

# *Before the High Court*

## Finality and Certainty in the Integrated National System of Chapter III Courts: *Judge Vasta v Stradford*

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### *Abstract*

Australian authority holds that there is a critical distinction between superior and inferior courts when it comes to the legal force of judicial orders affected by jurisdictional error. It is said that such orders, when made by a superior court, have legal force unless and until set aside but that, when made by an inferior court, they lack legal force from the outset. This distinction — recently consigned to pre-1846 history by the United Kingdom Supreme Court — does not align with the contemporary reality of the integrated system of courts established under ch III of the *Australian Constitution*. The appeals in *Commonwealth v Stradford*, *Judge Vasta v Stradford* and *Queensland v Stradford* present an opportunity for the High Court of Australia to set a new approach that reflects the constitutional context for ch III court operation. Specifically, the appeals may be upheld on the basis that any purported order made by a ch III court acting as a repository of judicial power has legal force unless and until set aside.

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Please cite as:

Emily Hammond, 'Finality and Certainty in the Integrated National System of Chapter III Courts: *Judge Vasta v Stradford*' (2024) 46(2) *Sydney Law Review* (advance).



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I thank Jo Shepard for helpful comments. All errors are my own.

## I Introduction

All courts in Australia are courts of limited jurisdiction, and all below the High Court of Australia ('the Court') are amenable to judicial review to enforce the limits on their jurisdiction. However, some are 'superior courts' and others are not. This distinction is thought important when it comes to certain matters. One is the legal force of a court order that has not been set aside. If a superior court makes an order that is affected by jurisdictional error, the order has legal force unless and until set aside. For instance, detention under a superior court order for imprisonment that has not been set aside is not actionable as false imprisonment. The appeals before the Court in *Commonwealth v Stradford*, *Judge Vasta v Stradford* and *Queensland v Stradford*<sup>1</sup> raise the question whether the position is otherwise if the order is made by an inferior court.

On the written submissions, the parties invite the Court to maintain a general rule that an inferior court order affected by jurisdictional error lacks legal force from the time it is made. The parties refer to this as an uncontroversial starting point. It is certainly consistent with numerous judicial statements, including in recent judgments of the Court.<sup>2</sup> However, no mention is made in the written submissions (nor in the judgment below) of recent United Kingdom Supreme Court ('UKSC') authority that there is a duty to obey *all* court orders unless and until set aside, and that this has been the position in the United Kingdom since at least 1846.<sup>3</sup> This is a significant gap in the materials before the Court. It is significant because, as this column will explain, there is a compelling case that Australia should likewise adopt a single principle governing the legal force of judicial orders of any institution that is a 'court' within the meaning of ch III of the *Australian Constitution* ('ch III court').

This column goes so far as to propose a principle, suitable for the Australian constitutional context, that could be applied to uphold these appeals.<sup>4</sup> The principle might be put this way: any judicial order made by a ch III court of competent jurisdiction has legal force until set aside. Competent jurisdiction conveys a threshold notion of general authority (that is, to make an order of the kind that has been made, on the subject matter of the application). The threshold ensures that a court is acting as a repository of judicial power when it makes a purported judicial order. That is critical because it is the underlying exercise of judicial power that sustains the legal force of a purported order affected by jurisdictional error.

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<sup>1</sup> High Court of Australia, Case Nos C3/2024, C4/2024, S24/2024 respectively.

<sup>2</sup> See, since 1996: *Re Macks*; *Ex parte Saint* (2000) 204 CLR 158, 275 [329] ('*Re Macks*'); *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, 370 [11] ('*Berowra*'); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [69]–[70] ('*Kirk*'); *New South Wales v Kable* (2013) 252 CLR 118, 140–1 [56] ('*Kable No 2*'); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33, 48 [48] ('*Oakey*'); *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, 231 [27] ('*Citta*'); *Stanley v DPP (NSW)* (2023) 407 ALR 222, 225–6 [15]–[16] ('*Stanley*'). See further below nn 67–74 and accompanying text.

<sup>3</sup> *R (Majera) v Secretary of State for the Home Department* [2022] AC 461 ('*Majera*'). See below Part IV(C); Justice Kristen Walker, 'When Can a Court's Decision be Ignored?' (2022) 46(2) *Melbourne University Law Review* 572, 583–6.

<sup>4</sup> Recognising that this is a matter on which the respondent has not yet been heard.

It is convenient to emphasise at the outset what is at stake in discussion of an order's legal force unless and until set aside. The legal force of an order refers to whether rights or liabilities are as specified in the order by force of law.<sup>5</sup> This does *not* pose a global inquiry into all legal consequences the existence of the purported order may or may not have.<sup>6</sup> Recognising that a court order has legal force unless and until set aside therefore does not prevent judicial review of the order,<sup>7</sup> or reopening the proceedings.<sup>8</sup> Nor does it preclude a respondent to proceedings for enforcement applying for the order to be set aside.<sup>9</sup> That said, if an order *does* have legal force until set aside, there is necessarily a legal duty to obey the order if it has not been set aside.

## II Facts and Proceedings

In December 2018, Mr Stradford (a pseudonym) was held in custody for seven days following an order by Vasta J that Mr Stradford be sentenced to 12 months' imprisonment for contempt of disclosure orders made by the Federal Circuit Court of Australia ('FCC') in proceedings under the *Family Law Act 1975* (Cth). The purported order was stayed upon the filing of an appeal, which was unanimously upheld.<sup>10</sup> The appellate Bench described the making of the declaration that Mr Stradford was in contempt and the imprisonment order as 'a gross miscarriage of justice'.<sup>11</sup>

Subsequently, Mr Stradford commenced proceedings in the Federal Court alleging that Vasta J had committed the torts of false imprisonment and collateral abuse of process, and that the Commonwealth and Queensland were vicariously liable for the actions of their officers and agents. Wigney J held that Vasta J, the Commonwealth, and Queensland were liable for false imprisonment and awarded damages.<sup>12</sup>

Wigney J found that there were five jurisdictional errors in Vasta J's conduct of the contempt proceedings, including a grave denial of procedural fairness and pre-judgment.<sup>13</sup> Wigney J expressly recognised that Vasta J 'had the jurisdiction to entertain the matter between Mr and Mrs Stradford, and had the power to deal with any alleged contempt by Mr Stradford in the context of that litigation'.<sup>14</sup>

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<sup>5</sup> See, eg, *Stanley* (n 2) 225–6 [15].

<sup>6</sup> See, eg, Leighton McDonald, Kristen Rundle and Emily Hammond, *Principles of Administrative Law* (Oxford University Press, 4<sup>th</sup> ed, 2023) 170–82.

<sup>7</sup> See, eg, *Kirk* (n 2) 583 [106]–[107]; *Kable No 2* (n 2) 132–3 [30]. See Enid Campbell, 'Inferior and Superior Courts and Courts of Record' (1997) 6(4) *Journal of Judicial Administration* 249, 250, 258.

<sup>8</sup> See, eg, *Cameron v Cole* (1944) 68 CLR 571, 589–90, 600, 607 ('*Cameron*'); Campbell (n 7) 259.

<sup>9</sup> Compare David Rolph, *Contempt* (Federation Press, 2023) 559. Noting that transfer may be required if enforcement is before a court that does not have authority to undertake judicial review.

<sup>10</sup> *Stradford v Stradford* (2019) 59 Fam LR 194.

<sup>11</sup> *Ibid* 212 [73] (Strickland, Murphy and Kent JJ).

<sup>12</sup> *Stradford v Judge Vasta* [2023] FCA 1020 ('*Stradford FCA*').

<sup>13</sup> *Ibid* [76]–[136].

<sup>14</sup> *Ibid* [174].

Nonetheless, Wigney J held that Vasta J's imprisonment order, being an order of an inferior court<sup>15</sup> affected by jurisdictional error, did not authorise the detention.<sup>16</sup>

In reaching this view, Wigney J rejected two lines of argument advanced in favour of the imprisonment order being effective until set aside.<sup>17</sup> First, that the general principle is that legal force is denied to those inferior court orders made without 'subject matter jurisdiction' (that is, orders that are not of the kind the court is authorised to make).<sup>18</sup> A second and more complex line of argument, also rejected by Wigney J, was that the general rule did not apply to the order made in exercise of the FCC's contempt powers, either by operation of statute (s 17(1) of the *Federal Circuit Court of Australia Act 1999* (Cth)) or due to the nature of the power to punish contempt as an attribute of judicial power.<sup>19</sup>

Wigney J went on to hold that Vasta J, as a judge of an inferior court, was not protected by the judicial immunity afforded to a superior court judge who acts bona fide in the exercise of office and under the belief that they have jurisdiction;<sup>20</sup> and that, because the invalid imprisonment order was made by an inferior court, no common law defence was available to the various Commonwealth and Queensland officers and agents who executed the warrant, apparently valid on its face.<sup>21</sup>

In the present appeals, no party contests Wigney J's findings as to the imprisonment order being affected by jurisdictional error, or the calculation of damages. The issues in the appeals fall into two categories:

- (1) whether Mr Stradford's detention was lawful because Vasta J's orders had legal force until set aside, despite being affected by jurisdictional error;<sup>22</sup> and
- (2) whether, if the order lacked legal force from the time it was made:
  - (a) Vasta J was protected by judicial immunity — because inferior court judges are immune for acts done with subject matter jurisdiction,<sup>23</sup> or

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<sup>15</sup> Ibid [190], [204].

<sup>16</sup> Ibid [173]–[197].

<sup>17</sup> Ibid [177]–[195].

<sup>18</sup> Ibid [182]–[184].

<sup>19</sup> Ibid [189]–[193] (contempt as attribute of judicial power), [88]–[99], [193]–[194] (effect and availability of *Federal Circuit Court of Australia Act 1999* (Cth) s 17).

<sup>20</sup> Ibid [206] (superior court judicial immunity), [342]–[347] (judicial immunity of inferior court judges).

<sup>21</sup> Ibid [524], [552]. Wigney J also rejected Queensland's claim of a statutory immunity under s 249 of the schedule to the *Criminal Code Act 1899* (Qld) on the basis that this statutory immunity did not apply to warrants issued by federal courts: at [544].

<sup>22</sup> Commonwealth, 'Submissions of the Appellant', Submissions in *Commonwealth v Stradford*, Case No C3/2024, 28 March 2024, [14]–[32] ('Commonwealth Submissions'); Hon Justice Vasta, 'Submissions of the Appellant', Submissions in *Judge Vasta v Stradford*, Case No C4/2024, 28 March 2024, [2], [47]–[56] ('Judge Vasta Submissions'). Cf Queensland, 'Submissions of the Appellant', Submissions in *Queensland v Stradford*, Case No S24/2024, 28 March 2024, [43] ('Queensland Submissions'); Attorney-General (SA), 'Submissions of the Intervenor', Submissions in *Commonwealth v Stradford*, Case No C3/2024, 28 March 2024, [10], [15] ('South Australia Submissions').

<sup>23</sup> Commonwealth Submissions (n 22) [51]–[65]; Judge Vasta Submissions (n 22) [46].

because there is only one principle of judicial immunity,<sup>24</sup> or because he had superior court immunity in the contempt proceeding;<sup>25</sup> and

- (b) the officers and agents who executed Vasta J's orders were protected — because they acted in execution of a warrant that appeared valid on its face,<sup>26</sup> and/or they had statutory authority to execute apparently valid warrants,<sup>27</sup> and/or the warrant was valid because it appeared valid on its face and the underlying imprisonment order was made within subject matter jurisdiction.<sup>28</sup>

If it is found that the imprisonment order had legal force until set aside, there is no actionable false imprisonment and the complex secondary questions going to liability do not require resolution.<sup>29</sup>

### III Submissions on Legal Force of the Imprisonment Order

For present purposes, there are three salient features of the parties' submissions on legal force of the imprisonment order.

First, no party challenges Wigney J's conclusion that, as a general rule, inferior court orders infected by jurisdictional error lack legal force whether or not they are set aside.<sup>30</sup> The Judge and Commonwealth do not press their argument below that inferior court orders have legal force until set aside if made within subject matter jurisdiction.

Second, the Judge and Commonwealth rely on established authority that a statute may provide that an inferior court order is to have legal force unless set aside, including by general words.<sup>31</sup> While not explored directly, this would presumably invite some threshold inquiry into whether there is sufficient connection between the order made and such statutory provision. As such, the arguments on legal force implicitly assume it is possible to demarcate between a court that is or is not acting in a way that attracts the statutory provision. Some such demarcation is in any event explicitly drawn in the Commonwealth's submission that judicial immunity operates for any judge acting with subject matter jurisdiction.<sup>32</sup>

Third, there is a striking contrast within the Judge's and Commonwealth's submissions on legal force and liability. Within their submissions on judicial immunity, they argue that the distinction between inferior and superior courts is

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<sup>24</sup> Commonwealth Submissions (n 22) [66]–[74]; Judge Vasta Submissions (n 22) [10]–[45].

<sup>25</sup> Judge Vasta Submissions (n 22) [47]–[56].

<sup>26</sup> Commonwealth Submissions (n 22) [33]–[47]; Queensland Submissions (n 22) [41]–[70].

<sup>27</sup> Queensland Submissions (n 22) [12]–[40].

<sup>28</sup> South Australia Submissions (n 22) [17]–[21].

<sup>29</sup> Noting that these may be resolved as additional bases for upholding the appeals.

<sup>30</sup> See Commonwealth Submissions (n 22) [12], [14]; Judge Vasta Submissions (n 22) [51]; Queensland Submissions (n 22) [43]; South Australia Submissions (n 22) [10], [15].

<sup>31</sup> Commonwealth Submissions (n 22) [14]–[19]; Judge Vasta Submissions (n 22) [50]–[56].

<sup>32</sup> Commonwealth Submissions (n 22) [50], [51]–[65]; Judge Vasta Submissions (n 22) [46]. Compare South Australia Submissions (n 22) [19] (validity of the warrant).

anachronistic: out of step with the contemporary realities of a professionalised judiciary and the constitutional context of an integrated national system of courts established under ch III of the *Constitution*.<sup>33</sup> These are points well made.<sup>34</sup> It is therefore notable that the Judge and Commonwealth do not press for a congruent approach to the underlying legal force of judicial orders by ch III courts. Such an approach is available, as will now be explained.

## IV A Principled Approach to Legal Force of Chapter III Court Orders

The argument of this Part seeks to demonstrate that there would be merit in exploring, within the context of these appeals, a new approach to the legal force of ch III court orders. Specifically, the appeals might be upheld on the basis that any judicial order made by a ch III court of competent jurisdiction will have legal force until set aside. It would be appropriate to take this step having regard to: (A) constitutional principle; (B) constitutional context; (C) UK authority; (D) no reliance militating against the change.

### A *Constitutional Principle Supports Taking the Step*

*New South Wales v Kable* (*'Kable No 2'*)<sup>35</sup> provides a principled account of the source of the legal force of a superior court order that is not authorised by the statute under which it is purportedly made. In this scenario, the order does not draw legal force from the statute under which it was purportedly made — it does not attract the operation of the statute. Similarly, when jurisdictional error is made in purported exercise of decision-making authority legislatively conferred, the purported decision 'exceeds the limits of decision-making authority legislatively conferred' and 'is properly regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all"'.<sup>36</sup> But as *Kable No 2* recognises, it is constitutionally permissible that even in these circumstances, a court order might, until set aside, have legal force from a different source.<sup>37</sup> That source, as explained in *Kable No 2*, is the underlying exercise of judicial power: the 'roots of the doctrine, that the orders of a superior court of record are valid until set aside even if made in excess of jurisdiction, lie in the nature of judicial power'.<sup>38</sup> This characteristic of superior court orders 'reflects the distinction between the exercise of judicial power (by the *final* quelling of controversies according to law) and the exercise of executive power (*subject to law*)'.<sup>39</sup>

<sup>33</sup> Commonwealth Submissions (n 22) [67]–[74]; Judge Vasta Submissions (n 22) [30]–[35]. See also Commonwealth, 'Commonwealth Reply', Submissions in *Commonwealth v Stradford*, Case No C3/2024, 24 May 2024, [15], [25] ('Commonwealth Reply').

<sup>34</sup> See also *Stradford FCA* (n 12) [331]–[332].

<sup>35</sup> *Kable No 2* (n 2).

<sup>36</sup> *Stanley* (n 2) 225–6 [15] (Gageler J) (citations omitted).

<sup>37</sup> *Kable No 2* (n 2) 135 [36], 141–2 [57].

<sup>38</sup> *Ibid* 134 [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>39</sup> *Ibid* 134 [34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).

*Kable No 2* concerned the exercise of judicial power by a superior court.<sup>40</sup> But the Court's reasons make clear that the fundamental justification for the legal force accorded to superior court orders lies in the nature of judicial power.<sup>41</sup> In the tri-partite classification of state powers, it is judicial power that provides a peaceful resolution of disputes about rights or liabilities, including in disputes about whether rights or liabilities are as specified in purported laws or determinations of the political branches of government. Within this constitutional conception, it is imperative that judicial power has the potential to produce orders in resolution of disputes that have legal force unless and until set aside, even if affected by serious error.

This understanding points to a necessary threshold consideration in any extended application of the principle to inferior courts. The order must be made by a court acting as a repository of judicial power. The inquiry here is *not* whether the court satisfied all preconditions and conditions for the effective exercise of power in the instant case. It is a more basic inquiry into whether the court was acting as a repository of judicial power when it made the order. For present purposes, the concept of subject matter jurisdiction is a serviceable reference point.<sup>42</sup> However, a more precise statement might be that the court has judicial power to make the kind of order it has made, on the subject matter of the proceeding.<sup>43</sup> This accommodates the principle that conferral of jurisdiction on an inferior court will *prima facie* carry only those powers necessary to its exercise (as distinct from the well of undefined powers implied in the status of 'superior court').<sup>44</sup>

## **B Constitutional Context Supports Taking the Step for Chapter III Courts**

The ch III scheme supports extending 'superior court effect' (that is, having legal force unless and until set aside even if affected by jurisdictional error) to ch III court judicial orders. There are robust constitutional safeguards for independence and impartiality in the exercise of judicial power, and correction of error, which operate across the integrated national system of courts established under ch III of the *Constitution*. Chapter III provides accountability for the exercise of judicial power by ch III courts through the system of appeals established by and under s 73, and the entrenched minimum provision for judicial review for jurisdictional error.<sup>45</sup> This is supplemented by the protections derived from ch III for the institutional integrity of courts as impartial and independent institutions for the administration of justice. As *Kable v DPP (NSW)* (*'Kable No 1'*)<sup>46</sup> established, all ch III courts are required to

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<sup>40</sup> Ibid 140 [56].

<sup>41</sup> Ibid 135–6 [38]–[40], 141–2 [58]–[60].

<sup>42</sup> Compare reliance on this concept in the parties' submissions on liability: see above n 32.

<sup>43</sup> *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 446 [29], 449–50 [44]–[46], 451–2 [50]–[54] (*'Pelechowski'*). See also at 459–60 [77].

<sup>44</sup> Ibid noting, as to the 'necessity' touchstone for implied powers, 451–2 [50]–[51].

<sup>45</sup> That is, the entrenched minimum provisions for review identified, for Commonwealth powers, in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*'Plaintiff S157'*) and, for state powers, in *Kirk* (n 2).

<sup>46</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51 (*'Kable No 1'*).

maintain, at an institutional level, those characteristics that make them suitable repositories for separated judicial power.

Conversely, the constitutional context might support drawing a distinction between the judicial orders of ch III courts and others. The exercise of judicial power by repositories that are *not* ch III courts occurs in a distinct context, removed from the safeguards provided in ch III. In the pre-*Kable No 1* era, Australian law drew a distinction between ‘courts’ and ‘non-courts’ in the related matter of identifying jurisdictional errors.<sup>47</sup> The logic articulated in that era might well be adjusted, in light of *Kable No 1*, to sharpen the relevant contrast between those institutions that are courts within the meaning of ch III and those that are not. That distinction has additional resonance following the Court’s recognition of an implied limit on state legislative capacity to confer state judicial power on bodies that are not ch III courts.<sup>48</sup> In light of the evolved ch III jurisprudence, it would seem defensible to draw a line between ch III courts and other repositories of judicial power.

### C *United Kingdom Authority*

In a 2021 judgment,<sup>49</sup> the UKSC unanimously held that the Secretary of State was bound to comply with a bail order issued by the First-Tier Tribunal until it was set aside, even if the order was invalid. Lord Reed P (writing for the Court) explained:

It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer*, in terms which have been repeated time and again in later authorities.<sup>50</sup>

...

In the light of this consistent body of authority stretching back to 1846, it is apparent that the alleged invalidity of the order made by the First-tier Tribunal had no bearing ... Even assuming that the order was invalid, the Secretary of State was nevertheless obliged to comply with it, unless and until it was varied or set aside.<sup>51</sup>

As explained by Lord Reed, this principle applies in the UK to courts of limited jurisdiction<sup>52</sup> such as the First-Tier Tribunal, a county court<sup>53</sup> and a mental health tribunal.<sup>54</sup> It applies provided the court is one of ‘competent jurisdiction’, a concept that appears analogous to acting with subject matter jurisdiction or broad authority to make the kind of order sought.<sup>55</sup>

<sup>47</sup> *Craig v South Australia* (1995) 184 CLR 163, 176–80 (‘*Craig*’); *Kirk* (n 2) 572–3 [67]–[68].

<sup>48</sup> *Burns v Corbett* (2018) 265 CLR 304. Note that this development casts substantially different light on the reservation expressed in *Kirk* (n 2) 573 [69].

<sup>49</sup> *Majera* (n 3).

<sup>50</sup> *Ibid* 480 [44], citing *Chuck v Cremer* (1846) 47 ER 884.

<sup>51</sup> *Ibid* 484 [56].

<sup>52</sup> *Ibid* 482 [48].

<sup>53</sup> *Ibid* 482 [50].

<sup>54</sup> *Ibid* 482–3 [51]–[52].

<sup>55</sup> *Ibid* 482 [49] (Lord Reed P).



This application is seen as

consistent with the rationale of the rule. ... [I]t is based on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as those made by courts possessing unlimited jurisdiction.<sup>56</sup>

The UKSC was, of course, addressing issues as they arise in a different constitutional and doctrinal setting. Notably, the UKSC suggested that a duty to obey may be extended to *executive* orders that have not been set aside.<sup>57</sup> That would not be open in Australia, where an entrenched separation of judicial power casts into relief the inherent incapacity of executive power to affect rights or liabilities, which means that any such legal force can be derived only from statute (or common law prerogative) operating on the fact of an executive decision.<sup>58</sup> Accordingly, a decision affected by jurisdictional error, when made by a repository of *executive* power, can have no legal force.<sup>59</sup>

That said, in the case of judicial orders of ch III courts, it is hard to see any differences in constitutional context that would pull against Australia taking the step taken by the UKSC. On the contrary, the differences would seem to *favour* the step being taken for Australia. Principally (as already discussed) the ch III scheme is conducive to taking this step for orders made by ch III courts, provided they are acting as repositories of judicial power (that is, authorised to make an order of the kind sought on the subject matter).

Might it be said that there is a distinct pressure for the UKSC to take this step that does not exist in Australia? The argument might run something like this: Because the UK has largely abandoned the distinction between jurisdictional and non-jurisdictional legal error, extending superior court effect to court orders was the only viable doctrinal move available in the UK to promote certainty and compliance with court orders.

It is correct that Australia, to a greater extent than the UK, uses the application of jurisdictional error to promote the rule of law value of certainty and obedience to inferior court orders.<sup>60</sup> But this is not the ideal doctrinal vehicle to promote those rule of law values. This is because, within the application of jurisdictional error to inferior courts, certainty competes with other rule of law values.<sup>61</sup> If superior court effect were extended to all ch III courts, this would alleviate some of the pressure of competing demands on the application of jurisdictional error to inferior courts. Thus, despite the difference in context, the step taken in the UK would benefit Australian doctrine too.

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid [27]–[42]. On this aspect and the legislative response, see Mark Aronson, ‘Reforming Certiorari and Messing with Nullity’ (2022) 29(2) *Australian Journal of Administrative Law* 110.

<sup>58</sup> See, eg, McDonald, Rundle and Hammond (n 6) 53–6.

<sup>59</sup> Contrast, on this point, Campbell (n 7) 258.

<sup>60</sup> See *Craig* (n 47) 179; *Kirk* (n 2) 572–3 [68]–[69]. See also South Australia Submissions (n 22) [7]–[9].

<sup>61</sup> See, eg, *Plaintiff S157* (n 45) 482–4 [5]–[9], 513 [103]–[104].

## D *No Reliance Militating against the Change*

It remains to note that there has been no reliance on present doctrine that militates against extending superior court effect to the judicial orders of ch III courts.

First, it bears mentioning that all post-*Kable No 1* statements from the Court supporting the present approach have been obiter in cases concerned with superior court judicial orders,<sup>62</sup> non-court tribunal judicial orders,<sup>63</sup> administrative orders of inferior courts,<sup>64</sup> questions whose resolution did not turn critically on the status of the court in which proceedings were brought<sup>65</sup> or proceedings for judicial review of an inferior court order affected by jurisdictional error.<sup>66</sup> The pre-*Kable No 1* Court authorities are, likewise, generally in obiter, being in cases concerning superior court judicial orders<sup>67</sup> or superior court administrative orders,<sup>68</sup> or upholding an inferior court's authority to make an impugned judicial order.<sup>69</sup>

Second, the proposal is to extend superior court effect only where a ch III court is acting as a repository of judicial power. As mentioned above, this would not be the case if the court lacked authority to make the kind of order it has made on the subject matter before it. The proviso would reconcile the proposed approach with the result in the one Court judgment that rests critically on the distinction to deny legal force to an inferior court order: *Pelechowski v Registrar, Court of Appeal (NSW)*.<sup>70</sup> There, the majority held that breach of a District Court order preserving the asset of a judgment debtor did not constitute a contempt because statute did not authorise the court to make an asset preservation order of that nature and effect.<sup>71</sup> McHugh J, although in dissent on the statutory construction, articulated the issue in terms consistent with the majority: did statute authorise the District Court to make 'such an order',<sup>72</sup> or give it authority 'to take cognisance of matters presented in a formal way for its decision'?<sup>73</sup> *Pelechowski* can therefore be reconciled with the proposed approach on the basis that there was no underlying exercise of judicial power to sustain the legal force of the District Court order.<sup>74</sup>

<sup>62</sup> *Re Macks* (n 2); *Kirk* (n 2); *Kable No 2* (n 2).

<sup>63</sup> *Citta* (n 2).

<sup>64</sup> *Oakey* (n 2).

<sup>65</sup> *Berowra* (n 2).

<sup>66</sup> *Stanley* (n 2).

<sup>67</sup> *Ex parte Williams* (1934) 51 CLR 545; *Cameron* (n 8); *R v Ross-Jones*; *Ex parte Green* (1984) 156 CLR 185; *R v Gray*; *Ex parte Marsh* (1985) 157 CLR 351; *W v W* (1982) 151 CLR 491.

<sup>68</sup> *Ousley v The Queen* (1997) 192 CLR 69.

<sup>69</sup> *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461.

<sup>70</sup> *Pelechowski* (n 43). In *Cameron* (n 8) only Latham CJ relied on inferior court orders lacking legal effect.

<sup>71</sup> *Pelechowski* (n 43) 446 [29], 449–50 [44]–[46], 452 [53]–[54] (Gaudron, Gummow and Callinan JJ).

<sup>72</sup> *Ibid* 459 [76].

<sup>73</sup> *Ibid* 459–60 [77] (citations omitted).

<sup>74</sup> The proviso also reconciles *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 335 (no authority to order prior restraint of a threatened contempt by the media) and *A-G (NSW) v Mayas Pty Ltd* (1998) 14 NSWLR 342, 357 (non-publication order can only be made in context of a closed hearing).

Third, the proposed change would *not* expand any court's powers or jurisdiction. Even if the change were made, legislators could rely on inferior court designation to establish certain parameters for a court's operation. For instance, the designation could continue to be used so that conferral of jurisdiction will *prima facie* carry only those powers necessary to its exercise,<sup>75</sup> or to indicate limited contempt jurisdiction.<sup>76</sup>

Fourth, it is quite unreal to suppose that the current limited application of superior court effect would be the driving reason for an Australian parliament to establish an inferior ch III court.<sup>77</sup> One theme that comes through very clearly in the written submissions in these appeals and related commentary is that the public interest in finality and certainty in litigation applies equally to all courts. There is no overriding public interest in maintaining the current scope for collateral challenge and contempt in relation to court orders at the expense of finality and certainty; certainly not for courts operating under ch III's entrenched safeguards for institutional integrity and correction of error.

## V Conclusion

There are numerous judicial statements, including from present members of the Court in recent cases, that there is a critical distinction between superior and inferior courts when it comes to the legal force of judicial orders affected by jurisdictional error. In stark contrast, the UKSC has recently held that there is a duty to obey all court orders unless and until set aside, and that this has been the position in UK common law since 1846. In any event, and for the reasons given, the distinction does not align with fundamental principles operating on the integrated system of ch III courts. These appeals present an opportunity for the Court to set a new approach that aligns with the framework that the *Constitution* provides for adjudication by ch III courts. Within that framework, it would be justifiable to recognise that any purported order made by a ch III court acting as a repository of judicial power (that is, with authority to make an order of the kind made on the subject matter of the proceeding) has legal force unless and until set aside.

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<sup>75</sup> But see, as to the 'necessity' touchstone for implied powers, *Pelechowski* (n 43) 451–2 [50]–[51].

<sup>76</sup> *Campbell* (n 7) 251–2; *Rolph* (n 9) 35. Noting an argument that some power to deal with contempt may be an essential characteristic of a ch III court: *Rolph* (n 9) 49–54.

<sup>77</sup> Compare (on judicial immunity) *Commonwealth Reply* (n 33) [22].