

# AACL

## Australian Association of Constitutional Law

### NSW PROGRAM OF EVENTS — 2013

*Wednesday 6 February 2013*

#### STATE JURISDICTIONAL RESIDUE: WHAT REMAINS TO A STATE COURT WHEN ITS CHAPTER III FUNCTIONS ARE EXHAUSTED?

Paper presented by **Professor Helen Irving** (Sydney Law School):

Among the many issues facing the High Court in *Momcilovic v The Queen* [2011] HCA 34, was the constitutional validity of 'declarations of inconsistent interpretation' made under section 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and exercised for the first time in 2010 by the Victorian Court of Appeal. Four members of the High Court found the declaration power valid. Of these, Chief Justice French notably found it valid for a State court, but invalid in the exercise of federal judicial power. The complication was that, when it made its 'declaration', the Victorian Court was exercising federal jurisdiction, under section 75(iv) of the Constitution. How, then, were these positions reconciled? The Chief Justice identified what this paper calls 'State jurisdictional residue'. In his words, 'There is no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of its federal jurisdiction . . . could not proceed to exercise the distinct non-judicial power conferred upon it by' the *Charter*. This paper considers what else, if anything, might lie in a State court's 'jurisdictional residue', and its potential implication for the evolution of the *Kable* doctrine.

Commentators: **The Hon Justice Steven Rares** (Federal Court of Australia) and  
**Associate Professor James Stellios** (Australian National University).

Chair: **The Hon Justice Christine Adamson** (Supreme Court of New South Wales)

**Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm**

*Thursday 14 February 2013*

#### GEORGE WINTERTON MEMORIAL LECTURE 2013 — Judicial Review and the Dismissal of an Elected Government in 1975: *Then and now?*

A public lecture by **Professor Geoffrey Lindell AM** (Adjunct Professor of Law, University of Adelaide and Australian National University, Professorial Fellow in Law, University of Melbourne).

When the Whitlam Labor Government was dismissed in 1975 it was widely assumed that judicial review was not available to challenge the validity of that dismissal. Since that time developments have occurred both in Australia and elsewhere which may involve in the future the courts resolving 'conflicts over the reins of power'. It has been questioned whether such conflicts would be resolved by a pronouncement of a court. In Australia developments in administrative law have undermined the assumption that the normal rules which govern the exercise of discretions vested in ordinary government officials and bodies do not apply to those vested in a Vice-regal representative. In addition there have also been developments which may have the effect of converting the core aspects of the conventions of responsible government - and their accompanying qualifications based on the reserve powers of the Crown - into judicially enforceable rules of law. This lecture addresses whether in the light of such

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developments the High Court would, and should, intervene to review the legal validity of the dismissal of an elected Government as a result of the Senate blocking Supply if this were to occur again.

**Supreme Court of NSW, Queens Square, Sydney, Banco Court (Level 13), 6:00–7.30pm**

This joint event was organised by Sydney Law School, AACL and the University of Western Australia.

**Wednesday 8 May 2013**

**MILITARY JUSTICE AND CHAPTER III OF THE CONSTITUTION: THE CONSTITUTIONAL BASIS OF COURTS MARTIAL**

Paper presented by **Professor Suri Ratnapala** and **Dr Jonathon Crowe** (University of Queensland):

The High Court has long struggled with the constitutional status of military tribunals established to hear disciplinary charges against service personnel. The Court's judgments reveal three distinct theories on this issue. The first view holds that military tribunals exercise judicial power, but not 'the judicial power of the Commonwealth' within the meaning of s 71 of the Constitution. The second view holds that the power in question is not judicial power at all for constitutional purposes. The third view holds that the power is 'the judicial power of the Commonwealth', but can be exercised by courts martial under a limited exception to the rules set out in Chapter III of the Constitution. The first view dominated the High Court's reasoning until *Lane v Morrison* (2009) 239 CLR 230, where the judges endorsed the second view. This article contends that the first and second views pose insuperable difficulties when placed in their broader constitutional context. The authors therefore argue for the third interpretation. They further argue that the constitutional basis for the third view strongly implies that military tribunals may only exercise jurisdiction over offences by military personnel that relate to service discipline.

[The paper was published in (2012) 40 *Federal Law Review* 161].

Commentators: **The Hon Justice Margaret J White AO** (Queensland Court of Appeal) and **The Hon Justice Paul Le Gay Brereton** (Supreme Court of New South Wales)

Chair: **Dr James Renwick SC** (Wentworth Chambers)

**Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm**

**Thursday 15 August 2013**

**REALISM ABOUT THE HIGH COURT REVISITED: PRAGMATIC STATESMANSHIP IN THE EXPANSION OF CHAPTER III**

Paper presented by **Professor Jeffrey Goldsworthy** (Monash University)

In a review of Brian Galligan's *Politics of the High Court* (UQP, 1987), published as 'Realism About the High Court' (1988) 18 *Federal Law Review* 27, I was very critical of his thesis that the High Court routinely used a pretense of "strict legalism" to conceal essentially political (albeit non-partisan) reasoning. Twenty five years later, I think there is more to be said for Galligan's position. In the *Wheat Board case* (2003) 216 CLR 277, *Kable* (1996) 189 CLR 51 and *Kirk* (2010) 239 CLR 531, the High Court has acted politically, under a cover of specious legalism, to boost the authority and independence of the judiciary and the Court's conception of the rule of law. This observation is not in itself a criticism: a moral argument to justify this approach could be made, although I would not accept it. These cases raise questions about the propriety of "pragmatic statesmanship" in constitutional adjudication.

Commentators: **The Hon Justice James Allsop AO** (Chief Justice, Federal Court of Australia) and **Professor Peter Cane** (ANU College of Law)

Chair: **The Hon Justice Robert Beech-Jones** (Supreme Court of New South Wales)

This is a joint event organised by AACL and the Australian Society of Legal Philosophy.

**Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm**

*[A date in October to November 2013]*

## STATE LAW AND ORDER REGIMES AND THE HIGH COURT: PAST, PRESENT AND FUTURE

Paper presented by **Dr Gabrielle Appleby** (Adelaide Law School):

One of the key bastions of State jurisdiction in the Federation remains law and order. However, like the States' legislative competence, this arena has come under increasing threat of harmonisation and unification by the High Court. Through the *Kable* principle, the High Court has been able to impose what are now very real limits on State responses to local law and order issues, stifling much government innovation in this arena. By reference to the reinvigoration of the *Kable* principle in the cases of *International Finance Trust Co v New South Wales Crime Commission*, *South Australia v Totani*, and *Wainohu v New South Wales*, and the current challenge on foot to the *Criminal Organisations Act 2009* (Qld) (*Condon v Pompano Pty Ltd*), this paper maps the trajectory of the *Kable* principle as it relates to the limits on the use of State courts in law and order regimes.

Commentators: **Mr Bret Walker SC** (St James Hall Chambers) and **Mr Nicholas Cowdery AM QC** (University of NSW)

Chair: **The Hon Justice Margaret Beazley AO** (President, New South Wales Court of Appeal)

*Tuesday 10 December 2013*

## COMPARATIVE CONSTITUTIONAL LAW – FINAL COURTS ROUND-UP 2013

This annual seminar provides an outline of recent constitutional developments in three jurisdictions – the United Kingdom, Canada and the United States – that are of key interest to Australian constitutional lawyers. Experts from each jurisdiction will report on two or three major constitutional cases argued or decided over the last year; changes in the composition and politics of each country's highest court; and flag the state of debate over constitutional reform. Together, the panellists will also discuss the potential relevance of these comparative developments for current issues in Australian constitutional law. A list of cases to be discussed will be provided prior to the seminar.

Commentators: **Visiting public law scholars** from the UK, Canada and the USA (TBA in late 2013).

Chair: **Professor Rosalind Dixon** (University of New South Wales)

This is a joint event organised by the Gilbert+Tobin Centre of Public Law (UNSW) and AACL.

## MEMBERSHIP OF AACL

### Why you should become a member

Seminars are restricted to members of AACL. Copies of papers are distributed to members in advance of the seminar by email. Members also receive other benefits such as newsletters and updates on constitutional law developments and events throughout the year.

I invite you to become a member of AACL. The association was formed in 1998 as a forum for scholars and practitioners of constitutional law throughout Australia. It now has some 500 members throughout Australia and over 180 members in Sydney alone. More information on AACL may be found at [www.aacl.asn.au](http://www.aacl.asn.au)

### Eligibility

A person may become an ordinary member by applying for membership and paying the annual subscription. The annual subscription is **\$50.00** (concession \$35.00). The membership year runs from July to June of each year. Membership is open to a person who is:

- a judge, legal practitioner or government legal officer;
- a current or former teacher of constitutional law or scholars engaged in research in the field of constitutional law or a related discipline;
- a member of an association which is a member of the International Association of Constitutional Law or similar foreign associations as approved by the Council;
- someone who is adjudged by the Council as having a sufficient interest, whether by reason of practical experience or occupation, in the field of constitutional law; or
- A law student with written approval from a teacher of constitutional law.

### Application form and nomination

Under the current rules of the Association, an application for membership must be nominated and seconded by existing members. If you would like to join AACL, please:

1. ***Fill out the form on page 5:*** Send the form to the NSW Convenor (Christos Mantziaris). The Convenor will take care of nomination, seconding and placement on the AACL NSW email list. The form will then be forwarded to the National Secretariat.

### **AND**

2. ***Pay the membership fee:*** Make an online payment for membership at <http://www.aacl.asn.au/> (or follow the instructions to send a cheque to the National Secretariat). *Please do not send any cheques or cash to the NSW Convenor.*

New members who join in the period February to June 2013 will be credited with membership for the 2013/2014 financial year.

### Enquiries regarding membership and interstate activities

Please direct all enquiries regarding membership or interstate activities to Ms Jean Goh, the Administrator of AACL: tel **03 8344 1011** or [law-cccs@unimelb.edu.au](mailto:law-cccs@unimelb.edu.au)

**19 March 2013**



**Dr Christos Mantziaris**  
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# AUSTRALIAN ASSOCIATION OF CONSTITUTIONAL LAW

ABN 11 717 363 928

## MEMBERSHIP APPLICATION FORM

<b>Surname</b>			
<b>Name</b>			
<b>Title</b>			
<b>Position</b>			
<b>Institution</b>			
<b>Address</b>			
<b>State</b>		<b>Postcode</b>	
<b>Phone</b>	[   ]		
<b>Email address</b> (obligatory)	<p>[Listing of a permanent 'personal' email address rather than a 'work' email address is preferred. This might avoid more frequent, work-related email address changes]</p>		

I hereby apply for Membership of the *Australian Association of Constitutional Law*

.....  
(signature)

.....  
(date)

Proposed by\*: .....  
(signature)

.....

Seconded by\*: .....  
(signature)

.....

\* At the applicant's request, these fields may be completed by the NSW Convenor and another current AACL member.

### **PAYMENT**

Please make your membership fee payment online, at the website of the Australian Association of Constitutional Law: <http://www.aacl.asn.au/membership/>.

If you intend to attend AACL events in Sydney, please forward the form for nomination, seconding and processing to: Dr Christos Mantziaris (NSW Convenor of AACL), 6<sup>th</sup> Floor St James Hall, 169 Phillip Street, Sydney NSW 2000 (DX 328 Sydney) or simply scan/email to: mantziaris@stjames.net.au

