LIMITS TO STATE PARLIAMENTARY POWER AND THE PROTECTION OF JUDICIAL INTEGRITY: A PRINCIPLED APPROACH?

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Case citation; *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24

I. BACKGROUND

The case of *Wainohu v New South Wales* (2011) (*'Wainohu')* was a challenge by Derek Wainohu, a member and former president of the Sydney Branch of the Hells Angels Motorcycle Club, against the constitutional validity of the *Crimes (Criminal Organisations Control) Act 2009* (NSW) ('the Act'). The case revisits the limits to State parliamentary power outlined fifteen years ago in *Kable v Director of Public Prosecutions (NSW)*[1] *('Kable')* and the scope of possible exceptions provided by the *persona designata rule,* against the backdrop of community uproar over gang violence that sparked the enactment of the impugned law.

The shooting of a bikie member at the Qantas terminal of Sydney Airport in March 2009 and the subsequent community outrage and media coverage prompted the New South Wales Parliament to consider and pass the Act all in one day on 2 April 2009. The Act received assent the next day and commenced immediately.

In relation to Derek Wainohu, the Act was enlivened on 6 July 2010 when the New South Wales Acting Commissioner of Police lodged an application with the Registry of the New South Wales Supreme Court seeking a declaration under Pt 2 of the Act by an 'eligible Judge' of the New South Wales Supreme Court that the Hells Angels Motorcycle Club was a 'declared organisation' under the Act. The declaration, if made, would give rise to further powers under the Act, which would have the effect of creating limitations on the activities in which members of the organisation could engage. Under s 35 of the Act, such

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[1] (1996) 189 CLR 51.

a declaration could not be reviewed (although as noted in the case of *Kirk v Industrial Court (NSW)*,[2] such ouster clauses have limited effect in relation to claims of jurisdictional error). Significantly, s 13(2) of the Act exempts an eligible Judge from any duty to give reasons for making or refusing to make a declaration (other than to a person conducting a review under s 39 if that person so requests). Under s 39(2), the Ombudsman may require an eligible Judge to provide 'information' about the exercise of police powers pursuant to such a declaration. The right of appeal in s 24 is limited to control orders under Pt 3 of the Act.

The basis for the challenge to the Act's validity was the proposition that the Act confers functions upon eligible Judges of an Australian court that could undermine the institutional integrity of that court. Supporting this proposition was the argument that under the Act an eligible Judge would be exercising an administrative power without being subject to the rules of evidence or providing reasons for decisions. The plaintiff also contended that the Act infringed the freedom of political communication and political association implied from the Constitution.

II. THE MAJORITY JUDGMENT

The majority of Gummow, Hayne, Crennan and Bell JJ ultimately found that Part 2 of the Act was invalid due to the application of the principles found in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[3] *('Wilson')* and *Kable*. These cases stand for the principle that the appointment of a judge to a position with executive powers could undermine the institutional integrity of the judge's court if the non-judicial function was incompatible with the judge's judicial position. The Court emphasised that the *Kable* principle applies through the entire Australian integrated court system because the many levels of the national court system cannot provide 'different grades or qualities of justice'.[4]

The majority in *Wainohu* determined that there was no statutory requirement for reasons to be provided by a judge making a declaration or decision under the Act.[5] The Court then found that the

[2] (2010) 239 CLR 531.
[3] (1996) 189 CLR 1.
[4] *Wainohu v State of New South Wales* [2011] HCA 24 [105], quoting *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 [103].
[5] *Wainohu v State of New South Wales* [2011] HCA 24 [95-104].

absence of a requirement to provide reasons was incompatible with the Supreme Court's institutional integrity.[6]

According to the majority, reasons are a key aspect of judicial decision-making,[7] and there is likely to be an obligation under *Public Service Board of NSW v Osmond*[8] to provide reasons in this instance given the seriousness of the consequences for the person subject to the application.

The majority judgment relied on two key precedents. The first authority is the joint judgment of Mason and Deane JJ in *Hilton v Wells*[9] *('Hilton')* which clearly stated that an eligible Judge discharging substantial non-judicial functions under the relevant act could undermine the integrity of the court system. For example, an application for a declaration in respect of an organisation would require that the judge take into account 'information' and 'submissions' that would not be admissible in a court of law or subject to any judicial process. The second authority relied upon by the majority is the reasoning of Gaudron J in *Wilson*[10] which identified the limits of the *persona designata* doctrine – ensuring impartiality, providing reasons and maintaining public confidence.

In this case, the majority found that there was too much overlap between the judge's non-judicial role as a *persona designata* and their judicial role; the hearing of the application would result in a decision similar to that of a judicial outcome but without a fundamental aspect of the judicial process – the giving of reasons.

In other words, the decision of a judge acting in a non-judicial role (which may appear to the public to be a judicial role) without the provision of reasons for such decision undermines the institutional integrity of the judge's judicial role and function. As the majority noted, quoting *Hilton*, '[A]n observer might well think, with some degree of justification, that it is all an elaborate charade.'[11]

The majority struck down the operation of Part 2 of the Act because it would undermine the public's confidence in 'impartial, reasoned and public decision-making' by eligible Judges through supporting

[6] *Wainohu v State of New South Wales* [2011] HCA 24 [104-109].
[7] *Wainohu v State of New South Wales* [2011] HCA 24 [92].
[8] (1986) 159 CLR 656.
[9] (1985) 157 CLR 57 (83-84).
[10] (1996) 189 CLR 1.
[11] *Wainohu v State of New South Wales* [2011] HCA 24 [106].

'inscrutable decision-making' under s 9 and s 12.[12] The majority found that the statute limits the requirement to provide reasons and thus undermines the Supreme Court's integrity, regardless of the actions, probity and integrity of individual judges acting in the non-judicial role – a direct dismissal of the core of Justice Heydon's dissenting judgment.

The majority found that the operation of Part 3 relied on the valid operation of Part 2 and that the effect of invalidating s 13(2) was that the entire Act was invalid as the remaining parts of the Act could not be severed.[13]

III. THE CONCURRING JUDGMENT OF FRENCH CJ AND KIEFEL J

French CJ and Kiefel J concurred with the majority in stating that the nature of the power conferred on the eligible Judges of the Supreme Court by the provisions in the Act undermines the integrity of that court. Their judgment is noteworthy for the detailed examination of the relevance of, and limits on, the *persona designata* mechanism[14] and its relationship to the separation of powers doctrine and other limits on (State) legislative power.

Although States are not bound by notions of the separation of powers, State Parliaments cannot give courts or judges functions that are incompatible with a court's essential and defining characteristics and every court's role in the integrated Australian court system created by Ch III of the *Commonwealth Constitution*. The provision in s 13 of the Act that a judge is not required to give reasons for a decision of such importance makes the Act incompatible with a court's essential characteristics.

French CJ and Kiefel J noted that judges can be appointed to non-judicial functions but caution must be exercised in such an appointment because such function may affect the independence and impartiality of courts, may attract political controversies, and/or may be onerous. The justices reviewed the High Court's recent development of these concepts starting with *Drake v Minister for Immigration and Ethic Affairs*,[15] *('Drake')* which determined that a Federal Court judge could

[12] *Wainohu v State of New South Wales* [2011] HCA 24 [109].
[13] *Wainohu v State of New South Wales* [2011] HCA 24 [115].
[14] The *persona designata* mechanism refers to a situation in which a judge acting in their personal capacity, rather than as a member of the court to which they belong, can exercise non-judicial powers without breaching the separation of powers doctrine.
[15] (1979) 24 ALR 577.

also sit in a non-judicial role on the Administrative Appeals Tribunal. The Court in *Drake* did not engage in any discussion of possible limits on this arrangement. In *Hilton*,[16] the High Court upheld the *persona designata* concept to allow Federal Court judges to exercise an administrative function in authorising telephone taps. The dissent in *Hilton* by Mason and Deane JJ noted the appearance to the public of a connection between the judge's judicial and non-judicial activity may be a limit on the concept's application. The majority in *Hilton* observed that a potential limit on the *persona designata* mechanism may exist if the non-judicial function is incompatible with the judge's judicial role. The *persona designata* concept was also applied successfully to allow a judge to exercise a non-judicial function in *Grollo v Palmer*[17] (*'Grollo'),* but with two conditions – the need for a judge's consent to acting in the role and the requirement that there be no incompatibility with the proper discharge of the judicial function. McHugh's J dissent in that case adopted the incompatibility principle, but stated that the public could not distinguish between the judge's judicial and non-judicial roles and thus McHugh J found that institutional independence had been undermined in that case. Next, French CJ and Kiefel J held that *Wilson*[18] expanded the application of the doctrine to judges even if their judicial office was not a requirement of their non-judicial appointment. Significantly, in *Wilson*, the *persona designata* argument failed and the High Court struck down the non-judicial appointment as incompatible with the judge's position on the Federal Court. Importantly, the Court in *Wilson* determined that it is irrelevant what measures an individual judge may take to avoid the incompatibility as the issue is whether the functions themselves are incompatible.

Moving to the States, the justices argue that the incompatibility doctrine is also found in *Kable*,[19] although it does not find its basis in the separation of powers doctrine. The limit on State power is that the State legislature cannot undermine the 'institutional integrity' of a court in the integrated Australian court system. The concept of institutional integrity is equated with the 'essential characteristics' of a court – impartiality, procedural fairness, open courts and the giving of reasons. In that sense, there cannot be different grades of justice between federal and State courts.

[16] (1985) 157 CLR 57.
[17] (1995) 184 CLR 348.
[18] (1996) 189 CLR 1.
[19] (1996) 189 CLR 51.

The justices inferred from *Kable*[20] that, even if the non-judicial function is conferred on the judge in their individual capacity, the function may nevertheless create a close connection between the judge's non-judicial function and their court role in a way that undermines the integrity or fundamental characteristics of that court. The justices argue that *persona designata* does not resolve the question of incompatibility. The fact that the judge is 'detached' from their judicial role is relevant, but if it is their status as a judge that forms the basis of their appointment to the non-judicial role, then the detachment may be insufficient to remove the incompatibility.

The justices warned of the risks of adopting the principle of incompatibility too swiftly and warned that it should be exercised with 'restraint' as courts should recognise the 'long history' of legislatures creating extra-judicial roles for judges.

French CJ and Kiefel J also examined the requirement of courts to provide reasons. While the justices cited the judgment of Gibbs CJ in *Public Service Board of New South Wales v Osmond*[21], which stated that there was no 'inflexible rule of universal application' that reasons be given for judicial decisions, they emphasise the subsequent development of the duty to provide reasons in *Grollo*[22] and *AK v Western Australia*.[23] The justices found that the duty to give reasons is an incident of the judicial function, strongly supported by policy considerations. [24] They emphasised that the duty will arise in judicial decision-making, even if there is no appeal available from that decision. The policy reason identified by the justices in support of this notion is the 'open court' principle which states the courts should be subject to public scrutiny.[25]

In considering the function of an eligible Judge under the Act, the justices argued for a focus on 'substance' rather than 'form' and noted that the eligible Judge performing their non-judicial function under the Act would appear to the public to be a judge of the Supreme Court. Such a non-judicial function, fulfilled without the requirement to provide reasons, was incompatible with the Supreme Court's integrity and fundamental characteristics.

[20] (1996) 189 CLR 51.
[21] (1986) 159 CLR 656.
[22] (1995) 184 CLR 348.
[23] (2008) 232 CLR 438.
[24] *Wainohu v State of New South Wales* [2011] HCA 24 [53-55].
[25] *Wainohu v State of New South Wales* [2011] HCA 24 [57].

Like the majority, French CJ and Kiefel J emphasised that the personal conduct of an eligible Judge, such as choosing to provide reasons for a declaration, does not resolve the issue of whether the limits on legislative power have been exceeded in a particular case.[26]

IV. HEYDON'S J DISSENT

Heydon J argued in favour of the Act's validity because, in his opinion and amongst many other grounds, there was insufficient empirical evidence to support the contention that a judge exercising the powers given under the Act would in fact undermine public confidence in the integrity of the judiciary.

The dissent argued strongly against any expansion of the incompatibility doctrine in limiting State legislative power. Heydon J asserted that judges would be likely to provide reasons for their decisions regardless of the Act's insistence that reasons are not required to be given. Heydon J also argued that the judicial duty to provide reasons (if it does exist) is not sacrosanct and has been removed by parliament in other situations without any ensuing invalidity of the Act removing the duty. His Honour also supported counsel's arguments that some of the High Court's previous jurisprudence on this issue overstated both the concern of the public about the exercise by judges of non-judicial functions and the extent to which State powers should be fettered in relation to State courts.

In the earlier decison in *South Australia v Totani*[27] on similar legislation, Heydon J referred to the difficulties caused by the *Kable* doctrine. In particular, he noted that intermediate appellate courts have experienced difficulties in understanding and applying the doctrine, which is a reason for courts to be cautious about expanding its scope.[28]

V. FURTHER COMMENT

Narrowly construed, *Wainohu* is another example of the common law method of developing principle: an ongoing, case-by-case evolution based on the constant re-interpretation of a signal case. However, it is arguable that the judgment of French CJ and Kiefel J provides a new basis for limiting State parliamentary sovereignty, as it presents an extended rationale for a more interventionist approach by courts to parliamentary interference with judicial independence. The concurring

[26] *Wainohu v State of New South Wales* [2011] HCA 24 [69].
[27] (2010) 242 CLR 1.
[28] (2010) 242 CLR 1, 95-97.

judgment of French CJ and Kiefel J develops the principles in this area by de-centering the importance of the 'label' *persona designata* (and its possible implicit limits) and re-focusing attention on the real or underlying concern, that is, the interaction between the judicial and non-judicial roles of eligible Judges.

The main concern with the concept of incompatibility is not the empirical one raised by Heydon J. The law deals with many areas of 'public concern' without reliance on public polling or other means of ascertaining public opinion, such as 'attending barbecues' or 'gladhanding at public events'. Judges' independence and their daily involvement in court life are suitable and sufficient bases for making determinations on matters of institutional integrity and public confidence. The real concern with incompatibility is how to logically justify the 'grandparenting' of historic non-judicial functions that essentially are incompatible with judicial decision-making but are still to be maintained under the guise of 'long standing practice'. While it is right to avoid 'the application of a Montesquieuan fundamentalism',[29] at the same time it is difficult to clearly see when historical practice will be sufficient justification for an ongoing arrangement, such as the example mentioned by French CJ and Kiefel J of the appointment of a judge to chair the National Crime Authority.

A clearer approach may emerge from following McHugh's J dicta in *Hilton*[30] on the importance of maintaining judicial independence from executive or legislative interference. The concept of independence was also central to the actual analysis by French CJ and Kiefel J of the actions of an eligible Judge under the Act. The notion of 'decisional independence' may provide future courts with a fruitful direction in relation to understanding the limits of State legislative power by allowing an evaluation of the real risk associated with parliamentary overreach: abuse of power through the absence of proper checks and balances.

All three judgments went beyond a formal analysis of the text of the Act and adopted a realist approach to the assessment of an eligible Judge's role under the Act. However, the difference between the majority and concurring judgments on one hand, and the dissenting judgment on the other, is the extent to which 'reality' may be used to trump formalism. The majority and concurring judgments pursue a limited degree of realism in adopting a functionalist perspective but

[29] *Wainohu v State of New South Wales* [2011] HCA 24 [30].
[30] (1985) 157 CLR 57.

eschew a consideration of what judges may actually do in individual cases. The dissent rejects the functionalist approach and focuses sharply on the professional and learned response of experienced judges to argue that it is highly unlikely eligible Judges will refuse to provide reasons when justice requires it. Both views of 'reality' are defensible but it will be a challenge for future courts to determine a rational basis for determining which level is correct in a particular case.

The most significant aspect of this case is the return to the Court's recent jurisprudence on the protection of State courts from legislative interference as initially outlined in *Kable*.[31] The justification for the outcome in *Kable* now seems to have been based on the importance of maintaining an 'intergrated national court structure' for the possible exercise of federal jurisdiction by State courts at some point in time. Even reposing a very minor federal power in a State court now carries very significant consequences for State courts, State parliaments and State judicial officers acting in non-judicial functions. The development of the *Kable* principle now means significant restraints on State parliamentary power can be justified on a very tenuous connection between State courts and federal authority. At some point it is conceivable that the tension between 'protecting' the potential future exercise of a marginal federal power by curtailing non-judicial functions and the maintenance of significant State responsibilities (such as stopping organised crime) may become too great and the High Court will need to re-examine the justification. The consequence may be the recognition that State courts are part of an integrated court system, not because of potential federal powers but because the users of State courts possess rights to a fair justice system that should be protected in all Australian courts.

VI. Concluding Remarks

Wainohu highlights the judiciary's jealous protection of an independent court system from legislative interference, even when the legislation deals with judges acting in a non-judicial capacity. Given the constitutionally broad scope of State legislative power, the High Court's dogged insistence on finding novel means to limit State power is remarkable. This decision is an example of how quite onerous legislation is defeated by the identification of one key flaw in its drafting – the removal of the requirement for reasons. The New South Wales Parliament's response to *Wainohu* is the Crimes (Criminal Organisation Control) Bill 2012, which repeals the Act and re-enacts it

[31] (1996) 189 CLR 51.

with the inclusion of an explicit obligation in Clause 13 on eligible Judges to provide reasons when making declarations under the act. The tension between the competing arms of government is readily apparent. As is so often the case, the judiciary's curtailment of legislative action results in a legislative response that addresses the Court's concern and shifts the conflict to another day.