Hinch, *Kable* and Open Justice: the Appropriate and Adapted Test

LIAM BOYLE

ABSTRACT

The decision in Hogan v Hinch *was uncontroversial to say the least. The outcome of that case was undoubtedly correct, but it was not necessary in reaching its conclusions for the High Court to discuss one of the deeper issues underlying the case: how Chapter III of the Constitution interacts with parliamentary sovereignty in the context of open justice. This article argues that that a proportionality methodology best answers this issue; that is, by asking whether an impugned law is reasonably appropriate and adapted for an end consistent or compatible with observance of the open court principle. This approach, it is argued, is consistent with the history and purpose of open justice in the administration of justice, and provides a workable methodology for answering the constitutional question posed.*

I INTRODUCTION

An opportunity arose in *Hogan v Hinch*[1] to test the extent to which the open justice principle, as a constitutional premise, is provided by Chapter III of the Constitution (*Chapter III).* The complexity of this enquiry was not explored fully. On one view, it is a shame that the impugned legislation in that case was not more severe in its effect. From one perspective, it would have been preferable to have a set of facts conducive to a more intricate debate. Instead, the issues in that case were dismissed quite easily by the High Court[2] and thus it was not necessary to provide clear and authoritative guidance on how Chapter III of the Constitution interacts with parliamentary sovereignty in the context of open justice.[3]

This interaction presents a conceptual difficulty in that the constitutional rules under Chapter III require, in this instance, analysis of another set of rules (the common law requirements of open justice) that involve exceptions from a general principle. The question is how these exceptions are to be constitutionally controlled. The judgments in *Hinch* did not state in detail why the impugned legislation did not fall foul of Chapter III.

1 *Hogan v Hinch* (2011) 243 CLR 506 ('Hinch').
2 French CJ and Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.
3 This 'missed opportunity' is not suggested to be a criticism of the High Court: see Chief Justice Robert French AC, 'Judges and Academics - Dialogue of the Hard of Hearing' (Speech delivered to the Australian Academy of Law, Federal Court of Australia, 30 October 2012) http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj30oct12.pdf, 13.

There were attempts by counsel at the hearing of *Hinch* to try to flesh out this deeper issue. It was put in the form of an 'appropriate and adapted' test in the sense that the limitation established in *Kable*, in the context of open justice, depended upon a review of the legislation by means similar to the test under the freedom of political communication limitation. This issue underlying the argument raised in *Hinch* is unexpressed within both the judgments and is arguably to some degree latent. This article discusses this issue and argues that the constitutional test underlying *Kable* in the context of open justice ought to be one the High Court is now becoming accustomed to: whether the legislation is reasonably appropriate and adapted for an end consistent or compatible with observance of the open court principle.

Because the High Court did not deal with the issue, this article will focus on the debate in the transcript of the proceedings and the written submissions.

II THE 'PRINCIPLE' OF OPEN JUSTICE

The reasons for open justice in our legal system are both historical and normative. It has been said that openness in English courts has not 'been the result of conscious policy but of their history.'[4] Likewise, Chief Justice Spigelman has stated 'the principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal'.[5]

It is difficult if not impossible to ascertain the precise point at which open justice entered our system of justice. For various reasons, it is fair to conclude that the 'origins and practice of judicial openness are obscure.'[6] At any rate, for present purposes such an enquiry is unnecessary; it is sufficient to observe that 'throughout its evolution, the trial has been open to all who cared to observe'[7] and this, as 'one of the most conspicuous features'[8] of judicial proceedings, 'appears to have been the rule in England from time immemorial'.[9] Sir Frederick Pollock, one of the most pre-eminent legal historians, commented with respect to the open court that '[here] we have one tradition, at any rate, which has persisted through all changes'.[10]

More important than the historical origins of open justice are the virtues it brings to the administration of justice. There is a plethora of inspiringly grandiose and delightfully eloquent pronouncements from jurists across the world that highlight the fundamental importance of open justice to the judicial process; each would provide a quaint summary of

---

4 Peter Wright, 'The Open Court: the Hallmark of Judicial Proceedings' (1947) 25 *Canadian Bar Review* 721, 721.

5 The Hon JJ Spigelman, 'Seen to Be Done: the Principle of Open Justice - Part 2' (2000) 74 *Australian Law Journal* 378.

6 Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 25, 26.

7 *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) 564.

8 E Jenks, *The Book of English Law* (6th ed, 1967) 73.

9 Ibid 74. In 1649 for example, the principle seemed sufficiently entrenched to allow John Lilbourne to plead 'the first fundamental liberty of an Englishman that all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear … and no man whatsoever ought to be tried in holes or corners, or in any place where the gates are shut and barred'; see Geoffrey Robertson QC, *The Tyrannicide Brief* (2005) 219.

10 F Pollock, *The Expansion of the Common Law* (1904) 31-32.

the principle, alas, there is not room to canvass them all here. One succinct quote from the South African Constitutional Court neatly summarises this principle in the criminal context (though it is equally applicable to the civil realm as well):

> Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for that reason that the principle of open justice is an important principle in a democracy.[11]

There are many good reasons why such pronouncements are continuously endorsed by jurists. Parts of the above statements allude to some of these reasons. In general terms, there are many values that open justice brings to the system of justice. *First*, there is the element of providing a system conducive to finding out the truth. *Secondly*, there is the enhancement of judicial accountability. *Thirdly*, it upholds the rule of law. *Fourthly*, it is a prerequisite to maintaining public confidence in the judiciary. *Fifthly*, there is an element of deterrence to would-be transgressors of the law. *Sixthly*, an open court is important to free expression and is a necessary condition to public involvement in government affairs.

Each of these values individually provides a strong foundation for the maintenance of open justice; cumulatively, they place considerable weight in the conceptual balance. It is for these reasons that open justice operates as a strict and fundamental principle to be applied in the administration of justice.

Although open justice is an important principle in our society, it is inherently qualified. Chief Justice Spigelman was at pains to demonstrate that 'the "principle of open justice" is a *principle;* it is not a freestanding right'.[12] His Honour continues:

> As a principle, it is of significance in guiding the court in determining a range of matters ... However, it remains a principle and not a right.

A principle, as Professor Ronald Dworkin has stated:

> ... states a reason that argues in one direction, but does not necessitate a particular decision...There may be other principles or policies arguing in the other direction ... If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive.[13]

This view is consistent with the approach taken by the House of Lords in *Scott v Scott*. Viscount Haldane observed that the paramount object must be to do justice, and that open justice is but a means to this end.[14] Consequently, at common law there are exceptions to this

---

11 Justice Yacoob in *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O'Connell and Others v The State* [2007] ZACC 3; 2007 (5) BCLR 474 (CC)).

12 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 (emphasis original).

13 Ibid, citing R Dworkin, *Taking Rights Seriously* (1977) 26.

14 *Scott v Scott* [1913] AC 417, 437. Chief Justice French provided a similar observation; *Hinch* (2011) 243 CLR 506, [20].

generally strict requirement. These exceptions are strictly limited, and they must meet the criterion of necessity – that is, 'necessary to secure the proper administration of justice'.[15]

President Kirby reviewed the authorities in this regard and reached the same conclusion. His Honour stated in *John Fairfax Group v Local Court of NSW*:

> The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally ... or would derogate from even more urgent considerations of public interest ... the rule of openness must be modified to meet the exigencies of the particular case.[16]

Formulated as a legal test at common law, the court begins with the dual propositions that proceedings ought to be administered openly and that this is generally fundamental to the administration of justice. However, departure from this general requirement may be warranted if a party can demonstrate that it is necessary to secure the proper administration of justice, and the court will make an order infringing open proceedings to the extent necessary to secure justice in the circumstances.

A *Exceptions to the Principle*

Understanding the exceptions to the principle of open justice enable its ambit to be understood better and will be significant in making a constitutional assessment of open justice. It would be imprudent to make some all-encompassing statement about the ambit and limits of open justice deduced from the current exceptions. Rather, the preferable approach is to understand the principles that have guided the exceptions to date. Obviously that is not to say the common law requirements and constitutional requirements are to be equated. It is well established that Parliament is not confined to common law principles, which are inherently susceptible to legislative modification. However, the common law's approach to questions of fundamental importance will be of assistance in determining questions arising from Chapter III of the Constitution, which was framed under strict historical and normative expectations.[17] Chief Justice French's judgment in *Hinch* demonstrates that the common law of open justice informs or assists with the interpretation of the 'institutional integrity' criterion,[18] and the approach his Honour took in *Totani* consolidates this view.[19]

Over time the common law has carved out from what would otherwise be the rule of open proceedings. These exceptions were developed as part of an overall test of necessity. The necessity test involves reviewing the information or circumstances to determine whether 'there be identified some substantial detriment or risk of detriment to the administration of

---

15 *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 477, 485 (McHugh JA).

16 *John Fairfax Group v Local Court of NSW* (1991) 26 NSWLR 131.

17 See discussion in Sir Owen Dixon, *Jesting Pilate*, (1965) 198-213. See also *Cheatle v The Queen* (1993) 177 CLR 541, 552; and *State of South Australia v Totani* (2010) 242 CLR 1, [59]-[62], [72].

18 *Hinch* (2011) 243 CLR 506, [46]; see also [21]-[27].

19 *State of South Australia v Totani* (2010) 242 CLR 1, [69]-[73].

justice that would, in a significant way, be alleviated by suppression of the information' or otherwise closing off that information from the public.[20] Under this test, suppression of the information must be more than merely 'convenient, reasonable or sensible, or that it serves the public interest, or even on balance serves the public interest.'[21] It is applied as a strict test.

One of the clearest demonstrations of the test of necessity at common law is with respect to trade secrets or secret processes. If the litigation involves such a subject matter, publicity would destroy the very thing the litigation was trying to protect. There would be, in these circumstances, a denial of justice if the secret were communicated to the world.[22] Courts are keen to protect the subject matter of litigation so as not to render its proceedings futile or make orders that are 'idle or ineffectual'.[23] The same reasoning applies to protect an order in proceedings in which confidential information exists, where, to exhibit that information publicly, would be to frustrate the attainment of justice.[24] But even this consideration is qualified: the order or judgment will be limited or structured in such a way 'so as to reveal as much of what occurred as is possible without destroying the secret.'[25]

From this reasoning follows other examples where it may be necessary to protect other secret processes or the object of the action, such as secret police methods or victims of blackmail.[26] In relation to secret police methods, orders may be made to suppress the publication of evidence that would disclose a secret police method used to solve cases and convict criminals.[27] Orders may be made that suppress or conceal the identities of witnesses[28] or national intelligence agency officers[29] involved in undercover operations. Pseudonyms are prevalently used for the parties' names, such that some volumes of law reports are beginning to read 'like alphabet soup'.[30] This is frequently under the justification of protecting the parties from potential threats or persecution.

The maintenance of order in courts may also justify an infringement with open justice. If rioters or protesters would impinge upon the proceedings the court may order a closed hearing.[31] Earl Loreburn held:

---

20 *Attorney-General (NSW) v Nationwide News Pty Ltd* (2007) 178 A Crim R 301 [39] (Hodgson JA, with Hislop and Latham JJ agreeing).

21 Ibid [34].

22 *Scott v Scott* [1913] AC 417, 445.

23 *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146, 154 (Lord Hatherley LC).

24 See, for example, *Versace v Monte* [2001] FCA 1565, which involved an application for an order to be made under the now repealed s 50 of the *Federal Court of Australia Act 1976* (Cth) for a restriction on the publication of evidence, namely, a defamatory and confidential book critical of Gianni Versace.

25 *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 308.

26 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54.

27 For a full discussion on these methods and the law in this regard, see Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods' (2007) 31 *Melbourne University Law Review* 171.

28 *R v Ngo* [2003] NSWCCA 82; special leave to appeal to the High Court from this decision was subsequently refused, see [2004] HCATrans 185.

29 *A v Hayden (No 2)*(1984) 156 CLR 532.

30 These were the 'provocative words' used in *Re Guardian News & Media Ltd* [2010] 2 All ER 799, [1].

31 *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254.

> [t]umult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general.[32]

Another example, which was referred to in *Scott v Scott*, is the Court's role with respect to wards, lunatics, the mentally ill and children (as *parens patriae*).[33] The mentally ill and lunatics require the protection of the court,[34] and in seeking this protection suffer the indignity of the court discussing his or her sensitive affairs. They should not have to 'suffer the further indignity of the salacious press prying into them.' [35] The court's jurisdiction in this respect is paternal, in that the court is to look after the interests of this class of litigant. This may require different infringements on open justice, such as use of a pseudonym, exclusion of the public or making orders *in camera*.[36]

It is clear that these exceptions were developed over time to address what would have otherwise been an inappropriate application of the strict rule. At common law, the exceptions are few and strictly defined.[37] In *John Fairfax Publications Pty Ltd v District Court of New South Wales* the Court held that it is 'now accepted that the court will not add to the list of exceptions'.[38] However, importantly, it is open to Parliament (subject to constitutional restraints) to develop new exceptions. Changing social conditions and judicial processes may warrant the application of a new exception previously unforseen or unnecessary.[39]

---

32 *Scott v Scott* [1913] AC 417, 446. This statement extends to policies encouraging protection of the court and its officers. Court practices involving the forfeiture of property or denying entrance upon suspicion of misconduct are justified under this exception; see Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (2002), 122 -125.

33 See, for example, *In re G (an infant)* [1892] 1 Ch 292. For a history of *parens patriae* see J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origin' (1994) 14 *Oxford Journal of Legal Stu*dies 159.

34 *In re E.S (A supposed lunatic)* 1876 4 Ch D 301.

35 *John Fairfax Publication Pty Ltd v Attorney General (NSW)* (2000) 181 ALR 694, [168] (Meagher JA).

36 See, for example, *In re B (an alleged lunatic)* [1892] 1 Ch 459.

37 *McPherson v McPherson* [1936] AC 177, 200; *John Fairfax Publications Pty Ltd and Anor v District Court of New South Wales and others* (2004) 61 NSWLR 344, 353; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 604 (Lord Steyn).

38 (2004) 61 NSWLR 344, 353. However, if there is a sufficient analogy to the existing exceptions, an extension may be permitted; see *R v Kwok* (2005) 64 NSWLR 335, [16] (Hodgson JA). However, in a subsequent case, his Honour then provided a broader formulation of this rule; see *Attorney-General (NSW) v Nationwide News Pty Ltd* (2007) 178 A Crim R 301 [38] (Hodgson JA, with Hislop and Latham JJ agreeing).

39 For example the advent of 'super injunctions' in the UK, see Master of the Rolls of the United Kingdom Court of Appeal, 'Report of the Committee on Super-Injunctions: Super-Injunction, Anonymised Judgments and Open Justice', 20 May 2011.

B *Parliament May Add More Exceptions*

It is trite but essential to recognise that Parliament may add to the list of exceptions.[40] Although courts have held that the common law is restricted in its ability to develop exceptions, only a constitutional restraint is imposed upon Parliament. This is an important recognition that new circumstances may arise that warrant a protective measure infringing open justice. This makes sense. It would absurd to have the goal of doing justice in the circumstances, but being precluded from doing so because the situation did not fit into an established exception. This approach would be overly deferential to past norms and would invite a miscarriage of justice. Moreover, sensitive questions of policy are rightly reserved for Parliament. As the cases grappling with principles of open justice demonstrate, there are numerous considerations that need to be taken into account and Parliament should have an ability to make an assessment as to which competing interest should take precedence. The law, as it were, may 'tilt the scales'.[41]

III THE OPERATION OF THE *KABLE* PRINCIPLE

The foregoing is necessary to lay the foundations for the central question of this article: how will the above-mentioned considerations inform the construction and application of a constitutional test? The principle derived and developed from *Kable*[42] highlights that under Chapter III there is a nationally integrated court system. The focus of the *Kable* principle is about protecting the 'institutional integrity' of courts,[43] and asking whether the law is 'repugnant to the judicial process in a fundamental degree'.[44] This includes an assessment of the defining characteristic of courts. But the discussion of this principle has at times been unclear and it has not been applied as a uniform test.

In *Hinch*, French CJ set out the relevant framework as follows. A law (whether federal or State) cannot empower or authorise a Court to do things that are 'repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.'[45] Further, 'that broad criterion of invalidity encompasses functions which would be inconsistent with or inimical to the defining characteristics of a court, or which deprive a court of one or other of those defining characteristics.'[46] This raises two questions. First, what, in the present context, is the scope of the judicial power of the Commonwealth? Second, to what extent is open justice a defining characteristic of a court?

---

40 *Russell v Russell* (1976) 134 CLR 495, 520; *John Fairfax Publication Pty Ltd v Attorney General (NSW)* (2000) 181 ALR 694, [70]-[73].

41 *Hinch v Attorney-General* (Vic) (1987) 164 CLR 15, 41 (Wilson J).

42 *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51

43 See *Forge v ASIC* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532; *K-Generation v Liquor Licensing Court* (2009) 237 CLR 531; *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 ('*International Finance'*); *State of South Australia v Totani* (2010) 242 CLR 1; *Wainohu v State of New South Wales* (2011) 243 CLR 181.

44 *International Finance* (2009) 240 CLR 319.

45 See *Hinch* (2011) 243 CLR 506, [45].

46 Ibid.

A *Judicial Power and Judicial Process*

One fairly well-settled view is that judicial power involves following what is described as the judicial process.[47] In *Bass v Permanent Trustee Co Ltd*, it was held that 'judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process.'[48] Justice Gaudron was one of the central advocates of the definition of judicial power involving a judicial process. Her Honour has stated:

> Judicial power is usually defined in terms of its subject matter, but it is a power that, for complete definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as 'the judicial process'.[49]

She also expressed this view in a number of subsequent authorities.[50] There is further support for this. In *Leeth v Commonwealth*, Deane and Toohey JJ held that it was implicit in the terms of Chapter III that judicial power requires the observance of the 'essential requirements of the curial process'.[51] A similar statement was made by Brennan, Deane and Dawson JJ in *Chu Kheng Lim*, where their Honours also found it implied in Chapter III that legislation cannot validly require or authorise courts to exercise judicial power in a manner inconsistent with the 'nature of judicial power'.[52]

The judicial process encompasses a number of considerations. In ascertaining the content of the judicial process, similarly to that of open justice, regard must be had to the common law. The Constitution was founded upon certain assumptions, chief amongst which was the operation of the common law and the essential principles it had distilled through time.[53] These principles must therefore have a bearing on the interpretation of Constitutional terms. The High Court in *Cheatle v The Queen* held:

> It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history.[54]

More specifically with respect to the meaning of judicial power, Brennan CJ has stated:

---

47 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ), 703-704 (Gaudron J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 67 (McHugh J); *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

48 (1999) 198 CLR 334, [56].

49 *Harris v Caladine* (1991) 172 CLR 84, 150.

50 See above n 47.

51 (1991) 174 CLR 455, 487.

52 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

53 See discussion in The Hon John Basten, 'The Supervisory Jurisdiction of the Supreme Courts (2011) 85 ALJ 273, 281–283. For a similar view see Sir Owen Dixon, *Jesting Pilate*, (1965) 198-213.

54 (1993) 177 CLR 541, 552.

> The nature of judicial power and the essential character of the courts which are charged with its exercise can be ascertained in part from the Constitution, in part from the common law.[55]

Open justice, as an important common law principle, will inform Constitutional interpretation; it will shape the way judicial power is constitutionally manifest. To a significant degree, judicial power must therefore be exercised in accordance with the principle of open justice. The development of the concept of judicial power is inextricably bound with the historical development of open justice. This view has been shared by some members of the High Court.

In *Russell v Russell*, a majority of the High Court invalidated a law that required State courts, exercising federal jurisdiction under s 77(iii) of the Constitution, to sit *in camera*.[56] Justice Gibbs held (in a frequently cited judgment):

> In requiring them to sit in closed court in all cases - even proceedings for contempt - the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.[57]

Justice Stephen, in the same case, stated in a seldom quoted judgment:

> To require that a Supreme Court, possessing all the attributes of an English court of justice, should sit as of course in closed court is, I think, in the words of Lord Shaw, to turn that Court into a different kind of tribunal and involves that very intrusion into its constitution and organization which s 77(iii) does not authorize.[58]

Another constitutional endorsement from the High Court can be found from Gaudron J in *Re Nolan; Ex parte Young* where her Honour observed:

> In answering that question it is important to bear in mind that an essential feature of judicial power is that it must be exercised in accordance with the judicial process. In *Harris v Caladine*, I described the general features of that process. Importantly for present purposes, *those features include 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.[59]

Her Honour therefore ties open justice into the definition of judicial power. Justice McHugh has taken a similar approach and has recognised open justice as a core part of the exercise of judicial power. In *Grollo v Palmer* he said 'open justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power.'[60] In the same case, Gummow J said:

---

55 *Nicholas v The Queen* (1998) 193 CLR 173, 185. Chief Justice French has made similar comments: see *State of South Australia v Totani* (2010) 242 CLR 1 [50], [72]. See also Basten, above n 53, 281-283.

56 (1976) 134 CLR 495.

57 Ibid 520.

58 Ibid 532.

59 (1991) 172 CLR 460, 496 (emphasis added).

60 (1995) 184 CLR 348.

> An essential attribute of the judicial power of the Commonwealth is the resolution of such controversies by the means described so as to provide final results which are delivered in public after a public hearing.[61]

The concept of judicial power thus entails a constitutional premise of open justice. The way in which the scope or extent of this premise is to be tested is discussed below.

B *Defining Characteristic of Courts*

For similar reasons open justice is a defining characteristic of a court. *Forge v ASIC*[62] (*Forge*) provides some useful clarification as to the operation of *Kable* on this point:

> But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those *defining characteristics which mark a court apart from other decision-making bodies*.
>
> It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court ... *An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial*. Essential to that system is the conduct of trial by an independent and impartial tribunal.[63]

The reference here to the 'common law system of adversarial trial' provides a foundation for open justice. The common law system adversarial trial is conditioned on an independent, impartial and open tribunal, subject to limited exceptions. But the determination of the defining characteristics of courts under *Kable* is not to be limited to an enquiry as to independence and impartiality, as these are subsets of the broader enquiry of looking to the institutional integrity of a court. Thus in *Kirk*, for example, supervisory jurisdiction was held to be a defining characteristic of a State Supreme Court.[64] The High Court explained that this jurisdiction 'is governed in fundamental respects by principles established as part of the common law of Australia'.[65] Removing this jurisdiction, in light of common law principles, as well as its purpose and history, would be to remove a defining characteristic of a State Supreme Court. The Constitution protects these common law institutional characteristics.[66]

As is now accepted, it is beyond a mere ordinary incident of their operation that courts administer their functions publicly – it is a defining characteristic. So much has been

---

61 Ibid 394.
62 *Forge v ASIC* (2006) 228 CLR 45.
63 *Forge v ASIC* (2006) 228 CLR 45, [63]-[64] (Gummow, Hayne and Crennan JJ) (emphasis added). See also *Gypsy Jokers* (2008) 234 CLR 532, [162].
64 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 ('*Kirk*').
65 Ibid, [99].
66 Basten, above n 53, 284.

explicitly stated by French CJ, amongst others.[67] For the historical and normative reasons outlined above, open justice is a defining characteristic.

It was against a background of open justice that Chapter III was framed. While a strict requirement, exceptions were permitted when necessary in the interests of justice and Parliament can determine, to some extent, what is necessary in the interests of justice and good policy. A crucial constitutional tension thus arises as to how far the legislature can go, and how any judicial review will operate in this context. The court must have some supervisory role lest Chapter III principles be subverted. But how far can Parliament go? When is the point reached when the infringement to open proceedings becomes repugnant, or when the defining characteristic of openness is no longer relevantly exhibited? How is this to be tested?

This was a point raised by the Solicitor-General for the Commonwealth both in written submission and at hearing. The debate was also picked up by counsel for Mr Hinch, and the Solicitors-General for Western Australia and South Australia.

IV THE APPROPRIATE AND ADAPTED TEST

At hearing, the Solicitor-General for the Commonwealth, Mr Gageler SC (as his Honour then was), elaborated his written submissions to argue that the principle properly underlying *Kable* in the context of open justice is:

> that a substantial legislative derogation from the principle of open justice will require, if challenged, constitutional justification in terms of the pursuit of a legitimate end by proportionate means.[68]

Mr Gageler argues that this is the result of the fundamental constitutional requirement picked up in *Bradley*, *Forge*, *Gypsy Jokers* and *K-Generation*, that the 'root principle of *Kable* lies in the protection of a Chapter III court as an independent and impartial tribunal'.[69] Further, he argues that this is the consequence of the fact that traditionally open justice is not an end in itself: it is 'a standard or common characteristic that reflects and promotes independence and impartiality – the very thing the constitutional principle protects.'[70]

It is worth looking at this submission further, as it elucidates an important point.

> [If] you admit of a rule that reflects and promotes the constitutionally protected independence and impartiality but you also admit of legislative derogations from that rule, then the scope of the legislative derogations that are constitutionally permissible need to be related to the reasons that underlie the rule. To say that any derogation has to be for an end that is itself consistent with the reason for the rule – independence and impartiality – and to say that the derogation must invoke means that having regard to the impact on independence and

67 *McPherson v McPherson* [1936] AC 177, 200; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 531 [10], [49]; *Totani* (2010) 242 CLR 1, [62]; *Hinch* (2011) 243 CLR 506, [20].

68 *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010) 89.

69 Ibid 90.

70 Ibid.

> impartiality are proportionate to that end, is simply to apply the standard analytical technique that as a matter of constitutional principle is applied in other areas where it is recognised that there is a constitutional limit, but it is not a bright line.[71]

The gist of this submission should be accepted, though not entirely for the reasons expressed by the learned then Solicitor-General. One problem is that the root principle of *Kable* is not exclusively about maintaining independence and impartiality: it is more broadly about protecting the constitutionally mandated judicial process and concept of a court, of which independence and impartiality form a part. Although independence and impartiality are key concerns, they are not the sole objects of enquiry. Thus recently in *Wainohu v New South Wales,* French CJ and Kiefel J stated with respect to the defining characteristics of a court:

> those characteristics include the reality and appearance of the court's independence and its impartiality. *Other defining characteristics* are the application of procedural fairness and adherence, as a general rule, to the open court principle.[72]

As indicated by *Harris v Caladine*[73] and *Re Nolan; Ex parte Young*[74], discussed above, maintaining the judicial process is a constitutional end in itself in relation to the exercise of federal judicial power, and an essential feature of the judicial process is 'open and public enquiry (subject to limited exceptions)'.[75] Also, as *Forge* clarifies, preserving the defining characteristics of a State Supreme Court is required by Chapter III, and again, one of these characteristics is the 'open court principle'.[76] This leads into the second difficulty of Mr Gageler's approach: characterising the principle of open justice solely in terms of independence and impartiality. If open justice is analysed normatively, it is clear that its normative basis can be found as promoting independence and impartiality, as Bentham, Mirabeau and Sir Thomas Smith identified. However, although open justice incontrovertibly assists in securing independence and impartiality, it is more than this, providing many benefits to the system of justice generally.[77] Subject to limited exceptions, it is the way the judicial process operates and has operated 'from time immemorial', such that it can be deemed as a defining characteristic of a court.[78] In looking at the various benefits that open justice broadly provides to the judicial system, it is apparent that not all go to securing independence and impartiality.

Thus *Kable* is applied as a test of repugnancy to the judicial process[79] and 'upon maintenance of the defining characteristics of a "court"'[80]. As open justice is a defining aspect of a court

---

71 Ibid.

72 (2011) 243 CLR 181, [44] (emphasis added).

73 (1991) 172 CLR 84.

74 (1991) 172 CLR 460.

75 Admittedly, those cases do not provide details on the content of this requirement, only that it is fundamentally a requirement of the exercise of judicial power. Mr Gageler argued that 'it has never been the case that judicial power is to be exercised in a traditional manner at any cost' *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010), 91-92.

76 *Totani* (2010) 242 CLR 1, [62]; *Wainohu v State of New South Wales* (2011) 243 CLR 181, [44].

77 See the discussion in The Hon Beverley McLachlin, 'Courts, Transparency and Public Confidence – To the Better Administration of Justice' (2003) 8 *Deakin Law Review* 1.

78 E Jenks, *The Book of English Law* (6th ed, 1967) 73.

79 *International Finance* (2009) 240 CLR 319, [87], [103], [136], [140].

80 *Forge v ASIC* (2006) 228 CLR 45, [63].

and the judicial process, Chapter III of the Constitution, to some extent, preserves open justice as a constitutional premise. Mr Gageler's suggested test is preferable insofar as it provides a mechanism for this *extent* to be tested.

As outlined above, exceptions to the norm of open proceedings are recognised as a part of the common law. Further, Parliament may legitimately add to these exceptions. The question of repugnancy, therefore, must recognise these exceptions to the rule. Once the *Kable* test is formulated to the effect that it will invalidate legislation that is 'repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia,'[81] the question then becomes how this criterion of repugnancy will be tested, and how the exceptions will be treated in light of the rule?[82] Adapting the submission of the Solicitor-General, the test in this context ought to be whether the law is reasonably appropriate and adapted for an end consistent or compatible with observance of the open court principle. In other words, whether the operation or effect of a law departs from open proceedings to serve the end of the interests of justice (broadly defined to include public policy) in a manner that is reasonably appropriate and adapted to that end. Once it is accepted that exceptions to the rule of open justice are justified on the basis that they serve a greater policy, e.g. prevention of harm or destruction of a secret, then this becomes the indicator under *Kable*: is the legislative measure a reasonable response? That is, does it attend to some legitimate public interest, and does it do so in a reasonably appropriate and adapted manner?

Thus while Parliament may assert that a law is necessary in the interests of justice or for some other public interest, this assertion will not be upheld if the quality of the legislative intrusion is such that it denies open justice in circumstances found not reasonably appropriate and adapted to the public interest. One of the corollaries of the constitutional premise of open justice is that courts must be able to exercise a supervisory role with respect to the exceptions to that premise and what lies in the interests of justice or the public interest.

The test of repugnancy must recognise that Parliament has an ability to determine when open justice may be infringed. The test must also, however, recognise the limitation of this ability, in that Parliament's assertion cannot remain untested – it must be reasonably based and the infringement must not go beyond what is necessary. Under the *Kable* principle, a law that required a court to sit in closed court, as a matter of course, would be invalid because there would be no discrimination between circumstances potentially warranting the infringement and circumstances that do not.[83] Axiomatically, this would deny open justice in a way not reasonably appropriate and adapted to what is necessary in the administration of justice and would be repugnant to the judicial process – and incompatible with Chapter III – by virtue of this fact. Further, it is submitted that this test would include assessing the circumstances, context and scheme within which a judicial discretion is to be exercised. A judicial discretion

81 Ibid [97]-[98]; see also [140], [159] (Heydon J). The subtle distinction between this approach and that of French CJ has been highlighted by Melissa Perry QC, see 'The High Court on Constitutional Law: The 2009 Term' (Paper delivered at the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, 19 February 2010) 10-11.

82 Cf *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 611 (McHugh J).

83 *Russell v Russell* (1976) 134 CLR 495, 520.

of itself is no protection to open justice if the legislative scheme is such that a discretion is to be exercised within a clearly devised but proportionately offensive framework.

The Solicitor-General for South Australia, Mr Hinton QC, posited a similar argument in written submissions, although the point was not put orally at hearing. He submitted:

> ... providing modification of the open justice principle can be regarded as a reasonable response to a legitimate policy concern, a State Parliament may provide that classes of proceedings to which that policy concern applies are to be conducted in private.[84]

Again, this recognises that the limitations under *Kable* in the context of open justice necessitate an enquiry into the reasons underlying the scheme and the form that it takes. He concludes:

> Providing the rules fixed by State legislation can be seen as a *reasonable implementation of a legitimate policy*, a requirement that courts be closed to the public in particular circumstances will not be inconsistent with the defining characteristics of a State Court.[85]

The appropriate and adapted test was also supported by counsel for Mr Hinch, Mr Bennett QC. Although his submission was neither as extensive nor as detailed as Mr Gageler's, it supported the view that 'any principle implied in the Constitution is going to have some exceptions and one has to work out the scope of them and what is the basis on which exceptions will be permitted.'[86] He continued:

> So when one has implications from Chapter III in one sense, it may be necessary to look at questions analogous to the appropriate and adapted tests which apply in relation to the implied freedom of political communication.[87]

This reasoning followed from a need to limit the exception. The reason underlying the appropriate and adapted test, as indicated above, is one of testing the discretion of Parliament to determine the contents of what lies in the interests of justice in a given context. It is this assessment by Parliament that is effectively reviewed. It would capture the heavy handed and more excessive legislative responses to problems where there is a disproportionate interference with open proceedings. Where a reasonable and proportional postulate is proffered by the government, it would be accepted by the courts under the proposed test. As will be discussed later, this was the tacit approach undertaken in *Hinch*.

These submissions were opposed by the Solicitor-General for Western Australia, Mr Meadows QC. He submitted that:

> [A] law that has that incidental effect cannot be constitutionally justified by the pursuit of some other end. The presence of those [defining characteristics of a court], we would submit, is an absolute constitutional imperative which is not subject to any form of reasonable

84 Solicitor General (SA), 'Written Submissions of the Attorney General for the State of South Australia (Intervening)', Submissions in *Hogan v Hinch*, M105 of 2010, 27 October 2010, 11.
85 Ibid (emphasis added).
86 *Hogan v Hinch* [2010] HCATrans 284 (2 November 2010) 24.
87 Ibid.

> regulation. If a State law deprives a court of those defining characteristics, it does not matter why it does so. There is no room, we would say, for an appropriate and adapted ... test.[88]
>
> A law which impairs the independence and impartiality of the court is invalid, whatever the reasons are for its imposition. So we would submit there is no occasion to consider whether the law is appropriate and adapted or necessary to the pursuit of some other end.

This argument would appear to have support in the comments of McHugh J in *Re Woolley; Ex parte Applicants M276/2003*.[89] Notwithstanding this, it is problematic for two reasons. First it seems to focus exclusively on independence and impartiality, in a similar way to Mr Gageler's submission. Secondly, it begs the question in that its conclusion is founded on an assumed content of 'defining characteristics of a court' as well as 'independence and impartiality', which need answering. The problem though is that these phrases require answering by reference to a complex enquiry in which a concept of proportionality may play a part once the exceptions to the rule are considered.

As outlined already openness is a defining characteristic but one subject to various exceptions. An analysis of these exceptions must recognise that traditionally courts can legitimately be closed in certain circumstances to protect a legitimate interest or to prevent a legitimate harm. This is constitutionally permissible. Thus, in accepting the traditional exceptions that permit a closed hearing, one must accept that the consequent impairment of openness is permitted (or legitimised) on the basis that it is reasonably appropriate and adapted to serving some end. For example, closing a hearing from the public to prevent disclosure of a trade secret, or in exercise of a court's *parens patriae* jurisdiction, is a reasonably appropriate and adapted policy to address the harms that would result if those proceedings were open. The interference is reasonable in the circumstances. Were it otherwise, the exception would have no basis.

Furthermore, and perhaps curiously, even the calculation of a court's institutional integrity with respect to its independence and impartiality can at times involve a question of proportionality. As will be elaborated below, in *Forge*, it was seen as important that the circumstances of the appointment of the acting judges to the Supreme Court of New South Wales be considered in determining the requirement of impartiality and integrity of a court. Thus:

> *The greater the necessity for the appointment*, the less influential on perceptions of impartiality and integrity may be the considerations of the possible frailties of the person or persons appointed. That is, the institutional integrity of the court is less likely to be damaged by response to pressing necessity than it is by the change of character that may be worked by a succession of short-term appointments for no apparent reason other than avoiding the costs associated with making full-time appointments or, perhaps worse, a desire to assess the 'suitability' of a range of possible appointees.[90]

88 *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010) 102-103.
89 (2004) 225 CLR 1, [80].
90 *Forge v ASIC* (2006) 228 CLR 45, [99] (Gummow, Hayne and Crennan JJ) (emphasis added).

The appropriate and adapted test adequately addresses the jurisprudential problems inherent in this limit to Chapter III and it is consistent with other constitutional tests.[91] The suitability of this type of reasoning has been summarised recently by Kiefel J. In briefly outlining the history and operation of proportionality reasoning, as well as the various contexts in which it appears in Australian constitutional law, her Honour argues that it can be useful in resolving tensions where a constitutional principle may not be regarded as absolute.[92] In the present context, it provides a structured way to address the tensions between a constitutional premise of open justice, parliamentary sovereignty and competing public policies. The test applies the requirements underlying *Kable* to a different context. The limits of *Kable* are maintained, however the constitutional questions posed by *Kable* and subsequent cases are answered in a way that best deals with these competing tensions. Accordingly, 'only the most intrusive legislation' or one without a proper policy basis would engage the test proposed.[93]

V ANY JUDICIAL SUPPORT?

Although there has been no explicit judicial support, the appropriate and adapted test remained untested, though arguably tacit, in *Hinch* as well as in other cases. In *Hinch*, the decision of Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ is clear in its support of and reliance upon the decision of Gibbs J in *Russell v Russell*.[94] They cite with approval:

> If the [Family Court Act] had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed courts *in appropriate cases* I should not have thought the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt – the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.[95]

A similar comment was made by Jacobs J in the same case. In dissent, he noted that the objections made to that Act were 'met by the *special nature* of the proceedings under the *Family Law Act 1975*.'[96] There is the recognition here that there exists a distinction between a law that is exempted from open proceedings in appropriate cases (or cases of a special nature) and one that is exempted in inappropriate cases. An analysis of what constitutes an 'appropriate case' was not strictly necessary in the *Hinch* case, because, first, their Honours could confidently reach the conclusion that the legislation left sufficient scope for

---

91 For example, the implied freedom of political communication as discussed in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520; s 92 of the Constitution as discussed in *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418, [101]-[103]; the scope of the race power, as suggested by Gaudron J in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; a citizen's entitlement to vote as discussed in *Rowe v Electoral Commissioner* (2010) 243 CLR 1. The test varies depending on its context, although it generally involves asking whether the law is 'reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85].

92 The Hon Justice Susan Kiefel AC, 'Proportionality: A rule of reason' (2012) 23 *Public Law Review* 85, 86.

93 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, [98] (Spigelman CJ).

94 See *Hinch* (2011) 243 CLR 506, [90].

95 *Hinch* (2011) 243 CLR 506, [90]. See also note 57.

96 *Russell v Russell* (1976) 134 CLR 495, 555.

determination of the exemption to the courts; and secondly, that the legislation was in any event clearly justified from a policy perspective.

Chief Justice French's approach in *Hinch* relied upon a similar assumption that was only partly elaborated. He conducts an analysis of the history of open justice in the common law, concluding that 'the open hearing is an essential aspect of courts'.[97] However, he recognised that the common law has been subject to various qualifications to the rule, and thus:

> Chapter III does not impose on federal courts or the courts of the States a more stringent application of the open justice principle than that described above.[98]

One of the curial characteristics is that open proceedings would be subject to some degree of qualification by laws enacted by Parliament. This leaves unanswered the question of how an unreasonable or extreme legislative qualification is to be tested. It cannot solely be by reference to 'analogous common law powers',[99] as there is a clear historical distinction between the common law powers and the powers of parliament to devise new exceptions (a distinction that his Honour acknowledged).[100] However, the analogous common law powers, as the Chief Justice recognised, will assist in the judicial determination of what a reasonable legislative response is. Because it was clear in *Hinch* that the legislation in that case was not inconsistent with the judicial function, there was no need for French CJ to engage in further analysis. Again, if the impugned legislation were more extreme or unreasonable in *Hinch*, French CJ's analysis may have elaborated on why the impugned law was or was not repugnant.

It is argued that further analysis would have required the High Court to engage in an enquiry into the reasonableness of the Victorian Parliament's legislative scheme, and the appropriate and adapted test may have seen the light. Although it was not necessary to do so on the facts of this case, a more elaborated judgment may have explained the decision for what it was: a reasonable infringement to open proceedings.

The appropriate and adapted test also appears to have been implicitly taken by Spigelman CJ in *John Fairfax v Attorney General (NSW)*, a case dealing with issues of open justice. In applying an early formulation of the *Kable* principle, his Honour concluded that the Act in question was valid on that basis.

> The restrictions imposed on the presence of the public and on publicity by s 101A(7), (8) and (9), represents the implementation of a policy that an individual ... has a right not to have an acquittal of a criminal charge called into question. *This constitutes a limited and justifiable exception to the general principle*, which the public is, in my opinion, likely to appreciate.[101]

The mention here of 'policy', 'justifiable' and public appreciation suggests that the law must accord with the interests of justice on some level. That is, the policy underlying a law ought

97 Ibid [46].
98 Ibid.
99 Ibid.
100 Ibid [27].
101 (2000) 181 ALR 694, [74] (emphasis added). Although the Act here was invalidated on other grounds.

to be scrutinised as to its purpose and proportionality. It is argued that, were, for example, an infringement on open justice not justifiable, or the public not be likely to appreciate it, it may not be reasonably appropriate and adapted to the interests of justice, and thus invalid.

There is a similar exercise of reasoning in *Forge*. Justices Gummow, Hayne and Crennan, in particular, took an approach to *Kable* that looked at the necessity of the appointment of acting judicial officers. Essentially, this required reviewing the circumstances of the appointments with a view to determining whether there was a 'pressing necessity' arising from the work of the court, rather than a merely desirable expedient.[102] Thus:

> Whether, or when, the institutional integrity of the court is affected depends, then, upon consideration of much more than the bare question: how many acting judges have been appointed? Regard must be paid to who has been appointed, for how long, to do what, and, no less importantly, why it has been thought necessary to make the acting appointments that have been made. Those alleging invalidity in the present matter did not seek to make a case *founded in any examination of the circumstances that led either to the successive appointments* of Foster AJ, or any of the other appointments made at or about the time of his appointments.[103]

Underlying part of this reasoning is again a species of proportionality: the appointment being proportional to the legitimate end of assisting overworked courts with limited resources. In such circumstances, there would be less influence on the perception of impartiality and independence.[104] This point looks to the circumstances and context in which the legislative or executive scheme takes place.

VI CONCLUSION

Open justice provides many benefits to the system of justice generally. The historical and normative force of open justice makes it an integral and essential attribute of the common law judicial process under the Constitution and a defining characteristic of a court. Thus it is recognised implicitly by the terms and assumptions of Chapter III.

This recognition places a constraint upon the legislature's ability to enact measures that infringe open justice. The precise limits of the constraint, however, are not clear. Crucially, there needs to be some room to allow Parliament to respond to competing considerations which too are placed in the scales of justice. Open justice is but a means to securing the attainment of justice (broadly defined) in the circumstances and must give way when necessary to do so. Parliament needs some control over these circumstances to protect legitimate interests and to prevent legitimate harms.

Although the High Court in *Hinch* did not fully explore the limits of open justice under the Constitution, this article has argued that the 'appropriate and adapted' test adequately addresses the competing tensions and provides a suitable methodology for analysis of the open justice principle as a constitutional premise. Under this test Parliament's decision to

102 *Forge v ASIC* (2006) 228 CLR 45, [97].
103 Ibid [101] (emphasis added); see also [90].
104 Ibid [99].

infringe open justice must be reasonable; it must pertain to a circumstance warranting intervention, and the measure enacted must be a reasonably appropriate and adapted response. We await a more contentious case to see how (or indeed if) these issues will be addressed.[105]

[105] As a postscript, the decision in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 came close to addressing some of these issues. Chief Justice French in particular observed the tension between the common law, parliament and the Constitution: see [2] and [3]. The issues in this case were put more as questions of procedural fairness than open justice per se.