

CONSTITUTIONALLY PROTECTED DUE PROCESS AND THE USE OF CRIMINAL INTELLIGENCE PROVISIONS

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I INTRODUCTION

Demands for government response to perceived threats to national security and personal safety, government incentives to appear ‘tough on crime’ and the absence of an express bill of rights have combined to fuel ever-increasing government intrusions on fundamental rights and liberties that were once thought to be beyond reproach. Recent examples in the Australian context have included property confiscation laws, in the absence of a specific allegation or finding of guilt, reverse onus provisions, curtailment of the right to silence, criminalisation of mere acts of association, and executive detention of individuals.

A current area of controversy is the use of ‘closed court’ processes in particular cases, aligned with the adoption of a court process whereby the person affected by the proceeding may lose the opportunity to see or hear the evidence being led against them, and with that the opportunity to cross-examine the witnesses being used. These types of laws offend several fundamental rights, but are claimed by governments to be necessary to protect witnesses and secure important evidence. For ease of reference, and because this is the phrasing used by the relevant legislation in Australia, I will refer to these as ‘criminal intelligence provisions’.

This type of legislation raises broader questions, specifically the extent to which a ‘due process’ principle may be derived from Chapter III of the *Constitution* (‘Chapter III’), and the extent to which such a principle might be engaged to preserve and protect fundamental human rights, such as those affected by ‘criminal intelligence’ type provisions. Part II charts a history of ‘due process’ protection in the Australian case law and literature. In Part III, I outline recent High Court authority apparently validating the use of ‘criminal intelligence provisions’. In Part IV, I consider how due process considerations might be utilised to challenge the constitutional validity of criminal intelligence provisions. Part V considers possible arguments favouring the constitutionality of ‘criminal intelligence’ provisions. In sum, whilst my principal purpose is to argue

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that the ‘criminal intelligence’ provisions in the legislation to be discussed should have been struck out as being contrary to Chapter III, this is part of a broader discussion regarding the extent to which Chapter III does, and should, protect due process generally, of which protection from ‘criminal intelligence’ provisions is one aspect.

II HISTORY OF DUE PROCESS PROTECTION IN AUSTRALIAN CONSTITUTIONALISM

Clearly, the founding fathers in Australia elected not to include a written bill of rights in the *Constitution*. In framing Australia’s ‘Washminster’ *Constitution*, on this question they leaned away from the United States (‘US’) model, the concession involved a limited number of express written rights scattered through the *Constitution*, but no bill of rights document. In many ways the document was a product of its time and the circumstances in which it was written. Obviously, it was not crafted in the furious days following a revolution against a perceived tyrannical ruler, which naturally would have sharpened concern over rights. As Sir Owen Dixon noted, the experience of the founding fathers had not shown them the need for inclusion of an express bill of rights.¹ The size of government and its influence on the lives of its citizens was negligible, compared with the situation today. In the late 19th century, the writing of Dicey was significant, including his notion of parliamentary supremacy. The founding fathers may well have been influenced by his theories, although today we understand that the principle of parliamentary supremacy, while useful to describe the United Kingdom Parliament with its unwritten constitution, is not fully applicable to the circumstances of Australia, with a written constitution and full acceptance of judicial review.² Dicey himself would have acknowledged this.³

For many years, one principle of statutory interpretation the courts have consistently recognised is that of ‘legality’, under which an ambiguous statute will be read so as not to trample on fundamental rights, or where there is more than one meaning of a provision, both of which trample on fundamental rights,

1 Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965) 102.

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 (Gleeson CJ, Gummow, Hayne and Heydon JJ). To clarify my use of the concept of ‘full judicial review’, it is acknowledged that the scope of such review in Australia is limited by the fact that there is no express bill of rights in this country, in contrast with jurisdictions like the US.

3 He gave three criteria for a sovereign lawmaking body: (a) there was no law which the body could not change; (b) there was no distinction between fundamental (or constitutional) laws and non-fundamental laws; and (c) nobody could pronounce void any enactment passed by the sovereign body on the basis that it was contrary to the constitution: Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1926) 84–7. At the very least, neither (a) nor (c) is apt to describe any Australian Parliament. No Parliament can amend the *Constitution*, and the High Court has power to declare laws to be contrary to the *Constitution* and invalid for that reason.

the interpretation that is least invasive of rights will be preferred.⁴ Secondly, the extent to which a statute impacts on fundamental human rights may be relevant in assessing whether it is a law with respect to a particular head of power, in the case of Commonwealth laws.⁵

Whilst such protections exist, they may be regarded as something of a frail shield. Clearly, they are inadequate to protect human rights in the face of a determined parliament. Judges have recognised this. They have not stopped abrogations of the presumption of innocence,⁶ departures from the right to silence,⁷ confiscation of property in the absence of a conviction,⁸ interference with rights to association,⁹ and the adoption of closed courts and associated abandonment of cross-examination rights. Many of the abrogations of fundamental rights occur at state level, meaning the second of the protections mentioned in the previous paragraph is not available to the court.

To those who perceive this situation as difficult, one possible solution is to draw an implication of due process from the *Constitution*.¹⁰ The High Court decision in the *Engineers* case appeared to sound the death knell for the drawing of implications from the document,¹¹ but Dixon J¹² and others maintained that implications could and should be drawn from the document.¹³ Such a process certainly allows the document to develop to reflect the society it purports to regulate, which would otherwise be hard given the extreme difficulty in formally amending the *Constitution*. On the other hand, of course it raises questions regarding the legitimacy of judges doing so, and concerns over uncertainty and subjectivity. During the 1990s, the movement towards drawing implications from the *Constitution* accelerated rapidly. It will be necessary to consider the prime cases in this area in some detail to determine the level of support for an

4 Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

5 *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ).

6 Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) *University of Tasmania Law Review* 132.

7 Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39 *Monash University Law Review* 156.

8 Anthony Davidson Gray, 'Forfeiture Provisions and the Criminal–Civil Divide' (2012) 15 *New Criminal Law Review* 32.

9 Anthony Gray, 'Freedom of Association in the Australian *Constitution* and the Crime of Consorting' (2013) 32(2) *University of Tasmania Law Review* 149.

10 The High Court has sometimes not preferred these words: *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ). Despite this, the concept of 'due process' is considered to be a convenient umbrella term to describe the kind of process that might be required in order that a process be seen to have the characteristics of a judicial process.

11 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 145.

12 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681–2.

13 *Eg, Victoria v Commonwealth* (1971) 122 CLR 353, 401–2 (Windeyer J); *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108–9 (Griffith CJ), 109 (Barton J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134–5 (Mason CJ), 149 (Brennan J), 168 (Deane and Toohey JJ), 209 (Gaudron J), 233 (McHugh J).

implication in the *Constitution* regarding a right to ‘due process’, at least in substance, if not in those terms.¹⁴

The constitutional basis for the implication of due process rights in the *Constitution* is generally considered to be Chapter III, involving the allocation of judicial power in Australia.¹⁵ The structure and text of the *Constitution* clearly separates judicial power from legislative power in Chapter I and executive power in Chapter II of the *Constitution*. The High Court recognised that there were consequences of this structure, including that generally judicial power could only be vested in a body that was recognised as a ‘court’, and that non-judicial power was to be exercised by bodies that were not courts.¹⁶ Mixing of the powers was generally unacceptable, reflecting the Montesquiean theory regarding the desirability of separating arms of government to limit the state’s power over the individual, and to enshrine a system of checks and balances to avoid tyrannical and unchecked power.

These findings have subsequently been confirmed by the High Court.¹⁷ In *Kable*, the High Court found that a consequence of the separation of powers which Chapter III reflects, together with denial that different grades of justice were possible within the federal system, was that state parliaments could not confer powers on state courts which were repugnant to or incompatible with their

14 Some prefer to see the Chapter III jurisprudence in less rights-based terms, and more as an example of the Court’s inherent jurisdiction to avoid an abuse of process: Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*’ (2003) 31 *Federal Law Review* 57, 59; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, 503 [212] (Gageler J) (‘*Condon v Pompano*’). Some judges have expressed disagreement with the use of the phrase ‘due process’ in describing the Australian position: *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ).

15 *Constitution* ss 1, 61, 71–80. Eg, Deane J referred to the separation of judicial from non-judicial power implicit in Chapter III as ‘the *Constitution*’s only general guarantee of due process’: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580. In *Magaming v The Queen*, Gageler J (dissenting) stated that

[d]ue process is constitutionally guaranteed at least to the extent that the court must always be independent of the executive and impartial, that the procedure adopted by the court at the initiative of the executive must always be fair to the individual, and that the processes of the court must (at least ordinarily) be open to the public.

(2013) 87 ALJR 1060, 1073 [64] (citations omitted). Fiona Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Monash University Law Review* 248; Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32 *Federal Law Review* 205; Michael McHugh, ‘Does Chapter III Protect Substantive as well as Procedural Rights?’ (2001) 21 *Australian Bar Review* 235. ‘It is only in recent years that it has become accepted that due process rights are guaranteed by the *Constitution*’: at 238; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 274; Rebecca Welsh, ‘A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality’ (2013) 39 *Monash University Law Review* 66. ‘There is great, unrealised potential for the development of an Australian conception of fair process.’: at 101.

16 *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254.

17 *Kable v DPP (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

exercise of Commonwealth judicial power, in the sense of repugnancy to or incompatibility with the institutional integrity of state courts.¹⁸

Generally a substantive view of Chapter III's requirements has prevailed.¹⁹ In other words, the High Court has recognised that the separation of powers principle has an important purpose,²⁰ and that an overly narrow or pedantic view of what the principle required could subvert that purpose.²¹ It is not enough, for example, that the court makes a decision about existing legal rights, if the *process* by which that outcome is achieved is problematic.²²

There has been some debate regarding whether the focus with the *Kable* decision should be on whether the body meets the minimum requirements in order to be accurately called a 'court', or whether the question concerns the characteristics of a judicial process. The High Court has readily ascertained and applied definitions of judicial power.²³ However, the question of what it means to be a court has proven to be more elusive, and the High Court has clearly been reluctant to be specific in this regard.²⁴ This question is important because only courts would be suitable receptacles of federal judicial power.²⁵ It is clearly not

18 Ibid 103 (Gaudron J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 [15] (Gleeson CJ), 599–600 [39]–[40] (McHugh J), 617 [101] (Gummow J), 627 [137] (Kirby J), 648 [198] (Hayne J), 655–6 [219] (Callinan and Heydon JJ).

19 *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7 (Deane and Toohey JJ) ('*Leeth*'); Lacey, above n 14, 73. Bateman notes there is some evidence of judges taking a narrower view, focusing on subject matter characteristics rather than process standards: Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 428.

20 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('*Wilson*'). 'The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Chapter III judges': at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J, with whom Gibbs CJ, Stephen and Mason JJ agreed):

we have inherited ... a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive ... the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example.

21 Wheeler, 'The Doctrine of Separation of Powers', above n 15, 254; Bateman, above n 19, 419.

22 *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Polyukovich v Commonwealth* (1991) 172 CLR 501, 685 (Toohey J, quoting Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374), 704–5 (Gaudron J); *Leeth* (1992) 174 CLR 455, 486–7 (Deane and Toohey JJ); Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341, 347, 354–5.

23 A standard definition appears in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ), to mean the power to decide controversies between subjects, or between itself and its subjects, by a tribunal with power to give a binding and authoritative decision.

24 'It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so': *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ) ('*Forge*').

25 *Leeth* (1992) 174 CLR 455, 487 (Deane and Toohey JJ); *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ); Bateman, above n 19, 433.

sufficient that parliament calls a body a ‘court’ that it be considered as such²⁶ – it is a question of substance, although appearances are relevant. Recently, the High Court found that the ability of a superior court to correct jurisdictional errors of lower courts and tribunals was an essential characteristic of a court.²⁷

Another path to a similar end is to state that the exercise of judicial power requires that proceedings be conducted in accordance with the judicial process.²⁸ Courts with federal jurisdiction cannot be required to exercise power in a manner inconsistent with traditional judicial process.²⁹ Legislation *requiring* a court that exercises federal jurisdiction to significantly depart from methods and standards that traditionally characterise judicial activities is (or may be) offensive to Chapter III.³⁰ There are also suggestions that legislation, which *authorises* this to happen may be offensive to Chapter III.³¹ This begs the question of what such characteristics are.³²

The Court has been reluctant to attempt an all-embracing statement of such characteristics,³³ a reluctance that has not escaped criticism.³⁴ Notwithstanding this, various judges have attempted over the course of many judgments to

26 Suri Ratnapala and Jonathan Crowe, ‘Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power’ (2012) 36 *Melbourne University Law Review* 175, 178.

27 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 566 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (‘*Kirk*’).

28 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (‘*Bass*’). Similarly, Gaudron J in *Leeth* spoke of the Chapter III requirement not being limited to content, but including the manner and processes by which judicial power was exercised: *Leeth* (1992) 174 CLR 455, 502. Others claim that process cannot easily be fitted within ‘judicial power’: Bateman, above n 19, 428.

29 *Kable* (1996) 189 CLR 51, 98 (Toohey J); *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ); *Polyukovich v The Queen* (1991) 172 CLR 501, 607 (Deane J), 685 (Toohey J), 703 (Gaudron J).

30 *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 157 (Crennan and Bell JJ) (‘*Totani*’); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 353 (French CJ) (‘*International Finance Trust*’).

31 Three judges in *Chu Kheng Lim v Minister for Immigration* said that the Commonwealth’s heads of power did not extend to laws which required or authorised courts in which the judicial power of the Commonwealth was vested to exercise power in a manner contrary to the essential character of a court or the nature of judicial power: (1992) 176 CLR 1, 26–7 (Brennan, Deane and Dawson JJ) (‘*Chu Kheng Lim*’). In *Nicholas v The Queen* (1998) 193 CLR 173, 208 [74], Gaudron J opined, ‘consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed [in a non-judicial manner]’ (emphasis added). See also *Leeth* (1992) 174 CLR 455, 470, where Mason CJ, Dawson and McHugh JJ said that an attempt by the legislature to cause a court to act in a non-judicial manner might be offensive to Chapter III requirements.

32 Again, there is a noticeable reluctance from the judges in categorically setting out the minimum characteristics of a judicial process, though as we will see to some extent this is being fleshed out on a case by case basis. This reluctance has been dismissed as ‘trenchant conservatism’ by some critics: Brendan Gogarty and Benedict Bartl, ‘Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts following *Kable v DPP (NSW)* and Why It Matters’ (2009) 32 *University of New South Wales Law Journal* 75, 104.

33 Eg, *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

34 See Gogarty and Bartl, above 32.

provide some detail. Clearly, historical practice is an important consideration.³⁵ The Court has clarified on several occasions that an independent and impartial tribunal is an essential characteristic of the Australian judicial system.³⁶ This is required in fact and in appearance.³⁷ Although it may not be possible to precisely identify the minimum required in order that a court be found to meet this requirement,³⁸ powers cannot be given to state courts in the federal hierarchy of courts that would lead observers to suspect that the court was not acting in an independent and unbiased fashion,³⁹ or in other words, those which impair the court's institutional integrity.⁴⁰ One type of law that would infringe this requirement is that featuring a direction to the court by another arm of government.⁴¹ Part of a court's independence is its power over formalities. So for instance the High Court found in an early case of *Russell v Russell* that a law purporting to direct where and when courts must sit, how the courtroom could be furnished, or which officials should attend the judge in court, or imposed time limits on the giving of judgments, was invalid.⁴²

Apart from an independent and impartial tribunal, what else is required?

In *Russell v Russell*, the High Court found that parliament could not, consistently with constitutional requirements, direct courts to invariably sit in closed court, because this would alter the nature of the court. It was an essential aspect of the character of courts that they are held openly and not in secret.⁴³

35 Specifically, the fact that a process has traditionally been followed in judicial proceedings suggests it may be a characteristic of such proceedings: *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17] (Gleeson CJ), 357 [120]–[121] (Gummow and Crennan JJ); *Kirk* (2010) 239 CLR 531, 580–1 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Ratnapala and Crowe, above n 26, 193. Historical considerations have also been important in interpreting another section of Chapter III, namely s 80: *Cheatle v The Queen* (1993) 177 CLR 541. See also Parker, above n 22, 356.

36 *Condon v Pompano* (2013) 87 ALJR 458, 488 [125] (Hayne, Crennan, Kiefel and Bell JJ); *Totani* (2010) 242 CLR 1, 43 [62] (French CJ); *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J), 108–9 (Brennan J), 135 (Toohey J), 164 (McHugh J); *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ), 162–3 [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), quoting *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81] (Gaudron J), 373 [116] (Kirby J).

37 *Wainohu v New South Wales* (2011) 243 CLR 181, 208–9 [44] (French CJ and Kiefel J) ('Wainohu').

38 *Northern Australia Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

39 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 117 (McHugh J), 133–4 (Gummow J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344–5 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 362–3 [80]–[82] (Gaudron J), 373 [116] (Kirby J).

40 *Forge* (2006) 228 CLR 45, 67 [40] (Gleeson CJ), 76 [63] (Gummow, Hayne and Crennan JJ), 122 (Kirby J); *Wainohu* (2011) 243 CLR 181, 206 [39] (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ).

41 *Totani* (2010) 242 CLR 1, 48–9 [71]–[72] (French CJ), 160 [436] (Crennan and Bell JJ), 172–3 [479]–[480] (Kiefel J); *International Finance Trust* (2009) 240 CLR 319, 338 [4] (French CJ); *Chu Kheng Lim* (1992) 176 CLR 1, 36–7 (Brennan, Deane and Dawson JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ) ('Gypsy Jokers').

42 (1976) 134 CLR 495, 514–29 (Gibbs J).

43 *Ibid* 520 (Gibbs J), 532 (Stephen J).

Justice Gaudron in *Re Nolan; Ex parte Young* said that characteristics of a judicial process included an open and public inquiry (subject to limited exceptions), the application of rules of natural justice, a fair trial, and open and public proceedings.⁴⁴ It required that the law be applied fairly and impartially to facts that had been properly ascertained.⁴⁵ In *Bass*, six High Court judges, in holding that judicial power had to be exercised in proceedings which accorded with judicial process, said that judicial power required that the parties be given an opportunity to present their evidence and challenge the evidence led against them (ie, natural justice).⁴⁶ In *Forge*, Gummow, Hayne and Crennan JJ declined to comprehensively define the characteristics of a court, but said that an adversarial trial and an independent and impartial tribunal were essential.⁴⁷ In *Wainohu*, the High Court found the giving of reasons was an essential aspect of the court process, together with procedural fairness, and a generally open court.⁴⁸ In *Grollo v Palmer*, Gummow J emphasised as an essential attribute of judicial power that results were delivered in public after a public hearing, and that justice was done and seen to be done.⁴⁹ Recently in *Kirk*, the High Court took issue with the failure of a prosecutor to detail specific allegations against a defendant in the context of an alleged workplace health and safety breach. Six members of the Court found that without particularisation of the acts and omissions said to found the charges, a court hearing the matter would be acting like an administrative commission of inquiry, rather than exercising a judicial function.⁵⁰

The Court has also clarified that an important characteristic of judicial power is to ensure, as far as is possible, fairness between the parties. One of the earliest cases to recognise this was *Dietrich v The Queen*, where a majority of the High Court found that an accused in Australia had a right to a fair trial.⁵¹ Of the majority, at least Deane and Gaudron JJ accorded this constitutional status

44 (1991) 172 CLR 460, 496–7. See also *Wilson* (1996) 189 CLR 1, 22, 25 (Gaudron J).

45 In *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 [74], Gaudron J stated that essential characteristics of a court exercising judicial power were

equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained, and in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.

46 (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

47 (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ, with whom Callinan and Heydon JJ agreed).

48 (2011) 243 CLR 181, 208–9 (French CJ and Kiefel J), 226 (Gummow, Hayne Crennan and Bell JJ). Sir Murray Gleeson wrote extra-judicially explaining the value of providing reasons, including better decision-making, improving the general acceptability of judicial decisions, and consistency with democratic institutional responsibility: Sir Murray Gleeson, ‘Judicial Accountability’ (1995) 2 *Judicial Review* 117, 122, quoted in *AK v Western Australia* (2008) 232 CLR 438, 470 [89] (Heydon J).

49 (1995) 184 CLR 348, 394 (Gummow J). See also *Wilson* (1996) 189 CLR 1, 25 (Gaudron J).

50 *Kirk* (2010) 239 CLR 531, 559 [30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

51 (1992) 177 CLR 292. Justice Gaudron emphasised fairness in characterising a judicial process in *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, 496.

via Chapter III of the *Constitution*.⁵² A legislative direction to a court to depart from fairness standard would indicate unconstitutionality.⁵³

The High Court in the *Kable* decision has emphasised the integrated nature of the Australian judicial structure.⁵⁴ This has meant that although the separation of powers appears in the *Constitution*, and does not appear in state constitutions, the principle can be drawn down and applied to state courts as part of the integrated judicial structure.⁵⁵ That does not mean that the separation of powers principle is implied into state constitutions, and there may be some differences in the application of the relevant principles to state courts and federal courts.⁵⁶

In summary, the High Court has found the following to be typical of a judicial process, in the context of what may inform Chapter III constitutional requirements: (a) the processes judges have typically adopted in the past,⁵⁷ (b) an independent and impartial tribunal/institutional integrity, (c) open and public hearings, (d) procedural fairness, which is taken to include natural justice and particularisation of acts or omissions alleged, to allow the person accused to present any defence; (e) an adversarial process (to the extent this is not implied by (d)). In addition, it has found that a superior ‘court’ must have the ability to correct jurisdictional errors of lower courts and tribunals.

52 In *Dietrich v The Queen* (1992) 177 CLR 292, 326 (*‘Dietrich’*), Deane J stated that:

The fundamental prescript of the criminal law ... is that no person shall be convicted ... except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the *Constitution’s* requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch III of the *Constitution* designates.

Justice Gaudron said that ‘[t]he fundamental requirement that a trial be fair is entrenched in the *Commonwealth Constitution* by Ch III’s implicit requirement that judicial power be exercised in accordance with the judicial process’: at 362. See also Gideon Boas, ‘*Dietrich*, the High Court and Unfair Trials Legislation: A Constitutional Guarantee?’ (1993) 19 *Monash University Law Review* 256; Janet Hope, ‘A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System’ (1996) 24 *Federal Law Review* 173. The Hon Michael McHugh might agree, concluding extra-judicially that ‘implications protective of personal liberty will be drawn from the conception of Ch III as an “insulated, self-contained universe of Commonwealth judicial power”’: Justice Michael McHugh, ‘Does Chapter III of the *Constitution* Protect Substantive as well as Procedural Rights?’ (2001) 21 *Australian Bar Review* 235, 252 (citations omitted).

53 *International Finance Trust* (2009) 240 CLR 319, 355 (French CJ), 366–7 (Hayne Crennan and Kiefel JJ), 386 (Heydon J); *Wainohu* (2011) 243 CLR 181, 208–9 (French CJ and Kiefel J); *Condon v Pompano* (2013) 87 ALJR 458, 497, 500 (Gageler J).

54 (1996) 189 CLR 51.

55 Suri Ratnapala and Jonathan Crowe state that the longstanding judicial view that the doctrine of separation of powers is not constitutionally entrenched at state level ‘no longer represents the constitutional law of Australia following a series of judgments of the High Court commencing with *Kable*’: Ratnapala and Crowe, above n 26, 176.

56 *Condon v Pompano* (2013) 87 ALJR 458, 488 (Hayne, Crennan, Kiefel and Bell JJ).

57 This will overlap with (c), (d) and (e).

III AUSTRALIAN CASE LAW CONSIDERING LEGISLATION USING THE CONCEPT OF ‘CRIMINAL INTELLIGENCE’

Prior to examining the Australian case law that has considered the constitutional validity of criminal intelligence provisions, it is necessary to briefly outline the nature of such provisions, so that the type of law being considered is as clear as possible. I will use the provisions currently contained in the *Criminal Organisation Act 2009* (Qld) (‘COA’) as the exemplar for this purpose.

Essentially, these provisions are a substantial departure from processes used in a typical judicial proceeding, where a person whose interests will be affected by the process has the right to hear the substance of any allegation being effectively made against them, and a chance to respond to those allegations, including a chance to question any witnesses being used against their interests. They have been introduced due to concern that such disclosure might prejudice a criminal investigation, compromise the anonymity of confidential sources, or place witnesses in unsafe situations.⁵⁸ Typically,⁵⁹ they provide firstly for a process by which a member of the executive applies for relevant information to be classified as being ‘criminal intelligence’.⁶⁰ This application is heard in the absence of the ‘other party’: specifically, in the context of the COA, it is heard in the absence of a legal representative of the association that will be the subject of an application under the COA, and in the absence of a member of the association that will be the subject of an application under the COA.⁶¹ The court then determines whether the material meets the definition of criminal intelligence, having regard to any unfairness to the accused.⁶²

The COA provides for control orders restricting (on pain of gaol terms) the ability of members of the association to associate, and limits on the extent to which members of the association can pursue certain vocations.⁶³ Subsequently in October 2013, a mandatory sentencing regime was introduced for crimes committed pursuant to a declared organisation’s purposes, providing for minimum 15 year jail terms for a large range of offences including drug

⁵⁸ COA s 60.

⁵⁹ Subsequent to the COA, the Queensland government supplemented this Act by directly declaring 26 motorcycle clubs: *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) sch 1. In other words, an application under the COA was not made to the Court in that case; the government opted for the direct route of declaring these organisations via regulation, and at the same time greatly increased the negative consequences of membership of and participation in such an organisation: see below n 64.

⁶⁰ COA s 63.

⁶¹ COA ss 66, 70. The COA also provides for the making of public safety orders, and fortification removal orders.

⁶² COA s 72.

⁶³ COA s 19; see also *Criminal Code Act 1899* (Qld) sch 1 ss 60A–60B.

possession, or minimum 25 year gaol terms if the person is an office bearer in the association.⁶⁴

If the court decides upon this preliminary application that the material is ‘criminal intelligence’, it will make such a declaration. The effect of this is that upon the hearing of the substantive application under the *COA*, for instance the application to have a particular organisation declared a criminal organisation under the *COA*, or an application for a control order against members of the declared organisation, information classified as being of ‘criminal intelligence’ will be heard in a ‘closed hearing’.⁶⁵ Specifically, it will be heard in the absence of a legal representative of the association and/or member(s), and in the absence of any members of the organisation. This limits the ability of the organisation and/or its members to know the case against them, and the evidence used to support it.

I will now consider how these types of provisions have been received by the High Court.

One leading case is a South Australian case *K-Generation Pty Ltd v Liquor Licensing Court*.⁶⁶ The case involved an application by the appellants to the Liquor and Gambling Commissioner (‘LGC’) for an entertainment venue licence. The Police Commissioner intervened in the proceedings, tendering information concerning the suitability of relevant officials of the appellants to hold the licence. The relevant legislation allowed evidence to be classified by the Police Commissioner as ‘confidential criminal intelligence’. Criminal intelligence was defined in the *Liquor Licensing Act 1997* (SA) section 4 to be information relating to actual or suspected criminal activity where its disclosure could reasonably be expected to prejudice criminal investigations or enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement. The effect of that classification was that the court was required to take steps to maintain the confidentiality of such evidence; typically the information was not provided to the appellant or their officers.⁶⁷ The LGC declined to provide the

64 *Vicious Lawless Association Disestablishment Act 2013* (Qld) ss 6–7. The list of offences to which the mandatory sentencing regime applies appears in sch 1 to this *Act*. The list is a varied one, ranging from serious offences to those of relative triviality, including possession of any illegal drugs. The mandatory minimum sentences cannot be mitigated by court. The likelihood of a successful constitutional challenge to the mandatory minimum sentencing provisions appears remote, with six members of the High Court validating mandatory sentencing provisions of customs legislation recently in *Magaming v The Queen* (2013) 87 ALJR 1060; cf Anthony Gray and Gerard Elmore, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes’ (2012) 22 *Journal of Judicial Administration* 37; Anthony Gray and Gerard Elmore, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes’ (Pt 2) (2013) 23 *Journal of Judicial Administration* 58.

65 *COA* s 78.

66 (2009) 237 CLR 501 (‘*K-Generation*’).

67 The second reading speech for the Liquor Licensing Bill 1997 (SA) by the Attorney-General upon introducing the legislation stated that the provisions directed the court to hear the evidence in the absence of the applicant and their legal representative: South Australia, *Parliamentary Debates*, House of Assembly, 9 December 2004, 1295 (M J Atkinson, Attorney-General), quoted in *ibid* 523 [56] (French CJ).

appellants with a licence, on the basis it would be contrary to the public interest to do so. The appellants' appeal to the Liquor Licensing Court was unsuccessful.

The High Court rejected an argument against the laws based on the *Kable* principle.⁶⁸ The majority conceded that the open court principle was a fundamental aspect of the character of a court. Departures from that principle may be possible, but were exceptional in nature. Chief Justice French noted that the determination of the Police Commissioner that the evidence met the definition of criminal intelligence was objective in nature, based on the application of defined criteria, and a decision that the court could overturn.⁶⁹ Chief Justice French interpreted the statute in what he regarded as authorised by the principle of legality, finding it authorised, but did not require, the Court to hear the criminal intelligence evidence in the absence of the applicant or their legal representative.⁷⁰ The court had a choice to do so. The court also had flexibility in determining what weight ought to be given the 'criminal intelligence' in the determination process.⁷¹ The court could question the evidence during a closed session.⁷²

These issues were considered again in the recent High Court decision of *Condon v Pompano*.⁷³ The *COA* provided for a process by which the police could seek a control order against members of an organisation thought to be involved in criminal behaviour. The *COA* contemplated a two-stage process, the first involving an application to the Supreme Court seeking to have an organisation declared under the *COA*; the second, an application for a control order with respect to members of an organisation declared at the first stage. With respect to the first stage, the police may wish to rely on information that was 'criminal intelligence'. This was information relating to actual or suspected criminal activity, disclosure of which could reasonably be expected to prejudice a criminal investigation, enable the discovery of a confidential source, or endanger a person's life or physical safety. The police had filed an

68 (1996) 189 CLR 51.

69 *K-Generation* (2009) 237 CLR 501, 524 (French CJ), 540–2 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). The issue of the ability of the court to overturn a finding of the Police Commissioner that evidence tendered to court against a motorbike association would prejudice the operations of the Commissioner, and so should not be disclosed, was also decisive in *Gypsy Jokers* (2008) 234 CLR 532, 551 (Gleeson CJ), 558 (Gummow, Hayne, Heydon and Kiefel JJ). Justice Kirby dissented in both cases.

70 *K-Generation* (2009) 237 CLR 501, 526 (French CJ).

71 *Ibid* 527 (French CJ), 543 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

72 *Ibid* 543 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). This reasoning has attracted criticism: see, eg, Anthony Gray, 'Constitutionality of Criminal Organisation Legislation' (2010) 17 *Australian Journal of Administrative Law* 213, 223–5; Steven Churches and Sue Milne, '*Kable*, *K-Generation*, *Kirk* and *Totani*: Validation of Criminal Intelligence at the Expense of Natural Justice in Ch III Courts' (2010) 18 *Australian Journal of Administrative Law* 29; Greg Martin, 'Jurisprudence of Secrecy: *Wainohu* and *Beyond*' (2012) 14 *Flinders Law Journal* 189, 205, pointing out Kafka-esque aspects of these regimes where a person is required to defend themselves against an allegation, but are unaware of the basis of the allegation, and noting the Australian High Court has been 'extremely accommodating to the state' in considering the compatibility of such provisions with Chapter III requirements.

73 (2013) 87 ALJR 458.

application seeking that particular information be declared to be ‘criminal intelligence’. The court considered this question without notice to the motorcycle club that would be affected by the declaration, and in closed court, as the *COA* required.⁷⁴ If the organisation was declared and a subsequent proceeding was commenced seeking a control order against the organisation’s members, information classified as criminal intelligence would be heard in a closed hearing.⁷⁵ Section 10 of the *COA* required the court to take such evidence into account in deciding whether or not to make the control order. Section 76 of the *COA* provided that an informant who provided criminal intelligence to an agency may not be called or otherwise required to give evidence.

Chief Justice French again asserted that at the heart of the common law tradition was the open court principle, where court proceedings were held in public and with each party given full opportunity to present its own case and to meet the case against it. He acknowledged that antithetical to that tradition was a closed court, or one in which only one party was present and/or one in which the judge hears argument or evidence from one side, which the other side has not heard.⁷⁶

However, French CJ then stated that the open court principle and hearing rule could be qualified by public interest considerations including the protection of sensitive information and identities of vulnerable witnesses, or where publicity would destroy the subject matter of the case.⁷⁷ He acknowledged the *COA* was inconsistent with the open court principle and procedural fairness, but claimed it was constitutionally valid because the Queensland Supreme Court retained its decisional independence, including whether information was in fact ‘criminal intelligence’, and the powers necessary to mitigate unfairness to those affected by a particular proceeding.⁷⁸ The Court had power to determine the weight, if any, to be given to information meeting the description of criminal intelligence. This included the right to refuse to act on criminal intelligence where it would be unfair to do so.⁷⁹

74 *COA* ss 66, 70.

75 *COA* s 78.

76 *Condon v Pompano* (2013) 87 ALJR 458, 463 [1].

77 *Ibid* 477–8 [68]–[70].

78 This is in contrast with the legislation impugned in *International Finance Trust* (2009) 240 CLR 319, where the court’s discretion had been removed.

79 *Condon v Pompano* (2013) 87 ALJR 458, 480 [88]. See Jenny Hocking for a critique of the increased use of such ‘evidence’: Jenny Hocking, ‘Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control’ (2003) 49 *Australian Journal of Politics and History* 355. Raising concerns about using intelligence in the terrorism context, she remarks at 365 that:

These laws put intelligence on the same legal plane as evidence, ignorant of the critical differences between them. Intelligence is not ‘hard’ information. Intelligence may be ‘speculative and unverified’ and should have little evidentiary value. It should not be admissible in court and traditionally it has not been collected with the [sic] that intention.

The joint reasons acknowledged that in an adversarial system, generally opposing parties would know what case the other side sought to make, and how that party would seek to make it. However, the rule was not absolute; sometimes competing interests compelled an exception to the general rule.⁸⁰ Here the criminal intelligence provisions did allow those affected to know what the allegation was against them, just not how that allegation would be proven by the police.⁸¹ As with Chief Justice French's reasons, the joint reasons emphasised the ability of the court to weigh the evidence appropriately, given it had not been tested in cross-examination.⁸²

Justice Gageler asserted that Chapter III mandated the observance of procedural fairness as an immutable characteristic of a court. A court could not be required to adopt a procedure that was unfair. Justice Gageler seemed troubled by the legislation at hand:

Procedural fairness requires the avoidance of 'practical injustice'. It requires, at the very least, the adoption of procedures that ensure to a person whose right or legally protected interest may finally be altered or determined by a court order a fair opportunity to respond to evidence on which that order might be based.⁸³

Justice Gageler pointed out the regime here differed from public interest immunity at common law, in that the information deemed to be criminal intelligence could be used in a substantive application to have a control order made against members of the declared organisation.⁸⁴ He was not satisfied that the ability of the Court to weigh the evidence cured the procedural unfairness inherent in the regime.⁸⁵ However, in the end, Gageler J also validated the scheme, because of the ability of the Supreme Court to stay a substantive application in the exercise of its inherent jurisdiction to avoid unfairness to a respondent.⁸⁶

In summary then, the recent High Court authorities have emphasised, in validating criminal intelligence type provisions, and after acknowledging

Justice Hayne in *Thomas v Mowbray* (2007) 233 CLR 307, 477 [510]–[511], seemed to share these concerns:

[B]y its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of intelligence. Those are judgments of a kind very different from those ordinarily made by courts ... Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

80 *Condon v Pompano* (2013) 87 ALJR 458, 494 [156] (Hayne, Crennan, Kiefel and Bell JJ).

81 *Ibid* 495 [163] (Hayne, Crennan, Kiefel and Bell JJ).

82 *Ibid* 495 [165]–[166] (Hayne, Crennan, Kiefel and Bell JJ).

83 *Ibid* 498–9 [188].

84 *Ibid* 501–2 [204].

85 'Procedural unfairness in an administrative process cannot be cured by a decision-maker choosing to ascribe no or little weight to adverse evidentiary material that has not been disclosed to a person whose rights or interests are affected by a decision. That is for a reason of principle': *ibid* 502 [209].

86 *Ibid* 503 [212].

the value of open court principles: (a) the court could determine whether or not the information met that description; (b) the court could determine whether the matter was to be heard in open or closed court; (c) the court could decide what weight to be placed on the evidence (if any); (d) the court could question the evidence in the hearing; (e) the public interest in protecting sensitive information and the identity of vulnerable witnesses; and (f) the court's power to stay proceedings on the basis of unfairness. I will critically consider these arguments in Part V.

I now turn to assess the compatibility of this jurisprudence with due process reasoning.

IV IS THE USE OF 'CRIMINAL INTELLIGENCE' PROVISIONS CONSISTENT WITH CONSTITUTIONAL DUE PROCESS?

I summarised above the kinds of characteristics that the High Court has found to typically characterise the exercise of judicial power, or a court. I now apply these characteristics in considering the constitutional validity of legislation which permits a Chapter III court to adopt a closed court process, featuring evidence being tendered by one side with the other side not seeing or hearing the evidence, or having an opportunity to test its veracity through cross-examination. To simplify the discussion, it will help to focus on a number of typical features of a judicial process; those will be: (1) natural justice; (2) specificity of allegation; (3) fairness; (4) independence and impartiality; (5) institutional integrity; (6) historical considerations; and (7) open and transparent processes.

A Natural Justice

The legislation under consideration here, for instance the 'criminal intelligence provisions' of the *COA*, clearly departs from the principle of natural justice.⁸⁷ Specifically, it does so by not providing members of the motorcycle club with notice of the application to have information declared to be criminal intelligence, and in respect of information so declared, by not allowing members of the motorcycle club or their legal representative to be

87 The High Court in *Kioa v West* (1985) 159 CLR 550, 582 (Mason J), held:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that ... when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.

Justice Brennan opined at 628:

A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise.

present when evidence deemed to be criminal intelligence was presented to the court.

The argument is that such provisions are inconsistent with the requirements of judicial process enshrined in Chapter III.⁸⁸ It is true that past authorities have claimed that parliament can remove the general entitlement to natural justice, if its will is sufficiently clear. However, these sentiments were often expressed at a time when the full consequences of Chapter III had not been realised. Further, numerous High Court decisions refer to the fundamental nature of natural justice as part of the judicial process, as part of due process.⁸⁹ Six members of the High Court did so in *Bass*:

Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that *requires* that the parties be given an opportunity to present their evidence and to challenge the evidence led against them.⁹⁰

In *International Finance Trust*,⁹¹ a majority of the High Court invalidated the legislation due to its inconsistency with Chapter III requirements. Of the majority, French CJ pointed out that ‘natural justice lies at the heart of the judicial function.’⁹² Justices Gummow and Bell referred to lack of disclosure of the allegation, among other factors, in finding it offensive to Chapter III,⁹³ and Heydon J referred to natural justice as being a ‘primary principle’ upon which the Australian judicial process operated.⁹⁴

In *Leeth*, Mason CJ, Dawson and McHugh JJ stated that ‘it may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power’.⁹⁵

88 Suri Ratnapala and Jonathan Crowe stated that ‘[t]he observance of the rules of natural justice is an essential characteristic of the curial method. A court that is not bound to determine cases by the curial method will not meet the requirements of body that can be invested with federal judicial power’: Ratnapala and Crowe, above n 26, 212; Churches and Milne, above n 72.

89 To clarify, my position is that due process is a broad concept, essentially reflecting traditional characteristics of a judicial process. Natural justice is one example of such a characteristic. In other words, the assertion is that natural justice is one aspect of due process.

90 (1999) 198 CLR 334, 359 [56] (emphasis added) (citations omitted) (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

91 (2009) 240 CLR 319.

92 Ibid 354 [54].

93 Ibid 366–7.

94 Ibid 370 [141].

95 (1992) 174 CLR 455, 470.

The significance of natural justice as a characteristic of a judicial process has been noted on many other occasions.⁹⁶

The argument is that given the centrality of natural justice to the judicial function, and acceptance that judicial power requires that natural justice be applied, legislation which allows a court to not accord a person with natural justice risks empowers a court to act in a non-judicial manner, contrary to the requirement of due process in Chapter III.

B Specificity of Allegation

As indicated earlier, six members of the High Court in the recent *Kirk* decision indicated that unless there had been particularisation of the acts and omissions said to found the charges, a court hearing the matter would be acting like an administrative commission of inquiry, rather than exercising a judicial function.⁹⁷ On the facts, the Court was not satisfied that the allegation was sufficiently specific that the defendant was in a realistic position to defend himself.

It is suggested that the same observation could be made regarding the ‘criminal intelligence provisions’ in the *COA*. Depending on the extent of the evidence classified as ‘criminal intelligence’, it *may be* that the defendant would not have sufficient detail of the allegations being made against them that they could defend the allegations made that would support the making of a control order against the members of an association. Specifically, the fact that a significant proportion of the evidence being led in a particular case is deemed to be criminal intelligence might compromise the ability of a defendant to

96 ‘Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial’: *Lee v The Queen* (1998) 195 CLR 594, 602 (citations omitted); ‘[I]t is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard’: *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395 (Dixon CJ and Webb J); *Thomas v Mowbray* (2007) 233 CLR 307, 433–5 (Kirby J), 477–8 (Hayne J); *Wainohu* (2011) 243 CLR 181, 208–15 (French CJ and Kiefel J); *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 (Gaudron J); *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, 496–7 (Gaudron J). See also *Wilson* (1996) 189 CLR 1, 22, 25 (Gaudron J); ‘key elements of the hearing rule, such as the right of parties to know key elements of the case against them and to present their own case, are so intrinsic to the integrity of courts that they cannot be excluded or significantly limited from the courts by legislation.’: Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39 *Monash University Law Review* 285, 285–6; ‘[t]he High Court has recently confirmed that core aspects of the hearing rule, such as the right to know an opposing case and to argue one’s own case in open court, are so central to the exercise of judicial power that constitutional principles preclude legislation that removes or significantly restricts them’: Matthew Groves, ‘Comment: The Insecurity of Fairness in Security Cases’ (2013) 24 *Public Law Review* 155, 158; *Secretary of State for the Home Department v AF [No 3]* [2010] 2 AC 269. There also appear suggestions that while natural justice is a fundamental right, it may be constitutionally possible for the parliament to remove such a right in some cases, at least when parliament’s intention to do so was sufficiently clear: *Saeed v Minister of Immigration and Citizenship* (2010) 241 CLR 252, 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

97 (2010) 239 CLR 531, 559 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); ‘it is at least strongly arguable that the right of an accused to particulars of a criminal charge is an essential aspect of the curial process.’: Ratnapala and Crowe, above n 26, 206.

adequately defend themselves. This may create constitutional difficulty in terms of compliance with Chapter III due process requirements.

A range of international case law reflects concern with a person being asked to answer allegations without being given the kind of detail that would be required to mount an effective defence. It is true that this case law has taken place in the context of rights instruments such as the *European Convention on Human Rights*,⁹⁸ the US *Bill of Rights* and the *Canadian Charter of Rights and Freedoms*.⁹⁹ This is not a reason to discount them. The European case law takes place in the context of a *European Convention's* right to a fair trial, something which the Australian High Court has accepted. The US case law takes place in the context of a constitutionally entrenched due process right which admittedly may be broader than any due process right in Australia. However, the Australian High Court has specifically referred with approval to the US *Bill of Rights* as a source of knowledge regarding the specific rights protected by the right to a fair trial, making comparisons here apposite, in my view.¹⁰⁰

The European Court of Human Rights ('ECHR') has considered legislated closed court proceedings in many cases. In essence, the ECHR has expressed grave concern where all or a decisive part of the evidence is presented in a closed process.¹⁰¹ In a recent decision, it has insisted that the essence of the grounds of government claims against a person must be conveyed to the person, in order that they can consider a defence. No state security arguments could override this.¹⁰² In the US, the Supreme Court has insisted that when a person is determined by a member of the executive to be an 'enemy combatant' must be given detail of the factual basis of the classification and a fair opportunity to rebut the government's allegations.¹⁰³ This was necessary in order to secure fairness of process.

The argument is that judicial process is characterised by the hearing of a specific allegation against an individual. As a result, legislation that contemplates that a person affected by a proceeding not be given the detail of the allegation made against them empowers the court to act in a non-judicial manner, contrary to the due process requirements of Chapter III.

98 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention*').

99 *Canada Act 1982* (UK) c 11, sch B pt 1.

100 Eg, *Dietrich* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J), 333 (Deane J), 371 (Gaudron J).

101 *A v United Kingdom* [2009] XLIX Eur Court HR 301, [210].

102 *ZZ v Secretary of State for the Home Department* [2013] 3 CMLR 46, 1274–5 [65]. In *Bank Mellat v Her Majesty's Treasury [No 1]* [2013] 4 All ER 495 ('*Bank Mellat*'), a bare majority validated the use of closed court measures in that particular case, but in so doing insisted that in the case of a closed hearing, the excluded party be given as much information as possible about the closed evidence, that efforts should be made by the parties to minimise the extent of closed material, and that the court should consider whether it is possible to avoid a closed hearing: at 513–15 [68]–[73] (Neuberger LJ with whom Hale, Clarke, Sumption and Carnwath LJ agreed).

103 *Hamdi v Rumsfeld*, 542 US 507, 533 (2004) (O'Connor, for Rehnquist CJ, Kennedy and Breyer JJ); *Hamdan v Rumsfeld*, 548 US 557, 633–4 (2006).

C ‘Fairness’

Fairness as an aspect of due process obviously includes, but is broader than, a requirement of natural justice or a requirement that an allegation made against a person be sufficiently specific.

On several occasions, the High Court has found that ‘fairness’ is a characteristic of a judicial process. This appears in the judgments of *Wainohu*, where French CJ and Kiefel J refer to procedural fairness as a defining characteristic of a court.¹⁰⁴ Justices Gummow, Hayne, Crennan and Bell agreed with comments of Gaudron J in an earlier case¹⁰⁵ that confidence in judicial officers depended on their acting in accordance with fair procedures.¹⁰⁶ Justice Heydon assumed these statements were correct, for the purposes of argument. In *Totani*, French CJ repeatedly used the word ‘fair’ in considering the requirements of the system of courts for which Chapter III provides, and said ‘fairness’ was a defining characteristic of a court.¹⁰⁷ His judgment in *International Finance Trust* similarly refers to ‘fairness’ in invalidating provisions requiring substantial departure from typical judicial process as contrary to Chapter III.¹⁰⁸ In *Condon v Pompano*, Gageler J referred to procedural fairness as an ‘immutable characteristic’ of a court.¹⁰⁹ Previously, a majority of the High Court had agreed that an accused had a right to a fair trial in Australia, with at least two judges finding this had a constitutional basis.¹¹⁰

My argument is that a process by which an application to have information declared to be ‘criminal intelligence’ is heard without notice to, and participation by, the members of the organisation which is the subject of the substantive application, is unfair. It is that a proceeding in which the subsequent application to have the organisation declared may then be based on such criminal intelligence, again without the right of those affected to see or hear the evidence or allegations being made that form the basis of the application, is unfair,¹¹¹ contrary to the due process requirements of Chapter III.

104 (2011) 243 CLR 181, 208.

105 *Wilson* (1996) 189 CLR 1, 22.

106 *Wainohu* (2011) 243 CLR 181, 225–6.

107 (2010) 242 CLR 1, 43.

108 Where French CJ was explaining the section was invalid because it ‘restricts the application of procedural fairness in the judicial process’: *International Finance Trust* (2009) 240 CLR 319, 338, referring to procedural fairness as being central to the judicial function: at 354. Other judges in the majority in that case, Gummow and Bell JJ, do not use the word fairness, but their references to ex parte sequestration of property, lack of full disclosure and reverse onus provisions of that law as being ‘repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia’: at 366–7, suggest they would agree with a fairness requirement as part of Chapter III.

109 (2013) 87 ALJR 458, 497 [177].

110 *Dietrich* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 362 (Gaudron J). Justices Deane and Gaudron said it had a constitutional basis.

111 ‘The idea that information might be used by the prosecution without the accused seeing the information need only be stated for its offensiveness to basic notions of fairness and justice to be apparent’: Ian Barker, ‘Human Rights in an Age of Counter Terrorism’ (2005) 26 *Australian Bar Review* 267, 274.

What is ‘fairness’ in this context? Clearly there are strong links between fairness and natural justice, discussed above. In the first High Court decision that decided that an accused has a right to a fair trial in Australia, members of the majority expressly referred to international legal material, specifically article 14 of the *International Covenant on Civil and Political Rights* (‘ICCPR’),¹¹² article 6 of the *European Convention*, as well as the due process provisions of the US *Bill of Rights*.¹¹³ Chief Justice Mason and McHugh J cited these sources as containing ‘some of the attributes of a fair trial’.¹¹⁴ Article 6(3)(d) of the *European Convention* specifically includes as part of a fair trial the right to examine, or have examined, witnesses against the accused.¹¹⁵ It seems justified to consider how this right has been interpreted in the context of government arguments that public safety and security require closed court hearings where the person affected by the proceeding is denied the right to confront those giving evidence against him or her.

Courts in the US, Europe and Canada have considered that part of a fair trial includes the right of a person to test evidence being led against them.

In the context of the US, a leading case on the question of ‘fair trial’ is *Re Oliver*.¹¹⁶ There, Black J for the Court outlined the minimum contents of a fair trial:

A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basics in our system of jurisprudence, and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.¹¹⁷

In *Chambers v Mississippi*, the Supreme Court noted:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.¹¹⁸

The US Supreme Court has repeatedly confirmed that the openness of the court is part of the right to fair trial, or due process,¹¹⁹ and that this general principle applies to pre-trial proceedings as well as the trial itself, in recognition

112 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

113 In particular, the Fifth, Sixth and Fourteenth Amendments.

114 *Dietrich* (1992) 177 CLR 292, 300. Justice Deane made extensive use of comparative material in determining what the principle of fair trial required: at 332–4, as did Toohey J: at 357–61, and Gaudron J: at 371.

115 See also ICCPR art 14(3)(e).

116 333 US 257 (1948).

117 *Ibid* 273 (citations omitted). In *Pointer v Texas*, 380 US 400, 405 (1965), Black J described the right to cross-examination as fundamental to a fair trial.

118 410 US 284, 294 (1973) (Powell J, for the Court); ‘[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.’: *Davis v Alaska*, 415 US 308, 316 (1974) (Burger CJ).

119 ‘[O]ne of the important means of assuring a fair trial is that the process be open to neutral observers. The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness’: *Press-Enterprise Co v Superior Court of California*, 478 US 1, 7 (1986).

of the fact that pre-trial determinations can greatly affect the outcome at trial,¹²⁰ and reflecting British traditions.¹²¹ This assists in ensuring that justice is not only done, but seen to be done.¹²²

The US Supreme Court has also emphasised the link between the openness of court proceedings and public confidence in the judicial system which is an essential aspect of its ongoing viability:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system ... This openness has what is sometimes described as a 'community therapeutic value.'¹²³

These principles have also been applied to those accused of the most serious crimes. In the terrorism context in *Hamdi v Rumsfeld* the US Supreme Court found that a person determined by a member of the executive to be an enemy combatant must be given notice of the factual basis for the classification, and a fair opportunity to rebut the government's assertions before a neutral decision-maker.¹²⁴ The Supreme Court called this 'an essential constitutional promise' of due process that could not be eroded, even in the face of terrorism.¹²⁵

Reference to European jurisprudence on the meaning of the right to a 'fair trial' is also justified, given the reference to such material in the High Court decision in *Dietrich v The Queen* in this context. As indicated, article 6(3)(d) of the *European Convention* includes within the minimum rights in a criminal

¹²⁰ Ibid.

¹²¹ Sir Frederick Pollock referred to the principle of open courts as one of the most conspicuous features of English justice: Frederic Pollock, *The Expansion of the Common Law* (Stevens and Sons, 1904) 31–2. In *Daubney v Cooper*, it was named as one of the 'essential qualities' of a court of justice: (1829) 10 B and C 237, 240; 109 ER 438, 440 (Bayley J).

¹²² *Richmond Newspapers Inc v Virginia*, 448 US 555, 570–1 (1980) (Burger CJ, with whom White and Stevens JJ agreed) ('*Richmond Newspapers*');

The early history of open trials in part reflects the widespread acknowledgement, long before there were behavioural scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

¹²³ *Press-Enterprise Co v Superior Court of California Riverside County*, 464 US 501, 508 (1984) (citations omitted) (emphasis in original); 'it is difficult for ... [people] to accept what they are prohibited from observing': *Richmond Newspapers*, 448 US 555, 572 (1980) (Burger CJ, with whom White and Stevens JJ agreed).

¹²⁴ 542 US 507, 533 (2004) (O'Connor J, for Rehnquist CJ, Kennedy and Breyer JJ).

¹²⁵ 'Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short': *ibid* 537. See also the Supreme Court in *Hamdan v Rumsfeld* noting the right to confront accusers as being one of the rights recognised as indispensable by civilised people and indisputably part of customary international law: at 548 US 557, 633–4 (2006) (Stevens J, for Kennedy, Souter, Ginsburg and Breyer JJ). In the Canadian context, a unanimous Supreme Court found that the right to fair judicial process included the right of a person to know the case made against them, and a chance to answer that case: *Charkaoui v Canada* [2007] 1 SCR 350, [29] (McLachlin CJ, for the Court).

context the right to examine or have examined witnesses used against the accused person.

The right to a fair trial, if not its precise requirements, is absolute.¹²⁶ The right to a fair trial has been considered in relation to requirements for closed hearings. For instance, the Court in *A v United Kingdom* considered proceedings involving the issue of a certificate by the United Kingdom Attorney-General that a nominated person was considered a threat to national security. The certificate would usually lead to the detention of the nominated person. The person so detained could appeal to a special commission. The commission could hear evidence either in closed or open court. The government could appoint a special advocate to assist the person. The special advocate could see the evidence heard in closed court, but could not ask the person affected about it. The ECHR found this proceeding breached procedural fairness requirements, in denying the person affected the ability to challenge the basis of the allegations.¹²⁷ Judicial proceedings were characterised by an adversarial process¹²⁸ involving ‘equality of arms’.¹²⁹ While the adversarial and open features of courts were not absolute requirements, any exceptions would have to be narrowly tailored to meet a compelling interest, and generally aspects of the evidence that were crucial, or decisive, would have to be heard in an open process.

In some recent decisions, European courts have re-asserted their concerns with closed court hearings. In one case, the use of such a hearing was validated with hesitancy by a bare majority of the United Kingdom Supreme Court, upon strict conditions.¹³⁰ In a recent decision, the European Court of Justice (‘ECJ’) found that the use of a closed court hearing infringed the right of the person affected to an effective legal remedy. This took place in the context of a law permitting restrictions on a person’s freedom of movement on the grounds of national security. The United Kingdom government made a decision to restrict the applicant’s freedom of movement, due to national security concerns. This

126 *Brown v Scott* [2003] 1 AC 681, 719 (Lord Hope); *Secretary of State for the Home Department v MB* [2008] 1 AC 440, 498 [91] (Lord Brown).

127 *A v United Kingdom* [2009] XLIX Eur Court HR 301 [204]. See also *Secretary of State for the Home Department v MB* [2008] 1 AC 440, 481–2 [41] (Lord Bingham), 497 [90] (Lord Brown).

128 ‘[A] fair trial presupposes adversarial proceedings’: *Home Office v Tariq* [2012] 1 AC 452, 523 [139] (Lord Dyson). See also Lord Kerr at 516 [113].

129 ‘If equality of arms lies at the heart of a fair trial, the essence of the right must surely include the requirement that sufficient information about the case which is to be made against him be given to a party so that he can give meaningful instructions to answer that case’: *ibid* 517 [118] (Lord Kerr); ‘[t]he best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations’: *Secretary of State for the Home Department v AF [No 3]* [2010] 2 AC 269, 355 [64] (Lord Phillips).

130 In *Bank Mellat* [2013] 4 All ER 495, the bare majority viewed closed court procedures with ‘distaste and concern’: at 510 [51] (Lord Neuberger, with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed). They imposed conditions such as that the judge who gave a closed court judgment and an open judgment identify which parts of the judgment were based on the evidence presented in closed court, to identify in the open judgment as much as possible about the closed material relied upon, consider whether it is possible to avoid a closed substantive hearing, if a closed court hearing is essential, consider how to minimise its extent, and if a closed court hearing must be held, ensure the excluded party is given as much information as possible about the closed material relied upon: at 513–15 [68]–[73].

decision was subject to an appeal. The court considering the appeal could avail itself of closed court procedures with respect to some of the evidence. In this case, the application to have the matter heard via a closed hearing itself took place in closed court. It was granted, and in the substantive proceeding part of it was held in closed court, without the person affected or their legal representative. The court involved acknowledged that little of the detail of the case against the person affected was made known to him.

The ECJ found there had been a breach of the applicant's right to an effective legal remedy.¹³¹ Regardless of the government's arguments that a closed court hearing was necessary in the interests of national security, the ECJ determined that at the very least the essence of the grounds of the decision made had to be disclosed to them, to allow them to defend themselves. This had not occurred in this case.¹³²

The argument is that fairness characterises judicial process, and legislation of the type studied in this article, by departing from a requirement that a person affected by a proceeding should be able to hear the allegation(s) made and have a chance to respond, by departing from open court principles, and by denying the person affected the opportunity to confront and test witnesses led against them, empowers a court to act in a non-judicial manner, contrary to the due process requirements of Chapter III.

D Independence and Impartiality

The High Court has accepted that both the reality and perception of independence and impartiality are essential characteristics of Australian courts.¹³³ Courts cannot be asked to exercise powers of such a nature, or in such a way, as to raise doubts as to the actual independence and impartiality of the decision-making body. It is enough if a perception is created that the body's decisional independence has been compromised. The need for such independence and impartiality reflects in part the concern that the public have confidence in its judicial system, that members of the public who do not see the judiciary as independent and impartial would have less or no confidence in the integrity of its functions and decisions. It is considered essential that members of the public have confidence in judicial decision-making.¹³⁴

131 The case was based on art 47 of the *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, rather than arts 6 and 13 of the *European Convention*. However, it is submitted that the principles involved are virtually identical.

132 *ZZ v Secretary of State for the Home Department* [2013] 3 CMLR 46.

133 *Condon v Pompano* (2013) 87 ALJR 458, 488 [125] (Hayne, Crennan, Kiefel and Bell JJ); *Totani* (2010) 242 CLR 1, 43 [62] (French CJ); *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J), 135 (Toohey J), 164 (McHugh J); *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152–3 [3] (Gleeson CJ), 162–3 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

134 The court has clarified that it is the independence and impartiality of the court that is the 'touchstone' principle, rather than public confidence in and of itself, though clearly the two are related in the way that the body of the article above describes.

It is submitted that the perception of the court's independence and impartiality can be compromised by the use of 'closed court' procedures.¹³⁵ If the public does not hear at least some of the evidence that the court hears in making its decision, it is likely to be less able to judge for itself whether the court's decision is warranted or fair. As Burger CJ noted, it is difficult for the public to accept what they are prohibited from observing.¹³⁶ If only one party is able to make submissions to the court regarding a particular matter, logically it is more likely that the court will decide in that person's favour.¹³⁷ Perceptions might arise that the court is on the government's side. This is not an idle concern. One of the reasons that the Supreme Court of Canada gave for finding the use of a closed court hearing there to be incompatible with a fair hearing was that the absence of the person affected helped to create a perception that the judge undertaking the proceeding may not be entirely independent and impartial as between citizen and state.¹³⁸

The argument is that by providing for a process by which a court might hear only one side of an argument, the legislation empowers a court to act in a non-judicial manner, contrary to the due process requirements of Chapter III.

E Institutional Integrity

Another way in which the High Court has described the relevant Chapter III principles has been to use the language of 'institutional integrity'.¹³⁹ Specifically, powers may not be given to a court, or members of a court, by which their institutional integrity is or may be compromised.¹⁴⁰ I argue here that by allowing the court to make a decision, both at an interim and final stage of proceedings, without allowing one of the parties to the proceeding to hear evidence being used against them and an opportunity to challenge or refute it in cross-examination, the legislation compromises the institutional integrity of the court. In addition to the arguments made under the heading of 'independence and impartiality' noted above, it does so by unacceptably increasing the risk that an 'incorrect' decision is made.¹⁴¹

After many centuries of development, the British legal system had eventually adopted the open court system, including the right of a person to cross-examine

135 'A law that removes the ability of a party to plead its case, or, alternatively, a law which privileges one party over the other may ... be characterised as infecting the judiciary with partiality towards a particular party': Bateman, above n 19, 440.

136 *Richmond Newspapers*, 448 US 555, 572 (1980).

137 *Thomas v Mowbray* (2007) 233 CLR 307, 477–8 [512] (Hayne J).

138 *Charkaoui v Canada* [2007] 1 SCR 350, [36]–[37] (McLachlin CJ, for the Court).

139 On occasions, there may be overlap between the category of 'independence and impartiality' and 'institutional integrity', however I will shortly argue that they may be applied in different ways in this context.

140 *Wainohu* (2011) 243 CLR 181, 206 (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ); *Forge* (2006) 228 CLR 45, 67 [40] (Gleeson CJ), 76 [63] (Gummow, Hayne and Crennan JJ), 122 (Kirby J).

141 By an 'incorrect' decision, I mean a decision different to the one the court would have made had it been aware of all relevant facts, and applied the law correctly to those facts.

witnesses being led against them, by the mid 17th century. The early 17th century had been a time of great legal change, with the trial of Sir Walter Raleigh in 1603 featuring a demand by the accused to confront a witness against him being refused, but other judges of the era apparently lauding open court proceedings.¹⁴² Subsequent developments included abolition of the inquisitorial Star Chamber in 1641, and the famous trial of Lilburne in 1649 featuring a form of witness confrontation.¹⁴³ Leading legal writers of the 18th century would laud the British system of open justice as an essential means of establishing truth.¹⁴⁴ Establishing ‘truth’, and thus arriving at legally ‘correct’ decisions, are seen as essential to the institutional integrity of a court. Clearly, if a court were arriving at incorrect conclusions, whether because its grasp of the facts was incorrect or incomplete, or if the judges appointed were incompetent, this could potentially undermine its institutional integrity, if not its independence and impartiality. The concern is that if a court hears evidence from only one side to the argument, and that the veracity and completeness of this evidence has not been tested by cross-examination, the risk that an incorrect decision is made increases to the extent that the court’s institutional integrity is compromised.

Again, these concerns have been noted by judges in other jurisdictions.¹⁴⁵ Judges in Canada and Europe have expressed concerns that an unintended consequence of the use of a closed court hearing was that a decision rendered under it could be incorrect, because the evidence relied upon by the judges was

142 *Case of the Union of the Realms* (1688) Moo KB 790, 798; 72 ER 908, 913 (Popham LJ):

[B]eing viva voce before the Judges in open face of the world ... [is] much to be preferred before written depositions by private examiners or Commissioners. First, for that the Judge and Jurors discern often by the countenance of a Witness whether he comes prepared, and by his readiness and slackness, whether he be ill affected or well affected, and by short questions may draw out circumstances to approve or discredit his testimony, and one witness may contest with another where they are viva voce. All of which are taken away by written depositions in a corner.

143 ‘[H]ear what the witnesses say first’, reportedly said the presiding judge, interrupting one of Lilburne’s arguments. He was later allowed to question the witnesses: Richard D Friedman and Bridget McCormack, ‘Dial-In Testimony’ (2002) 150 *University of Pennsylvania Law Review* 1171, 1205 n 125, citing *Lilburne’s Case* (1649) 4 Howell’s State Trials 1270, 1329.

144 Matthew Hale, *The History of the Common Law of England, Book III of Private Wrongs* (1713) vol 1, 163–4, lauding the ‘open court of evidence to the jury in the presence of the judges, jury, parties and council (allowing) opportunity for all persons concerned to question the witness and opportunity of confronting the adverse witnesses’; Sir William Blackstone, *Commentaries on the Laws of England, Book III, Of Private Wrongs* (1783) 373:

This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination ... the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

145 These concerns were expressed in Australia in *Thomas v Mowbray* (2007) 233 CLR 307, where Hayne J in a dissenting judgment claimed that given the decision-maker was only hearing evidence from one side, they would have little practical choice other than to accede to that side’s case, in a way that offended Chapter III and the kind of institutional integrity it required: at 477–8 [512]. See also Justice Kirby’s dissenting judgment: at 434–5.

inaccurate or incomplete.¹⁴⁶ The US Supreme Court has recently re-emphasised the critical role that cross-examination plays in weeding out false testimony or testimony derived from incomplete procedures, citing a study finding that in cases where exonerating evidence led to the overturning of convictions, on 60 per cent of occasions this occurred because of the use of invalid forensic testimony. They pointed out that some forensic scientists faced career pressure to sacrifice appropriate methodology for expediency.¹⁴⁷

The argument is that by providing for a process by which a court might hear only one side of an argument, the legislation increases the risk that a court will make an incorrect decision (in other words, one different from the one the court would have made if it had heard the evidence according to ordinary rules of evidence and procedure) increases to such an extent that the institutional integrity of that court is compromised in a manner contrary to the due process requirements of Chapter III.

F History

There are several indications from members of the High Court that historical considerations will help determine the characteristics of a judicial process in the context of Chapter III requirements.¹⁴⁸ Recent evidence of this appears in judgments in *Thomas v Mowbray*¹⁴⁹ and *Kirk*,¹⁵⁰ for example.¹⁵¹ In interpreting another section appearing in Chapter III, namely the provision for jury trial in section 80, the High Court has placed strong emphasis on historical practice in interpreting what that section practically required.¹⁵²

A comprehensive discussion of the historical use of open court proceedings is beyond the scope of this article.¹⁵³ Suffice to say that there is evidence of it in

146 *Charkaoui v Canada* [2007] 1 SCR 350 [50], [54] (McLachlin CJ, for the Court); *Bank Mellat* [2013] 4 All ER 495, 527 [123] (Lord Kerr); '[e]vidence which has been insulated from challenge may positively mislead': *Al-Rawi v Security Service* [2012] 1 AC 531, 592–3 [93] (Lord Kerr); *John v Rees* [1970] Ch 345, 402 (Megarry J):

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; or inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

147 'A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.': *Melendez-Diaz v Massachusetts*, 557 US 305, 318 (2010) (Scalia J, with whom Stevens, Souter, Thomas and Ginsburg JJ agreed).

148 *R v Davison* (1954) 90 CLR 353, 365 (Dixon CJ and McTiernan J), 376 (Fullagar J), 382 (Kitto J).

149 (2007) 233 CLR 307, 329 (Gleeson CJ), 356 (Gummow and Crennan JJ).

150 (2010) 239 CLR 531, 580–1 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

151 Ratnapala and Crowe, above n 26, 182; Parker, above n 22, 356; Bateman, above n 19, 430.

152 For instance, in *Cheatle v The Queen* (1993) 177 CLR 541, the judges referred extensively to historical practice in interpreting the requirement of trial by jury with respect to Commonwealth offences to require unanimity in verdict.

153 For a detailed account, see Frank Herrmann and Brownlow Spear, 'Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause' (1994) 34 *Virginia Journal of International Law* 481; Richard D Friedman, 'Confrontation: The Search for Basic Principles' (1998) 86 *Georgetown Law Journal* 1011.

ancient Roman and Hebrew times,¹⁵⁴ it is reflected in Justinian's Code of 534,¹⁵⁵ evidence of its adoption in England at least by the mid 17th century,¹⁵⁶ lauding of open court proceedings by leading legal historical figures, and evidence of continued strong adherence to this principle today.

The historical record supports the argument that open court processes should be seen as a hallmark of the exercise of judicial power, at least in the common law world. The argument is that by empowering a court to proceed with a closed court process, the legislation causes the court to depart so significantly from traditional judicial process so as to offend the due process requirements of Chapter III. In recognition that history has seen some limited departures from the open court principle in exceptional cases, arguments in favour of the constitutionality of closed court hearings are considered in Part V of this article.

G Openness and Transparency

Legislation allowing for the use of closed court procedures departs from the kind of openness and transparency which is also considered to be a characteristic of traditional judicial process. Numerous High Court authorities, and much academic commentary,¹⁵⁷ confirm the public nature of judicial proceedings as

154 Holy Bible (New International Version), *Old Testament*, Deuteronomy 19, 15–18. Scriptural law required multiple witnesses for a criminal prosecution. These witnesses would give evidence in the presence of the accused: Lawrence H Schiffman, *Sectarian Law in the Dead Sea Scrolls: Courts, Testimony and the Penal Code* (Brown Judaic Studies, 1983) 73.

155 '[I]n criminal [matters], in which there is danger concerning great things, by all means witnesses are to be present before the judges and inform of those things that are known to them.' Justinian, *Novel 90: Constitutio on Witnesses* (445–53) 451, quoted in Herrmann and Speer, above n 153, 491 fn 59.

156 Evidence of this appeared in the trial of Lilburne: Friedman and McCormack, above n 143, 1205 fn 125, citing *Lilburne's Case* (1649) 4 Howell's State Trials 1270, 1329; *R v Payne* (1792) 1 Ld Raym 729; 91 ER 1387; 'the excellency of our laws I take chiefly to consist in that part of them, which regards criminal prosecutions ... In other countries ... the witnesses are examined in private, and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present, and at liberty to cross-examine them': Sollon Emlyn, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours* (2nd ed, 1730) i, iii–iv; Hale, above n 144, 163–4, lauding the open presentation of evidence and observance of cross-examination as features of the English system; Blackstone, above n 144:

This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down before an officer, or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law.

157 Former Chief Justice of the New South Wales Supreme Court, the Hon J J Spigelman described open justice as 'one of the most pervasive axioms of the administration of justice': J J Spigelman, 'Seen to Be Done: The Principle of Open Justice' (Pt 1) (2000) 74 *Australian Law Journal* 290, 292; John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol 4, 305, 316–17:

Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity ... Without publicity, all other checks are fruitless ... It is to publicity, more than to everything else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst.

one of its fundamental characteristics.¹⁵⁸ It performs a crucial role in securing public confidence in the judiciary. United Kingdom case law confirms its essentiality.¹⁵⁹ As US Supreme Court Chief Justice Burger succinctly stated, ‘it is difficult for ... [people] to accept what they are prohibited from observing’.¹⁶⁰ These issues are sometimes combined with questions about the need for judges to give reasons. Talking of this, former Chief Justice of the High Court the Hon Murray Gleeson stated:

First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of their reasoning by which they came to those decisions.¹⁶¹

These issues were directly raised in the recent High Court decision in *Wainohu*.¹⁶² One of the difficulties with the legislation was that it did not require the judge to give reasons for their decisions under the *Crimes (Criminal Organisations Control) Act 2009* (NSW) section 13(2) (‘CCOCA’). Six members of the High Court found this breached the requirements of Chapter III. For instance, French CJ and Kiefel J stated that:

The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is as the heart of the judicial function.¹⁶³

Justices Gummow, Hayne, Crennan and Bell were concerned that the ‘opaque’ and ‘inscrutable’ nature of the proceedings under the *CCOCA* made it very difficult for the person affected to challenge the decision, including an

158 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J), 532 (Stephen J); *Grollo v Palmer* (1995) 184 CLR 348, 394 (Gummow J); *Wilson* (1996) 189 CLR 1, 25 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496–7 (Gaudron J); Steven Churches, ‘Civil and Political Rights: How Closed Can a Court Be and Still Remain a Common Law Court?’ (2013) 20 *Australian Journal of Administrative Law* 117.

159 The principle of open courts was described as ‘sacred’ by Lord Shaw in *Scott v Scott* [1913] AC 417, 473; ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’: *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ); ‘nothing would be more detrimental to the administration of justice in any country than to entrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy’: *Scott v Scott* [1912] P 241, 274 (Court of Appeal) (Fletcher-Moulton LJ).

160 ‘The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in the corner [or] in a covert manner”’: *Richmond Newspapers*, 448 US 555, 571 (1980) (Burger CJ); *Offutt v United States*, 348 US 11, 14 (1954) (Warren CJ).

161 Sir Murray Gleeson, ‘Judicial Accountability’ (1995) 2 *Judicial Review* 117, 122, quoted in *AK v Western Australia* (2008) 232 CLR 438, 470 [89] (Heydon J).

162 (2011) 243 CLR 181, 215 (French CJ and Kiefel J).

163 *Ibid* 215 [58].

application for judicial review for jurisdictional error.¹⁶⁴ This led to the unconstitutionality of the relevant provisions due to a breach of the requirements of Chapter III.

Analogously here, a person who wishes to appeal against the making of an order that followed the hearing of ‘criminal intelligence’ by the court will find it more difficult to challenge that decision when they are not aware of the nature of the evidence considered. Although the *COA* does not specifically prohibit the court from including reference to the ‘criminal intelligence’ in its reasons for decision, it is unlikely the court would do so, given the lengths to which the *COA* goes to preserve the confidentiality of such information. It is an offence to disclose such information without lawful authority.¹⁶⁵ Surely, this result also suffers from the very ‘opaqueness’ and ‘inscrutability’ that troubled the High Court in *Wainohu*.

The argument is that by empowering a court to depart from open court principles, the legislation undermines principles of openness and transparency, traditional characteristics of a judicial process. These features encourage good decision-making, and facilitate essential public scrutiny of a public institution. The appeal rights of a person aggrieved by a decision reached after the use of such processes are severely compromised. It is argued that this offends the due process requirements of Chapter III. In recognition that occasionally, legislatures have in the past provided for closed court hearings, arguments for their constitutionality are considered in detail below.

Concluding Part IV, I have pointed out important ways in which legislation relying on the principle of ‘criminal intelligence’ undermines key features of the judicial process as it has traditionally been understood in Australia, including the requirement of natural justice, the need for specificity of allegation, fairness, openness and transparency. History has suggested for centuries that the exercise of judicial power is essentially characterised by these things. Substantial departures from these principles, as contemplated by ‘criminal intelligence’ provisions, risk undermining the perception of judicial independence and impartiality, and the institutional integrity of a court, in a way that is fundamentally offensive to the due process requirements of Chapter III. I will now consider whether such substantial departures may be constitutionally justified on other grounds.

V ARGUMENTS IN FAVOUR OF THE CONSTITUTIONAL VALIDITY OF CLOSED COURT HEARINGS

Various arguments have been made to support the constitutional validity of so-called closed court hearings, at least in some cases. As indicated above, these arguments have appealed to majorities in the High Court of Australia in recent

¹⁶⁴ Ibid 229–30 [109].

¹⁶⁵ *COA* s 82(2).

years. I will now outline the arguments typically made to support the validity of such laws, in the face of arguments that they are constitutionally invalid, or contrary to fundamental human rights. To be clear, this section focuses on arguments regarding their constitutional validity, not arguments that they are good policy. As always, the question of whether a law is good public policy is removed from questions of constitutionality, and this distinction must always be borne in mind.

A The Court Can Appropriately Weigh the Evidence Obtained by Use of a Closed Court Procedure

One of the stated reasons that members of the High Court gave in both *K-Generation*,¹⁶⁶ and in *Condon v Pompano*,¹⁶⁷ for validating the closed-court provisions was that the court retained discretion as to the weight to be placed, if any, on evidence obtained via such a process. The implication is that a court might choose to place less weight on evidence obtained through such a process, than evidence obtained via more traditional means, including cross-examination.

This response to concerns about fairness is considered inadequate, and plagued by uncertainty. How significantly is the weight of the evidence to be tempered by the circumstances in which it was provided? Different judges will approach this in a different manner, potentially leading to different outcomes.

Further, the ability of judges to weigh such evidence does nothing to meet the concerns expressed above, that the decision of the court will be incorrect because it is relying on evidence that is unreliable.¹⁶⁸ With no disrespect to judges, judges may not be aware that it is unreliable because any weaknesses in it have not been teased out during cross-examination. They may not have detailed information regarding the circumstances in which the evidence was obtained. The evidence may be technical or scientific in nature which might leave the judge in a difficult situation interpreting it and understanding its strengths and weaknesses. It is true that judges face these challenges with evidence in many cases, but at least in most cases they have the benefit of submissions of the two sides, whereupon competent representation for the accused should point out these kinds of matters.

166 (2009) 237 CLR 501, 527 [76]–[79] (French CJ), 543 [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

167 (2013) 87 ALJR 458, 482 [88] (French CJ), 495 [165]–[166] (Hayne, Crennan, Kiefel and Bell JJ), [209] (Gageler J).

168 Lord Kerr in *Al Rawi v Security Service* [2012] 1 AC 531, 592–3 [93], stated:

Evidence which has been insulated from challenges may positively mislead ... However astute and assiduous the judge, the proposed procedure [closed court hearing] hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.

‘The judge is ... not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet’: *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, 389 [63] (McLachlan J).

There is no guarantee that this will happen in the absence of such advocate prompting.¹⁶⁹ Edmond and Roberts make this point in a slightly different context:

many of the substantial problems with forensic science and medicine seem to be methodological, statistical or linked to subtle forms of contamination. Whether we can expect lay individuals to follow critiques in these areas, or fully appreciate how they might undermine the probative value of incriminating opinion evidence, is open to doubt ... Where such evidence is not challenged we can confidently assume that juries will generally have few, if any, ideas about the evidentiary limitations or magnitude of risks. In many situations, liberal admissibility standards will systematically advantage the state with little evidence of corresponding improvements in the accuracy of decisions.¹⁷⁰

They add that '[m]ost Australian judges have also been inattentive to the reliability of incriminating expert evidence.'¹⁷¹

B The Court Retains Its Discretion

Arguments have also been raised that the type of laws studied here, do not infringe the requirements of Chapter III because the court retains discretion. The argument is that the more that a judge retains discretion, the harder it would be to show that a breach of separation of powers principles has occurred. Discretion here can refer to a discretion to exclude the evidence derived from the use of a closed court hearing, or discretion to not use the closed court hearing at all.

The existence of discretion (in that case, discretion to exclude the evidence) in this context appealed to Gageler J in *Condon v Pompano*. He had rejected an argument that procedural unfairness could be cured by the fact that the decision-maker could weigh up the evidence.¹⁷² For Gageler J, the constitutionality of the law in *Condon v Pompano* was only saved by the existence of the court's inherent jurisdiction to avoid abuse of its process, and to stay a substantive application brought pursuant to the Act in the exercise of such a power.¹⁷³ Support for the proposition that the extent of the retention of the court's discretion in relation to the subject matter of the legislative intervention is important in assessing Chapter III compatibility also appears in *Nicholas v The Queen*.¹⁷⁴

This was also particularly the case with the legislation considered in *K-Generation*, where the law merely required the court to take steps to maintain the

169 This, in turn, is part of a broader discussion regarding the extent to which a judge can, or should, go beyond the representations of the parties and undertake their own research prior to rendering their judgment. Available resources, including time and expertise, will surely limit their ability to do so in the case of technical or scientific evidence.

170 Gary Edmond and Andrew Roberts, 'Procedural Fairness, the Criminal Trial and Forensic Science and Medicine' (2011) 33 *Sydney Law Review* 359, 370.

171 Ibid 374 (citations omitted). See also William E O'Brian, 'The Right of Confrontation: US and European Perspectives' (2005) 121 *Law Quarterly Review* 481; Margaret A Berger, 'The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model' (1992) 76 *Minnesota Law Review* 557.

172 *Condon v Pompano* (2013) 87 ALJR 458, 502 [209].

173 Ibid 503 [212]. See also Lacey, above n 14.

174 (1998) 193 CLR 173, 191 (Brennan CJ), 211 (Gaudron J), 238 (Gummow J).

confidentiality of certain evidence, without specifying what those steps should be.¹⁷⁵ This was one of the grounds upon which the High Court declared the legislation valid. On the other hand, it was one of the constitutional difficulties with the legislation struck out in *International Finance Trust*.¹⁷⁶ The argument is that breach of the *Kable* principle is more readily ascertained where the court is required to hear applications in closed court, and less easily ascertained when the court is merely entitled to do so. Specifically, can the Commonwealth avoid constitutional difficulty with enacting closed court procedures, provided it confers courts merely with discretion to operate in such a fashion, rather than directing its use? And can legislation otherwise constitutionally invalid because of Chapter III incompatibility really be saved by the fact that court has inherent jurisdiction to avoid abuse of process?

On the other hand, there are several arguments that the existence of a discretion in the court (a) to avoid abuse of process and/or (b) to adopt or not adopt a closed court process, is not sufficient to avoid legislation otherwise invalid due to Chapter III due process requirements. It is also worth noting that many English authorities have questioned both the constitutionality and the wisdom of conferring judicial discretion in relation to the use of closed court procedures. In one case, Lord Shaw referred to the open court principle as a 'sacred' part of the constitution. Lamenting the acquiescence of the some members of the judiciary in the gradual dilution of the open court principle, he added: 'To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.'¹⁷⁷

Firstly, the existence of such discretion does not overcome the problem mentioned above, of the danger of the court reaching incorrect conclusions because it has not heard all of the evidence, or is relying on unreliable evidence (again, through no fault of the judges). A court's discretion to exclude evidence will not help if the court is not aware that the evidence is unreliable, which is a main concern here. A court's discretion to hear the matter in open court will not help if it does in fact proceed to hear the matter in closed court, and then decides based on incomplete or unreliable evidence.

Secondly, the suggestion that the court's inherent discretion to avoid abuse of process can overcome what are otherwise constitutionally invalid provisions due to Chapter III lacks support in the case law. For example, the legislation in *Kable* was invalid because it was apt to impair the institutional integrity of the New South Wales Supreme Court and compromise its independence. The same could be said of other New South Wales legislation considered and invalidated in

175 (2009) 237 CLR 501. The Queensland legislation considered in *Condon v Pompano* was more direct, requiring the application for information to be declared to be criminal intelligence to be heard in closed court, and if the application were so declared, requiring that it be presented at the substantive proceeding in closed court.

176 (2009) 240 CLR 319, 354–5, where French CJ noted the legislation required the court to determine the application ex parte, as did Gummow and Bell JJ: at 366.

177 *Scott v Scott* [1913] AC 417, 476–7 (House of Lords). See also *ibid* 435, where Viscount Haldane agrees with Vaughan-Williams LJ in *Scott v Scott* [1912] P 241, 260 (Court of Appeal), that the power to conduct closed court proceedings should not be left to a judge's unfettered discretion.

International Finance Trust, *Kirk and Wainohu*, and in the South Australian context, the legislation in *Totani*. In all of these cases, evidently the ability of those courts to control their own processes and prevent an abuse of process did not save otherwise constitutionally invalid legislation. I prefer the principles to be based on the requirements of Chapter III, including its guarantees of ‘courts’ and ‘judicial process’. These principles are considered more capable of sufficiently specific delineation, and the cases to date can be much more readily explained as demonstrations of these principles, rather than an exercise of the courts’ inherent jurisdiction.

Thirdly, admittedly some difference in wording is evident in the High Court when describing the precise requirements of Chapter III. While some expressions are narrow, stating that laws that *require* the court to depart from traditional judicial process are invalid, broader wording appears elsewhere. For instance, three judges in *Chu Kheng Lim* said that the Commonwealth’s heads of power did not extend to laws which required *or authorised* courts in which the judicial power of the Commonwealth was vested to exercise power in a manner contrary to the essential character of a court or the nature of judicial power.¹⁷⁸ In *Leeth*,¹⁷⁹ three judges said that an attempt by the legislature to *cause* a court to act in a non-judicial manner might be offensive to Chapter III requirements.¹⁸⁰ These dicta comments are taken to be support for the proposition that the mere fact a court is given discretion to adopt closed court proceedings, and the mere fact that a court has inherent jurisdiction to avoid abuse of process, is not sufficient to remove *Kable* difficulties. I agree with the broader formulation of Chapter III requirements, that they could invalidate both laws that require a court to depart from traditional judicial process, as well as laws that allow a court to depart from such process, because both types of laws can compromise the relevant principle of institutional integrity and decisional independence, bearing in mind that perceptions as well as actualities are important.

C Closed Court Procedures/Withholding of Evidence Are Not Unknown to the Law

It is sometimes argued that the adoption of closed court procedures, and procedures by which less than all of the evidence is openly presented, should not be seen as contrary to the *Kable* principle because such procedures are known to the law. Examples cited include the use of ex parte hearings, public interest immunity principles, proceedings involving children, and/or in family law matters, or occasions where a public trial would defeat the object of the action.

178 (1992) 176 CLR 1, 26–7 (Brennan, Deane and Dawson JJ). See also *Nicholas v The Queen* (1998) 193 CLR 173. ‘[C]onsistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed (in a non-judicial manner)’: at 208–9 (Gaudron J) (emphasis added).

179 (1992) 174 CLR 455.

180 Ibid 470 (Mason CJ, Dawson and McHugh JJ).

It must be accepted that the requirement of open courts is not an absolute principle, and exceptions have traditionally been observed.¹⁸¹ However, care must be taken with these exceptions, lest they multiply to such an extent that the principle of open justice is effectively gutted. For this reason, exceptions to the general principle should be cast in narrow terms, no broader than is absolutely necessary to meet some compelling justification, and very carefully justified.

For instance, it is one thing to adopt a closed court (or closed chamber) process at an interlocutory stage of proceedings, not involving the final determination of issues, sometimes where time is imperative, as contexts in which *ex parte* hearings are often found. In the balancing of competing interests, courts have found that in that context, closed court hearings might be acceptable. However, it is quite another to adopt them in a final hearing of a matter, involving the possible making of a control order, with dire consequences for those affected, and criminal consequences for breach.¹⁸² This is the context in which the current laws operate. For this reason, the mere fact that interlocutory proceedings have contemplated *ex parte* hearings in the past cannot be used to justify a closed court hearing in this very different circumstance.

Provision for private hearings involving those of unsound mind or children may also be in a special category, involving the exercise of the court's *parens patriae* jurisdiction. These cases may be ones where it is considered to be essential in the interests of justice that a private hearing occur.¹⁸³ Again, that kind of case is quite removed from the current context of the use of 'criminal intelligence' provisions involving applications for entertainment licences, or proceedings, which will lead to the criminalisation of association. It is hard to see why it is essential in the interests of justice for an entertainment licence application to be heard in private. Proceedings for the criminalisation of association are more serious, typically taken where it is alleged that the association is involved in serious criminal activity. However, if the common law, when considering procedures for all kinds of serious crime including murder and rape, when weighing up the ever-present risk of witness intimidation versus the right of a person accused to face accusers in an open process, sided with the right of a person to face accusers in an open process, it is hard to argue how it is now considered to be essential in the interests of justice to hold a proceeding which will lead to the criminalisation of association in a closed court. And again, the fear is that the more exceptions we create to the general rule, the more the

181 *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ), citing *Bass* (1999) 198 CLR 334, 359 [56]; *Hogan v Hinch* (2011) 243 CLR 506, 553–4 [90] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), quoting *Russell v Russel* (1976) 134 CLR 495, 252.

182 *Condon v Pompano* (2013) ALJR 458, 501–2 [204] (Gageler J).

183 *Scott v Scott* [1913] AC 417, 437–8 (Viscount Haldane); *A-G (UK) v Leveller Magazine* [1979] AC 440, 450 (Lord Diplock); Garth Nettheim, 'The Principle of Open Justice' (1986) 8 *University of Tasmania Law Review* 25; Liam Boyle, 'Hinch, Kable and Open Justice: The Appropriate and Adapted Test' (2012) 11 *Canberra Law Review* 57, 60–3.

floodgates will open and before we know it, the general rule is washed down the waterway.¹⁸⁴

As to suggested analogies with ‘public interest immunity’ principles and ‘criminal intelligence’ provisions, care must be taken. In cases where public interest immunity has been considered, for instance relating to possible disclosure of Cabinet documents, or security classified documents, members of the High Court have indicated that a narrow approach should be taken, and government claims that documents should be not disclosed in an open proceeding must be shown to be necessary in the public interest.¹⁸⁵ The High Court has been sensitive to the possibility that ‘great injustice’ could result from non-disclosure:

If state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to be accepted that in those circumstances the documents must be disclosed ...¹⁸⁶

In that case, Stephen J referred with apparent approval to previous authority indicating that the public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, such that this information had to be forthcoming when required to establish innocence.¹⁸⁷

While the comments were made in a slightly different context, they tend to counter any argument supporting the validity of ‘criminal intelligence’ provisions because of the law in relation to public interest immunity.

D Witnesses May Be Intimidated/Informants Compromised

Another argument sometimes used to justify closed court procedures is that they are a necessary means to ensure that witnesses feel comfortable testifying. Naturally, some witnesses may fear repercussions if they provide evidence against an individual in open court. This fear may increase as the stakes of the trial increase, for example in relation to a person accused of murder or terrorism, or liable to be deported as a threat to national security. Further, there may be a need to preserve the identity of confidential witnesses, for instance where the witness has infiltrated an alleged criminal organisation, and is now giving evidence as to what they have learned through such a process. A closed court hearing might be argued to be necessary to preserve the identity of that person,

184 The High Court’s recent decision in *Hogan v Hinch* (2011) 243 CLR 506 is not thought to be a bar to this conclusion. In that case, an argument that legislation mandating some secrecy surrounding criminal proceedings was offensive to Chapter III requirements was unanimously rejected by the High Court. However, this was on the basis that the section allowed the court to order that the identity of an offender or other witness be suppressed, or otherwise dealt with in the manner mandated by the court order. This kind of restriction is obviously less invasive than not allowing a person affected by a proceeding to see or hear the evidence being led against them.

185 *Sankey v Williams* (1978) 142 CLR 1, 41 (Gibbs ACJ); *Spencer v Commonwealth* (2012) 206 FCR 309.

186 *Sankey v Williams* (1978) 142 CLR 1, 42 (Gibbs ACJ) (citations omitted).

187 Ibid 62, quoting Lord Simon in *D v National Security for the Prevention of Cruelty to Children* [1978] AC 171, 232. Justice Aickin expressed general agreement with Stephen J.

their safety, and their continued ability to obtain important information in future.¹⁸⁸

On the other hand, these concerns are not new. There has always been concern that witnesses could be intimidated or threatened. Police have long used informants to obtain necessary evidence, and preserving their identity has been important. While the extent of intelligence gathering has certainly increased, fuelled by both an increased perceived security threat and advances in enabling technology, the essential conflict between open and transparent courts on the one hand, and concerns with witness protection and intelligence gathering ability on the other, is an old one. Why does this matter? It matters because the common law grappled with this debate, and eventually established in the 17th century the supremacy of the open court principle,¹⁸⁹ a supremacy that has only faced serious challenge in the last decade. The law should not alter its balancing of these competing interests.

Having said that, there may be some room to accommodate, in particular, the needs of intelligence gathering with the open court principle. I would be willing to consider measures, in extreme cases, whereby a witness may be able to give evidence in a way whereby their safety concerns are addressed. Detailed consideration of this issue is largely beyond the scope of this article, but examples might include giving evidence in a different room than the person the subject of the proceedings, or (in extremely rare cases) having their facial features suppressed, in order to preserve their identity. These measures would not compromise the ability of the person affected to hear the case made against them, and be given the opportunity to rebut the evidence used to do so.¹⁹⁰ They by and large leave intact the open court principle.

VI CONCLUSION

This article has considered constitutional questions arising from the growing use of ‘criminal intelligence provisions’ in Australian legislation. These questions have been identified as being caught up in a broader debate about the extent to which due process is and should be protected at constitutional level. The requirements of Chapter III seem most promising in this regard. Chapter III jurisprudence has developed rapidly in Australia in the past 20 years. This jurisprudence has marked out typical characteristics of a judicial process and of courts, and suggested that legislation facilitating a process, which is inconsistent

188 *Condon v Pompano* (2013) 87 ALJR 458, 477–8 [68]–[70] (French CJ).

189 *R v Davis* [2008] 1 AC 1128, 1152–3 [44] (Lord Rodger).

190 Indeed, similar measures were considered and validated by the High Court in the recent decision of *Hogan v Hinch* (2011) 243 CLR 506. In that case, legislation permitted the court to make orders suppressing the identity of an offender, or other witnesses, with respect to a particular proceeding, or to make other orders regarding the identity of those involved. All members of the High Court found that these provisions did not infringe Chapter III of the *Constitution*. I do not disagree with the High Court’s decision.

with these features may be constitutionally suspect. Characteristics of a judicial process most relevant to the specific context of ‘criminal intelligence provisions’ include natural justice, the need for a specific allegation, fairness, the actual and perceived independence of the decision-maker, the institutional integrity of the decision-making body, and openness and transparency. Historical considerations are also relevant. The article has suggested that the use of ‘criminal intelligence’ provisions is offensive to these characteristics, in a way that contravenes Chapter III.

I have explained why the High Court in its recent case law has apparently validated the use of such provisions despite arguments concerning Chapter III. In particular, the High Court has pointed to the ability of courts to appropriately weigh evidence provided under such circumstances, the court’s inherent jurisdiction to avoid an abuse of process, the fact that open court principles are historically not immutable, and concerns regarding witness welfare. I have explained why these counter-arguments do not adequately respond to Chapter III concerns. They do not adequately address the grave risk that a court arrives at an incorrect decision because it does not have all of the information, has incorrect information or does not have all explanations for the information that has been provided. A court should not over-estimate its ability to deal with such risks. Exceptions to an open court approach should be carefully confined, and existing examples where they have proven to be acceptable do not easily translate to the kind of contexts in which ‘criminal intelligence’ is currently being utilised. There is nothing new in the danger of witnesses being intimidated or compromised. In extreme cases, non-traditional means of providing evidence might be considered, particularly including non-disclosure of the identity of evidence providers if a sufficiently strong case is made out. However, as part of due process and at all costs, the evidence being used against an individual must be made available to them to a sufficient degree that they have the opportunity to meaningfully mount a defence to a specific allegation, if they wish to do so. Far greater interests than those involved in the immediate case would otherwise be imperilled.