

Judges reclaim power from political masters

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HOW far is the High Court prepared to go in reclaiming power from politicians and the parliament?

This has been the defining issue of 2010 for the nation's top court, from the very first decision of the year (Kirk v Industrial Relations Commission) through to one of the final cases for hearing: a challenge to NSW's bikie laws.

Yes, the High Court has been beating up the taxman with a wider view of income and deductions, but it's nothing compared with the rethink on the roles of the executive and judiciary.

There have been seven cases: on bikie laws, offshore processing and specialist courts, that have explored the issue in the past 16 months. It's been one-way traffic.

Although there was a 72 per cent success rate for appellants this year, the second-highest in a decade, those arguing the case for judicial power had a 100 per cent record.

The first step was striking down the Military Court in August last year.

A cartoon by Peter Nicholson in *The Australian* said it all, Chief Justice Robert French barking at some cowering soldiers: "Now who do you think you blokes are, cavorting around the place imagining you're some sort of real court? Twenty push-ups!"

Kirk then took aim at legislation that imposed an absolute liability on employers for accidents and introduced some questionable evidentiary rules to back that up.

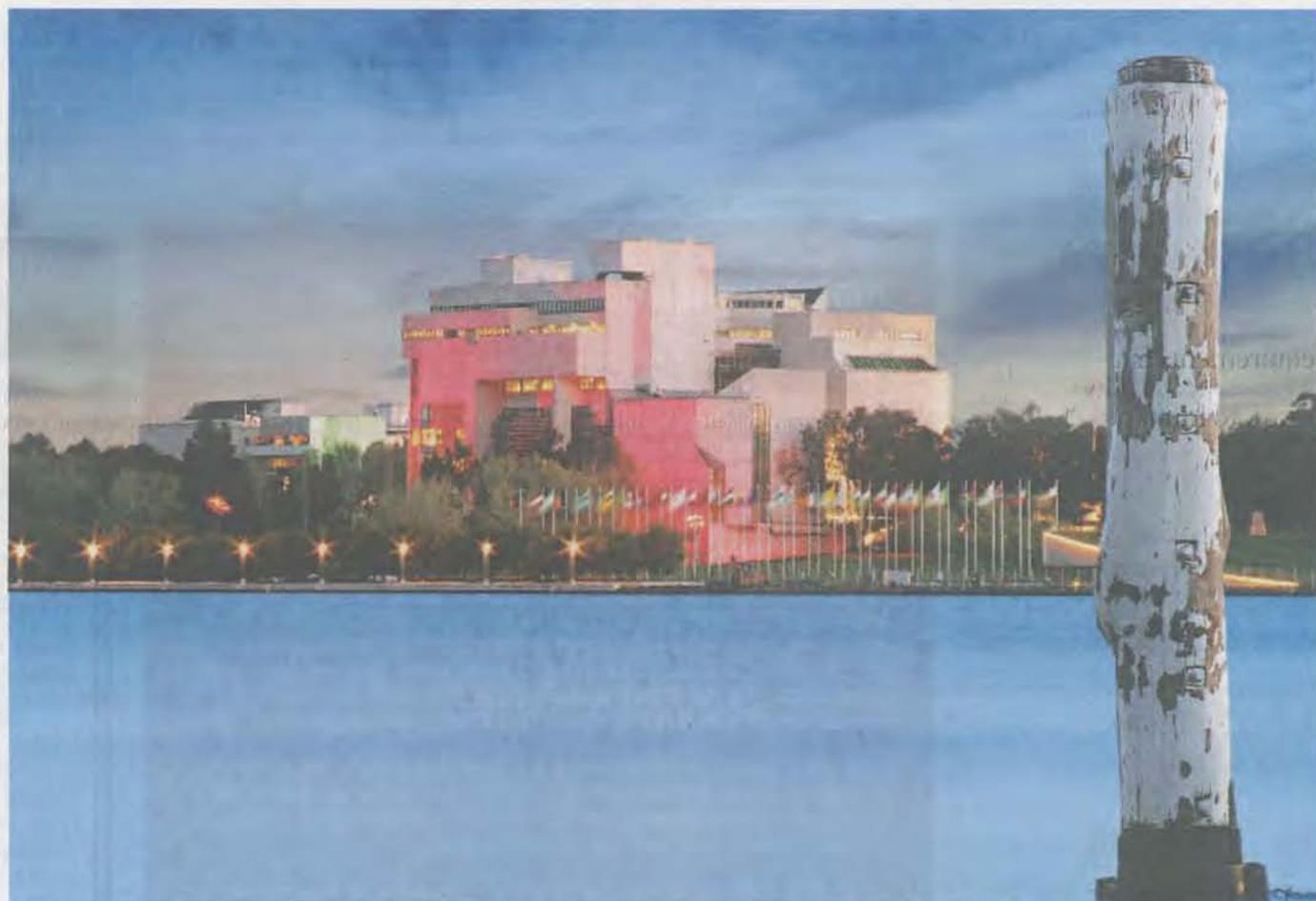
Two offshore processing judgments, Saeed in July and M61 in November, found migration claims were subject to the rules of natural justice and judicial review.

The bikie/crime cases also reflect the shift.

Asset recovery provisions in NSW were found to be invalid late last year because they didn't leave enough discretion for a judge.

Yet many scholars and lawyers didn't see much difference from laws that were waived through in previous years on the fortification of a bikie clubhouse (Gypsy Jokers) and the licensing court in South Australia (K-Generation).

The South Australia bikie laws were then struck down last month with considerable fury.



The High Court of Australia has had a busy year, from its decision on Kirk v IRC to a challenge to NSW's bikie laws

That can happen when legislation says a judge "must" act in a certain way and provides no path for judicial review.

It also meant that last week's challenge to the NSW bikie laws, which are not nearly as prescriptive, assumed greater significance.

One interested observer said if they were declared invalid "then that's the end for this kind of legislation".

The transcript from last week's hearing indicates the bench is, at the very least, sceptical about the NSW laws.

Hells Angels president Derek Wainohu, who engaged the wonderfully named Hardinlaw solicitors, complained the "eligible judges" were "steered" towards a particular result.

There was plenty on the plus side for Wainohu; one question from Justice Susan Kiefel even seemed loaded.

The judge asked about "the length of time that the judge is likely to be involved and therefore taken out of judicial duties".

"And taking up a very nice courtroom," added barrister Mark Robinson.

He explained there were 35 boxes of material, including photos of gang members "at funerals and doing things" and that dealing with the 18 "motor-

cycle clubs" in NSW could take out a year or two of Supreme Court time.

Justice Bill Gummow teased that "we have to be sure we have the Act in the right text if we are going to say bits of it are invalid", an argument that led to an interesting exchange between Justice Kiefel and Mr Robinson.

Justice Kiefel had just shot down his suggestion that the laws violated the implied freedom of free speech and association: "It is directed to prohibit communication and association for the purposes of disrupting criminal activities," the judge said.

"You cannot say that that is directed to communications of a political kind."

So perhaps he should have chosen his words more carefully

when Justice Kiefel opined that "if you could read the legislation down to give effect to the freedom" then a judge could also limit the operation of a control order.

Justice Kiefel: "Could not you actually do that?"

Mr Robinson: "That is possible. That assumes a good judge..."

Justice Kiefel: "All judges are competent."

Mr Robinson: "I have never met a bad one, your Honour..."

Of more concern would have been Justice Virginia Bell opining that the control order provisions were "by no means directing an outcome", Chief Justice Robert French suggesting the judge has to be satisfied and Justice Crennan saying the provision for a closed hearing was not unknown in the context of an exercise of

judicial power. He also didn't get much joy from the Chief Justice when he argued that it was "just not a good look" for a judge to be involved and that it was "simply bone lazy... to say we will just declare all the bad organisations".

"Well, that is not a criterion of invalidity," French said.

And when he thought he was making ground with Justice Ken Hayne on the fact a judge is not compelled to give reasons, Justice Crennan intervened, suggesting "the scale and the fact of the contest... means that an eligible judge is always going to give reasons".

After Kirk, NSW Chief Justice Jim Spigelman said in a speech that there was "now an entrenched minimum provision of judicial review".

When the decision on the NSW bikie laws is handed down, it might be clear just what that minimum is.

It's been an intriguing year, made all the more so by the fact that this reclaiming of judicial power was taking place as the Labor government rejected a charter of rights for Australia.

The explanation? It was concerned that giving judges more power would be divisive.

Next week: The next great dis-

The fate of appeals from lower courts in 2010

	Appeals	Allowed	Dismissed	Year	Allowed	%
NSW	15	9	6	2006	27/58	47
FEDERAL COURT	12	9	3			
VIC	7	6	1	2007	29/54	54
QLD	4	3	1			
SA	2	1	1	2008	32/50	64
FAMILY COURT	1	1	0			
WA	1	1	0	2009	36/47	77
NT	1	1	0			
TOTAL	43	31	12	2010	31/43	72