

Chapter 14

The *Kable* Case: A Guard-Dog that Barked But Once?*

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It is an established proposition that the Australian States are not subject to a separation of powers doctrine.¹ Even though separate functionaries, manifested in the forms of distinct legislative, executive and judicial organs, exist in the States, a constitutional impediment to restrict the law-making capacity of a State Parliament from conferring non-judicial powers on a judicial body cannot be directly derived from a separation of powers doctrine. There is a clear divergence in constitutional doctrine relating to separation of powers between the Commonwealth and the States. *Kable v Director of Public Prosecutions*² (“*Kable*”) signals a landmark convergence to some extent in constitutional *outcome* between these two levels of government by precluding State judicial bodies from being invested with statutory powers which would compromise their integrity

* The title of the chapter is drawn from Kirby J’s judgment in *Baker v R* (2004) 210 ALR 1 at 17 [54].

1 *Clyne v East* (1967) 68 SR(NSW) 385 at 395, 400; *Nicholas v Western Australia* [1972] WAR 169; *Gilbertson v South Australia* (1976) 15 SASR 66 at 85; *affd* [1978] AC 772 at 783; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 381, 400, 407, 410, 419-20; *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652.

2 (1996) 189 CLR 51. See generally: G Carney, “*Wilson and Kable: the Doctrine of Incompatibility – an Alternative to the Separation of Powers?*” (1997) 13 *Queensland University of Technology Law Journal* 175; R Hardcastle, “A Chapter III Implication for State Courts: *Kable v DPP*” (1998) 3 *Newcastle Law Review* 13; P Johnston and R Hardcastle, “State Courts: the Limits of *Kable*” (1998) 20 *Sydney Law Review* 216; R Orr, “*Kable v DPP: Taking Judicial Protection Too Far?*” (1996) 11 *AIAL Forum* 11; K Walker, “*Persona Designata, Incompatibility and the Separation of Powers*” (1997) 8 *Public Law Review* 153 at 164-6; F Wheeler, “The *Kable* Doctrine and State Legislative Power Over State Courts” (2005) 20(2) *Australasian Parliamentary Review* 15.

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