Chapter Seven

The *Kable* Case

Gim Del Villar

In September 1989, Gregory Wayne Kable stabbed his wife to death. He was arrested and charged with her murder. He pleaded guilty to manslaughter on the basis of diminished responsibility. In August 1990 he was sentenced to imprisonment for a period of five years and four months. His sentence was to expire on 4 January 1995.

In prison, with his release in prospect, Mr Kable wrote a series of threatening letters to his wife's relatives. The New South Wales Government was so concerned that it enacted legislation to deal with the situation.

The legislation was unusual. It was directed at Mr Kable and only Mr Kable. It allowed the NSW Supreme Court, upon application by the Director of Public Prosecutions, to make a preventive detention order that Mr Kable be detained in prison for a specified period if the Court was satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence and that it was appropriate, for the protection of particular persons or the community generally, that he be held in custody. The Court was to be satisfied on the civil standard, and the rules of evidence applied, subject to exceptions for medical and prison records or reports, which might not otherwise have been admissible.

Mr Kable challenged the validity of the law. He failed before a single judge of the NSW Supreme Court and the Court of Appeal, but succeeded in the High Court (by a 4-2 majority).[1] The case gave rise to what is known as the *Kable* doctrine. At its simplest, it means that a State cannot confer functions on a State court that would undermine its suitability as a repository for federal jurisdiction; that is, as a court exercising jurisdiction conferred upon it by the Commonwealth under sections 75 and 76 of the Constitution.

The doctrine was a significant departure from earlier case law. Before the decision in *Kable*, the position was that the States were free to confer any functions they desired upon their courts. Thus, in *Commonwealth v Hospital Contribution Fund*, Mason J stated:

> Generally speaking, the Parliament of a State may in the exercise of its plenary legislative power alter the composition, structure, and organization of its Supreme Court for the purposes of the exercise of State jurisdiction. It is in the exercise of this power that provisions of the kind already discussed have been enacted. **Chapter III of the Constitution contains no provision which restricts the legislative competence of the States in this respect. Nor does it make any discernible attempt to regulate the composition, structure or organization of the Supreme Courts as appropriate vehicles for the exercise of invested federal jurisdiction**. It is therefore sensible and natural to read the expression "any Court of a State" in s. 77(iii) as referring to State courts in the sense explained by Gibbs J. in *Kotsis*.
>
> His Honour there observed that the exercise of federal jurisdiction did not call for

> a curial organization different in kind from that established for the exercise of State jurisdiction (1970) 122 CLR, at p 110. In this situation there is every reason for supposing that the framers of the Constitution **intended to arm the Parliament of the Commonwealth with a power to invest federal jurisdiction in a State court as it happened to be organized under State law from time to time**. Although the Commonwealth Parliament has no power to alter the structure or organization of State courts, its freedom of action is completely preserved. It has the choice of investing State courts with federal jurisdiction or of establishing appropriate federal courts. Moreover, it may condition the investment of federal jurisdiction on the existence of a suitably structured State court - see, for example, s. 39(2) of the *Judiciary Act 1903* (Cth), as amended.[2] [emphasis added]

But, although the *Kable* doctrine restricted the States' power to confer functions on their courts, the High Court did not use it to strike down any other State legislation for more than a decade.[3] Its practical impact was therefore thought to be limited. In *Fardon v Attorney-General (Qld)*, McHugh J observed that the decision in *Kable* was of "very limited application" and resulted from legislation that was "almost unique in the history of Australia".[4] In *Baker v The Queen*, Kirby J went so far as to complain that the doctrine was "a constitutional guard dog that … [barked] but once".[5]

That was in 2004. Much has changed since that time. In three cases decided since 2009 (coincidentally, after Kirby J retired), the High Court has struck down State legislation conferring functions or powers on State courts or judges.

In *International Finance Trust Co Ltd v NSW Crime Commission*,[6] a majority of the High Court struck down section 10 of the *Criminal Assets Recovery Act* 1990 (NSW). That section empowered the New South Wales Crime Commission to apply to the Supreme Court of New South Wales for a restraining order in respect of some or all of the property of a person suspected of having committed a serious offence. It also required the Supreme Court to hear and determine, without notice to the persons affected, applications for restraining orders made ex parte by the Commission. Such restraining orders could only be set aside in limited circumstances. For the majority, the section was invalid principally because it required the Supreme Court to make ex parte orders for the sequestration of property upon suspicion of wrongdoing, for an indeterminate period, without any effective enforcement of the duty of full disclosure.[7]

The other two cases involved members of what are sometimes called outlaw motorcycle gangs. In *South Australia v Totani*, a majority of the High Court dismissed an appeal from a decision of the Full Court of the Supreme Court of South Australia that had held that section 14(1) of the *Serious and Organised Crime (Control) Act* 2009 (SA) was invalid.[8] Under that Act, the Commissioner of Police could apply to the Attorney-General for a declaration against an organisation. The Attorney could make a declaration if satisfied that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represented a risk to public safety and order in the State. Once a declaration was made, the Commissioner could apply to the Magistrates Court for control orders against named individuals who were members of the organisation and by section 14(1), the Magistrates Court had to make a control order with certain features. The Magistrates Court was required to make the order.

The majority of the High Court held that the law was invalid because it authorised

the Executive (the Commissioner of Police and the Attorney-General) to require the Magistrates Court to implement the decisions of the Executive. As it was up to the Executive to decide whether and why an organisation should be declared, the only question to be determined by the Magistrates Court was whether a person was a member of a declared organisation. This, in the words of Crennan and Bell JJ, had "the effect of rendering the [Magistrates] Court an instrument of the Executive".[9]

In *Wainohu v New South Wales*,[10] a majority[11] struck down the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the Act"). This Act permitted the Commissioner of Police for New South Wales to apply to a judge of the Supreme Court of NSW for a declaration under Part 2 of the Act in respect of an organisation. The declaration sought was an administrative, not a judicial, act and the judge acted as *persona designata*. The judge was not required to provide reasons. If the eligible judge made the declaration which was sought then, under Part 3 of the Act, the Supreme Court would be empowered, on the application of the Commissioner of Police, to make control orders against individual members of the Club. The majority of the Court held that because a Supreme Court judge was not required to provide reasons, the Act violated the *Kable* doctrine.[12]

Even apart from those cases, however, the Court has over the years progressively expanded the *Kable* doctrine and, until recently, resisted attempts by the States to confine its operation.

In *Forge v Australian Securities and Investments Commission*, a case that involved an unsuccessful challenge to the validity of the appointment of an acting judge of the New South Wales Supreme Court, Gummow, Hayne and Crennan JJ said:

> [A]s is recognised in *Kable*, *Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[13]

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.

There was no suggestion that the application of the *Kable* doctrine would be very limited, and subsequent cases have demonstrated that to be the case. Furthermore, as various commentators have pointed out, the focus of the doctrine shifted from the fitness of State courts to exercise federal jurisdiction to the "defining characteristics" of courts.[14]

In *K-Generation Pty Ltd v Liquor Licensing Court (SA)*, moreover, five members of the High Court were at pains to emphasise that the States may not establish a "court of a State", within the meaning of Chapter III of the Constitution, "and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court".[15] In doing so,

they rejected submissions from Queensland and Western Australia that would have confined the *Kable* doctrine to the Supreme Court on the basis that other courts were not required to exist.

I propose to describe the *Kable* doctrine by reference to the case of *Assistant Commissioner Condon v Pompano Pty Ltd* and to outline some difficulties with the doctrine. In making those criticisms, I doubt that I will be adding to what others have already said.

Assistant Commissioner Condon v Pompano Pty Ltd

The most recent description of the *Kable* doctrine is found in the case of *Assistant Commissioner Condon v Pompano Pty Ltd*.[16] That case involved a challenge to provisions of the *Criminal Organisation Act* 2009 (Qld) that permitted the Supreme Court to declare certain information to be "criminal intelligence"[17] and enabled that information to be used in applications under the Act, including applications for a declaration that an organisation was a "criminal organisation".[18] It also included a challenge to the provision that authorised the making of a declaration that an organisation was a "criminal organisation".

Pursuant to the statutory scheme, the Commissioner of Police could apply to the Supreme Court for a declaration that particular information was "criminal intelligence".[19] Evidence was given on the application at a special closed hearing before the Court, and the Court, if it was satisfied that the information is "criminal intelligence", had a discretion whether to make the declaration.[20] In exercising that discretion, the Court might have regard to whether matters such as prejudice to a criminal investigation[21] outweigh any unfairness to a person who might have orders made against them under the Act (such as control orders, fortification removal orders or public safety orders).[22]

The Commissioner of Police could also apply to the Supreme Court for a declaration that a particular organisation was a "criminal organisation". Evidence was given at a closed hearing of the links between the serious criminal activity and criminal convictions of members of the organisation in question. The Court could make a declaration that an organisation is a "criminal organisation" if it was satisfied that the statutory requirements have been proven.[23]

On 1 June 2012, the Assistant Commissioner of Police, Michael Condon, applied to the Supreme Court for a declaration that the motorcycle club known as Gold Coast Chapter of the Finks was a "criminal organisation". The application identified Pompano Pty Ltd as a part of the organisation. It listed several distinguishing features of the organisation, including the rules of the organisation, the clothing worn by the members, and the membership structure.

The Finks challenged the *Criminal Organisation Act* 2009 (Qld) in the High Court, alleging that it infringed the *Kable* doctrine by conferring functions on the Queensland Supreme Court which were incompatible with the Court's independence and impartiality, and impaired its institutional integrity. Reliance was placed upon the remarks of the joint judgment in *Forge*, previously quoted.

French CJ acknowledged that the defining characteristics of courts, although rooted in the text and structure of the Constitution, were not absolute, and even foundational principles of independence and impartiality such as the requirements of procedural fairness might be qualified if, in the circumstances, other considerations required it. His

Honour stated:

> . . . the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters.[24]

French CJ upheld the legislation, noting that the Supreme Court is exercising judicial power, in part because it has a discretion to refuse to make the declaration sought, is required to form its own assessment of the evidence and not merely to accept the opinion of members of the Executive, and can choose whether or not to have regard to confidential criminal intelligence, having regard to the degree of unfairness to the respondent.[25]

The joint judgment of Hayne, Crennan, Kiefel and Bell JJ contains a concise summary of the *Kable* principle:[26]

> As Gummow J explained in *Fardon*, the State courts (and the State Supreme Courts in particular) have a constitutionally mandated position in the Australian legal system…. [I]t follows that "the Parliaments of the States [may] not legislate to confer powers on State courts which are *repugnant to or incompatible with* their exercise of the judicial power of the Commonwealth". As Gummow J further pointed out, and as is now the accepted doctrine of the Court, "the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system".

Their Honours accepted that it was not possible to define the notions of repugnancy and incompatibility, or of institutional integrity, in terms which necessarily dictated future outcomes.[27] They opined that:

> Independence and impartiality are defining characteristics of all courts of the Australian judicial system. Thus, State courts must be and remain free from external influence; in particular, they cannot be required to act at the dictation of the executive.[28]

However, because a separation of powers does not apply to the States in the same way as it does at Commonwealth level, it was possible to accept that State courts sometimes performed functions which went beyond those that could constitute an exercise of the judicial power of the Commonwealth.[29] In the result, their Honours upheld the legislation because it did not alter the duty of the Supreme Court to assess the cogency and veracity of the evidence that is tendered in an application for a declaration of an organisation as a criminal organisation.[30] The Supreme Court retained the capacity to act fairly and impartially, and that was critical to its continued institutional integrity.[31]

The final judge in *Pompano*, Gageler J, succinctly described the basis of the *Kable* principle in these terms:

> [Chapter III] allows the separated judicial power of the Commonwealth to be vested in courts other than those created by the Commonwealth Parliament. All

> State and Territory courts are able to be vested by the Commonwealth Parliament with the judicial power of the Commonwealth. They are all "Ch III courts".
>
> That structural expedient can function only if State and Territory courts are able to act "judicially". To be able to act judicially, a court must have institutional integrity: it must "be and appear to be an independent and impartial tribunal".
>
> There lies the essentially structural and functional foundation for the implication that has come to be associated with *Kable v Director of Public Prosecutions (NSW)*. **The implication is a practical, if not logical, necessity**. **To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the Constitution preserves the institutional integrity of State and Territory courts.** A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth.[32] [emphasis added]

His Honour differed from the other judges in saying that the unfairness of the process was cured only by the capacity of the Supreme Court to stay a substantive application in any case in which practical unfairness becomes manifest.[33]

Problems with the *Kable* doctrine

The *Kable* doctrine is the law of the land. Until the High Court decides to reconsider it, practitioners must take it into account in advising their clients, and judges must apply it.

It is, however, important to consider the reasoning supporting any constitutional doctrines in order to understand how that doctrine may be developed or qualified in the future, and in order to determine whether attempts should be made to have the Court reconsider it.

The starting point for any analysis of *Kable* is that constitutional implications should have a secure textual or structural basis. In *APLA v Legal Services Commissioner*, Hayne J said, by reference to the words of Mason CJ in *Australian Capital Television v Commonwealth*:

> The critical point to recognise is that "any implication must be securely based". Demonstrating only that it would be reasonable to imply some constitutional freedom, when what is reasonable is judged against some unexpressed a priori assumption of what would be a desirable state of affairs, will not suffice. Always, the question must be: what is it in the text and structure of the Constitution that founds the asserted implication?[34]

In the same vein, Callinan J emphasised that an implication must not only be reasonable but "necessary".[35]

The *Kable* principle is an implication derived from Chapter III of the Constitution.[36] But, as an implication, it lacks clear textual and historical support and generates myriad uncertainties. In short, there is much to be said for the view that it is not "securely based".

First, the *Kable* doctrine is premised on all components of the integrated judicial system being equal. Gaudron J, for instance, said in *Kable*:

> To put the matter plainly, there is nothing anywhere in the Constitution to

> suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament.[37]

A similar point was made by Gummow, Hayne, Crennan and Bell JJ in *Wainohu v New South Wales*:

> The principle [in *Kable*] applies throughout the Australian integrated court systems because it has been appreciated since federation that the Constitution does not permit of different grades or qualities of justice.[38]

That premise, however, is questionable. The Constitution does not, in terms, deal with the defining characteristics of State courts. By contrast, the Constitution does speak to the characteristics of federal courts. Section 72 of the Constitution secures the tenure and remuneration of judges who are appointed to federal courts. The importance of these provisions for the independence and impartiality of the federal judiciary has been emphasised on several occasions.[39] In *Harris v Caladine*, for instance, McHugh J observed:

> [T]here is a real difference between the exercise of jurisdiction by State courts invested with federal jurisdiction and the exercise of jurisdiction by the High Court and federal courts created under s 71 of the Constitution. **To fail to perceive the difference is to overlook the unique role which the federal judiciary plays in a federal system of government and the need to ensure that the federal judiciary is independent of the federal Parliament and the Executive Government of the Commonwealth . . .**
>
> Those who framed the Constitution were aware of the need to insulate the federal judiciary from the pressures of the Executive Government of the Commonwealth and the Parliament of the Commonwealth so that litigants in federal courts could have their cases decided by judges who were free from potential domination by the legislative and executive branches of government …
>
> It was to ensure the independence and impartiality of the Justices of the High Court and the judges of the federal courts that the framers of our Constitution enacted s 72 so as to give security of tenure and remuneration to the federal judges who were to exercise the judicial power of the Commonwealth. It is plain that the framers intended that the judicial power of the Commonwealth should be exercised only by courts composed of Justices and judges appointed in accordance with s 72 or State courts invested with federal jurisdiction under s 77(iii) of the Constitution. Though the Parliament might confer federal jurisdiction on a State court whose members did not have the security of tenure and remuneration afforded by s 72, **this result would ensue only because the State concerned did not want its judicial officers to have the same security of tenure as given by s 72**. But the exercise of the judicial power of the Commonwealth by federal courts was another matter.[40] [emphasis added]

The absence of an equivalent provision for State courts suggests that there is a clear distinction between the kinds of courts that exercise federal jurisdiction. Dawson J recognised this in his dissent in *Kable*, where he stated:

> The suggestion that the Constitution does not permit of two grades of judiciary exercising the judicial power of the Commonwealth, or that Ch III does not draw the clear distinction between State and federal courts which it has hitherto been thought to, simply ignores the fact that the Constitution ensures security of tenure

> and of remuneration in respect of judges of courts created by or under Ch III but does not do so in respect of judges of State courts invested with federal jurisdiction. It equally ignores the fact that the Constitution does not require that State courts only exercise judicial power. The suggestion that the Act is invalid because it compromises the institutional impartiality of the Supreme Court of New South Wales ignores the fact that the mechanisms for ensuring judicial impartiality and independence – security of tenure and remuneration, and separation from the other arms of government – are not constitutionally prescribed for State courts notwithstanding that they are prescribed for courts created by or under Ch III. It is difficult to conceive of a clearer distinction.[41]

Nor does the presence of an integrated judicial system entail that the courts within that system must share similar defining characteristics. In *Re Wakim; Ex parte McNally*, Gummow and Hayne JJ observed:

> [W]hen it is said that there is an "integrated" or "unified" judicial system in Australia, what is meant is that all avenues of appeal lead ultimately to this Court and there is a single common law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured.[42]

In this respect, the position of the High Court today is not relevantly different from the position of the Privy Council in the British Empire before federation. In *Trimble v Hill*, the Privy Council opined that it was "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same".[43] The courts from which appeals lay to the Privy Council were not, however, defined by a common set of characteristics, except that they could make orders and pronounce judgments; under the relevant imperial enactments, the Privy Council could "give leave to a suitor to appeal from any decision of *any Court whatever* in a colony or possession" [emphasis added].[44]

Secondly, in any event, as the late Professor Winterton pointed out, the Constitution does not *oblige* the Commonwealth under section 77(iii) to invest any State court with federal jurisdiction.[45] If the Commonwealth is concerned about the institutional arrangements in a particular court, it can decide either not to invest it with jurisdiction or to withdraw the conferral of federal jurisdiction.[46] To imply that all State courts, regardless of their position in the State hierarchy, are immunised from interference by the legislatures and executives because of their *potential* to exercise federal jurisdiction is not an implication that flows naturally or, indeed, logically from the provisions of Chapter III. Indeed, to discover such an implication, as Callinan J observed in *APLA*, requires "the drawing of a very long bow".[47]

Thirdly, the historical materials undercut the doctrine. It has never been doubted that, after federation, courts of summary jurisdiction could validly exercise federal jurisdiction.[48] Yet, until recently, courts of summary jurisdiction in the States were staffed by justices of the peace or magistrates.[49] The latter were members of the State public service, and were subject to executive direction and discipline.[50] In some jurisdictions, they were not even required to be lawyers.[51] The former often had no legal training at all. It was for this reason that the Commonwealth enacted section 39(2)(d) of the *Judiciary Act* 1903 (Cth), which (before its repeal) provided:

> The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or

> some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.

As Heerey J explained in *Commonwealth v Wood*:

> [T]he fact that Parliament thought it necessary to impose such a condition suggests that at the time of the drafting of the Constitution a few years earlier it was contemplated that even honorary justices, who had no security of tenure at all, would, in the absence of such a condition, constitute a court of a State.[52]

This history demonstrates that Gibbs J was correct when he observed that a court "composed of laymen, with no security of tenure, might effectively be invested with jurisdiction under s 77(iii)".[53]

Furthermore, as the Convention Debates reveal, the immediate purpose of the reference in section 73(ii) to "any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council" was to ensure that appeals lay to the High Court from the Local Court of Appeal of South Australia.[54] This court, although virtually obsolete at federation, consisted of members of the Executive Council apart from the Attorney-General.[55] To suggest that it is a defining characteristic of all courts in the Australian legal system that they display independence and impartiality from the other branches of government is difficult to reconcile with this fact.[56]

Fourthly, it is no answer to these difficulties to claim, as French CJ did in *Totani*, that the framers assumed that State courts would be independent and were therefore willing to allow for the autochthonous expedient.[57] Such an unqualified claim is difficult to reconcile with the framers' acceptance of the Local Court of Appeal from South Australia that fell within Chapter III of the Constitution. In any event, the framers did not expressly provide for the independence of State courts in the Commonwealth Constitution, whereas they did provide for the independence of the federal courts through security of tenure and a strict separation of powers.[58]

Fifthly, there is no clear "practical necessity" for the *Kable* doctrine. The existence of such a principle was unheard of for the first 93 years of federation. In that time, the Commonwealth conferred federal jurisdiction on State Supreme Courts and other State courts. No one could say that the *autochthonous* expedient was seriously compromised. And that was despite States occasionally passing laws such as those at issue in the *Builders' Labourers Federation* case in NSW in 1986.[59] Those laws required the NSW Supreme Court to uphold a ministerial order that had been challenged by the Builders' Labourers Federation (the "BLF") in pending proceedings, and to award costs against the BLF. They infringed on characteristics of courts that would now be regarded as being protected by the *Kable* doctrine; but, as Professor Jeffrey Goldsworthy has observed, "it did not occur to anybody at the time, or subsequently, that one effect of the legislation was that the Supreme Court had ceased to be a court".[60]

Sixthly, and self-evidently, the *Kable* doctrine impinges seriously on the ability of States to experiment with their court systems. Justice Heydon in *Public Service Association v Director of Public Employment* expressed the point in these terms:

> A federation is a system of government permitting diversity. It allows its

> component units to engage in their own legislative experiments. It leaves them free to do so untrammelled by what other units have done or desire to do. And it leaves them free to do so untrammelled by what the central legislature has done or desires to do, subject to a provision like s 109 of the Australian Constitution.
>
> In 1996, *Kable v Director of Public Prosecutions (NSW)* cut into that concept of the Australian federation by reducing the legislative freedom of the States. Statements in that case have been much debated in this Court over the last 16 years. Some of them have been invoked successfully to strike down State legislation.[61]

Finally, the *Kable* doctrine is highly uncertain in its application. Consider the recent formulation of the principle in the joint judgment in *Condon*. There are uncertainties at two levels: what is meant by "repugnancy" and what is meant by "the constitutionally mandated position of State courts". Such indeterminate concepts invite sharp differences of judicial opinion and reduce the ability of governments and other entities to plan their affairs.[62] In *Momcilovic v The Queen*,[63] for example, three members of the High Court would have struck down a provision of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) that gave the Supreme Court of Victoria the power to declare that a statutory provision could not be interpreted consistently with a human right.[64] For the majority, however, that function posed no such problem.[65]

The result of the *Kable* principle may be that State laws restricting the capacity of Supreme Courts to grant equitable relief are invalid, and that laws directing courts to awards costs in certain circumstances are invalid. It may even mean that State tribunals established as courts of record, the predominant functions of which are non-judicial, can be precluded from exercising those functions on the basis of a need to preserve their essential characteristics as a court. That a doctrine can create such uncertainty over so many areas is another factor suggesting that it may not have a sound basis.[66]

Endnotes

1. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The majority consisted of Toohey, Gaudron, McHugh and Gummow JJ; the minority of Brennan CJ and Dawson J.

2. (1982) 150 CLR 49 at 61.

3. *Kable* was, however, applied by the Queensland Court of Appeal to strike down s. 30 of the *Criminal Proceeds Confiscation Act 2002* (Qld): *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 39.

4. (2004) 223 CLR 575 at [43].

5. *Baker v The Queen* (2004) 223 CLR 513 at 535 [54].

6. (2009) 240 CLR 319.

7. French CJ, Gummow, Heydon and Bell JJ; Hayne, Crennan and Kiefel dissenting.

8. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting.

9. (2009) 240 CLR 319 at [207].

10. (2011) 243 CLR 181.

11. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting.

12. (2011) 243 CLR 181 at [67]-[69] (French CJ and Kiefel JJ), [109] (Gummow, Hayne, Crennan and Bell JJ).

13. (2006) 228 CLR 45 at [63] – [64] [footnotes omitted].

14. S McLeish SC, "The Nationalisation of the State Court System", paper presented at Melbourne University Law School, 21 July 2011, 9-10; J Goldsworthy, "Kable, Kirk and Judicial Statemanship", paper presented on 15 August 2013, 11.

15. (2009) 237 CLR 501 at [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

16. (2013) 87 ALJR 458.

17. Part 6 of the *Criminal Organisation Act* 2009 (Qld).

18. Section 10 of the *Criminal Organisation Act* 2009 (Qld).

19. This term is defined in s 59 of the *Criminal Organisation Act* 2009 (Qld).

20. Subsection 72(1) of the *Criminal Organisation Act* 2009 (Qld).

21. And other matters set out in s 60 of the *Criminal Organisation Act* 2009 (Qld).

22. The types of applications which may be made against a person are defined in s 75 of the *Criminal Organisation Act* 2009 (Qld).

23. The Court must be satisfied, on the balance of probabilities, of three matters: the respondent is an organisation; members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and the organisation is an unacceptable risk to the safety, welfare or order of the community.

24. *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 *ALJR* 458 at [68] (emphasis added).

25. Ibid., at [87].

26. Ibid., at [123] (emphasis added).

27. Ibid., at [124].

28. Ibid., at [125].

29. Ibid., at [126].

30. Ibid., at [168].

31. Ibid., at [167].

32. Ibid., at [181]-[183].

33. Ibid., at [212].

34. (2005) 224 CLR 322 at [389].

35. (2005) 224 CLR 322 at [469]-[471].

36. See, for example, *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163 [29]: "It is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal".

37. (1996) 189 CLR 51.

38. (2011) 243 CLR 181 at [105].

39. See, for example, *Waterside Workers Federation of Australia v JW Alexander* (1918) 25 CLR 434; *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1.

40. (1991) 172 CLR 84 at 157-159.

41. (1996) 189 CLR 51 at 82 (footnotes omitted).

42. (1999) 198 CLR 511 at [110].

43. (1879) 5 App Cas 342 at 345.

44. *Parkin v James* (1905) 2 CLR 315 at 331 (emphasis added). In *Kamarooka Gold Mining Company, No Liability v Kerr* (1908) 6 CLR 255 at 256, the High Court accepted that the Victorian Court of Mines was a court from which appeal lay, as a matter of special leave, to the Privy Council.

45. G Winterton, "Justice Kirby's Coda in *Durham*" (2002) 13 *Public Law Review* 165 at 167-168.

46. In *Commonwealth v Hospital Contribution Fund* (1981) 150 CLR 49 at 61, Mason J also pointed out that the Commonwealth "may condition the investment of federal jurisdiction on the existence of a suitably structured State court".

47. (2005) 224 CLR 322 at 484 [469].

48. See, for example, *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 347, 348; *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 82 [82].

49. *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at [82] (Gummow, Hayne and Crennan JJ).

50. *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 165 [37] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

51. *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 153 (Gleeson CJ) (noting that it was not until 1955 that new recruits to the magistracy in New South Wales had to be legally qualified); *Commonwealth v Wood* (2006) 148 FCR 276 at 293 [72] (noting that in some jurisdictions the requirement to be a lawyer was not imposed until the 1970s).

52. (2006) 148 FCR 276 at 293 [72].

53. *Commonwealth v Hospital Contribution Fund of Australia* (1981) 150 CLR 48 at 57.

54. Quick and Garran, *Annotated Constitution for the Commonwealth of Australia*, 1901, p 742.

55. *Parkin v James* (1905) 2 CLR 315 at 330.

56. In *Forge* (2006) 228 CLR 45 at 82-83 [84]-[85], Gummow, Hayne and Crennan JJ claimed that the methods for securing independence and impartiality differed between courts, and in the case of inferior courts independence and impartiality was sought to be achieved through the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias rule in particular cases. They added that the differences in history did not deny the importance of real and perceived independence in defining a "court" in Chapter III; all they denied was that the *Act of Settlement* terms of appointment were the defining characteristics of every Chapter III court. It is, however, curious to claim that for well over seventy years after federation magistrates who lacked guaranteed tenure and who formed part of another branch of State government — the executive — would satisfy any test of actual and perceived independence.

Furthermore, their Honours do not explain why the Local Court of Appeal was a "court" within Chapter III.

57. *South Australia v Totani* (2010) 242 CLR 1 at [59]-[65]. His Honour's reliance on the Convention Debates at [63] for such an assumption is particularly problematic, given that the Debates concerned a provision that was not inserted into the Constitution.

58. See also J Goldsworthy, "Kable, Kirk and Judicial Statemanship", paper presented on 15 August 2013, 14-16.

59. *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

60. J Goldsworthy, "Kable, Kirk and Judicial Statesmanship", paper presented on 15 August 2013, 13.

61. (2012) 87 ALJR 162 at [61]-[62].

62. Given the indeterminacy, it is also unsurprising that the joint judgment in *Condon* warned against "taking what has been said in explanation of the decisions in other cases about other legislation to its apparently logical end" and thereby severing the applicable principle from its constitutional roots: (2013) 87 ALJR 458 at [137].

63. (2011) 245 CLR 1.

64. Ibid., at [175]-[188] (Gummow J), [280] (Hayne J), [457] (Heydon J).

65. Ibid., at [96]-[97] (French CJ), [592]-[606] (Crennan and Kiefel JJ), [661] (Bell J).

66. Compare *Sweedman v Transport Accidence Commission* (2006) 226 CLR 362 at [51].