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WHEN CAN A COURT'S DECISION BE IGNORED?

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It may seem counterintuitive to think that a judicial decision can be ignored. It would seem contrary to the rule of law and to the good governance of our society. Respect for judicial decisions is important. However, the authorities indicate that there are circumstances where a judicial decision can be ignored. In considering when that may occur, it is necessary to draw certain distinctions. First, it is necessary to distinguish between a court's orders and its reasons for judgment. Second, it is necessary to distinguish between different courts — in particular between 'inferior courts' and 'superior courts of record'. And third, it is necessary to distinguish between the different actors who might wish to disregard a judicial decision: an individual, the executive, the legislature or a court. In this paper I will address some of the complexities that arise in answering the question I have posed, by reference to these distinctions.

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I Introduction

It might appear that the answer to the question 'when can a court's decision be ignored?' is obvious. It seems counterintuitive to think we can simply ignore a judicial decision. Surely, you might be thinking, that would be contrary to the rule of the law and to the good governance of our society. Or you might recall Justice Gordon's *Melbourne University Law Review* Annual Lecture from two years ago, where her Honour spoke about the importance of respect for the courts and their decisions, in particular those of the High Court of Australia.[1] So the answer must be 'never'. Or, you might think, 'of course a court decision that has been overturned on appeal can be ignored, but no other judicial decisions can be'. You might agree with Lord Neuberger of the Supreme Court of the United Kingdom, with whom Lords Kerr and Reed agreed:

> [S]ubject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive.[2]

However, in Australia the answer to the question is not so straightforward. The authorities indicate that there are circumstances where a judicial decision *can* permissibly be ignored. In this paper I will address some of the complexities that arise in answering the question I have posed.

It is necessary at the outset to interrogate the question in a little more detail. In particular, it is necessary to explain what I mean by a 'judicial decision'.

1 First, as might already be apparent, I mean the decision of a *court*. Not a decision of a tribunal or any other administrative decision-maker.

2 Secondly, and more importantly, a judicial decision is a term that can refer to both the orders of a court and the reasons the court gives for those orders. So when I speak of ignoring a 'judicial decision', the answer might be

[1] Justice Michelle Gordon, 'The Integrity of Courts: Political Culture and a Culture of Politics' (2021) 44(3) *Melbourne University Law Review* 863, 876, 878–81, 888.

[2] *R (Evans) v A-G (UK)* [2015] AC 1787, 1818 [52] (Lord Neuberger PSC, Lords Kerr and Reed JJSC agreeing) ('*R (Evans)*').

different, depending on whether I am speaking of the court's reasons, or its orders.

In addition, the answer to the question might be different depending on who wishes to do the ignoring: an individual, a parliament, an executive or a court. And the answer might be different, depending on the court in question. Are we talking about the High Court? An intermediate appellate court, such as my own Court? A superior court such as a state Supreme Court or the Federal Court? The County Court (or its equivalent)? Or perhaps the Magistrates' Court (or its equivalent)?

It is also necessary to say something about what I mean by 'ignore'. I have in mind, in particular, circumstances where a person or body puts to one side a judicial decision and does not follow or adhere to it. I do not have in mind circumstances where a body pays attention to a judicial decision, but distinguishes it. Nor do I have in mind circumstances where the Parliament, having considered a judicial decision, resolves to change the law and in that way depart from the decision. In my view, those circumstances do not involve 'ignoring' a judicial decision; they involve engaging with it and taking a legally authorised step to respond to it.

Finally, I note that it is not possible for me to be comprehensive or definitive in my answer to the question I have posed. Rather, I want to provoke reflection on the issues raised by the question.

II The High Court

I want to start by considering the position of the High Court. Can its decisions be ignored? It is, of course, essential in any lecture on constitutional questions in the current milieu to make reference to Alexander Hamilton. Hamilton described the judiciary as 'the least dangerous' branch of government, having 'neither force nor will, but merely judgment'.[3] Hamilton's words are apt to describe the High Court of Australia. The High Court has no police force or other officers capable of enforcing its decisions — for this it relies upon the executive. It has no mechanism for raising funds — for this it relies on the legislature. Yet its authority over matters legal is undisputed. The Court's judgments are obeyed and enforced, even where the other branches disagree with them — although its non-constitutional decisions may be subject to legislative reversal.[4]

[3] Alexander Hamilton, 'The Federalist No 78: The Judiciary Department' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed Ian Shapiro (Yale University Press, 2009) 391, 392.

[4] See HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 67.

In this regard, the High Court's history differs from the Supreme Court of the United States, which has had controversies concerning enforcement of, and obedience to, its judgments. In the 1930s, after the Supreme Court struck down various New Deal measures, President Roosevelt threatened to stack the Court by appointing up to six additional justices.[5] The Court backed down.[6] In 1957, following the decision of the Supreme Court in *Brown v Board of Education of Topeka* ('*Brown*') (concerning the desegregation of schools),[7] federal troops were sent to Arkansas to enforce the decision and protect the nine students seeking to attend Little Rock Central High School.[8] The Governor of Virginia vowed to use 'every legal means' to 'continue segregated schools'.[9] Alabama and other southern states passed laws permitting, or even requiring, school boards to close schools to avoid having black children sit in classrooms with white ones.[10] Further, notwithstanding *Brown*, much of the United States ('US') education system is segregated today.[11]

A more recent example can be found in 2015, following the US Supreme Court's decision recognising a constitutional right for same-sex couples to marry.[12] The Chief Justice of Alabama issued an order directing probate judges in Alabama not to issue marriage licences to same-sex couples,[13] and a county clerk in Kentucky was jailed for her refusal to do so.[14]

5 81 *Congressional Record* 893–6 (Franklin D Roosevelt) (1937, House of Representatives). See also Justin Crowe, 'The Constitutional Politics of the Judiciary' in Mark Tushnet, Mark A Graber and Sanford Levinson (eds), *The Oxford Handbook of the US Constitution* (Oxford University Press, 2015) 197, 210; Leonard Baker, *Back to Back: The Duel between FDR and the Supreme Court* (Macmillan, 1967) 6, 8–9.

6 Crowe (n 5) 210.

7 347 US 483 (1954).

8 Gary Orfield and Susan E Eaton, *Dismantling Segregation: The Quiet Reversal of* Brown v Board of Education (New Press, 1996) vii; Tony A Freyer, 'Politics and Law in the Little Rock Crisis, 1954–1957' (1981) 40(3) *Arkansas Historical Quarterly* 195, 195, 213–14; John A Kirk, 'The Little Rock Crisis and Postwar Black Activism in Arkansas' (1997) 56(3) *Arkansas Historical Quarterly* 273, 274.

9 'Stanley Backs Segregation', *The New York Times* (New York, 26 June 1954).

10 See Nikole Hannah-Jones, 'Segregation Now', *ProPublica* (online, 16 April 2014) <https://www.propublica.org/article/segregation-now-full-text>, archived at <https://perma.cc/B5XZ-5D53>.

11 See ibid.

12 *Obergefell v Hodges*, 576 US 644, 681 (Kennedy J for the Court) (2015).

13 Colleen Jenkins, 'Alabama Chief Justice Orders Halt to Same-Sex Marriage Licenses', *Reuters* (online, 7 January 2016) <https://www.reuters.com/article/us-alabama-gaymarriage-idUSKBN0UK2AR20160106>, archived at <https://perma.cc/25CV-VYJ6>.

14 Ibid; 'Kentucky Clerk Kim Davis Jailed for Denying Same-Sex Marriage Licences on Religious Grounds', *ABC News* (online, 4 September 2015) <https://www.abc.net.au/news/2015-09-

It is difficult to imagine reactions of this kind to decisions of the Australian High Court. Even the Court's most controversial decisions, such as *Australian Communist Party v Commonwealth* ('*Communist Party Case*'),[15] *Commonwealth v Tasmania* ('*Tasmanian Dam Case*'),[16] *Mabo v Queensland [No 2]*,[17] and, most recently, *Love v Commonwealth* ('*Love*')[18] have not sparked civil or governmental disobedience. The Court's authority is such that its decisions are accepted and acted upon, even when they are criticised.[19]

Of course, if the decision is non-constitutional, legislative reversal is possible. Further, if the government is dissatisfied with a decision, it can seek to have the High Court overrule its earlier decision. That is the course that was initially adopted in relation to *Love*, in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, heard in April 2022.[20] In that case, counsel for Mr Montgomery told the Court that about 12 people had obtained their liberty as a result of *Love*: three through court order, and nine through the Commonwealth applying *Love*.[21] That is, the Commonwealth executive obeyed the decision, but took steps to have it overturned. As explained above, I do not consider that that involves ignoring *Love*. I note that in July 2022, the Commonwealth withdrew its appeal,[22] and thus the High Court did not decide whether *Love* was correctly decided.

04/kentucky-clerk-jailed-for-denying-same-sex-marriage-licenses/6748700>, archived at <https://perma.cc/DE3C-UWW8>.

15 (1951) 83 CLR 1, concerning the validity of the dissolution of the Communist Party of Australia: see at 129 (Latham CJ). The ultimate question there was ultimately put to the people at a referendum and rejected: George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 92.

16 (1983) 158 CLR 1, concerning the validity of Commonwealth legislation directed to preventing the construction of a dam across the Gordon River in Tasmania: see at 59–60 (Gibbs CJ).

17 (1992) 175 CLR 1 ('*Mabo [No 2]*'), concerning recognition of native title: see at 15 (Mason CJ and McHugh J).

18 (2020) 270 CLR 152, concerning whether an Aboriginal person can be an 'alien' for constitutional purposes: see at 169 [1] (Kiefel CJ).

19 Such criticisms have been robust, and at times intemperate and inappropriate: see Michael Kirby, 'Attacks on Judges: A Universal Phenomenon' (1998) 72(8) *Australian Law Journal* 599, 600–1. In the aftermath of *Mabo [No 2]* (n 17), for example, a Member of Parliament described the High Court as a bunch of 'pissants': see John Gardiner-Garden, 'The Mabo Debate: A Chronology' (Background Paper No 23, Social Policy Group, Parliamentary Research Service (Cth), 12 October 1993) 20.

20 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, S192/2021, commenced 3 December 2021).

21 Transcript of Proceedings, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* [2022] HCATrans 52, 4789–93 (JT Gleeson SC).

22 'Case S192/2021', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/case_s192-2021>, archived at <https://perma.cc/TMU3-HFJT>.

We might speculate as to why there is this difference between Australia and the US. No doubt cultural and historical differences play some part, as do constitutional differences between the two countries. Australia has no bill of rights, so the High Court is perhaps less often involved in politically charged decisions (but that is not to say it is never involved in such decisions, as *Love* reveals). The appointment process for the High Court is different from that of the US Supreme Court: High Court appointments are by the executive alone, with no legislative involvement, a fact which has tended to result in less politicised appointments.[23] Further, the High Court has generally adopted a legalistic technique that has been said to disguise its power and legitimate its more controversial decisions.[24] And the Court has generally tended to use the rhetoric of 'strict and complete legalism'[25] to explain the proper approach to judicial decision-making.[26] But, whatever the reasons, the High Court's authority has remained respected and observed throughout its history, even when it has handed down politically unpopular decisions.

III When Can a Court's Orders Be Ignored?

Having set the scene with that discussion of the position of the High Court, and recalling the distinction between a court's orders and its reasons, I want to turn now to consider when it is permissible to ignore a court's *orders*. I have in mind orders made in a case in which the individual or the executive is a party to the case. In those circumstances the individual or the executive will be bound by the orders made in such a case.

As a general proposition, if a person who is subject to a court order ignores that order — namely, a direction to do something, or not to do something — they will be in contempt of court.[27] I pause to observe that contempt of court can be punished by imprisonment.[28] Court orders may also be able to be enforced through more direct action, such as through taking possession of a person's property, or through garnisheeing their wages.[29] So, generally, an

[23] See Lee and Campbell (n 4) 85.

[24] Brian Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 242.

[25] James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 648.

[26] See generally ibid 638–49.

[27] See *New South Wales v Kable* (2013) 252 CLR 118, 135 [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Kable (No 2)*').

[28] *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 463 [88] (McHugh J) ('*Pelechowski*').

[29] See ibid 454 [63]; *Aristocrat Technologies Australia Pty Ltd v Allam* (2016) 327 ALR 595, 597 [3], 600 [16]–[17] (Gageler J).

individual, or the executive government, cannot simply ignore the orders of a court — at least not without consequences.

A *Australia: The Distinction between Inferior and Superior Courts*

In articulating the position in relation to obeying court orders, I said that, as a *general proposition*, the orders of a court that bind a person cannot be ignored by that person. That suggests, then, that there might be some atypical cases where the orders of a court can be ignored by a person to whom they are directed. And, indeed, there are. This requires attention to the difference between inferior and superior courts. That is because 'the authority belonging to a judicial order of a court varies between categories of courts'.[30]

Traditionally, a superior court is a court of general or unlimited jurisdiction, and the orders of such a court are reviewable only on appeal.[31] Such a court is presumed to act within its jurisdiction.[32] However, the High Court has cautioned against the 'unthinking transplantation to Australia of what has been said in English cases about the consequences of a court being established as a "superior court of record"', because the Australian constitutional context is different and proper regard must be paid to those differences.[33]

There is no Australian court with unlimited jurisdiction.[34] Thus, although it has been suggested that, in the United Kingdom ('UK'), the prerogative writs of mandamus, prohibition and certiorari were not available to provide relief against the orders of a superior court,[35] that suggestion has no direct application in Australia. Nonetheless, Australia has adopted the concept of a 'superior court', both in the general law[36] and in legislation.[37]

In Australia, the High Court is inherently a superior court.[38] The state Supreme Courts are 'necessarily' superior courts, because they are referred to in s 73 of the *Constitution* and because they are courts of general (albeit not truly

[30] *Kable (No 2)* (n 27) 140 [54] (Gageler J).

[31] See *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 184 [49] (Gaudron J) ('*Re Macks*').

[32] See *Scott v Bennett* (1871) LR 5 HL 234, 248 (Lord Chelmsford); *R v Chancellor of St Edmundsbury and Ipswich Diocese; Ex parte White* [1948] 1 KB 195, 206 (Wrottesley LJ); *Ruhani v Director of Police* (2005) 222 CLR 489, 510 [47] (McHugh J).

[33] *Kable (No 2)* (n 27) 132 [29] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (citations omitted).

[34] Ibid 132 [30].

[35] Ibid 132–3 [30].

[36] See ibid 140 [54]–[56] (Gageler J).

[37] See, eg, *Federal Court of Australia Act 1976* (Cth) s 5(2) ('*FCA Act*').

[38] *Constitution* s 71. See also *Kable (No 2)* (n 27) 140 [54] (Gageler J).

unlimited) jurisdiction under their constitutive legislation.[39] Further, a court may be established by legislation as a superior court even if it does not have general jurisdiction, and even if its orders are subject to supervisory review as well as appeal.[40] The Federal Court of Australia is an example of such a court. Its jurisdiction is confined to the matters set out in ss 75 and 76 of the *Constitution*,[41] and its orders may be set aside pursuant to review under s 75(v) of the *Constitution*, as well as on appeal.[42] But its statute provides that it is a superior court of record.[43]

An inferior court is any court that is not a superior court.[44] Thus, the County Court of Victoria and the Magistrates' Court of Victoria (and their interstate analogues) are inferior courts.[45] (I do not mean that in a pejorative sense, but in a technical legal sense.)

The distinction is important because the orders of a superior court are valid unless and until set aside.[46] That is so even if the court's decision was affected by jurisdictional error[47] — in other words, even if the court made orders that it had no authority to make. Thus the orders of such a court cannot be ignored, at least not without consequences. Such orders must be obeyed and, if a person wished to ignore the orders without consequences, they would need to file an appeal[48] or an application for judicial review, and succeed in having the orders set aside.

This was most starkly illustrated in *New South Wales v Kable* ('*Kable (No 2)*').[49] Gregory Wayne Kable had been sentenced to a term of imprisonment for the manslaughter of his wife.[50] While in prison he wrote threatening letters to various people stating what he would do to them on his release.[51] In response, the New South Wales ('NSW') Parliament passed the now infamous

[39] *Constitution* s 73. See, eg, *Constitution Act 1975* (Vic) s 85(1).

[40] See *Re Macks* (n 31) 184–6 [49]–[53] (Gaudron J).

[41] Ibid 184 [49].

[42] Ibid 185–6 [53].

[43] *FCA Act* (n 37) s 5(2).

[44] See Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) xv.

[45] Ibid.

[46] See *Re Macks* (n 31) 184 [49] (Gaudron J).

[47] *Kable (No 2)* (n 27) 133 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[48] It would be possible, while an appeal is pending, for the court's orders to be stayed, in which case they need not be obeyed: see, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.16. I will not deal with stays in this paper.

[49] *Kable (No 2)* (n 27).

[50] *Kable v DPP (NSW)* (1996) 189 CLR 51, 68 (Dawson J) ('*Kable (No 1)*').

[51] Ibid.

Community Protection Act 1994 (NSW) ('*Community Protection Act*'), which provided for him to be kept in 'preventive detention' at the conclusion of his sentence, by order of the NSW Supreme Court.[52] Justice Levine made such an order for a period of six months.[53] An appeal was dismissed,[54] and Mr Kable then appealed to the High Court.[55] Before that appeal was heard, he was released from detention.[56] The High Court nonetheless heard the appeal and held that the *Community Protection Act* was invalid.[57] That was *Kable v Director of Public Prosecutions (NSW)* ('*Kable (No 1)*').[58]

Mr Kable later brought an action for false imprisonment against the State, based on his detention under the invalid legislation.[59] He was unsuccessful at first instance, but succeeded on appeal to the NSW Supreme Court.[60] However, the High Court upheld the State's appeal.[61] The key reason for doing so was that the original orders made by Levine J, under which Mr Kable had been detained, were orders of a superior court.[62] Therefore, they were valid until they were set aside on appeal, even though it later emerged that the judge lacked jurisdiction to make them.[63] It thus followed that his detention was, at the time it occurred, authorised by a court order, and so there was no basis for a claim of false imprisonment.[64]

In contrast, although the orders of an *inferior court* cannot *generally* be ignored, they can be ignored in certain circumstances: namely, if the inferior court's decision is infected by jurisdictional error. Anyone may ignore such orders, even a person to whom the orders are directed.

Thus it is not a contempt of court to fail to obey the orders of an inferior court that were made in excess of jurisdiction. It is well established that a

[52] *Community Protection Act 1994* (NSW) s 5, as enacted. See also *Kable (No 1)* (n 50) 68 (Dawson J).

[53] See *Kable (No 1)* (n 50) 70.

[54] See *Kable (No 2)* (n 27) 125 [3] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[55] See ibid 125 [4].

[56] See ibid.

[57] *Kable (No 1)* (n 50) 99 (Toohey J), 108 (Gaudron J), 124 (McHugh J), 144 (Gummow J).

[58] Ibid.

[59] *Kable (No 2)* (n 27) 125 [5] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[60] Ibid 125–6 [6]–[7].

[61] Ibid 136 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 136–7 [46]–[47] (Gageler J).

[62] Ibid 136 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also at 147 [77]–[78] (Gageler J).

[63] Ibid 132 [28], 133 [32], 136 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[64] Ibid 136 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 147 [77]–[78] (Gageler J).

judicial order of an inferior court made without jurisdiction 'has no legal force as an order of that court'.[65] If an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it cannot be a contempt.[66] Such an order is a nullity. Any person may disregard it.

However, in the context of inferior courts, a jurisdictional error is not *any* error of law or fact. Rather, it is a more fundamental lack of power to make an order of the kind in question. (In contrast, in relation to administrative decision-makers, a jurisdictional error is considerably broader.)

Thus, as the High Court observed in *Craig v South Australia* ('*Craig*'):

> [A]n inferior court will fall into jurisdictional error for the purposes of the writ [of certiorari] where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.[67]

Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the limits of its functions and powers. The High Court gave some examples in *Craig*:[68]

1 An inferior court would act wholly outside its jurisdiction 'if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge.'[69]

2 An inferior court would act partly outside its jurisdiction if

> in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach …[70]

3 If it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event has in fact occurred, an inferior court

[65] Ibid 140 [56] (Gageler J).

[66] Ibid; *Pelechowski* (n 28) 445 [27], 453 [55] (Gaudron, Gummow and Callinan JJ), 456–7 [71] (McHugh J); *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 357 (McHugh JA).

[67] (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Craig*').

[68] Ibid 177–8. See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–4 [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

[69] *Craig* (n 67) 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[70] Ibid.

will commit a jurisdictional error if it purports to act when that event has not in fact occurred, even though the matter is the kind of matter which the court has jurisdiction to entertain.[71]

4 An inferior court will commit a jurisdictional error if it disregards a matter that the statute establishing it and conferring its jurisdiction requires it to take account of.[72]

5 Similarly, an inferior court will commit a jurisdictional error if it considers a matter that the statute establishing it and conferring its jurisdiction requires it to ignore as a precondition of its authority to make a particular order.[73]

6 Finally, an inferior court will commit a jurisdictional error if it misconstrues the relevant statute and thereby 'misconceives the nature of the function which it is performing or the extent of its powers'.[74]

The Court has cautioned that this list of examples is not a 'rigid taxonomy of jurisdictional error', but rather an elucidation of the broader category of such errors.[75]

Although this seems like quite a long list of possible errors, it is important to bear in mind that it will be relatively rare for a decision of a court to be infected by a jurisdictional error. In that regard, most courts have 'authority to go wrong'[76] or, less elegantly, jurisdiction 'to decide [a] question wrongly'.[77]

So, to build on one of the examples just given, if a court has jurisdiction over civil matters, and power to make an order for an award of damages for negligence, then it will not be a jurisdictional error if the court makes an error in finding that the plaintiff owed a duty of care to the defendant, or if it made an error in calculating the amount of damages. Those are errors within jurisdiction. They can be corrected on appeal or review, but they do not undermine the authority or validity of the order, and a person who ignores such an order would be in contempt of court.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid 177–8.

75 *Kirk* (n 68) 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

76 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J). See also *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 731 (Barton J); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 32 [82] (Gageler J) ('*Probuild*').

77 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid). See also *Probuild* (n 76) 44 [107] (Edelman J).

This approach to the orders of inferior courts reflects a tension between two aspects of the rule of law. The first aspect concerns the importance of people obeying court orders; our system of law turns on such obedience. The second aspect, however, involves a recognition that certain courts are limited in the orders that they are permitted to make — and if a court has strayed beyond its limited power, it will have failed to obey the law, something that ought not be countenanced. The courts, as much as individuals and the executive, are bound by the law of the land, and inferior courts should observe the limits of their jurisdiction.[78] These two policies 'pull in opposite directions'.[79]

In Australia, that latter aspect of the rule of law has prevailed. Inferior courts are not permitted to exceed their jurisdiction and, if they do, their judgments can be ignored. Thus, returning to my topic, in Australia a certain limited category of court orders can, in theory, be ignored — although I also observe that it might not always be clear whether a court has acted beyond jurisdiction, so an individual would be unwise to decide for themselves that that has occurred, and simply ignore a court's orders.

B *A Different Approach: The United Kingdom*

I now want to mention, by way of contrast, a different approach to this issue taken in the UK. The question of whether the executive can ignore orders made by a court or judicial tribunal has arisen in two recent UK Supreme Court cases, and we see there quite a different approach to the status of orders of an inferior court that are infected by jurisdictional error.

First, in *R (Majera) v Secretary of State for the Home Department* ('*Majera*'), an immigration tribunal (called the First-tier Tribunal) constituted by a judge made an order that Mr Majera, who had been subjected to immigration detention, be granted bail, with certain conditions.[80] That order was, in effect, ignored by the Secretary of State: she purported to impose more stringent conditions on Mr Majera, relying on a power under the *Immigration Act 1971* (UK).[81] Mr Majera contended that the Secretary of State could not impose those conditions on him, in light of the bail order.[82] In response, the Secretary of State

[78] See, eg, *Kirk* (n 68) 567–8 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Geoffrey Sawer, 'Error of Law on the Face of an Administrative Record' (1954) 3(1) *University of Western Australia Annual Law Review* 24, 35.

[79] *Kirk* (n 68) 568 [57].

[80] [2022] AC 461, 471 [4]–[5] (Lord Reed PSC, Lords Sales, Leggatt and Burrows and Lady Rose JJSC agreeing) ('*Majera*').

[81] Ibid 471 [7].

[82] Ibid 473 [16].

argued that the bail order did not comply with a relevant legislative requirement and was void and a nullity.[83] Thus, it was said, it could be ignored.[84]

The Supreme Court did not accept the Secretary of State's submission. Lord Reed (with whom Lords Sales, Leggatt and Burrows and Lady Rose agreed) said as follows:

> 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.[85]

His Lordship identified three important points that emerged from *Chuck v Cremer*:[86]

1 First, the duty to obey a court order which has not been set aside is a rule of law, not merely a matter of good practice.[87]

2 Secondly, the rationale of according such authority to court orders is the rule of law, referring to the passage from *R (Evans) v Attorney General (UK)* ('*R (Evans)*') that I quoted at the outset of this paper.[88]

3 Thirdly, 'the rule applies to orders which are "null", as well as to orders which are merely irregular'.[89] Notwithstanding that this might appear to be a paradox, a court order which is a nullity must nonetheless be obeyed unless and until it is set aside.[90]

The Supreme Court was very clear: the proposition that a court order must be obeyed unless and until it is set aside is not confined to orders made by courts possessing unlimited jurisdiction (ie superior courts). It applies also to inferior courts. In *Majera*, the Supreme Court applied that proposition to the tribunal in question:

[83] Ibid.

[84] Ibid.

[85] Ibid 480 [44].

[86] (1846) 1 Coop t Cott 338; 47 ER 884, 885 (Cottenham LC), cited in *Majera* (n 80) 480 [44]–[45] (Lord Reed PSC, Lords Sales, Leggatt and Burrows and Lady Rose JJSC agreeing).

[87] *Majera* (n 80) 481 [45].

[88] *R (Evans)* (n 2) 1818 [52] (Lord Neuberger PSC, Lords Kerr and Reed JJSC agreeing), quoted in ibid. For the prior discussion of *R (Evans)* (n 2), see above n 2 and accompanying text.

[89] *Majera* (n 80) 481 [45] (Lord Reed PSC, Lords Sales, Leggatt and Burrows and Lady Rose JJSC agreeing).

[90] Ibid.

> 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 on the challenge to the decision of the Secretary of State. 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.[91]

The second recent Supreme Court decision is *R (Evans)*.[92] In that case Mr Evans, a journalist, requested disclosure of letters passing between various government departments and HRH The Prince of Wales.[93] The requests were made under two statutes, the *Freedom of Information Act 2000* (UK) ('*FOIA*') and the *Environmental Information Regulations 2004* (UK) ('*EIR*').[94] The Departments refused to disclose the letters on the ground that they considered the letters were exempt.[95] Mr Evans complained and his case made its way to the Upper Tribunal — a judicial body which has the same status as the High Court.[96] The Upper Tribunal decided that many of the letters should be disclosed.[97] The Departments did not appeal this decision, but on 16 October 2012 the Attorney General issued a certificate under the *FOIA* and the *EIR* stating that he had, on 'reasonable grounds', formed the opinion that the Departments had been entitled to refuse disclosure of the letters.[98] If the certificate was valid, its effect would have been to override a decision of the Upper Tribunal.[99]

The Court held that the Attorney General was not entitled to issue the certificate under the *FOIA* in the manner that he did and that the certificate was invalid.[100]

Lord Neuberger (with whom Lords Kerr and Reed agreed) held that the *FOIA* did not permit the Attorney General to override a decision of a judicial tribunal or court by issuing a certificate merely because he, a member of the executive, considering the same facts and arguments, took a different view from that taken by the tribunal or court.[101] This, his Lordship said, would be 'unique in the laws of the United Kingdom' and would 'cut across two constitutional

[91] Ibid 484 [56].

[92] *R (Evans)* (n 2).

[93] Ibid 1806 [1] (Lord Neuberger PSC, Lords Kerr and Reed JJSC agreeing).

[94] *Environmental Information Regulations 2004* (UK) SI 2004/3391, cited in ibid 1807 [3].

[95] *R (Evans)* (n 2) 1807 [3] (Lord Neuberger PSC, Lords Kerr and Reed JJSC agreeing).

[96] Ibid.

[97] Ibid.

[98] Ibid 1806 [1], 1807 [4].

[99] Ibid 1807 [6].

[100] Ibid 1827–8 [86]–[89].

[101] Ibid 1827–8 [89]. See also at 1818 [52], 1820 [58]–[59].

principles which are also fundamental components of the rule of law':[102] that a decision of a court is binding between the parties and cannot be set aside by the executive; and that decisions and actions of the executive are reviewable by the courts, and not vice versa.[103] '[C]rystal clear' statutory language would be required if a statute was to permit the executive to ignore a judicial decision, and the *FOIA* was far from sufficiently clear.[104]

What is most notable about the UK authorities is how completely different the attitude of the UK courts is to the status of judicial orders from the attitude of the Australian courts. In the UK, all judicial orders are treated as valid unless and until they are set aside. Rule of law considerations are paramount in that approach.

The difference no doubt reflects our particular constitutional arrangements. But I am not sure that provides a complete explanation. A more satisfying explanation will have to await a further paper.

C *Can the Executive Ignore Declaratory Orders?*

A discrete issue arises in relation to declaratory relief. It is common in Australia, and in the UK, in cases concerning the executive government, for courts to make declaratory orders that simply state the rights and duties of the parties, rather than orders (such as injunctions) that direct the executive branch to do something. The accepted convention is that the executive will obey such orders, so that there is no need for coercive orders. So, for example, in *Vince v Advocate General for Scotland*, the Court accepted the government's submission that it was unnecessary to make a coercive order against the Prime Minister, since members of the government could be expected to respect a declaratory order.[105]

A similar approach has been adopted in Australia. In *Fauna and Flora Research Collective Inc v Secretary, Department of Environment, Land, Water and Planning (Vic)*, Keogh J observed that declarations

> about past conduct in contravention of statutory duties or prohibitions can clearly carry consequences, not least because of the obligation of the Executive branch to act in accordance with judicial declarations as to the law.[106]

That might have stated the matter more strongly than the UK approach.

[102] Ibid 1818 [51].

[103] Ibid 1818 [52].

[104] Ibid 1820 [58].

[105] 2020 SC 90, 92–3 [3], [6]–[8] (Lord President Carloway for the Court).

[106] [2018] VSC 366, [24].

But what happens if that convention or obligation is breached? That was the subject of a recent UK Supreme Court decision, *Craig v Her Majesty's Advocate*.[107] In that case a court had made a declaration that the failure of the executive branch to bring into force certain legislative provisions that had been passed by the Parliament was unlawful.[108] However, the executive branch did not take steps to bring those provisions into force.[109] The UK Supreme Court was unimpressed.

Lord Reed, with whom Lords Kitchin, Burrows, Stephens and Lloyd-Jones agreed, said this:

> The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which Ministers have failed to comply with court orders (such as *M v Home Office* and the recent case of *R (Majera) v Secretary of State for the Home Department* …), they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard.[110]

IV When Can the Executive Ignore a Court's Reasons?

A more difficult issue arises in relation to the reasons for a court's decision (as opposed to the orders). As Lord Reed pointed out in *Majera*, unlike a court's orders, the reasons given for the orders do not have legal effects.[111] Does that mean that a court's reasons can be ignored?

[107] [2022] 1 WLR 1270 ('*Craig*').

[108] Ibid 1279 [22] (Lord Reed PSC, Lords Kitchin, Burrows and Stephens JJSC and Lord Lloyd-Jones agreeing). The terms of the order were, relevantly, that

> in its continuing failure to bring into force in Scotland the extradition forum bar provisions in section 50 of, and Schedule 20 to, the *Crime and Courts Act 2013*, the UK Government is acting unlawfully and contrary to its duties under section 61 of the Act.

[109] Ibid 1279 [23].

[110] Ibid 1284 [46].

[111] *Majera* (n 80) 476 [28] (Lord Reed PSC, Lords Sales, Leggatt and Burrows and Lady Rose JJSC agreeing).

Of course, an individual is unlikely to have an opportunity to ignore a court's reasons for judgment. They will simply be bound by the orders, but the reasons are unlikely to have ongoing relevance to them. (The issue might be different for a private litigant who is a repeat player, but I put that situation to one side.) The more interesting question is how the *executive* should or must treat a court's reasons for judgment. If the executive abides by the orders in the particular case, can it ignore the court's reasons when it comes to deal with the next, similar case, involving a different person?

This issue caused some controversy in the 1990s and 2000s in relation to the attitude of the Commissioner of Taxation to single-judge decisions of the Federal Court of Australia. As Rachel Davies and Professor Miranda Stewart have explained, following a series of adverse decisions by single judges, the Commissioner had taken the approach that he would not follow a single-judge decision in later cases, pending an appeal of the single-judge decision.[112] That is, he decided that, having complied with the orders made by the judge in the particular case, he could ignore the reasons the judge had given for making those orders.

The Commissioner's approach was based on advices received from the then Solicitor-General, David Bennett QC, with Henry Burmester, that, although it would 'usually be inappropriate and unwise' for the Commissioner not to follow a Full Court decision,[113] in relation to a single-judge decision it would be acceptable to treat the law as unsettled, and thus not to follow the decision, if advice was received that the single-judge decision was wrong in law.[114] The Commissioner took this advice to mean that he was 'not required to follow a single-judge decision if, on the basis of legal advice, there are good arguments that, as a matter of law, the decision is incorrect', at least in circumstances where prompt action is taken to clarify the position (presumably by way of appeal or review of the single-judge decision).[115]

[112] See Rachel Davies and Miranda Stewart, 'The Gatekeeper Court: For the Revenue or for the Taxpayer?' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 213, 233–4.

[113] David Bennett and Henry Burmester, *Application of Precedent to Tax Cases* (Opinion, 15 December 2005) 3 [8] <https://www.ato.gov.au/law/view/pdf/psr/indooroopilly1.pdf>, archived at <https://perma.cc/J9BU-DP48>.

[114] Ibid 3 [9]–[11].

[115] Australian Taxation Office, 'Decision Impact Statement: Commissioner of Taxation v Indooroopilly Childrens Services Pty Ltd', *Australian Taxation Office* (Web Page, 1 September 2007) <https://www.ato.gov.au/law/view/view.htm?docid=LIT/ICD/QUD253OF2006/00001&PiT=99991231235958>, archived at <https://perma.cc/R5QN-WPUX>.

This issue came to a head in *Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* ('*Indooroopilly*').[116] That case concerned the Commissioner's failure to follow the earlier, single-judge decision in *Essenbourne Pty Ltd v Federal Commissioner of Taxation*.[117] The Commissioner submitted that he was not compelled to follow decisions of a single-judge, because the taxpayers were not privy to those decisions, and because there is no principle of estoppel that would bind him to apply those single-judge decisions.[118]

The Full Federal Court expressed concern about this approach. In oral argument, the bench indicated that the proposition that 'the Commissioner does not have to obey the law as declared by the courts until he gets a decision that he likes was astonishing'.[119] More formally, in the judgment, Allsop J said as follows:

> I wish, however, to add some comments about the attitude apparently taken by, and some of the submissions of, the appellant. From the material that was put to the Full Court, it was open to conclude that the appellant was administering the relevant revenue statute in a way known to be contrary to how this Court had declared the meaning of that statute. Thus, taxpayers appeared to be in the position of seeing a superior court of record in the exercise of federal jurisdiction declaring the meaning and proper content of a law of the Parliament, but the executive branch of the government, in the form of the Australian Taxation Office, administering the statute in a manner contrary to the meaning and content as declared by the Court; that is, seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament by the former. This should not have occurred. If the appellant has the view that the courts have misunderstood the meaning of a statute, steps can be taken to vindicate the perceived correct interpretation on appeal or by prompt institution of other proceedings; or the executive can seek to move the legislative branch of government to change the statute. What should not occur is a course of conduct whereby it appears that the courts and their central function under Ch III of the *Constitution of the Commonwealth* are being ignored by the executive in the carrying out of its function under Ch II of the *Constitution*, in particular its function under s 61 of the *Constitution* of the execution and maintenance of the laws of the Commonwealth.[120]

116 (2007) 158 FCR 325 ('*Indooroopilly*').

117 (2002) 51 ATR 629.

118 *Indooroopilly* (n 116) 346–7 [44] (Edmonds J).

119 Ibid 347 [45].

120 Ibid 326–7 [3].

Justice Allsop also observed that '[t]here was some inferential suggestion in argument' that the Commissioner was somehow bound by legislation — which was not specifically identified — to administer the relevant legislation by reference to his own view of the law and his own view of the meaning of statutory provisions, 'rather than by following what the courts have declared'.[121] His Honour was plainly sceptical of this argument, and observed that 'any such provision would require close scrutiny'.[122]

Not long afterwards, on the hearing of the special leave application in *Petroulias v The Queen*, the following exchange occurred:

> GLEESON CJ: It is surprising that a circumstance could arise in which Justice Allsop should feel it necessary to say what he said …
>
> MR HASTINGS: Yes, I am not aware of that, your Honour, but I can say in relation to the …
>
> GLEESON CJ: It sounds as though somebody needs some instruction in basic civics.[123]

Of even greater interest is that, after the decision in *Indooroopilly*, the Commissioner obtained further advice from the then Solicitor-General, with Mr Burmester and Mr Hmelnitsky, asking whether the remarks in *Indooroopilly* altered their previous advice.[124] Their answer was 'no'.[125] They said that they did not consider that those remarks meant that the Australian Taxation Office ('ATO') 'must always follow' the reasons for judgment of a single judge.[126] They again stated that a single judge's reasons need not be followed if there are good legal arguments that the decision is wrong, and if action is being taken to clarify the position, preferably by way of an early test case.[127] However, they emphasised that that did not mean that the ATO is 'generally free to ignore judicial decisions' in private rulings.[128] They also stated that once there is a series of

121 Ibid 327 [7].

122 Ibid.

123 Transcript of Proceedings, *Petroulias v The Queen* [2007] HCATrans 92, 347–55.

124 David Bennett, Henry Burmester and James Hmelnitsky, *Application of Precedent to Tax Cases: Further Opinion on Declaratory Proceedings* (Advice, 18 June 2007) 22 [66] <https://www.ato.gov.au/law/view/pdf/psr/indooroopilly3.pdf>, archived at <https://perma.cc/FLS8-RPAY>.

125 Ibid 22 [67].

126 Ibid 23 [68].

127 Ibid.

128 Ibid.

decisions expressing the same view, 'it will always be more difficult to justify' ignoring those decisions.[129]

Thus the formal advice to the ATO was that it could ignore the reasons of the Full Court insofar as those reasons were to the effect that the ATO could not ignore a court's reasons for decision![130]

Lest it be thought the Commissioner's attitude was an isolated example, similar issues had also arisen in relation to the Collector of Customs,[131] and had previously been the subject of a paper by Professor Dennis Pearce, reflecting on his experience as the former Commonwealth Ombudsman. He said this:

> It is a nice point whether a decision of a single judge adverse to an agency should be followed where the agency intends to appeal against the judgment. It could be said, for example, that where a ruling extended the range of persons eligible for benefit under an Act, an agency is entitled to decline to pay such benefits until the issue in contention has been contested on the appeal. To do otherwise would be to make payments that might well be unlawful and have to be recovered. … This is a defensible approach to take although it may have certain technical difficulties in terms of the doctrine of stare decisis. More problematical, however, is where the decision of the lower court holds a regulation invalid. If the agency ignores this ruling pending an appeal and enforces the regulation, it will be taking action that is invalid if the appeal is subsequently dismissed. … In cases of this kind, it seems that the appropriate action to take is to remake the regulation in a form that will withstand challenge, notwithstanding the view that the ruling of the court may not be correct. To act otherwise elevates the Department's opinion over that of the judge and constitutes a clear challenge to the rule of law.
>
> An even more worrying situation that came to my attention was a case where a department did not accept that a ruling of the court was correct, but it did not wish to appeal against the decision because of the facts of the particular case. Rather, it indicated that it simply would not follow the ruling in its future decision-making. This is nothing short of a refusal to adhere to the rule of law because it does not accord with the view that the agency takes of the law.[132]

[129] Ibid 23 [69].

[130] Ibid 22–3 [66]–[69].

[131] See *Collector of Customs v LNC (Wholesale) Pty Ltd* (1989) 19 ALD 341, 342, where Davies J said:

> It has been rumoured for some time that the Collector of Customs has been reluctant to give effect to decisions of this court and of the Administrative Appeals Tribunal, … reluctant to change a decision once made, and reluctant to give practical effect in monetary terms to a decision of this court or of the Tribunal which is contrary to a decision of the collector.

[132] Dennis Pearce, 'Executive versus Judiciary' (1991) 2(3) *Public Law Review* 179, 189–90.

Justice McHugh made reference to Professor Pearce's paper in a speech, saying this:

> No doubt an Executive agency is entitled to disregard a decision where it is truly in conflict with another decision that it thinks is correct. It may sometimes also be justifiable to refuse to follow a decision that is the subject of appeal. But that has problems. Judicial decisions are not provisional rulings until confirmed by the ultimate appellate court in the system. Until set aside, they represent the law and should be followed. Moreover, the Executive can run into serious legal problems where it continues to enforce legislation that a court has ruled invalid. Even more difficult to justify is the refusal to follow a ruling that is not the subject of appeal merely because the agency regards it as wrong and will test it at the next opportunity.[133]

On the other hand, a former justice of the Federal Court, the Hon Daryl Davies, has argued that the Commissioner is not bound to 'apply immediately every statement of law adumbrated by a judge or judges', because '[a] decision of a court binds the parties but it does not bind either of the parties in other litigation with other people'.[134] He pointed out that there would always be some cases where the Commissioner could not appeal the judgment in question.[135] In those circumstances, he argued, if the Commissioner was advised that a judicial decision may be wrong and should be tested before a Full Court, the only way to achieve this is for the ATO to issue an assessment or give a private ruling contrary to the interpretation applied by the single-judge decision.[136] Otherwise, the possibly wrong decision may never be able to be reconsidered.[137]

Although there has not been any recent controversy of this kind, Professor Margaret Allars observed in 2015 that the Commissioner's position in relation to single-judge decisions does not appear to have changed very much.[138]

[133] Justice McHugh, 'Tensions between the Executive and the Judiciary' (Speech, Australian Bar Association Conference, 10 July 2002) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_paris.htm>, archived at <https://perma.cc/3S25-FU9W>.

[134] Daryl Davies, 'The Relationship between the Commissioner of Taxation and the Judiciary' (2007) 41(11) *Taxation in Australia* 630, 631.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Margaret Allars, 'Executive versus Judiciary Revisited' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 49, 76.

A somewhat different issue arose in *Plaintiff M61/2010E v Commonwealth*,[139] a High Court decision concerning executive decision-making about whether particular individuals were refugees — that is, persons to whom Australia owed protection obligations under the *Convention Relating to the Status of Refugees*.[140] The Commonwealth had set up what it called a 'non-statutory' decision-making process, whereby a 'reviewer' (who was not a member of the executive, but who was engaged under contract to perform work for the executive) would determine whether Australia owed such obligations.[141] The reviewers were informed that, although they may be 'guided' by Australian case law on the interpretations of the definition of a refugee and 'protection obligations', these decisions were — and I quote — 'not binding authorities'.[142] These decisions included, of course, decisions of the High Court.

The High Court was underwhelmed by this attitude to its decisions (and the decisions of other courts). It held that the reviewer had erred in determining that Australia did not owe protection obligations to the plaintiffs.[143] It observed that when the executive (and its contractors) were considering whether Australia owed such obligations, 'relevant case law' had to be treated as binding upon those who made the assessments, not just as aids or guides to decision-making.[144]

V When Can a Court Ignore a Court's Decision?

A *When Can a Court Ignore the Reasons of Another Court?*

There are a lot of courts in Australia. Within each state and territory, there is a court hierarchy, from the Magistrates' Court up to the High Court, to which the doctrine of precedent applies. This means it is necessary to consider how a lower court deals with the decisions of courts higher in the hierarchy, as well as how courts deal with decisions of other courts that are at the same level in the judicial hierarchy. And here my focus is on the reasons for decision, rather than on the orders made.

139 (2010) 243 CLR 319 ('*Plaintiff M61*').

140 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

141 *Plaintiff M61* (n 139) 333 [3], 344 [47] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

142 Ibid 344 [47].

143 Ibid 360 [105].

144 Ibid 356 [88]. See also at 358 [97].

1 *When Can a Court Ignore the Reasons of a Higher Court?*

As for the first of those matters, it is trite to observe that a lower court must follow the ratio decidendi of a decision of a higher court. That, of course, can raise some difficult issues concerning what the ratio of a particular case is. I recall one of the most difficult exchanges I observed in the High Court was a discussion between Gleeson CJ and Stephen McLeish (when his Honour was still a junior barrister) concerning the ratio of the *Communist Party Case*.[145] McLeish gave an excellent answer, although I note that Gummow J came to his aid by observing that the ratio was hard 'to distil'.[146]

Assuming, however, that a ratio can be identified, it must be followed by a lower court. But what of statements in a judgment that are not the ratio? That is, what about obiter dicta — something said by a judge while giving judgment that was not essential to the decision in the case? Such remarks do not form part of the ratio and therefore create no binding precedent; however, obiter remarks may be persuasive in later cases. By definition, one might think, a lower court does not have to follow obiter remarks of a higher court, although no doubt they would be highly persuasive.

However, that is not quite right, at least where the higher court is the High Court. In a case that is no doubt etched in the minds of intermediate appellate court judges, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Constructions*'), a unanimous five-judge bench of the High Court stated that an intermediate appellate court should not develop the law in the face of 'seriously considered dicta' of a majority of the High Court.[147] That would be, they said, a 'grave error'.[148] Those are strong words coming from the High Court.

Keith Mason, the then President of the NSW Court of Appeal, and a member of the court to which those remarks were directed, described the High Court as effecting a 'profound shift in the rules of judicial engagement'.[149]

Of course, one might ask, how do we tell 'seriously considered dicta' from other forms of dicta (apparently less seriously considered)? Perhaps one day I shall find out the hard way the answer to that question.

[145] Transcript of Proceedings, *Thomas v Mowbray* [2006] HCATrans 661, 5603–15, 5626–36 (Gleeson CJ and SGE McLeish).

[146] Ibid 5617 (Gummow J).

[147] (2007) 230 CLR 89, 151 [134], 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[148] Ibid 149 [131].

[149] Justice Keith Mason, 'President Mason's Farewell Speech' (2008) 82(11) *Australian Law Journal* 768, 769. See generally Matthew Harding and Ian Malkin, 'The High Court of Australia's Obiter Dicta and Decision-Making in the Lower Courts' (2012) 34(2) *Sydney Law Review* 239.

A further question that flows from *Farah Constructions* is the extent to which this approach to dicta applies to a single judge considering the seriously considered dicta of an intermediate appellate court. The High Court has held that this approach does not apply in that context. It said this:

> *Farah Constructions* identified two decision-making principles. The first is that an intermediate appellate court should not depart from seriously considered dicta of a majority of this Court. The second is that neither an intermediate appellate court nor a trial judge should depart from a decision of another intermediate appellate court on the interpretation of Commonwealth legislation, uniform national legislation or the common law of Australia unless convinced that the interpretation is plainly wrong or, to use a different expression, unless there is a compelling reason to do so.
>
> Although both principles are directed to ensuring coherence in the law, the principles are distinct. The first concerns the relationship between an intermediate appellate court and this Court. The second concerns the relationships between intermediate appellate courts and between intermediate appellate courts and trial judges. In that latter context, intermediate appellate courts and trial judges are not bound to follow obiter dicta of other intermediate appellate courts, although they would ordinarily be expected to give great weight to them.[150]

Finally, it is necessary to observe that the reasons of a higher court may be put to one side if it is possible to distinguish the case at hand from the earlier, higher court case. It is not necessary to say more about that at present.

2 *When Can a Court Ignore the Reasons of a Coordinate Court?*

A different issue arises when another court of the same level has decided an issue involving a federal statute in a particular way — whether in the same state or territory, or in a different state or territory. In those circumstances, the practice of judicial comity requires the court to follow the decision of the coordinate court unless it is of the view that the decision is 'plainly wrong'.[151] That is a higher standard than simply 'wrong'. It has been said that that expression requires 'the strong conviction of the later court that the earlier judgment was

[150] *Hill v Zuda Pty Ltd* (2022) 401 ALR 624, 630 [25]–[26] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) (citations omitted).

[151] In relation to single judges, see, eg, *Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation* [1982] 1 NSWLR 113, 119 (Rogers J); *Re Amerind Pty Ltd (in liq)* (2017) 320 FLR 118, 176–7 [289]–[293] (Robson J), and the authorities there cited. In relation to intermediate appellate courts, see, eg, *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 411–12 [49] (Gummow, Heydon and Crennan JJ).

erroneous and not merely the choice of an approach which was open, but no longer preferred'.[152] That is, it involves a degree of deference to the other court, in the interests of promoting certainty and consistency in the law.[153] But it leaves some 'wiggle room' for one court to disagree with another court at the same level of the judicial hierarchy.

This applies to both trial judges considering a decision of another trial judge, and to appellate courts considering a decision of another appellate court. But when an appellate court is considering overruling one of its own decisions, some courts — mine included — have adopted a practice of having a five-judge bench.[154]

As for the High Court, it does not regard itself as bound by its own decisions: it has power to depart from its previous decisions. It has observed, in relation to decisions concerning statutory provisions, that

> the justification for not following an earlier decision construing a statute must be that in the view of the Court that earlier decision was wrong, that it was wrong in a significant respect, and that the Court should give effect to the intention of the Parliament.[155]

That is, the Court must give effect to what it considers to be a correct view of the law. As Isaacs J put it in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia*:

> The oath of a Justice of this Court is 'to do right to all manner of people *according to law*.' Our sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.[156]

[152] *Gett v Tabet* (2009) 254 ALR 504, 565 [294] (Allsop P, Beazley and Basten JJA).

[153] *Hili v The Queen* (2010) 242 CLR 520, 537–8 [56]–[57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[154] CJF Kidd, 'Stare Decisis in Intermediate Appellate Courts: Practice in the English Court of Appeal, the Australian State Full Courts, and the New Zealand Court of Appeal' (1978) 52(5) *Australian Law Journal* 274, 277.

[155] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) ('*John*'). See also *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 424 [66] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Barns v Barns* (2003) 214 CLR 169, 205 [104] (Gummow and Hayne JJ).

[156] (1913) 17 CLR 261, 278 (emphasis in original) ('*Australian Agricultural Co*').

However, the Court has observed that overruling is not undertaken lightly.[157] In that regard, the High Court considers that four matters are relevant when the Court is considering whether to depart from an earlier decision:[158]

1 whether the 'earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases';[159]

2 whether there is 'a difference between the reasons of the justices constituting the majority in one of the earlier decisions';[160]

3 whether 'the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience';[161] and

4 whether 'the earlier decisions had not been independently acted on in a manner which militated against reconsideration'.[162]

Further, there are particular reasons for the High Court to be more willing to depart from its earlier constitutional decisions, as they cannot be altered by legislation.[163]

B *When Can a Court Ignore Its Own Orders?*

Finally, I want to consider when a court can ignore orders that it has made itself. That is, what if a court has made orders, but realises that it had no power to make those orders? This requires consideration of the doctrine of *functus officio*. A court is *functus officio* if it has given a final and conclusive judgment or decree as to the merits of a case, so as to exhaust its powers and jurisdiction in respect of that case. This rule is important mainly if an attempt is made to induce the court to vary or rescind such a final and conclusive judgment. In *Cameron v Cole* ('*Cameron*'), Rich J formulated this rule in the following words: '[A] court which, after a real trial, has given a valid decision determinative of

157 *Queensland v Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J), 602 (Stephen J), 620 (Aickin J).

158 *John* (n 155) 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), citing *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 56–8 (Gibbs CJ, Stephen J agreeing at 59, Aickin J agreeing at 66).

159 *John* (n 155) 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

160 Ibid.

161 Ibid.

162 Ibid 438–9.

163 See, eg, *Australian Agricultural Co* (n 156) 274–9 (Isaacs J).

right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.'[164]

The consequence would appear to be that a court cannot ignore its own final orders and simply make new and different orders in the same case. (I put to one side interlocutory orders, which are different.) But the use of the qualifier 'valid' in the passage from *Cameron* is to be noted.

In *Director of Public Prosecutions (Vic) v Edwards*, the Victorian Court of Appeal split on the question of the consequences of a jurisdictional error committed by an inferior court.[165] The County Court made a sentencing order that, on any view, it had no power to make. It had misunderstood the scope of its power. But it had sentenced the offender and the sentence had passed into the record. The Court then purported to set aside the first sentence and impose a fresh sentence.[166] Could it do so, or was it *functus officio*?

Chief Justice Warren held that the County Court was not *functus officio* and could correct its error.[167] Her Honour addressed three key questions:[168]

1 First, was the County Court's error jurisdictional in nature? She held that it was.[169] The Court had 'misconceive[d] … the extent of its powers', to use the language of *Craig*.[170]

2 Secondly, at common law does an order of an inferior court affected by jurisdictional error nonetheless have sufficient legal effect to trigger the *functus officio* doctrine? She held that it did not because, as discussed above, inferior court orders made in excess of jurisdiction generally lack legal effect.[171]

3 Thirdly, if at common law the Court was not *functus officio*, had the Parliament altered the position so as to give the purported order sufficient legal effect to attract the operation of the *functus officio* doctrine? Her Honour concluded that there had been no statutory alteration of the common law

[164] (1944) 68 CLR 571, 590.

[165] (2012) 44 VR 114, 161–2 [230] (Weinberg JA and Williams AJA, Warren CJ dissenting at 127 [51]) ('*Edwards*').

[166] Ibid 118 [2], 128–9 [57] (Warren CJ), 144–5 [141], [145] (Weinberg JA and Williams AJA).

[167] Ibid 135 [98].

[168] Ibid 126 [46].

[169] Ibid 131 [67].

[170] Ibid 128–9 [57], quoting *Craig* (n 67) 177–8 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[171] *Edwards* (n 165) 133 [81].

> position that would give some legal effect to a County Court order vitiated by jurisdictional error.[172]

Thus Warren CJ held that the original sentence was a nullity and that it was open to the County Court to re-sentence the offender.[173]

In contrast, Weinberg JA and Williams AJA held that the County Court could *not* impose a fresh sentence: it was *functus officio* and the fact it had made a jurisdictional error in the first sentence did not affect the operation of the *functus officio* doctrine.[174] In this regard they overruled the earlier decision of the Victorian Court of Appeal in *R v Brattoli*.[175]

There are persuasive policy arguments on both sides of this case. On the one hand, there is obvious force in the proposition that, once made, a judicial order, whether of a superior or inferior court, should not be treated as a nullity, for that would allow a person subject to such an order simply to ignore it. Could a person sentenced to a term of imprisonment simply leave the prison, and not be guilty of escaping custody?[176] Justices Weinberg and Williams thought that such an analysis would bring the law into disrepute.[177] This approach also leads to uncertainty for those subject to court orders or charged with carrying them out.

On the other hand, to recognise a power of self-correction where a court realises it has made a jurisdictional error has practical benefits in removing the need for a formal appeal or judicial review. It is a power that would be exercised by judges, acting judicially, and there is some merit in permitting that course. This has been recognised in other states that have clear statutory provisions dealing with the correction of error by inferior courts.[178] Indeed, the *Sentencing Act 1991* (Vic) has now been amended to give the courts of Victoria the same power.[179]

[172] Ibid 135 [97].

[173] Ibid 135 [98].

[174] Ibid 150 [169], 161–2 [230]–[237] (Weinberg JA and Williams AJA).

[175] [1971] VR 446, 448 (Winneke CJ for the Court), discussed in ibid 162 [231]–[236] (Weinberg JA and Williams AJA).

[176] This example is given in *Edwards* (n 165) 161 [225] (Weinberg JA and Williams AJA), quoting *R v Swansson* (2007) 69 NSWLR 406, 432 [162] (Simpson J).

[177] *Edwards* (n 165) 161 [226].

[178] See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43.

[179] *Sentencing Act 1991* (Vic) s 104B.

VI Conclusion

I hope by this point in the analysis you will have appreciated the complexity of the apparently simple question I set out to address. The question reveals tensions between the various branches of government, and between various aspects of the rule of law. Different approaches to this question have been taken in other jurisdictions.

I want to finish by observing that, at the international level, judicial decisions have an even greater chance of being ignored. The International Court of Justice ('ICJ') — to which our very own Professor Hilary Charlesworth was recently appointed[180] — perhaps epitomises Hamilton's proposition that the judiciary is the least powerful branch. Although its judgments are binding on member states, it has no real recourse to enforcement measures for its judgments,[181] and there are various examples of States simply ignoring ICJ decisions.[182]

[180] 'University Laureate Professor First Australian Woman To Be Elected to International Court of Justice', *The University of Melbourne* (Blog Post, 6 November 2021) <https://www.unimelb.edu.au/newsroom/news/2021/november/university-laureate-professor-first-australian-women-to-be-elected-to-international-court-of-justice>, archived at <https://perma.cc/VCN7-HQ2E>.

[181] Under the *Charter of the United Nations*, noncompliance with an ICJ judgment is dealt with in art 94(2), which provides that

> [i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

That brings into play the veto power of the permanent members of the Security Council, and the question of what enforcement measures the Security Council could recommend or would consider recommending. In that regard, the relationship between art 94(2) and the Security Council's general powers is unclear. As Professor Reisman has observed:

> Security Council decisions may commission armed force or measures short of such force only if peace is threatened. Clearly not every act of non-compliance constitutes an imminent threat to the peace. Were Article 94(2) an independent form of action, by-passing the need for a finding of a threat to the peace, it would have enormous constitutional and enforcement significance; on the juridical level, at least, it would make the United Nations a real international enforcer.
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> WM Reisman, 'The Enforcement of International Judgments' (1969) 63(1) *American Journal of International Law* 1, 15 (emphasis omitted) (citations omitted).

[182] For example, the US ignored the ICJ's decision in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 146–9 [292] ('*Nicaragua*'): Martin Cleaver and Mark Tran, 'US Dismisses World Court Ruling on Contras', *The Guardian* (online, 28 June 1986) <https://www.theguardian.com/world/1986/jun/28/usa.marktran>, archived at <https://perma.cc/HLN6-RF87>. Israel also ignored the ICJ's advisory opinion in *Legal Consequences of the Construction of a Wall*

The most recent example, of course, is the ICJ's issue of provisional measures — a kind of interlocutory order — in relation to the Russian invasion of Ukraine.[183] The Court ordered Russia to immediately suspend its military operations in the territory of Ukraine.[184] Although orders of this kind are binding under the ICJ's statute,[185] the ruling does not appear to have had any significant impact on Russia's military action.[186] I note that Russia did not participate in the ICJ hearing, and claimed the Court had no jurisdiction.[187]

in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, 201–3 [163] in relation to the wall in Palestine: Linah Alsaafin, 'Israel's Separation Wall Endures, 15 Years after ICJ Ruling', *Al Jazeera* (online, 9 July 2019) <https://www.aljazeera.com/news/2019/7/9/israels-separation-wall-endures-15-years-after-icj-ruling>, archived at <https://perma.cc/EP5G-F2AV>. Compliance with provisional measures has been particularly poor: Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004) 3. However, this can partly be explained by the fact that the binding nature of provisional measures was unclear until *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 506 [109] ('*LaGrand*') was decided in 2001. I also note that views on compliance differ; for example, Aloysius Llamzon has argued that, since the *Nicaragua* (n 182) decision, 'almost all of the Court's decisions have achieved substantial, albeit imperfect, compliance': Aloysius P Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18(5) *European Journal of International Law* 815, 815.

183 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Provisional Measures)* (International Court of Justice, General List No 182, 16 March 2022) 18–19 [86] ('*Ukraine v Russian Federation*').

184 Ibid.

185 *Statute of the International Court of Justice* art 41, discussed in *LaGrand* (n 182) 506 [109].

186 See, eg, Luke Harding, Dan Sabbagh and Isobel Koshiw, 'Russia Targets Ukraine Energy and Water Infrastructure in Missile Attacks', *The Guardian* (online, 31 October 2022) <https://www.theguardian.com/world/2022/oct/31/russian-missiles-kyiv-ukraine-cities>, archived at <https://perma.cc/4BR2-LDWU>.

187 *Ukraine v Russian Federation* (n 183) 5 [16].