CITATION:	*Parklands Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics* [2021] NTSCFC 4
PARTIES:	PARKLANDS DARWIN PTY LTD (ACN 166 220 248) v MINISTER FOR INFRASTRUCTURE, PLANNING AND LOGISTICS
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Supreme Court exercising Territory jurisdiction
FILE NO:	2020-03216-SC
DELIVERED:	5 August 2021
HEARING DATE:	9 June 2021
JUDGMENT OF:	Grant CJ, Kelly J & Hiley AJ

CATCHWORDS:

CONSTITUTIONAL LAW – The Judiciary – *Kable* doctrine

Whether legislation purporting to validate a decision by the defendant to refuse a request by the plaintiff to amend the NT Planning Scheme directs the Supreme Court in the exercise of its jurisdiction in a manner prohibited by the principles identified in *Kable* – Legislation a retrospective validation of an administrative act which did no more than attribute legal validity to that past act – That the legislation was passed during the currency of pending litigation does not impair the Court's institutional integrity – That the legislation was directed to a specific parcel of land the subject of pending proceedings does not constitute an impermissible interference with judicial power – Irrelevant that the motive or purpose of the defendant and the Legislative Assembly in enacting the statute was to circumvent the proceedings – Legislation not invalid on *Kable* grounds.

Planning Act 1999 (NT), s 148A

Attorney-General (NT) v Emmerson (2014) 253 CLR 393, *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, *Baker v The Queen* (2004) 223 CLR 513, *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, *Kuczborski v Queensland* (2014) 89 ALJR 59, *Leeth v Commonwealth* (1992) 174 CLR 455, *Liyange v The Queen* [1967] 1 AC 259, *Nelungaloo Pty Ltd v The Commonwealth* (1947) 75 CLR 495, *Nicholas v The Queen* (1998) 193 CLR 173, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, *Re Macks; Ex parte Saint* (2000) 204 CLR 158, *South Australia v Totani* (2010) 242 CLR 1, *Thomas v Mowbray* (2007) 233 CLR 307, *Wainohu v New South Wales* (2011) 243 CLR 181, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	AL Tokley QC with R Bonig
Defendant:	N Christrup SC, Solicitor-General for the Northern Territory, with L Peattie

Solicitors:

Plaintiff:	Finlaysons Lawyers
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	A
Number of pages:	26

IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Parklands Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics [2021] NTSCFC 4
No. 2020-03216-SC

BETWEEN:

PARKLANDS DARWIN PTY LTD (ACN 166 220 248)

Plaintiff

AND:

MINISTER FOR INFRASTRUCTURE, PLANNING AND LOGISTICS

Defendant

CORAM: GRANT CJ, KELLY J AND HILEY AJ

REASONS FOR JUDGMENT

(Delivered 5 August 2021)

THE COURT:

[1] This is a reference to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT). The sole issue for determination is whether legislation purporting to validate a decision by the defendant to refuse a request by the plaintiff to amend the NT Planning Scheme directs the Supreme Court in the exercise of its jurisdiction in a manner prohibited by the principles identified in *Kable v Director of Public Prosecutions (NSW)* ("*Kable*").[1]

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

Background

[2] In 2014, the plaintiff purchased Lots 6907 and 6908 Town of Darwin ("the Land"). The Land was zoned as Community Purpose under the NT Planning Scheme. The purpose of that zone at the time of purchase was expressed to be to "[p]rovide for community services and facilities, whether publicly or privately owned or operated, including facilities for civic and government administration".

[3] In December 2017, the plaintiff requested the defendant to amend the NT Planning Scheme to rezone the Land from Community Purpose to a Specific Use zone pursuant to s 13(1) of the *Planning Act 1999* (NT) ("the Act"). A revised rezoning application was submitted on 11 August 2019. The intended effect of the request was to facilitate high and medium density residential development on the Land.

[4] After exhibiting the proposal and holding a public hearing, the defendant refused the request to rezone the land by letter to the plaintiff dated 27 July 2020.

[5] On 23 September 2020, the plaintiff commenced proceedings in the Supreme Court of the Northern Territory challenging the validity of the defendant's decision. The Originating Motion sought an order in the nature of *certiorari* quashing the defendant's decision on a number of grounds, including:

(a) that the defendant failed to comply with the requirements of ss 13(4) and 29 of the Act to provide reasons for the refusal;[2]

(b) that the defendant took into account irrelevant considerations; and

(c) that the defendant failed to take into account (or gave insufficient weight to) relevant matters, particularly the 2020 Traffic Impact Statement and the Darwin Inner Suburbs Area Plan.

[6] In order to succeed in the claim, the plaintiff was required to establish in accordance with administrative law principles that the defendant's decision was invalid on one or more of the grounds specified in the Originating Motion. The commencement of the proceedings invoked the jurisdiction of the Supreme Court to determine that matter.

[7] On 16 February 2021, the executive government introduced the Planning Amendment Bill 2021 (NT) ("the Bill") into the Legislative Assembly. The Bill received assent on 10 March 2021 and commenced on 11 March 2021. The Bill did the following three things.

(a) It inserted s 13(7)into the Act, to provide

> A failure by the Minister to comply with subsection (4)(b) or (6) does not affect the validity of the Minister's decision.

(b) It inserted s 29(2) into the Act, to provide:

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2 At the time the decision was made, s 13 of the Act set out the processes to be followed in determining a request for the amendment of a planning scheme. Sub-section 13(4) provided that, if the Minister decided to refuse to amend the planning scheme as proposed, the notice of the decision must include the reasons for the refusal. Section 29 provided that after amending or refusing to amend a planning scheme, the Minister must make available for purchase or inspection by the public a copy of the written reasons for the decision.

A failure by the Minister to comply with subsection (1) does not affect the validity of the Minister's decision.

(c) It inserted s 148A into the Act, to provide:

148A Validity of Decision

(1) This section applies in relation to the Minister's decision to refuse a request to amend the NT Planning Scheme to change the zones of Lots 6907 and 6908 Town of Darwin, notice of which decision is dated 27 July 2020.

(2) Despite any law to the contrary, the decision is valid, and is taken to have been valid on and from the date it was made.

[8] It is clear from its terms that s 148A of the *Planning Act* is directed specifically to the defendant's decision to refuse the request to amend the NT Planning Scheme in relation to Land. Not only is that the objective intention of the provision properly construed, it was also the subjective intention of the defendant, the executive government and the legislature both to validate the decision and to defeat the proceedings brought by the plaintiff in the Supreme Court. On the day the Bill was introduced into the Legislative Assembly, the defendant issued a media release which stated that a "key feature" of the Bill was:

> To put beyond doubt the validity of the decision by the Minister to refuse a request to rezone the land at 16 and 25 Blake Street, The Gardens (Lots 6907 and 6908, Town of Darwin) from community purposes to a special use zone that would have facilitated high and medium density residential development, which does not fit with the existing character of The Gardens.

[9] Similarly, in the Second Reading Speech made on that same day, the defendant stated:

> The bill includes a provision that puts beyond doubt the validity of the decision made by myself in regard to the land located at 16 and 25 Blake Street, The Gardens, Lots 6907 and 6908, Town of Darwin. This would, for all practical purposes, conclude the current Supreme Court proceedings. To achieve this, the bill inserts a new section at 148A.

[10] In conformance with that intention, by Notice of Defence dated 6 May 2021 the defendant pleaded that the refusal was valid and was taken to be valid by reason of s 148A of the *Planning Act*. By its Reply dated 20 May 2021, the plaintiff pleaded that the provision was invalid and was not a bar to the prosecution of the proceedings.[3]

[11] On 25 May 2021, the following question was referred for determination by the Full Court.

> Having regard to the Statement of Claim dated 31 March 2021, the Notice of Defence dated 6 May 2021, and the Reply dated 20 May 2021, is s 148A of the *Planning Act 1999* (NT) invalid on the grounds that it:
>
> (a) undermines or interferes with the institutional integrity of the courts of the Northern Territory; or
>
> (b) otherwise infringes Chapter III of the Constitution?

The operation of the *Kable* principle

[12] The decision in *Kable*, and subsequent authorities explaining and refining its principal rationale, establishes that a State legislature cannot confer upon a State court a function which substantially impairs, or which is incompatible with or repugnant to, the institutional

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3 Sections 13(7) and 29(2) are not given retrospective operation under the terms of the *Planning Amendment Act 2021*, they are not relied upon by the defendant in defence of the plaintiff's claims in the Originating Motion, and there is no challenge to their validity.

integrity of the court and its role under Ch III of the *Constitution* as a repository of federal jurisdiction and as part of the integrated Australian court system.[4]

[13] Although the principle derives from the fact that the *Constitution* expressly contemplates the exercise of federal jurisdiction by State Supreme Courts, the Supreme Court of the Northern Territory exercises the judicial power of the Commonwealth as one of the "other courts [the Parliament] invests with federal jurisdiction" within s 71 of the Constitution[5], and hence the principle in *Kable* also has application to the Legislative Assembly of the Northern Territory[6].

[14] In broad terms, a court's institutional integrity will be impaired in the relevant sense where:

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4 *Baker v The Queen* (2004) 223 CLR 513 at [5]-[6] per Gleeson CJ, [21] per McHugh, Gummow, Hayne and Heydon JJ; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [15] per Gleeson CJ, [37] per McHugh J, [102] per Gummow J, [192] per Hayne J, [213] per Callinan and Heydon JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [40] per Gleeson CJ, [63] per Gummow, Hayne and Crennan JJ; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [56] per French CJ; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44]-[45] per French CJ and Kiefel J, 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ; *South Australia v Totani* (2010) 242 CLR 1 at 47 [69] per French CJ, 82 [205], 83 [212] per Hayne J, 157 [426] per Crennan and Bell.

5 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [28]-[29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

6 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at 595 [41] per French CJ, Kiefel and Bell JJ.

(a) the legislation directly conscripts or enlists the court in the implementation of the legislative or executive policies of the State or Territory concerned;[7] or

(b) the legislation requires the court to depart to a significant degree from the methods and standards which have historically characterised the exercise of judicial power.[8]

[15] The gravamen of the plaintiff's challenge is that s 148A of the Act is directed specifically to the proceedings it has brought for judicial review of the defendant's decision, and thereby prejudges the subject matter of those proceedings and requires the Supreme Court to exercise its jurisdiction accordingly. The argument follows that on proper characterisation, the legislation amounts to a direction to the Court as to the outcome of the proceedings, and is thus an impermissible intrusion into the judicial process.

[16] The High Court has previously had occasion to consider the constitutional validity of validating legislation in the *Kable* context, most recently in *Duncan v Independent Commission Against*

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7 *Kuczborski v Queensland* (2014) 89 ALJR 59 at 88 [140] per Crennan, Kiefel, Gageler and Keane JJ; *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 92-93 [236] per Hayne J, 173 [481] per Kiefel J.

8 *Kuczborski v Queensland* (2014) 89 ALJR 59 at 88 [140] per Crennan, Kiefel, Gageler and Keane JJ; *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131] per Gummow J, 157 [42] per Crennan and Bell JJ; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 353-354 [52] per French CJ; *Thomas* v *Mowbray* (2007) 233 CLR 307 at 355 [111] per Gummow and Crennan JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

Corruption ("Duncan")[9]. That matter involved a challenge to a provision of the *Independent Commission against Corruption Act 1988* (NSW), which provided that anything done by the Commission before a specified date[10] that would have been validly done if "corrupt conduct" for the purposes of the Act had a particular operation, was taken to have been, and always to have been, validly done.

[17] In *Duncan*, the High Court observed that there can be no objection to the validity of a statute which is "simply a retrospective validation of an administrative act".[11] Such a statute "does no more than attribute the consequences of legal validity" to past acts.[12] In addition, the mere fact that the statute in question was passed during the currency of pending litigation does not, of itself, render the legislative provision unconstitutional as an impairment of the Court's institutional integrity. In support of that proposition, the plurality cited[13] what Mason J (as his

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9 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 95 [16] per French CJ, Kiefel, Bell and Keane JJ.

10 The specified date was the date of the High Court's decision in *Independent Commission Against Corruption v Cuneen* (2015) 256 CLR 1. The High Court in *Cuneen* had determined that "corrupt conduct" in s 8 of the *ICAC Act* did not include conduct that adversely affects or could adversely affect the efficacy, but not the probity, of the exercise of official functions. This meant that the ICAC report in relation to the plaintiff was beyond power, a matter sought to be established by the plaintiff. The NSW legislature enacted legislation which provided: "Anything done or purporting to be done by the Commission that would have been validly done if corrupt conduct for the purposes of this Act included relevant conduct is taken to have been, and always to have been, validly done." "Relevant conduct" was defined as "conduct that would be corrupt conduct for the purposes of this Act if the reference in section 8(2) to conduct that adversely affects, or could adversely affect, the exercise of official conduct included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions."

11 *Duncan* at 96 [19] per French CJ, Kiefel, Bell and Keane JJ; citing *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 597-580 per Dixon J.

12 *Duncan* at 95 [15] per French CJ, Kiefel, Bell and Keane JJ.

13 *Duncan* at 96-97 [20] per French CJ, Kiefel, Bell and Keane JJ.

Honour then was) had said in an earlier case concerning an asserted interference with the judicial process:

> Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action.[14]

[18] The Court in *Duncan* went on to observe that "[i]t is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Chapter III of the *Constitution*, even if those rights are in issue in pending litigation."[15] In the *Kable* context, the Court made reference to its earlier decision in *HA Bachrach Pty Ltd v Queensland* ("*Bachrach*") as authority for the proposition that legislation directed to a specific parcel of land does not constitute an impermissible interference with judicial power, even if that land is the subject of pending proceedings.[16]

[19] A distinction is to be drawn in that respect between legislation which impermissibly affects the processes and procedures to be applied by a court in the determination of pending and future proceedings, and legislation which permissibly effects a retrospective alteration of the substantive law which is to be applied by the courts in accordance with

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14 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250. This observation was subsequently adopted by Gummow, Hayne and Bell JJ (with whom French CJ, Crennan and Kiefel JJ agreed in this respect) in *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 150 [76].

15 *Duncan* at 98 [26] per French CJ, Kiefel, Bell and Keane JJ.

16 *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 560 [8]-[9], 563-564 [18]-[22] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

their ordinary processes.[17] It was on that basis that the legislation under consideration in *Duncan* was distinguished from the legislation which had been declared invalid in *International Finance Trust Co Ltd v New South Wales Crime Commission*[18]. That latter legislation required a court not only to receive an *ex parte* application, but also to hear and determine it *ex parte* in a statutorily mandated departure from procedural fairness. It was in that context that the Court in *Duncan* spoke of legislation which purported "to give a direction to a court to treat as valid that which the legislature has left invalid".[19] The requirement to proceed in that fashion constituted an impermissible direction to the court as to the manner in which it exercised its jurisdiction, and deprived the court of an important characteristic of judicial power.[20]

The validity of s 148A

[20] In reliance on those principles, the defendant contends that s 148A does nothing more than retrospectively (and expressly) validate the decision of the Minister made in relation to the Land. It does not

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17 *Duncan* at 98 [28] per French CJ, Kiefel, Bell and Keane JJ.

18 *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] 240 CLR 319.

19 *Duncan* at 98 [27] per French CJ, Kiefel, Bell and Keane JJ.

20 *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] 240 CLR 319 at 354-355 [55] per French CJ. Similarly, Gummow and Bell held (at 366-367 [96]), that s 10 of the *Criminal Assets Recovery Act 1990* (NSW) engaged the Supreme Court in an activity repugnant to the judicial process because it conscripted the court into a process which required the mandatory *ex parte* sequestration of property on suspicion of wrongdoing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on *ex parte* applications and the only possibility of the release of the property from sequestration being proof of a negative proposition of considerable legal and factual complexity.

confer any power or function upon a court nor deprive it of one, and it requires only that the alteration of the substantive law be applied in accordance with the ordinary curial processes.

[21] On the other hand, the plaintiff contends that a nuanced approach should be taken to the question of the validity or invalidity of s 148A, relying on the statement of Gummow, Hayne and Bell JJ in *AEU v Fair Work Australia*[21] that "it is very much to be doubted that any single, all-embracing proposition could be devised which would mark off statutes which are beyond power – because the statute impermissibly interferes with the exercise of the judicial power – from those which are not". Their Honours then went on to say:

> At least in cases which are still pending in the judicial system, it will be important to consider whether or to what extent the impugned law amounts to a legislative direction about how specific litigation should be decided. That is, as one author has written, a balance must be struck between the recognition that the Parliament may change the law in a way that has an effect on pending proceedings (a proposition that has been described as "the changed law rule") and the recognition that the Parliament cannot direct the courts as to the conclusions they should reach in the exercise of their jurisdiction (a proposition that has been described as "the direction principle").[22]

[22] Although that case was concerned with the judicial power of the Commonwealth and the separation of powers at federal level, the

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21 *Australian Education Union v General Manager of Fair Work Australia* [2012] 246 CLR 117 at 149 [76] per Gummow, Hayne and Bell JJ.

22 *Australian Education Union v General Manager of Fair Work Australia* [2012] 246 CLR 117 at 153 [87] per Gummow, Hayne and Bell JJ.

plaintiff contends that legislation which infringes "the direction principle" must also attract the application of *Kable* principles. In the plaintiff's submission, s 148A of the Act purports to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The effect – and the only effect – of s 148A is to remove the supervisory jurisdiction of the Supreme Court in relation to a single administrative decision, the validity of which is the sole question to be determined in the pending proceedings for judicial review. The function of the Supreme Court in determining that application would ordinarily be to assess whether the Minister has validly complied with criteria set out in ss 13 and 29 of the Act. It is said that s 148A abrogates this process and effectively dictates the result to the Court. In making that submission, counsel for the plaintiff sought to draw a number of points of distinction between the present matter and the operation of the validating legislation considered in *Duncan* and the earlier authorities.

[23] First, a distinction was drawn between the operation of s 148A and the provision under consideration in *Duncan*. In *Duncan*, although there was litigation on foot the outcome of which would effectively be determined by the impugned legislation, and the legislation was concerned to address one problem, the legislation itself was in general terms and did not merely prescribe the outcome of the pending proceedings. By analogy with the legislation under consideration in *Duncan*, a contrast was drawn between s 148A and a hypothetical

legislative provision which provided that any decision made by the defendant before 28 July 2020 shall be taken to be valid notwithstanding an insufficiency of reasons. In the plaintiff's submission, a provision in those more general terms would have satisfied the test of validity.

[24] Secondly, a distinction was sought to be made between the operation of s 148A and the legislation under challenge in *Bachrach*. Attention was drawn to the following passage in support of the proposition that the validating legislation there was not directed to the pending proceedings, and in fact could not have been if it was to achieve the purpose of the legislature:

> The plaintiff's legal proceedings are not mentioned in the Act. The manifest purpose and effect of the Act is to establish a legal regime affecting the Morayfield shopping centre land, binding the developer, the Council, and all other persons including the plaintiff. Indeed, assuming that the ultimate objective of the Government was to bring about the result that the Morayfield shopping centre could lawfully be constructed as expeditiously as possible, it would not have been sufficient to enact legislation which merely addressed the plaintiff's legal proceedings. In order to achieve the desired result, it was necessary to enact legislation binding all those who might possibly be concerned, in the future, with the proposed development and all those who might avail themselves of the broad standing provision in respect of "a person" provided by s 4.3(8) of the *Planning and Environment Act*.
>
> The same consideration answers the plaintiff's argument that this was legislation *ad hominem*. An examination of the terms of the Act reveals that this is not so, and the objective attributed to Parliament by the plaintiff is such that it could not be so. Legislation *ad hominem* would not have achieved that objective. It was not enough to deal with the plaintiff's legal proceedings. It

was necessary to ensure that the proposed development was lawful.[23]

[25] The reference to *ad hominem* legislation is said by the plaintiff to reflect the generally accepted proposition that legislation will amount to a usurpation of, or impermissible interference with, judicial power if it prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly, brings down a "legislative judgment" directed against specific individuals, or directs the courts as to the manner and outcome of their jurisdiction.[24]

[26] Thirdly, a distinction was drawn between the operation of s 148A and the legislation which was challenged in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*[25]. In that matter the Conciliation and Arbitration Commission had declared that the Builders Labourers' Federation had contravened certain agreements. The effect of the declaration was to empower the responsible Minister to deregister the union. The union then commenced proceedings for judicial review of the Commission's

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23 *Bachrach* at 564 [22]-[23] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

24 *Leeth v Commonwealth* (1992) 174 CLR 455 at 469-470 per Mason CJ Dawson and McHugh JJ; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ; *Nicholas v The Queen* (1998) 193 CLR 173 at 221 [113] per McHugh J. The relevant observations in those cases were made with particular reference to *Liyange v The Queen* [1967] 1 AC 259 at 290, in which the Privy Council held that a legislative provision which purported to legalise *ex post facto* the detention of individuals imprisoned in respect of an attempted coup, to widen the class of cases that could be tried without jury, to retrospectively validate arrests and to prescribe new minimum penalties for the offence of waging war against the Queen were invalid as "a grave and deliberate incursion into the judicial sphere" which was inconsistent with the separation of powers required by the constitution of Ceylon.

25 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88.

decision, and an order prohibiting the Minister from cancelling its registration. Those proceedings were listed to be heard before the High Court on 6 May 1986. On 14 April 1986 the Parliament enacted legislation which cancelled the registration of the union, thereby making redundant the legal proceedings which the union had commenced.

[27] In the plaintiff's submission, there are material differences between that form of legislation and s 148A of the Act. Rather than simply validating the defendant's decision, s 148A goes on to provide that the decision "is taken to have been valid on and from the date it was made". The provision was said thereby to be cast in terms that amount to a command to the Supreme Court as to the conclusion that it is to reach in the issues which present in the application for judicial review, and that are more accurately characterised as directive rather than substantive.[26] That submission picks up what was said by Street CJ in *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations*[27] concerning New South Wales legislation which provided that a certificate given by the responsible Minister under New South Wales legislation as a precondition to the cancellation of the union's registration:

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26 That submission must be considered in light of the fact that the validating legislation under challenge in *Duncan* was expressed in similar terms.

27 *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 377-378.

> … shall (to the extent, if any, that that action was invalid) be treated, for all purposes, as having been valid, and the certificate shall correspondingly be treated, for all purposes, as having been validly given from the time it was given or purportedly given.

[28] The challenge to that legislation was considered by the New South Wales Court of Appeal at a time before *Kable* had been decided. The Court's consideration proceeded necessarily on the basis that there was no separation of powers doctrine operating at State level, with the result that the legislation was found to be valid despite an acceptance by at least some members of the Court that it constituted an exercise of judicial power because it directed the outcome of pending litigation. The plaintiff says legislation of that character and circumstance would now attract the application of *Kable* principles on the basis that:
(a) there was a proceeding before a court of competent jurisdiction challenging the validity of the administrative act in question; (b) the legislation was directed to a particular legal person and the incidents of that particular litigation; and (c) rather than substantively validating the administrative act, the legislation directed a conclusion. The plaintiff says further that those same characteristics and circumstances are present in the legislation here under consideration.

[29] Although it may be accepted that legislation which directs a court to reach a particular conclusion would ordinarily infringe *Kable* principles, on proper characterisation s 148A is not a direction to the Supreme Court as to how to determine the issues in this proceeding. It

does not direct or conscript the Supreme Court to treat as valid that which the legislature has left invalid. Its effect, rather, is to validate retrospectively the Minister's decision. That is to say, it is a retrospective validation of an administrative act which thereby affects substantive rights. It states expressly, and in the clear exercise of legislative rather than judicial authority, that "[d]espite any law to the contrary, the decision is valid". The subsequent provision that the decision "is taken to have been valid on and from the date it was made" is ancillary to that validation, and a direction to the Court only in the sense that it clarifies and puts beyond doubt that the legislative validation is retrospective in its operation.

[30] The fact that the defendant's decision was validated by legislation at a time when there were already proceedings on foot challenging the decision, and that the validation is determinative of those proceedings, does not mean that the Supreme Court has been unlawfully enlisted or conscripted to the purpose of the executive or legislature. The notion of conscription in Australian law is borrowed in part from *Mistretta v United States*[28], in which the United States Supreme Court observed (at 407) that the judicial branch's reputation for impartiality and non-

28 *Mistretta v United States* 488 US 361 (1989).

partisanship may not be borrowed by the political branches "to cloak their work in the neutral colours of judicial action".[29]

[31] In order for a court to be impermissibly conscripted there must be some form of passing off of a legislative or executive decision, or desire to bring about a particular outcome, as an exercise of the judicial power of a court in a manner inconsistent with the proper relationship between the arms of government.[30] So far as is relevant for these purposes, the proper operation of that relationship requires that the courts independently and impartially interpret and apply statutes in the determination of controversies between parties. For legislation to unlawfully impair that relationship in the constitutional sense there must be some signal feature in its operation, such as a frank direction

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29 This observation has been cited with approval in decisions of the High Court regarding the constitutional validity of conferring non-judicial functions upon Federal Court judges: see *Grollo v Palmer* (1995) 184 CLR 348 at 366 per Brennan CJ, Deane, Dawson and Toohey JJ, at 377 per McHugh J, at 392 per Gummow J. The High Court has stated that this principle proscribing conscription is "equally relevant to the interpretation of Ch III of the *Constitution* of this country": see *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ. *Mistretta* was also cited with approval in *Kable*, and has featured in the High Court's applications of the principle since then.

30 *Kable* at 121 (invoking the Supreme Court's authority), 122, 124 (making the Supreme Court the instrument of a legislative plan initiated by the Executive) per McHugh J; at 131 (employing the Supreme Court to execute the legislature's plan), 133 (drawing the Supreme Court into a scheme), 134 (ratifying the political and policy decisions with the judiciary's reputation and authority) per Gummow J; at 96-97, 98 (requiring the Supreme Court to participate in a process to achieve the executive's object) per Toohey J; at 106, 108 (dressing up the process as a judicial process) per Gaudron J; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 596 [34] (the Court's jurisdiction was a disguised substitute for an ordinary legislative or executive function) per McHugh J; *Totani* at 52 [82] (a substantial recruitment of the judicial function of the Court to an essentially executive process) per French CJ; at 66 [142] (the conscription of the Court to effectuate a political function), 67 [149] (enlist a court in the implementation of legislative policy) per Gummow J; at 89 [229], 90 [230] (using the courts as the arm of the executive), 92 [236] (enlisting the court to create new norms of behaviour for persons identified by the executive) per Hayne J; at 160 [436] (rendering the Court the instrument of the Executive) per Crennan and Bell JJ; at 172 [480] (disguising the Executive's aims), 173 [481] (enlisting the court to give effect to legislative and executive policy) per Kiefel J; *Momcilovic v The Queen* (2011) 245 CLR 1 at 228 [602] per Crennan and Kiefel JJ (disguising a legislative or executive function by use of the court's process).

incompatible with the judicial process, the utilisation of confidence in the impartial and public decision-making of judicial officers to support inscrutable decision-making[31], or the incorporation at the behest of the executive of unstated premises into a judicial determination[32]. The legislation under consideration here expressly validates the defendant's decision, and even if the plaintiff's challenge to that decision is pursued to an ultimate determination in the Supreme Court, the reasons underlying that determination will be patent.

[32] Nor is it sufficient to engage the *Kable* principle that the judiciary, in the declaration and enforcement of legislation, gives effect to government policy formulated, or even dictated, by the executive. All judicial enforcement of legislation enacted substantially in conformity with a Bill presented to the legislature by the executive will have that operation.[33] In many cases, the legislation in question will be the outcome of political controversy, or reflect controversial political determinations; but administering and giving effect to such legislation does not compromise the integrity of a court simply by reason of the fact that the result is the outcome of political action or in conformance with a legislative or executive intention.[34]

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31 See, for example, *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [109] per Gummow, Hayne, Crennan and Bell JJ.

32 See, for example, *South Australia v Totani* (2010) 242 CLR 1 at 173 [480] per Kiefel J.

33 *PSA (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 177 [69] per Heydon J.

34 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 592 [21] per Gleeson CJ.

[33] It can readily be accepted that when analysing for *Kable* purposes the manner in which the legislative or executive object is achieved, legislation directed to specific individuals or to identified proceedings must be subjected to careful scrutiny to ensure the court is not impermissibly directed or conscripted to the achievement of that object. One of the salient features of the impugned legislation in *Kable* was that it was expressly directed to the continued detention of a named individual and no other person.[35] However, the fact that legislation may have application limited to particular individuals or proceedings, or to an identified but limited class thereof, is not in itself determinative of validity. That characteristic did not deny the validity of the impugned legislation in *Baker v The Queen*[36], notwithstanding that in the Second Reading Speech the responsible Minister identified by name the 10 prisoners to whom the legislation was directed[37]. The plurality in *Baker* noted that the application of the impugned legislation to a small class of persons, or a single individual, will give rise to issues of constitutional validity where the legislation is properly characterised as *ad hominem* in accordance with the invalidating

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35 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 99 per Toohey J, at 104 per Gaudron J, at 121 per McHugh J, at 130, 133 per Gummow J. See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 580 [258] per Kirby J; *PSA (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 178 [70] per Heydon J.

36 *Baker v The Queen* (2004) 223 CLR 513.

37 See the text of the Second Reading Speech at 569 [165] per Callinan J.

principle expressed in *Liyanage v The Queen*.[38] That process of characterisation requires a consideration of the subject matter and context of the legislation.

[34] The subject matter of the impugned legislation may be important in determining whether that legislation constitutes an impermissible interference with the judicial process by reason of the narrowness of its application. In particular, a distinction is properly drawn between powers that are exclusively judicial in nature (eg determining the guilt or otherwise of a defendant in a criminal matter), and matters which the legislature may choose to have determined either by a judicial or non-judicial body (eg planning matters). As the Court observed in *Bachrach*, a statute affecting litigation with respect to criminal guilt and punitive detention will involve quite different considerations from one affecting litigation concerning rights amenable to administrative determination.[39] Of course, in that respect s 148A of the Act bears no resemblance at all to the provisions of the Acts which were held invalid in *Liyanage* or *Kable* itself.

[35] So far as context is concerned, it is plain from the media release and Second Reading Speech extracted above that the defendant expected and intended that the enactment of the legislation would, for all

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38 *Baker v The Queen* (2004) 223 CLR 513 at 534 [50] per McHugh, Gummow, Hayne and Heydon JJ; referring to what was said in *Nicholas v The Queen* (1998) 193 CLR 173.

39 *Bachrach* at 563 [18] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

practical purposes, conclude the Supreme Court proceedings. However, whether legislation constitutes an impermissible interference with the judicial process does not depend upon the motives or intentions of the Minister or of individual members of the legislature. The determination of validity depends upon the nature of the rights which the statute changes, regulates or abolishes.[40] It should be noted in that respect that McHugh J's observations in *Nicholas*[41] about the usurpation of judicial power by "legislative judgment" require not only a legislative interference which affects specific and pending litigation, but also that the interference affects the judicial process itself in the sense that it abrogates the discretion or judgement of the judiciary or the rights, authority or jurisdiction of the court.

[36] As already described, s 148A of the Act validates the defendant's decision by way of a legislative statement affecting or declaring substantive rights to be applied in accordance with the ordinary curial processes. The terms of the legislation do not suggest the court has determined the validity of the defendant's decision in the exercise of judicial discretion. It is clearly and expressly a legislative validation. There is nothing in the legislation requiring the Supreme Court to act otherwise than in accordance with the principles and procedures

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40 *Bachrach* at 561 [12] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

41 *Nicholas v The Queen* (1998) 193 CLR 173 at 221 [113] per McHugh J.

according to which it ordinarily exercises judicial power.[42] The legislation does not remove or affect any of the ordinary judicial processes by which the Supreme Court performs its judicial function.[43] In determining the application for judicial review the Supreme Court would be undertaking an orthodox and conventional judicial exercise[44] involving the adjudication of rights and liabilities established by statute.[45] Although the effect of the provision is that the application for judicial review of the defendant's decision, if prosecuted to a determination, would be resolved in favour of the defendant, s 148A does not constitute a direction to the Supreme Court as to how to determine the proceeding. It is directed to the decision.

[37] During the course of both written and oral submissions, counsel for the plaintiff invoked the principle expressed in *Kirk v Industrial Court of New South Wales*[46] in aid of the submission that s 148A of the Act

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42 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 374 [127] and 377 [134] per Hayne, Crennan and Kiefel JJ, at 388 [165] per Heydon J; referring to *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554.

43 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 232 [208] per McHugh J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] per Gleeson CJ.

44 *Baker v The Queen* (2004) 223 CLR 513 at 574 [177] per Callinan J.

45 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 232 [207], [208] per McHugh J.

46 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581 [100]. *Kirk* involved a privative clause stating that a decision of the Industrial Court "is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal", extending to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, injunctions, declaration or otherwise. The High Court's decision that this legislative provision was invalid depended upon the fact that Chapter III of the *Constitution* requires that there be a body fitting the description "the Supreme Court of a State" so that it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. As there is no reference in the *Constitution* to the Supreme Court of a self-governing territory, there may be some doubt as to the applicability of the principle in *Kirk* to the Northern Territory. Given the manner in which the plaintiff framed its argument, it is unnecessary to resolve that matter for present purposes.

constituted an impermissible interference with the ordinary judicial processes, on the basis that it would effectively deprive the Supreme Court of power to grant relief on account of jurisdictional error. In framing the submission, counsel made it clear that the plaintiff was not seeking to argue that the principle expressed in *Kirk* had application to the Northern Territory's constitutional arrangements. The submission was only that, by way of analogy, legislation which removed that jurisdiction would impair the Court's institutional integrity in the application of *Kable* principles. That submission must be rejected on the ground that s 148A does not have privative operation in the relevant sense, and effects no diminution of or restriction on the Court's jurisdiction. It is not directed to the jurisdiction of the Supreme Court in either pending or future proceedings, but rather to the validity of the Minister's decision. As stated above, the constitutional character of the provision will turn on the nature of the rights which the statute changes.

[38] In that assessment, there is no material point of distinction between the present circumstances and the legislation which was considered by the Court in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*[47]. After making the point that Chapter III contains no prohibition that rights in issue in a legal

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47 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88.

proceeding shall not be the subject of legislative action, the Court stated:

> It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings. *Liyanage v The Queen* (1967) 1 AC 259 was such a case where the legislation attempted to circumscribe the judicial process on the trial of particular prisoners charged with particular offences on a particular occasion and to affect the way in which judicial discretion as to sentence was to be exercised so as to enhance the punishment of those prisoners.
>
> Here the situation is very different. The Cancellation of Registration Act does not deal with any aspect of the judicial process. It simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings.[48]

[39] Although the High Court was there concerned with the exercise of the judicial power of the Commonwealth, as the Court has subsequently explained, if the law in question "would not have offended those principles, then an occasion for the application of *Kable* does not arise".[49]

Conclusion

[40] For these reasons, the question referred to the Full Court is answered as follows:

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48 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96-97 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

49 *Bachrach* at 561-562 [14] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

Question:

Having regard to the Statement of Claim dated 31 March 2021, the Notice of Defence dated 6 May 2021, and the Reply dated 20 May 2021, is s 148A of the *Planning Act 1999* (NT) invalid on the grounds that it:

(a) undermines or interferes with the institutional integrity of the courts of the Northern Territory; or

(b) otherwise infringes Chapter III of the *Constitution*?

Answer:

No.
