

## ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PTY LTD V WARDLEY (1980)

- An award made under the Conciliation and Arbitration Act 1904 (Cth) stated that airline pilots could be dismissed subject to certain notice requirements
- A female pilot contested her dismissal on the grounds that it infringed the Equal Opportunity Act 1977 (Vic) which prohibited employers from discriminating on grounds of sex or marital status when dismissing employees
- The airline argued that the Victorian Act was inapplicable, on the ground that it had been displaced by the Cth award, which (apart from the notice provisions) gave employers a free hand in dismissing employees
- In this case, the majority characterised the State law as dealing with anti-discrimination matters and the Cth law as dealing with notice provisions – in other words, they related to different fields altogether
- There was, therefore, no covering the field inconsistency
- The majority also rejected the argument that there was inconsistency in the form of the Cth granting a right to employers to dismiss at will and the State purporting to remove it
- It made the point that this test and the covering the field test will often overlap, because, if a right granted by the Cth is to be interpreted as absolute, it will follow that the Cth intended to occupy the field
- Interpreting the award in this case, it was clear that it was intended to grant not an absolute right to dismiss on notice, but rather, a right to dismiss subject to other laws
- In other words, there was no evident intention on the part of the Cth to deal comprehensively with dismissal and to exclude State legislation
- The Cth intended to address notice provisions only, leaving other matters to be regulated by State law
- This case can also be seen as one in which the failure of the Cth to provide a detailed set of rules relating to the employment of pilots operated to raise an inference of lack of intent to cover the field
- Contrast this with **O'Sullivan v Naorlunga Meat Ltd**, where the level of detail did indicate an intention to cover the field

## APLA LIMITED V LEGAL SERVICES COMMISSIONER (NSW) [2005] HCA 44

- The court upheld a State regulation prohibiting advertising of legal services regarding personal injury actions
- Gleeson CJ and Heydon J held that the regulations prohibited commercial advertising, not communications about political issues.
- "The possibility that [the Regulation's] advertisement might mention some political or governmental issue, or might name some politician, does not mean that the regulations infringe the Constitutional requirement. The Regulations do not prohibit ... communications about government or political matters. They prohibit communication between lawyers and people who, by hypothesis, are not their clients, aimed at encouraging the recipients of the communications to engage the services of lawyers. Such communications are an essentially commercial activity."
- Such restrictions did not infringe on the implied freedom
- McHugh J held that the implied freedom of communication did not extend to the exercise of the federal judicial power. The courts do not take part in the system of representative and responsible government. The advertising of legal services did not concern governmental matters, and did not violate the implied freedom.

- Gummow J also held that the advertising of legal services did not concern political or governmental matters. The laws controlled an activity (advertising). The laws did not restrict political communication about whether that activity should be controlled. A political comment could be made about personal injury claims provided it contained no advertising content.
- Callinan J held that the advertising of legal services was not a communication about governmental or political matters. In general, commercial speech will not be protected by the implied freedom of communication.

### BAKER V THE QUEEN (2004)

- Issue – Amendment to s13A of the **Sentencing Act of NSW** changing the rules relating to early release of people sentenced to life imprisonment.
- Changes included where the original court had made a “non-release recommendation” that person was required to complete 20 years imprisonment rather than 8 as previously.
- The person requesting the early release would be ineligible unless the “Supreme Court is satisfied that special reasons exist that justify making the determination.”
- Based on *Kable* it was argued in *Baker* that the new rules were invalid. The argument was unsuccessful with only Kirby J dissenting
- **Kirby J:** His arguments were twofold:
  1. The category of persons who had non-release recommendations was small and defined and therefore it could be said the legislation was directed at particular individuals.
  2. Special reasons was too vague and open to arbitrariness
- **Response to argument 1**
  - *Gleeson J:* The selection was not arbitrary and the criterion was not irrelevant.
  - *McHugh, Gummow, Hayne and Heydon JJ* “it could not be said that the appellant was the sole and direct target of the 1997 Act”. No guarantee of equality in the Constitution
- **Response to argument 2**
  - *Gleeson J* – there is nothing unusual about legislation that requires a court to find special reasons or special circumstances
  - *McHugh, Gummow, Hayne and Heydon JJ:* It is important ...in construing such a broadly expressed conferral of authority that it is to be exercised by a court, not by an administrator.”
- Since the opinion was that there was nothing about the provisions that resulted in a breach of separation of powers no further consideration of *Kable* was necessary.
- Important dicta on *Kable*: *The court having indicated there was no Kable issue in this case went on to say: “The doctrine in Kable is expressed to be protective of the institutional integrity of the State courts as recipients and potential recipients of federal jurisdiction.”*
- Kirby’s dissent
  - He referred to the purpose of the legislation as described in Parliament as directed at ten specific prisoners.
  - He noted the class was closed since they had to be currently serving life sentences.
  - It was not general legislation - no new people could ever be added to the list
  - He accepted the argument it was arbitrary based on the loose practices of judges when sentencing serious criminals as to whether they comment that they should not be released
  - Further retroactivity was a problem

### FARDON V A-G (QLD) (2004) 223 CLR 575

- In this case a State law provided that if the Supreme Court was satisfied that a prisoner serving a serious sexual offence was a serious danger to the community, the court could order that the prisoner be detained indefinitely
- 'serious danger' was defined as an unacceptable risk that the prisoner would commit a serious sexual offence if released
- The court held that this Act did not infringe the *Kable* principle due to the following differences:
  - Fardon's legislation was not directed at a specific individual as was in *Kable* (ad hominem legislation)
  - Fardon's legislation contained numerous safeguards which were absent in *Kable*
  - The court had a broad discretion regarding the orders that could be made
  - The A-G bore the onus of proving that the prisoner should be detained
  - Ordinary evidential rules would apply
  - The 'unacceptable risk' must be established 'to a high degree of probability'
  - The prisoner could appeal against a detention order
  - Hearings regarding the making of an order were to be held in public
  - Detention orders would be regularly reviewed by the court
  - In exercising this jurisdiction the Supreme Court did not act under the instructions of the executive or legislature
  - The statute under challenge did not jeopardise the 'institutional integrity' of the Supreme Court
- *Dangerous Prisoners (Sexual Offenders) Act 2003 QLD* authorised "interim detention orders" and "supervision orders" and "continuing detention orders" of prisoners convicted of a serious sexual offences by the Supreme Court of QLD
- Effect was to allow the court to extend a sentence through one of these orders.
- Fardon was serving his sentence when the new legislation was passed and towards the end of his sentence he was subject to an interim detention order and finally a continuing detention order.
- Issue: would a similar scheme be Constitutional if introduced at the federal level? If no was there a *Kable* issue here?
- **Gummow J:** similar federal scheme would not be Constitutional since it was based on criminal propensity not a crime committed.
- **Kirby J:** agreed on this point with Gummow.
- **Hayne J:** argued that the line between detention that is punitive and detention that is not was not as clear as Gummow J had made out and that therefore it might be within appropriate judicial power to detain people for the protection of society
- **Applicability of *Kable*:** The key difference here was the majority's view about that standard of judicial process required at the State level as a consequence of *Kable*
- **McHugh J:** argued that *Kable* does not assimilate State courts into the federal system. Integration is not unification.
- **Callinan and Heydon JJ:** not everything by way of decision-making denied to a federal judges is denied to a judge of the State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised then the legislation in question will not infringe CH III of the Constitution.
- **Gleeson J:** felt it was an appropriate exercise of judicial power easily distinguishable from that in set down in *Kable*
- **McHugh J:** Also stated the *Kable* legislation was extraordinary compared with this Act- the fact that *Kable* was directed at a single person was crucial
- **Callinan and Heydon JJ** made similar remarks but also reiterated that a Supreme Court of a State was not the same in all respects as a federal court and that what was being required here was in line with the relevant judicial power.

- **Kirby's dissent:** In this country judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed.

#### KINGSWELL V THE QUEEN (1985) 159 CLR 264

- The Commonwealth can determine which offences are 'indictable': **R v Archdall (1928)**.
- This effectively makes the right vulnerable to legislative override, but this interpretation was endorsed in the current case

#### KIRMANI V CAPTAIN COOK CRUISES PTY LTD (NO 1) (1985) 159 CLR 351

The High Court held that the Parliament's repeal of the Merchant Shipping Act 1894 (UK), which was applicable in Australia, was a matter falling within the concept of external affairs, because it related to Australia's relationship to the UK.