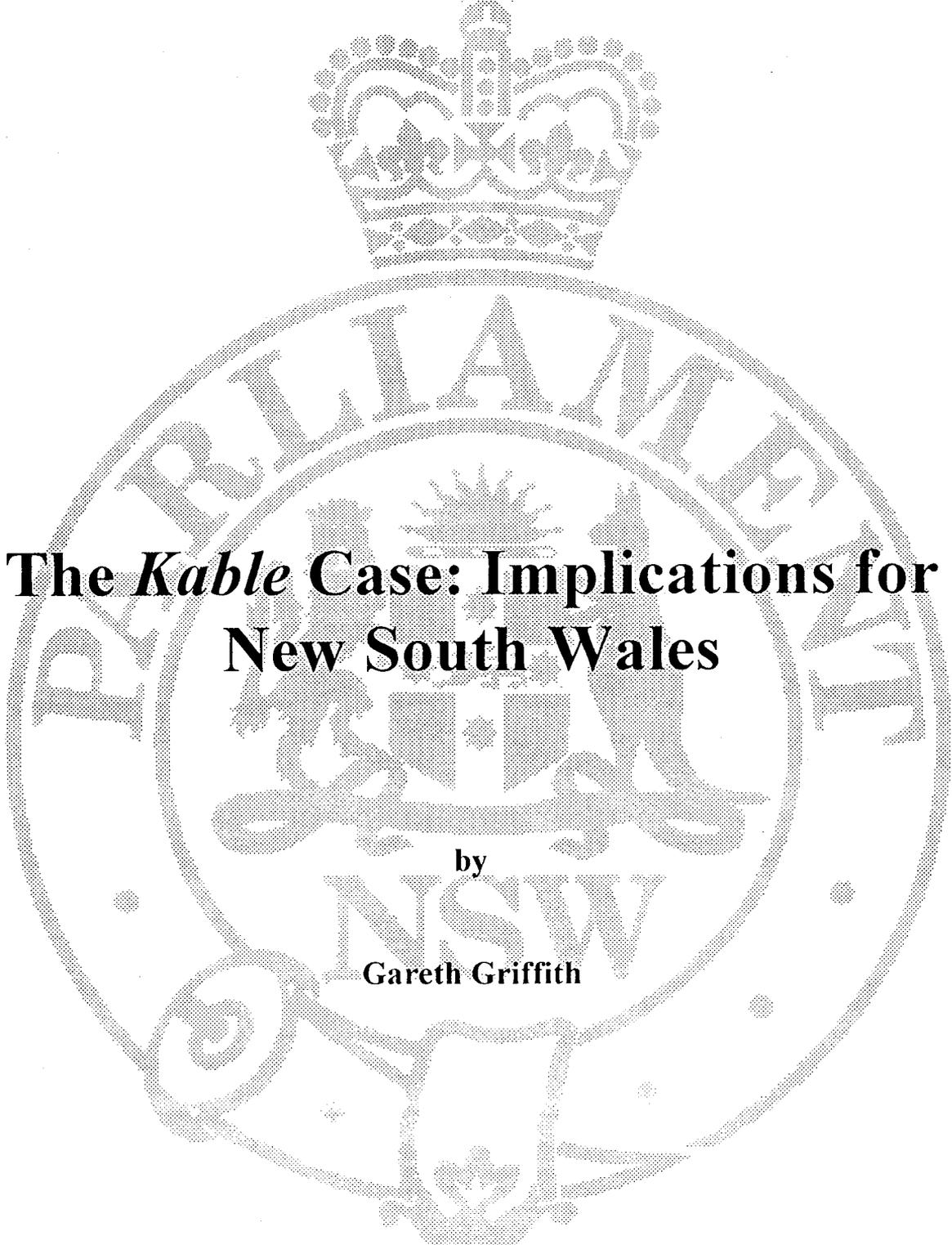


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**The *Kable* Case: Implications for  
New South Wales**

by

**Gareth Griffith**

**Briefing Paper No 27/96**

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October 1996

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## EXECUTIVE SUMMARY

This paper explores the possible implications for New South Wales of the recent High Court decision in *Kable v Director of Public Prosecutions (NSW)* (unreported, High Court of Australia, 12 September 1996). By a majority of 4-2 the decision held that the *Community Protection Act 1994* (NSW) was invalid. The paper's main findings are as follows:

- on 25 February 1995 Levine J in the NSW Supreme Court made a six month preventive detention order against Gregory Wayne Kable (henceforth, Kable). The order was made under section 5(1) of the *Community Protection Act 1994*, the application of which was confined to Kable alone (page 4);
- Kable's submissions before the High Court had two main limbs: (i) the CPAct involved a usurpation of judicial power by the State Parliament which contravened the entrenchment of the judiciary under Part 9 of the NSW *Constitution Act 1902*; (ii) the Act required the Supreme Court to undertake a function that was incompatible with the integrity of the judiciary, thereby contravening Chapter III of the Commonwealth Constitution which requires the State courts vested with federal judicial power to keep themselves free from such incompatibility in order that they remain suitable receptacles of that power. The assumption seems to have been that both limbs had as their common trunk the doctrine of the separation of powers (page 5);
- in Australia the core meaning of the separation of powers doctrine has revolved around the independence of the judiciary from either the legislature or the executive. Traditionally, the view has been that the separation of powers doctrine does not operate in the States in any formal way, at least as a 'legal restriction on power' (pages 6-9);
- none of the majority judgments relied on the submission based on Part 9 of the NSW Constitution. Instead, the balance of the reasoning in the case was on Chapter III of the Commonwealth Constitution (page 10);
- whilst varying somewhat as to detail, all the majority judgments agreed that a version of the Chapter III argument could be held to apply, but without finding that the separation of powers doctrine applies in the States, at least in a direct way (page 10);
- the focus, rather, is on the institutional integrity of the courts themselves, most notably the State Supreme Courts, which are said to be entrenched under Chapter III of the Commonwealth Constitution. In this context, Australia is said to have an integrated legal system with the High Court at its apex (page 18);
- the relevant test to be applied in this context is that of incompatibility of function, understood in relation to the maintenance of public confidence in the integrity and independence of those courts vested with federal jurisdiction (page 17);
- the *Community Protection Act 1994* (NSW) was found to fail that test because, in providing for the virtual imprisonment of Kable without a finding of guilt, federal

judicial power was not exercised 'in accordance with the judicial process'. Thus, the decision would appear to extend the requirement of procedural due process to those State courts vested with federal jurisdiction (page 18);

- furthermore, McHugh J at least makes it clear that courts exercising federal judicial power must be perceived to be free from legislative or executive interference and that this requirement is not restricted to where a State court which is vested with federal jurisdiction is actually exercising federal judicial power. Indeed, the requirement would apply to the exercise of the court's non-judicial functions, as well as to the appointment of a judge as *persona designata* (the term is defined at Note 11, page 5). In this way, applying the principles underlying Chapter III may lead to the same result as one that would be arrived at if an enforceable doctrine of separation of powers were in force in the States (pages 14-15);
- however, with the possible exception of Gummow J, the other majority judges would appear to hold a narrower view of the implications of *Kable*. For example, Gaudron J would not apply it to the *persona designata* doctrine at the State level (page 12);
- a feature of Gummow J's judgment is his wide definition of what is meant by the term 'federal jurisdiction', with the effect that the judicial power of the Commonwealth would be engaged, 'at least prospectively, across the range of litigation pursued in the courts of the States' (page 13)
- to the extent that the incompatibility of function test in *Kable* is to be applied to the *persona designata* doctrine at the State level, this may have implications in some situations for the appointment of judges to Royal Commissions, as well as for the appointment of judges to report on particular matters to the executive government. The *Hindmarsh Island* case is instructive in this respect (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, unreported, High Court of Australia, 6 September 1996) (page 20);
- views as to the potential implications of the case can be grouped under three broad categories: (i) a narrow view which holds that the implications will be confined to extreme and/or rare instances of State executive or legislative interference with those State courts which are vested with federal judicial power; (ii) a more expansive view that the implications are hard to predict and may range across a wide terrain in which distinctions have to be made between judicial and administrative functions; (iii) and the more speculative view that the decision is one step along the way to the more or less wholesale importation of the federal separation of powers doctrine into the States (page 23); and
- the *Kable* decision redefines the status of the State courts (notably the Supreme Courts) in the context of Australia's integrated legal system; it refines the meaning of the 'supremacy' of the parliaments of the States under the paramount authority of the Commonwealth Constitution; and it has implications for the application of certain implied due process rights to the States, the ultimate formulation of which is hard to predict (page 23).

## 1 INTRODUCTION

On 12 September 1996 the High Court handed down its decision in the *Kable* case. At issue in the case was the constitutionality of the *Community Protection Act 1994* (NSW). In the event, in a majority 4 -2 decision the High Court found the Act to be unconstitutional, basically on the ground that, under Australia's integrated legal system, no State Parliament may require a State court to undertake a function which is incompatible with its exercise of federal judicial power pursuant to Chapter III of the Commonwealth Constitution. Chapter III is headed 'The Judicature'; Chapters I and II are headed 'The Parliament' and 'The Executive Government' respectively. The text of Chapter III of the Commonwealth Constitution is set out at Appendix A.

The purpose of this paper is to explore the possible or likely implications of the decision, as well as to explain the means by which it was arrived at. Already various formulations of the case's implications for the States have emerged, notably in Bernard Lane's article headed, 'Separation of powers for States inevitable', published in *The Australian* on 17 September 1996. These ranged from comments attributed to the NSW Attorney General, Mr JW Shaw MP, to the effect that the decision 'would only cause State governments difficulty in "extreme cases" where they tried to confer "some aberrant, non-judicial function" on their courts'.<sup>1</sup> Whereas, on the other side, Sir Maurice Byers QC, former Commonwealth Solicitor General and counsel for *Kable*, is reported to have said that the judgment 'reflected a gradual, but inevitable movement towards a Commonwealth-like separation of powers at the State level'. Representing the first wave of academic commentary on the decision, Professor George Winterton said the judgment had 'enormous implications' for the States, while Professor Tony Blackshield thought that it would be hard for State parliaments to 'predict the effect on their legislation' and, having described the Court's reasoning as rather 'artificial', he said the decision 'could be the basis for the High Court creating other "due process" guarantees for the courts'.<sup>2</sup>

Two publications relevant to the background of the case can be noted: the NSW Parliamentary Library's Occasional Paper No 3/May 1996, *Gregory Wayne Kable: A Criminal and Constitutional Hard Case*, by Gareth Griffith; and the NSW Parliamentary Library's Bills Digest No 35/1994, *Community Protection Bill 1994*, by Gareth Griffith.

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<sup>1</sup> Lane B, 'Separation of powers for States inevitable', *The Australian*, 17 September 1996.

<sup>2</sup> *Ibid.*

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## 2 BACKGROUND TO THE DECISION

On 1 August 1990 Gregory Wayne Kable (henceforth Kable) was convicted of the manslaughter of his wife, Hilary Kable, and sentenced to a minimum term of imprisonment of four years and an additional term of one year and four months. During his stay in prison Kable wrote a series of threatening letters, mainly to relatives of his deceased wife, such as to cause serious concern that, upon his release, there would be a repetition of the same conduct that led to his wife's death. He was due to be released from prison on 5 January 1995. Responding to these concerns, on 2 December 1994, the NSW Parliament passed the *Community Protection Act 1994* (NSW) (henceforth, the CPAct). That Act provided for the preventive detention of Kable, by order of the Supreme Court on the application of the Director of Public Prosecutions. In its original form the Bill for the CPAct was of general application, but an amendment made during its passage through Parliament confined its application to Kable alone. The only precedent for the CPAct was the Victorian legislation passed for the exclusive purpose of keeping Garry David in preventive detention, the *Community Protection Act 1990* (Vic).

The object of the CPAct was 'to protect the community by providing for the preventive detention ...of Gregory Wayne Kable' and in interpreting this provision 'the need to protect the community is to be given paramount consideration'.<sup>3</sup> As Dawson J commented, 'Thus, notwithstanding that the Act provides for the appellant's imprisonment, ambiguities in it are not to be construed strictly in his favour but against him'.<sup>4</sup> Moreover, proceedings under the CPAct were civil proceedings<sup>5</sup> and the case against Kable needed only to be proved on the balance of probabilities.<sup>6</sup> Another feature of the Act was that, read in combination, section 17(1) and section 17 (3) permitted the Supreme Court to have regard to material, including hearsay, which would not otherwise be admissible in evidence. The effect of section 22 was that Kable could be detained in a prison for up to six months, classified as a 'detainee' and therefore not dealt with under the *Sentencing Act 1989*, yet taken for practical purposes to be a prisoner.

On 23 February 1995 Levine J in the Supreme Court made a six month preventive detention order pursuant to section 5(1) of the CPAct, a decision he described in singular terms 'as a melancholy moment in the law and the history of the administration of justice in this State'.<sup>7</sup> On 21 August 1995 Grove J refused to issue a further order. However, on 18

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<sup>3</sup> Section 3(1) and (2).

<sup>4</sup> *Kable v Director of Public Prosecutions for NSW* (unreported, High Court of Australia, 12 September 1996) at 9. (Henceforth, *Kable*).

<sup>5</sup> Section 14.

<sup>6</sup> Section 15.

<sup>7</sup> *DPP v Kable* (SCNSW, unreported 23 February 1995 - 13152/94) at 187.

August the High Court had already granted Kable leave to appeal against the original detention order made by Levine J. The High Court was told that Kable would remain liable for detention under the CPAct, which meant that the issue in the application would remain a live one for him unless and until the Act itself was declared to be unconstitutional.

### 3 THE MAIN ISSUES IN THE CASE

Kable's submissions before the High Court had two main limbs, one connected to Part 9 of the NSW *Constitution Act 1902*, the other to Chapter III of the Commonwealth Constitution. It seemed both limbs had as their common trunk the doctrine of the separation of powers. However, it will be seen from the majority High Court judgments in the case that the precise relevance of that doctrine to the second limb, connected to Chapter III of the Commonwealth Constitution, is in question.

Briefly, the argument which was reliant on the entrenchment by referendum in 1995 of the judiciary under Part 9 of the NSW Constitution maintained that the CPAct involved a usurpation of judicial power by the State Parliament. Informed, in particular, by the landmark *Liyanage*<sup>8</sup> and *Polyukhovich*<sup>9</sup> cases the contention was that, further to sections 3 and 5 of the CPAct, the Legislature was effectively directing the judiciary to imprison Kable. This, it was said, contravened the independence of the judiciary and, therefore, the implied doctrine of the separation of powers which, with the entrenchment of Part 9, was now a feature of the NSW Constitution.

Alternatively, it was argued that more or less the same conclusion could be arrived at by reference to Chapter III of the Commonwealth Constitution, based on the idea that the CPAct required the Supreme Court to undertake a function that was incompatible with the integrity of the judiciary. With specific reference to sections 71 and 77 (iii) of the Commonwealth Constitution, the proposition was that Chapter III requires the State courts, as components of Australia's integrated legal system, to keep themselves free from such incompatibility in order that they remain suitable receptacles of federal judicial power. In support of this contention, particular reliance was placed on the discussion of the integrity of the judiciary in *Grollo's* case.<sup>10</sup> That case concerned the operation of the *persona designata* doctrine<sup>11</sup> in a federal context where the constitutionality of judicial warrants for

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<sup>8</sup> [1967] 1 AC 259

<sup>9</sup> (1991) 172 CLR 501

<sup>10</sup> (1995) 184 CLR 348.

<sup>11</sup> The various uses of the term '*persona designata*' were discussed in *Grollo* (at 234). It is explained that the *persona designata* doctrine usually refers to the situation where an individual judge is 'detached from the court to which the judge is appointed'. The point is made that 'It is in this sense that the term is used when the question is whether the legislature has intended to invest the power in the court or in individual judges detached from the court'. However, in *Grollo* itself the term was considered in a more specific sense, that is, 'as a

telephonic interception was at issue. In this context, the key ‘incompatibility condition’ approved in *Grollo* was that ‘no function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power’.<sup>12</sup> Moreover, the assumption appears to have been that that discussion presupposed the operation of the federal doctrine of the separation of powers, which is associated with the *Boilermakers* case.<sup>13</sup> In other words, reliance on *Grollo* would, presumably, visit the complexities of the separation of powers doctrine on the States.

Among the arguments submitted against *Kable* was that, with reference to *Le Mesurier v Connor*,<sup>14</sup> the power to invest federal jurisdiction in a State court, pursuant to section 77(iii) of the Commonwealth Constitution, is limited by the principle that the Federal Parliament takes the State courts as it finds them: it cannot, therefore, change the constitution, the structure or the organisation of those courts.

#### 4 SEPARATION OF POWERS AND THE STATES

Like any concept which has a long history the separation of powers has more than one possible meaning. Wade and Bradley identify three of these as follows:

- that the same persons shall not form part of more than one of the three organs of government, for example, that Ministers should not sit in Parliament;
- that one organ of government should not control or interfere with the exercise of its function by another organ, for example, that the judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament;
- that one organ of government should not exercise the functions of another, for example, that Ministers should not have legislative powers.<sup>15</sup>

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shorthand expression of a limitation on the principle of *Boilermakers*, acknowledging that there is no necessary inconsistency with the separation of powers mandated by Ch III of the Constitution if non-judicial power is vested in individual judges detached from the court they constitute’.

<sup>12</sup> Ibid at 365 (per Brennan CJ, Deane, Dawson and Toohey JJ).

<sup>13</sup> (1956) 94 CLR 254; (1957) 95 CLR 529. The key relevance of the *Boilermakers* case to the *Grollo* decision was evident in all the judgments - (1995) 184 CLR 348 at 363 (per Brennan CJ, Deane, Dawson and Toohey JJ), at 376-377 (per McHugh J) and at 389 (per Gummow J). However, it should be noted that the decision in the *Boilermakers* case has been questioned - Zines L, *The High Court and the Constitution*, 3rd ed, Butterworths 1992, pp 179-184.

<sup>14</sup> (1929) 42 CLR 481 at 495-496.

<sup>15</sup> Wade ECS and Bradley AW, *Constitutional Law*, 7th ed, Longmans 1965, p 23.

In no sense is a 'pure' or complete separation of powers possible.<sup>16</sup> Indeed, it is fair to say that in the Westminster tradition, informed as this is by the notion of responsible government, what has been aimed at usually is something like a partial and sometimes ill-defined separation in which the core meaning of the concept has tended to revolve around the independence of the judiciary from either the Legislature or the Executive.

That emphasis is certainly reflected in the operation of the separation of powers doctrine at the federal level in Australia where the High Court has inferred two related legal principles from the Commonwealth Constitution: (i) the judicial power of the Commonwealth can only be vested in courts recognised under section 71 of the Constitution,<sup>17</sup> which provides in part that such power 'shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'; and (ii) under the *Boilermakers* doctrine, that federal courts cannot be vested with non-judicial powers (in that case arbitral power which was vested in the then Commonwealth Court of Conciliation and Arbitration), except to the extent that this is incidental to their judicial functions. Thus, it has been said that, not only is the separation of powers implied in the structure of the Commonwealth Constitution, but that the Constitution has been found to provide certain guarantees of 'essential conditions underpinning the independence of the federal judiciary'.<sup>18</sup> Elaborating on the nexus between judicial independence and the separation of powers at the federal level, the joint judgment in the recent case of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (the Hindmarsh Island case) observed:

Harrison Moore wrote that under the Australian Constitution there was, between legislative and executive power on the one hand and judicial power on the other, 'a great cleavage'. The function of the federal judicial branch is the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation. This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion. The result is

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<sup>16</sup> Vile MJC, *Constitutionalism and the Separation of Powers*, Oxford University Press, 1967, p 13. In this classic work Vile offers his version of the 'pure doctrine' of the separation of powers in which, for the sake of the 'establishment and maintenance of political liberty', there is an absolute separation of functions and personnel between the legislature, the executive and the judiciary.

<sup>17</sup> *Huddart Parker v Moorehead* (1909) 8 CLR 330; see also the *Wheat* case (1915) 20 CLR 54 where the High Court declared invalid the Commonwealth's attempt to constitute the Inter-State Commission as a court. This view was reaffirmed recently in *Brandy's case* (1995) 183 CLR 245.

<sup>18</sup> King L, 'The separation of powers' from *Courts in a Representative Democracy*, The Australian Institute of Judicial Administration Incorporated, 1995, p 8.

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promulgated in public and implemented by binding orders. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government.<sup>19</sup>

To this the joint judgment added the important comment, ‘The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges.’ Next it quoted the landmark formulation of Kitto J from *R v Davison*, identifying the conceptual basis of the Constitution’s division of the functions of government with ‘the protection of the individual liberty of the citizen’.<sup>20</sup>

Traditionally, the view has been that the separation of powers doctrine does not operate in any formal way in the States, at least as ‘a legal restriction on power’. Writing from a Queensland perspective, Gerard Carney explains that a variety of reasons have been advanced for this, notably:

- there is no reference in the State Constitutions to the vesting of the judicial power of the State in any particular institution or court;
- neither the Supreme Court nor its judicial power are entrenched in the Constitutions of the States;
- there is no clear division of powers in the State Constitutions;
- the past practice of Colonial and State Parliaments of delegating legislative and judicial functions to administrative bodies; and
- Colonial and State Parliaments have in the past exercised judicial power by way of impeachment and bills of attainder.<sup>21</sup>

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<sup>19</sup> Unreported, High Court of Australia, 6 September 1996 at 8 (per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

<sup>20</sup> *Ibid* at 9; (1954) 90 CLR 353 at 380-381 per Kitto J.

<sup>21</sup> Carney G, ‘Separation of powers in the Westminster system’ (1994) 8 *Legislative Studies* 59 at 62. The powers and jurisdiction of the Victorian Supreme Court are in fact entrenched under sections 18(2A) and 85 of the *Constitution Act 1975 (Vic)*. However, it was found in *Collingwood* [1994] 1 VR 652 that those sections did not embody the doctrine of the separation of powers, even to the limited extent of proscribing legislative interference with the judicial process.

However, Carney adds that, even if the doctrine of the separation of powers does not operate as a legal restriction on power in the States, it can be said to provide 'the basis for important principles which the law protects, such as the independence of the judiciary, and for certain political conventions'.<sup>22</sup> Likewise, John de Meyrick has written that to reject the doctrine's relevance altogether to the States would be 'to deny the history and legal development of our constitutional system'.<sup>23</sup>

Nonetheless, such considerations of history and practice do not alter the accepted view that the separation of powers doctrine does not operate in any formal sense in the States. The classic statement of that view in NSW is found in the *BLF* case where it was decided that the State Parliament can exercise judicial power, with Kirby P commenting: 'Indeed, the [NSW Constitution in 1986] makes no relevant provision in respect to the judicature at all. Therefore, neither from its structure nor its terms can a Montesquieuan separation of powers be derived'. His Honour, with specific reference to the *NSW Constitution Act 1855* and subsequent statutes relating to the Supreme Court, added that 'the history of judicial arrangements in New South Wales denies the suggestion of a constitutional separation' and went on to conclude:

By virtue of the *Constitution Statute* and the *Constitution Act*, there is therefore no limitation on the power of the New South Wales Parliament ...to abolish, alter or vary the constitution, organisation and business of the Supreme Court. Any limitation in that regard must be derived from politics and convention, grounded in history. They are not based on legal restrictions.<sup>24</sup>

As noted, one question put to the High Court in *Kable's* case was whether that situation had now altered with the entrenchment, following the referendum of 25 March 1995, of Part 9 of the NSW Constitution. Part 9 is headed 'The Judiciary'.

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<sup>22</sup> Ibid, p 62.

<sup>23</sup> Meyrick de J, 'Whatever happened to Boilermakers? Part 1' (1995) 69 *ALJ* 106 at 119.

<sup>24</sup> (1986) 7 *NSWLR* 372 at 400.

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## 5 THE HIGH COURT'S DECISION IN *KABLE'S* CASE - THE MAJORITY VIEW

**Overview:** In the event, none of the majority judgments relied on the Part 9 argument relating to the independence of the judiciary under the NSW Constitution. Indeed, Toohey, McHugh and (by implication) Gummow JJ all agreed that the separation of powers doctrine does not operate in a constitutional sense in NSW as a consequence of Part 9.<sup>25</sup> Instead, the balance of the reasoning was on Chapter III of the Commonwealth Constitution. The interesting feature there was that, whilst all the majority judgments varied somewhat as to detail, they agreed that a version of the Chapter III argument could be held to apply but, apparently, again without finding that the doctrine of the separation of powers operates in the States, at least in a direct way. In all the majority judgments there is affirmation of the view that federal judicial power must be exercised 'in accordance with the judicial process'.<sup>26</sup> Also, with the exception of Toohey J, the majority judgments all seem to agree that the Chapter III test of incompatibility of function, concerning the integrity of the judiciary, has implications beyond those situations where the Supreme Courts of the States (or indeed any other relevant court) is exercising federal jurisdiction.

**Toohey J:** The majority judge who discussed the separation of powers doctrine at most length was Toohey J; conversely, he was the least inclined to consider Australia's integrated judicial system as a factor in his decision. In his reasoning his Honour cited *Grollo* and was inclined to emphasise, by further reference to *Mistretta v United States*<sup>27</sup>, the importance of the 'integrity of the Judicial Branch' to his decision. At issue in the case, he explained, was 'incompatibility with the essence of judicial power' where the Supreme Court of NSW had the function of making an order for the virtual imprisonment of Kable without, among other things, there being a finding of guilt. According to Toohey J this function offends against an aspect of the separation of powers doctrine, namely, that aspect 'serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive'. Thus, his conclusion was that the CPAct requires the NSW Supreme Court 'to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process'.<sup>28</sup> The significant qualification, however, in the judgment was that this conclusion was founded on the premise that the Supreme Court was in fact exercising federal jurisdiction, that is, in so far as Kable had relied on 'federal constitutional points' at first

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<sup>25</sup> *Kable* at 37 (per Toohey J), at 56 (per McHugh J) and at 75 (per Gummow J).

<sup>26</sup> *Leeth* (1992) 174 CLR 455 at 486-487 (per Deane and Toohey JJ) and 502 (per Gaudron J). For a discussion of this and other relevant decisions see - Winterton G, 'The separation of judicial power as an implied Bill of Rights' from *Future Directions in Australian Constitutional Law* edited by Lindell G, The Federation Press 1994, pp 199-200.

<sup>27</sup> (1989) 488 US 361.

<sup>28</sup> *Ibid* at 42.

instance and on appeal to the Court of Appeal. Thus, the application of the separation of powers doctrine was limited in these circumstances to where a State court is exercising federal jurisdiction. Having set out the relationship between section 71 of the Commonwealth Constitution, which contemplates that a State court may be invested with federal judicial power, and section 77(iii) which empowers the Federal Parliament to invest such courts with federal jurisdiction, along with section 39(2) of the *Judicature Act 1903* (Cth) which gives effect to section 77(iii), Toohey J concluded:

To the extent that they are invested with federal jurisdiction, the federal courts and the courts of the States exercise a common jurisdiction. It follows that in the exercise of its federal jurisdiction a State court may not act in a manner which is incompatible with Ch III of the Commonwealth Constitution.<sup>29</sup>

**Gaudron J:** The approach of Gaudron J would appear to be in wider terms and builds more directly on the views she expressed in *Harris v Caladine*<sup>30</sup> and *Leeth*<sup>31</sup> concerning the protection of the judicial process. At the basis of her Honour's judgment in *Kable* was the premise that Chapter III 'provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth' and that, as a consequence of this, State courts have a 'role and existence transcending their status as State Courts'.<sup>32</sup> On that basis, Gaudron J found that Chapter III does not 'permit of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by Parliament' and, further, that State parliaments cannot 'legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth'.<sup>33</sup> Unlike Toohey J, it seems that for Gaudron J such incompatibility is not invoked only where a State court is exercising federal jurisdiction, but goes to the integrity of the judicial process generally which, it is said, depends in no small measure 'on the maintenance of public confidence in that process'.<sup>34</sup>

<sup>29</sup> *Kable v DPP for NSW* (unreported, The High Court of Australia, 12 September 1996) at 38. (Henceforth, *Kable*)

<sup>30</sup> (1991) 172 CLR 84 at 150-151. Among other things, Gaudron J held there that the Federal Parliament is precluded from conferring powers on a court that are to be exercised in a partisan manner or in a non-judicial way; also, that it cannot require the courts to act in a way that tends to bring their reputation for impartiality or the integrity of the judicial process into question.

<sup>31</sup> (1992) 174 CLR 455 at 498-499 and at 502.

<sup>32</sup> *Kable* at 49. In this respect Gaudron J was building on her comments in *Leeth*, although in that case the focus was on the situation where State courts are 'exercising' federal jurisdiction (at 498).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at 53.

Distinguishing this from the implications of the *Boilermakers* doctrine, Gaudron J stated in part that the limitation on State legislative power derived from this interpretation is ‘more closely confined and relates to powers or functions imposed on a State court, rather than its judges in their capacity as individuals’.<sup>35</sup> Does this mean, therefore, that this version of the incompatibility test would not apply to the *persona designata* doctrine? If that is so then a State Parliament, unlike its Federal counterpart, would not be constrained by the *Grollo* test preventing the conferring of a function on a judge in his or her individual capacity in circumstances where this would bring the reputation of the judge or that of the courts into question.<sup>36</sup>

Conversely, her Honour explains later that the Parliaments of the States may confer non-judicial powers on their courts (for example, arbitral powers) but, again, only ‘so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth’<sup>37</sup> - the crux of which seems to be so long as they do not undermine public confidence in the integrity of the judicial process (which, according to Gaudron J, forms part of the definition of judicial power).<sup>38</sup> Another way of stating this is that in Gaudron J we find something approximating a procedural due process guarantee of wide application based on section 71 of the Commonwealth Constitution. As for the CPAct, her Honour said it was a ‘mockery’ of that process, thereby compromising the integrity of the Supreme Court of NSW.

**Gummow J:** Similarly, Gummow J in his somewhat opaque judgment found that the CPAct was ‘repugnant to judicial process’ and, like Gaudron J, based his reasoning to a large extent on the proposition that Australia has an integrated legal system. At the apex of this system is the High Court. The position of the State Supreme Courts in that scheme is also distinctive in that section 73 ‘entrenches’ a right of appeal from those courts to the High Court. Further, as a consequence of our integrated system of law, read alongside the terms of Chapter III of the Constitution, an Australian judiciary exercising the judicial power of the Commonwealth cannot be divided into two grades, ‘an inferior grade, namely the *possessors of invested federal jurisdiction* who are subject to the imposition and receipt of

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<sup>35</sup> Ibid at 49.

<sup>36</sup> How does this relate to Gaudron J’s view expressed in *Wilson* (the Hindmarsh Island case) that ‘Public confidence in the independence of the judiciary is diminished if, even in their capacity as individuals, judges perform functions which place them or appear to place them in a position of subservience to either of the other branches of government’ (at 27). In *Kable*, it seems, she is concerned with courts and the ‘powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth’ (at 49). However, it can be suggested that this line of reasoning may give rise to some difficult and artificial distinctions. In *Kable* Gaudron J went on to acknowledge that in both cases ‘the limitation derives from the necessity to ensure the integrity of the judicial process and the integrity of the courts specified in s 71 of the Constitution’ (at 49).

<sup>37</sup> Ibid at 52.

<sup>38</sup> *Wilson*, Unreported, High Court of Australia, 6 September 1996 at 23 (per Gaudron J).

incompatible functions under State law, and a superior grade, comprising this Court and other federal courts which are not subject to the imposition and receipt of such functions *whether pursuant to Commonwealth or State law*' (emphasis added).<sup>39</sup> Here Gummow J was reconstructing part of *Kable*'s submission to the Court which, he concluded, should be accepted 'in the broad'.

The balance of the judgment seems to point to the application of Chapter III considerations where a State court is vested with federal jurisdiction, regardless of whether that jurisdiction is being exercised at the time.<sup>40</sup> It can be queried whether this would extend to a court's non-judicial functions. What Gummow J is concerned about, ultimately, in the *Kable* case is what he calls 'the institutional impairment of the judicial power of the Commonwealth', which cannot be avoided 'by an attempt at segregation of the courts of the States into a distinct and self-contained stratum within the Australian judicature'.<sup>41</sup> The term 'institutional impairment' refers in this context to the removal of a 'condition or characteristic of a court such as the Supreme Court'. Procedural due process and judicial independence would be conditions or characteristics of this kind.

Another feature of the judgment which is worth noting again reflects Gummow J's emphasis on an integrated legal system with the High Court at its apex. This is his expansive interpretation of the implications of section 73(ii), entrenching the right of appeal to the High Court, for the interrelationship between federal and State jurisdiction. His Honour stated:

Section 73(ii) indicates that the functions of the Supreme Courts of the States, at least, are intertwined with the exercise of the judicial power of the Commonwealth. This is because decisions of the State courts, whether or not given in the exercise of invested jurisdiction, yield "matters" which found appeals to this Court under s 73 (ii). By this means, the judicial power of the Commonwealth is engaged, at least prospectively, across the range of litigation pursued in the courts of the States.<sup>42</sup>

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<sup>39</sup> *Kable* at 77.

<sup>40</sup> During its discussion of inconsistency under section 109 of the Commonwealth Constitution, the judgment does refer to a finding of invalidity 'during the *operation* of an investment of federal jurisdiction' (emphasis added).

<sup>41</sup> *Kable* at 94.

<sup>42</sup> *Ibid* at 93. However, with reference to the *Mellifont* case (1991) 173 CLR 289, Gummow J then commented that this expansive federal/State jurisdiction is not co-terminus with the jurisdiction of the State courts which, in the absence of 'any constitutional separation of judicial power in the States', may extend to 'a jurisdiction which does not involve the exercise of power which has the same character or quality as the judicial power of the Commonwealth' (*Kable* at 93-94).

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**McHugh J:** Many of the themes explored above receive clear exposition in the judgment of McHugh J, which is also perhaps the most forthright in its discussion of the implications for the separation of powers in the States. In what may prove to be the leading judgment in the case, McHugh J arrived at his conclusion that the CPAct is invalid by the following reasoning:

- nothing in the NSW Constitution nor the constitutional history of the State precludes the State Parliament from vesting legislative or executive power in the NSW judiciary, or judicial power in the legislature or the executive. Likewise, the federal doctrine of the separation of powers is not '*directly applicable*' to NSW;
- however, that does not mean that the Commonwealth Constitution, notably Chapter III, does not contain implications concerning the exercise of judicial power by State courts and judges;
- under the Commonwealth Constitution and within Australia's integrated legal system the State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are in fact an integral and equal part of the judicial system set up by Chapter III of the Commonwealth Constitution;
- it follows, therefore, that neither the NSW nor the Federal Parliament can invest functions in the NSW Supreme Court that are incompatible with the exercise of federal judicial power. For example, neither could legislate in a way that permits the Supreme Court, while exercising federal judicial power, to disregard the rules of natural justice. In this way, the judgment points towards a guarantee of procedural due process in the States, at least where State courts are exercising federal jurisdiction;
- more generally, courts exercising federal jurisdiction must be perceived to be free from legislative or executive interference. This is because the independent exercise of federal judicial power is a necessary condition of public confidence in the courts;
- nor is this requirement of independence limited to where a State court is actually exercising federal judicial power. It is, instead, an essential requirement of the legal system and therefore (presumably) relates to every facet of the work undertaken by the State Supreme Court;
- thus, with respect to the vesting of non-judicial functions in the State courts, McHugh J contends that 'those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State';<sup>43</sup>

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<sup>43</sup> Ibid at 64.

- however, a statute violating that principle would not fail because it breached ‘any entrenched doctrine of separation of powers in the State Constitution but because it gave the appearance that a court invested with federal jurisdiction was not independent of its State government’;<sup>44</sup>
- in this way the effect of applying the principles underlying Chapter III of the Commonwealth Constitution may, in some situations, lead to the same result as one that would be arrived at if an enforceable doctrine of separation of powers were in force in the States;
- for example, a State law would be invalid if the appointment of a judge as *persona designata* gave the appearance that the court as an institution was not independent of the executive government.<sup>45</sup>

The core of the judgement of McHugh J is found in the following statement, which may well prove to encapsulate the *Kable* decision:

It follows therefore that, although New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution’s plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts. If it could, it would inevitably result in a lack of public confidence in the administration of invested federal jurisdiction in those courts. State governments therefore do not have unrestricted power to legislate for State courts or judges. A State may invest a State court with non-judicial functions and its judges with duties that, in the federal sphere, would be incompatible with the holding of judicial office. But under the Constitution the boundary of State legislative power is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions invested in the court.<sup>46</sup>

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<sup>44</sup> Ibid at 65.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid at 66.

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## 6 THE HIGH COURT'S DECISION IN *KABLE'S* CASE - THE MINORITY VIEW

Briefly, Brennan CJ and Dawson J could find 'no textual or structural foundation' for the submission advanced by *Kable* with respect to Chapter III of the Commonwealth Constitution. Using the judgment of Dawson J as a guide, that minority view can be reconstructed thus:

- Part 9 of the NSW Constitution does not constitute an exhaustive statement of the way in which the judicial power of the State may be vested and it does not, therefore, constitute the basis for the separation of powers in NSW;<sup>47</sup>
- the Australian court system, though integrated, is not unitary;
- each of the States has its own hierarchy which is governed by State legislation, whereas the federal courts created under section 71 of the Commonwealth Constitution constitute a different system;
- with reference to the *Boilermakers* doctrine, once it is recognised that State courts can perform non-judicial functions, but can yet be invested with federal jurisdiction under section 77(iii), then 'any question of incompatibility with Ch III upon the ground that the State court is required to perform executive or legislative functions must disappear',<sup>48</sup>
- to the extent that the 'incompatibility test' was based on *Grollo's* case, it was said that that concept of incompatibility 'is derived from the separation of powers and does not have a life of its own independent of that doctrine'.<sup>49</sup> The recent case of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* was cited in support of this view, where five members of the High Court said that '*Grollo* was concerned with constitutional incompatibility, derived from the constitutional separation of the functions of the Judiciary from the functions of the Parliament or the Executive'.<sup>50</sup>
- effectively, to apply the incompatibility test to the CPAct will result in 'a quasi-separation of powers' being established in the States;<sup>51</sup> and

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<sup>47</sup> Ibid at 19.

<sup>48</sup> Ibid at 27.

<sup>49</sup> Ibid at 28.

<sup>50</sup> Unreported, High Court of Australia, 6 September 1996 at 13 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

<sup>51</sup> *Kable* at 29.

- the argument that the NSW Supreme Court was exercising federal jurisdiction in ordering the preventive detention of *Kable* under a NSW statute, may have a certain practical efficacy for the purpose of determining the available avenues of appeal, but it will tend to lead to some very ‘artificial’ results.<sup>52</sup>

Brennan CJ referred to the ‘novelty’ of the propositions advanced by *Kable* in relation to Chapter III of the Commonwealth Constitution, noting that they were not supported by any authority or by any debate at the Constitutional Conventions of the 1890s. With particular reference to the *Grollo* case, his Honour said: ‘The incompatibility qualification applied to the *persona designata* doctrine has no counterpart in the context of possible limitations on the power of a State Parliament to invest courts of the State with non-judicial powers or the power of the Commonwealth Parliament to select whichever State courts it sees fit to invest with federal judicial power’.<sup>53</sup>

## 7 THE IMPLICATIONS OF *KABLE*’S CASE FOR NSW

**The decision:** Apart from the immediate issue of damages, it is clear that the potential implications of the *Kable* case for NSW are the same as for all the other States. However, identifying these implications with any clarity or certainty is another matter and, with that thought in mind, the following commentary attends more to the possible than to the probable implications of the case. As Professor Blackshield has suggested, the effect of the case on State legislation is hard to predict.<sup>54</sup>

In essence what the decision appears to establish is that the test of incompatibility of function, understood in relation to the maintenance of public confidence in the integrity and independence of those courts vested with federal jurisdiction (however defined), is to be applied across the board to the exercise of all the judicial and, more tentatively, non-judicial functions of any relevant State courts. It seems that McHugh and Gummow JJ would extend this test to cover individual members of those courts, so that it would apply to the *persona designata* doctrine: in this context the test would be whether such appointments compromised the independence or impartiality of the relevant court.<sup>55</sup> This conclusion would seem to build on the observation in the influential minority judgment of Mason and Deane JJ in *Hilton v Wells* that ‘The metaphysical notion of a judge acting in his character or capacity as a judge, at large, so to speak, detached from the court of which he is a member,

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid at 7.

<sup>54</sup> Lane B, ‘Separation of powers for States inevitable’, *The Australian*, 17 September 1996,

<sup>55</sup> *Kable* at 65 (per McHugh J) and 76 (per Gummow J).

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cannot be supported as a matter of legal theory'.<sup>56</sup> Furthermore, the decision would also seem to extend procedural due process to State courts, at least where these are exercising federal judicial power. Also, in Gummow J's judgment, in particular, there is a tendency to operate with a wide definition of what is meant by federal jurisdiction, based on section 73 (ii) of the Commonwealth Constitution which entrenches the right of appeal to the High Court.

**Would the *Boilermakers* doctrine apply to the States?:** As noted, McHugh J contends that the incompatibility of function test would have the same effect, in some situations, 'as if an enforceable doctrine of the separation of powers were in force in the States'.<sup>57</sup> The question, therefore must be: what are those 'situations' giving rise to what for convenience may be called a quasi-separation of powers at the State level? Bearing in mind that the key criteria of the incompatibility of function test - the independence and integrity of the judiciary - appear to embody the core features of the contemporary separation of powers at the federal level, the further question can be asked whether in the long term, as Sir Maurice Byers has suggested, the *Kable* judgment reflects an 'inevitable movement towards a Commonwealth-like separation of powers at the State level'. Stated another way, what is the purpose of the *Boilermakers* doctrine which insists that Chapter III federal courts cannot exercise non-judicial power, except to the extent that this is incidental to their judicial functions? Is it to effect some formal division of powers in order to satisfy the structural design of the Commonwealth Constitution? Or, instead, does the doctrine serve the substantive purpose of ensuring the integrity and independence of the judiciary? If the latter is the case, then on one reading at least, the practical effect of that doctrine in all its ramifications may not be all that (if at all) different from the implications of the majority's (with the apparent exception of Toohey J) reasoning in *Kable's* case. The question, then, is whether that practical effect would place at risk McHugh J's conclusion that, subject to certain conditions, 'A State may invest a State court with non-judicial functions and its judges with duties that, in the federal sphere, would be incompatible with the holding of judicial office'.<sup>58</sup>

However, it should be said that the majority judgments in *Kable* are at some pains to point out that the federal separation of powers doctrine is not intended to apply to State courts. The focus, rather, is on the institutional integrity of the courts themselves, most notably the State Supreme Courts which are entrenched under Chapter III of the Commonwealth Constitution. But, then, as McHugh J commented with respect to the CPAct, 'The compatibility of State legislation with federal judicial power does not depend on intention. It depends on effect'.<sup>59</sup> Is the effect here to introduce a distinction without a difference, that

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<sup>56</sup> (1985) 58 ALR 245 at 261.

<sup>57</sup> *Kable* at 66.

<sup>58</sup> *Ibid* at 66.

<sup>59</sup> *Ibid* at 63.

is, between the incompatibility of function test and the separation of powers doctrine? A further observation to make is that the logic underlying the idea of an integrated or unified system of law in which there can only be one grade of federal judicial power may tend, ultimately, towards a uniform standard across every aspect of this subject. If the federal separation of powers is said to be one of the 'bulwarks of liberty',<sup>60</sup> or 'necessary for the protection of the individual liberty of the citizen',<sup>61</sup> then the question arises: why, under our integrated system of law, should that procedural and institutional bulwark and protection of liberty be constructed any differently in the States? The example may be extreme, but would this kind of thinking have implications for the constitutionality of the Industrial Relations Commission, established under the *Industrial Relations Act 1996* (NSW), which combines judicial and arbitral functions?

**Implications suggested by McHugh J:** Moving away from these more speculative reflections, McHugh J does offer some guidance as to the situations where the *Kable* decision may or may not have the same result as if the States had an enforceable doctrine of the separation of powers. The following hypothetical instances were noted by his Honour:

- a State law giving the Supreme Court powers to determine issues of a purely governmental nature, such as how much of the State budget should be spent on child welfare, would be invalid;<sup>62</sup>
- although non-judicial functions may be vested in a State Supreme Court, such functions cannot be 'so extensive or of such a nature that the Supreme Court would lose its identity as a court'. Under this approach, a State Supreme Court could be invested with a jurisdiction similar to the of the federal Administrative Appeals Tribunal. However, a State Supreme Court could not be stripped of all other jurisdictions except that which is similar to the Tribunal;<sup>63</sup>
- a State may confer executive government functions on a State court judge as *persona designata*, but not if that appointment gave the appearance that 'the court as an institution was not independent of the executive government'. A State law appointing the Chief Justice of the Supreme Court to the Cabinet would be invalid. Whereas, the situation where a Chief Justice acted as Lieutenant-Governor or as Acting Governor, would be valid. Of this McHugh J commented that, 'given the long history of such appointments, it is impossible to conclude that such appointments compromise the independence of the Supreme Courts or suggest that

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<sup>60</sup> *Grollo* (1995) 184 CLR 348 at 376 (per McHugh J).

<sup>61</sup> *R v Davison* (1954) 90 CLR 353 at 380-381 (per Kitto J).

<sup>62</sup> *Kable* at 64.

<sup>63</sup> *Ibid* at 65.

they are not impartial'.<sup>64</sup>

It seems the implication of these reflections is to suggest that the effect of the *Kable* decision would only be felt in the States in certain extreme situations where a court exercising federal jurisdiction was demonstrably the subject of legislative or executive interference. Further to this, contrary to the view expressed by Kirby P (as he then was) in the *BLF* case a State Parliament cannot abolish its Supreme Court, or alter its constitution so that the Court would no longer be a suitable receptacle of federal judicial power. In other words, the Supreme Courts of the States are an entrenched feature of the Commonwealth Constitution.

**Possible implications from the persona designata doctrine:** On the issue of the potential scope of the *Kable* decision for the States, it is interesting to note in this context that McHugh J was in the minority in *Grollo*, a case which otherwise upheld the constitutionality of judicial warrants for telephonic interception. What, then, would his Honour's conclusion be regarding the issuing of judicial warrants under State law? In *Grollo* McHugh J spoke in strong terms of the connection between the separation of powers and the incompatibility test where the application of the persona designata doctrine is concerned, stating:

Clearly, a tension exists between complying with the principle of the separation of powers and vesting powers in federal judges as persona designata. If the separation of powers doctrine is to continue effectively as one of the bulwarks of liberty enacted by the Constitution, the incompatibility qualification on the persona designata doctrine is a necessity. Without that qualification, it would permit the Parliament 'to sap and undermine' the separation of legislative, executive and judicial powers that is inferentially expressed by ss 1, 61 and 71 of the Constitution and which was rigorously applied by this Court and the Judicial Committee of the Privy Council in the *Boilermakers' Case*. The constitutional wall that separates the exercise of judicial power and the exercise of executive power would be effectively breached if a federal judge could exercise any executive power invested in him or her as persona designata.<sup>65</sup>

That statement was quoted with approval in the joint judgment in *Wilson*<sup>66</sup> (the Hindmarsh Island case), where the nomination and/or appointment by the then Minister of Aboriginal and Torres Strait Islander Affairs of a Judge of the Federal Court, the Hon Justice Jane Mathews, to prepare a report under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was held to be invalid. The joint judgment explained this was

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<sup>64</sup> Ibid.

<sup>65</sup> (1995) 184 CLR 348 at 376.

<sup>66</sup> Unreported, High Court of Australia, 6 September 1996 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ. (Henceforth, *Wilson*)

because, 'The function of a report under [section 10 of the Act] is not performed by way of an independent review of an exercise of the Minister's power. It is performed as an integral part of the process of the Minister's exercise of power. The performance of such a function by a judge places the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protections, in a position equivalent to that of a ministerial adviser'.<sup>67</sup> The report added that the reporter (Justice Mathews) was required to furnish advice to the Minister on a question of law, 'Yet the giving to the executive of advisory opinions on questions of law is quite alien to the exercise of the judicial power of the Commonwealth'.<sup>68</sup> Would the same now be true at the State level further to the decision in *Kable*?

Another facet of the joint judgment in *Wilson* is worth noting in this regard, namely, its discussion of where a judge conducts a Royal Commission and has a 'close working connection with the Executive Government' yet is required to act judicially in finding the facts, applying the law and delivering an independent report. The judgment does not lay down any hard and fast rules in these circumstances, but suggests rather that the constitutionality of each such appointment would be considered on a case by case basis, stating 'The terms of reference of the particular Royal Commission and of any enabling legislation will be significant'.<sup>69</sup> Again, would the same considerations now apply to the States? Presumably, the answer must be 'yes'.

What these further observations suggest is that the implications of the *Kable* decision may not be straightforward or limited necessarily to certain extreme scenarios of executive or legislative interference with the independence of the judiciary. Significantly in this context, following the decisions in *Grollo* and *Wilson* it can be said that the interpretation of the 'effect' of the persona designata doctrine at the federal level itself is currently in a state of re-evaluation, following a period when the 'criteria of incompatibility...have not always been observed in practice'.<sup>70</sup>

**Limitations on State legislative power:** Obviously a statute in the same terms as the CPAct would not survive the incompatibility of function test. This would mean that the preventive detention of dangerous persons, where this is considered to be necessary, would have to be effected by other methods, presumably through the kind of recidivist statute currently in force in the form of the *Habitual Criminals Act 1957* in NSW or, what is more likely, by serious offender legislation which is of general application.<sup>71</sup> The difficulty here

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<sup>67</sup> Ibid at 17-18.

<sup>68</sup> Ibid at 19.

<sup>69</sup> Ibid at 16.

<sup>70</sup> Ibid at 19.

<sup>71</sup> For example, this would be available under amendments made in 1993 to the Victorian

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is that neither form of legislation may cover the circumstances relevant to *Kable*, where the offender's perceived continuing dangerousness was only recognised during his term of imprisonment. Whether that is a significant difficulty depends very much on one's perception of the civil liberties questions at issue in a case of this sort. Either way, observations of this kind suggest the clear limitations on State legislative power which arise as a result of the *Kable* decision.

With this in mind, Dicey's absolutist doctrine of the sovereignty of parliament, which is based on the idea of legislative omnipotence, can almost certainly be set to one side so far as the parliaments of the States are concerned: the blue-eyed babies of Dicey's notorious example concerning the scope of parliamentary omnipotence can rest easy. Following *Kable* it is more appropriate still to refer to the 'supremacy' of parliament and to construct a careful understanding of this based, among other things, on the notion of the rule of law embodied in the Commonwealth Constitution.

**Section 71 as a reservoir of rights:** In finding that procedural due process applies to the States, or at least to those State courts vested with federal judicial power, the High Court appears to have redefined the scope of an implied constitutional right based on section 71 of the Commonwealth Constitution. Basically, the right at issue here is to a fair trial, but it has been suggested that the potential implications of section 71 may be broader still, extending to substantive due process rights. As Professor Winterton has explained, 'These include criminal process rights, such as the right not to incriminate oneself, and freedom from unreasonable searches and seizures, excessive bail and cruel and unusual punishment, and other civil and political rights, such as freedom of communication and the right to equal treatment by the law'. The question, Professor Winterton asks, is: 'To what extent can these rights be implied in the concept of the "judicial power of the Commonwealth"?'<sup>72</sup> Suggesting an answer to this, Professor Zines has said that 'the concept of judicial power in section 71 looks like being a great reservoir of rights which will be found to include those rights relating to the justice system to be found in various constitutions and treaties and which were recommended by the Constitutional Commission'.<sup>73</sup> Whether Professor Zines would support that extended interpretation of section 71 is another matter. The point to make in this context is that the *Kable* decision has implications for the application of certain implied rights to the States, the ultimate formulation of which is hard to predict.

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*Sentencing Act 1991.*

<sup>72</sup> Winterton G, op cit, pp 200-201. Winterton makes it clear that he would not agree with this interpretation of section 71 on the basis that it would introduce open-ended common law liberties into the Commonwealth Constitution which would not find support in the text of the Constitution itself.

<sup>73</sup> Zines L, 'A judicially created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 at 167.

## 8 CONCLUSIONS

As noted, the *Kable* decision seems to establish that the test of incompatibility of function, based on the maintenance of public confidence in the integrity and independence of those State courts vested with federal jurisdiction, is to be applied to all the judicial and non-judicial functions of relevant State courts and their member judges. That decision might be described variously as novel, radical or innovative. As to the first of these, in his dissenting judgment Brennan CJ suggested that the majority view(s) was unencumbered by precedent, but accepted that 'novelty is not necessarily a badge of error'.<sup>74</sup> Some of the case's potential implications have been discussed and these can now be grouped under three broad headings. First, there is the view that these implications are relatively narrow, confined to extreme and/or rare instances of State executive or legislative interference with those State courts which are vested with federal judicial power. The CPAct itself is a case in point. Secondly, there is the more expansive view of the potential implications, based on the idea that the decision's implications are hard to predict and may range across a wider terrain in which distinctions have to be made between judicial and administrative functions. Indeed, the case imports the difficult concept of 'judicial power' into the State arena, which has resulted at the federal level in much complex jurisprudence further to the *Boilermakers* case. Moreover, on this more expansive front, an interesting feature of the case is the tendency, evident in the judgment of Gummow J in particular, to operate with a wide definition of what is meant by the term 'federal jurisdiction', so that any matters which found appeals to the High Court from the State court under section 73(ii) of the Commonwealth Constitution might be included. As Gummow J concluded, 'By this means, the judicial power of the Commonwealth is engaged, at least prospectively, across the range of litigation pursued in the courts of the States'.<sup>75</sup> Thirdly, there is the more speculative view that the *Kable* decision is one step along the way to the more or less wholesale importation of the federal separation of powers doctrine into the States, based on the idea that this is the logical outcome of an integrated Australian legal system under the paramount authority of the Commonwealth Constitution.

Whichever approach is found to be the more accurate, the likelihood is that the *Kable* decision will be a landmark in the ongoing elaboration by the High Court of the nature of Australia's federal compact. Very significantly, the decision redefines the status of the State courts (notably the Supreme Courts) in that compact. As well, it refines again the meaning of the supremacy of the parliaments of the States under the Commonwealth Constitution. Lastly, the decision opens up a new and potentially unpredictable area of implied rights as far as the States are concerned.

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<sup>74</sup> *Kable* at 7.

<sup>75</sup> *Ibid* at 93.