Bell JJ held that s 10 engaged the Supreme Court in activity, which was repugnant to a fundamental degree in relation to the judicial process as understood and conducted throughout Australia.[84] In terms of the Gummow proposition, Heydon J in the majority went so far as to explain that it is a *central* proposition to be derived from *Kable*.[85] The application of this principle by the joint judgement, the reliance on the principle by Heydon J, the general agreement of Chief Justice French,[86] and the reference to it by the minority[87] suggests that the Gummow proposition may be an argument that future litigants seeking to invoke the *Kable* principle could rely upon.

3 *Justice Heydon*

(a) Repugnance to the Judicial Process

Justice Heydon found that the 'self contained and exhaustive nature'[88] of Pt 2 of the Act did not take the Supreme Court as it found it and consequently offended the *Kable* principle. His Honour began by saying, in respect of *Kable,*[89] that '[t]he case stands'.[90] His Honour identified 'that a provision in a State statute conferring an authority on a State court capable of exercising federal jurisdiction which is *repugnant to the judicial process in a fundamental degree* is not constitutionally valid (emphasis added).'[91] This principle derives from the judgement of Gummow J in *Kable* itself and was applied in the joint judgement of Gummow and Bell JJ. Heydon J applied this principle and then considered the meaning and importance of hearings.[92] A hearing was implicitly identified as central to the judicial process.

(b) Hearings

His Honour identified the hearings as one of the primary principles on which the judicial process in Australia operates. His Honour then turned

84 Ibid [98] per Gummow and Bell JJ.
85 *IFTC* (2009) 261 ALR 220, [140] per Heydon J.
86 Ibid [58]–[61] per French CJ.
87 Ibid [135]–[136] per Hayne, Crennan and Kiefel JJ.
88 *IFTC* (2009) 261 ALR 220, [163] per Heydon J.
89 *Kable* (1996) 189 CLR 51.
90 *IFTC* (2009) 261 ALR 220, [140] per Heydon J.
91 Ibid.
92 Ibid [141]–[145] per Heydon J.

to explain the importance of hearings. He identified four justifications for hearings: first the evidence and arguments which each party wants to have considered is necessary for the operation of the adversarial system,[93] secondly, advancing on the evidence of one adversary risks reaching unsound conclusions,[94] thirdly, to respect human dignity[95] and individuality, and finally an argument from political liberty that courts have a duty to hear people where a decision is capable of adversely affecting their interest.[96] This explanation provides guidance as to the content of the judicial process.

(c) Interpretation and Application

His Honour then turned to interpretation of the Act. He said that the Act gave no discretion to the Supreme Court to adjourn proceedings briefly while notice is given to the person affected, and went on to say that '[a]lthough this is not by itself repugnant to the judicial process in a fundamental degree, it is relevant to whether one aspect of the legislation is.'[97] The central issue that he identified was whether there was a procedure whereby the person subject to the s 10 order could approach the Court to have it set aside.[98] He found that there was no procedure for the Court to entertain an application to dissolve an *Ex parte* restraining order once the defendant had received notice of its grant pursuant to s 11(2).[99] It followed in his Honour's reasoning that the lack of a procedure for the dissolving of the s 10 order was repugnant to the judicial process pursuant to the repugnance proposition asserted by Gummow J in *Kable*.

His Honour concluded that:

> In short, the strict, confined, specific and tight regulation of the powers granted excludes recourse by analogy or otherwise to the general powers and traditional procedures of the Supreme Court in its administration of equitable relief. The 'reasonably plain intendment' of the legislation is that Pt 2 does not, in this respect at least, take the Supreme Court of New South Wales as it finds it.[100]

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93 Ibid [142] per Heydon J.
94 Ibid [143] per Heydon J.
95 Ibid [144] per Heydon J.
96 Ibid [145] per Heydon J.
97 Ibid [152] per Heydon J.
98 Ibid [155] per Heydon J.
99 *IFTC* (2009) 261 ALR 220, [156]–[158], [159]–[160].
100 Ibid [165] per Heydon J.

His Honour's reasoning, like that of the joint judgement of Gummow and Bell JJ, suggests that the Gummow proposition may be an argument that future litigants seeking to invoke the *Kable* principle will rely upon. It also reflects a divergence from the refined *Kable* principle that focuses on the independence and institutional integrity of the Court.

C The Minority

1 *Justice Hayne, Justice Crennan and Justice Kiefel*

The dissenting joint judgement of Hayne, Crennan and Kiefel JJ identified two 'distinct but related elements' in the appellants' argument:[101] one concerning the grounds for making a restraining order, and the other concerning the procedures to be followed by the Supreme Court in making an order of that kind.'[102] The judgement considered whether either element supported a finding that the legislation offended the *Kable* principle. Importantly, in determining the validity of the legislation the minority sought to apply the Gummow proposition, which found favour with Gummow and Bell JJ in their joint judgement and with Heydon J.[103]

(a) Grounds for Making the Order

In relation to the grounds for making a restraining order, their Honours recognised that the Act provided three distinct forms of order and that the orders under each were made on different footings.[104] They said that the appellants challenged the validity of s 10, which related to the making of a restraining order.[105] The requirements under the section were then considered[106] and their Honours determined that:

> The provisions of s 10(3) of [the Act] do not differ from any of a number of different statutory conferrals of jurisdiction upon courts which require the court to exercise a power if conditions prescribed for its exercise are met. … a restraining order, though working a considerable effect on property rights, does not finally dispose of those rights. The final disposition of property by assets forfeiture order or exclusion order is not to be made on

[101] Ibid [113] per Hayne, Crennan and Kiefel JJ.
[102] Ibid.
[103] Ibid [136] per Hayne, Crennan and Kiefel JJ.
[104] Ibid [114]–[115] per Hayne, Crennan and Kiefel JJ.
[105] Ibid [116] per Hayne, Crennan and Kiefel JJ.
[106] Ibid [117]–[120] per Hayne, Crennan and Kiefel JJ.

mere suspicion.[107]

The judgement did not identify other conferrals similar to those of the Act. Whilst speculation as to what the judges had in mind may be of limited utility other conferrals may include similar acts enacted by other states; or indeed any legislation adopting an *Ex parte* process.

The minority's reasoning determined repugnancy to the judicial process by considering other similar legislation. In essence the grounds for making the order were valid because there were other pieces of legislation with similar provisions. The difficulty with this approach is that just because there are multiple pieces of legislation that have similar provisions does not mean that in isolation each piece of legislation is not repugnant to the judicial process. A further difficulty is that by allowing an affected party to review an order the purpose of the Act may be frustrated.[108]

(b) Procedures for Making the Order

In relation to the procedure for making a restraining order, their Honours asked '[d]o the procedures for exercise of the Supreme Court's powers to make a restraining order under [the Act] differ in any relevant respect from the procedures usually followed in the judicial process?'[109]

In determining this question their Honours sought to overrule *New South Wales Crime Commission v Ollis*[110] in terms of its interpretation of the operation of the Act.[111] In contradistinction to *New South Wales Crime Commission v Ollis*[112] (and to the reliance on it in the joint judgement of Gummow and Bell JJ) their Honours interpreted the Act as not precluding an affected party to have an *Ex parte* order under the Act reconsidered *inter partes* upon application to the Court.[113] Their Honours went on to identify, non-exhaustively, grounds for reconsidering an *Ex parte* order

107 Ibid [121] per Hayne, Crennan and Kiefel JJ.

108 *Kioa v West* (1985) 159 CLR 550, 615 per Brennan J. The Explanatory Memorandum to the *Drug Trafficking (Civil Proceedings) Bill 1990* provides *inter alia* that: 'The objects of this Bill are … to enable the State Drug Crime Commission ("the Commission") to apply to the Supreme Court for a "restraining order" preventing the disposal of interests in property of a person suspected of having been engaged in drug-related activities …'

109 Ibid [122] per Hayne, Crennan and Kiefel JJ.

110 (2006) 65 NSWLR 478.

111 *IFTC* (2009) 261 ALR 220, [123] per Hayne, Crennan and Kiefel JJ.

112 (2006) 65 NSWLR 478.

113 *IFTC* (2009) 261 ALR 220, [126] per Hayne, Crennan and Kiefel JJ.

under the Act.[114]

Their Honours considered the judicial application[115] and regulatory basis[116] of the power to reconsider *Ex parte* orders and considered the context of the s 56 requirement of the *Civil Procedure Act 2005* (NSW).[117] On this point the Crime Commission expressly accepted, in argument, that the Act does not inferentially exclude the ordinary power of the Supreme Court to reconsider an order made *Ex parte* if the order was obtained without full disclosure of relevant matters.[118] The majority did not accept this concession by the Crime Commission, instead finding that the Act would lead to the 'death of the judicial function by a thousand cuts',[119] created a 'distinct regime' without a provision within the Act for reviewing *Ex parte* orders and ultimately that it did not 'take the Supreme Court of New South Wales as it finds it'. The approach of the majority, or at least the Chief Justice, may be supported by the Chief Justice's statement that '[t]he court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity.'[120] In terms of the concession of the Crime Commission, the minority determined that:

> [T]he question which then arises is whether, by permitting but not requiring the Commission to apply *ex parte*, the Act impliedly excludes the engagement of an important consequence that attaches to and ordinarily follows from a court's exercise of power *ex parte*. That question is presented, but not answered, by the observation that a restraining order may be made *ex parte*.[121]

In this respect it appears that the minority found the legislation constitutionally valid based on their interpretation of the Act. The minority found that the Act did not create its own distinct regime and identified whether the discretion left open to the Crime Commission to apply *Ex parte* impliedly excluded aspects of the judicial process. Their Honours noted that '[t]he question is presented, but not answered,

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[114] Ibid [126] per Hayne, Crennan and Kiefel JJ.
[115] *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679.
[116] *Uniform Civil Procedure Rules 2005* (NSW) r 36.16(2)(b).
[117] *IFTC* (2009) 261 ALR 220, [127]–[134] per Hayne, Crennan and Kiefel JJ.
[118] Ibid [135] per Hayne, Crennan and Kiefel JJ.
[119] Ibid [57] per French CJ.
[120] *IFTC* (2009) 261 ALR 220, [42] per French CJ.
[121] Ibid [135] per Hayne, Crennan and Kiefel JJ.

by the observation that a restraining order may be made *ex parte.*'[122] Instead, the minority found on the basis of overruling *Ollis* that s 10 was constitutionally valid. This judgement is consistent in outcome with previous cases that have sought to invoke *Kable* in so far as the legislation was interpreted in a way that meant that it was constitutionally valid. However, the primary implication to be drawn from the minority's reliance on the Gummow proposition is that their interpretation of the proposition is more persuasive than the interpretation of Heydon J and Gummow and Bell JJ.

IV Discussion

The judgement in *IFTC* is a divergence from the emerging understanding of the *Kable* principle. This shift of focus from the propositions of independence and institutional integrity to repugnance to the judicial process is subtle but profound. The majority judgements found that the legislation offended the institutional integrity and independence, but applied differing interpretation of the same proposition (the Gummow proposition).[123] The minority also applied the Gummow proposition in determining the constitutional validity of the Act. There are a number of important implications from this case.

First, the repugnancy in *Kable* arose in part because the legislation allowed the Supreme Court to criminally sanction Gregory Wayne Kable without a trial. The legislation in *IFTC* was not criminal.[124] As the first case in which the High Court has invalidated state legislation since *Kable* it is important to note that the legislation was not criminal. This confirms that non-criminal state legislation is capable of being found constitutionally invalid if it is repugnant to the judicial process.

Secondly, in the civil context, Heydon J provided an explanation of an important aspect of the judicial process that is the existence of a hearing. He found that the lack of a procedure to dissolve the application made it repugnant to the judicial process. Gummow and Bell JJ focused their analysis on discharging a s 10 order suggesting this was a further aspect of the judicial process. Their Honours found, according to their interpretation of the Act, that the complexity of seeking a discharge of the order made it repugnant to the judicial process. The judgements go some way to defining the judicial process, but a complete definition was not provided.

[122] Ibid [135] per Hayne, Crennan and Kiefel JJ.
[123] See III above.
[124] *IFTC* (2009) 261 ALR 220, [78] per Gummow and Bell JJ.

Indeed, the minority may have found the Act constitutionally valid due to a different aspect of the judicial process. That is that the judicial process can be determined by considering the consistency of the process with other statutory enactments. The minority found the Act constitutionally valid, in part, because there were other pieces of legislation containing similar provisions.[125] The difficulty with the minority's approach is that the argument that because there are multiple pieces of legislation that have similar provisions does not mean that in isolation each piece of legislation is not repugnant to the judicial process.

The lack of a conclusive definition raises a concern as to certainty in the law, particularly for parliament and the executive who have no adequate guide as to their relationship with the judiciary.

Perhaps further guidance as to a more comprehensive definition of the judicial function may be seen in the recent address of Chief Justice French at the Conference on Judicial Reasoning, where his Honour said that:

> [The judicial process] requires of the judges fidelity to the rule of law. It means, as the judicial oath or affirmation requires, administration of justice according to law without fear or favour, affection or ill-will. It requires that interpretation and application of laws made by the parliament be done according to established and well understood rules and constraints. Where the common law or judge-made law is concerned, it requires recognition of boundaries beyond which incremental judicial law-making will not trespass.[126]

Thirdly, another important implication from the judgement is its effect on interpretation of Acts which are the subject of proceedings to determine their constitutional validity. Chief Justice French said that '[t]he court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity.'[127] Indeed, this dictum appears to be a qualification of s 31 of the *Interpretation Act 1987* (NSW). This suggests that there is a threshold of artificiality or marked departure from ordinary meaning where an Act cannot be found constitutionally valid.

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[125] See III above.

[126] The Hon Chief Justice Robert French, *Opening Address — Conference on Judicial Reasoning: Art or Science?,* Australian Journal of Forensic Sciences (2010) 42(1) 5, 5.

[127] *IFTC* (2009) 261 ALR 220, [42] per French CJ.

Fourthly, there are a number of consequences that arise as a consequence of the Puisne Justices' reliance on the Gummow proposition. The first is that for lower courts the minority's interpretation of the Gummow proposition is more persuasive than the interpretation of Heydon J and Gummow and Bell JJ. A further implication of the reliance on the Gummow proposition is that there has been a subtle shift from the refined *Kable* principle to the Gummow proposition. The latter concept appears much wider than the refined *Kable* principle in so far as legislation appears to be constitutionally invalid with reference to the very general concept of the judicial process. The proposition appears on its face to be of wider application than the refined *Kable* principle. In essence there has been a shift away from referring to the judicial power of the Commonwealth towards an implicit acceptance of the unified court system. A further implication is that the Puisne Justices' focus on the Gummow proposition suggests that the proposition may be an argument that future litigants seeking to invoke the *Kable* principle could rely upon. This is particularly important in light of the *Totani* appeal. A final and perhaps the most important implication is that the Gummow proposition provides a framework for the unification of the Australian court system and indeed a separation of the court system from state in addition to federal legislature and executive. A wide interpretation of the Gummow proposition may be read to suggest that '[t]he special position and function of this Court under the Constitution require[s] that it should be able to declare the law for all courts that are within the governance of Australia.'[128]

Finally, The Chief Justice's judgement adds to the refinement of the *Kable* principle and provides an illustration of when the refined *Kable* principle can be invoked to invalidate legislation. It also adds to it insofar as his Honour provided that a number of minor intrusions would result in the 'death of the judicial function by a thousand cuts'.[129] This reasoning supports the view that litigants who identify a number of minor intrusions into the judicial function may seek to apply the refined *Kable* principle to invalidate legislation.

V Conclusion

The *IFTC* decision explores Chapter III of the *Constitution* insofar as it involves invalidating State legislation that confers a non-judicial function on a State Supreme Court contrary to the judicial function of

[128] *Spratt v Hermes* (1965) 114 CLR 226, 277 per Windeyer J.
[129] *IFTC* (2009) 261 ALR 220, [57] per French CJ.

the Commonwealth. The *IFTC* decision is another step in the evolution of the *Kable* principle. The effect of the application of the Gummow proposition is to set in stone an integrated legal system operating upon an uncertain judicial process so as to maintain the judicial power in the States as separate from the legislature and the executive. The approach of the bench in applying the repugnancy test reveals that there is another aspect of the *Kable* decision, which may be invoked to invalidate state legislation. The approach adopted by the Puisne Justices has many complexities, not least because the divergence in the application of the Gummow proposition.

What is apparent is that the majority saw the legislative intrusion into the judicial function as fundamental, and this may provide guidance as to when State legislation may unconstitutionally infringe the judicial power of the Commonwealth. The full bench relied on aspects from the judgement in *Kable* or that derive from *Kable*. Their reliance on the decision intimates that the principle may have a wider application than might be inferred from previous decisions.[130] What has become apparent as a consequence of this judgement is that *Kable* is not 'a constitutional guard-dog that would bark but once'.[131]

[130] Cf *Fardon* (2004) 223 CLR 575, 601 per McHugh J. See also, Brendan Gogarty and Benedict Bartl, above n 22, 90–1; Oscar Roos, above n 22, 276, 279–82.

[131] *Baker* (2004) 223 CLR 513, 535 per Kirby J.