Case Notes

Wainohu v New South Wales (2011) 278 ALR 1

In *Wainohu v New South Wales*, the *Crimes (Criminal Organisation Control) Act 2009* (NSW) became the latest state anti-bikie legislation to be declared invalid by the High Court. It is the third case in recent years to apply the *Kable* doctrine to invalidate legislation. Though that on its own is significant, the decision confirms that the *Kable* doctrine does apply to functions conferred on state judges acting in their capacity as individuals. Although the Court held that this application was conceptually distinct from incompatibility arising from the *persona designata* device at the federal level, there appears to be little practical difference. *Wainohu* also emphasises the importance of judges providing reasons for their decisions.

I HELLS ANGELS AND CONTROL ORDERS

Derek Wainohu, a lifelong member of the Hells Angels Motorcycle Club, brought an action in the High Court's original jurisdiction challenging the validity of the *Crimes (Criminal Organisation Control) Act 2009* (NSW) ('the Act').[1] The New South Wales Parliament passed the Act 10 days after a man was bashed to death with a bollard at Sydney Airport during a brawl between rival bikie gangs.[2] Though an immediate response to that incident, the Act forms part of an Australia-wide push by states and territories to toughen up police powers aimed at bikie gangs and related organised crime.[3] Similar legislation existed, exists or is proposed in South Australia, Queensland, the Northern Territory and Western Australia.[4]

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[1] *Wainohu v New South Wales* (2011) 278 ALR 1, [3]; Geesche Jacobsen, 'Hells Angel Kills Off Invalid Bikie Laws', *Sydney Morning Herald* (Sydney) 24 June 2011, 2.

[2] Dylan Welch, Les Kennedy and Ellie Harvey, 'Bikie Killed in Airport Brawl', *Sydney Morning Herald* (Sydney) 23 March 2009, 1; New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009 (Nathan Rees, Premier).

[3] Anthony Gray, 'The Constitutionality of Criminal Organisation Legislation' (2010) 17 *Australian Journal of Administrative Law* 213, 213; Mark Polden, 'Anti-Bikie Laws May Be Fatally Flawed' (2010) *Law Society Journal* 64.

[4] *Serious and Organised Crime (Control) Act 2008* (SA); *Criminal Organisation Act 2009* (Qld)*; Serious Crime Control Act 2009* (NT); Australian Broadcasting Commission, *Tough Anti-Bikie Laws to be Introduced in WA* (3 August 2011) ABC News Online <http://www.abc.net.au/news/2011-08-03/anti-gang-laws-in-wa/2822550>.

II THE DECISION OF THE HIGH COURT IN WAINOHU

Wainohu made two submissions challenging the validity of the Act. First, that it went against the *Kable* doctrine because it conferred functions on the Supreme Court that were incompatible with it being a repository of federal jurisdiction under Chapter III of the *Constitution*.[5] Second, that it impinged on the implied constitutional freedom of political communication and association.[6] The second submission was unanimously rejected,[7] but Gummow, Hayne, Crennan and Bell JJ, with French CJ and Kiefel J agreeing, held that the Act was invalid because of the *Kable* doctrine.[8] Heydon J dissented.

A *Crimes (Criminal Organisation Control) Act 2009* (NSW)

The Act created a two-step process through which control orders could be granted. First, the Commissioner of Police had to apply under Part 2 to have the relevant organisation designated a 'declared organisation'.[9] The application was to be made to an 'eligible' judge of the Supreme Court, who consented to operate as an individual administrator for the purposes of making a declaration.[10] For an organisation to be 'declared', the eligible judge had to be satisfied that its members associated, in some way, to further 'serious criminal activity', and that the 'organisation represent[ed] a risk to public safety and order.'[11]

A second application was then to be made to the Supreme Court under Part 3 of the Act to obtain control orders over particular members of that organisation.[12] Those under control orders would not be able to associate with each other,[13] recruit people to become members, or do certain activities, such as having a gambling, liquor or firearms license.[14] Penalties of up to five years in prison applied to breaches of control orders.[15]

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[5] *Wainohu* (2011) 278 ALR 1, [3]; *Kable* (1996) 189 CLR 51, 103.
[6] *Wainohu* (2011) 278 ALR 1, [3].
[7] Ibid [72] (French CJ and Kiefel J), [112]-[113] (Gummow, Hayne, Crennan and Bell JJ), [186] (Heydon J).
[8] Ibid [70] (French CJ and Kiefel J), [109] (Gummow, Hayne, Crennan and Bell JJ).
[9] *Crimes (Criminal Organisation Control) Act 2009* (NSW) s 6.
[10] Ibid s 5.
[11] Ibid s 9 (1) (a) and (b).
[12] Ibid s 19.
[13] Ibid s 26.
[14] Ibid s 26A and s 27.
[15] Ibid s 26 and s 26A.

B *The Judgment of Gummow, Hayne, Bell and Crennan JJ*

1 *Nature of a Declaration and s 13(2)*

The decision of the majority hinged on the potential for 'inscrutable decision-making' under Part 2 of the Act.[16] They noted that the eligible judge had to make a decision based on factual submissions in order to make or revoke a declaration.[17] Despite the determination of substantive issues involved in this process, s 13(2) provided that 'the eligible judge is not required to provide any grounds or reasons for the declaration or decision.'[18] The majority held that s 13(2) has the potential to allow for arbitrary decisions to be made for which no reasons needed to be provided.[19]

2 *The Kable Doctrine and Public Confidence in the Judiciary*

The principle underlying the *Kable* doctrine is the protection of the institutional integrity of the courts, in order to preserve the integrated Australian judicial system.[20] Where functions conferred by state legislatures on courts negatively impact on that institutional integrity, they are invalid.[21] The majority held that institutional integrity included public confidence in the court and its judges. Citing Gaudron J in *Wilson v Aboriginal and Torres Strait Islander Affairs*, the majority connected 'public confidence' with the independence and impartiality of judges, including that their decisions could be scrutinised on their own terms.[22]

The majority found that though the eligible judges were acting in their capacity as individuals, their performance of those functions could still diminish public confidence in the judiciary.[23] This was because, to the public, the distinction between judges acting as individuals, as opposed to in their official capacity, was often difficult to discern.[24] As eligible judges under s 13(2) did not have to give reasons for their decisions, those decisions were 'inscrutable'.[25] The Act used public confidence in the judiciary to support such decision-making, therefore undermining that

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[16] *Wainohu* (2011) 278 ALR 1, [107] (Gummow, Hayne, Crennan and Bell JJ).
[17] *Crimes (Criminal Organisation Control) Act 2009* (NSW) ss 9 and 12.
[18] Ibid s 13(2). There is an exception in the section for reasons to be provided on request to the Ombudsman if he or she is reviewing the exercise of police powers under the Act pursuant to s 39.
[19] *Wainohu* (2011) 278 ALR 1, [92] (Gummow, Hayne, Crennan and Bell JJ).
[20] Ibid [105].
[21] Ibid.
[22] *Wilson v Ministers for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22 and 25-6 (Gaudron J) ('*Wilson*').
[23] *Wainohu* (2011) 278 ALR 1, [94] (Gummow, Hayne, Crennan and Bell JJ); *Wilson* (1996) 189 CLR 1, 25-6 (Gaudron J).
[24] *Hilton v Wells* (1985) 157 CLR 57, 83-4 (Mason and Deane JJ); *Wainohu* (2011) 278 ALR 1, [106] (Gummow, Hayne, Crennan and Bell JJ).
[25] *Wainohu* (2011) 278 ALR 1, [109] (Gummow, Hayne, Crennan and Bell JJ).

confidence and in turn the institutional integrity of the Supreme Court.[26] As s 13(2) of the Act was directly linked with the making of a declaration under Part 2, and Part 3 of the Act depended on that declaration, the entire Act was invalid.[27]

C *The Judgment of French CJ and Kiefel J*

1 *The Kable Doctrine and the Essential Characteristics of a Court*

French CJ and Kiefel J also held that the *Kable* doctrine extends to powers conferred on a judge acting in a non-judicial capacity, where those powers impact on the institutional integrity of the court that the judge sits on.[28] However, rather than connect institutional integrity directly to public confidence in the judiciary as the majority did, French CJ and Kiefel J found that it meant the 'possession of the…essential characteristics of a court.'[29] One of these essential characteristics is the provision of reasons for decisions.[30] They held that the absence of a duty on eligible judges to give reasons would undermine the institutional integrity of the Supreme Court if the Act created an actual or perceived connection between the non-judicial and judicial functions of judges.[31]

2 *Perception Created by the Act*

French CJ and Kiefel J held that such a perception was created.[32] Eligible judges had functions that were highly similar to those that they performed as judges, including making determinations based on information presented to them.[33] This made the eligible judge appear 'to all the world as a judge of the court' without requiring that they do what judges normally do and provide reasons.[34] Added to this was that the decision of the eligible judge under Part 2 directly affected the jurisdiction of judges under Part 3.[35] These factors created a perceived connection between non-judicial and judicial functions, in the absence of a duty to provide reasons undermined the institutional integrity of the Supreme Court and therefore the Act was invalid.[36]

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[26] Ibid [107] and [109] (Gummow, Hayne, Crennan and Bell JJ).
[27] Ibid [115].
[28] *Wainohu* (2011) 278 ALR 1, [47]; *Kable* (1996) 189 CLR 51, 117-18 (McHugh J).
[29] *Wainohu* (2011) 278 ALR 1, [44] (French CJ and Kiefel J).
[30] Ibid; *Grollo v Palmer* (1995) 184 CLR 57; *AK v Western Australia* (2008) 232 CLR 438, [89].
[31] *Wainohu* (2011) 278 ALR 1, [50]-[52] (French CJ and Kiefel J).
[32] Ibid [66].
[33] Ibid [67].
[34] Ibid [68].
[35] Ibid [67].
[36] Ibid [70].

D *The Judgment of Heydon J*

1 *The Extent of the Kable Doctrine*

In his dissenting judgment, Heydon J held that the *Kable* doctrine did not extend to powers conferred on judges acting in their individual capacity.[37] He found that the doctrine applied to the protection of courts as institutions, which did not logically include functions performed by judges outside of their official positions.[38] Heydon J held that extending the doctrine in such a manner would amount to importing the federal notion of separation of powers into a state context, when there was no constitutional basis for doing so.[39]

2 *Practical Affect of s 13(2)*

Heydon J accepted that s 13(2) did not create a duty for eligible judges to give reasons. However, he held that it was unlikely that s 13(2) would result in eligible judges not providing reasons.[40] He argued that because they are judges who give reasons 'habitually and routinely', they would continue to do so when acting as individuals to make declarations under Part 2.[41] Plus, because their decisions could be subject to judicial review,[42] they had more incentive to provide reasons to support their decision-making before the Court.[43] Heydon J held that it would be 'extremely unlikely' that eligible judges would not provide reasons,[44] and that such an improbable event should not provide the means for invalidating a piece of legislation.[45]

III THE SIGNIFICANCE OF THE DECISION

A *The Rejuvenation of the Kable Doctrine*

Wainohu is only the third case in which the *Kable* doctrine has been successful applied since the *Kable* decision itself. *Wainohu* follows the successful challenge to the validity of the equivalent South Australian anti-bikie legislation in *South Australia v Totani*.[46] Along with *International Finance Trust Company v New South Wales Crime*

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[37] Ibid [172].
[38] Ibid [169].
[39] Ibid [172]; Cf *Hilton v Wells* (1985) 157 CLR 57, 83-4 (Mason and Deane JJ); *Wilson* (1996) 189 CLR 1, 22.
[40] *Wainohu* (2011) 278 ALR 1, [147].
[41] Ibid.
[42] *Crimes (Criminal Organisation Control) Act 2009* (NSW) s 39; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
[43] *Wainohu* (2011) 278 ALR 1, [149].
[44] Ibid [152].
[45] Ibid [154].
[46] (2010) 271 ALR 662 (*'Totani'*); Elizabeth Southwood, 'Extending the *Kable* Doctrine: *South Australia v Totani*' (2011) 22 *Public Law Review* 89, 90.

Commission,[47] these three cases have reaffirmed the incompatibility principle from *Kable* v Director of Public Prosecutions.[48] The doctrine had previously been distinguished a number of cases.[49]

1 *International Finance Trust Company*

In this case the High Court held that s 10 of the *Criminal Assets Recovery Act 1990* (NSW) was invalid.[50] That section allowed the New South Wales Crime Commission to make ex parte applications to seize property without giving notice to the affected party.[51] It was found to be invalid because its operation amounted to a denial of procedural fairness, which was repugnant to the institutional integrity of the Supreme Court and that affected its ability to exercise federal jurisdiction.[52]

2 *South Australia v Totani*

In *Totani*, the High Court held that s 14 of the *Serious and Organised Crime (Control) Act 2008* was invalid.[53] That section required that if the Magistrates Court were satisfied the individual was a member of the organisation, then they must make a control order.[54] Because the definition of who was or was not a member was broad, it essentially rested on the application put forward by the Attorney-General.[55] As a result, s 14 engaged the Court to realise a decision of the executive, in a way that undermined the 'appearance of independence and impartiality' and was incompatible with its institutional integrity.[56]

3 *Breadth of the Doctrine?*

The potential breadth of the *Kable* doctrine is demonstrated in the submissions of the plaintiff in *Wainohu*.[57] The plaintiff focused his arguments on aspects of the legislation which appeared to be contrary to the principle in *Kable*, particularly arguments which were accepted in

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[47] (2009) 240 CLR 319 ('*International Finance Trust Company*').
[48] *Kable* v Director of Public Prosecutions (1996) 189 CLR 51 ('*Kable*').
[49] See, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 234 CLR 501.
[50] (2009) 240 CLR 319, [57]-[58], [97]-[98] and [152].
[51] *International Finance Trust Company* (2009) 240 CLR 319; Ayowande A McCunn, 'The Resurgence of the *Kable* Principle: *International Finance Trust Company'* (2010) 17 *James Cook University Law Review* 110, 120.
[52] *International Finance Trust Company* (2009) 240 CLR 319; McCunn, above n 52, 110.
[53] (2010) 271 ALR 662; Southwood, above n 46, 90.
[54] *Serious and Organised Crime (Control) Act 2008* (SA) s 14.
[55] *Totani* (2010) 271 ALR 662, [82].
[56] Ibid [82]-[83], [149], [236], [436] and [481]; Mirko Bagaric, 'The Revived of the *Kable* Doctrine as a Constitutional Protector of Rights?' (2011) 35 *Criminal Law Journal* 197, 198.
[57] *Wainohu* (2011) 278 ALR 1, [111].

International Finance Trust Company and *Totani*. These included that the making of control orders by the Supreme Court depended on administrative declarations and that the prescribed criteria for determining the application of control orders undermined the Court's independence.[58] Those arguments were distinguished and rejected.[59] The point which the plaintiff did succeed on, that the Act did not require the provision of reasons, was not directly addressed in oral submissions.[60]

The three recent cases in which it has been applied shed little light on the possible extent of the doctrine, as concerns about institutional integrity centred on quite different issues in each. It appears to be sufficiently broad to cover a denial of procedural fairness,[61] a lack of independence,[62] and the absence of a duty to give reasons.[63]

B *Persona Designata, Incompatibility and the Application of the Kable Doctrine*

Wainohu is the first case in which the *Kable* doctrine has been held to apply to judges acting in their capacity as individuals. This raises questions about the distinction between incompatibility resulting from *persona designata* appointments at the federal level and that from the *Kable* doctrine.

1 *Importing the Separation of Powers to the State Level?*

In his dissenting judgment in *Wainohu*, Heydon J held that applying the *Kable* doctrine to state judges acting in non-judicial roles would amount to an imposition of federal separation of powers principles on state legislatures.[64] He argued that this was unprincipled and without constitutional basis.[65] There is no equivalent separation of powers at the state level, and states have a long tradition of using judges in administrative roles.[66] At the federal level, judges can be appointed to perform administrative or executive functions as *persona designata*, an

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[58] Ibid.
[59] Ibid [111] and [124]. The Act was amended in anticipation of a challenge along the lines of that brought in *Totani*. Changes included that the Attorney-General no longer had power to appoint or dismiss eligible judges, and also had no 'control or direction' over their decisions – *Crimes (Criminal Organisation Control) Act 2009* (NSW) s 5. See also *Criminal Organisations Legislation Amendment Act 2009* (NSW); *Courts and Crimes Legislation Amendment Act 2009* (NSW); *Courts and Crimes Legislation Further Amendment Act 2010* (NSW); Polden, above n 3, 66.
[60] *Wainohu* (2011) ALR 1, [119]-[122] (Heydon J).
[61] *International Finance Trust Company* (2009) 240 CLR 319.
[62] *Totani* (2010) 271 ALR 662.
[63] *Wainohu* (2011) 278 ALR 1.
[64] Ibid [172].
[65] Ibid.
[66] *Kable* (1996) 189 CLR 51; Justice Robert S French, 'Executive Toys: Judicial and Non-Judicial Functions' (2009) 19 *Journal of Judicial Administration* 5, 16.

exception to the strict separation between judicial and executive functions.[67] However, those functions will be constitutionally invalid where they are incompatible with those of the judge acting as a judicial officer.[68]

The judgment of the majority and the separate judgment of French CJ and Kiefel J both recognised that there is no separation of powers at the state level.[69] Though the majority did not directly address it, French CJ and Kiefel J were careful to set out the conceptual differences between constitutional incompatibility arising under the *Kable* doctrine and that of *persona designata* appointments at the federal level.[70] The *Kable* doctrine comes from the need to preserve the integrated Australian judicial system established under Chapter III, rather than any concept of separation of powers between judicial and administrative or executive functions.[71]

As part of his argument that the *Kable* doctrine did not extend to state judges acting in non-judicial roles, Heydon J accepted the Victorian Attorney-General's submissions that the doctrine applied to courts as institutions rather than judges as individuals.[72] This division cannot be maintained in practice - courts are made up of judges. It is implicit in the majority judgement that judges will generally be viewed as judges by the public regardless of what functions they are carrying out.[73]As the majority found, a doctrine directed at protecting institutional integrity should encompass judges acting as individuals where their acting in that capacity impacts on that integrity.[74] There is obiter support in the *Kable* decision for this application of the doctrine.[75]

2 *Circumstances in Which the Kable Doctrine Will Apply*

The distinction between incompatibility resulting from a *persona designata* appointment and incompatibility based on the *Kable* doctrine is subtle. Theoretically, it can be seen in the focus on the impact on institutional integrity rather than on judges' judicial functions.[76] In line with this focus, the Court in *Wainohu* held that *Kable* would only apply to non-judicial functions conferred on state judges in particular

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[67] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 57.
[68] *Wilson* (1996) 189 CLR 1; Colin D Campbell, 'An Examination of the Doctrine of *Persona Designata* in Australian Law' (2000) 7 *Australian Journal of Administrative Law* 109, 110.
[69] *Wainohu* (2011) 278 ALR 1, [77] and [52].
[70] Ibid [52].
[71] Ibid; *Totani* (2010) 271 ALR 662, [201] (Hayne J).
[72] *Wainohu* (2011) 278 ALR 1, [168].
[73] Ibid [106].
[74] Ibid [52], [105] and [109].
[75] Ibid [48] cf [169]; *Kable* (1996) 189 CLR 51, 117-8 (McHugh J) cf 103-4 (Gaudron J); French, above n 68, 16 and 20; Bagaric, above n 25, 201.
[76] *Wainohu* (2011) 278 ALR 1, [79] and [109].

circumstances. The majority decision of Gummow, Hayne, Crennan and Bell JJ held that the doctrine would apply where those functions affect public confidence in the judiciary.[77]

French CJ and Kiefel J applied a two-step test – that the functions affected the essential characteristics of a court, and that there was a perceived connection between the judicial and non-judicial functions under the Act.[78] They identified 'essential characteristics' as including independence and impartiality,[79] procedural fairness,[80] being open to the public,[81] and providing reasons. This approach, though appearing narrower than that of the majority, would probably have the same result in most instances. As the focus of the *Kable* doctrine is on institutional integrity, public confidence in that integrity is likely to be based on whether courts have the 'essential characteristics' identified by French CJ and Kiefel J.[82]

3 *Any Difference in Application?*

It is unlikely that the conceptual distinctions between incompatibility stemming from *persona designata* and that from the *Kable* doctrine would lead to much, if any, practical difference between the two principles. The tests applied in each instance are the same. Gummow, Hayne, Crennan and Bell JJ used the 'public confidence' test from *Wilson*, a primary case on incompatibility and *persona designata* appointments.[83] The principles that they found to be 'determinative' of the validity of s 13(2) were also from *Wilson*.[84] In the same sentence as recognising its different conceptual basis from the *Kable* doctrine, French CJ and Kiefel J held that 'the incompatibility condition … indicate[s] standards which may be sufficient to ensure that a state law conferring a non-judicial function on state judges is consistent with the requirements of Ch III.'[85]

C *The Importance of Giving Reasons*

The decision in *Wainohu* is also significant because it highlights the importance of judges providing reasons for their decisions. It confirms

[77] Ibid [109] (Gummow, Hayne, Crennan and Bell JJ).
[78] Ibid [70] (French CJ and Kiefel J).
[79] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [66].
[80] *International Finance Trust Company* (2009) 240 CLR 319, [55].
[81] *Russell v Russell* (1976) 134 CLR 495, 520.
[82] *Wainohu* (2011) 278 ALR 1, [70].
[83] Ibid [94]; *Wilson* (1996) 189 CLR 1.
[84] *Wainohu* (2011) 278 ALR 1, [94].
[85] Ibid [43].

what earlier cases have also set out,[86] namely that providing reasons is a key part of the judicial function and central to the conduct of a court.

1 *Absence of a Duty to Provide Reasons*

Heydon J argued that eligible judges were highly likely to give reasons despite not being under a duty to do so, because of their training and experience as judges.[87] The majority found that s 13(2) could not be read down to create a duty requiring reasons,[88] and that the possibility that no reasons would be provided could not be 'dismissed from consideration as some remote or fanciful possibility.'[89] In contrast to Heydon J's position, French CJ and Kiefel J focused on the type of function conferred on the judges, rather than how a judge might choose to carry it out.[90] The majority also found that the possibility or even likelihood that eligible judges would give reasons was not sufficient, because it did not adequately address the importance of the purpose of providing reasons.[91]

2 *The Purpose of Giving Reasons*

The majority stressed that providing reasons allowed a decision to be freely assessed for independence, impartiality, principle and logic.[92] Both the majority, and French CJ and Kiefel J, emphasised the importance of giving reasons to allow access to the right of appeal or judicial review.[93] French CJ and Kiefel J characterised the duty to give reasons as 'constitutional' and linked it to the fundamental importance of public justice.[94] The Court deemed reasons to be so important that it was irrelevant that the plaintiff did not make any substantive submissions on s 13(2) as a basis for invalidity.[95]

3 *Rescuing the Act?*

The absence of a duty to give reasons proved to be fatal for the Act. However the majority expressly stated that if s 13(2) were amended to create such a duty, the Act could be rescued.[96] The judges could take steps to keep criminal intelligence confidential and not fall foul of the *Kable* doctrine.[97]

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[86] *Grollo v Palmer* (1995) 184 CLR 57; *AK v Western Australia* (2008) 232 CLR 438, [89].
[87] *Wainohu* (2011) 278 ALR 1, [151].
[88] Ibid [101].
[89] Ibid [103].
[90] Ibid [41].
[91] Ibid [103].
[92] Ibid [94].
[93] Ibid [109] and [57].
[94] *Grollo v Palmer* (1995) 184 CLR 57; *AK v Western Australia* (2008) 232 CLR 438, [89].
[95] *Wainohu* (2011) 278 ALR 1, [119]-[122].
[96] Ibid [108].
[97] Ibid [92] and [108]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 234 CLR 501.

IV CONCLUSION

The decision in *Wainohu* confirms that the *Kable* doctrine has been revived, though its actual extent remains unclear. Following *Wainohu*, the doctrine will apply to functions performed by judges in their capacity as individuals. Though conceptually different, this application is likely to apply in much the same way as incompatibility as a result of *persona designata* appointments at the federal level. The Court also again affirmed that providing reasons is central to the functions of a court and of judges.

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