Case Note

Extending the Reach of *Kable*: *Wainohu v New South Wales*

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Abstract

Wainohu v New South Wales marks the High Court's most recent application of the *Kable* principle to invalidate state legislation. The significance of *Wainohu* arises from the Court's extension of the *Kable* principle to state judges, therefore establishing that the conferral of functions on state judges acting in a non-judicial capacity can be incompatible with or repugnant to the institutional integrity of the court. This case note first canvasses the High Court's majority judgments and Heydon J's dissenting judgment. Second, it considers the implications arising from the High Court's clarification of the root of compatibility in *Kable* and its interrelationship with compatibility under the *Wilson* and *Grollo* line of cases. Third, it assesses the Court's finding that a duty to give reasons for a decision is an 'essential and defining characteristic of a court', which in turn forms part of the 'institutional integrity' that is at the heart of the *Kable* principle. It argues that Heydon J's strong dissent on this issue flags this as an area for future jurisprudential debate. Fourth, it asserts that the majority judges' discussion of 'public confidence' and 'public perception' may see a possible re-elevation of this principle as an indicator of validity. Finally, it canvasses the implications of *Wainohu* for state law-making in relation to criminal and organisational control legislation.

I Introduction

The decision in *Wainohu v New South Wales*[1] marks the High Court's most recent application of the *Kable*[2] principle to invalidate state legislation. For the first time, the High Court has also considered the application of the *Kable* principle to the conferral of functions on state judges as *personae designatae*. A 6:1 majority of the court affirmed the relationship between the *Kable* principle and the incompatibility doctrine emanating from *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[3] and *Grollo v Palmer*.[4] In doing so, they extended the reach of the *Kable* principle to hold that the conferral of functions on state judges acting in a non-judicial capacity could be incompatible with or repugnant to the institutional integrity

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1 *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*').

2 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 ('*Kable*').

3 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('*Wilson*').

4 *Grollo v Palmer* (1995) 184 CLR 348 ('*Grollo*').

of the court. Additionally, the High Court's finding that a statutory provision immunising eligible judges from a duty to give reasons for decisions can lead to invalidity is a useful extrapolation on what constitutes the 'essential and defining characteristics of a court', which in turn forms part of the institutional integrity that is the touchstone of the *Kable* principle. However, while some clarity has been achieved in *Wainohu*,[5] the case appears to reanimate tensions about the status of public confidence and public perception within the *Kable* doctrine and has left unresolved some of the conceptual opaqueness for which *Kable*[6] has been criticised.

Part II of this case note will outline the background to *Wainohu* and provide a brief overview of the imputed legislation. Part III will then examine the reasoning of the majority and minority judgments in the case. Part IV will assess the extent to which *Wainohu* has further articulated and clarified the *Kable* principle, examining the concepts of incompatibility, procedural fairness and public confidence that are apparent in *Wainohu*, and will evaluate aspects of the judgments in relation to each of these concepts. Finally, Part V will examine the implications of the case for future jurisprudence on the *Kable* principle and law-making by state legislatures.

II Background to *Wainohu* and the *Crimes (Criminal Organisations Control) Act 2009* (NSW)

The *Crimes (Criminal Organisations Control) Act 2009* (NSW) ('the Act') was enacted following the increased incidence of motorcycle gang-related violence in Australian states, and was significantly motivated by the high-profile killing of a Hells Angel bike club member at Sydney Airport on 22 March 2009.[7] The Long Title of the Act indicates the legislation is for the making of declarations and orders 'for the purpose of disrupting and restricting the activities of criminal organisations and their members'.[8] While drafted broadly, former NSW Premier, Nathan Rees, made it clear in introducing the Bill that its purpose was specifically to 'outlaw motorcycle gangs and their members and ensure that police have the powers they need to deal with violent outlaw motorcycle gangs'.[9]

The enactment of this Act followed a raft of similar legislation passed in South Australia,[10] Queensland[11] and the Northern Territory,[12] specifically relating to the control of 'bikie gangs,' or more general legislation passed in an attempt to prevent criminal activity or undertake criminal surveillance.

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5 (2011) 243 CLR 181.

6 (NSW) (1996) 189 CLR 51.

7 Mark Polden, 'Anti-bikie laws may be fatally flawed' *Law Society Journal*, October (2010) 64, 65; Andrew Lynch, 'Terrorists and Bikies: The Constitutional Licence for Laws of Control' (2009) 34(4) *Alternative Law Journal* 237.

8 *Crimes (Criminal Organisations Control) Act 2009* (NSW), Long Title.

9 New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 1232 (Nathan Rees, Premier).

10 *Serious and Organised Crime (Control) Act 2008* (SA).

11 *Criminal Organisation Act 2009* (Qld).

12 *Serious Crime Control Act 2009* (NT).

The imputed legislation in *Wainohu* established a scheme whereby judges of the Supreme Court of NSW acting as 'eligible judges' could make declarations against organisations whose members associated for the purposes of serious criminal activity and posed a risk to public safety.[13] The Commissioner of Police could apply to an eligible judge seeking a declaration that a particular organisation is a 'declared organisation'.[14] An eligible judge would then hold a hearing to determine whether he or she is satisfied that the members of the organisation associate for the purpose of organising, planning, or engaging in serious criminal activity and that the organisation represents a risk to public safety and order, and therefore should be a declared organisation.[15]

The judgments in *Wainohu*[16] focused on the provisions relating to the conduct of hearings concerning declaration applications. Under s 13(1), the rules of evidence do not apply to the hearing of an application for a declaration. Furthermore, under s 13(2), 'if an eligible judge makes a declaration or decision under this Part, the eligible judge is not required to provide any grounds or reasons for the declaration or decision'.[17]

A declaration under pt 2 of the Act provides the basis for an application to be made to judges of the Supreme Court, acting in their judicial capacity, for an interim control order and control order to be made against members of a declared organisation.[18] When orders are made against a person as a 'controlled member,' the Act makes it an offence for these members to associate with other controlled members of the declared organisation[19] and such persons are also barred from engaging in certain businesses or activities usually associated with serious organised crime.[20]

On 6 July 2010, the NSW Acting Commissioner of Police applied to an 'eligible judge' seeking a declaration under the Act that the Hells Angels Motorcycle Club of NSW was a declared organisation. Derek Wainohu, a club member likely to be subject to a control order if the declaration was made, filed proceedings in the High Court seeking to assert that the Act undermined the institutional integrity of the Supreme Court of NSW or was otherwise outside the

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13 *Crimes (Criminal Organisations Control) Act 2009* (NSW) s5(2). Under pt 2 of the Act, a judge of the Supreme Court can consent to be an 'eligible judge'. A judge who has given consent may also revoke it. The NSW Attorney-General cannot revoke a declaration of an eligible judge unless this is with the judge's consent or the Chief Justice notifies the Attorney-General that the judge should not continue as an eligible judge: *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 5(3); s 5(6)(b). These protections were presumably introduced in the wake of *Grollo* (1995) 184 CLR 348 where incompatibility was found to arise from legislative provisions that did not require a judge's consent and therefore implied an impermissible, on-going commitment to the performance of non-judicial functions.

14 *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 6(1).

15 Ibid s 9(1).

16 (2011) 243 CLR 181.

17 *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 13. There was an exception to this under s 39 of the Act in instances where the NSW Ombudsman in performing his or her duty to scrutinise the exercise of powers conferred on police officers under the Act may require the Commissioner of Police or any public authority to provide information about the exercise of those powers.

18 Ibid s 14(1); s 19(1).

19 Ibid s 26(1).

20 Ibid s 27.

legislative powers of the NSW Parliament. An action was commenced in the original jurisdiction of the High Court as a special case pursuant to r 27.08 of the *High Court Rules 2004.*

III The Judgments in *Wainohu*

The High Court, in a six judge majority, held that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was invalid in its entirety on the basis that it undermined the institutional integrity of the Supreme Court of NSW. Justice Heydon dissented, holding that the Act was valid.

A *The Majority*

1 Justices Gummow, Hayne, Crennan and Bell

(a) Incompatibility

The judges determined that the Act conferred powers upon Supreme Court judges in a *persona designata* capacity, rather than conferring jurisdiction on the Court itself.[21] The majority[22] noted that at a Federal level the conferral of non-judicial powers on a judge *persona designata* has the capacity to undermine the separation of powers principle articulated in the *Boilermakers* case.[23] In considering whether this doctrine extended to state judges, the majority noted the dispute between counsel for the Commonwealth and Victoria[24] about the interaction of notions of incompatibility under the *Kable* principle and the incompatibility doctrine derived from *Grollo*[25] and *Wilson.*[26] The majority upheld the arguments advanced by the Commonwealth Solicitor-General that the *Grollo*/*Wilson* and *Kable* lines of authority 'share a common foundation in constitutional principle'; 'the protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or state'.[27] Consequently, they held it is possible for repugnancy or incompatibility to occur through the conferral of non-judicial functions upon a state judicial officer acting in a *persona designata* capacity.[28] Therefore, it is not only the conferral of judicial functions on a *court* but also the conferral of functions or powers on a *judicial officer* that can impact on the broader institutional integrity of the court.[29]

Particular emphasis was placed on the fact that under the Act the performance of roles in the capacity of an eligible judge could 'diminish public

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21 *Wainohu* (2011) 243 CLR 181, 221 [77].
22 Ibid [78].
23 *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 25.
24 See Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCATrans 164 (2 December 2010) 64–6 (Cth); 74–80 (Vic).
25 (1995) 184 CLR 348.
26 (1996) 189 CLR 1.
27 *Wainohu* (2011) 243 CLR 181, 228 [105].
28 Ibid.
29 Ibid.

confidence in the particular judges concerned or in the judiciary generally'[30] because the confidence reposed in judicial officers is dependent upon them acting openly, impartially and in accordance with the proper procedures for determining a matter.

(b) Section 13(2)

The majority's primary basis for finding invalidity was s 13(2) of the Act, which it construed as not only conferring a power on eligible judges to provide reasons regarding pt 2 decisions and declarations but going further to deny any requirement or duty to do so.[31] Diverging from Heydon J's dissenting judgment, the majority asserted that a prediction about whether judges are actually likely to give reasons in practice is not significant, concluding that it is not a remote or fanciful possibility that declarations would be made or revoked with no reasons given.[32]

Furthermore, drawing on Justice Gaudron's statement in *Wilson*[33] the judges concluded that here the denial of a duty to give reasons meant there were no 'results in a report or other outcome which can be assessed according to its own terms'. This meant the state legislature was utilising the confidence reposed in the impartial, reasoned and public decision-making of judges performing an eligible judge function to support 'inscrutable decision-making'.[34]

Consequently, the majority invalidated the Act in its entirety as the making of a pt 2 declaration was the factum upon which the exercise of Court's jurisdiction under Part 3 was based. As s13(2) has the effect of invalidating pt 2, and Part 3 assumes the valid operation of pt 2 ,there is therefore a flow-on effect that invalidates the entire Act in its entirety.[35]

2 Chief Justice French and Justice Kiefel

(a) Incompatibility

French and Kiefel agreed with the majority that a state cannot confer administrative functions upon judges that are incompatible with the essential and defining characteristics of a court, and that such an action has the potential to undermine the institutional integrity of the court in a way that is inconsistent with the national integrated judicial system under ch III of the *Constitution.*[36] Similarly to the majority, they held that the incompatibility condition under *Wilson* provides sufficient standards to ensure that a state law conferring non-judicial functions on state judges are consistent with ch III of the *Constitution*. In relation to the Act, French and Kiefel emphasised the fact that the jurisdiction of the Court is 'enlivened' by the decision of a judge where reasons do not need to be given. The impression of a connection between the judge's performance of non-judicial functions and their exercise of

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30 *Wilson* (1996) 189 CLR 1, 26 (Gaudron J).
31 *Wainohu* (2011) 243 CLR 181, 227 [99].
32 Ibid 228 [103].
33 *Wilson* (1996) 189 CLR 1, 26 (Gaudron J).
34 *Wainohu* (2011) 243 CLR 181, 230 [109].
35 Ibid 224 [90], 231[115].
36 Ibid 192 [7].

judicial power can therefore adversely affect public 'perceptions' of that judge and the court of which the judge is a member.[37]

Diverging slightly from the majority, French CJ and Kiefel J appear to eschew the significance of characterising the judges as acting in a *persona designata* capacity. In noting the artificiality of the concept, they assert that instead, attention must be paid to 'the functions conferred upon the judge, the extent to which they are connected to or integrated with the exercise of the Court's jurisdiction, and the degree of decisional independence enjoyed by the judge in the exercise of those functions'.[38] In applying this, they note that while there is decisional independence from the Executive under the Act,[39] when looking at the substance of the functions under pts 2 and 3, there is little difference in the appearance between the two and therefore greater potential for perceptions of public confidence to be adversely affected in relation to the judicial function.[40]

(b) Section 13(2)

French and Kiefel agreed with Justices Gummow, Hayne, Crennan and Bell in their characterisation of s 13(2) as exempting or 'immunising' an eligible judge from the duty to give reasons for making a declaration.[41]

As the touchstone of the *Kable* doctrine is institutional integrity, this includes the possession of defining or essential characteristics of the court. According to French and Kiefel, this itself includes procedural fairness, giving reasons for decisions, and the reality or appearance of a court's independence and impartiality.[42] French and Kiefel argue that the provision of reasons is a key incident of the judicial function and is a duty of a constitutional character because of the High Court's appellate jurisdiction under s 73 of the *Constitution*.[43]

In contrast to the majority judgment, French and Kiefel emphasise the consequences of making declarations without reasons and note that orders emanating from these declarations have the ability to impose significant restrictions on the freedoms of declared persons despite the fact that the Court's power to make such orders would go unexplained.[44] Therefore, in agreeing with the majority judges that a declaration under pt 2 is a necessary condition for the exercise by the Supreme Court of the jurisdiction conferred on it by pt 3, French and Kiefel held the Act to be invalid in its entirety.[45]

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37 Ibid 192 [7].
38 Ibid 216 [61].
39 Ibid 217 [64].
40 Ibid 218 [66], 219 [68].
41 Ibid 215 [59]. 219 [68].
42 Ibid 208 [44].
43 Ibid 213–15 [54]–[57].
44 Ibid 213 [53].
45 Ibid 195[14], 220 [71].

B *Dissenting Judgment — Justice Heydon*

Similar to his judgment in *South Australia v Totani*,[46] Justice Heydon delivered a strong dissent in *Wainohu*,[47] departing from the majority judgments on the significance and interpretation of s 13(2), and departing even more fundamentally from the majority's conceptualisation of the interrelationship between the incompatibility doctrines contained in *Kable* and *Grollo/Wilson* and its implications for state judges.

(a) Incompatibility and Kable

In contrast to the majority judgments, Heydon J did not find that the *Kable* principle extends to instances where state judges are acting in a *persona designata* capacity. Rather, he supported the submissions made by Victoria[48] that 'the *Kable* doctrine is concerned primarily with the conferral of functions on state courts as institutions, not the conferral of functions on persons who happen to be members of state courts'.[49] The basis for this reasoning is that unlike federal courts where there is a constitutional separation of powers that means functions cast upon judges which prejudice their judicial functions are invalid, this is not the case in states and the *Kable* doctrine does not import this separation. Therefore, *Kable* applies to state *courts* but not state *judges*. To extend the principle would be an unwarranted merger between the incompatibility doctrine and *Kable* principle.[50]

Heydon J also questions the primacy given to the indicia of public confidence in the majority judgments through their reference to Gaudron J's tests in *Wilson*.[51] Heydon J notes the problems with qualitatively determining 'public confidence' and concludes that it could not be said that the failure of eligible judge to give reasons would lead to failure of public confidence in the court.[52]

(b) Section 13(2)

Heydon J agrees with the majority judgments in terms of characterisation of s 13(2), finding that it absolves an eligible judge from the obligation to give reasons for the making of declarations and does not create a duty to give reasons, whether or not in a contested hearing.[53] However, Heydon J concludes that s 13(2) is valid. A key point of distinction from the majority is Heydon J's emphasis on the likely behaviour of judges where he argues that 'it is clear...that the validity of s 13(2) is to be assessed bearing in mind practical realities and likelihoods, not remove or fanciful

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46 (2010) 242 CLR 1 ('*Totani*').
47 (2011) 243 CLR 181.
48 Ibid 245–7 [169]–[170].
49 Ibid 245 [169].
50 Ibid 245 [169], 248 [172].
51 Ibid 248 [173].
52 Ibid 249 [176].
53 Ibid 237 [145]. This is therefore a rejection of the argument made by NSW that there is a duty to give reasons in relation to contested applications for a declaration. See Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCATrans 164 (2 December 2010) 50.

possibilities'.[54] Therefore he asserts that 'members of the Supreme Court tend to give reasons habitually and routinely'.[55] Such judges would also be conscious that their conduct as eligible judges is subject to judicial review, and consequently they would be more likely to give reasons.[56]

IV *Wainohu's* Significance and Implications for the *Kable* Principle

The judgments in *Wainohu* display a significant engagement with the fundamental precepts underlying the *Kable* principle. This Part first outlines the *Kable* principle as extrapolated and refined by the High Court up to *Wainohu.* It then assess the significance of *Wainohu* in extending the ambit of the *Kable* principle to functions conferred on state judges, providing content for what defines the essential characteristics of the court, and re-elevating the significance of public confidence and perception in considerations of incompatibility and repugnance.

A *The Kable Principle*

The *Kable* principle, which was developed by the High Court in *Kable v Director of Public Prosecutions (NSW),*[57] posits that a state legislature cannot confer upon a state court a function which substantially impairs its institutional integrity and which is therefore incompatible with its status under ch III of the *Constitution* as a repository of federal jurisdiction and part of the integrated nature of the Australian court system. Such laws are incompatible with the exercise of the judicial power of the Commonwealth[58] as there 'is nothing in the constitution that permits different grades or qualities of justice'.[59]

The principle therefore acts as a means of imposing limitations on the functions that state Parliaments can impose on state courts.[60] The constitutional status of the *Kable* principle emerges from s 71 of the *Constitution* which permits the vesting of judicial power in High Courts, federal courts and other courts invested with such jurisdiction, and s 73, which confers appellate jurisdiction from inferior courts on the High Court.[61]

Over time, the refinement of the *Kable* principle has seen the touchstone of the doctrine shift from 'public confidence' to a focus on whether the law would

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54 *Wainohu* (2011) 243 CLR 181, 241[153].
55 Ibid 238 [147].
56 Ibid 239 [149].
57 (1996) 189 CLR 51.
58 *South Australia v Totani* (2010) 242 CLR 1, 47 [69] (French CJ).
59 *Kable* (1996) 189 CLR 51, 103 (Gaudron J).
60 Melissa Perry, 'The High Court on Constitutional Law: The 2009 Term' (Paper presented at the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, Art Gallery of New South Wales, 19 February 2010).
61 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [15] (Gleeson CJ); 627 [137] (Kirby); Dan Meagher, 'The Status of the Kable Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 173, 184.

substantially impair the 'institutional integrity' of the Supreme Court.[62] This has relegated perceptions of the undermining of confidence in a court to a mere indicator of invalidity.[63]

Furthermore, despite a number of the judgments in *Kable* referring to 'incompatibility' with the judicial functions of a court, the notion of repugnancy has gained increasing saliency over time, where judges have considered a law repugnant to the judicial process of a court if it impinges upon its independence or appearance of independence.[64] Hence, the *Kable* principle now questions both whether a state Act is repugnant to or incompatible with the institutional integrity which the vesting of federal jurisdiction in state courts requires.

B *Incompatibility: Extending the* Kable *Principle*

The significance of the *Wainohu* decision lies in the clarity it provides regarding the root of 'compatibility' in the *Kable* principle, its interrelationship with compatibility under the *Wilson/Grollo* line of cases, and its effect in extending the application of the *Kable* doctrine to instances where state judges are acting in a *persona designata* capacity. The case also clarifies and resolves some of the inherent tensions evident in the *Kable* judgments regarding when the judicial power of the Commonwealth is invoked in a state court.

The High Court attempts to provide some conceptual clarity to the relationship between the incompatibility principles drawn from the *Grollo* and *Wilson* line of cases and the *Kable* principle. There has been longstanding criticism of the logic behind the *Kable* principle and its invocation of the incompatibility doctrine, with Blackshield and Williams arguing that:

> [t]he incompatibility doctrine had [been] treated merely as an exception to the *persona designata* doctrine. In *Kable* where there was no *personae designatae* the incompatibility doctrine is treated as a wider concomitant of any exercise of judicial power of the Commonwealth.[65]

The incompatibility doctrine that has developed at a Federal level is that emanating from the constitutional separation of powers, which asserts that the legislature cannot confer a function on a judge that is repugnant to the judicial function. An exemption from this principle is constituted by the *persona designata* exception, however, where the exercise of non-judicial functions in this capacity is repugnant to the exercise of the judicial function this will lead to invalidity.[66]

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62 *Silbert v DPP (WA)* (2004) 217 CLR 181, 190 (Kirby J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67 (Gleeson CJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 [102] (Gummow J); 648 [198] (Hayne J).

63 *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575, 618 [102] (Gummow J).

64 *International Finance Trust International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [87] (Gummow and Bell JJ) ('*International Finance Trust*'); [140] (Heydon J); *Kable* (NSW) (1996) 189 CLR 51, 132 (Gummow J); Ayowande McCunn, 'The resurgence of the *Kable* principle: International Finance Trust Company' (2010) 17 *James Cook University Law Review* 118, 130.

65 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 3rd ed, 2002) 1296.

66 *Grollo* (1995) 184 CLR 348, 36 (Brennan CJ, Deane, Dawson and Toohey JJ).

Previously, the compatibility of conferring non-judicial functions on *persona designata* judges had only been applied to judges of federal courts, with *Wainohu*[67] being the first consideration of whether similar principles of incompatibility also apply to the exercise of non-judicial functions by state judges.

The position adopted by Victoria in *Wainohu*, and supported by Heydon J, asserts that the concept of incompatibility applying to a non-judicial function conferred on a federal judge or court would not apply with equal force to members of state courts, given the absence of the doctrine of separation of powers at a state level.[68] It is argued that the *Kable* doctrine is limited to the functions that can be conferred on state *courts* rather than on state *judges* acting as designated persons, and that there would be an improper extension of the *Wilson/Grollo* principle to state judges which would muddy the conceptual clarity between these two streams of authority.[69] As noted by Leslie Zines,[70] 'in the case of state power...the doctrine is concerned primarily with courts, while in respect of Commonwealth power it is, as a result for the Boilermakers case, applied only where a person who is a federal judge, is not sitting as a member of the court.' This reasoning appears to arise from the historical application of the doctrine of incompatibility only to federal judges appointed as *personae designatae*, and is also based on Gaudron J's statement in *Kable* that the limitation on state legislative power 'is more closely confined and related to the powers or functions imposed on a state court rather than its judges in their capacity as individuals'.[71]

However, the majority judgments in *Wainohu* confirm that it is not only the conferral of functions on a state court which has the capacity to infringe its institutional integrity and be repugnant to federal judicial power. Rather, the performance of non-judicial functions by state judges (whether *persona designata* or not) can also have an impact on the institutional integrity of the court. While recognising a common foundation between the incompatibility principles is the 'protection against legislative or executive intrusion upon the institutional integrity of the courts',[72] the court reaffirms that the *Kable* principle does not emerge from the same separation of powers basis as the *Wilson/Grollo* incompatibility doctrine. Rather, the compatibility with commonwealth judicial power arises from the *Kable* principle's focus on maintaining the institutional integrity of the court.

Therefore, despite the fact that the separation of powers does not operate at a state level, the High Court in *Wainohu*[73] establishes that the importance of institutional integrity underlying the *Kable* principle permits an extension of the principle to state judges. It is important to note that in *Kable*[74] there was some contemplation of the possible application of the principle to judges acting as *personae designatae*, with McHugh J noting that in principle there is no reason why *Kable* should not also extend to the functions of a state judge as *persona*

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67 (2011) 243 CLR 181.
68 Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCATrans 164 (2 December 2010) 48.
69 *Wainohu* (2011) 243 CLR 181, 247 [169].
70 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 261.
71 *Kable* (NSW) (1996) 189 CLR 51, 103.
72 *Wainohu* (2011) 243 CLR 181, 228 [105].
73 (2011) 243 CLR 181.
74 (1996) 189 CLR 51.

designata where those functions gave the appearance that the court was not independent of the executive government of the state.[75] This view has found some support in both academic[76] and extra-curial commentary.[77]

Wainohu is also significant for clarifying some of the key disagreements that underlie *Kable* about the invocation of Commonwealth judicial power in state courts. In *Kable* there was disagreement between the majority judges regarding when the federal judicial power is engaged at a state level. The approach of McHugh, Gaudron and Gummow JJ was that there is an overriding requirement that at all times state Parliaments must not vest non-judicial functions in state courts that would 'render them unworthy receptacles for federal jurisdiction'.[78] Toohey J reached a similar conclusion to the majority but on the more limited ground that the incompatibility test was to be applied only in circumstances where a state court was actually exercising federal jurisdiction.[79] The lack of conceptual clarity on such a fundamental issue has been problematic in applying the *Kable* principle, however, in reflecting on the emerging jurisprudence of previous cases,[80] *Wainohu* confirms the view of McHugh, Gaudron and Gummow JJ that incompatibility with the judicial power of the Commonwealth can apply even where federal judicial power is not actually being exercised by the court. In fact where a state court is exercising a function based on a *state* law which confers functions on a *state* judge in a non-judicial capacity, this still has the capacity to be repugnant to the federal judicial power vested in the court.[81]

Therefore, *Wainhou* extends the application of *Kable* as it recognises that it is possible for the appointment of state judges to non-judicial tasks to be incompatible with the perceived integrity and independence of the state court in a way affecting its ability to receive and exercise federal jurisdiction.

C *Procedural Fairness and the Defining Characteristics of the Court*

The significance of *Wainohu*[82] also derives from the content it gives to the 'defining or essential characteristics of the court' which forms part of the 'institutional integrity' concept in *Kable*.[83] There has been some uncertainty as to what powers, functions and procedures are considered essential to the character of a court and

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75 Ibid 116.

76 Zines, above n 70, 272.

77 Robert French, 'Executive toys: Judges and non-judicial functions' (2009) 19 *Journal of Judicial Administration* 5, 16.

78 *Kable* (1996) 189 CLR 51, 108.

79 Ibid 94.

80 *Baker v The Queen* (2004) 223 CLR 513, [51] (McHugh, Gummow, Hayne and Heydon JJ) where it was held that *Kable* protects the institutional integrity of state courts as potential recipients of federal jurisdiction.

81 However note that the High Court's recent decision in *Momcilovic v The Queen* [2011] HCA 34 which upheld the validity of a state court's non-judicial power to make declarations of invalidity, however, found it was unconstitutional for such a power to be exercised by federal courts. This may upset the clarity of these distinctions regarding the invocation of federal judicial power in state courts. See Helen Irving, 'The High Court of Australia kills dialogue model of human rights', *The Australian* (Sydney) 16 September 2011.

82 (2011) 243 CLR 181.

83 (1996) 189 CLR 51.

which therefore can undermine the court's institutional integrity through their absence or manipulation.[84] *Wainohu* assists in establishing that an obligation on decision-makers to provide reasons for a decision constitutes a defining characteristic of the court, and it reinforces the recent line of *Kable* authority which has held that procedural fairness and natural justice are at the heart of the judicial function.[85]

As noted by French CJ and Kiefel J, the touchstone of the *Kable* doctrine is institutional integrity and this includes the possession of defining or essential characteristics of the court. Those characteristics include procedural fairness and the reality or appearance of a court's independence and impartiality, and to this they specifically add the giving of reasons for decisions.[86] This reaffirms comments in *International Finance Trust Co Ltd v New South Wales Crime Commission* that the processes of natural justice are a core characteristic of judicial power.[87]

The judgments in *Wainohu* provide guidance for the source of this obligation. In particular, the integrated nature of the federal court system has ensured that the protections accorded to ch III courts also extend to state courts.[88] Furthermore, as noted by Gummow, Hayne, Crennan and Bell, JJ, the functions of the eligible judge could be susceptible to exercise under federal law by a ch III court and if this is the case then reasons would be necessary.[89] This affirms the jurisprudence of lower courts[90] and it suggests the possibility for laws to be invalidated where the procedural safeguards they provide, such as the provision of reasons, are less than common law standards.[91]

Wainohu also marks an interesting shift from a significant number of preceding *Kable* cases where legislation was not invalidated because there were various procedural protections such as rights of appeal and collateral attack which saved the legislation.[92] This line of cases led to observations that the High Court approached questions of *Kable* invalidity by finding 'wormholes' in decisions to claim the court retained essential features such as independence and impartiality despite lacking particular procedural protections as a result of, for example, the non-disclosure of confidential information or no provision for reasons.[93] By

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84 Zines, above n 70, 272.

85 *International Finance Trust* (2009) 240 CLR 319, 354 [54] (French CJ); Anthony, Gray, 'Due process, natural justice, Kable and organisational control legislation' (2009) 20 *Public Law Review* 290, 296.

86 *Wainohu* (2011) 243 CLR 181, 209 [44].

87 *International Finance Trust Co Ltd* (2009) 240 CLR 319, 354 [54] (French CJ).

88 Meagher, above n 61, 184.

89 *Wainohu* (2011) 243 CLR 181, 225 [91].

90 See *Re Criminal Proceeds Confiscation Act (2002)* [2004] 1 Qd R 30.

91 Mirko Bagaric, 'The High Court on Crime in 2010: Analysis and Jurisprudence' (2011) 25 *Criminal Law Journal* 5, 10.

92 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

93 Steven Churches and Sue Milne, 'Kable, K-Generation, Kirk and Totani: Validation of criminal intelligence at the expense of natural justice in Ch III Courts' (2010) 18 *Australian Journal of Administrative Law* 29, 40; Andrew Lynch, 'Terrorists and Bikies: The constitutional licence for laws of control' (2009) 34(4) *Alternative Law Journal* 237, 242; Anika Gauja, 'High Court Review 2009: Exit Kirby, Enter Consensus?' (2010) 45 *Australian Journal of Political Science*, 681, 686.

contrast, in *Wainohu* there is the invalidation of an entire Act based on one aspect of procedural fairness being denied. This would suggest that the giving of reasons for decisions is a fundamental characteristic of a court that significantly impacts on its institutional integrity. However, as noted by Heydon J in his dissenting judgment, while the majority argue that the failure to give reasons is repugnant to the judicial function, there was not a significant examination by the parties as to why a duty to give reasons is a fundamental requirement of the judicial function.[94] There is some weight to Heydon J's criticism as the majority judgments lack a comprehensive examination of why this duty forms such a fundamental part of the judicial process and constitutes an essential characteristic of the court.

D *Public Confidence and Institutional Integrity*

In contrast to the clarification that *Wainohu* provides in relation to the above two aspects of the *Kable* principle, the conceptual linkages drawn between *Kable* and the *Grollo/Wilson* incompatibility doctrine appear to re-elevate the importance of the notion of 'public confidence' in *Kable* in a way that diverges from previous jurisprudence on this issue.

The refinement of the *Kable* principle over time has seen a shift away from public confidence being the 'touchstone' of the doctrine.[95] The diminution of public confidence has been rejected as a criterion for invalidity, instead merely being an indicator of it.[96] However, in *Wainohu*, notions of public confidence and public perception appear to be given primacy as there is an emphasis on public perception of judges and the close proximity between the judicial and non-judicial roles they perform impacting on whether they are seen to be acting like a judge when in a *persona designata* capacity.

The judgment of Gummow, Hayne, Crennan and Bell JJ places emphasis on Gaudron J's statements in *Wilson* regarding confidence being reposed in judges[97] and the possibility of investing judges with non-judicial roles, however not if their performance would 'diminish public confidence in the particular judges concerned or in the judiciary generally' or impact on the 'reputation' of the courts.[98] French CJ and Kiefel J similarly note the issue of adverse public perceptions of the judicial role where there is a close association between the judge's judicial and non-judicial roles.[99] These principles of public confidence noted in the judgments are derived from cases which have concerned the *Grollo/Wilson* incompatibility doctrine and its application of federal judges acting *persona designata*. However the High Court's recognition that *Kable* shares a common constitutional foundation with this incompatibility doctrine raises questions about the extent to which public confidence also forms a central component of considerations as to whether

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94 *Wainohu* (2011) 243 CLR 181, 232 [121].
95 First held in *Silbert v DPP (WA)* (2004) 217 CLR 181, 190.
96 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [23] (Gleeson); [102] (Gummow) [144] (Kirby); *South Australia v Totani* (2010) 242 CLR 1, 34.
97 *Wainohu* (2011) 243 CLR 181, 225–26 [94].
98 Ibid.
99 Ibid 210 [47].

functions conferred on a state judge are incompatible with the federal judicial power reposed in their court.

The High Court's failure to extrapolate on this tension is problematic, considering that concepts of public confidence are difficult for the court to apply.[100] Heydon J's criticism of the empirical problems in determining the content of public confidence are of saliency and import in this context, especially considering the inherent difficulties in establishing that a failure of an eligible judge to give reasons would result in the diminution of public confidence in judicial officers and the court.

V The Implications of *Wainohu*

The increased incidence of state legislatures passing criminal and organisational control legislation has meant decisions such as *Wainohu*[101] are likely to have significant implications for state law-making in these areas.

The invalidation of state legislation in both *Wainohu*[102] and *Totani*[103] appears to narrow the range of processes and models available to state executives to confer administrative functions on states judges and courts for the purpose of making control orders. It is important to note that the imputed legislation in *Wainohu* was itself revised on the basis of the *Serious and Organised Crime (Control) Act 2008* (SA), with the NSW legislation giving the power to make declarations in respect of organisations to an 'eligible judge' of the Supreme Court rather than the state Attorney-General. Therefore, the legislation in *Wainohu* represented an attempt to judicialise the decision-making process and overcome the problem of judicial decision-making following an executive declaration being considered invalidly constrained by the initial executive action.

However, the cumulative effect of *Totani* and *Wainohu* demonstrates that this attempt to make the process more independent and 'judicial' by removing the declaration process from direct executive decision-making in fact carries an equal risk of the legislation being invalidated. This is because of the primacy given to arguments in *Wainohu* about the adverse public perceptions that emanate from a judge's non-judicial roles where there is a close connection or association with the person's role as a judge.[104] Therefore, functions conferred on judges acting in a quasi-judicial manner that give the appearance they may be exercising judicial power and which the public may associate with their judicial role runs the risk of being held invalid unless it is ensured that the procedures and functions they fulfil are compatible with the judicial power of the Commonwealth that is vested in the state court.

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100 Elizabeth Handsley, 'Do Hard Laws Make Bad Cases — the High Court's decision in *Kable v DPP*' (1997) 25 *Federal Law Review* 171, 174.

101 (2011) 243 CLR 181.

102 Ibid.

103 (2010) 242 CLR 1.

104 *Wainohu* (2011) 243 CLR 181, 210 [47].

Arguably this may require state legislatures to ensure the full gamut of procedural fairness protections and unfettered discretion is available to judges, or alternatively it may encourage the removal of judges from these quasi-judicial roles because of the difficulty in foreseeing whether a law will satisfy *Kable* requirements. As Heydon J's strong dissents in both *Wainohu*[105] and *Totani*[106] indicate 'there is often a fine judgement call whether a law violates the Kable doctrine'[107] which makes it difficult for state legislatures to anticipate when a particular conferral of function will cross the line. However, there is some utility in having opaqueness in the boundaries of the principle as this is likely to keep Parliaments in check. As noted by Heydon J in *International Finance Trust* 'it has influenced government to ensure the inclusion within otherwise draconian legislation of certain objective and reasonable safeguards for the liberty and the property of persons affected by that legislation'.[108]

To temper concerns that this extended use and deployment of the *Kable* principle may have constraining effects for states regulating their justice systems, it should be noted that a recently emerging trend of the High Court has been to invite redrafting of legislation as a means of overcoming the invalidity.[109] This is evident in *Wainohu*, where the majority judgments note that legislative redrafting or removal of s 13(2) would likely overcome the Act's invalidity.[110] However, this leaves an unsatisfying precedent for state legislatures in having to re-work legislation continually and retrospectively as the scope and content of the *Kable* principle is redrawn in each case.

VI Conclusion

The decision in *Wainohu* represents the latest in a line of High Court cases that have revived the *Kable* principle. It appears that Kirby J's lament in *Baker v The Queen*[111] that *Kable* would be the 'constitutional guard dog that would bark but once' has been disproven with the invalidation of legislation in *Wainohu*,[112] *Totani*,[113] *Kirk v Industrial Relations Commission of New South Wales*[114] and *International Finance Trust*[115] permitting further elucidation and clarification of the *Kable* principle. *Wainohu* has added to this jurisprudence by providing clarity on the interrelationship between *Kable* and the *Grollo/Wilson* incompatibility doctrine. It has also extended the reach of the *Kable* principle by holding that it is not only the conferral of functions on state courts as institutions which can be incompatible with the judicial power of the Commonwealth vested in state courts, but also the conferral of

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105 Ibid 231.
106 (2010) 242 CLR 1, 93.
107 Bagaric, above n 91, 9.
108 (2009) 240 CLR 319, [162].
109 See, eg, *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18.
110 *Wainohu* (2011) 243 CLR 181, 211 [50], 220 [70].
111 (2004) 223 CLR 513, 535.
112 (2011) 243 CLR 181
113 (2010) 242 CLR 1.
114 (2010) 239 CLR 531.
115 (2009) 240 CLR 319.

functions on persons who are members of state courts. Furthermore, the High Court's emphasis on the lack of an obligation to give reasons and its repugnancy to the judicial function of state courts provides some content to the 'essential and defining characteristics of the court' which is at the heart of the *Kable* principle. The case does, however, create some uncertainty with regard to the place of public confidence and perception within the *Kable* doctrine as the conceptual linkage the High Court finds between *Kable* and *Wilson/Grollo* incompatibility appears to re-elevate the significance of these indicia to an extent that may require clarification in the High Court's future jurisprudence on the *Kable* principle.