**Kuczbor SK v Queensland and the Scope of the Kable Doctrine**

REBECCA ANANIAN-WELSH*

I. INTRODUCTION

This article considers the impact of the High Court’s findings in *Kuczbor SK v Queensland* (‘*Kuczbor SK*’) on the scope of the *Kable* doctrine. In particular, *Kuczbor SK* confirms that *Kable* cannot be relied upon as a source of implied rights protection, even when those rights relate to a fair trial. Nonetheless, the doctrine presents an important limit on governmental powers in the states and territories – provided that any *Kable* challenge is focussed squarely on the ‘essential aspect’ of the doctrine, namely, the institutional integrity of state courts, and not on arguments pertaining to the severity of the laws or their impact on citizens.

In 1996, the High Court recognised a key limit on state legislative power when, in *Kable v Director of Public Prosecutions (NSW)* (‘*Kable*’), it held that the federal *Constitution* protects the institutional integrity of state courts. Two decades have passed since that landmark decision and appreciation of the *Kable* doctrine has gone through a number of phases. At first the doctrine was heralded as an invaluable, substantive, principled limit on legislative power. Within ten years opinions had changed. In 2004, *Kable* was convincingly (and famously) disparaged as a ‘constitutional guard dog that would bark but once’. Despite these remarks, *Kable* challenges continued to be launched and, since 2009, the doctrine has undergone a reinvigoration. The guard dog has begun to bark again – though perhaps not as fiercely as once hoped.

One of the primary contexts in which this reinvigoration has played out is in challenges mounted by representatives of outlaw motorcycle gangs (or ‘bikies’) over

---

*Lecturer, TC Beirne School of Law University of Queensland. This article is based on a paper presented to the 2015 Gilbert + Tobin Centre of Public Law Constitutional Law Conference on 13 February 2015. I am grateful to Professor Sean Brennan and other members of the Gilbert + Tobin Centre for that opportunity, to Kate Gover for her invaluable research assistance and to Dr Jessie Blackbourn for her feedback on earlier drafts. All flaws and failings in this article are my own.*

5. *Baker v The Queen* (2004) 233 CLR 513, 535 (Kirby J). See also argument of Gageler J (then Senior Counsel representing the Australian Investment and Securities Commission) that any furtherance of the *Kable* rule was like asking the dog ‘to turn on the family’: Transcript of Proceedings, *Forge v Australian Securities and Investments Commission* [2006] HCATrans 25 (8 February 2006). For discussion of this phase, see Murray, above n 3, 148-9; Appleby and Williams, above n 3, 8-9.
the validity of state anti-organised crime measures.\(^6\) The focus of this article is on the latest of these challenges, in which Stefan Kuczorski – a member of the Brisbane Chapter of the Hells Angels Motorcycle Club – argued that a suite of Queensland’s anti-organised crime laws infringed the institutional integrity of Queensland courts. In this article I focus on the \textit{Kable} aspects of the High Court’s decision to uphold those laws, and only touch on the issues of standing and design of anti-organised crime laws raised therein.

The dynamic history of the \textit{Kable} doctrine has left many wondering whether \textit{Kable} is indeed a substantive limit on state legislative power capable of protecting equal justice, fair process, and other rule of law values. Or, is \textit{Kable} a thin doctrine – only capable of preventing the most extreme infringements to judicial independence?\(^7\) In \textit{Kuczorski}, the High Court has given some clarity to the scope of the \textit{Kable} doctrine and emphasised its essential aspect – the institutional integrity of state courts. In this way, \textit{Kuczorski} can assist advocates and scholars in properly and persuasively framing a \textit{Kable} challenge.

I begin in Part II by placing \textit{Kuczorski} within the broader context of \textit{Kable} challenges to anti-organised crime laws, before turning to the impugned laws and the substance of Kuczorski’s challenge in Parts III and IV. In Part V, I outline the High Court’s findings in \textit{Kuczorski}. I close in Part VI with a discussion of the impact of this decision on the scope of the \textit{Kable} doctrine.

II A RECENT HISTORY OF BIKIES IN THE HIGH COURT

In many ways, \textit{Kuczorski} is the latest bout in an ongoing tussle between state governments and bikies over the design of anti-organised crime laws. The key cases that fit this mould include the 2008 case of \textit{Gypsy Jokers Motorcycle Club Inc v Commissioner of Police} (‘\textit{Gypsy Jokers}’)\(^8\) concerning the issuance of fortification removal notices by courts. \textit{Gypsy Jokers} was followed in 2010 by \textit{South Australia v Totani} (‘\textit{Totani}’),\(^9\) in 2011 by \textit{Wainohu v New South Wales} (‘\textit{Wainohu}’),\(^10\) and in 2013 by \textit{Assistant Commissioner Condon v Pompano} (‘\textit{Pompano}’).\(^11\) All four of these challenges were mounted on \textit{Kable} grounds.\(^12\) Each involved representatives of motorcycle groups alleging that an aspect of the state’s anti-organised crime laws conferred powers on the judicature that were incompatible with the fundamental

\(^{6}\) Appleby and Williams, above n 3.


\(^{8}\) (2008) 234 CLR 532.


\(^{10}\) (2011) 243 CLR 181.

\(^{11}\) (2013) 252 CLR 38.

independence or institutional integrity of the courts.\textsuperscript{13} In \textit{Totani} and \textit{Wainohu} this argument was successful. In \textit{Gypsy Jokers} and \textit{Pompano} the legislation withstood challenge.\textsuperscript{14}

\textit{Totani}, \textit{Wainohu} and \textit{Pompano} concerned anti-organised crime control orders.\textsuperscript{15} Such orders had been adapted to the organised crime context from federal anti-terrorism laws, after they were upheld by the High Court in 2007.\textsuperscript{16} Like their anti-terrorism predecessors, anti-organised crime control orders allow a court to impose a potentially wide array of restrictions or obligations on a person on the basis of his or her association with a ‘declared organisation’. Organisations may be ‘declared’ by the executive or the judiciary, but a court is always responsible for issuing the control order.\textsuperscript{17}

In \textit{Totani} and \textit{Wainohu}, the control order provisions were struck down on \textit{Kable} grounds. In \textit{Totani}, invalidity was established on the basis that South Australian control order legislation obliged the Magistrates Court to issue an order upon finding an individual was a member of a declared organisation – the latter classification having been determined solely by the executive.\textsuperscript{18} For a majority of the Court, this provision rendered the Supreme Court an instrument of the executive, thereby undermining its institutional integrity and falling foul of \textit{Kable}.\textsuperscript{19} The Court suggested that replacing the obligation on the Supreme Court with a discretion (ie, providing that the court ‘may’ issue the order, rather than ‘must’) would avoid incompatibility.\textsuperscript{20}

\begin{thebibliography}{99}
\bibitem{} For summary of the \textit{Kable} doctrine, see \textit{Kable} (1996) 189 CLR 51, 103 (Gaudron J). See also \textit{Fardon v Attorney-General (Qld)} (2004) 223 CLR 575 (‘\textit{Fardon}’), 591 [15]-[18] (Gleeson CJ), 655 [219] (Callinan and Heydon JJ); \textit{Kuczborski} (2014) 89 ALJR 59, 82-3 [102]-[106] (Hayne J).
\bibitem{} For a fuller discussion of these cases, see Appleby and Williams, above n 3, 13-26; Rebecca Ananian-Welsh, ‘Secrecy, Procedural Fairness and State Courts’ in Miiko Kumar, Greg Martin and Rebecca Scott-Bray (eds), \textit{Secrecy, Law and Society} (Routledge, 2015) 120.
\bibitem{} \textit{Thomas v Mowbray} (2007) 233 CLR 307. For discussion of that case, see Andrew Lynch, ‘\textit{Thomas v Mowbray}: Australia’s “War on Terror” Reaches the High Court’ (2008) 32 \textit{Melbourne University Law Review} 1182. On this ‘migration’ of control orders, see Ananian-Welsh and Williams, above n 12, 397-400.
\bibitem{} For example, organisations are declared by a judge in a personal capacity in the Northern Territory and by the Supreme Court in South Australia, New South Wales, Queensland, Victoria, and Western Australia. See \textit{Serious Crime Control Act 2009} (NT) ss 6 (definition of ‘eligible judge’), 14; \textit{Serious and Organised Crime (Control) Act 2008} (SA) ss 3 (definition of ‘Court’), 11; \textit{Crimes (Criminal Organisations Control) Act 2012} (NSW) ss 3(1) (definition of ‘Court’), 7; \textit{Criminal Organisation Act 2009} (Qld) ss 10, 18, sch 2 (definition of ‘Court’); \textit{Criminal Organisations Control Act 2012} (Vic) ss 3(1) (definition of ‘Court’), 19; \textit{Criminal Organisations Control Act 2012} (WA) ss 3(1) (definition of ‘Court’), 7. When the South Australian control order legislation was first enacted, the declaration was made by the Attorney-General. Following the High Court’s decision in \textit{Totani} (2010) 242 CLR 1, this process was relocated to the Supreme Court.
\bibitem{} \textit{Serious and Organised Crime Control Act 2008} (SA) s 14(1); \textit{Totani} (2010) 242 CLR 1, 21 (French CJ), 67 (Gummow J), 153, 159-60 (Crennan and Bell JJ), 171-2 (Kiefel J).
\bibitem{} Ibid 56 (Gummow J), 88–89 (Hayne J), 160 (Crennan and Bell JJ).
\end{thebibliography}
In *Wainohu*, a similar control order scheme was struck down despite the Supreme Court maintaining an independent discretion whether to issue control orders over members of declared organisations. Under that scheme, the NSW Supreme Court was empowered to issue control orders over members of certain organisations, following a declaration of the organisation by a judge in his or her personal capacity. A majority of the High Court found that the Act as a whole violated the *Kable* doctrine. The sole basis for invalidity was the removal of the judge’s obligation to give reasons for his or her decision to declare an organisation. The giving of reasons was held to be an essential feature of the judicial institution and of institutional integrity, so that the removal of the obligation to give reasons was sufficient to violate *Kable*. Also crucial to the Court’s decision was the fact that declaration proceedings resembled open court, and that the judge’s declaration involved important determinations of fact which enlivened the Supreme Court’s jurisdiction to issue control orders.

When the High Court upheld the *Criminal Organisation Act 2009* (Qld) in *Pompano*, it confirmed that Queensland had succeeded in designing *Kable* compliant control order laws. The provisions allowed for evidence to be withheld from the respondent and his or her representatives. However, for a majority of the Court, any potential unfairness was capable of being remedied by an exercise of the judge’s existing discretions.

The focus of this article is on what happened next. After *Pompano* was handed down in 2012, the Newman government abandoned its only control order application. Attorney-General Jarrod Bleijie labelled control orders ‘a failure’. They were simply not tough enough. On 15 October 2013, between 2.30pm and 3am, the Newman government introduced, debated and enacted a vast suite of new anti-bikie laws, namely, the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (‘VLAD Act’), the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) (‘Disruption Act’), and the *Tattoo Parlours Act 2013* (Qld). Rather than harness civil proceedings to restrain liberty – as control orders had done – these new laws returned the focus to the criminal sphere. They imposed onerous mandatory sentences and created new offences aimed at ‘destroying’ bikie gangs. It is this suite of laws that Hells Angel Stefan Kuczborski challenged in the High Court.

---


23. Ibid 192, 215, 218-20 (French CJ and Kiefel J). It was on this basis that the Court concluded s 13(2) effectively rendered the entire *Crimes (Criminal Organisations Control) Act 2009* (NSW) invalid: 220 (French CJ and Kiefel J), 231 (Gummow, Hayne, Crennan and Bell J).

24. For broader analysis of the impact of the provisions on fair process, see Guy, above n 7.

25. *Pompano* (2013) 252 CLR 38. French CJ suggested that the Supreme Court’s existing discretion enabled the Court to ‘refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case’: 80 [88]. Hayne, Crennan, Kiefel and Bell JJ suggested that the Supreme Court may attribute less weight to the secret evidence: 102-3 [166]-[168]. Gageler J concluded that the only effective means by which the Supreme Court might be able to counter any unfairness arising from the secret evidence would be to order a stay of proceedings: 115 [212].


III THE IMPUGNED LAWS

The laws challenged by Kuczborski were numerous and complex. They included a number of new sentencing principles, a change to the bail laws, and seven new offences, scattered across four different Acts. This vast set of provisions may be addressed in two categories: the sentencing and bail provisions, and the new offence provisions.

A Category One: Sentencing and Bail Provisions

The first of the sentencing and bail provisions is the notorious and dramatically titled *Vicious Lawless Association Disestablishment Act 2013* (Qld), more commonly referred to as the *VLAD Act*. In essence, the *VLAD Act* imposes an additional, mandatory, non-parole sentence on persons who meet three qualifications. First, the person has committed a declared offence. A list of 70 declared offences is contained in the schedule to the *VLAD Act*. These offences range from murder to rape, child sex offences, wounding, drug trafficking, supply and possession, robbery, acts intended to cause grievous bodily harm, affray, and so on. The second qualification is that the offence was committed in a group of three or more. Third, the person must be unable to prove that the group did not have a purpose of committing declared offences. If these three qualifications are met the person will not only be sentenced for the offence, but will face an additional mandatory sentence of 15 years imprisonment without parole. If the person is a leader or authority figure within the group – a ringleader in a drug ring for example, or an office-holder in a bikie gang – then he or she will be sentenced for the offence, plus an additional mandatory sentence of 25 years imprisonment without parole. Parole may be granted only at the (unreviewable) discretion of the Police Commissioner if the person cooperates with police and the Commissioner is satisfied that his or her cooperation is of significant use in a proceeding about a declared offence.

The other provisions challenged by Kuczborski hinge on the concept of ‘participants in a criminal organisation’ (‘PICOs’). The Criminal Code defines

Parliamentary Debates, Legislative Assembly, 15 October 2013, 3208, 3114 (Campbell Newman), 3248 (Jarrod Bleijie).

29 *Vicious Lawless Association Disestablishment Act 2013* (Qld) ss 7-9.
30 *Bail Act 1980* (Qld) ss 16(3A)-(3D) as introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4 and shortly thereafter amended by the *Criminal Law (Criminal Organisations Disruption) and Other Legislations Amendment Act 2013* (Qld) s 7.
31 *Criminal Code Act 1899* (Qld) sch 1 (‘Criminal Code’) ss 60A-60C as introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 42, and *Liquor Act 1992* (Qld) ss 173EB-173ED as introduced by the *Tattoo Parlours Act 2013* (Qld) s 75.
32 This was the categorisation adopted by Bell J: *Kuczborski* (2014) 89 ALJR 59, 104 [263]. The joint judgment of Crennan, Kiefel, Gageler, and Keane JJ instead divided the sentencing provisions from the bail provisions to arrive at a total of three categories, namely, the sentencing provisions, the new offence provisions, and the *Bail Act* provisions: 87 [134]-[136].
33 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 5(1)(a).
34 Ibid ss 3 (definition of ‘association’), 5(1)(b)-(c).
35 Ibid s 5(2).
36 Ibid ss 7(1)(a)-(b).
37 Ibid ss 7(1)(a)-(c).
38 Ibid s 9.
39 Defined in *Criminal Code* s 60A(3).
‘participant’, in this context, broadly. A participant is any person who is a director or officer of a criminal organisation, or who in any way asserts, declares, seeks, or advertises his or her association with a criminal organisation. Participants include those who have attended more than one gathering of such an organisation, or who participate or take part in the affairs of a criminal organisation in any way. The one stated exception from this broad notion is for lawyers acting in a professional capacity.

The term ‘criminal organisation’ is defined much more narrowly. There are three ways that an organisation may be identified as a criminal organisation. The first two are through the courts and the third is by the executive government. These three pathways are provided for in s 1 of the Criminal Code as follows:

1. an organisation of 3 or more persons—
   (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the Criminal Organisation Act 2009;
   (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community;
2. a criminal organisation under the Criminal Organisation Act 2009;
3. an entity declared under a regulation to be a criminal organisation.

The definition of criminal organisation under the Criminal Organisation Act 2009 (Qld) is substantially identical to the definition outlined in sub-s (a) extracted above (making sub-s (b) somewhat obsolete). Thus, a criminal organisation is either identified by a court following a determination that the organisation meets the criteria outlined above, or it is identified by the executive government as such in the relevant Regulation.

So one may surmise, with minimal generalisation, that a PICO is someone who is, or has been, or seeks to be, in any way associated with: a group of three of more people that has a purpose related to serious criminal activity and presents an unacceptable risk to community safety, or with a group declared to be a criminal organisation by Regulation.

Once a person meets the criteria for being a PICO, for instance by attending two meetings of the Hells Angels Motorcycle Club, it appears that he or she will be ‘marked for life’ as a PICO. It does not seem to matter whether the activity that makes a person a PICO took place before or after the introduction of these provisions.

---

40 Criminal Code s 60A(3).
41 Ibid s 60A(3)(d)-(e).
42 Ibid s 60A(3).
43 Ibid s 1 (definition of ‘criminal organisation’).
44 See Criminal Organisation Act 2009 (Qld) ss 10(1)(b)-(c), sch 2 (definition of ‘criminal organisation’). These provisions define a ‘criminal organisation’ as an organisation subject to a declaration by the court under the Act. A declaration may be made if the court finds that ‘members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity’ and ‘the organisation is an unacceptable risk to the safety, welfare or order of the community’.
45 Kuczbarski (2014) 89 ALJR 59, 96 [209] (Crennan, Kiefel, Gageler and Keane JJ). Their Honours say that this would be an ‘odd and undesirable outcome’, though not one that would necessarily fall foul of the Kable doctrine: 96 [209].
To date, 26 organisations have been declared to be criminal organisations. All of these organisations were declared under sub-s (c) extracted above. In respect of these declared criminal organisations, then Attorney-General Jarrod Bleijie said that the reasons behind the declarations may never be revealed to the public.

Changes to the Bail Act 1980 (Qld) (‘Bail Act’) brought about by the Disruption Act, reverse the presumption in favour of bail for PICOs. A PICO will not be granted bail unless he or she can establish that his or her detention would be unjustified. The Disruption Act also amends the Criminal Code to provide that being a PICO is an aggravating circumstance in sentencing for the offences of affray, misconduct in public office, grievous bodily harm, and assault. This means that PICOs are subject to significantly higher maximum and minimum penalties for the commission of these four offences.

The Hells Angels Motorcycle Club is a declared criminal organisation. Kuczborski is a member of the Hells Angels Motorcycle Club, rendering him a PICO. Therefore, Kuczborski is subject to a presumption against bail if he is charged with an offence, and the aggravating circumstance provisions apply to him if he is charged with affray, misconduct in public office, grievous bodily harm, or assault.

B Category Two: New Offence Provisions

Kuczborski also challenged a range of provisions that create new offences. The majority of these provisions also hinge on the concept of a PICO. This second category of laws make it a criminal offence for PICOs to meet in a group of three or more in public, go to prescribed places, attend prescribed events, or recruit to the ‘criminal organisation’. These offences are punished severally. Each carries a minimum sentence of six months in prison and a maximum of three years. It is a defence to these four offences to prove that ‘the criminal organisation is not an

---

47 Criminal Code (Criminal Organisations) Regulation 2013 (Qld) s 2.
49 Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld) s 4; Bail Act 1980 (Qld) ss 6 (definition of ‘participant’), 16(3A)(a).
50 Bail Act 1980 (Qld) s 16(3A(a).
51 Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld) ss 43-6; Criminal Code ss 72(2), 92A(4A), 320(2), 340(1A).
52 Criminal Code ss 72(2), 92A(4A), 320(2), 340(1A). Specifically: The maximum penalty for affray is raised from one to seven years imprisonment, with a minimum penalty of six months imprisonment for PICOs. The maximum penalty for misconduct in relation to public office is raised from seven to fourteen years for PICOs. For grievous bodily harm, a minimum penalty of one year’s imprisonment is imposed on PICOs, although the maximum penalty of fourteen years remains unchanged. Likewise, a minimum penalty of one year’s imprisonment is imposed on PICOs who engage in serious assault against a police officer, although the maximum penalty of fourteen years remains unchanged.
53 Criminal Code (Criminal Organisations) Regulation 2013 (Qld) s 2.
55 Criminal Code s 60A.
56 Ibid s 60B(1). ‘Prescribed places’ are declared under the Criminal Code (Criminal Organisations) Regulations 2013 (Qld) s 3.
57 Ibid s 60B(2).
58 Ibid s 60C.
59 Ibid ss 60A-60C
organisation that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity’.60

In addition, the Liquor Act 1992 (Qld) as amended by the Tattoo Parlours Act 2013 (Qld), criminalises the display of a name, logo or anything that indicates association with a ‘declared criminal organisation’ on licensed premises.61 The provisions expressly prohibit ‘1%’ and ‘1%er’ logos, commonly associated with members of outlaw motorcycle gangs.62

The offence of ‘participants in criminal organisation being knowingly present in public places’ has attracted particular controversy. In one highly publicised case, Sally Kuether, a librarian and community service award holder with no criminal history, was arrested for meeting her partner and a friend at a hotel for a drink. Kuether was wearing the insignia of the Life and Death Motorcycle Club, to which her partner and his friend allegedly belonged. The police arrested all three for committing the offence of ‘participants in a criminal organisation being knowingly present in public places’ and for entering and remaining in a licensed premises wearing prohibited items, being Life and Death club vests.63 The Police opposed bail and raided Kuether’s home.64 Following her release on bail, Kuether said to the media: ‘I can’t see what I’ve done wrong, all I did was have a beer with my partner and my mate’.65 The more serious charges were eventually dropped against Kuether before the Brisbane Magistrates Court on 8 April 2015, although she was fined $150 for her breach of the Liquor Act.66

Because Kuczborski is a PICO, he is prohibited from meeting two or more other PICOs in public, from attending prescribed places (including the Hells Angels Clubhouse),67 from attending prescribed events, from recruiting to the Hells Angels, and from wearing any logos or insignia of the Hells Angels – in addition to a range of other symbols, including the ‘1%’ sign he has tattooed on his forearm – on licensed premises.

IV KUCZBORSKI’S CHALLENGE

A The Category One Provisions: A Question of Standing

The first issue that faced the High Court in Kuczborski’s challenge to this suite of anti-bikie laws, was whether Kuczborski had sufficient standing to challenge the category one sentencing and bail provisions. The Court was unanimous in finding that

---

60 Ibid ss 60A(2), 60B(2), 60C(2).
61 Liquor Act 1992 (Qld) ss 173EA-173ED.
62 Ibid. Currently, no other items have been prescribed under the Liquor Regulation 2002 (Qld).
63 Ibid ss 173EA, 173EC.
67 Located at 3/31 Tradelink Drive, Hillcrest: Kuczborski (2014) 89 ALJR 59, 105 [275] (Bell J). This address was prescribed under s 3 of the Criminal Code (Criminal Organisations) Regulations 2013 (Qld).
he lacked standing to challenge these provisions. Kuczborski had not been charged with any offence that would enliven these provisions. Nor did he express any wish or desire to commit an offence that would enliven the provisions (as the plaintiff had in Croome v Tasmania). The provisions only created further liability as an ‘extra incentive’ to abide by existing laws and therefore did not ‘materially affect [his] legal position’. Thus, a decision upholding or striking down the category one provisions would not impact Kuczborski’s rights or liberties any more than it would impact the rights and liberties of all Queenslanders. Moreover, there was no matter or dispute raised between the parties with inherent standing – namely, the state and territory governments who had intervened in the case. Kuczborski faced a united front of Solicitors-General in this dispute.

On these bases the High Court held that there was no relevant ‘matter’ presented for the Court’s determination and that Kuczborski lacked sufficient standing to challenge the sentencing and bail provisions. Thus, the constitutional validity of the VLAD Act, the aggravating circumstance provisions, and the presumption in favour of bail for PICOs remain questions for another day. Moreover, the Court did not address the plaintiff’s arguments that these provisions infringed a notion of equal justice as this argument had been limited to the category one laws.

B The Category Two Provisions

Kuczborski’s standing to challenge the new offence provisions was uncontested. As a participant in a declared criminal organisation, Kuczborski was directly prohibited from engaging in a range of otherwise innocent activities, such as meeting other PICOs in public or entering licensed premises because of his clothing or his ‘1%’ tattoo. If charged with one of these offences, Kuczborski’s only defence would be to prove that the organisation – the Hells Angels – had no criminal purpose.

---

68 Ibid 60 [17], [19], 71-2 [30], [34] (French CJ), 81-2 [99]-[100] (Hayne J), 89 [151], 92 [177]-[178], 94 [185], 103 [259] (Crennan, Kiefel, Gageler and Keane JJ), 106-7 [280], [283], [285] (Bell J).
71 Ibid 89 [151] (Crennan, Kiefel, Gageler and Keane JJ).
72 Ibid 69 [18]-[19] (French CJ). See also 106 [278]-[280] (Bell J).
73 That is, the Attorneys-General of the Commonwealth, New South Wales, the Northern Territory, South Australia, Victoria, and Western Australia. See ibid 67 [8] (French CJ). Cf, Williams v Commonwealth (2012) 248 CLR 156, 224 [111]-[112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J).
75 Ibid 108 [285] (Bell J). For discussion of ‘matter’ under s 76(i) of the Constitution and s 30(a) of the Judiciary Act 1903 (Cth) see 65-6 [3]-[6] (French CJ).
76 Kuczborski (2014) 89 ALJR 59, 88 [141], 90 [157] (Crennan, Kiefel, Gageler and Keane JJ). Only Hayne J addressed the plaintiff’s equal justice arguments. However, his Honour found that the plaintiff had not established that participation in a criminal organisation is ‘not a criterion which the legislature can adopt to identify certain persons as meriting different punishment’. His Honour also found that the plaintiff had not sufficiently linked the concept of equal justice to argue ‘how the impugned provisions are repugnant to or incompatible with [the] institutional integrity’ of state courts under the Kable doctrine: 83-4 [107]-[109].
78 Criminal Code ss 60A(2), 60B(3), 60C(2). This defence does not apply to the new offence under the Liquor Act 1992 (Qld).
It is clear that the new offence provisions have a harsh impact. They single out one class of persons in society and place severe limitations on their conduct, movement, and associations. They impose serious penalties – such as between six months and three years’ imprisonment for the mere act of meeting in a group of three or more in a public place, or going to a prescribed address or event that non-PICOs are free to attend.79 These restrictions are imposed regardless of any suspicion of criminality, or past finding of guilt. In the absence of a Charter of Rights, Kuczborski lacked a mechanism to challenge the liberty-intrusive nature of these laws directly on that basis. The task that faced Kuczborski was to establish that these laws undermined the institutional integrity of Queensland courts and thereby violated the Kable doctrine.

To establish this, Kuczborski’s case needed to go beyond demonstrating the severity of the new offence provisions and – if that severity was at all relevant – to link it to the concept of institutional integrity. Kuczborski’s case failed in drawing any such link or in establishing that the laws were incompatible with institutional integrity.80

Kuczborski’s arguments ran along the following lines. He alleged that the new offence provisions were exceedingly broad. In particular he pointed to the broad meaning of participant and the opacity of the Attorney-General’s power to declare criminal organisations.81 To this end he argued that the Beefsteak and Burgundy Club, the Australian Medical Association, even the Australian Bar Association, could be declared to be criminal organisations and their members and associates made subject to the harsh limitations on movement and association under the new offence provisions.82

Kuczborski alleged that the Attorney-General’s power to declare organisations was not only opaque, but it was unreviewable. Justice Hayne agreed with this reasoning, noting that ‘[n]either the information on which the determination [that the organisation is a criminal organisation] was based nor the criteria applied in making it is known.’83 However, the other judgments did not resolve the proper construction of the declaration power.84

Based on this framing of the laws, Kuczborski argued that the new offence provisions enlist courts to do the bidding of the executive. That is, to destroy organisations of the executive’s choosing.85 He further argued that the provisions effect a usurpation of judicial power, as the declaration by the Attorney-General is integral to the determination of criminal guilt or innocence.86 Thirdly, he argued that the provisions cloak a fundamentally executive determination in the neutral colours of judicial action, thereby undermining the institutional integrity of the courts.87

79  Ibid s 60A(1).
81  Ibid 96-7 [206]-[211] (Crennan, Kiefel, Gageler and Keane JJ). In his dissenting judgment, Hayne J saw some merit in Kuczborski’s argument: 84-5 [115]-[116].
83  See also Kuczborski (2014) 89 ALJR 59, 109 [294] (Bell J).
84  Kuczborski (2014) 89 ALJR 59, 79 [84].
85  Justices Crennan, Kiefel, Gageler, and Keane did suggest, in obiter dicta, that the declaration-making power may be narrower than the plain text might suggest: ibid 96-7 [210]-[215]. This view may imply that their Honours disagreed with the plaintiff’s contention that an exercise of that power would be unreviewable. However, it cannot be said that the decisions resolve this issue at all. I return to this point below.
87  Ibid 100 [232] (Crennan, Kiefel, Gageler and Keane JJ).
Finally, Kuczborski argued that the defence – proving that the organisation has no criminal purpose – requires an accused to establish an ‘impossible negative proposition’ and do not remedy the challenges that the provisions pose to judicial independence and institutional integrity. Justice Bell summarised Kuczborski’s arguments in the following concise passage:

The plaintiff encapsulated his … argument as the conscription of the courts to do the legislature’s and the executive’s bidding by requiring the courts to treat certain individuals as ‘participants in organised crime’ while denying the courts the power to engage in a genuine adjudicative process as to whether the person before the court is in fact a ‘participant in organised crime’.

Kuczborski thus argued for an interpretation of the provisions whereby a Queensland court determining the guilt or innocence of an accused under the new offence provisions would be incapable of engaging in a genuine and independent adjudicative process. The court would be bound by the executive’s declaration, which effectively resolved whether the person was a PICO. Following this, only the most minor determinations were left in the power of the court (for example, whether the person had attended the prescribed premises), and the accused would face an insurmountable task in attempting to establish the available defence. The plaintiff argued that this combination of factors caused impermissible damage to the institutional integrity of Queensland courts. These arguments were resoundingly unsuccessful.

V THE NEW OFFENCE PROVISIONS AND KABLE

The High Court issued four judgments in Kuczborski. Chief Justice French and Justices Hayne and Bell each wrote alone. Justices Crennan, Kiefel, Gageler, and Keane issued a joint judgment. Justice Hayne agreed with his fellow justices on most aspects of the case but issued a lone dissent, finding that the new offence provisions infringed the Kable doctrine on narrow grounds.

A Approaching the Kable Doctrine

The justices adopted distinct approaches to applying Kable. The Kable doctrine is presently one of the most litigated aspects of the Commonwealth Constitution, however its content and application remain fraught with uncertainty. Clearly enough, the doctrine prohibits the conferral or regulation of court powers that violate the institutional integrity or ‘essential features’ of a court. However, judicial

88 Kuczborski (2014) 89 ALJR 59, 73 [37] (French CJ).
89 Ibid 109 [293].
90 Ibid 86 [125]-[126].
independence and institutional integrity are elusive concepts, particularly as the bases for assessments of constitutional validity. And what are these ‘essential’ or ‘defining’ features of courts? In order to give clarity to the content of institutional integrity, claimants and courts have tended to harness verbal formulae drawn from key cases. In Kuczborski, this was reflected in the plaintiff’s allegations that Kable was breached when the court was ‘enlisted’, its powers ‘usurped’, and judicial independence used as a ‘cloak’ for executive action. The enlistment of the courts to do the bidding of the executive had been crucial to the finding of invalidity in Totani; the idea of usurpation had assisted the Court’s determination in Leeth v Commonwealth; and the metaphor of ‘cloaking’ was drawn from the US case of Mistretta v United States and has been harnessed in a number of High Court cases, including Fardon.

In their joint judgment, Crennan, Kiefel, Gageler and Keane JJ embraced the applicant’s use of verbal formulae to give content to the Kable doctrine. In fact, their Honours utilised the phrases ‘enlist’, ‘cloak’, and ‘usurp’ in some of the sub-headings in their judgment. Their Honours dealt with each of these notions in turn, concluding that the independence and integrity of the Queensland judicature remained intact under the new offence provisions.

Chief Justice French and Hayne J, however, expressly rejected this approach to applying the Kable doctrine. For Hayne J, the Kable doctrine requires that courts ‘grapple with that “essential notion” of repugnancy to or incompatibility with the institutional integrity of the State courts’. He said that the use of metaphors such as ‘cloaking’ can be no substitute for direct engagement with that essential notion, and warned: ‘Conclusions cannot and must not be formed by reference only to particular verbal formulae’. The Chief Justice expressly agreed with Hayne J’s view in this

94 Welsh, above n 7, 94-5; Appleby and Williams, above n 3, 28-9.
95 ‘It is neither possible nor profitable to attempt to make some all-embracing statement of the defining characteristics of a court. The cases concerning the identification of judicial power reveal why that is so’: Forge v Australian Investment and Securities Commission (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ). See also Pompano (2013) 252 CLR 38, 72 [68] (French CJ); Wainohu (2011) 243 CLR 181, 208-9 [44] (French CJ and Kiefel J) in which their Honours identify the following characteristics, inter alia: institutional integrity, the reality and appearance of independence and impartiality, procedural fairness, the open court principle, and the giving of reasons; Luke Beck, ‘What is a “Supreme Court of a State”? ’ (2012) 34 Sydney Law Review 294. For discussion of this approach to Kable, see also Lim, above n 93; Suri Ratnapala and Jonathan Crowe, ‘Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power’ (2012) 56 Melbourne University Law Review 175, 178-81.
100 These sub-headings were: ‘Enlisting judicial power’ at 98 [219], ‘Cloaking’ at 99 [228], and ‘Usurpation of judicial power’ at 100 [232].
101 Kuczborski (2014) 89 ALJR 59, 83 [106].
102 Ibid 83 [105].
respect, reinforcing the necessity that courts engage with the essential notion of institutional integrity that underlies Kable.103

B A Usual Exercise of Judicial Powers

Despite this slight divergence of approach, the Court was unanimous in holding that the applicant’s submissions were too broad to support a finding of invalidity. Each judgment pointed to the traditional role of courts as being to interpret and apply law as set down by the other branches of government.104 These laws may be directed to a wide array of purposes, from deterring drug use to regulating road-usage, stopping domestic violence, or destroying bikie gangs. In applying the law as set down in Acts of parliament and in executive Regulations, the courts were not co-opted or enlisted to fulfil the whims of the political branches; nor did this amount to the political branches impermissibly cloaking their work in the neutral colours of judicial action. Rather, the courts were simply fulfilling their traditional role in accordance with the constitutional framework, the separation of powers and the rule of law.105

Crucial to this reasoning was the fact that the court’s role was undertaken in accordance with ‘ordinary judicial process’.106 The new offence provisions may have created onerous limitations on movement and association, and stipulated a difficult avenue of defence, but the provisions left the criminal trial process intact.107 The accused was innocent until proven guilty, the normal rules of evidence were retained, and the judge maintained his or her usual control of proceedings and ordinary discretions.108

C The Breadth and Severity of the Provisions

As to the breadth of the laws, it seems that this issue was quite beside the point when it came to resolving whether the Kable doctrine had been violated. Justices Crennan, Kiefel, Gageler and Keane observed that:

[M]erely to point out the severity of the laws is not to articulate the connection between the novelty and breadth of the second category of impugned laws and the engagement of the Kable principle.109

Their Honours went on to cite Magaming v The Queen,110 in which mandatory sentencing laws had withstood a Kable challenge, and stated that: ‘to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity’.111

Whilst the severity of the laws was held to have no impact on their validity under the Kable doctrine, some of the justices nonetheless suggested how the executive

103 Ibid 73 [38].
104 Ibid 73 [40] (French CJ), 84 [111] (Hayne J), 99 [225]-[227] (Crennan, Kiefel, Gageler and Keane JJ), 111 [303] (Bell J).
105 Ibid 73 [40] (French CJ), 89-90 [156] (Crennan, Kiefel, Gageler and Keane JJ).
106 Ibid 96 [209], 98-9 [224], [230] (Crennan, Kiefel, Gageler and Keane JJ), 73-4 [40]-[41] (French CJ), 110-1 [296]-[297], [303], [305] (Bell J).
109 Ibid 96 [207].
110 (2013) 252 CLR 381.
111 Kuczborski (2014) 89 ALJR 59, 98 [217].
power to declare criminal organisations (the ‘declaration power’) might be interpreted. In this respect their Honours expressed interesting, and divergent, views on the proper interpretation of that power. Justice Hayne reasoned that the declaration power was effectively untestable and unreviewable. 112 Justices Crennan, Kiefel, Gageler, and Keane, however, indicated that a far narrower view of that power was available. Their Honours favoured a highly contextual reading of the declaration power, taking into account its placement in the Criminal Code and the criteria by which an organisation could be declared by a court. 113 Looking to these factors, their Honours suggested that, despite its broad framing, the declaration power may in fact be limited to the declaration of organisations engaged in serious criminal activity (so, presumably neither the Australian Bar Association, the Australian Medical Association, nor the Beefsteak and Burgundy Club). 114 Ultimately, the proper interpretation and scope of this important power remains unsettled after Kuczborski. It may take an application for judicial review of an exercise of the declaration power to resolve its scope.

The scope of the declaration power did not affect the resolution of Kuczborski’s Kable challenge. Justices Crennan, Kiefel, Gageler, and Keane indicated that regardless of the breadth of the impugned provisions, institutional integrity was preserved so long as ordinary judicial process was maintained. 115 Even a broad declaration power would fail to amount to a usurpation of judicial power. Rather, it would simply allow the executive to make a declaration that would then form a factum upon which the later exercise of judicial power would depend. 116 Justice Bell provided the apt example of executive identification of prohibited drugs as analogous to the declaration of criminal organisations, each with onerous consequences under the criminal laws of the state and neither falling foul of the Kable doctrine. 117

Similarly, for the majority justices, the practical difficulty of establishing the available defence did not support a finding of constitutional invalidity. Rather, the availability of a defence underscored the conformity of the proceedings with the hallmarks of the ordinary criminal trial. 118

D Justice Hayne’s Dissenting Opinion

Justice Hayne issued a lone dissent and would have struck down the new offence provisions for violating the Kable doctrine. The basis for Hayne J’s dissent, however, was narrow. As mentioned above, his Honour had eschewed the applicant’s reliance on ‘verbal formulae’ and had agreed with his fellow judges in finding that Kuczborski’s arguments were framed too broadly to establish repugnancy to, or incompatibility with, the institutional integrity of Queensland courts. However, for his Honour, the availability of three alternate avenues by which a criminal organisation could be identified – two judicial avenues and one executive – amounted to an impermissible ‘assimilation’ of judicial and executive powers.

Justice Hayne interpreted the declaration power to be effectively unreviewable. By contrast, the two avenues by which a court could identify a criminal organisation

112 Ibid 79 [84].
113 Ibid 96-7 [210]-[215].
114 Ibid. See also 109 [294] (Bell J), citing Kuczborsi v Queensland [2014] HCATrans 187 (2 September 2014) 887-8 (K C Fleming QC).
115 Kuczborski (2014) 89 ALJR 59, 96 [206]-[209].
116 Ibid 73-4 [40], [46] (French CJ).
117 Ibid 111 [303]. See also 86-7 [131] (Crennan, Kiefel, Gageler and Keane JJ).
were open and subject to contest in open court proceedings governed by the usual rules of evidence and procedure. His Honour found that:

> By treating these three different paths to establishing what is a criminal organisation as legally indistinguishable, the Executive and the legislature seek to have an untested and effectively untestable judgment made by the political branches of government treated as equivalent to a judgment made in judicial proceedings conducted chiefly in public.\(^\text{119}\)

His Honour reasoned that the provision of these three avenues by which a criminal organisation could be identified, impermissibly merged two distinct forms of judgment.\(^\text{120}\) If a verbal formula was to be used, Hayne J elected the ‘\textit{Mistretta} metaphor of cloaking’ to say that ‘by assimilating the two different kinds of judgment, each is cloaked in the dress of the other. The clothes do not fit’.\(^\text{121}\)

Justice Hayne’s reasons attach grave consequences to a relatively innocuous aspect of the legislation, and it must be admitted that his Honour’s view is not easy to follow. The other justices did not share Hayne J’s reading of the provisions. The Chief Justice, whose reasons most closely align with Hayne J’s in other respects, directly attacked this basis for finding constitutional repugnancy. Chief Justice French saw no issue with the provision of three alternate pathways by which the factum of ‘criminal organisation’ might be identified. His Honour concluded that: ‘Although the nomenclature of “criminal organisation” and the outcomes are the same, the pathways are distinct and do not have any legal effect upon each other’.\(^\text{122}\)

Whilst there is no need for the Queensland government to respond to Hayne J’s concerns, they could be addressed quite simply through legislative amendment. The process by which criminal organisations are identified could be moved into only the judicial arm or only the executive – as has always been the case in control order schemes in the Australian states and territories.\(^\text{123}\) Alternately, the three avenues could be identically written with clear provision for the executive declaration to be open to review, whereby a court would be empowered to revisit the grounds on which the declaration had been made. Finally, the defence could be amended to be commensurate with the judicial criteria for declaration when the organisation has been declared by regulation. This final option would allow for the declaration to be tested in open court when the defence was invoked.

\*VI Kuczborski and the Scope of Kable*

Since 2009, the High Court has breathed new life into \textit{Kable}, confirming that it has potential as a valuable and substantive limit on government power. However, these cases have also emphasised the limits of \textit{Kable} and, thereby, the startling breadth of legislative and executive powers over state and territory courts. \textit{Kuczborski} is emblematic of these two aspects of the \textit{Kable} doctrine. In this Part, I use \textit{Kuczborski} as a starting point to discuss four points regarding the scope of the \textit{Kable} doctrine, focussing in particular on the capacity for the doctrine to protect civil liberties and fair process.

\(^{119}\) Ibid 85 [116].
\(^{120}\) Ibid.
\(^{121}\) Ibid 85 [117].
\(^{122}\) Ibid 74 [46].
\(^{123}\) For summary, see Ananian-Welsh and Williams, above n 12.
A. Institutional Integrity, Severity, and Disproportionality

Since its inception, Kable has been invoked as a shield against laws that are perceived as harsh. It is not fanciful to expect that a legislative scheme that violates rule of law values such as fair, equal and open justice will undermine the integrity of a court applying that law.124 This view of the Kable doctrine is reflected in the types of laws that have been challenged under it. The vast majority of Kable challenges arise in the law and order context, where the rights and liberties of citizens are most critically at stake. Kable, Fardon, and the more recent case of Pollentine v Bleijie (‘Pollentine’)125 involved challenges to the potentially indefinite detention of sex offenders at the conclusion of their sentences.126 Totani, Wainohu, and Pompano each related to control order schemes, capable of imposing onerous restrictions and obligations on persons in the absence of criminal charge or guilt.127 The case of Magaming v The Queen128 involved the mandatory sentencing of people-smugglers,129 Emmerson130 concerned onerous asset forfeiture orders131 – the list goes on. When a law involves state or territory courts in a scheme that infringes the rights and liberties of citizens, there is a good chance that a Kable challenge will be launched in an attempt to have the law read-down or overturned. Kable, it seems, has offered a potential avenue of constitutional protection for citizens from liberty-intrusive state and territory laws.132 In Kuczborski, the High Court sends a clear message that the role of the Kable doctrine is to protect the institutional integrity of courts, not the rights or liberties of citizens. Justices Crennan, Kiefel, Gageler, and Keane in particular drew a clear distinction between concerns over the severity and disproportionate impact of the law, and concerns for the institutional integrity of the courts.133 This message aligns with earlier cases. In almost all of the cases listed immediately above, the laws were upheld. In Kable, Totani, and Wainohu, the laws were struck-down, but the grounds for invalidity did not relate to the impact of the law on individual rights or liberties.134 Today, it can be confidently surmised that mandatory sentences,135 potentially indefinite preventive incarceration,136 preventive restraints on liberty under a control order,137 and secret evidence138 are compliant with the Kable protection for

124 Guy, above n 7, 285.
125 (2014) 88 ALJR 796.
126 Criminal Law Amendment Act 1945 (Qld) s 18.
127 Serious and Organised Crime (Control) Act 2008 (SA), Crimes (Criminal Organisations Control) Act 2009 (NSW), and Criminal Organisation Act 2009 (Qld) respectively.
128 (2013) 252 CLR 381.
129 Migration Act 1958 (Cth) ss 233A, 233C, 236B.
130 (2014) 88 ALJR 522.
131 Criminal Property Forfeiture Act (NT) ss 44(1)(a), 94; Misuse of Drugs Act (NT) s 36A.
133 Kuczborski (2014) 89 ALJR 59, 96 [207], 98 [217].
134 For a summary of the findings in these cases (and others), see Rebecca Ananian-Welsh, ‘Preventative Detention Orders and the Separation of Judicial Power’ (2015) 38 The University of New South Wales Law Journal 756, 760-8.
135 Magaming v The Queen (2013) 252 CLR 381.
institutional integrity. These outcomes demonstrate the truth in McHugh J’s statement in *Fardon* that:

State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise, or even patently unjust. Nevertheless, it does not follow that, because State legislation required State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.139

Against this backdrop it is unsurprising that Kuczborski’s challenge failed, insofar as it relied upon establishing the severe and disproportionate impact of the anti-organised crime laws on citizens.

The acknowledgment that *Kable* is not a source of implied rights protection prompts one to query whether any legal (as opposed to political) shield exists to protect citizens from state or territory legislation that intrudes on basic rights and freedoms. Certainly the Victorian and ACT human rights Charters provide an avenue of legal recourse in those contexts.140 But for the rest of Australia this remains a vital question. One thing is sure, the High Court has clearly communicated that *Kable* is no shield for civil liberties.

Whilst *Kable* is no implied bill of rights, it may yet have some potential to shield the community from liberty-intrusive laws. This capacity rests entirely on the link that may be drawn between the impact of the law and the institutional integrity of the court. That is, it is not enough to establish the severity of a law – the crucial step is to demonstrate how that severity has a direct impact on the institutional integrity of the judiciary. 141 One facet of human rights that *Kable* may therefore be capable of protecting is the right of citizens to fair judicial process.142

**B Institutional Integrity and Fair Judicial Process**

In *Kuczborski*, as in other *Kable* cases,143 the process by which the court exercised its powers was vital to the High Court’s decision to uphold the new offence provisions.144 Justice Bell emphasised that the court’s powers at the trial of an accused under the new offence provisions ‘are exactly the same as on the trial of an accused for any criminal offence’. 145 Justices Crennan, Kiefel, Gageler, and Keane similarly grounded their reasons in the statement that:

The only judicial activity which attends the enforcement of these laws is the *characteristically judicial process* of a criminal trial, upon which these laws do not trench.146

---

140 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); Appleby, above n 91, 697.
142 Guy, above n 7, 284-5; Seytler and Field, above n 7, 255-9.
143 See, eg, *Enmeshron* (2014) 88 ALJR 522, 537 [57]-[60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); Ratnapala and Crowe, above n 95, 194-200.
144 *Kuczborski* (2014) 89 ALJR 59, 96 [209], 98-9 [224], [230] (Crennan, Kiefel, Gageler and Keane JJ), 73-4 [40]-[41] (French CJ), 110-1 [296]-[297], [303], [305] (Bell J).
145 Ibid 110 [296].
146 Ibid 96 [209] (emphasis added).
Their Honours concluded that ‘so far as the Kable principle is concerned’ even odd or undesirable outcomes arising from the legislation ‘would be a consequence of the enforcement of the legislation by ordinary judicial processes’, and therefore would not violate the Constitution.\textsuperscript{147}

The Court’s reasoning in\textit{Kuczborski} indicates that institutional integrity requires that proceedings conform to ordinary judicial process, in this case, the usual and expected aspects of a criminal trial. The apparent implication of this is that\textit{Kable} defends ordinary judicial process from legislative or executive interference. In the context of\textit{Kable}’s ‘post-2009 rejuvenation’,\textsuperscript{148} the High Court appeared to be (re)embracing the capacity for\textit{Kable} to protect judicial process.\textsuperscript{149} In 2013, Scott Guy surmised that the doctrine ‘now affords a substantial degree of protection for State Supreme Courts and their procedural processes’.\textsuperscript{150}

The centrality of judicial process to institutional integrity has also been reflected in the case-law. In\textit{Emmerson}, for example, asset forfeiture provisions survived constitutional challenge on the basis that the Northern Territory Supreme Court was able to conduct proceedings with ‘ordinary judicial process’, exercising its usual discretions and control of proceedings.\textsuperscript{151} The High Court reached this finding despite the severe and arguably disproportionate impact on rights effected by the legislation.\textsuperscript{152} Moreover, the provisions obliged the Supreme Court to issue a far-reaching forfeiture notice, provided merely that the Director of Public Prosecutions could prove that the person had been subject to three drug-related prosecutions in 10 years.\textsuperscript{153} In a joint judgment, French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ, said that:

\begin{quote}
A legislature which imposes a judicial function or an adjudicative process on a court, whereby it is essentially directed or required to implement a political decision or a government policy\textit{without following ordinary judicial processes}, deprives that court of its defining independence and institutional impartiality.\textsuperscript{154}
\end{quote}

This approach indicates that institutional integrity is maintained regardless of the impact of a law on citizens’ rights or liberties, provided that ordinary judicial process is preserved.\textsuperscript{155} So what is ordinary judicial process? What elements of court process are enshrined through the\textit{Kable} doctrine?\textsuperscript{156}

\textsuperscript{147} Ibid 99 [230].
\textsuperscript{148} Murray, above n 3, 152.
\textsuperscript{149} Appleby and Williams, above n 3, 28; Guy, above n 7; Steytler and Field, above n 7, 251; Bagaric, above n 132.
\textsuperscript{150} Guy, above n 7, 285.
\textsuperscript{151} (2014) 88 ALJR 522, 537 [57]-[60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
\textsuperscript{152} ‘The provisions … do not cease to be laws with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment’: 541 [81] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
\textsuperscript{153} Misuse of Drugs Act (NT) s36A, read together with Criminal Property Forfeiture Act (NT) s 94(1).
\textsuperscript{155} On the importance of maintaining ordinary judicial process, see also International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319 (‘International Finance Trust’), 355 [56] (French CJ), 366-7 [97]-[98] (Gummow and Bell JJ), 286-7 [159]-[161] (Heydon J).
\textsuperscript{156} Other scholars have grappled with and criticised this question. See, eg, Gogarty and Bartl, above n 7; Anthony Gray, ‘Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions’ (2014) 37(1) University of New South Wales Law Journal 125, 130.
One may argue that ordinary judicial process encompasses procedural fairness, thereby opening a pathway for Kable to protect the fairness of court proceedings.157 This view is bolstered by the identification of procedural fairness as one of the ‘defining and essential’ characteristics of courts.158 Whilst the close relationship between institutional integrity and procedural fairness is clear, apparent infringements to fair process have been tolerated under the Kable doctrine. Ex parte proceedings,159 secret evidence,160 reversals of the onus of proof,161 and decisions based on information that may avoid the rules of evidence162 have all withstood Kable challenge – even where the power has resulted in severe incursions on rights or liberties.163

Decisions of this nature led Heydon J to observe in Totani that the due process implications of Kable were ‘apparently dormant’.164 In the earlier case of Gypsy Jokers, Kirby J similarly remarked that the Kable doctrine had been ‘under-performing’ in its capacity to protect fair process.165

Against this background it appears that the form of judicial process enshrined through the Kable doctrine may not extend to ‘fair’ process. That is to say, the Kable doctrine is not concerned with the degree of fairness afforded to the parties. Another way of framing this distinction may be drawn from Dawson J’s observation in Kruger v Commonwealth, that: ‘Chapter III may, perhaps, be regarded … as affording a measure of due process, but it is due process of a procedural rather than substantive nature’.166 It follows that a more apt framing of the protection for judicial process arising from Kable is that it requires the maintenance of ‘ordinary judicial process’, rather than fair process or the more Americanised notion of ‘due process’. This language of ‘ordinary’ process has been favoured in the most recent Kable cases, including Kuczborski and Emmerson.167

157  Guy, above n 7, 293; Gray, above n 156; Ratnapala and Crowe, above n 95, 211-2.
158  Wainohu (2011) 243 CLR 181, 208 (French CJ and Kiefel JJ); Leeth v Commonwealth (1992) 174 CLR 455, 469-70 (Mason CJ, Dawson and McHugh JJ); International Finance Trust (2009) 240 CLR 319, 354-5 (French CJ), 379-80 (Heydon J); Pompano (2013) 252 CLR 38, 72 [68] (French CJ). As to the requirements of fair process in the Chapter III context, the High Court regularly harnesses the definition provided by Gaudron J in Re Nolan; Ex parte Young (1991) 172 CLR 460, 496 quoted in, eg, Fardon (2004) 223 CLR 575, 615 [92] (Gummow J): ‘[Fair process involves] open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts’.

159  Provided that notice of the proceeding is provided to the respondent party: International Finance Trust (2009) 240 CLR 319, 355 [56] (French CJ); Ratnapala and Crowe, above n 95, 199-200.


162  Martin, above n 160, 523-5.


166  (1997) 190 CLR 1, 63 (Dawson J). See also Steyler and Field, above n 7, 256-7.

The maintenance of ordinary judicial process appears to overcome many (if not most) arguable affronts to the institutional integrity of courts. However, the precise aspects of ordinary judicial process that are protected through the Kable doctrine are difficult to define. The giving of reasons was identified as essential to institutional integrity in Wainohu.\(^{168}\) More broadly, the application of rules of evidence,\(^{169}\) the application of law to facts in issue,\(^{170}\) the provision of a right of appeal,\(^{171}\) provisions as to onus and standard of proof,\(^{172}\) and the existence of appropriate discretions,\(^{173}\) all seem to be important aspects of ordinary judicial process.\(^{174}\) However, two trends have arisen in the case-law that together suggest that Kable has a thin capacity to protect even the ordinary, or procedural, aspects of judicial process.

First, the executive and legislature have wide powers to regulate core aspects of trial process, including the rules of evidence, sentencing principles, and the onus of proof.\(^{175}\) As discussed above, the case-law indicates that this regulation may even bring about harsh or disproportionate effects without violating Kable. For instance, parliament may design a scheme that reverses the onus of proof,\(^{176}\) assigns a disproportionate mandatory sentence,\(^{177}\) and provides for evidence to be withheld from the respondent and his or her representative,\(^{178}\) all in keeping with Kable’s protection of ordinary judicial process.

Secondly, in certain cases the infringement of an aspect of ordinary judicial process has been overcome by the preservation of basic judicial discretions.\(^{179}\) The foremost example of this is the case of Pompano, in which control order provisions were upheld despite the police being allowed to rely on secret evidence. Validity was grounded in the preservation of the court’s overarching discretions and independent control of proceedings.\(^{180}\)

---

\(^{168}\) Wainohu (2011) 243 CLR 181, 192 [7], 213-5 [54]-[59] (French CJ and Kiefel J), 228 [104] (Gummow, Hayne, Crennan and Bell JJ).

\(^{169}\) Fardon (2004) 223 CLR 575, 692 (Gleeson CJ), 596 (McHugh J), 656 (Callinan and Heydon JJ).


\(^{171}\) Fardon (2004) 223 CLR 575, 617 (Gummow J), 658 (Callinan and Heydon JJ).

\(^{172}\) Ibid 596 (McHugh J), 615-6, 620-1 (Gummow J); International Finance Trust (2009) 240 CLR 319.

\(^{173}\) Fardon (2004) 223 CLR 575, 592 (Gleeson CJ), 596 (McHugh J), 656 (Callinan and Heydon JJ); Wainohu (2011) 243 CLR 181.

\(^{174}\) Such lists have been attempted by, eg: Gray, above n 156, 133, 139; Guy, above n 7, 285; Steyler and Field, above n 7, 249.


\(^{176}\) Ibid.

\(^{177}\) Emmerson (2014) 88 ALJR 522; Magaming v The Queen (2013) 252 CLR 381.

\(^{178}\) Pompano (2013) 252 CLR 38.

\(^{179}\) Gray, above n 156, 197. Cf Wainohu (2011) 243 CLR 181, in which the preservation of a discretion to give reasons was held not to remedy incompatibility arising from the explicit removal of the obligation on the judge to give reasons for his or her decision to declare an organisation: Wainohu (2011) 243 CLR 181, 213 [53], 219-20 [69] (French CJ and Kiefel J). See also Rebecca Welsh, ‘‘Incompatibility’ Rising?: Some Potential Consequences of Wainohu v New South Wales’ (2011) 22 Public Law Review 259, 264-5.

\(^{180}\) Pompano (2013) 252 CLR 38, 80 [88] (French CJ), 102-3 [166]-[168] (Hayne, Crennan, Kiefel and Bell JJ), 115 [212] (Gageler J).
secret evidence was ‘antithetical’ to the traditional system of justice, but nonetheless the judge’s capacity to maintain fairness in other ways – such as by giving less weight to the untested evidence – overcame potential invalidity. Whilst considerable weight is given to ordinary trial process in overcoming potential invalidity, these two trends suggest that Kable does not give rise to substantive or particularly reliable protections even for the basic procedural elements of ordinary judicial process.

It is difficult to reconcile the High Court’s clear indications that ordinary judicial process and procedural fairness are protected, with the breadth of the legislative and executive interference with court processes that have been permitted. One solution to this dilemma was posited by Wendy Lacey well before the resurgence of the Kable doctrine. Lacey’s ‘alternative approach’ contends that Kable may not directly protect elements of judicial process – rather, the doctrine protects courts’ inherent jurisdiction and capacity ‘to ensure the integrity, efficiency and fairness of its process’. This conception of Kable as a protection for the inherent jurisdiction of courts (rather than providing an avenue for rights-protection or an implied due process principle) has not been adopted in decisions of the High Court. However, it does make sense of the case-law. Lacey’s approach maintains the crucial focus on the essential aspect of Kable – the institutional integrity of the courts. It accounts for the considerable weight given to the preservation of judicial discretions in maintaining constitutional validity, and it sits comfortably with statements to the effect that a court cannot be required to exercise power in a manner that is inconsistent with procedural fairness.

The relationship between the Kable doctrine and judicial process remains fraught and uncertain. Kuczborski confirms that the preservation of ordinary judicial process plays a crucial role in maintaining constitutional validity. However, it will take future developments to clarify which aspects of judicial process are indeed protected under Kable, or whether the doctrine merely enshrines the inherent capacity of a court to effectively exercise its discretions and control proceedings before it.

C Interpreting Executive Power

Justices Crennan, Kiefel, Gageler, and Keane upheld the impugned laws as compliant with the Kable doctrine, however in obiter dicta, their Honours suggested a very narrow and highly contextual reading of the executive government’s declaration power – a fundamental aspect of the laws. These observations were unnecessary to the outcome of the case, but nonetheless their Honours dedicated five paragraphs of their judgment to elaborating this point. This reflects a willingness on the part of the High

181 Ibid 46 [1] (French CJ). See also 106-8 [184]-[188] (Gageler J) and analysis in: Gray, above n 156, 139-53.
183 For instance, Anthony Gray has argued that the factors relied upon by the High Court to uphold the use of secret evidence in judicial proceedings are inadequate: Gray, above n 156, 161.
185 See, eg, Pompano (2013) 252 CLR 38; Welsh, above n 7, 92.
187 Kuczborski (2014) 89 ALJR 59, 96-7 [210]-[215].
Court to respond to broad executive powers by way of statutory interpretation – even where such interpretation is not required by Chapter III.

It is not possible to draw significant inferences from these *obiter dicta* statements. However, they suggest that the High Court was not blind to the severity of the laws at hand or their potential to affect the relationship between the executive and judicial arms of government. The narrow interpretation of the declaration power posited by Crennan, Kiefel, Gageler, and Keane JJ was not obvious on the face of the legislation, and it would provide a considerable limit on the potential breadth and impact of the new offence provisions. Their Honours seem to be opening a doorway to judicial review of the Attorney-General’s declaration with one hand, even whilst closing the doorway to judicial review under the *Kable* doctrine with the other. This willingness to harness statutory interpretation to limit broad executive powers offers a potential counter-balance to the Court’s aversion to harnessing *Kable* as a protection for citizens from liberty-intrusive laws.

D Arguing a Kable Case: Verbal Formulae and the Essential Notion

Finally, the case of *Kuczborski* offers a valuable lesson in how *Kable* ought to be approached in legal argument. In the context of *Kable*’s dynamic evolution, the already broad notion of institutional integrity has become further clouded. This has given rise to a temptation to deconstruct the *Kable* doctrine into clearer, more manageable tests. For instance, it can be difficult to determine whether an executive action impermissibly compromises judicial integrity, but much clearer to identify whether the executive is exercising control over the judiciary, usurping judicial powers, seeking to cloak a non-judicial decision in ‘the neutral colours of judicial action’, or has enlisted, conscripted or dictated an exercise of the court’s powers.

In *Kuczborski*, the High Court continues this trend of harnessing formulae to assist its determination of *Kable* validity. However, French CJ and Hayne J send a clear and crucial warning. Such formulae are merely helpful; they do not amount to tests for *Kable* validity and they cannot be allowed to replace the essential inquiry of whether a law is incompatible with or repugnant to the institutional integrity of the court.188

This point emphasises the pervasive flexibility of the *Kable* doctrine. As Gabrielle Appleby and John Williams have observed, this flexibility is required to support the full-breadth of the *Kable* doctrine: ‘If [Kable] is to be used as such a large umbrella, it must be capable of adapting to any type of measure that can be concocted by the states that makes incursions into the institutional integrity of the Court’.189 However, this flexibility brings with it a lack of clarity, which in turn will continue to tempt advocates, scholars, and even judges to rely on verbal formulae. The tension between the approaches adopted in the joint judgment and in the judgments of French CJ and Hayne J in *Kuczborski*, reflects the ongoing challenge of maintaining the *Kable* doctrine’s focus on a flexible, amorphous notion of ‘institutional integrity’, whilst allowing the doctrine to be refined by precedent.190

188 *Kuczborski* (2014) 89 ALJR 59, 73 [38], [40] (French CJ), 83 [105]-[106] (Hayne J).

189 Appleby and Williams, above n 3, 29.

190 A tension reflected in the statement from *Pompano* (2013) 252 CLR 38 that ‘the constitutional validity of one law cannot be decided by taking what has been said in earlier decisions of the court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration’: 94 [137] (Hayne, Crennan, Kiefel and Bell JJ).
VII Conclusion

The case of Kuczborski does not dramatically alter the constitutional landscape or extend the Kable doctrine into new territory. However, it plays an important role in giving clarity to a dynamic constitutional principle.

The practical impact of the High Court’s decision in Kuczborski is to uphold the new offences provisions enacted by the Queensland government in October 2013 as part of its war on bikie gangs. At the time of writing both South Australia and Western Australia have indicated that they are considering following Queensland’s lead and enacting similar legislation.191 Thus, Kuczborski has cleared a path for the migration of these measures across Australia – a trend that has already played out for anti-organised crime control orders.192

However, South Australia and Western Australia have displayed some hesitancy to adapt Queensland’s laws to their own statute books. This may be a consequence of the many questions left unanswered in Kuczborski. Due to the plaintiff’s lack of standing, the High Court did not rule on the validity of other key aspects of the Newman government’s anti-bikie laws, including the imposition of 15 and 25 year mandatory sentences under the VLAD Act, the introduction of a presumption against bail for PICOs, and the aggravating circumstance provisions. The validity of these provisions remains unresolved. Moreover, the scope of the executive power to declare criminal organisations is less certain following Kuczborski. It may be that this power is effectively unbounded and unreviewable, as Hayne J suggested. However, the alternate interpretation put forward by Crennan, Kiefel, Gageler, and Keane JJ suggests a much narrower reading of that power. These divergent interpretations of the declaration power invite future applications for judicial review that would subject these declarations to judicial and public scrutiny. It remains, however, that regardless of whether the broad or narrow interpretation of the declaration power is favoured by the courts, the provisions are nonetheless compatible with Chapter III of the Constitution.

In terms of the Kable doctrine, Kuczborski marks a shift away from the optimism sparked by Kable’s post-2009 rejuvenation.193 The case-law clearly demonstrates that Kable is no implied bill of rights or due process clause. It is true that the High Court has consistently recognised the centrality of procedural fairness to institutional integrity, but it has also upheld grave interferences with fairness as Kable compliant. Similarly, the preservation of ‘ordinary’ judicial process has been vital to maintaining constitutional validity in Kuczborski and other cases – prompting some to argue that


192 Ananian-Welsh and Williams, above n 12.

193 Reflected in, eg: Bagaric, above n 132; Guy, above n 7, 285, 293; Steytler and Field, above n 7, 251; Appleby and Williams, above n 3, 28; Ratnapala and Crowe, above n 95, 211-2; Gray, above n 156.
‘procedural due process’ has been elevated to a constitutional imperative. But this too does not stand under the weight of precedent, as the High Court has also permitted extensive interference with fundamental aspects of ‘ordinary’ or ‘procedural’ judicial processes. A more coherent approach (though not one expressly adopted by the High Court) is that Kable protects the inherent capacities of courts to protect their own processes, rather than enshrining particular facets of court process as such.

This third conception of Kable’s capacity to protect judicial process aligns with French CJ and Hayne J’s warnings in Kuczborski that the focus of a Kable analysis must rest squarely on the institutional integrity of the court. It also is reflected in Crennan, Kiefel, Gageler, and Keane JJ’s clear statements that Kable has nothing to do with the impact of a law on civil liberties – even where that impact is severe or disproportionate.

The dynamic history of the Kable doctrine underscores its inherent flexibility and uncertainty. However, by confirming that Kable focuses squarely on the courts Kuczborski can assist advocates and scholars in persuasively framing a Kable challenge and effectively testing the doctrine’s potential as a substantive, principled limit on government power. As the Kable doctrine continues to evolve, attempts to harness its capacity to protect judicial process should focus on the court’s inherent discretions and control of proceedings, rather than on the impact of the law on rights, liberties, fairness, or even the expected procedural elements of a trial. These notions may be protected under human rights Charters, as in Victoria and the ACT, but one ought not rely on Kable to give rise to similar protections.

194 Kruger v Commonwealth (1997) 190 CLR 1, 63 (Dawson J); Steytler and Field, above n 7, 256-7.
197 Kuczborski (2014) 89 ALJR 59, 73 [38], [40] (French CJ), 83 [105]-[106] (Hayne J).
199 Appleby, above n 91.