SUPREME COURT OF QUEENSLAND

CITATION:	*The Australian Workers' Union of Employees, Queensland v State of Queensland; State of Queensland v Together Queensland, Industrial Union of Employees & Anor* [2012] QCA 353
PARTIES:	**In Appeal No 9035 of 2012:** **STATE OF QUEENSLAND** (applicant) **v** **TOGETHER QUEENSLAND, INDUSTRIAL UNION OF EMPLOYEES** (first respondent) **ALEXANDER PATRICK SCOTT** (second respondent) **In Appeal No 8204 of 2012:** **THE AUSTRALIAN WORKERS' UNION OF EMPLOYEES, QUEENSLAND** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 8204 of 2012 Appeal No 9035 of 2012 SC No 8204 of 2012 SC No 9035 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Removal or Remission Miscellaneous Application - Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2012
JUDGES:	Holmes, Muir and White JJA Judgment of the Court
ORDERS:	**1. Proceeding number BS9035 of 2012 is dismissed with costs.** **2. Proceeding number BS8204 of 2012 is dismissed with costs.**

CATCHWORDS: HIGH COURT AND FEDERAL COURT – THE FEDERAL JUDICATURE – NATURE AND EXTENT OF JUDICIAL POWER – CONFERRAL ON STATE COURTS – where the Australian Workers' Union and the Together Union parties assert that each of the Queensland Industrial Relations Commission and the Industrial Court of Queensland may be described as "a court of a State" within the meaning of s 77(iii) of the Commonwealth *Constitution* – where the State contends that it is unnecessary to decide this issue in determining the constitutional validity of the relevant legislation – whether the QIRC and Industrial Court are courts of a State under s 77(iii)

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION AND LEGISLATIVE POWERS – LEGISLATIVE POWERS – POWER TO ACT CONTRARY TO SEPARATION OF POWERS DOCTRINE – where the Together Union parties submit that a constitutional principle which mandates the separation between the executive, legislative and judicial powers of Queensland is sourced in the *Constitution of Queensland* 2001 (Qld) – where they concede that no such constitutional principle operated in Queensland prior to 2001 – where the State rejects any contention of a new constitutional principle of institutional or functional separation of powers – where the Together Union parties contend that the QIRC, in certifying agreements, exercises judicial power – where they further contend that ss 691C(1) and 691E(2), as inserted by s 23B of the *Public Service and Other Legislation Amendment Act* 2012 (Qld) into the *Industrial Relations Act* 1999 (Qld), interfere with that exercise of judicial power – whether the QIRC exercises judicial power – whether s 23B of the *Amendment Act*, to the extent that it inserts ss 691C(1) and 691E(2), is invalid as contrary to the principle of separation of powers

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION AND LEGISLATIVE POWERS – LEGISLATIVE POWERS – POWER TO ACT CONTRARY TO SEPARATION OF POWERS DOCTRINE – where the Together Union parties contended that the QIRC exercised judicial power when certifying and/or making certified agreements – where the certification process does not involve the QIRC in ascertaining, declaring or enforcing existing rights or obligations – where the QIRC's role in relation to certified agreements is administrative in nature with executive and legislative aspects – where there is no controversy to be quelled, no determination of existing rights or liabilities – whether the certification is analogous to functions traditionally exercised by the courts

CONSTITUTIONAL LAW – OPERATION AND EFFECT

OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, s 109) – PARTICULAR CASES – INDUSTRIAL LAWS – where the AWU contended that s 691D of the *Industrial Relations Act* 1999 (Qld) was inconsistent with Part 6-4 of the *Fair Work Act* 2009 (Cth) – where s 786 of the *Fair Work Act* made detailed provision in respect of the timing and extent of notification and consultation with employee organisations where the termination of 15 or more employees who were not national system employees was to be carried out for specified reasons – where s 691D, in contrast, allowed the employer to decide when to notify an employee organisation of a decision, and when consultation regarding the decision should occur – whether s 691D altered, impaired or detracted from the operation of s 786 – whether Part 6-4 intended to be a complete statement of the law relating to termination of non-national system employees – whether s 691D is valid law – whether s 109 of the *Constitution* renders s 691D inoperative

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – EXERCISE OF JUDICIAL POWER – JUSTICIABLE MATTERS – where s 3B of the *Public Service and Other Legislation Amendment Act* 2012 (Qld) inserted a new paragraph in s 53 of the *Public Service Act* 2008 – where the amended provision would enable the chief executive to make directives about "remuneration and conditions of employment of public service employees" – where such directives by virtue of s 52 of the *Public Service Act* prevail over industrial instruments of the QIRC unless otherwise provided for in a regulation – where the AWU contended that s 3B breached the *Kable* principle – where s 3B will not commence until 1 January 2013 – where the State of Queensland argued that this Court had no jurisdiction to hear a constitutional challenge regarding s 3B because there was no immediate right duty or liability to be established – whether the effect of s 3B of the amending Act is a justiciable matter

Commonwealth of Australia Constitution Act 1901 (Cth), s 71, s 77(iii), s 108, s 109
Constitution Act 1867 (Qld), s 1, s 2, s 2A, s 11A, s 11B, s 30, s 40, s 53
Constitution Act Amendment Act 1890 (Qld), s 2
Constitution Amendment Act 1934 (Qld), s 3, s 4
Constitution of Queensland 2001 (Qld), s 3, s 5, ss 57 – 63, s 88, s 90
Fair Work Act 2009 (Cth), s 13, s 14, s 399, s 545, s 550, s 720, s 722, s 769, ss 784 – 788
Industrial Relations Act 1999 (Qld), s 89, s 90, s 90A, ss 123 – 126, s 141, s 142, s 148, s 149, ss 153 – 157, s 160, s 164, s 165, s 167, s 169, s 170, s 172, ss 174 – 183, s 274A, s 275, s 320, s 334, s 423, s 670, s 683, ss 691A – 691E

Judiciary Act 1903 (Cth), s 39, s 78B
Parliament of Queensland Act 2001 (Qld)
Public Service Act 2008 (Qld), s 9, s 52, s 53
Public Service and Other Legislation Amendment Act 2012 (Qld), s 3B, s 22A, s 23A, s 23B
Supreme Court of Queensland Act 1991 (Qld), s 61(5)

Attorney-General (Cth) v Alinta Ltd (2008) 233 CLR 542; [2008] HCA 2, considered
Attorney-General for the State of Western Australia v Marquet (2003) 217 CLR 545; [2003] HCA 67, cited
Attorney-General (Cth) v The Queen (1957) 95 CLR 529; [1957] AC 288, cited
Australian Building Construction Employees' & Builders' Labourers Federation v The Commonwealth of Australia (1986) 161 CLR 88; [1986] HCA 47, considered
Australian Education Union v General Manager of Fair Work Australia (2012) 86 ALJR 595; [2012] HCA 19, considered
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9, considered
Building Construction Employees' and Builders' Labourers Federation (NSW) v Minister for Industrial Relations (1986) 7 NSWLR 372, cited
City of Collingwood v State of Victoria & Anor [No 2] [1994] 1 VR 652; [1994] VicRp 46, cited
Clyne v East (1967) 68 SR (NSW) 385, considered
Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453; [1995] HCA 44, cited
Commonwealth v Sterling Nicholas Duty Free Pty Ltd (1972) 126 CLR 297; [1972] HCA 19, considered
Croome & Anor v State of Tasmania (1997) 191 CLR 119; [1997] HCA 5, considered
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Ex parte McLean (1930) 43 CLR 472; [1930] HCA 12, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, considered
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45; [2006] HCA 44, cited
Gilbertson v State of South Australia (1977) 14 ALR 429; [1978] AC 772, cited
Grollo v Palmer (1995) 184 CLR 348; [1995] HCA 26, cited
Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532; [2008] HCA 4, considered
Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors [2011] QCA 380, cited
Hilton v Wells (1985) 157 CLR 57; [1985] HCA 16, considered
Huddart Parker & Co Pty Ltd & Anor v Moorehead (1909) 8 CLR 330; [1909] HCA 36, considered
In re Judiciary and Navigation Acts (1921) 29 CLR 257;

[1921] HCA 20, considered
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, considered
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, cited
Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Liyanage v The Queen [1967] 1 AC 259; [1965] UKPC 1, considered
McCawley v The King (1920) 28 CLR 106; [1920] HCA 11, considered
McGinty v State of Western Australia (1996) 186 CLR 140; [1996] HCA 48, considered
Momcilovic v The Queen (2011) 245 CLR 1; [2011] HCA 34, considered
New South Wales v The Commonwealth (1975) 135 CLR 337; [1975] HCA 58, cited
Nicholas v Western Australia [1972] WAR 168, cited
North Australian Aboriginal Legal Aid Service v Bradley (2004) 218 CLR 146; [2004] HCA 31, cited
Owen v Menzies & Ors; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170, cited
Pape v Federal Commissioner of Taxation (2009) 238 CLR 1; [2009] HCA 23, cited
Port MacDonnell Professional Fishermens Association Inc v South Australia (1989) 168 CLR 340; [1989] HCA 49, cited
Precision Data Holdings Ltd v Wills (1991) 173 CLR 167; [1991] HCA 58, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254; [1956] HCA 10, considered
R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361; [1970] HCA 8, considered
Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd (1987) 163 CLR 140; [1987] HCA 29, cited
Re Dingjan; Ex parte Wagner (1995) 183 CLR 323; [1995] HCA 16, considered
Re L (an infant) [1968] P 119, cited
Re Ranger Uranium Mines (1987) 163 CLR 656; [1987] HCA 63, cited
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23, cited
State of South Australia v Totani (2010) 242 CLR 1; [2010] HCA 39, considered
Steele v Defence Forces Retirement Benefits Board (1955) 92 CLR 177; [1955] HCA 34, cited
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104; [1994] HCA 46, cited
Victoria v The Commonwealth (1937) 58 CLR 618; [1937] HCA 82, considered
Victoria v The Commonwealth (1971) 122 CLR 353; [1971]

HCA 16, cited
Wainohu v State of New South Wales (2011) 243 CLR 181; [2011] HCA 24, considered
Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434; [1918] HCA 56, considered
Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1; [1996] HCA 18, considered

COUNSEL: In Appeal No 9035 of 2012:

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In Appeal No 8204 of 2012:

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W Sofronoff QC SG, with G Del Villar, for the respondent

SOLICITORS: In Appeal No 9035 of 2012:

Crown Law for the applicant
Slater & Gordon Lawyers for the respondents

In Appeal No 8204 of 2012:

Maurice Blackburn Cashman Lawyers for the applicant
Crown Law for the respondent

[1] **THE COURT:** By order of this court made on 11 October 2012 pursuant to s 61(5) of the *Supreme Court of Queensland Act* 1991 (Qld) certain proceedings pending in the Trial Division were removed into the court and directed to be heard together.

[2] The Australian Workers' Union of Employees, Queensland ("the AWU") filed an originating application dated 7 September 2012 against the State of Queensland ("the State") seeking certain declarations of invalidity in relation to recent amendments to the *Industrial Relations Act* 1999 (Qld). An amended originating application dated 19 October 2012 and filed at the hearing sought an additional declaration of invalidity.

[3] Together Queensland, Industrial Union of Employees ("Together Union") and Alexander Patrick Scott, who is the person empowered under the union rules to sue and institute proceedings on behalf of the union ("the Together Union parties"), filed a claim and statement of claim on 31 August 2012 seeking similar relief against the State.

[4] An early trial date had been obtained for that proceeding but the State was desirous of having both proceedings determined at the same time and filed an application in this court on 4 October 2012 that those proceedings be removed. When it became apparent that an early hearing date could be offered in this court all parties agreed to the removal.

[5] For the purpose of this hearing the parties filed an Agreed Statement of Facts and Issues, the relevant paragraphs of which are:

"**Part 1: Agreed Statement of Facts**

1. Together Queensland Industrial Union of Employees ('Together Union') and The Australian Workers' Union of Employees ('AWU') are each:

   (a) a body registered under Chapter 12 of the *Industrial Relations Act 1999 (Qld)* ('IRA') as an organisation; and

   (b) a body corporate able to sue by reason of s 423 of the IRA.

2. The State of Queensland ('the State') is capable of being sued under the *Crown Proceedings Act 1980*.

3. Under the registered rules of the Together Union some Queensland public service employees (within the meaning of s 9 of the *Public Service Act 2008* (Qld) ('the PSA')) are eligible to be, and are, members of the Together Union.

4. Under the registered rules of the AWU some Queensland public service employees are eligible to be, and are, members of the AWU.

5. The Together Union and the AWU (each as employee organisations) and the State (as the only employer) are persons bound to various presently operative industrial instruments, including:

   Certified Agreements to which the State and AWU or Together Union (or both) are parties (each where necessary, as amended)

   [naming 27 agreements]
   …
   (collectively 'certified agreements to which the State is the only employer party').

   Awards to which State and AWU are parties

   [naming six awards]
   …

6. The Together Union and the AWU each have members who are covered by the industrial instruments listed in paragraph 5 above.

7. Each of the certified agreements listed in paragraph 5 above was certified and, further or alternatively, made by the Queensland Industrial Relations Commission ('the QIRC').

8. Each of the awards listed in paragraph 5 above was made by the QIRC.

9. On 29 August 2012, the *Public Service and Other Legislation Amendment Act 2012* ('the Amendment Act') commenced to operate (except Parts 2, 3 and 4, which are to commence on 1 January 2013).

10. The Supreme Court of Queensland has supervisory jurisdiction over all other courts of the State.

Part 2: Agreed Statement of Issues

1. Whether the QIRC is a court of a State within the meaning of s 77(iii) of the *Commonwealth Constitution*.

2. Whether the Industrial Court is a court of a State within the meaning of s 77(iii) of the *Commonwealth Constitution*.

3. Whether in certifying and, further or alternatively, making the certified agreements to which the State is the only employer party, the QIRC exercised judicial power.

4. Whether s 23B of the *Amendment Act*, to the extent that it inserts s 691C(1) into the *Industrial Relations Act 1999* (Qld) ('the IRA'), is invalid because it is contrary to the separation of powers, if any, introduced into the constitution of Queensland by the *Constitution of Queensland 2001* (Qld).

5. Whether s 23B of the *Amendment Act*, to the extent that it inserts s 691E(2) into the IRA, is invalid because it is contrary to the separation of powers, if any, introduced into the constitution of Queensland by the *Constitution of Queensland 2001* (Qld).

6. Whether s 23B of the Amendment Act, to the extent that it inserts s 691C into the IRA, is invalid because it undermines the QIRC's institutional integrity or its appearance of independence and impartiality and thereby breaches the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('the *Kable* principle').

7. Whether s 23B of the Amendment Act, to the extent that it inserts s 691D into the IRA, is invalid because it breaches the *Kable* principle.

8. Whether s 23B of the Amendment Act, to the extent that it inserts s 691E(2) into the IRA, is invalid because it breaches the *Kable* principle.

9. Whether the Court of Appeal has jurisdiction to consider whether s 3B of the Amendment Act breaches the *Kable* principle.

10. If so, whether s 3B of the Amendment Act [is] invalid because it breaches that principle.

11. Whether s 23B of the Amendment Act, to the extent that it inserts s 691D into the IRA, is inconsistent with Part 6-4 of the *Fair Work Act 2009* (Cth) and thereby inoperative."

Notice of a constitutional matter

[6] Notice of a constitutional matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth) was given by the Together Union parties to the several Attorneys-General. None appeared at the hearing.

The legislation

[7] The Queensland Parliament passed the *Public Service and Other Legislation Amendment Act* 2012[1] ("the *Amendment Act*") which was assented to on 29 August 2012. Parts 2, 3 and 4 commence on 1 January 2013. Part 2 contains s 3B which amends s 53 of the *Public Service Act* 2008 (Qld) in respect of which a declaration of invalidity is sought although that provision is not yet in force.

[8] The amendments of central importance for these proceedings are those in Pt 5 of the *Amendment Act* which relate to the *Industrial Relations Act* 1999 (Qld). By s 23B a new Ch 15 Pt 2 is inserted. Omitting the examples inserted, the new provisions are:

> "**Part 2 Particular provisions of industrial instruments**
>
> **691A Definitions for pt 2**
>
> In this part –
>
> ***industrial instrument*** see the *Public Service Act 2008*, schedule 4.
>
> ***relevant industrial instrument*** means an industrial instrument to which this part applies under section 691B.
>
> ***TCR provision***[2] see section 691D(4).
>
> **691B Industrial instruments to which this part applies**
>
> (1) This part applies to an industrial instrument (whether made or certified before or after the commencement of this part) to the extent the instrument applies to the employment of persons in a government entity.
>
> (2) In this section –
>
> ***government entity –***
> (a) has the meaning given by the *Public Service Act 2008*, section 24; and
> (b) despite the *Public Service Act 2008*, section 23(4), includes a public service office for which an application provision has been made under that section.
>
> **691C Particular provisions are of no effect**
>
> (1) The following provisions of a relevant industrial instrument are of no effect –
> (a) a contracting provision;
> (b) an employment security provision;
> (c) an organisational change provision.
>
> (2) In this section –
> ***contracting provision –***
> (a) means a provision about the contracting out, or in, of services; but
> (b) does not include a TCR provision.

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1 Act No 22 of 2012.

2 Termination, change and redundancy provision.

employment security provision –

(a) means a provision about job security or maximising permanent employment, including a provision that applies all or part of a government policy about employment security; but

(b) does not include a TCR provision.

organisational change provision does not include a TCR provision.

691D Termination, change and redundancy provisions

(1) This section applies if a relevant industrial instrument includes a TCR provision about notifying an entity of a decision or consulting with an entity about a decision.

(2) The following principles apply –

(a) the employer is not required to notify the entity of the decision until the time the employer considers appropriate;

(b) the employer is not required to consult with the entity about the decision until the employer notifies the entity of the decision;

(c) the employer is not required to consult with the entity about the decision other than in relation to implementation of the decision.

(3) The TCR provision is of no effect to the extent it is inconsistent with any of the principles mentioned in subsection (2).

(4) In this section –

TCR provision means a termination, change and redundancy provision of a relevant industrial instrument that is an award.

691E Restriction on giving personal employee information

(1) This section applies if a relevant industrial instrument includes provision for giving personal information about an employee to an entity other than the employee or a government entity.

(2) Despite the provision of the industrial instrument, an employer may give the information to the entity only with the express written consent of the employee.

(3) In this section –

giving information to an entity includes –

(a) releasing information to the entity; and

(b) providing the entity with access to the information.

> ***personal information*** means information about an individual whose identity is apparent, or can reasonably be ascertained, from the information."

[9] Section 3B of the *Amendment Act* on its commencement on 1 January 2013 will amend s 53 of the *Public Service Act* 2008 so that it reads as follows:

> "**53 Rulings by commission chief executive**
>
> The commission chief executive may make a ruling about –
>
> (a) a matter relating to any of the commission's or the commission chief executive's functions; or
> [Examples] …
>
> (b) the overall employment conditions for persons employed or to be employed as –
>
> (i) chief executives or senior executives; or
>
> (ii) public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior executive; or
>
> (ba) a matter relating to the application of chapter 6 or 7 to a former public service employee; or
>
> (baa) the remuneration and conditions of employment of public service employees other than persons mentioned in paragraph (b)(i) or (ii); or
>
> (c) other specific matters that, under this Act, the commission chief executive may make a ruling about."

(The sub-section to be introduced by the amendment is underlined.)

Whether the QIRC and Industrial Court are courts of a State within the meaning of s 77(iii) of the Commonwealth Constitution

[10] The focus in this hearing is upon the QIRC, notwithstanding the inclusion of the Industrial Court of Queensland's status in the issues for determination. The State's position was that it is unnecessary to decide this issue in determining the constitutional validity of the challenged amendments. The AWU and the Together Union parties asserted that each of the QIRC and the Industrial Court may be described as a court of a State for the purpose of s 77(iii) of the Commonwealth Constitution and, thus, be suitable repositories for federal judicial power.

[11] It is necessary for the resolution of the issues raised only to assume that those bodies are courts of the State, without finally deciding. Amongst the many functions performed – and it is convenient to speak only of the QIRC – are arbitration and conciliation which are plainly legislative and/or administrative. It may also carry out judicial functions. If a separation of powers principle can be discerned in the *Constitution of Queensland* 2001, that the QIRC performs all three functions of government raises significant issues relating to validity. If the nature of the amendments gives rise to *Kable* implications, again, that will impact upon the legislative validity.

Whether s 23B of the *Amendment Act*, in inserting ss 691C(1) and 691E(2) into the *Industrial Relations Act* 1999 (Qld), is contrary to a constitutional principle of separation of powers and therefore invalid

[12] The Together Union parties submitted that s 23B of the *Amendment Act*, particularly by inserting s 691C(1) and s 691E(2) into the *Industrial Relations Act* 1999 (Qld), was invalid because it infringed a constitutional principle mandating the separation between the executive, legislative and judicial powers of the State which is sourced in the *Constitution of Queensland* 2001. They conceded, as the argument is understood, that prior to 2001 no such constitutional principle operated in Queensland and, if it is relevant, does not in the other Australian States.[3] The argument was elaborated as follows:

- The Constitution of Queensland is written and sourced in a number of documents.
- The *Constitution of Queensland* 2001 introduced a separation of powers into the Constitution of Queensland – so far as judicial power is concerned, in Ch 4 – which reflected contemporary conditions.
- The certification of agreements by the QIRC involves the exercise of judicial power.
- The insertion of s 691C and s 691E into the *Industrial Relations Act* interferes with the exercise of judicial power by the QIRC and is therefore invalid.
- As a further infringement of constitutional principle, s 23B restricts the unlimited jurisdiction of the Supreme Court as set out in s 58 of the *Constitution of Queensland* 2001.

Introductory observations

[13] Some basic propositions may be set out. The expression "the separation of powers", insofar as it relates to constitutional theory, assigns the functions of government to three divisions of power – legislative, executive and judicial.[4] The purest applied form of this constitutional theory is, conventionally, seen in the United States Constitution where "the executive is independent of Congress and office in the former is inconsistent with membership of the latter";[5] and judicial power is vested solely in a system of federal courts. But, as any student of constitutional theory knows, any strict separation in a living constitution is impossible. This was readily recognised by James Madison.[6] He concluded that even Montesquieu, the author of the proposition that "the preservation of liberty required that the three great departments of power should be separate and distinct",[7] allowed for some overlap. Madison summarised:

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3 *Building Construction Employees' and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v State of Victoria & Anor [No 2]* [1994] 1 VR 652; *Gilbertson v South Australia* (1977) 14 ALR 429; [1978] AC 772; *Nicholas v Western Australia* [1972] WAR 168.

4 For a modern discussion of the philosophical underpinning for this division see S Ratnapala *Australian Constitutional Law: Foundations and Theory* (OUP) (2002), Chapter 5. See also G Sawer, *Australian Federalism In The Courts* (Melbourne University Press) (1967), Chapter 9.

5 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275.

6 The Federalist No 47 in *The Federalist Papers* (Yale University Press) (2009) at 246-7.

7 The Federalist No 47 in *The Federalist Papers* (Yale University Press) (2009) at 246.

> "The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.* Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'"[8]

[14] Government in Australia, both Commonwealth and State, adopted the British system of parliamentary government with an executive responsible to the legislature. Sir Harry Gibbs, writing extra-judicially, said:

> "Australian courts have not strictly adhered to the principle of the separation of powers, although they profess to have found it embodied in the Constitution. It is only in relation to the judicial power that the doctrine has had any practical effect in Australia, and even in that respect there has been a disposition to confine it within fairly narrow bounds."[9]

Nonetheless, the Privy Council in *Boilermakers* saw in the structure and text of the Commonwealth Constitution the embodiment of the principle of the separation of powers.[10] The separation of judicial and non-judicial powers is seen as essential to the maintenance of the federal system.[11]

[15] In *Huddart, Parker & Co Pty Ltd v Moorehead*[12] Griffith CJ described "judicial power" as embodied in s 71 of the *Constitution* to mean:

> "… the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."[13]

In the Commonwealth Constitution the judicial power of the Commonwealth is exclusively vested in the courts described in s 71[14] including "any court of a State" which has been invested with federal jurisdiction.[15] This exclusivity is to be contrasted with the power of State governments to invest bodies which exercise, for example, administrative and executive power, with judicial power.

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8 At 247.

9 *The Separation of Powers – A Comparison* (1987) 17 Fed. L. Rev. 151 at 160. See also Ratnapala at 89.

10 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 539-40.

11 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; *Grollo v Palmer* (1995) 184 CLR 348 per McHugh J at 376; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 per Kirby J at 40.

12 (1909) 8 CLR 330.

13 At 357.

14 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 538-540 (*Boilermakers* in the Privy Council).

15 Section 77(iii) and *Judiciary Act* 1903 (Cth) s 39.

The Constitution of Queensland

[16] The Constitution of Queensland is found in a number of written instruments:

- *Commonwealth of Australia Constitution Act* 1900 (Imp) and *Commonwealth of Australia Constitution Act* 1901 (Cth)
- *Australia Act* 1986 (Cth)
- *Constitution Act* 1867 (Qld)
- *Constitution Act Amendment Act* 1890 (Qld)
- *Constitution Act Amendment Act* 1934 (Qld)
- *Constitutional Powers (Coastal Waters) Act* 1980 (Qld)
- *Constitution of Queensland* 2001 (Qld).

A description of those documents, to the extent that they are relevant to the issues to be decided, follows.

[17] Chapter 5 of the Commonwealth Constitution concerns the States and preserves the former colonies as States of the Commonwealth as they were, with their laws "subject to this Constitution".[16] In *McGinty v Western Australia*[17] Brennan CJ described the ensuing situation for the States after 1901:

> "It follows that the Constitution of a State at any time must be ascertained by reference to (i) its Constitution as at Federation; (ii) the overriding effect of the provisions of the *Commonwealth of Australia Constitution Act* and the Commonwealth Constitution; (iii) the modifications of the State Constitution that have been made either by Imperial legislation or State legislation provided, in the case of State legislation, it has been made in accordance with any relevant manner and form provisions of the particular State Constitution; and (iv) the *Australia Act* 1986."[18]

The States thus derive their existence as States from the Commonwealth Constitution.[19]

[18] The Privy Council in *McCawley v The King*[20] made abundantly plain that the *Constitution Act* 1867 (Qld) conferred unlimited constitutional power on the Queensland legislature such that the *Industrial Arbitration Act* 1916 (Qld) was held to be a valid enactment despite inconsistency with the provisions of the *Constitution Act* 1867. Thus the fixed-term appointments of Thomas William McCawley to the Presidency of the Court of Industrial Arbitration and as a Judge of the Supreme Court were upheld. Lord Birkenhead, delivering the advice of

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16 Section 108.

17 (1996) 186 CLR 140.

18 At 172-173. See also Dawson J at 189; Toohey J at 208-210; Gaudron J at 216; McHugh J at 251; and Gummow J at 292-293.

19 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 371; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 372.

20 [1920] AC 691.

the Board, described the Queensland Constitution as "uncontrolled".[21] Sir John Simon KC, for McCawley, referred to Dicey's classification - "flexible"- as distinguished from a "rigid" constitution.[22] The legislature of Queensland was described by their Lordships as "the master of its own household"[23] except insofar as its powers in special cases were restricted: a reference to the *Colonial Laws Validity Act* 1865 (Imp) concerning repugnancy with certain Acts of the British Parliament. The arguments of the Together Union parties, that in some manner the 2001 Constitution brought about a fundamental change in the nature of the constitutional arrangements for Queensland, find resonance in the contentions of the respondents[24] in *McCawley* which were soundly rejected by the Privy Council. Those parties contend that the Constitution speaks to the present and should reflect contemporary conditions in a way that *McCawley* does not.

[19] The passage of the *Australia Act* 1986 in both the United Kingdom and Commonwealth Parliaments removed any fetters remaining by virtue of the *Colonial Laws Validity Act* on the legislative reach of the State Parliaments[25] save to the extent that manner and form requirements relating to "the constitution, powers or procedure of the Parliament of the State" were required to be followed.[26]

[20] The *Constitution Act* 1867 (Qld) established and maintains the Legislative Assembly which is endowed with power "to make laws for the peace welfare and good government of the colony in all cases whatsoever".[27] Manner and form limitations apply to any Bill which expressly or impliedly provides for the abolition of, or alteration in, the office of Governor or the Legislative Assembly, the Parliament and its power to pass bills and their enactment, are required to be first approved by referendum.[28] This limitation on the freedom of the legislature to deal with its household was introduced into the *Constitution Act* 1867 in 1977 by ordinary passage in the Parliament and Governor-in-Council assent. It was not consolidated into the *Queensland Constitution* 2001 but incorporated by reference.

[21] The *Constitution Act Amendment Act* 1890 (Qld) reduced the parliamentary term from five to three years.

[22] The *Constitution Act Amendment Act* 1934 (Qld) provided for referendum approval before an upper house may be restored or constituted and three year terms for the Legislative Assembly extended.

[23] The *Constitutional Powers (Coastal Waters) Act* 1980 (Qld) arose out of the offshore constitutional settlement between the Commonwealth and the States following the *Seas and Submerged Lands Act* 1973 (Cth) case.[29] The State requested (in the Act) the Commonwealth to enact legislation to confer legislative power on Queensland in relation to its coastal waters below the high water mark.

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21 At 704.

22 AV Dicey *Law of the Constitution*, republished 8th edition of 1915 by Liberty Fund Indianapolis (1982) at 64-65.

23 At 714.

24 The relators – Messrs Feez and Stumm.

25 Sections 2 and 3(2).

26 *Attorney-General for the State of Western Australia v Marquet* (2003) 217 CLR 545 at 571; [2003] HCA 67; *Port MacDonnell Professional Fishermens Association Inc. v South Australia* (1989) 168 CLR 340 at 381.

27 Section 2.

28 Section 53.

29 *New South Wales v The Commonwealth* (1975) 135 CLR 337.

The other States passed similar legislation. The Commonwealth Parliament responded by passing the *Coastal Waters (State Powers) Act* 1980 (Cth) which extended the jurisdiction of the State into the coastal waters in the manner described.

[24] The enactment of the *Constitution of Queensland* 2001 (and its companion legislation, the *Parliament of Queensland Act* 2001) is the first consolidation of Queensland's Constitution since 1867. The genesis was a recommendation of the Electoral and Administrative Review Commission (EARC) in 1993 followed later by those of the Queensland Constitutional Review Commission.[30]

***Constitution of Queensland* 2001**

[25] The text of that document must now be examined to see if it reflects the Together Union Parties' contention that it contains this hitherto absent constitutional principle separating the exercise of judicial power from the legislative and executive powers.

[26] The *Constitution of Queensland* 2001 has as its long title: "An Act to consolidate particular laws relating to the Constitution of the State of Queensland". It commenced on 6 June 2002 which was stated in the Preamble to be the 150th anniversary year of the establishment of Queensland.

[27] The Act:

> "… declares, consolidates and modernises the Constitution of Queensland",

noting[31] that it does not consolidate

> "the following constitutional provisions because of the special additional procedures, including approval by the majority of electors at a referendum …"[32]

There follows reference to the *Constitution Act* 1867, ss 1, 2, 2A, 11A, 11B and 53, the *Constitution Act Amendment Act* 1890, s 2, and the *Constitution Act Amendment Act* 1934, ss 3 and 4. The note further states that the Act does not consolidate the *Constitution Act* 1867, ss 30 and 40. Those provisions concern the wastelands of the Crown.

[28] Professor Gerard Carney describes as an "unusual feature" the inclusion of provisions which operate "merely as 'signposts' to provisions which are purportedly referendum entrenched".[33]

[29] The *Constitution of Queensland* 2001 describes broadly and coherently the traditional division of organs of government, including making provision for the first time in a designated constitutional document for local government in Ch 7. Chapter 1 deals with preliminary matters already discussed. Chapter 2 concerns the

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30 Gerard Carney, *"Constitutional Milestones from 1867 to 2009" in Queensland's Constitution Past, Present and Future*, ed White and Rahemtula (Supreme Court Library) (2010) at 117.

31 By s 5 "[a] note in the text of this Act is part of this Act."

32 Section 3.

33 *"Constitutional Milestones from 1867 to 2009" in Queensland's Constitution Past, Present and Future*, ed White and Rahemtula (Supreme Court Library) (2010) at 117.

Parliament, its constitution and powers, referring to those provisions in the *Constitution Act* 1867. Chapter 3 concerns the Governor and Executive Government. For the first time, Cabinet is referred to as a necessary institution of government – "There must be a Cabinet …"; similarly for Executive Council.

[30] Chapter 4 concerns the courts. By s 57 the Act provides that there must be a Supreme Court and a District Court of Queensland[34] using the same imperative language as earlier employed for "the Cabinet" and "the Executive Council". No other courts, such as the Land Court or the Magistrates Court, are mentioned. The jurisdiction of the Supreme Court is set out in s 58. It provides:

> "(1) The Supreme Court has all jurisdiction necessary for the administration of justice in Queensland.
>
> (2) Without limiting subsection (1), the court –
>
> (a) is the superior court of record in Queensland and the Supreme Court of general jurisdiction in and for the State; and
>
> (b) has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise."

Sections 59 to 63 concern the appointment of judges, their tenure, removal from office, salary and protection if the office held by a judge is abolished. Tenure is described as "indefinitely during good behaviour" but s 60(2) refers to the *Supreme Court of Queensland Act* 1991 and the *District Court of Queensland Act* 1967 which "provide for a judge's retirement".

[31] It is immediately apparent that Ch 4 does not vest the judicial power of Queensland exclusively in the courts named in Ch 4, in contrast with s 71 of the Commonwealth Constitution:

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. …"

[32] Section 88 contains, amongst the transitional provisions in Ch 9 securing the continuation of various offices of state and its institutions, the continuation of the Supreme Court of Queensland "as formerly established". Section 90 affirms the continuation of the appointment of judges appointed before the passage of s 59 (appointment of judges).

[33] For completeness, the balance of the Act provides in Ch 5 for revenue, in Ch 6 for the wastelands of the Crown, by reference back to the *Constitution Act* 1867, and, in Ch 7, for local government.

Contentions and discussion

[34] The Together Union parties did not point to any expression employed in the provisions of Ch 4, apart from the word "must" – "There must be a Supreme Court …" – to protect those provisions from subsequent inconsistent amendment which would, according to ordinary principles, prevail.[35] The express protection of other

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34 For brevity, only the Supreme Court will be referred to hereafter.

35 *Attorney-General for the State of Western Australia v Marquet* (2003) 217 CLR 545; [2003] HCA 67 at [80] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

organs of government – the Office of Governor and the Legislative Assembly – which require a referendum for alteration to be achieved, supports the conclusion that the courts mentioned could be altered or even abolished, subject only to the requirement that there be some court fit to be the repository of federal jurisdiction.[36]

[35] The Together Union parties argued instead, using the language of Brennan J (as his Honour then was) in *Theophanous v Herald & Weekly Times Ltd*,[37] that the *Constitution of Queensland* 2001 "operates in and upon contemporary conditions". They contended that by bringing the States into conformity with the Commonwealth, by virtue of the passage of the *Australia Act* 1986 (Cth), modern constitutional thinking, compared with that in 1859, did not "comprehend the exercise of judicial power by that Parliament".[38] But the *Australia Act* says nothing about any limitations on the exercise of State legislative power which would require a separation of powers doctrine, at least as far as the judicial power is concerned, to be read into or imposed upon a State legislature.[39]

[36] A further contemporary condition which informs the interpretation of the Constitution was said to arise out of the reasoning in *Kable v Director of Public Prosecutions (NSW)*[40] which limited the legislative power of the States to deal with their court systems as they pleased to the extent that the provisions of Ch III of the *Commonwealth Constitution* would be frustrated.[41] However, those limitations say nothing about the separation of judicial power and those judges who considered that issue in *Kable* emphatically rejected any separation of judicial power in State constitutions.[42] This limitation on State legislative power was described as being "closely confined"[43] and related to the powers or functions imposed on a State court, rather than its judges and their capacities, which are repugnant to, or incompatible with, the exercise of the judicial power of the Commonwealth.[44]

[37] The third contemporary condition which the Together Union parties contended informs the construction of the *Constitution of Queensland* 2001 is the so-called double entrenching in 1977. The *Constitution Act Amendment Act* 1977 (Qld) amended the *Constitution Act* 1867 to entrench by referendum the then system of monarchical government in Queensland. The amendment inserted a new s 53 which purported to entrench, along with itself, the provisions which have been discussed above. While the constitutional legitimacy of enacting manner and form provisions without complying first with their own requirements has never been challenged, that question was raised by Gummow J in *McGinty*[45] and was the subject of an observation by Kirby J in *Marquet*.[46]

[38] The Together Union parties did not make clear what role those amendments entrenching certain constituent parts of the legislature and executive play in respect

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36 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 per Gaudron J at 103, McHugh J at 111.

37 (1994) 182 CLR 104 at 143-144.

38 Respondent's Submissions in Reply at [15].

39 *Attorney-General for the State of Western Australia v Marquet* (2003) 217 CLR 545; [2003] HCA 67 at [80].

40 (1996) 189 CLR 51.

41 Per Gaudron J at 103; McHugh J at 111.

42 Per Brennan CJ at 67; Dawson J at 78 and Toohey J at 92.

43 At 104 per Gaudron J.

44 At 109 per McHugh J.

45 (1996) 186 CLR 140 at 297.

46 (2003) 217 CLR 545 at [194].

of the exercise of judicial power and its separation from the legislative and executive powers. It cannot be that "laws" made for "the peace welfare and good government" of the State which may be made by the Legislative Assembly[47] partake of the requirement for referendum mentioned in s 53. Government would come to a standstill. In fairness, that did not seem to be the contention.

[39] The Together Union parties submitted that the observations in *Kable* rejecting any constitutional separation of judicial power in the Australian States' constitutions concerned materially different arrangements. Part 9 of the *Constitution Act* 1902 (NSW) is headed "The judiciary" and concerns judicial independence. The provisions are very similar to those in the *Constitution of Queensland* 2001. What is absent, as observed by Dawson J,[48] is the reposing of judicial power exclusively in the holders of judicial office. The provisions do not preclude the exercise of non-judicial power by persons in their capacity as holders of judicial office:

> "They clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested".[49]

[40] The Together Union parties contended that the emphatic statement "[t]here must be a Supreme Court of Queensland …" in s 57, and the endorsing pronouncement that "[t]he Supreme Court has all jurisdiction necessary for the administration of justice in Queensland" in s 58, expressly or impliedly vests the judicial power of the State exclusively in those courts.

[41] The Together Union parties referred to *Liyanage v The Queen*[50] as providing an example of a written constitution, silent as to the separation of judicial power from the legislative and executive powers, yet having such a separation implied into it. The Privy Council noted that Ceylon was established as an independent nation by the *Ceylon Independence Act* 1947 (UK) and that that foundation document did not vest judicial power in the courts. Even so, the Privy Council held certain retrospective criminal legislation which removed well recognised protections for specific accused persons invalid as interfering impermissibly in the traditional and proper functions of the judiciary. Their Lordships reached this conclusion because, prior to 1947, judicial power was vested in the courts of Ceylon in the *Charter of Justice* 1833. It provided in cl 4:

> "… that the entire administration of justice, civil and criminal therein, shall be vested exclusively in the courts erected and constituted by this Charter … and [it] shall not be competent to the Governor … by any Law or Ordinance to be by him made, with the advice of the Legislative Council thereof or otherwise howsoever, to constitute or establish any court for the administration of justice in any case civil or criminal, save as hereinafter as expressly saved and provided."

[42] Those provisions continued the jurisdiction and procedure of the courts in subsequent ordinances and the courts had functioned continuously to independence.

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47 *Constitution Act* 1867 (Qld), s 2.

48 At 77.

49 At 77.

50 [1967] 1 AC 259.

There was thus, the Privy Council found, no compelling need to make any specific reference to the judicial power of the courts "when the legislative and executive powers changed hands":[51]

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature."[52]

[43] As Dawson J commented in *Kable*:

> "There is no such background to the New South Wales Constitution which inherited the United Kingdom model under which the extent to which a separation of powers was observed was conventional rather than compelled by any constitutional mandate".[53]

[44] The approach of the New South Wales Court of Appeal on this question in *Clyne v East*,[54] was said to be correct. Sugerman JA had observed:

> "It is one thing to suggest the desirability of a doctrine of separation of powers as a constitutional convention, understanding, or tradition … it is another thing to demonstrate, as a matter of construction, its existence as part of the law of the constitution."[55]

And

> "… the answer to the question whether a body is of a judicial character or its acts judicial acts may well depend upon the purpose for which the question is asked. … But for the purposes of a doctrine of separation of powers the general test of what is judicial power appears to be that furnished by a passage from the judgment of Isaacs and Rich JJ in *Waterside Workers' Federation of Australia v JW Alexander Ltd*[56] approved by the Privy Council in the *Boilermakers'* case '… the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.' And in the same

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51 At 287.
52 At 287-288.
53 At 79.
54 (1967) 68 SR (NSW) 385.
55 At 397.
56 (1918) 25 CLR 434 at 463.

> case Isaacs and Rich JJ said:[57] 'The two functions therefore are quite distinct. The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it finds it, then proceeds if necessary to enforce the law."[58]

[45] If there were any doubt as to the true meaning of sections 57, 58 and 88 of the *Constitution of Queensland* 2001, a reference to the extrinsic material would remove it. The Bill was introduced by the then Premier. In the Second Reading Speech Mr Beattie said:

> "On its face, the Constitution of Queensland 2001 could be any other act of parliament; it provides for matters including the operation of various entities and the appointment of various office holders. But this act is much more; it is the fundamental law of Queensland that underpins our system of government. The entities it provides for include this parliament, the Supreme and District Courts of this state and the system of local government that we know in Queensland. The office holders under this act include the Governor of Queensland, the ministers of the Crown and the judges of the Supreme and District Courts. This law is of supreme importance.
>
> …
>
> The Constitution of Queensland 2001 represents the first time in our history that a single act containing the most comprehensive statement of Queensland's constitutional arrangements will be passed by a parliament of Queensland as a state legislature, rather than by the colonial legislature that passed the Constitution Act 1867. But, more than that, by bringing substantially all of our constitutional legislation into the one act and by presenting it in modern language, this parliament will be making our Constitution more accessible and easier for all to understand."[59]

[46] The Premier explained that hitherto the Constitution was largely unknown and unknowable to the people of Queensland and it was proposed to prepare constitutional resource materials to be used in schools and adult civic education programs. He said:

> "The centrepiece of this package will be an annotated Constitution which will provide a plain English explanation of our constitutional arrangements."

The Premier continued:

> "While one of the major objectives of the Constitution of Queensland 2001 is to consolidate our existing constitutional laws, this opportunity has been taken to enhance some aspects of our constitutional arrangements. For the first time, our Constitution will recognise the Queensland cabinet and use the terms 'Premier' and

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57 At 464.

58 At 401.

59 Hansard, 9 November 2011, 3715-3716.

> 'Ministers' in a constitutional context. The bill also enhances the independence of the judiciary by clearly establishing the only means by which a judge might be removed from office and by including a provision to protect judges from the abolition of a judicial office, either directly or through the abolition of a court or a part of a court."[60]

[47] In a reference to the 1977 entrenching amendments the Premier said:

> "The government is proud of its record of community consultation for constitutional review. It is only right and proper that in a democratic society the people of Queensland be given every opportunity to contribute to the fundamental law of the state. Those provisions that are said to be referendum entrenched remain untouched in the shells of their current acts."

He added:

> "The Constitution of Queensland 2001 … consolidate[s] and modernise[s] our current constitutional provisions and [is] the first important step, the springboard, to future constitutional reform."[61]

[48] Provisions protecting and enhancing the independence of the judiciary are quite compatible with the absence of separation of powers in the State. So much was included in Pt 9 of the NSW Constitution considered in *Kable.* The State contends that it is unlikely that there was any intention to introduce a constitutional principle limiting the legislative power as it had been understood since the inception of the colony or, at least, the passage of the *Colonial Laws Validity Act*. To conclude otherwise would mean that the State legislature would be unable to confer a non-judicial function, apart from incidentally, on a State court. This would have the further consequence that the QIRC could not make certified agreements if to do so involved the exercise of non-judicial power. The Together Union parties countered this submission by arguing that an institutional separation of powers for the Supreme Court would be consistent with their present functions and accord with historical tradition; but not all separation of powers must be institutional. It would be possible for functional separation to occur such that the Queensland Parliament could not, legislatively, intrude upon the discharge of the exercise of judicial power by a body which also exercises non-judicial power.

[49] The State rejected any concept of a new version of the constitutional principle of separation of powers which would permit the QIRC to carry out both judicial and non-judicial functions and which would prevent the legislature from exercising or interfering with any judicial function. That was because it is now clearly recognised that the Commonwealth Constitution postulates an integrated Australian court system for the exercise of the judicial power of the Commonwealth[62] and, in such an integrated system, there is no place for a doctrine which, in its application, is so dissimilar to that embodied in the Commonwealth Constitution. That must be correct.

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60 Hansard, 9 November 2001, 3716.

61 Hansard, 9 November 2001, 3717.

62 Noting, of course, that courts of a State may, consistently with the exercise of federal jurisdiction, exercise non-judicial functions, subject only to *Kable* considerations.

[50] The Together Union parties relied upon comments by the President in *Owen v Menzies*:[63]

> "The separation of judicial and executive power is not a constitutional requirement of all courts at State level, although I note that in Queensland the separation of powers insofar as Supreme and District Court judges are concerned is impliedly acknowledged in Ch 4 *Constitution of Queensland* 2001 (Qld)."

Those comments were *obiter dicta*; they were not responsive to any submission made by the parties and did not have the benefit of considered argument.

[51] Except as might arise from the application of the principles identified in *Kable*, there is no legislative impediment to a State's vesting judicial power in non-judicial bodies or in legislating for particular outcomes in court. It is fundamental to *Kable* and the cases which follow, that the doctrine of the separation of the judicial from the legislative and executive powers of government does *not* apply to the States. Because there is no such separation of powers similar to the Commonwealth model it is necessary to invoke some other constitutional limitation on the conferral of powers upon a State court which are antithetical to its status as a repository of federal judicial power. Such an analysis would not be required if the legislature were subject to a separation of powers limitation in how it confers power on a court of the State.

[52] In *Fardon v Attorney-General (Qld)*[64] McHugh J said:[65]

> "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."

Later[66] his Honour observed that the Queensland Parliament has power to make laws for the peace, welfare and good government of Queensland, a power which is preserved by s 107 of the *Commonwealth Constitution*:

> "Those words give the Queensland Parliament a power as plenary as that of the Imperial Parliament. They would authorise the Queensland Parliament, if it wished, to abolish criminal juries and require breaches of the criminal law to be determined by non-judicial tribunals. The content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State. If a State legislates for a tribunal of accountants to hear and determine 'white collar' crimes or for a tribunal of psychiatrists to hear and determine cases involving mental health issues, nothing in Ch III of the *Constitution* prevents the State from doing so. Likewise, nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts. The powers conferred on the Queensland Parliament by s 2 of the *Constitution Act 1867* (Qld) are, of course, preserved subject to the *Commonwealth Constitution.* However, no process of legal or logical reasoning leads to the conclusion that,

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63 [2012] QCA 170 at [46].
64 (2004) 223 CLR 575; [2004] HCA 46.
65 At [37].
66 At [40].

> because the federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals."

[53] Similarly Gummow J observed:[67]

> "The repugnancy doctrine in *Kable* does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III. That is fundamental for an understanding of *Kable*. No party or intervener submits otherwise."

[54] On a slightly different point, Callinan and Heydon JJ said:[68]

> "Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the *Constitution*, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the *Constitution*, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the *Constitution.*"

Fardon was decided after the enactment of the *Constitution of Queensland* 2001.[69]

[55] To similar effect were observations in *South Australia v Totani*.[70] Hayne J said that the limitation in s 106 of the *Commonwealth Constitution* was not one which followed any separation of judicial and legislative functions under the constitutions of the States but rather as a consequence which followed from Ch III establishing an integrated Australian legal system.[71]

[56] Again in *Wainohu v State of New South Wales*,[72] French CJ and Kiefel J noted:[73]

> "It is, however, important that the requirement of compatibility within the *Kable* doctrine, which is functionalist rather than formalist in character, be approached with restraint. The principle does not apply so as to infringe the freedom that State legislatures enjoy with respect to the organisation and arrangement of their courts. It is not a surrogate for the application of a separation of powers doctrine to the States."

Later, their Honours, referring to the "persona designata" characterisation to avoid institutional incompatibility, said:

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67 At [86].

68 At [219].

69 See also *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 per French CJ at [35]; and per Hayne, Crennan, Kiefel and Bell JJ at [57].

70 (2010) 242 CLR 1 at [66]; [2010] HCA 39 at [66] per French CJ.

71 At [201].

72 (2011) 243 CLR 181; [2011] HCA 24.

73 At 212; [52].

> "The separation of powers doctrine does not prevent non-judicial functions from being conferred on a State judge."[74]

[57] The Together Union parties contended that:

> "If the Supreme Court is not entitled to declare that purported legislation which sets aside a concluded judicial decision of an inferior court is invalid as involving an impermissible interference with judicial power, then [the Supreme Court's] supervisory jurisdiction will …. be limited."[75]

The argument is circular. If legislation is invalid in the way or ways postulated by the union parties the court, exercising federal jurisdiction, can declare it to be so. But if the argument is that the State legislature is precluded by reason of s 58 from limiting the Supreme Court's supervisory jurisdiction over inferior courts, it is misconceived. As Chesterman JA said in *Hammercall Pty Ltd v Robertson*:[76]

> "Section 58 does not confer power on the Supreme Court to do whatever it likes."

[58] Thus, if legislation interferes with a judgment of an inferior court, subject to any contrary constitutional principle, the Supreme Court would be required to apply the law.

Conclusion

[59] While constitutional law is a fertile field of surprises,[77] it may confidently be concluded that the *Constitution of Queensland* 2001 does not contain any constitutional principle of separation of powers.

[60] Accordingly, to the extent that s 23B of the *Amendment Act* inserts sections 691C(1) and 691E(2) into the *Industrial Relations Act* 1999 (Qld) it is not invalid on the ground that it is contrary to any separation of powers doctrine.

Whether in certifying and, further or alternatively, making the certified agreements to which the State is the only employer party, the QIRC exercised judicial power

[61] The AWU made no submissions directly relating to this issue. It was content to make the point, in reliance on *Wainohu v New South Wales*,[78] that the *Kable* principle was capable of application to legislation which related to the performance of an administrative function by a state court if the operation of the legislation would be repugnant to, or incompatible with, the institutional integrity of the state court.

[62] The Together Union parties, no doubt perceiving that a favourable finding would strengthen its *Kable* arguments, contended that the QIRC exercised judicial power

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74 At [66].

75 Outline of Argument of first and second respondent, para 3.12.

76 [2011] QCA 380 at [41]. See observations by Heydon J in *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 at [70].

77 Gibbs, *op. cit.*, at 156.

78 (2011) 243 CLR 181.

when certifying and/or making certified agreements. That conclusion was said to be compelled by the following. In exercising its function of determining whether to certify or refuse certification of an agreement under s 156 and s 157 of the *Industrial Relations Act*, the QIRC must afford natural justice to the parties. A certified agreement may be made only about the relationship between an employer and a group of its employees, including employees of the State.[79] Successor employers are also bound by certified agreements and such agreements can be altered only as prescribed by s 169 with the approval of the QIRC. In making its decision, the QIRC must have regard to the "no disadvantage test" in s 169(6)(c)(ii). The certifying of an agreement is intended to result in a fairly negotiated and lengthy period of industrial peace, lasting until the nominal expiry date of the agreement.[80] If there is no certified agreement or the nominal expiry date of a certified agreement has expired, subject to certain safeguards, "protected industrial action" is authorised.[81]

[63] The argument continued as follows. The QIRC has power to enforce certified agreements and may make declarations or grant injunctions to facilitate or compel such compliance.[82] Contravention of a certified agreement is an offence which may be prosecuted summarily.[83] These purposes and consequences of the exercise of the certification power satisfy the first limb of Kitto J's statement of the content of judicial power in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*,[84] in which his Honour said:[85]

> "[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to *the existence of a right or obligation*, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified." (original emphasis)

[64] No certification of an agreement under the statutory scheme may take place unless and until there has been "an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined by the facts as determined". Consequently, the second limb of Kitto J's test is satisfied.

[65] The QIRC's judgment on the matters raised by both s 160(2) and s 160(4) is based "upon an ascertainment of facts and governed by standards which if indefinite are

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79 *Industrial Relations Act*, s 141.
80 Sections 181, 182 and 183.
81 Sections 174–180.
82 Sections 274A and 275.
83 Sections 670 and 683.
84 (1970) 123 CLR 361.
85 At 374–375.

not undefined and are by no means foreign to the judicial function".[86] Applying the "no disadvantage test"[87] in s 156(1)(h) and s 169(6)(c)(ii) requires the QIRC to find as a fact the relevant award or other industrial instrument which is the source of the existing "entitlements or protections" and then to interpret it. The QIRC, having ascertained the meaning and effect of the proposed agreement sought to be certified,[88] applies the legal norm provided for in s 160(2) so as to judge whether the proposed agreement would, if certified, result in a reduction in the employees' entitlements or protections. An affirmative conclusion results in certification having to be refused. In substance, this is the judicial enforcement of existing rights and liabilities between defined persons or classes of persons.

[66] If a negative conclusion is reached in respect of s 160(2) and the requirements of s 156 and s 157, the QIRC's decision "entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to the facts has shown to exist". The final element of Kitto J's test is thus met.

[67] By virtue of s 157(2), the QIRC must refuse to certify an agreement if satisfied that the employer has engaged in contravention of s 170 or Ch IV of the *Industrial Relations Act*. This part of the decision making process also falls within Kitto J's expression of principle.

Consideration of the exercise of judicial power

[68] Before addressing the Together Union parties' arguments, it is useful to refer to further authority on the nature of judicial power.

[69] The determination of existing rights and liabilities has been accepted as a defining characteristic of the judicial function. In that regard, Hayne J said in *South Australia v Totani*:[89]

> "But as decisions like *R v Davison* show, the absence of any dispute about existing rights and liabilities does not, of itself, entail the conclusion that there is no exercise of the judicial power of the Commonwealth. And as one writer has recently suggested, '[t]he guiding principle of rights-determination versus rights-creation has proved to be imprecise and malleable'. It is, none the less, both right and important to observe that the determination of rights and liabilities lies at the heart of the judicial function, and that the creation of rights and liabilities lies at the heart of the legislative function." (citations omitted)

[70] Kiefel J also identified "the quelling of controversies" as part of the essential function of judicial power, stating:[90]

> "In general terms, courts are understood to have an adjudicative role, the essential function of judicial power being the quelling of controversies and the ascertainment and determination of rights and

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86 *Steele v Defence Forces Retirement Benefits Board* (1955) 92 CLR 177 at 188.

87 An agreement passes the no disadvantage test if it does not disadvantage employees in relation to their employment conditions, s 160(1).

88 Which is not necessarily always in writing signed by the parties, see s 156(1)(c), 1A and 1B.

89 (2010) 242 CLR 1 at 86.

90 At 162–163.

> liabilities. Controversies to be resolved may involve questions or issues arising under statutes. The process involved, in the exercise of judicial power, is as stated in the often-quoted passage by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*:…"

[71] In *Attorney-General (Cth) v Alinta Ltd,*[91] Crennan and Kiefel JJ said:

> "The purpose of the judicial function identified by their Honours is not controversial. An adjudication is undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are, not in order to determine what rights and obligations should be created. Holmes J, delivering the opinion of the Court in *Prentis v Atlantic Coast Line Co* said that a judicial inquiry 'investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.'
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> It is both logical and necessary that the right or obligation in question exist independent of, and prior to, the exercise of judicial power. The controversy about its existence is the hallmark of a matter before the courts. The ascertainment of its existence is exclusively a judicial function." (citations omitted)

[72] In *Wainohu v New South Wales*,[92] Gummow, Hayne, Crennan and Bell JJ approved of Gaudron J's following statement in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* that the confidence reposed in judicial officers:[93]

> "…depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.
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> …
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> In general terms, a function which is carried out in public, save to the extent that general considerations of justice otherwise require, [and which is] manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government." (original emphasis)

[73] Before considering the nature of the QIRC's role in relation to certified agreements, it is desirable to touch on the QIRC's role in relation to awards. This is also relevant to the AWU's and the Together Union parties' *Kable* submissions.

[74] An award, quite unlike a court order, has the force of a law.[94] Also, unlike a court order, it binds employers and employees irrespective of whether they were parties to

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91 (2008) 233 CLR 542 at [152]–[153].
92 (2011) 243 CLR 181 at 225.
93 (1996) 189 CLR 1 at 22, 25–26.
94 Section 123(1)(b).

any proceeding before the QIRC.[95] An award may be made or amended to provide "fair and just employment conditions".[96] It must provide "for secure, relevant and consistent wages and employment conditions",[97] "fair standards for employees in the context of living standards generally prevailing in the community"[98] and take "account of the efficiency and effectiveness of the economy, including productivity, inflation and the desirability of achieving a high level of employment".[99] In those regards, the award making function does not resemble the judicial function. Awards are not concerned with the determination of existing rights or obligations between parties to a dispute or with the application of existing laws to facts as found. The judicial function is not normally concerned with questions of public and social policy, but they are relevant to the exercise of the QIRC's powers in relation to the making of awards.

[75] The certification of agreements also involves public interest considerations. Such agreements "may be made about the relationship between an employer and a group of employees… of the employer".[100] Once made, a certified agreement "covers all employees in the group, even if they were employed after the agreement was made".[101] A "group of employees" includes "employees of an employer who are engaged in a project, including a proposed project… and… employees proposed to be employed in a new business by an employer, other than a multi-employer".[102] A certified agreement may be made between "the employer" on the one hand and, on the other, "[one] or more employee organisations who represent, or are entitled to represent, any employees who are, or are eligible to be, members of the organisation" or "the employees at the time the agreement is made".[103]

[76] Under s 148, the QIRC, in prescribed circumstances, may make orders to "help the parties to negotiate the agreement". Section 149 permits the QIRC, in prescribed circumstances, to exercise arbitral powers. In so doing, the QIRC must consider, *inter alia*, "the public interest" and, where a "public sector entity" is involved, "the State's financial position and fiscal strategy, and the financial position of the public sector entity". In any other matter, "the employer's financial position" must be considered.[104]

[77] An application for certification may be made only in respect of an agreement between all of the parties which has been approved "by a valid majority of the relevant employees at the time in a properly conducted ballot".[105] The QIRC must certify the agreement if satisfied of the matters set out in s 156. It may not certify the agreement if it is not so satisfied. Under s 156, the agreement must specify a nominal expiry date, which, "for a project", must be "no later than the date on which the project ends" and otherwise "a date no later than [three] years after the date on which the agreement will come into operation".

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95 Section 124(1).
96 Section 125.
97 Section 126(d).
98 Section 126(f).
99 Section 126(h).
100 Section 141(1).
101 Section 141(2).
102 Section 141(3).
103 Section 142(a) – (b).
104 Section 149(c).
105 Section 153.

[78] One of the requirements of s 156 is that the agreement passes the "no-disadvantage test". A certified agreement "starts operating when it is certified".[106] When operating, "it prevails, to the extent of any inconsistency, over an award or industrial agreement…" and "While a project agreement operates, it operates to the exclusion of any other certified agreement".[107] An award, as observed earlier, takes effect as a law. Also, not only is an employer bound by a certified agreement, so is a "successor (whether or not immediate) of the whole or a part of the business" of the bound employer.[108] The power of certification, in these respects, is markedly different to a court's power to make orders. Orders bind only the parties to a proceeding, do not take effect as laws and do not override agreements entered into by non-parties.

[79] The certification process does not involve the QIRC in ascertaining, declaring or enforcing existing legal rights or obligations. Before an application for certification is made, there must be an agreement. A certified agreement may be amended if the amendment has been approved by "a valid majority of the relevant employees at the time". An employer, or if "[one] or more organisations are bound by the agreement – the employer and the [one] or more organisations", may terminate the agreement by notice with the QIRC's approval. The approval must be given if the QIRC is "satisfied a valid majority of the relevant employees at the time approve its termination". The termination takes effect when the QIRC's approval takes effect.[109] These processes and attributes are antithetical to the judicial process which emphasises the finality, subject to rights of appeal, of judicial determinations and the necessity for proceedings to take place only upon due notice to all parties.

[80] In making a "decision", the QIRC is required to consider the public interest and "the likely effects of the commission's decision on the community, local community, economy, industry generally and the particular industry concerned".[110] "Decision" is defined in Schedule 5 of the *Industrial Relations Act* to include "an agreement approved, certified, or amended by the commission and an extension of the agreement".

[81] The Together Union parties' argument seizes on a few features of the exercise of the QIRC's certification powers which, arguably, in some cases, correspond with characteristics of judicial power. It must be said, however, that some of the matters relied on (that successor employers are bound by certified agreements, the limited duration of certified agreements, the ability to vary them with the QIRC's consent and that contravention of a certified agreement is an offence) detract from, rather than support, the Together Union parties' arguments.

[82] The fact that the QIRC in deciding whether to certify an agreement must apply the no-disadvantage test is of little assistance to the Together Union parties' argument, particularly when it is recognised that in applying the test, the QIRC may take the public interest into account.[111]

[83] It will commonly be the case that a tribunal, although performing a function recognised as non-judicial, has an obligation to act in some respects as a court would act in exercising judicial power. For example, administrative bodies making

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106 Section 164.
107 Section 165.
108 Section 167.
109 Section 172(3).
110 Section 320.
111 Section 160(1), (2), (3) and (4).

administrative decisions may be required to afford natural justice, particularly where the statute under which the decision is made confers power to destroy or prejudice a person's rights or interests.[112] The State drew attention to the fact that the *Fair Work Act*[113] requires Fair Work Australia, which cannot exercise judicial power, to follow procedures similar to those in the *Industrial Relations Act* in relation to certified agreements so as to ensure procedural fairness.

[84] The power to enforce rights under a certified agreement does not establish that certification, a quite distinct process, certification, is an exercise of judicial power. Nor is it the case that the necessity to apply "the no-disadvantage test" and the other requirements of s 156 of the *Industrial Relations Act* demonstrate that the QIRC is exercising judicial power. As the State submitted, arbitrators can determine existing rights and obligations as a step to creating new rights and so too can industrial bodies.[114]

[85] In *Re Dingjan; Ex parte Wagner*,[115] Gaudron J, with whose reasons Mason CJ, Brennan, Deane and Toohey JJ relevantly agreed, held that a power conferred by the *Industrial Relations Act* 1988 (Cth) to review a contract on the grounds that it was unfair, harsh or against the public interest and, if it found in the affirmative, to set it aside in whole or in part and to vary its terms did not involve the exercise of judicial power. Her Honour concluded that the power of variation contemplated by the sections under consideration was "a power to create new rights and obligations" and in "that respect… precisely analogous with the Commission's power to make industrial awards, at least when the award-making power is exercised, as is generally the case, to create new rights and obligations attaching to pre-existing employment relationships". It was said also that the power to bring a new set of rights and obligations into existence did not involve the exercise of judicial power even if it was "necessary for the tribunal to decide disputed facts or to form an opinion as to existing rights and obligations as a step in arriving at its ultimate determination".[116]

[86] The Together Union parties sought to rely on the role of courts in sanctioning the compromise of damages claims by infants or other persons lacking capacity. In those circumstances, there is a proceeding before the court in which the plaintiff, through a litigation guardian, seeks a determination of an existing right to damages. The court's role, in relation to infant claimants, although now statutorily confirmed, corresponds with the traditional *parens partiae* role of superior courts which "derives from the right and duty of the Crown as *parens partiae* to take care of those who are not able to take care of themselves".[117] The courts role in relation to other persons under a legal disability is analogous.

Conclusion

[87] When regard is had to the substance of the QIRC's role in relation to certified agreements, it is apparent that it is administrative in nature with executive and

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112 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258–259; *Kioa v West* (1985) 159 CLR 550.

113 Part 2–4 and s 399.

114 *In re Ranger Uranium Mines* (1987) 163 CLR 656 at 666; *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149; and *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189–190.

115 (1985) 183 CLR 323.

116 At 360–361.

117 *In Re L (an infant)* [1968] P 119 at 156 per Lord Denning MR.

legislative aspects. There is no controversy to be quelled, no determination of existing rights or liabilities. There is, on the other hand, the creation of new rights and liabilities. It is clear that certification is not analogous to functions traditionally exercised by the courts. The matters identified by the Together Union parties do not suffice to transform an obviously unjudicial process to a judicial one.

Whether s 23B of the *Amendment Act*, to the extent that it inserts ss 691B, 691C, 691D and/or 691E into the *Industrial Relations Act*, is invalid because it undermines the QIRC's institutional integrity or its appearance of independence and thereby breaches the principle in *Kable v Director of Public Prosecutions (NSW)* ("the *Kable* principle")

[88] The argument advanced by the AWU in support of its contention that ss 691C and 691D infringe the principle in *Kable v Director of Public Prosecutions (NSW)*[118] may be summarised as follows. Each of the Industrial Court and the QIRC is a "Court of a State" within the meaning of Ch III of the *Commonwealth Constitution*. The *Kable* principle is directed to protecting the "institutional integrity of the Courts of the States and Territories".[119] One of the defining characteristics of a court is that the body is impartial and appears to be impartial.[120] Decisional independence is a necessary condition of impartiality.[121]

[89] Sections 691C(1) and 691D(3) of the *Industrial Relations Act* render particular provisions of industrial instruments, including those of the QIRC of no effect.

[90] The *Amendment Act* undermines the institutional integrity of the QIRC because:

- the QIRC has functions and powers with respect to the making of awards and the certifying of industrial agreements, which are "industrial instruments" under the PS Act;

- sections 691C(1) and 691D(3) of the *Industrial Relations Act*, to the extent that they provide that these provisions of industrial instruments are "of no effect", directs the QIRC as to the outcome of decisions it might make in enforcement proceedings.

[91] It is contrary to the decisional independence of the QIRC that the State arrogates to itself the power to disturb any decision of the Court, particularly one between the State and a citizen. The *Amendment Act* denies both the QIRC and the Industrial Court the decisional independence necessary to maintain their actual and apparent independence and impartiality.

[92] Even if, contrary to the AWU's submissions, the relevant powers and functions of the QIRC are not judicial, the interference with the QIRC's decision making functions undermines the integrity of the QIRC as an institution because the Commissioners are judicial officers.

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118 (1996) 189 CLR 51.

119 See, for example, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [63].

120 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [27]–[29] approving observations of Gaudron J in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [81].

121 *South Australia v Totani* (2010) 242 CLR 1 at [62].

[93] Reliance was placed on the following passage from the reasons of Mason and Deane JJ in *Hilton v Wells*,[122] approved of in the reasons of the majority in *Wainohu v New South Wales*:[123]

> "when a function is entrusted to a judge by reference to his judicial office the legislators and the community are entitled to expect that he will perform the function in that capacity. To the intelligent observer, unversed in what Dixon J. accurately described – and emphatically rejected – as 'distinctions without differences', it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade."

[94] It was contended also that the following observations of French CJ and Kiefel J in *Wainohu v New South Wales* were applicable to the subject statutory provisions:[124]

> "The Act also creates an impression of a connection between the performance of a non-judicial function and the following exercise of judicial power, such that the performance of that function may affect perceptions of the judge, and of the court of which he or she is a member, to the detriment of that court."

[95] Section 334(1)(b) of the *Industrial Relations Act* empowers the QIRC and the Industrial Court, in the exercise of their respective jurisdictions, to enforce their own decisions. This involves the exercise of judicial power. Where a party to an award or a certified industrial agreement invokes the jurisdiction of either body, that body is unable to "determine for itself" any alleged non-compliance with the provisions that are of "no effect". The effect of s 691C(1) and s 691D(3) of the *Industrial Relations Act* is that the QIRC and the Industrial Court are directed by the Parliament as to the decision that must be reached in any such proceedings.

[96] The Together Union parties claimed that s 691C and s 691E infringed the *Kable* principle for generally the reasons advanced by the AWU. It was submitted that the impugned provisions direct the QIRC to ignore aspects of its decisions which the State regards as unfavourable to it and that "the reality and not merely the appearance of the Commission's independence and impartiality is savaged by such a course". The Together Union parties submitted that even if this were not an interference with the QIRC's exercise of judicial power, it resulted in an erosion of public confidence in all of the QIRC's functions.

Consideration of the Kable arguments

[97] In *South Australia v Totani*,[125] French CJ described aspects of the *Kable* principle as follows:[126]

> "The consequences of the constitutional placement of State courts in the integrated system include the following:

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122 (1985) 157 CLR 57 at 83–84.
123 (2011) 243 CLR 181 at [36].
124 (2011) 243 CLR 181 at 192 [7].
125 (2010) 242 CLR 1 at [69].
126 At 47.

1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.
2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.
3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality…" (citations omitted)

[98] The Chief Justice explained the concept of "institutional integrity" as follows:[127]

> "The question indicated by the use of the term 'integrity' is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity. By way of example, a law which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court, would be inconsistent with the subsistence of judicial decisional independence." (citations omitted)

[99] The following observations of the Chief Justice concerning the application of the *Kable* principle are also relevant:[128]

> "4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation because: 'the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes.' For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.
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> 5. The risk of a finding that a law is inconsistent with the limitations imposed by Ch III, protective of the institutional integrity of the courts, is particularly significant where the law impairs the reality or appearance of the decisional independence of the court."

[100] As a general proposition, legislation will infringe the *Kable* principle, by impermissibly impairing "the character of the courts as independent and impartial

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127 At 48.

128 At 47–48.

tribunals", [129] if it "purports to direct the courts as to the manner and outcome of the exercise of their jurisdiction".[130]

[101] A similar proposition was stated by Crennan and Bell JJ in *South Australia v Totani*:[131] "Legislation which draws a court into the implementation of government policy, by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes, will deprive that court of the characteristics of an independent and impartial tribunal – 'those defining characteristics which mark a court apart from other decision-making bodies'. Such legislation would render that court an unsuitable repository of federal jurisdiction." (citations omitted)

and by Callinan and Heydon JJ in *Fardon v Attorney-General (Qld)*:[132]

> "So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the *Constitution*."

[102] Sections 691C, D and E do not impinge in any way on the decision making independence or impartiality of the QIRC or the Court. The award making power and the power to certify are creatures of statute which the Parliament may revoke or vary from time to time. The Parliament may prescribe what may or may not be contained in awards. It did that in s 126 of the Act, prior to the enactment of the *Amendment Act*. Similarly, it may prescribe the requirements for certification and the procedures relating to applications for certification. It did that in ss 153, 154 and 155 prior to the enactment of the *Amendment Act*. As the respondent submitted, the effect of ss 691C, 691D and 691E is to attach new legal consequences to parts of existing instruments and to state the legal consequences of relevant provisions in future instruments.[133]

[103] In *The Australian Building Construction Employees' and Builders' Labourers Federation v The Commonwealth of Australia*,[134] the Court said:

> "It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.
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> > 'Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action.'

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129 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39]; and see also *South Australia v Totani* (2010) 242 CLR 1 at 63 per Gummow J.

130 *South Australia v Totani* (2010) 242 CLR 1 at 63 per Gummow J.

131 (2010) 242 CLR 1 at 157 [428].

132 (2004) 223 CLR 575 at [219].

133 Cf *Australian Education Union v General Manager of Fair Work Australia* (2012) 86 ALJR 595 at [48]–[49].

134 (1986) 161 CLR 88 at 96.

> (*Reg. v. Humby; Ex parte Rooney*.) So, in *Nelungaloo Pty. Ltd. v. The Commonwealth*, the validity of the *Wheat Industry Stabilization Act (No 2)* 1946 (Cth) was upheld, notwithstanding that the Act validated an order for the acquisition of wheat, the validity of which was in issue in the proceedings.
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> It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings."

[104] The legislation says nothing about the way in which the Industrial Court or the QIRC must perform their respective duties. It merely provides a legal framework for decision making. There is no legislative or executive direction of the QIRC or the Industrial Court nor is there anything in the subject legislation which compromises the Industrial Court's or the QIRC's integrity and independence.

[105] Section 691C was said to direct the award making power. It was explained that the Act gave the QIRC the responsibility of making industrial instruments that may make provision for job security if the QIRC considered such a provision was necessary to make an award that provided for "fair and just employment conditions". Despite this mandate, according to the argument, the QIRC, because of s 691C, would have to make an award that omitted the job security provision. The QIRC would thus have to err in law by not including an appropriate job security provision or include a job security provision which would have no effect.

[106] Another argument advanced by the Together Union parties was that if the QIRC exercised judicial power by granting an injunction compelling compliance with a certified agreement it would be required "to renege" upon the effect of its decision certifying that agreement. The Supreme Court, it was argued, would be deprived of the capacity in its supervisory jurisdiction to correct the situation.

[107] There would be no "reneging" by the QIRC or need for the Supreme Court to make any correction. Both bodies would be required to apply the law as it existed at the date of their respective determinations.[135]

[108] When the QIRC makes a decision, it will do so against the background of the existing law, i.e. the law as altered by the *Amendment Act*. The AWU's and the Together Union parties' arguments do not take into consideration the requirement that the meaning of a statutory provision must be determined "by reference to the language of the instrument viewed as a whole" and that "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals".[136] The new provisions must be read with the old "as one connected and combined statement of the will of Parliament".[137] Moreover, in construing the *Industrial Relations Act* it cannot be thought that the quite specific, and later, provisions inserted by the *Amendment Act* would not prevail over the more general, and earlier, provisions relied on in the arguments just discussed.

[109] The State was content to assume for the purposes of argument that the Industrial Court and the QIRC were Chapter III courts. The same assumption is made in these reasons, but it remains relevant that neither the making of awards nor the

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135 See *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58.

136 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–382.

137 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 479.

certification of agreements involves the exercise of judicial power. Consequently, in order to establish that the subject legislation attracts the *Kable* principle, it would need to be shown, not merely that the role of the QIRC, or the Industrial Court where relevant, is affected by the subject legislation, but that the role of the QIRC, or where relevant the Industrial Court, is so affected that it is not an appropriate recipient of invested Federal Jurisdiction. Neither body would be an appropriate recipient of invested Federal Jurisdiction if its institutional integrity was disturbed by its no longer exhibiting "in some relevant respect those defining characteristics which mark a court apart from other decision making bodies".[138]

[110] The necessity to give effect to the subject legislation in decisions of the QIRC and the Industrial Court does not require the processes, practices and procedures of either body to change. Neither body, in applying the subject legislation, will be called upon to act and decide effectively as the alter ego of the legislature or the executive. Neither body will be required to give effect to a decision of an executive authority as if it were a judicial decision of that body. The subject legislation does not confer on members of the QIRC or the Industrial Court any function which is substantially incompatible with the functions of their respective tribunals.[139] The institutional integrity of both bodies remains unaffected. The subject legislation does not infringe the *Kable* principle.

Whether this Court has jurisdiction to consider whether s 3B of the *Amendment Act* breaches the *Kable* principle

[111] The AWU complained also of the effect of s 3B of the *Amendment Act*, which inserted a new paragraph in s 53 of the *Public Service Act* 2008. The amended provision would enable the chief executive to make directives about "the remuneration and conditions of employment of public service employees" which would, by virtue of s 52 of the *Public Service Act* 2008, prevail over the industrial instruments of the QIRC unless a regulation provided otherwise.

[112] Section 3B, however, will not commence until 1 January 2013. The State of Queensland pointed out that there was no evidence to suggest that once it commenced the Public Service Commissioner had any intention to make a directive under s 53(baa), or that if a directive were to be made it would affect any industrial instrument to which the AWU was a party. In the circumstances, this court had no jurisdiction, the State argued, to hear a constitutional challenge in respect of s 3B because in doing so it would be exercising Federal jurisdiction, which was restricted in the way the High Court described in *Re Judiciary and Navigation Acts*:[140]

> "…there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court. If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained…But it cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law."[141]

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138 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

139 Cf *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 at [35].

140 (1921) 29 CLR 257.

141 At 265 -266.

[113] In response, the AWU argued that it was artificial to ignore the fact that the *Amendment Act* had been passed and received royal assent. Section 3B was not severable from s 691C and s 691D.[142] If the AWU had standing to challenge those sections, it extended to s 3B as well. In *Bass v Permanent Trustee Co Ltd*[143] the majority had endorsed Barwick CJ's statement in *Commonwealth v Sterling Nicholas Duty Free Pty Ltd*[144] that the court had jurisdiction to declare that conduct which had not yet taken place would not be in breach of a contract or a law.[145] It was not critical that there was no evidence that a directive pursuant to s 53(baa) of the *Public Service Act* would be made; the mere fact that the Act created a scheme under which the chief executive had power to make such a directive impaired the reality and appearance of impartiality and independence of the QIRC and the Industrial Court.

[114] The AWU is right to say that the absence of evidence that a directive will be made is beside the point. Brennan CJ, Dawson and Toohey JJ left no doubt on the point in their joint judgment in *Croome and Anor v State of Tasmania*:[146]

> "It is a misconception of the principle in *In Re Judiciary and Navigation Acts* to suggest that, in proceedings for a declaration of invalidity of an impugned law, no law is administered unless the executive government has acted to enforce the impugned law."[147]

In their joint judgment, Gaudron, McHugh and Gummow JJ added this explanation of *Re Judiciary and Navigation Acts* and what was meant by the reference to administering the law:

> "The administration referred to is that of the courts in dispensing justice. The concern of the Court in *In re Judiciary and Navigation Acts* was to establish that Ch III is an exhaustive statement of that judicial power which may be conferred for the exercise of federal jurisdiction. A determination of questions of law on a reference by the Executive Government to the High Court could only be made, if at all, in exercise of the judicial power of the Commonwealth. A determination of such questions, if they do not arise in a legal proceeding where there is some immediate right, duty or liability to be established by the determination of the Court, does not fall within that judicial power which may be exercised under Ch III."[148]

[115] The difficulty with the AWU's argument is that the proposed s 53(baa) is not presently an operating part of any scheme created by the *Public Service Act*. (Indeed, on one view, the AWU's real complaint is of the effect of s 52 of that Act, which gives the chief executive's directives primacy over industrial instruments; but the Union mounted its argument only in respect of s 3B of the *Amendment Act*.)

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142 Reference was made to the joint judgment of Gummow, Crennan and Bell JJ in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69, holding that a plaintiff who could demonstrate invalidity of part of a statute directly affecting payments to be made to him had standing to argue the question of whether remaining provisions of the statute, relating to payments for which he was not eligible, were severable, and noting that there was utility in allowing him to do so.

143 (1999) 198 CLR 334.

144 (1972) 126 CLR 297.

145 At 305.

146 (1997) 191 CLR 119.

147 At 126.

148 At 136.

The hurdle is insurmountable. Whatever the practical advantages of resolving the validity of s 3B at the same time as dealing with s 691C and s 691D, s 3B has not commenced in operation. It is not presently a law to which the parties are subject, and any rights duties or liabilities which the Court might discern in it are prospective, not immediate.

[116] There is, therefore, no justiciable matter, and this Court has no jurisdiction to consider whether s 3B of the *Amendment Act* breaches the *Kable* principle.

Whether s 23B of the Amendment Act, to the extent that it inserts s 691D into the IRA is inconsistent with Part 6-4 of the Fair Work Act 2009 (Cth) and thereby inoperative

[117] The AWU contended that s 23B of the *Amendment Act* insofar as it inserted s 691D into the *Industrial Relations Act* was inconsistent with Part 6-4 of the *Fair Work Act* 2009, and was thus rendered inoperative by s 109 of the *Constitution*. The argument focussed on s 786 and s 787 of the *Fair Work Act*, provisions contained in Division 3 of Part 6-4. The *Fair Work Act*'s coverage is generally confined to "National system employees",[149] but the reach of Part 6-4 is broader, with "employee" and "employer" given their ordinary meanings throughout it.[150] The Part is headed "Additional provisions relating to termination of employment". Section 769 provides the "Guide" to Part 6-4; it explains:

> "This Part contains provisions to give effect, or further effect, to certain international agreements relating to discrimination and termination of employment...Division 3 sets out notification and consultation requirements in relation to certain terminations of employment".

[118] Division 3 of Part 6-4 is headed "Notification and consultation requirements relating to certain terminations of employment". Section 784 sets out the object of the Division, which is "to give effect, or further effect" to the International Labour Organisation Convention concerning Termination of Employment at the Initiative of the Employer and the Termination of Employment Recommendation adopted by the General Conference of the International Labour Organisation.

[119] Article 13 of the Termination of Employment Convention requires an employer contemplating termination for specified reasons to provide workers' representatives, firstly, and in good time, with relevant information which includes the reasons for the terminations, the numbers and categories of workers likely to be affected and the period over which the terminations will be carried out; and secondly, and as early as possible, with an opportunity for consultation on measures to avert or minimise the terminations and their adverse effects on the workers concerned.

[120] The Recommendation, which supplements the Convention with more detailed guidelines, includes this provision as to consultation:

> "CONSULTATIONS ON MAJOR CHANGES IN THE UNDERTAKING
>
> 20. (1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or

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149 Sections 13 and 14 of the *Fair Work Act* explain who is a "National system employee" and who is a "National system employer".

150 Section 720 of the *Fair Work Act*.

technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have."

[121] The first of the provisions the subject of contention here, s 786, deals with Fair Work Australia's ability to make an order in the event of an employer's non-compliance regarding notification and consultation, and with what amounts to compliance:

"**786 FWA may make orders where failure to notify or consult registered employee associations about terminations**

(1) FWA may make an order under subsection 787(1) if it is satisfied that:

(a) an employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and

(b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee associations) or subsection (3) (which deals with consulting relevant registered employee associations); and

(c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

Notifying relevant registered employee associations

(2) An employer complies with this subsection if:

(a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:

(i) the proposed terminations and the reasons for them;

(ii) the number and categories of employees likely to be affected;

(iii) the time when, or the period over which, the employer intends to carry out the terminations; and

(b) the notice is given:

(i) as soon as practicable after making the decision; and

(ii) before terminating an employee's employment in accordance with the decision.

Consulting relevant registered employee associations

(3) An employer complies with this subsection if:

(a) the employer gives each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, an opportunity to consult the employer on:

(i) measures to avert or minimise the proposed terminations; and

(ii) measures (such as finding alternative employment) to mitigate the adverse effects of the proposed terminations; and

(b) the opportunity is given:

(i) as soon as practicable after making the decision; and

(ii) before terminating an employee's employment in accordance with the decision."

[122] The orders which Fair Work Australia may and may not make are set out in the following section:

"787 Orders that FWA may make

(1) FWA may make whatever orders it considers appropriate, in the public interest, to put:

(a) the employees; and

(b) each registered employee association referred to in paragraph 786(2)(a) or (3)(a);

in the same position (as nearly as can be done) as if the employer had complied with subsections 786(2) and (3).

(2) FWA must not, under subsection (1), make orders for any of the following:

(a) reinstatement of an employee;

(b) withdrawal of a notice of termination if the notice period has not expired;

(c) payment of an amount in lieu of reinstatement;

(d) payment of severance pay;

> (e) disclosure of confidential information or commercially sensitive information relating to the employer, unless the recipient of such information gives an enforceable undertaking not to disclose the information to any other person;
>
> (f) disclosure of personal information relating to a particular employee, unless the employee has given written consent to the disclosure of the information and the disclosure is in accordance with that consent."

Section 788 provides that Fair Work Australia may make an order under s 787(1) only on application by one of the employees or a registered employee association entitled to represent the industrial interests of one of the employees.

[123] Section 691D of the *Industrial Relations Act* has already been set out in these reasons. By way of background for that provision, Division 2 of Part 4, Chapter 3 of the *Industrial Relations Act*, before amendment, contained provisions giving effect to article 13 of the Termination of Employment Convention. The Division applied when an employer decided to dismiss 15 or more employees for an economic, technological or structural reason.[151] It prescribed notification and consultation by employers in generally similar terms to those in s 786(2) and (3) of the *Fair Work Act*, except that it provided that an employer could dismiss employees only if the prescribed notification was given[152] and that the employer "must" give employee organisations the opportunity to consult.[153] The *Amendment Act* removed the Division's application to employees covered by a "relevant industrial instrument".[154] At the same time, s 691D was enacted to apply where a "relevant industrial instrument" included a "TCR" provision about notification or consultation.

[124] The AWU relied on both direct and indirect inconsistency of the kinds identified by Dixon J in *Victoria v The Commonwealth*:[155]

> "When a State law, if valid, would alter, impair or detract from the operation of the law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent."[156]

Direct inconsistency

[125] The AWU argued that the insertion of s 691D altered, impaired and detracted from obligations imposed on employers by s 786. Fair Work Australia's power to make an order depended on non-compliance with s 786(2) and (3), which led by

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151 Section 89.
152 Section 90.
153 Section 90A.
154 Section 22A.
155 (1937) 58 CLR 618.
156 At 630.

implication to the conclusion that there was an obligation to comply with those subsections. The existence of an obligation to consult and notify was consistent with the object of the division as giving effect to the Termination of Employment Convention and in particular, article 13. If s 786 did not impose such an obligation, the object of Division 3 of Part 6-4, to give effect or further effect to the Termination of Employment Convention and the associated Recommendation, would be defeated. Fair Work Australia did not have a discretion whether to make an order, but an obligation to do so once it was satisfied that the matters in s 786(1)(a), (b) and (c) existed.

[126] Section 691D purported to state the law in a way which was directly inconsistent with s 786. The former provision authorised the making of an award containing provisions consistent with the principles set out in s 691D(2) which then, although inconsistent with s 786, would have the force of law. And s 691D denied or varied the positive obligations placed on employers under s 786 to notify and consult as soon as practicable. Section 786 made detailed provision in respect of the timing and extent of notification and consultation with employee organisations where the decision was made to terminate 15 or more employees for the specified reasons. In particular, it required that the employer notify and consult as soon as practicable after a decision had been made. Section 691D, on the other hand, allowed the employer to decide when it was appropriate to notify an employee association of a decision, and permitted consultation to be deferred until after that notification. It limited consultation to the implementation of the decision to terminate, whereas s 786 specified that consultation should include measures to avert or minimise the effects of the proposed terminations.

[127] The State contended that s 786 imposed no requirement on an employer to give notice or to consult. It was to be contrasted with s 785 of the Act, which provided that if an employer decided to terminate 15 or more employees for the same reasons as those specified in s 786(1)(a), he "must" give a written notice about the proposed terminations to the chief executive officer of Centrelink. Subsection (4) provided that the employer "must not" terminate an employee's employment unless he had complied with the section. Subsection (5) dealt with the orders which could be made under s 545(1) of the Act (which dealt with contravention of civil remedy provisions) in respect of a contravention of ss (4). Section 550 defined "civil remedy provision" as including s 785, but not 786.

[128] Section 785 created obligations; the language of s 786 was entirely different. It merely conferred a general discretion upon Fair Work Australia to make orders if certain facts were found to exist: those set out in ss (1)(a) – (c), which included a failure to comply with ss (2) and (3). It did not make any reference to contravention. There was a possible consequence for an employer if he failed to notify or consult in the way provided for in ss (2) and (3), but no obligation for him to do so. The terms of s 691D did not conflict with s 786, because the former simply made it clear that there was no obligation under Queensland industrial instruments to notify or consult; but s 786 did not assume the existence of any obligation before it could operate.

[129] The starting point for considering inconsistency is to ascertain the respective effects of the provisions said to be inconsistent. In respect of s 691D, that is made somewhat more difficult by the unusual choice of expression in subsection (2): "the following principles apply". Both by reason of its reference to "principles" and the

absence of any statement as to their context and extent, the meaning of the sub-section is obscure. The following paragraphs (a) to (c), each of which limits an obligation to notify or consult, do not constitute what one would ordinarily regard as principles. The word must have some significance; the only explanation for its use is that the "principles" in (a) to (c) are the tenets by which the industrial instrument is to be construed and applied, rather than amounting to any general statement of employer rights or duties. The effect of the section, then, is that employers have no obligation by virtue of anything contained in an award to notify or consult beyond the requirements of s 691D, rather than that they are exempt for all purposes from any wider obligation.

[130] Section 786 is also unusual, because it does not in terms command anything of an employer; it merely formulates a series of acts the performance of which will avert consequences by way of orders. As the State says, there is an obvious contrast between its language and that of s 785, which is clearly that of requirement. On the other hand, there are general references to the provisions in Division 3 of Part 6-4 as containing requirements, without distinctions drawn between them: in s 769, which refers to Division 3 as setting out "notification and consultation requirements" and in the heading of the Division in similar terms. In any event, it may be too narrow an approach, in considering whether conflict exists, to confine attention to the existence or absence of imperative terms. In *Momcilovic v The Queen*[157] Crennan and Kiefel JJ made this observation:

> "Direct inconsistency can also arise where there is a direct conflict or collision between Commonwealth law and a State law, each of which creates rights and duties or imposes obligations by stating a rule or norm of conduct and a sanction for a breach of that rule or norm."[158] (Footnote omitted.)

It is arguable that s 786, by stating (in s-ss (2) and (3)) a norm of conduct and (in s-s(1)) a sanction for its breach, does in that sense impose an obligation which could give rise to direct inconsistency.

[131] But assuming that s 786 imposes an obligation of that kind, s 691D does not absolve employers of that obligation; it merely removes the industrial instrument as an additional source of such an obligation. Section 691D does not provide for the making of awards in any particular form, as opposed to applying to existing instruments the "principles" contained in the section. A new award might be expressed in such a way as to adopt those principles, in which case questions of operational inconsistency might arise as between it and Fair Work Australia's power to make orders under s 787, but that is a different issue.

[132] One can also consider the question of inconsistency from the point of view of rights, as opposed to obligations. The combined effect of s 786, s 787 and s 788 is to give an employee or an employee association a right to seek an order from Fair Work Australia if notification or consultation in terms of s 786(2) and (3) has not taken place. Nothing in s 691D hinders the exercise of that right.

[133] The insertion of 691D in the *Industrial Relations Act* does not alter, impair or detract from the operation of ss 786 and 787; no direct inconsistency exists.

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157 (2011) 245 CLR 1.

158 At [632].

Indirect inconsistency

[134] Whether indirect inconsistency exists

> "depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."[159]

[135] On the AWU's argument, the Commonwealth Parliament had intended Part 6-4 of the *Fair Work Act* to be a complete statement of the law regarding termination in relation to employers and employees who fell outside the Federal system. The purpose of the Part, as identified, was to give effect to the Termination of Employment Convention, and the fact that it had been enacted in reliance on the external affairs power indicated that the Commonwealth intended to cover the field in respect of its subject matter. Section 691D of the *Industrial Relations Act* attempted to regulate and deal with the same subject matter as that contained in s 786 of the *Fair Work Act* in a manner that detracted from the latter's operation.

[136] The State's response was that s 722 of the *Fair Work Act* provided an indication that there was room left for the operation of State law in the same field. Section 722 is in the following terms:

> "**722 Notification and consultation requirements applications**
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> FWA must not make an order under subsection 532(1) or 787(1) if FWA is satisfied that there is available to the applicant, or to the employees represented by the applicant, an alternative remedy that:
>
> (a) exists under a law of the Commonwealth (other than Division 2 of Part 3-6 or Division 5 of Part 6-1) or a law of a State or Territory; and
>
> (b) will give effect, in relation to the employees and registered employee associations concerned, to the requirements of Article 13 of the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4)."

[137] The State's argument on this point must be accepted. Section 722 plainly contemplates the possibility of State legislation, along similar lines to s 786, giving effect to article 13. Indeed, before the *Amendment Act* was passed, Division 2 of Part 4 Chapter 3 did precisely that, and continues to do so where no industrial agreement is in place. The existence of s 722 negates any prospect that s 786 was intended to be exhaustive on the subject matter of notification and consultation before termination.

[138] Section 23B of the *Amendment Act*, to the extent that it inserts s 691D into the *Industrial Relations Act*, is not inconsistent with Part 6-4 of the *Fair Work Act*.

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159 *Ex parte McLean* (1930) 43 CLR 472 per Dixon J at 483.

Orders

[139] For the reasons given, all of the issues in the Agreed Statement of Issues are resolved against the AWU and the Together Union parties. Since the declarations of invalidity sought in their proceedings depended in their entirety on favourable answers to the questions asked, the orders must now be as follows:

1. Proceeding number BS9035 of 2012 is dismissed with costs.

2. Proceeding number BS8204 of 2012 is dismissed with costs.