

MANNER & FORM ATTACK PLAN:

Part A may be able to challenge the validity of the _____ Act (2020) (Provision X) if s 22 of the _____ Act (2016) (Provision Y) is a valid & binding manner and form (MNF) provision on s1 Provision X.

Provision X: New Act – Here (PAFA).

Provision Y: Previous MNF (NPBA).

1 – Does Prov X or Prov Y trigger s73 Constitution Act 1889 (WA)?

- **S73(1)** – Legislation that changes the ‘Constitution (composition) of the Legislative Council or Legislative Assembly’ must be passed w/ an absolute majority (impacting the representative nature of each house).
 - Absolute majority: Majority of those eligible to vote.
- Absolute majority (s73(2)(f)) and referendum (s73(2)(g)) required for bills that:
 - S73(2)(a) – expressly or implicitly (E or I) abolishes or alters office of Governor (s50(2)).
 - S73(2)(b) – E or I abolishes legislative council or legislative assembly.
 - S73(2)(c) – E or I proposes that LC or LA are composed by members other than those directly chosen by people.
 - S73(2)(d) – E or I reduces number of members in LC or LA.
 - S73(2)(e) – E or I in anyway affects:
 - S2:
 - S2(1) – POGG
 - S2(2) – Parliament in WA = Queen + LA + LC.
 - S2(3) – Standard passage of bills (LA → LC → Queen for assent) – changes to this will trigger s73.
 - S3 – Governor may fix time & place of sessions, prorogue Houses & dissolve assembly.
 - S4 – LA and LC must meet at least once a year.
 - S5 – LA and LC must be called for the first time at least 6 months after this Act commences.
 - S50 – Office of governor (Governor is WA’s representative of the Queen).
 - S51 – Instructions to Governor must be signed by royal hand.
 - S73 – double entrenches itself.
 - S73(6) – Any person entitled to vote at a general election of members of legislative assembly can bring proceedings in Supreme Court for a declaration injunction or other remedy to enforce provisions of this section before or after a bill in s73(2) is presented for assent.

2 – Relevant MNF Provision (Provision Y) – Old Act that is trying to be repealed / altered:

A – MANDATORY?

- To be valid, a MNF prov must be mandatory (Clayton v Heffron).
- If not mandatory, future Parl have choice as to whether it must apply, thereby rendering prov ineffective.
- Given this prov uses the term “must/shall not” (may) it is evident that s22 is (is not) mandatory in nature.

B – DOUBLE ENTRENCHED?

- MNF prov must also be doubly entrenched to be valid (Trethowan) otherwise a future Parl may amend or remove the MNF prov through standard legislative process.
- SY in Prov Y satisfies this requirement because it references back to itself through the words “any provision of this Act”.

C – SUBSTANTIVE RESTRAINT?

- MNF prov will constitute a substantive restraint on legislative power if it is so onerous that it effectively makes repealing a law impossible. In such caess, the prov will likely be deemed invalid (Trethowan).
- sY prov Y requires a _____ % majority at referendum to amend or repeal any prov of the 2016 Act.
- Courts have found that referendum requirements are not necessarily substantive restraints, as despite being extra-parl in nature, they represent a decision by the people which Parl directly represents (West Lakes, Trethowan).
- However, in West Lakes, it was determined that a 75% referendum majority was onerous enough to constitute substantive restraint.
- Relative to this, a _____ % majority is considerably lower/higher, and would thus not (will) constitute substantive restraint.

3 – VALIDLY CREATED?

A – SELF-COMPLIANCE:

- Kirby J (Marquet) and Gummow J (McGinty) have suggested that a MNF prov that has failed to comply w/ its own procedures should not be considered validly created.
 - SY prov Y does not (does) comply w/ its own procedures, because it was enacted by an absolute majority rather than the referendum contemplated in the prov itself (because it complies w/ absolute majority & referendum requirement).

NATIONHOOD POWER ATTACK PLAN:

STEP 1: IDENTIFY WHAT EXECUTIVE IS TRYING TO DO:

The Govt is attempting to _____ and has introduced the _____ Act and set up the _____ to achieve this.

STEP 2: IDENTIFY THE ULTIMATE SOURCE OF EXECUTIVE POWER:

The ultimate source of executive power is s61 CC which vests executive power in the Queen exercisable by the Governor General and extends to the 'execution and maintenance of the Constitution and laws of the Commonwealth. However, its scope has never been properly defined as per **Mason CJ, Deane and Gaudron JJ in Davis**.

STEP 3: IDENTIFY THE RELEVANT SOURCE OF EXECUTIVE POWER:

Firstly, we must check whether the _____ Act falls under an express head of power in s51CC.

- Summon, prorogue and dissolve Parliament (ss5, 28, 57), issue writs for general elections (s32), assent to Bills (s58), appoint Ministers (s64), command defence forces (s68), appoint and remove judges (s72).

As the _____ Act doesn't fall under s51 CC we must test whether one of the following sources of executive power being statute, common law or the nationhood power authorises it as per **Pape**.

STEP 4: NATIONHOOD POWER:

4A: INTRODUCTION:

Per **Mason J's test in the AAP Case**, due to the existence and character of the Commonwealth as a national government, and the presence of s51(xxxix) and s61 CC there is a capacity to engage in activities that are (1) peculiarly adapted to the government of a nation and (2) which cannot otherwise be carried on for the benefit of the nation.

4B: IS THIS ACT PECULIARLY ADAPTED TO THE GOVERNMENT OF THE NATION?

If AAP test is satisfied, then exec function falls under s61 exec power and empowers Parl to pass legislation under s51(xxxix) that is incidental to carrying out such a function.

As such, the act will be facultative not coercive (e.g the general holding of national bicentennial celebration fell squarely within NH power & was facultative, however prohibition of phrases imposing penalties in s22 was not necessary for carrying out function for national benefit and was coercive under **Davis**).

Indicators of facultative:

"National emergency or crisis"?

- The facultative aspect is potentially very broad and self-defining as per **Pape** and could be used too readily by govt to extend Cth power too easily which threatens federalism. Defining a crisis as an emergency does not mean it is one that is deserving of the nationhood power.
 - **Pape** – national emergencies & crisis – authorisation of money to individuals after the GFC.

National identity issues?

- Flag, national anthem, national celebrations, national orchestra, CSIRO, national literature body.
 - **Davis** – nationhood includes protection and advancement of the nation per **Brennan J** – here it was federation which is overwhelmingly significant in Australian national history.
 - Per **Mason CJ, Gaudron and Deane JJ (Davis)**, it must definitely be peculiarly adapted to the Federal Government (not the states, ie the national bicentenary).

Limits of nationhood power outlined by French CJ in Pape:

- Cannot affect the separation of powers, undermine Federalism (separation of federal and state governments) and cannot regulate economy.
- Large scale & short-term impact?
 - 'Short term measure to meet urgent national economic problem is not in any way intervening with constitutional distribution of powers' (**French CJ in Pape**).
 - Address challenges within capacity & resources of Cth? Yes = Facultative.
 - Is Exec uniquely placed to respond to crisis of this nature (Financial crisis)? Yes = Facultative.
 - Short term issues are more likely to succeed as in Pape vs 50 years prolonged issues (targeted spending during GFC).

KABLE PRINCIPLE ATTACK PLAN **STATE LAWS **:

General steps:

- 1 – If State Court which has the capacity to be vested with Cth Judicial power under ChIII CC.
- 2 – AND State Parl is purporting to vest the State Court with function which substantially impairs OR is incompatible with its institutional integrity.
 - YES – Draw on cases applying KABLE doctrine.
 - NO – KABLE does not apply.

INTRODUCTION:

Bill X may encounter constitutional difficulty with respect to Kable principle.

s71 of the CC provides for the vesting of Cth judicial power in State court per “such other courts”. **s77(iii)** provides that Parl may make laws investing federal jurisdiction in any court of a state. **s73** provides for the role of state supreme courts in appellate process to reach the High Court. State courts are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as state judicial power (**McHugh J**).

State Courts are repositories of Federal judicial power (**s71 + s77(iii)**), therefore, to be protected from undue parliamentary influence, states cannot invest in State courts powers that undermine the independence of the judiciary or public confidence in the judicial process (**Kable**).

Public confidence in the impartial exercise of federal judicial power would soon be lost if federal or state courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature of executive government.

Bill X concerns judges in the [Supreme Court of WA/District Court of WA], which constitutes a state court under Ch III CC. Thus, the Kable principle applies.

INSTITUTIONAL INTEGRITY:

Under the Kable principle Bill X invalid if it vests the [Supreme Court of WA / District Court of WA] with a function that undermines its institutional integrity (**Fardon**).

RED = INVALID.

GREEN = VALID.

INDEPENDENCE & IMPARTIALITY?

*Independence and impartiality are considered key features of state courts institutional integrity (**Totani**).*

- A court cannot be made an instrument of the state’s plan (**Kable**).
 - Cf **Fardon** – there was sufficient discretion as to the terms of order and whether to make the determination.
 - Keeping enough discretion to determine if an order once ‘an organisation’ was declared – **Kuczborski**.
- Ex-parte hearing without avenues of appeal – effectively unable to overturn a decision. Cannot direct court in manner of exercising jurisdiction (**International Finance Trust**).
 - De novo appeal against ex parte supports institutional integrity.
- **Totani**, there was no discretion by court whatsoever (*acting as a mere puppet of the executive*).
 - Maintaining sufficient discretion for the court regarding ‘sufficient danger’ – **Fardon**.
- Decisions being subject to review by executive → **Lawrence** executive could overrule a court’s decision.
- Appointment of temporary judges so long as they are impartial & independent – **Forge**.

PROVIDING REASONS FOR SUBSTANTIVE DECISIONS?

Providing reasons for substantive decisions is another key feature of state courts' institutional integrity (Totani).

- **Not providing reasons erodes institutional integrity:**
 - Courts must provide reasons for substantive decisions – even the option not to is unacceptable (**Wainohu**).

OPENNESS/TRANSPARENCY?

Openness and transparency are another key feature of state courts institutional integrity (Totani).

- Public nature of standard judicial process was a factor in favour of institutional integrity in **Fardon**.
- Secret evidence in closed courts is acceptable due to inherent jurisdiction of state supreme courts to rectify injustice (**Condon**).

STANDARD JUDICIAL PROCESSES?

Standard judicial process is also a key feature of state courts' institutional integrity (Totani).

- Applying rules of evidence and allowing cross-examination was a factor in favour of institutional integrity in **Fardon**.

INTEGRATED COURT STRUCTURE?

The institutional integrity of Ch III courts must be also considered with respect to Australia's integrated court structure (Kable).

- **Fardon** – the ability to appeal decision is an important feature of institutional integrity as part of integrated court structure.
- **Kable** – found to undermine public confidence in the system, as no longer perceived as sufficiently independent.

CASE SUMMARY BRIEF:

- ☆ **Kable:** Legislation to protect community from 1 person = **INVALID**.
- ☆ **Fardon:** Useful for institutional integrity – legislation for keeping people in prison = **VALID**.
- ☆ **Forge:** Method of appointing judges = **VALID**.
- ☆ **International Finance Trust:** Apply to court for restraining order for people suspected of serious crime activities = **INVALID** (first time since Kable).
- ☆ **Totani:** Order MUST be made if Cth satisfied defendant member of crime gang = **INVALID**.
- ☆ **Wainohu:** Eligible judges had power for control orders against persons = **INVALID**.
- ☆ **Momcilovic:** Court turning to Parl to make a decision about reconciling a human right = **VALID**.
- ☆ **Lawrence:** Exec power to overturn Court decisions = **INVALID**.
- ☆ **Condon:** Secret evidence in closed courts to make control order against gang = **VALID**.
- ☆ **Kuzcborski:** 3 avenues of labelling bikie groups = **VALID**.
- ☆ **Knight v Victoria:** Parole minimum = **VALID**.
- ☆ **Vella (2019):** Court can make order if satisfied of serious criminal conviction or person involved in crime related activity but not yet convicted & court satisfied on reasonable grounds to protect public = **VALID**.

CASE & FACTS	REASONING & HELD
KABLE: LEGISLATION TO PROTECT COMMUNITY FROM 1 PERSON. <ul style="list-style-type: none">☆ Kable subject to ad hominem legislation to prevent him being released from prison – this legislation ONLY applied to Kable & no one else.☆ Legislation to protect community from Kable – convicted of manslaughter of wife, wrote threatening letters to wife's family from jail, thought he'd be likely to hurt them.☆ Court empowered to resume the imprisonment of Kable if they were satisfied that it was more probable than not that he would commit a serious crime if released back into the community – appears as non-judicial power.	INVALID! HELD the impugned provisions were constitutionally invalid. State parliaments cannot legislate in a way to undermine the role of state courts as repositories of federal power: Supreme Court effectively taking on functions that make it no longer able to serve constitutional function (Ch III) as part of integrated court structure. Removed ordinary protection of federal judicial process: <ul style="list-style-type: none">☆ Didn't need to find him guilty to detain him.☆ Keep him detained by civil standard.☆ Court could take into account normally inadmissible evidence. AND The court must maintain independence & freedom from political control, as well as the perception thereof. Whole system designed to preserve public confidence in system:

	<ul style="list-style-type: none"> ☆ State courts are a part of this and should not be able to undermine constitutional scheme of Ch III. ☆ Public confidence would be lost if they were no longer perceived to be sufficiently independent. <p>In Kable, court made an instrument of state's plan:</p> <ul style="list-style-type: none"> ☆ Tainting the court.
<p>FARDON: LEGISLATION FOR KEEPING PEOPLE IN PRISON:</p> <p>FACTS very similar to Kable, in that the impugned state law allowed for prisoners to be pre-emptively detained if they were seen as a risk to community.</p> <ul style="list-style-type: none"> ☆ DIFFERENT because applied EQUALLY to all people opposed to just 1 individual in Kable. <p>To make the order, there was sufficient judicial discretion as to what constituted a 'serious danger'.</p>	<p>VALID!</p> <p>Reworded principle in Kable to focus on whether the impugned law vests 'the court of the state' with a function which substantially impairs (or is incompatible with) its INSTITUTIONAL INTEGRITY.</p> <ul style="list-style-type: none"> ☆ Principle only comes into play where introduction of state law would act in such a way that would lead the reasonable person to lose faith in state's capacity to administer federal jurisdiction impartially without compromise. ☆ Must maintain essential characteristics of court – judicial independence, judicial impartiality, natural justice. <p>Court found that institutional integrity was NOT compromised:</p> <ul style="list-style-type: none"> ☆ Felt legislation applied to class of people. ☆ Sufficient scope for judicial discretion as to what order to make (terms of detention) and whether or not to make it. ☆ Sufficient characteristics of standard judicial process. <ul style="list-style-type: none"> ▪ Applying rules of evidence. ▪ Applying cross-examination. ▪ Room for prisoner to appeal. ▪ All in public. <p>Sometimes consideration that courts must accept a slight threat to characteristics of court, in order to provide checks on executive power that would not otherwise exist.</p>
<p>FORGE: METHOD OF APPOINTING JUDGES:</p> <p>Related to 'acting judges' within the Supreme Court and how their appointment may undermine the institutional integrity of the court.</p> <p>Based on a claim that these acting judges might have an incentive to act in particular ways to further their progression in the court system.</p> <ul style="list-style-type: none"> ☆ Acting judge may not be as independent and impartial as permanent judge. 	<p>VALID!</p> <p>Held that appointment of acting judgements did not necessarily compromise impartiality and independence of court:</p> <ul style="list-style-type: none"> ☆ Ch III requires there be "body fitting the description of Supreme Court of a State". ☆ The Kable doctrine is all about maintaining the defining characteristics of a court which go to give it its institutional integrity. ☆ INDEPENDENCE & IMPARTIALITY maintained in this case. <p>Note – institutional integrity will be distorted if Court no longer exhibits characteristics which separate court from other decision making bodies (impartiality & independence are crucial).</p>
<p>INTERNATIONAL FINANCE TRUST: APPLY TO COURT FOR RESTRAINING ORDER FOR PEOPLE SUSPECTED OF SERIOUS CRIME ACTIVITIES.</p> <p>NSW legislation allowed NSW Crime Commission to apply to Supreme Court for restraining order in respect to persons who benefitted from proceeds of crime.</p> <p>Supreme Court was required to hear this matter WITHOUT notifying the property owner.</p> <ul style="list-style-type: none"> ☆ These were ex parte applications for restraining orders which left virtually no discretion to the court & compelled them to grant the orders. 	<p>INVALID!</p> <p>First time since Kable it was applied to invalidate state legislation.</p> <ul style="list-style-type: none"> ☆ Supreme Court required by Executive to conduct judgements ex parte if executive wanted. ☆ Legislation was directing Courts in manner of exercising jurisdiction. ☆ It is restricting their ability to apply procedural fairness (which is at the heart of judicial function) because there is no fair hearing at which you are heard by independent and impartial tribunal. ☆ This distorted the court's institutional integrity & ability to remain a repository of Federal Jurisdiction. ☆ Appeals procedure was inadequate to remedy the effects of this ex-parte hearing therefore it was impossible for someone to overturn the decision. (Hard to rectify any injustice). <p>Allowing for these provisions would result in death of institutional integrity by courts by 1000 cuts.</p>
<p>TOTANI: ORDER MUST BE MADE IF CTH SATISFIED DEFENDANT MEMBER OF CRIME GANG.</p> <p>Serious and Organised Crime Act 2008 (SA) s14 stipulated that a control order MUST be made if court is satisfied the defendant is a member of a declared organisation.</p> <p>Attorney-General could declare an organisation was a 'declared organisation' if satisfied the members were involved in serious criminal activity & posed a risk to public safety & order.</p> <ul style="list-style-type: none"> ☆ Significant executive discretion to decide this! 	<p>INVALID!</p> <p>Majority:</p> <ul style="list-style-type: none"> ☆ The influence of executive on imposition of this order TAINTED the decisional independence of the court – involved them in a process that was incompatible w its institutional integrity. ☆ Differed from Fardon in that there was no discretion left to court to determine if individual threat to community but instead solely if they were a member of a declared organisation. ☆ Court acting as a puppet of executive – no judicial role to play.
<p>WAINOHU: ELIGIBLE JUDGES HAD POWER FOR CONTROL ORDERS AGAINST PERSONS</p>	<p>INVALID! Breached Kable doctrine.</p>