STATE CONVENORS’ REPORT TO THE ANNUAL GENERAL MEETING 2012

NSW

Details of 2013 Events
The NSW Chapter has hosted the following events that have been well attended:

1. **Wednesday, 6 February 2013**
   State Jurisdictional Residue: What Remains to a State Court When Its Chapter III Functions Are Exhausted?
   Presenter: Professor Helen Irving, Sydney Law School
   Commentators: The Hon. Justice Steven Rares, Federal Court of Australia and Associate Professor James Stellios, Australian National University
   Chair: The Hon. Justice Christine Adamson, Supreme Court of New South Wales
   Venue: Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm

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

2. **Thursday, 14 February 2013**
   George Winterton Memorial Lecture 2013: Judicial Review and the Dismissal of an Elected Government in 1975: Then and now?
   Presenter: Professor Geoffrey Lindell AM, Adjunct Professor of Law, University of Adelaide and Australian National University, Professorial Fellow in Law, University of Melbourne.
   Venue: Supreme Court of NSW, Queens Square, Sydney, Banco Court (Level 13), 6:00–7.30pm
When the Whitlam Labor Government was dismissed in 1975 it was widely assumed that judicial review was not available to challenge the validity of that dismissal. Since that time developments have occurred both in Australia and elsewhere which may involve in the future the courts resolving 'conflicts over the reins of power'. It has been questioned whether such conflicts would be resolved by a pronouncement of a court. In Australia developments in administrative law have undermined the assumption that the normal rules which govern the exercise of discretions vested in ordinary government officials and bodies do not apply to those vested in a Vice-regal representative. In addition there have also been developments which may have the effect of converting the core aspects of the conventions of responsible government - and their accompanying qualifications based on the reserve powers of the Crown - into judicially enforceable rules of law. This lecture addresses whether in the light of such developments the High Court would, and should, intervene to review the legal validity of the dismissal of an elected Government as a result of the Senate blocking Supply if this were to occur again.

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

3. **Wednesday, 8 May 2013**

Military Justice and Chapter III of the Constitution: The constitutional Basis of Courts Martial
Presenter: Professor Suri Ratnapala and Dr Jonathon Crowe, University of Queensland
Commentators: The Hon Justice Margaret J White AO, Queensland Court of Appeal and The Hon. Justice Paul Le Gay Brereton, Supreme Court of New South Wales
Chair: Dr James Renwick SC, Wentworth Chambers
Venue: Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm

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

[The paper was published in (2012) 40 Federal Law Review 161].
4. Monday, 22 July 2013
The Boundaries of Judicial Review and Justiciability; Comparing Perspectives from Australia and Canada
Presenter: Professor Lorne Sossin, Dean, Osgoode Hall Law School, York University, Toronto
Commentator: The Hon. Justice Alan Robertson QC, Federal Court of Australia
Chair: The Hon. Justice Margaret Beazley AO, President, NSW Court of Appeal
Venue: Supreme Court of NSW, Queens Square, Sydney, Banco Court (Level 13), 5:30 pm


This event was organised by the Australian Institute of Administrative Law (NSW Chapter) in conjunction with the Constitutional and Administrative Law Section of the NSW Bar Association and AACL. Professor Sossin is in Australia to deliver the opening address at the AIAL National Conference in Canberra on 18 July 2013 and has kindly agreed to speak in Sydney on the issue of justiciability.

5. Thursday 15 August 2013
Realism about the High Court Revisited: Pragmatic Statesmanship in the Expansion of Chapter III
Presenter: Professor Jeffrey Goldsworthy, Monash University
Commentators: The Hon. Roger Gyles AO QC, Selborne/Wentworth Chambers and Professor Peter Cane, ANU College of Law
Chair: The Hon. Justice Robert Beech-Jones, Supreme Court of New South Wales
Venue: Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm

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

This is a joint event organised by AAACL and the Australian Society of Legal Philosophy (ASLP). The annual conference for the ASLP will be held at the University of Sydney on 16–17 August 2013.

6. Wednesday, 23 October 2013
State Law and Order Regimes and the High Court: Past, Present and Future
One of the key bastions of State jurisdiction in the Federation remains law and order. However, like the States’ legislative competence, this arena has come under increasing threat of harmonisation and unification by the High Court. Through the *Kable* principle, the High Court has been able to impose what are now very real limits on State responses to local law and order issues, stifling much government innovation in this arena. By reference to the reinvigoration of the *Kable* principle in the cases of *International Finance Trust Co v New South Wales Crime Commission, South Australia v Totani*, and *Wainohu v New South Wales*, and the current challenge on foot to the *Criminal Organisations Act 2009 (Qld)* (*Condon v Pompano Pty Ltd*), this paper maps the trajectory of the *Kable* principle as it relates to the limits on the use of State courts in law and order regimes.

**Forthcoming Events:**

- **The Last Seminar of the Year, 10 December 2013**
  COMPARATIVE CONSTITUTIONAL LAW – FINAL COURTS ROUND–UP 2013
  Presenters: Professor Richard Fallon, Harvard Law School, Professor Janet Hiebert, Queens University, Professor Claudia Geiringer, Victoria University of Wellington
  Chair: Professor Rosalind Dixon, University of New South Wales
  Venue: Federal Court, Queens Square, Sydney, Court 18B, 5:30 pm

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

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

- **The Winterton Lecture, 14 February 2014**
  The 2014 George Winterton Memorial Lecture will be delivered by Professor Fiona Wheeler (ANU). Professor Wheeler's Lecture is entitled "Judges as Royal Commissioners" Reprised: The Involvement of Australian Judges in Extra–Judicial Work"
The Lecture will be held in the Banco Court of the NSW Supreme Court on 14 February 2013. This event is organised by Sydney Law School and sponsored by AAACL. The lecture is free, but registration is necessary.

- Conferences
  - On 15 November 2013, the ANU College of Law will hold its annual Public Law conference in Canberra. The focus is on administrative law, but a number of papers explore the constitutional/administrative law intersection. The program and registration details can be found at: [http://law.anu.edu.au/conferences/public-law-weekend-2013](http://law.anu.edu.au/conferences/public-law-weekend-2013)
  
  - On 15 February 2014, the Gilbert + Tobin Centre for Public Law (UNSW) will hold its annual Constitutional Law Conference and Dinner. The draft program and registration details can be found in the fourth attachment. (The event follows the Winterton Lecture of the previous evening).

Dr Christos Mantziaris  
NSW Convenor  
24 October 2013

VIC

Details of Events- 2013

1. **Thursday, 27 June 2013 - 5:45pm - 7:00pm**  
   What is the relevance of *Williams* and *Plaintiff M61* for the exercise of State executive power?  
   Speaker: Ms Kathleen Foley, Ninian Stephen Chambers, Victorian Bar  
   Commentators: Mr Ben Saunders, Legal Officer, Office of Crown Counsel (Advisings), Mr David Heaton, Boston Consulting Group  
   Chair: Mr Stephen McLeish SC, Solicitor General for Victoria  
   Venue: Courtroom 1, Level 8, Owen Dixon Commonwealth Law Courts  
   Address: 305 Williams Street, Melbourne

2. **Tuesday, 10 September 2013 - 5:30pm - 7:00pm**  
   *Fortescue Metals Group Limited v The Commonwealth*  
   Speaker: Professor Michael Crommelin AO, Zelman Cowen Professor of Law, University of Melbourne  
   Commentators: Dr Gavan Griffith AO QC, Owen Dixon Chambers, Victorian Bar; Essex Court Chambers, English Bar; Professor Ross Garnaut AO, Vice-Chancellor’s Fellow and Professorial Fellow in Economics, University of Melbourne and Distinguished Professor of Economics, ANU; Mr Graeme Hill, Melbourne Chambers, Victorian Bar  
   Venue: Court 1, Level 8, Owen Dixon Commonwealth Law Courts  
   Address: 305 William Street, Melbourne
3. Friday, 8 November 2013 - 5:45pm - 7:00pm
The Centralisation of Judicial Power
Speaker: Associate Professor James Stellios, ANU College of Law
Commentators: to be confirmed
Chair: The Hon. Justice Maxwell, President of the Court of Appeal of the Supreme Court of Victoria
Venue: Courtroom 1, Level 8, Owen Dixon Commonwealth Law Courts
Address: 305 Williams Street, Melbourne

Angel Aleksov
Acting VIC convenor
24 October 2013

ACT

Round table on recent High Court cases on the implied freedom of political communication
In April this year Mr Tom Howe QC facilitated a round table discussion of recent High Court cases on the implied freedom of political communication. The cases discussed included Attorney-General for the State of South Australia v the Corporation of the City of Adelaide [2013] HCA 3 (Corneloup) and Monis v The Queen [2013] HCA 4 (Monis) in which Mr Howe QC was senior counsel for the Attorney-General of the Commonwealth (who intervened in both cases in support of the impugned legislation). Over 25 members, many of them new to AACL, attended the event and participated in debate about the significance, if any, of the gender split in the judgments in Monis and the new meaning that some judges in Monis and Corneloup appear to have given to the test enunciated in Lange v Australian Broadcasting Commission (1997) 189 CLR 520 (and modified in Coleman v Power (2004) 220 CLR 1) for determining the invalidity of impugned provisions in light of the implied freedom of political communication.

October 2013 – Judging the Sir Gibbs Moot
Many of our members kindly gave their time in mid-October this year to judge rounds of the Sir Gibbs Moot, in which university students mooted a problem question raising constitutional issues such as the scope of the defence power and the validity of legislation allowing a judge, acting in their personal capacity, to make an order detaining a person who presents a risk to Australia’s security. Prior to the rounds, the AACL hosted an information evening during which attendees discussed the key issues in the moot problem.
Upcoming events
We are currently working with the Australian Institute of Administration Law to organise a seminar with, among others, Professor Mick Dodson, on indigenous recognition in the Australian Constitution. We hope to host the seminar later this year.

Ms Megan Caristo
Acting ACT Convenor
24 October 2013

QLD
Nothing further to report.

Professor Nicholas Aroney
QLD Convenor
24 October 2013

SA
The South Australian Chapter has had a busy year with more to come! In February we started off the year with a discussion on proportionality with presenters Sarah Moulds from the Law Council of Australia and Cornelia Koch from the Adelaide Law School. This seminar explored the status of proportionality in constitutional rights adjudication in Australia and Germany and considered whether the German approach could inform the development of a more consistent and structured principle in Australian law.

In April AACL teamed up with the University of Adelaide and co-hosted Professor Harold Hastings Bruff, Rosenbaum Professor of Law at the University Of Colorado School Of Law. Professor Bruff delivered an informative and entertaining seminar on the Separation of Powers in the United States of America.

In May AACL joined forces with AIAL to present a series of two seminars following the decision of the High Court in Attorney-General (SA) v Corporation of the City of Adelaide (the Street Preachers Case). In the first seminar Michael Roder SC discussed the scope council by-law making powers following the Street Preachers Case. In the second seminar Luci Byers and Mike Wait of the Crown Solicitor’s Office explored freedom of political communication following the case. This seminar series attracted many people from local government and was well attended with over 80 attendees at each seminar.
The committee spent some time on planning and preparation towards a seminar on the Local Government referendum. However, with the election timing the referendum did not go ahead. We have kept our plans for this in the future!

In late October we are co-hosting an event with the Australian Labour Law Association. Rachel Doyle SC is visiting from the Victorian Bar and will speak on "Buying Power: State procurement policies and labour standards". The seminar will explore the two recent cases of *Construction, Forestry, Mining and Energy Union v State of Victoria* and *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* and the labour and constitutional law implications.

We are now in the throes of preparing for our end of year event which will be themed "The Twelve Constitutional Cases of Christmas" and will involve a summary of the leading constitutional law cases from 2013.

Already in planning for 2014, we have a seminar on letters patent for early in the new year and event with Dyson Heydon in around May 2014.

Sarah Mitchell, SA Committee Member
Mike Wait, SA Convenor
24 October 2013

WA

**Details of 2013 Events**
The WA Chapter has had the following recent seminars:

1. **4 September 2013:**
   Present: Dr Peter Johnston Adjunct Professorial Fellow-UWA, Senior Fellow, Monash University
   Chair: Justice James Edelman
   Commentary: Professor Gerard Carney, Curtin University Law School

2. **6 August 2013**
   ‘The 4th Arm of Government’
   Chair: Professor Simon Young, UWA Law School
   Speakers:
   - Mr Chris Field, Ombudsman
   - Mr Colin Murphy, Auditor General
   - Mr Sven Bluemmel, Information Commissioner
3. **30 July 2013**
   ‘Implied Freedom of Political Communication: New Dimensions’
   Chair: Amy Preston Samson, State Solicitor’s Office
   Speakers:
   - Jean Shaw, State Solicitor’s Office
   - Tim Goyder, Associate to the Hon. Chief Justice Wayne Martin AC Supreme Court of Western Australia

4. **9 July 2013**
   ‘Sir John Forrest Lecture – State of the Federation Address’
   Speaker: Professor Geoffrey Bolton AO

5. **11 June 2013**
   ‘Inside the White House- Appointing US Supreme Court Justices’
   Speaker: The US Ambassador Jeffrey Bleich
   Chair: Grant Donaldson QC, Solicitor-General (WA)

**Proposed events for 2014**
- Proposed Half-day conference on ‘Human Rights and the Constitution’
- Twilight Seminar: ‘Recent decisions from the High Court’

Associate Professor Sarah Murray
WA Convenor
24 October 2013