Constitutional Protection of State Courts and Judges

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INTRODUCTION

A constitution may give protection to courts of law and their judges in a number of ways. It may establish particular courts, invest them with jurisdiction and prevent their disestablishment, or alteration of their constitutionally invested jurisdiction, save by formal constitutional amendment.[1] A constitution may require an institutional separation of the judicial and non-judicial powers of government so that the judicial powers are exercisable only by courts and so that neither the executive nor the legislative branches of government may require courts or their judges to exercise non-judicial powers.[2] A constitutionally mandated separation of powers may also preclude enactment by parliaments of legislation which intrudes into the performance of the judicial functions reposed in the courts.[3] A constitution may in addition ensure the independence of the judiciary by means of provisions guaranteeing security of tenure.[4]

The strength of constitutional protections of these kinds can vary. The strongest mode of protection is probably that exemplified in s 128 of the Commonwealth of Australia Constitution. That section prescribes a mode of constitutional amendment which requires not only parliamentary approval of a proposed amendment but also approval of electors voting at a referendum.[5] A much less exacting mode of constitutional amendment is one which gives the legislature alone the power to enact amending legislation but which requires amendments to be passed by prescribed majorities.[6]

This article is concerned with the protections afforded to the courts and judges of the Australian States under both the State constitutions and the Commonwealth of Australia Constitution. It examines in particular the protections accorded by the *Constitution Acts* of the States of New South Wales and Victoria, by s 73 of the Commonwealth of Australia Constitution and by the implications which a majority of the High Court of Australia have found

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1 The jurisdiction invested in the High Court of Australia by s 75 of the Commonwealth of Australia Constitution cannot be diminished except by amendment under s 128 of the Constitution.

2 Chapter III of the Commonwealth of Australia Constitution has been interpreted as requiring such a separation, at least at federal level. See L Zines, *The High Court and the Constitution* (4th ed 1996) Chap 9.

3 See *Chu Kheng Lim* v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. See also G Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 185 at 193–208; F Wheeler, 'Original Intent and the Doctrine of Separation of Powers in Australia' (1996) 7 *PLR* 96, 97.

4 See eg Commonwealth of Australia Constitution, s 72.

5 See also the NSW *Constitution Act* 1902, s 7B.

6 Eg the Victorian *Constitution Act* 1975, s 18(2) and s 18(2A).

in Chapter III of the federal Constitution in the recent case of *Kable* v *Director of Public Prosecutions (NSW)*.[7] Those implications are ones which serve to inhibit the powers of State Parliaments to determine what powers and jurisdictions are exercisable by State courts as a matter of State law.

The article also includes commentary on recent dicta which suggest that there may be some fundamental constitutional principles, not expressed in any constitutional document, which inhibit the powers of Australian parliaments to legislate in relation to courts and judges.

STATE CONSTITUTIONS

The constitutions of the Australian States do not explicitly require any separation of the judicial and the non-judicial powers of government.[8] The Parliaments of the States are thus free, at least under State constitutions, to invest State judicial powers in bodies other than the courts and also to invest in the courts of the States powers and functions which are not of a judicial character. Under State constitutional law there are also no constitutional impediments to the appointment of individual judges as persona designata (designated persons) to perform non-judicial functions[9], though there may be statutory provisions which preclude judges from holding other offices of profit.[10]

'Manner and form' provisions in State Constitution Acts may, however, require special legislative procedures to be followed to alter or repeal particular provisions relating to courts and judges.[11] The *Constitution Acts* of two of the Australian States — New South Wales and Victoria — contain 'manner and form' provisions of this kind.

[7] (1996) 70 ALJR 814.

[8] *Clyne* v *East* (1967) 68 SR(NSW) 385, 395, 400; *JD & WG Nicholas* v *State of Western Australia* [1972] WAR 168; *Gilbertson* v *South Australia* (1976) 15 SASR 66, 85, affd [1978] AC 772, 783; *Grace Bible Church* v *Reedman* (1984) 36 SASR 376; *Building Construction Employees and Builders Labourers Federation of New South Wales* v *Minister for Industrial Relations* (1986) 7 NSWLR 372, 381, 400, 407, 410, 419–20; *Love* v *Attorney-General* (NSW) (1990) 169 CLR 307, 319; *Collingwood* v *Victoria [No 2]* [1994] 1 VR 652.

[9] Contrast the position under the federal Constitution: *Grollo* v *Palmer* (1995) 184 CLR 348; *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743.

[10] See Victorian *Constitution Act* 1975, s 84.

[11] See *Colonial Laws Validity Act* 1865 (UK), s 5 (UK — since repealed) and *Australia Acts* 1986 (Cth and UK) s 6.

Constitution Act 1902 (NSW)

In 1992 the *Constitution Act* 1902 was amended by the addition of a new Part, 'Part 9 — The Judiciary'.[12] This Part deals with removal, suspension and retirement from judicial office[13] and the rights of judicial officers when their offices have been abolished by legislation.[14] In 1995 the *Constitution Act* was further amended[15] to prevent Part 9 being repealed or amended, expressly or impliedly, unless the repealing or amending Bill has been passed by both Houses of the Legislature and then approved by a majority of electors.[16] A Bill to repeal or amend this 'manner and form' requirement cannot become law unless enacted by the same process.[17]

Part 9 secures the independence of the State judiciary, but it does not effect 'a constitutional separation of judicial power from legislative power'[18] or from executive power. Its provisions, Dawson J observed in *Kable's* case[19] —

> cannot be seen as reposing the exercise of judicial power exclusively in the holders of judicial office. Nor can they be seen as precluding the exercise of non-judicial powers by persons in their capacity as holders of judicial office. They clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested.

Constitution Act 1975 (Vic)

Part III of Victoria's *Constitution Act* 1975, as amended, is entitled 'Supreme Court of the State of Victoria'.[20] It deals, inter alia, with appointments to the Court (which Court includes the Court of Appeal[21]), and the tenure, salaries, allowances and pensions of members of the Court. One section in this Part, s 85, deals with the jurisdiction and powers of the Court.

[12] Act No 106 of 1992.

[13] The term 'judicial office' is defined in s 52 to cover the Chief Justice, the President of the Court of Appeal, Judges of Appeal, and Judges and Masters of the Supreme Court; the Chief Judges, the Deputy Chief Judges of the Industrial Court, the Land and Environment Court, the District Court and the Compensation Court; magistrates of the Local Court and other magistrates.

[14] Section 56(1) makes it clear that Part 9 does not prevent the abolition by legislation of a judicial office. The section further provides as follows:

> (2) The person who held an abolished office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status, unless already the holder of such an office.
>
> (3) That right remains operative for the period during which the person was entitled to hold the abolished office, subject to removal or suspension in accordance with law. The right lapses if the person declines appointment to the other office or resigns from it.
>
> (4) This section applies whether the judicial office was abolished directly or whether it was abolished indirectly by the abolition of a court or part of a court.

[15] *Constitution (Entrenchment) Amendment Act* 1992, in force from 2 May 1995.

[16] Section 7B.

[17] Section 7B(1)(a).

[18] *Kable* v *Director of Public Prosecutions* (NSW) (1996) 70 ALJR 814, 833–4 per Toohey J.

[19] Id 824–5. Brennan CJ agreed (817). The other Justices did not consider the effect of Part 9.

[20] The Part includes ss 75–87.

[21] The Court of Appeal was established in 1995.

Section 18(2) of the *Constitution Act* deals with the manner in which Bills to repeal, alter, or vary Part III (except s 85) must be passed if they are to become law. Section 18(2) relevantly reads as follows:

> It shall not be lawful to present to the Governor for Her Majesty's assent —
> (a) ...
> (b) any Bill by which this section... Part III, except section 85... or any provision substituted for any provisions therein contained may be repealed altered or varied —
> unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of members of the [Legislative] Council and of the [Legislative] Assembly respectively.

Section 18(3) declares that any Bill dealing with any of the matters specified in s 18(2) which is not passed with the concurrence of the specified majorities 'shall be void'.

Two points should be made about these sub-sections. The first is that the special procedure required by s 18(2) applies whether the Bill in question expressly or impliedly repeals, amends or varies Part III (except s 85). The second point is that, if a Bill to which s 18(2) applies is not passed with the concurrence of the prescribed parliamentary majorities, but the Bill nevertheless receives the royal assent, the resulting Act is invalid.[22]

Sections 18(2A) and 85 of the *Constitution Act*, in combination, control the legislative procedures which must be followed to repeal, alter or vary s 85, expressly or impliedly.[23]

Section 18(2A), which was inserted in 1991,[24] provides as follows —

> A provision of a Bill by which section 85 may be repealed, altered or varied is void if the Bill is not passed with the concurrence of an absolute majority of the whole number of the members of the [Legislative] Council and of the [Legislative] Assembly respectively.

Section 85(5), which was also inserted in 1991[25] (following a report by the Legal and Constitutional Committee of the Parliament in March 1990), introduces further 'manner and form' requirements. It states that —

> A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless —

[22] The Act is invalid to the extent that alterations to the protected provisions have not been passed in accordance with the prescribed procedures.

[23] The history of these sections is described in C Foley, 'Section 85 Victorian Constitution Act 1975: Entrenched Right or Wrong?' (1994) 20 Mon LR 110. See also J Waugh, 'The Victorian Government and the Jurisdiction of the Supreme Court' (1996) 19 UNSWLJ 409.

[24] Act No 35 of 1991.

[25] Act No 35 of 1991.

(a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and
(b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and
(c) the statement is so made —
  (i) during the member's second reading speech; or
  (ii) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
  (iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

Particular points to be noted about s 85(5) are these:

(i) Subject to s 85(6), the requirements of s 85(5) apply only when an Act indirectly repeals or amends any part of s 85. Those requirements are additional to those imposed by s 18(2A).[26]
(ii) If the requirements of s 85(5) have not been satisfied, the resulting Act is ineffective to repeal or amend s 85, notwithstanding that the Bill for the Act was passed by an absolute majority of members of each House, in accordance with s 18(2A).[27]
(iii) Section 85(6) makes the requirements of s 85(5) applicable to any provision which directly or indirectly excludes or restricts 'judicial review by the [Supreme] Court of a decision of another court, tribunal, body or person. . .'.
(iv) The reasons which are required by paragraph (b) of s 85(5) 'are those "for repealing, altering or varying" s 85, and not those explaining why the Bill being introduced indirectly produces a repeal, alteration or variation of s 85. Equally, the reasons to be stated are not those "for affecting the Supreme Court's jurisdiction or its powers or authorities", or anything of the kind'.[28]

What is protected by ss 18(2A) and 85 of the *Constitution Act* 1975 (Vic)?

These provisions in the *Constitution Act* provide protection against legislative measures the effect of which would be to repeal, amend or vary any part of s 85, including those parts of the section to do with legislative procedures. What is protected is primarily such jurisdiction, both original and appellate, and 'such powers and authorities as. . . [the Supreme Court] had immediately before the commencement of the *Supreme Court Act* 1986'.[29] The jurisdiction, powers and authorities so protected are described, in part, in what was

[26] *Broken Hill Proprietary Co Ltd* v *Dagi* [1996] 2 VR 117.
[27] Ibid 158 per Tadgell JA.
[28] Ibid 161 per Tadgell JA.
[29] Sec 85(3).

formerly s 85(2) of the *Constitution Act*, which sub-section was repealed by the *Supreme Court Act* 1986. Section 85(2) provided as follows —

> The Court and the Judges of the Court shall have and may exercise such jurisdictions powers and authorities as were had and exercised by any of the superior Courts in England or the judges thereof or by the Lord High Chancellor of England including the jurisdiction powers and authorities in relation to probate and matrimonial cases and administration of assets at or before the commencement of Act No 502.

Act No 502 was the *Judicature Act* 1874 which gave to the Supreme Court jurisdiction of the kind possessed by the superior courts in England at that time, including the supervisory jurisdiction of the English common law courts of law and the equitable jurisdiction of the Court of Chancery.

Section 85(2) of the *Constitution Act*, before its repeal by the *Supreme Court* 1986, was not an exhaustive statement of the jurisdictions, powers and authorities possessed by the Supreme Court immediately before the commencement of the *Supreme Court Act* 1986. The reason is that, before the commencement of the 1986 Act there were Victorian statutes in force which had invested in the Supreme Court jurisdiction, powers and authorities not encompassed by the jurisdiction, powers and authorities described in s 85(2) of the *Constitution Act*, among them jurisdiction to hear and determine appeals against decisions of specified inferior courts and administrative bodies[30], and the jurisdiction conferred on the Court by s 584 of the *Crimes Act* 1958 (Vic).[31]

Section 85 of the *Constitution Act* thus protects the jurisdictions, powers and authorities possessed by the Supreme Court immediately before the commencement of the *Supreme Court Act* 1986, regardless of the legislative source of the jurisdiction, power or authority.

Section 85(4) of the *Constitution Act* states that 'This Act does not limit or affect the power of the Parliament to confer additional jurisdiction or powers on the [Supreme] Court', i.e. jurisdiction and powers additional to the jurisdiction and powers possessed by the Court immediately before the commencement of the *Supreme Court Act* 1986. The result is that the Parliament can add to the jurisdiction and powers of the Court by following ordinary legislative processes, and, having added to the jurisdiction and powers of the Court (e.g. by conferring on the Court a jurisdiction to hear and determine appeals against the decisions of a specified administrative body), may subsequently remove the additional jurisdiction, again by ordinary legislative processes.

It remains to consider what kinds of proposed or actual legislative measures will exclude, amend or vary the protected jurisdiction, powers and authorities of the Supreme Court. To date there have been few judicial decisions on this question.

[30] See eg *Chiropodists Act* 1968, s 16(4) and (5); *Chiropractors and Osteopaths Act* 1978, s 15(1) and (2); *Credit (Administration) Act* 1984, s 61; *Dentists Act* 1972, s 26(2) and (3); *Pharmacists Act* 1974, s 18(4) and (5); *Physiotherapists Act* 1978, s 19; *Veterinary Surgeons Act* 1958, s 22(8), (9) and (10).

[31] See p 411 below.

In *City of Collingwood* v *State of Victoria (No 2)*[32] a Full Court of the Supreme Court held that the jurisdiction of the Court is not affected by a law which alters the substantive law to be applied by the Court in the exercise of its jurisdiction. This conclusion is consistent with views expressed by some of the Justices of the High Court of Australia in *Deputy Commissioner of Taxation* v *Richard Walter Pty Ltd*[33] regarding the kinds of legislative measures which the federal Parliament can validly enact in exercise of its legislative powers, without infringement of s 75 of the federal Constitution, the section which gives the High Court original jurisdiction in several specified matters. In the opinion of Deane and Gaudron JJ, the federal Parliament 'can consistently with [s 75(v)[34]] and within the limits of the legislative powers conferred upon it by the Constitution, alter the substantive law to ensure that the impugned decision or conduct is in fact lawful'.[35] If, for example, an injunction were sought against a Commonwealth officer whose conduct was alleged to be unlawful, the Parliament —

> could ... consistently with s 75(v), alter the substantive law so that the threatened conduct which would otherwise be unlawful was actually rendered lawful, with the consequence that, while the jurisdiction of the court to entertain an application for injunctive relief to restrain unlawful conduct by an officer of the Commonwealth remained undiminished, subsequent proceedings for an injunction would fail.[36]

Equally —

> the parliament could consistently with s 75(v), provide that administrative decisions of the relevant kind were valid and enforceable notwithstanding the existence of some procedural defect which would otherwise result in invalidity.[37]

In the opinion of Mason CJ a legislative provision which 'does no more than attach definitive legal consequences to an act, transaction or instrument' does not affect a court's jurisdiction.[38] In the opinion of Dawson J, the federal —

> parliament may deal with a subject matter within its legislative competence in such a way as to render the kind of relief referred to in s 75(v) inappropriate without affecting the jurisdiction of the court to grant such relief where appropriate ... There is no reason why the legislature should not render prerogative relief inappropriate by making a particular kind of evidence conclusive proof of specified matters, provided that in so doing it does not deny the jurisdiction for which s 75(v) provides.[39]

[32] [1994] 1 VR 652.
[33] (1995) 183 CLR 168.
[34] Section 75(v) gives the High Court an original jurisdiction 'In all matters ... in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth'.
[35] (1995) 183 CLR 168, 206.
[36] Ibid.
[37] Id 206–7.
[38] Id 184–5.
[39] Id 219–20.

In *Deputy Commissioner of Taxation* v *Richard Walter Pty Ltd* examples were also given of federal laws which were considered to be inconsistent with s 75(v) and thus invalid. These examples are indicative of the kinds of Victorian laws which might be taken to affect the protected jurisdiction of the Supreme Court. The examples were these:

(1) A provision to deprive 'a citizen of the constitutional right to invoke the jurisdiction of this court under s 75(v) to entertain an action for an injunction against a particular officer'.[40]

(ii) A provision which precluded 'the court from determining whether the impugned conduct [of the Commonwealth officer] is or is not in fact unlawful', e.g. a provision that 'there is an irrebutable presumption that the impugned conduct is lawful'.[41]

(iii) A provision that 'in a case in which an injunction is sought to restrain an officer from enforcing an allegedly invalid decision, a certificate of the defendant officer to the effect that the impugned decision was valid and enforceable would conclusively determine the issue in his or her favour regardless of whether the decision was in fact invalid'.[42]

(iv) A provision which makes 'a particular kind of evidence conclusive proof of specified matters' and 'where the conclusiveness of the evidence effectively determined the issue between the parties for all purposes'.[43]

Victoria's Supreme Court (including its recently established Court of Appeal[44]) has not yet had occasion to consider the relevance of the opinions expressed in *Deputy Commissioner of Taxation* v *Richard Walter Pty Ltd*[45] to the interpretation of ss 18(2A) and 85 of the State's *Constitution Act*. In *Broken Hill Proprietary Company Ltd* v *Dagi*[46] the State's Court of Appeal did, however, decide (on 15 December 1995) that the protected jurisdiction, powers and authorities of the Supreme Court were relevantly affected by the *Public Prosecutions Act* 1994 (Vic), s 46 of which had provided that only the Attorney-General could 'apply to a court for punishing of a person for a contempt of court that involves an interference with the due administration of justice, either in relation to a pending proceeding or more generally'. What this section did was to remove from the Supreme Court its power to deal with contempts on the application of persons other than the Attorney-General. Nonetheless the section was adjudged valid since it had been enacted in accordance with the applicable 'manner and form' requirements.

The jurisdictions of the Supreme Court of Victoria which are protected by the *Constitution Act* 1975 undoubtedly include its supervisory jurisdiction. Clauses detracting from that jurisdiction, including ones which restrict the

[40] Id 206 per Deane and Gaudron JJ.
[41] Ibid.
[42] Ibid per Deane and Gaudron JJ.
[43] Id 220 per Dawson J.
[44] Established in 1995.
[45] (1995) 183 CLR 168.
[46] [1996] 2 VR 117.

grounds on which judicial review may be sought[47], must therefore be held invalid unless they have been passed in accordance with the applicable manner and form requirements.[48] Arguably the Court's jurisdiction is not affected by legislation to restrict standing to invoke the supervisory jurisdiction, but the decision in *Broken Hill Proprietary Co Ltd* v *Dagi*[49] suggests that legislation of this kind could, in some circumstances, be regarded as affecting the Court's powers and authorities and thus legislation which cannot be validly enacted except in accordance with the requirements of ss 18(2A) and 85. Legislation which limits the quantum of damages which the Court may award or which otherwise limits the remedies the Court may grant might equally be regarded as detracting from the protected powers and authorities of the Court.[50]

Inspection of the Victorian statutes enacted since the amendments to ss 18 and 85 of the *Constitution Act* which were made in 1991 reveals a large number of Acts which declare an intention to repeal, alter or vary the protected jurisdiction, powers and authorities of the Supreme Court.[51] Many of these

[47] The grounds on which the Supreme Court may review decisions of the Credit Tribunal, the Residential Tenancies Tribunal and the Small Claims Tribunals are limited to absence of jurisdiction or breach of natural justice: *Administrative Law Act* 1978, s 4(3) and (4).

[48] In 1989 the Parliament enacted legislation to prevent the constitutional validity of any Act passed since the *Constitution Act* 1975 came into force from being questioned on the ground that it had divested the Supreme Court of jurisdiction, without compliance with s 18 of the *Constitution Act*. *The Constitution (Supreme Court) Act* 1989 (as amended in 1991) provided as follows —

> 4. (1) The enactment or validity of the *Retail Tenancies Act* 1986, the *Planning and Environment Act* 1987 or any other Act enacted or purporting to have been enacted after 1 December 1975 and before 1 July 1991 shall not be called in question in any proceeding in any court or tribunal on the ground that the Bill for the Act contained any provision by which section 85 of the Principal Act may be repealed, altered or varied and, because the requirements of section 18(2) of the Principal Act were not complied with, the Bill was not lawfully presented for Royal Assent or was void.
>
> (2) In sub-section (1), a reference to a provision in a Bill for an Act does not include a reference to a provision directly amending Part III of the Principal Act by the insertion, substitution, omission or repeal of matter.
>
> (3) Anything done or omitted to be done under the authority or purported authority of an Act to which sub-section (1) applies shall not be called in question on the ground referred to in sub-section (1).

One of the questions which has been referred to the Victorian Court of Appeal is *Aust Scan Pty Ltd (trading as "Ikea Home Furnishings")* v *Paul Valta* (Supreme Court of Victoria No 6571 of 1995) is whether s 4 of the *Constitution (Supreme Court) Act* 1989 (as amended) is invalid by reason of s 73 of the federal Constitution or otherwise. Section 4 altered the jurisdiction of the Supreme Court under s 85 of the *Constitution Act* 1975. But the Bill for the Act was passed by the requisite majorities at all relevant stages (Hansard, LA 2 May 1989 (pp 1134, 1142), 26 May 1989 (p 2217), LC 26 May 1989) (pp 1228, 1230)). To the extent that s 4 of the 1989 Act precludes judicial review of the legislation to which the section applies it necessarily forecloses any possibility of an appeal from a decision of the Supreme Court on the validity of this legislation. There has never, however, been any suggestion that s 73 of the federal Constitution inhibits the power of State Parliaments to enact privative clauses.

[49] [1996] 2 VR 117.

[50] Query however the status of a provision of a kind which the High Court held invalid in the case referred to in fn 3 supra.

[51] There is a survey of the statutes up to the end of 1994 in Victoria, Parliaments, Scrutiny of Acts and Regulations Committee, *Discussion Paper No 1: Section 85 of the Constitution Act* 1975 (May 1995).

Acts are, however, ones which could not reasonably be regarded as ones which affect the protected jurisdiction, powers and authorities of the Court. As Hayne JA noted in *Broken Hill Proprietary Co Ltd* v *Dagi*[52], explicit statements of intention to repeal, alter or vary the protected jurisdiction, powers and authorities of the Supreme Court have been inserted in many Victorian statutes out of an abundance of caution.

The protections which have been afforded to Victorian courts and judges by the State's *Constitution Act* are not insignificant ones, but they extend only to the Supreme Court and its judges. They are, moreover, protections which are of little avail when the political executive of the day commands majorities in both of the Houses of the Parliament. More significant constitutional protections of the court systems of the States are promised by the High Court's recent decision in *Kable* v *Director of Public Prosecutions (NSW)*.[53] I deal with this case and its implications in the next part of the article.

THE FEDERAL CONSTITUTION

The Commonwealth of Australia Constitution presupposes the continued existence of State court systems and, in particular, State Supreme Courts. Section 77(iii) authorises the federal Parliament to invest federal jurisdiction in 'any court of a State'.[54] Federal jurisdiction has in fact been invested in State courts since the early days of federation.[55] Under s 73 of the Constitution the High Court of Australia has:

> jurisdiction, with such exceptions and subject to such regulations as the [federal] Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences —
>
> ...
>
> (ii) Of any ... court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State which at the establishment of the Commonwealth an appeal lies to the Queen in Council.[56]

These provisions have made for an integrated federal/State court system.

When the federal Parliament confers federal jurisdiction on a court of a

[52] [1996] 2 VR 117, 203 and 206.

[53] (1996) 70 ALJR 814.

[54] Section 71 should also be noted. It provides that:

> The judicial power of the Commonwealth 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 ... (Emphasis added.)

[55] See *Judiciary Act* 1903, s 39(2).

[56] In *Kable* v *Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814, 826–7 Dawson J noted that 'in South Australia at federation an appeal lay from the Supreme Court to the Court of Appeals which comprised the Governor in Executive Council. Special provision had to be made in s 73 of the Constitution to include the Court of Appeals'. Dawson J cited the *Official Records of the Debates of the Australian Federal Convention* (Melbourne) 31 January 1898, Vol IV, 332–333.

State it must take that court as it finds it[57]: it cannot alter its structure or organisation or jurisdictional limits under State law, though under s 79 it is authorised to prescribe the number of judges (State or federal) who are to exercise a federal jurisdiction. To an extent the federal Parliament can also regulate the procedures to be followed in the exercise of the federal jurisdiction[58] and, in exercise of its power under s 73, it may regulate appeals to the High Court from State courts.[59] State Parliaments are, however, denied any capacity to regulate appeals to the High Court from State courts exercising State jurisdiction.[60] A State statute which invests a jurisdiction in the State Supreme Court and which declares that decisions made in the exercise of that jurisdiction are 'final and conclusive' or 'final and without appeal' is therefore ineffective to bar appeals to the High Court.[61] Section 73 gives the power to regulate appeals to the High Court solely to the federal Parliament.

While the federal Constitution does not insist that the judicial powers of the States be separated from their non-judicial powers,[62] a majority of Justices of

[57] *Federated Sawmill Timberyard and General Woodworkers Employees Association (Adelaide Branch)* v *Alexander* (1912) 15 CLR 308, 313; *Le Mesurier* v *Connor* (1929) 42 CLR 481, 495–6; *Bond* v *George A Bond and Co Ltd and Bond's Industries Ltd* (1930) 44 CLR 11; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545; *Silk Bros Pty Ltd* v *State Electricity Commission of Victoria* (1943) 67 CLR 1; *Aston* v *Irvine* (1955) 92 CLR 353; *Russell* v *Russell* (1976) 134 CLR 495; *Commonwealth* v *Hospital Contribution Fund* (1982) 150 CLR 49, 61. See also *Kable* v *Director of Public Prosecutions* (NSW) (1996) 70 ALJR 814, 838–9 per Gaudron J, 843 per McHugh J, 858–9 per Gummow J.

[58] *Lorenzo* v *Carey* (1921) 29 CLR 243, 253. There have been differences of judicial opinion about the source of federal legislative power to make laws with respect to the procedures of courts invested with federal jurisdiction under s 77(iii) of the federal Constitution. Some judges have suggested that it is s 51(xxxix); some have suggested that it is s 77(iii); some have suggested that it is a substantive head of power; others have suggested that it is a combination of s 77(iii) and a substantive head of power. The differences of opinion are discussed in Z Cowen and L Zines, *Federal Jurisdiction in Australia* (2nd ed 1978) 196–8. See also *Russell* v *Russell* (1976) 134 CLR 495, 518–9 per Gibbs J.

In *Russell* v *Russell* a majority (3:2) held invalid a provision which required State courts exercising a particular federal jurisdiction to hear proceedings in closed court. The provision was regarded by the majority as 'more than a law regulating the practice and procedure which the State court is to follow in exercising its invested jurisdiction . . .' (519 per Gibbs J). It was rather 'a regulation of the court itself . . .' (520 per Gibbs J). 'To require a court invariably to sit in closed court is to alter the nature of the court' (ibid).

[59] Eg *Judiciary Act* 1903, ss 35 and 35A on special leave to appeal.

[60] *Peterswald* v *Bartley* (1904) 1 CLR 497, 498–9 per Griffith CJ; *Adelaide Fruit and Produce Exchange Co Ltd* v *Corporation of the City of Adelaide* (1960) 105 CLR 428, 439 per Menzies J; *Kotsis* v *Kotsis* (1970) 122 CLR 69, 77 per Barwick CJ; *Medical Board of Victoria* v *Meyer* (1938) 58 CLR 62, 98–9 per Dixon J.

[61] A State statute which vests an appeals jurisdiction in an inferior court and declares that decisions made in the exercise of that jurisdiction to be 'final and conclusive' or 'final and without appeal' will preclude further appeal to the Supreme Court and thence an appeal to the High Court (see *Twist* v *Randwick Municipal Council* (1976) 136 CLR 106; *Szirom* v *Surveyors Board of Victoria* (1995) 9 VAR 91). A State statute which declares a decision of a single judge of the State Supreme Court, on appeal, to be final etc. may debar further appeal within the State court system (*Komesaroff* v *Law Institute (Vic)* [1992] 2 VR 257) but it cannot preclude appeals under s 73 of the federal Constitution.

[62] All judges in *Kable's* case recognised this to be so.

the High Court have, in *Kable* v *Director of Public Prosecutions (NSW)*,[63] found that Chapter III of the Constitution impliedly limits the powers of State Parliaments in relation to the functions they may assign to State courts. According to the majority, Chapter III impliedly prohibits State Parliaments from enacting legislation which invests in State courts non-judicial powers the exercise of which is incompatible with the exercise by them of federal jurisdiction. In the opinion of McHugh J, non-judicial functions invested in State courts under State law must not 'be of such 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'.[64] The State law which the majority in *Kable* held to violate what may be termed the incompatibility doctrine was a New South Wales statute which authorised the Supreme Court to make preventive detention orders against a named person.[65]

The majority opinions in *Kable* have far-reaching implications for the States. While the majority have conceded that the federal Constitution does not prohibit absolutely the investiture of non-judicial State functions in State courts, their ruling is bound to cast doubts on the constitutionality of a variety of State measures which invest in State courts powers and functions which, according to federal constitutional tests,[66] would be regarded as being of a non-judicial character.

There are dicta in some of the majority opinions which suggest that Chapter III of the Constitution also inhibits the powers of the State Parliaments to reconstruct State court systems. According to Gaudron J the States 'must each maintain courts, or, at least, a court for the exercise of the judicial power of the Commonwealth. Were they free to abolish their courts . . . the provisions of Chapter III which postulate an integrated judicial system would be frustrated in their entirety'.[67] According to McHugh J —

> [Section] 73 of the Constitution implies the continued existence of the State Supreme Courts . . . [the reason being that] the right of appeal from a State Supreme Court to . . . [the High] Court would be rendered nugatory if the Constitution permitted a State to abolish its Supreme Court . . . [A]nd if there is a system of State courts in addition to the Supreme Court, the Supreme Court must be at the apex of the system.[68]

Later on McHugh J expressed the view that Chapter III places limitations on the powers of State Parliaments to abolish the jurisdictions of the Supreme Courts. They could not, for instance, remove from the Supreme Courts all jurisdictions save a jurisdiction to hear and determine appeals against administrative decisions. 'To do so would make a mockery of the principles contained in Chapter III of the Constitution'.[69]

[63] (1996) 70 ALJR 814, Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.
[64] Ibid, 847.
[65] *Community Protection Act* 1994.
[66] See L Zines, *The High Court and the Constitution* (4th ed 1996) Chap 10.
[67] *Kable* v *DPP (NSW)* (1996) 70 ALJR 814, 839. See also id 861 per Gummow J.
[68] Id 894.
[69] Id 845.

Both Gaudron J and McHugh J, it should be added, hinted that Chapter III may impliedly impose restrictions on the kind of legislation which State Parliaments may enact to regulate the procedures of State courts.[70] That suggestion will be considered in a later part of the article.[71]

The next part of the article explores some of the questions which could arise as a result of the central aspect of the majority opinion in *Kable*, that is to say, the proposition that Chapter III of the federal Constitution, by implication, prohibits the Parliaments of the States from enacting legislation to invest in State courts functions which are incompatible with the exercise by them of any of the judicial powers of the Commonwealth.

THE INCOMPATIBILITY DOCTRINE

Advisory jurisdictions

There must surely be a question about the validity of State legislation which requires a Supreme Court to give advisory opinions upon the request of the Executive, whether they be opinions on questions of law or on other matters. It would, for example, be doubtful whether it would now be open to a State Parliament to enact a statute along the lines of Article 143(1) of the Indian Constitution or s 53 of Canada's *Supreme Court Act* or s 4 of the United Kingdom's *Judicial Committee Act* 1833.[72] Article 143(1) of the Indian Constitution provides that —

> If at any time it appears to the President that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court, he may refer the question to that court for consultation and the court may, after such hearing as it thinks fit, report its opinion thereon.[73]

The corresponding Canadian provision provides that if the Governor in Council refers a question of law or fact to the Supreme Court, it is the duty of the Court to consider and answer the question.[74]

The questions which could be referred to a court under reference provisions such as these could be entirely abstract and hypothetical. The court might, for instance, be asked to advise on whether certain proposed regulations are authorised by an enabling statute, whether one of the Houses of Parliament would be acting contrary to some statute if it treated the issue of a writ against a member of the Parliament in respect of a speech or proceeding by him or her

[70] Id 839 per Gaudron J, 843, 847 per McHugh J.

[71] See pp 416–8 below.

[72] If as Gummow J has suggested '[t]he advisory opinion is alien to the federal judicial power' (*Grollo* v *Palmer* (1995) 184 CLR 348, 391) it must equally be alien to State judicial power.

[73] On the effect and use of this provision see MP Jain, *Indian Constitutional Law* (3rd ed 1978) 134–9.

[74] There are similar provisions in the Canadian Provinces. See BL Strayer, *The Canadian Constitution and the Courts* (3rd ed 1988) 315–8 and PW Hogg, *Constitutional Law of Canada* (3rd ed 1992) section 8.6.

in Parliament as in breach of its privileges,[75] or perhaps even on whether a Bill, if enacted, would be unconstitutional.

The constitutional validity of the Canadian reference provision, which was first introduced in 1875, was considered by the Judicial Committee of the Privy Council in *Attorney-General, Ontario* v *Attorney-General, Canada.*[76] The Committee found nothing in the *British North America Act* 1867 that would preclude the Dominion Parliament from enacting the provision, though they conceded that the Supreme Court's answers to the questions referred to it would be 'only advisory' and would 'have no more effect than the opinions of the law officers'.[77] The Committee was unmoved by the arguments of the Provinces that the reference provision was 'a gross interference with the judicial character of' the Supreme Court;[78] that 'to place the duty of answering questions' referred by the Executive was 'incompatible with the maintenance of such judicial character or of public confidence in it [the Supreme Court], or with the free access to an unbiased tribunal of appeal to which litigants in the provincial Courts are of right entitled';[79] and in that was 'subversive of justice to require the Court to answer questions not in litigation'.[80]

The *British North America Act* 1867 contained no equivalent of Chapter III of Australia's federal Constitution, and the Judicial Committee's opinion can certainly not be regarded as one which would now carry much weight in determining the validity of Australian State legislation conferring a purely advisory jurisdiction on a State court.

A jurisdiction of that kind needs to be distinguished from the kind of jurisdiction conferred on Queensland's Court of Criminal Appeal by s 669A of the State's Criminal Code and which, in *Mellifont* v *Attorney-General (Queensland)*,[81] a majority of the High Court held to involve an exercise of judicial power. The section, which has counterparts in the legislation of other Australian States,[82] empowered the Attorney-General to refer a point of law to the Court 'for its consideration and opinion' if the accused had been acquitted of the charge in the indictment, or if the accused had been discharged after Crown counsel, 'as a result of a determination' by the trial judge 'on that point of law', had informed the court that the Crown would not proceed further with the charge. The opinion of the Court could not affect an acquittal or expose the accused to double jeopardy. Nevertheless it could not be described as 'in response to an abstract question, and hypothetical in the sense that it was

[75] A question of that kind was referred to the Judicial Committee of the Privy Council under s 4 of the *Judicial Committee Act* 1833 (UK): *Re Parliamentary Privilege Act 1970* [1958] AC 331. For other examples of such references see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) 449.

[76] [1912] AC 571.

[77] Id 589.

[78] Id 582.

[79] Id 584.

[80] Id 588.

[81] (1991) 173 CLR 289 (Brennan J dissenting).

[82] See NSW *Criminal Appeal Act* 1912, s 5A; Tas *Criminal Code* s 410(2); Victoria *Crimes Act* 1958, s 450A; WA *Criminal Code* s 693A.

unrelated to any actual controversy between parties'.[83] 'The fundamental point. . .', it seemed to Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, was that the procedure enabled 'the Court of Criminal Appeal to correct an error of law at the trial'. It was 'that characteristic of the proceedings that. . . [stamped] them as an exercise of judicial power and the decision as a judgment or order within the meaning of s 73' of the federal Constitution.[84]

Procedures of the kind considered in *Mellifont* are somewhat different from those established by s 584 of Victoria's *Crimes Act* 1958 and under which the Supreme Court may be involved in determination of whether the prerogative of mercy should be exercised. Section 584 provides as follows:

> Nothing in this Part shall affect the prerogative of mercy, but the Attorney-General on the consideration of any petition for the exercise of her Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence passed on a person so convicted, may if he thinks fit, at any time either —
> (a) refer the whole case to the Court of Appeal and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or
> (b) if he desires the assistance of the judges of the Trial Division of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to such judges for their opinion thereon, and such judges or any three of them shall consider the point so referred and furnish the Attorney-General with their opinion thereon accordingly.

Paragraph (a) of the section probably does not offend against the incompatibility doctrine enunciated in *Kable's* case[85] since a petition for mercy referred to the Court of Appeal under that paragraph is to be determined by it as if it were an appeal by a person convicted. The constitutionality of paragraph (b) is less clear since references under that paragraph seek no more than opinion and the opinion sought may be on whether the prerogative of mercy should be exercised at all.

Administrative appeals jurisdictions

Yet another type of State legislation the validity of which is cast in doubt by the majority decision in *Kable* is legislation which invests in a designated State court a jurisdiction to hear and determine appeals from administrative decisions, and to do so by way of a de novo hearing on the merits. The administrative decisions made subject to appeals may be ones which involve exercise of wide and unstructured discretions. Hitherto it has been assumed that there is no constitutional impediment to the use of State courts as administrative appeals tribunals and States have, in fact, made extensive use of the ordinary courts as tribunals of this kind.[86] There are also decisions of the High Court which support the proposition that decisions of State Supreme Courts

[83] (1991) 173 CLR 289, 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
[84] Ibid.
[85] (1996) 70 ALJR 814.
[86] See fn 30 supra.

made in the exercise of an administrative appeals jurisdiction can qualify as judgments and orders for the purposes of s 73 of the federal Constitution.[87] In *Kable*, McHugh J ventured the opinion that it is open to State Parliaments to invest in State courts jurisdictions of the kind invested by federal legislation in the federal Administrative Appeals Tribunal.[88] But he questioned the validity of State legislation which denuded the State's Supreme Court of all or most of its ordinary judicial jurisdiction and which left it with little more than an administrative appeals jurisdiction.[89]

Preclusion of review of decisions of inferior courts and tribunals

A further possible restriction on the capacity of State Parliaments to determine the shape State judicial systems was suggested by McHugh J. It was that s 73 of the federal Constitution may prevent State Parliaments from enacting legislation to preclude appeals from, or other forms of judicial review of, decisions of the inferior courts of the State.[90] If this view is accepted, it could be argued that s 73 also limits the powers of State Parliaments to remove or restrict the supervisory jurisdictions of State Supreme Courts, since legislation of this kind will, if valid, necessarily restrict the appellate jurisdiction of the High Court under s 73.

Legislation on indefinite sentences

In *Kable*, two members of the majority (Toohey and McHugh JJ) made reference to State legislation which permits courts to impose indefinite sentences for certain crimes.[91] They assumed this legislation to be valid.[92] Shortly after the decision in *Kable* was handed down, Geoffrey John Moffatt, sought leave to appeal against the indefinite sentence imposed upon him by Victoria's County Court. One of the grounds of his application was that the relevant provisions in the State's *Sentencing Act* 1991 (in Sub-Division (1A)) were incompatible with Chapter III of the federal Constitution. The incompatibility, it was argued, arose from those provisions which made it necessary for a court to undertake periodic reviews of indefinite sentences. Traditionally it had been left to the Executive to decide whether an indefinite sentence should be terminated.[93]

[87] See *Medical Board of Victoria* v *Meyer* (1937) 58 CLR 62; *Mellifont* v *Attorney-General (Qld)* (1991) 173 CLR 289.

[88] (1996) 70 ALJR 814, 848. See also *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743, 751 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

[89] (1996) 70 ALJR 814, 848.

[90] Id 845–6.

[91] See Qld *Penalties and Sentences Act* 1991, Pt 10; SA *Criminal Law (Sentencing) Act* 1988, Div 3; Tas *Criminal Code*, s 392; WA *Criminal Code* s 662(a); *Crime (Serious and Repeat Offenders) Sentencing Act* 1992; NT *Criminal Code*, ss 399, 403.

[92] (1990) 70 ALJR 814, 836 per Toohey J, 850 per McHugh J.

[93] Review powers have, however, been given to the courts in Queensland, the Northern Territory and South Australia: see fn 91 supra.

The Victorian Court of Appeal concluded that the State's indefinite sentencing provisions were not incompatible with Chapter III of the federal Constitution.[94] Hayne JA noted that these provisions were very different from the New South Wales *Community Protection Act* 1994 which the majority in *Kable* had found invalid. An indefinite sentence could 'be imposed only on an offender found guilty of a particular offence'. And unlike the New South Wales Act, 'the indefinite sentencing provisions' in Victoria's *Sentencing Act* were 'general in their application' rather that 'directed to any particular individual'. All judges agreed that the provision for periodic judicial review of indefinite sentences could not be regarded as antithetical to the exercise of judicial power. There was, Hayne JA observed, 'nothing in the legislation or the circumstances which existed at the time of its enactment which would lead reasonable members of the public to conclude that the Supreme Court or County Court was being called on to act as no more than an instrument of the executive government'. In the opinion of Charles JA the review function assigned to the courts was 'properly characterized as a judicial function'. In the exercise of that review function, a court 'is left with a clear discretion to be exercised upon grounds which must be exposed in reasons and which are thereafter open to an appeal'. Moreover, the review process was —

> intended to protect individual rights and uphold principles of natural justice. Far from weakening confidence in the court it might well be thought that the process of review of an indefinite sentence by a court would be seen by the community as preferable and more fair to the offender than would making a sentence of indefinite duration terminable only at the ill-defined pleasure of the Executive.

Appointment of judges as designated persons

In *Kable* it was not necessary for the High Court to consider whether Chapter III of the federal Constitution restricts the circumstances in which individual State judges may be appointed to perform non-judicial tasks as persona designata (designated persons). The Court's decisions in *Grollo* v *Palmer*[95] and *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs*[96] have made it clear that Chapter III limits the circumstances in which judges of federal courts may be employed as designated persons. These judges cannot be so employed without their consent. Thus a federal statute which made all judges of the Federal Court members of the Administrative Review Council, ex officio, would probably be held invalid since the functions of the Council are advisory functions of a non-judicial character. More importantly non-judicial tasks cannot be assigned to individual judges of federal courts, even with their consent, if the tasks assigned to them are incompatible with the judge's performance of his or her judicial functions or with 'the proper discharge by the judiciary of its responsibility as an institution exercising judicial

[94] *The Queen* v *Moffatt*, unreported 14 March 1997.
[95] (1995) 184 CLR 348.
[96] (1996) 70 ALJR 743.

power'.[97] If there are, as the majority held in *Kable's* case, constitutional inhibitions on the power of State Parliaments to invest non-judicial powers in State courts, it is hard to understand why the same inhibitions should not apply equally to the uses which State Parliaments and State Executives may make of the services of individual judges of the State courts. If the functions to be performed by a judge of the Federal Court of Australia as a reporter appointed by a Minister under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) were, as a majority of the High Court held in *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs*,[98] incompatible with the performance of her duties as a member of the Federal Court, must it not follow that those, or similar, functions could not be assigned to a judge of a State Supreme Court, a court which under the *Jurisdiction of Courts (Cross Vesting) Act* 1987 (Cth) exercises federal jurisdiction co-extensive with that of the Federal Court of Australia?

In *Kable* McHugh J suggested that 'although nothing in Ch III prevents a State from conferring executive functions on a State court judge as persona designata, 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 of the State, it would be invalid'.[99]

Kable's case certainly throws doubts on the constitutional validity of State legislation which conscripts all judges of a specified State court as members of a statutory tribunal the functions of which are not strictly judicial in character. In *Lisafa Holdings Pty Ltd* v *Commissioner of Police*[100] Street CJ was highly critical of New South Wales legislation which had made all judges of the State's District Court members of the Gaming Tribunal and the Police Tribunal.[101] This legislation was said to be an unwarranted 'interference by Parliament with the judicial institutions of this State' — an interference which defied 'an indispensable bulwark of our democracy — independence of the judiciary'.[102] Although both tribunals had been declared, by statute, to be courts of record they 'formed no part of the ordinary machinery of justice'.[103] Their 'proceedings were made subject to Executive Government control by regulations'[104] and the Minister responsible for the administration of both tribunals was a Minister other than the Attorney-General. Judges had 'thus in

[97] *Grollo* v *Palmer* (1995) 184 CLR 348, 364–5.

[98] (1996) 70 ALJR 743 (Kirby J dissenting). The reasons why the functions of a reporter were considered to be incompatible with the performance of federal judicial powers were: (i) A reporter could be removed from office by the Minister before he or she had presented a report to the Minister; (ii) A reporter does not enjoy judicial immunities from suit; (iii) A reporter is equivalent to a ministerial adviser; (iv) The matters on which a reporter is required to report, under s 10, include matters which involve exercise of political functions, eg assessment of the weight to be accorded to competing interests and what action should be taken in the future; (v) The matters on which a reporter is required to report include matters of legal advice.

[99] (1996) 70 ALJR 814, 848; cf Gaudron J, 840.

[100] (1988) 15 NSWLR 1.

[101] By the *Gaming and Betting (Amendment) Act* 1987 and the *Police Regulation (Allegations of Misconduct) Act* 1978.

[102] (1988) 15 NSWLR 1, 4.

[103] Id 5.

[104] Id 6.

effect' been 'drafted to provide services outside the conventional role of judges in our society — a role that is properly confined to membership of a court and to exercising the jurisdiction of that court'.[105]

> It was indeed a far reaching and . . . extra-ordinary step for Parliament to repudiate the constitutional independence of the District Court as an institution, and of its judges as individual members of the judiciary, by simply treating the judges as a group of persons who can involuntarily be conscripted to be members of a statutory tribunal. What, one might ask rhetorically, is to become of a District Court judge who found membership of the Gaming Tribunal unacceptable and repudiated the statutory duty imposed on him or her by Parliament? Would such a refusal of duty amount to misbehaviour exposing him or her to removal from the District Court bench?[106]

Street CJ acknowledged that there had been 'many instances of individual judges being appointed to statutory tribunals',[107] as designated persons. He went on to say:

> But such appointments are carefully evaluated for their acceptability by the head of the court from which the judge is proposed to be selected. Likewise they are only made if the selected judge indicates a willingness to accept such an appointment; it has never been thought permissible for Parliament simply to conscript a judge as a member of a statutory tribunal irrespective of his or her own views on the matter.[108]

The majority opinions in *Kable's* case should prompt State Governments to reassess current arrangements under which non-judicial functions have been assigned to State courts and judges and also those under which State judges are appointed as designated persons to undertake non-judicial tasks.[109] Furthermore, if as McHugh J maintains, Chap III of the Commonwealth Constitution requires that State courts 'must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government'[110], State laws which do not accord security of tenure to the judicial officers of the State may need to be reconsidered.

[105] Id 7.
[106] Id 6.
[107] Ibid.
[108] Ibid. Street CJ's views on the conventions which should be observed when individual judges are invited to accept appointment to non-judicial offices were expressed, most forcefully, in correspondence relating to the appointment of Stewart J as chairman of the National Crime Commission. This correspondence is reproduced in R Thomson, *The Judges* (1986) Chap 4.
[109] Non-judicial functions undertaken by State judges have included inquiries by royal commission, functions as members of standing, statutory commissions (including law reform commissions) and boards (eg parole boards). State Chief Justices have also served as acting vice-regal representatives. Examples of non-judicial tasks which have been undertaken by judges are provided in the dissenting opinion of Kirby J in *Wilson's case* (1996) 70 ALJR 743. See also Australian Institute of Judicial Administration, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986).
[110] (1996) 70 ALJR 814, 847.

ENTRENCHMENT OF JUDICIAL PROCESS

In a speech delivered in July 1996, almost two months before the High Court handed down its judgment in *Kable*, Sir Anthony Mason stated: 'It is generally accepted that Chapter III [of the federal Constitution] preserves essential characteristics of the judicial process'.[111] Procedural fairness was, he thought, one such essential characteristic[112], and possibly also the right to a fair trial[113], and 'the jurisdiction to stay a prosecution for an offence against the Commonwealth on the ground of abuse of process . . .'.[114] Some Justices of the High Court have said that one essential feature of the judicial process is that hearings be generally open and public.[115]

If there are implied limitations on the power of the federal Parliament to make laws regarding the processes by which Commonwealth judicial power is exercised, do those limitations also apply to the State Parliaments and in such a way as to limit the extent to which those Parliaments can regulate the manner in which State judicial powers are exercised? In the majority opinions in *Kable* there are statements which suggest that Chapter III of the federal Constitution does place some restrictions on State legislative powers to regulate judicial processes. According to Toohey J, one of the vices of the New South Wales *Community Protection Act* 1994 was that it 'require[d] the Supreme Court to exercise the judicial power of the Commonwealth in a manner which is inconsistent with judicial process'.[116] In the opinion of Gaudron J 'there is nothing anywhere in the [federal] 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 [federal] Parliament'.[117] A vice in the State legislation under review was, in her opinion, that it envisaged proceedings that were 'not proceedings otherwise known to law'; proceedings that did 'not in any way partake of the nature of legal proceedings'.[118] McHugh J rejected the proposition that the federal Constitution

[111] 'A New Perspective on Separation of Powers' (1996) *Canberra Bulletin of Public Administration* (No 82), 1, 8. Cases in which Justices of the High Court have spoken of Chapter III as requiring the judicial powers of the Commonwealth to be exercised in accordance with essential judicial processes include *Harris* v *Caladine* (1991) 172 CLR 84, 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J; *Polyukhovich* v *Commonwealth* (1991) 172 CLR 507, 607 per Deane J, 703 per Gaudron J; *Leeth* v *Commonwealth* (1992) 174 CLR 455, 486–7 per Deane and Toohey JJ, 502 per Gaudron J; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1, 70 per Deane and Toohey JJ. See also C Parke, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adel LR* 341.

[112] See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 per Deane J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J; *Leeth* v *Commonwealth* (1992) 174 CLR 455, 470 per Mason CJ and Dawson and McHugh JJ.

[113] *Dietrich* v *The Queen* (1992) 177 CLR 292, 326 per Deane J and 362 per Gaudron J.

[114] (1996) *Canberra Bulletin of Public Administration* (No 82) 1, 8.

[115] See *Russell* v *Russell* (1976) 134 CLR 495, 520 per Gibbs J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 per Gaudron J; *Grollo* v *Palmer* (1995) 184 CLR 348, 394 per Gummow J.

[116] (1996) 70 ALJR 814, 857.

[117] Id 839.

[118] Id 841.

'contains no implications concerning the powers of State legislatures . . . to regulate the exercise of judicial powers by State courts and judges'.[119] And in his opinion, neither the federal Parliament nor a State Parliament 'can legislate in a way that permits the Supreme Court [of a State] while exercising federal judicial power to disregard the rules of natural justice . . .'.[120] Gummow J described the New South Wales legislation under review as 'repugnant to the judicial process in a fundamental degree'.[121]

When State courts exercise federal jurisdiction, they usually do so according to State procedural laws which apply as a matter of federal law.[122] The State procedural laws will, however, be inapplicable if they deviate from the essential features of judicial process. In the light of the majority opinions in *Kable*, it would now be difficult for the High Court to resist the conclusion that Chapter III of the federal Constitution, by implication, prohibits State Parliaments from enacting legislation which requires State judicial powers to be exercised according to processes which are considered to be fundamental to judicial process. After all, in some cases State courts will be exercising federal and State jurisdiction concurrently. And from a practical point of view it would be highly inconvenient if State courts were required to observe certain minimal procedural requirements in federal cases but not in State cases.

One wonders how the High Court might regard s 360A of Victoria's *Crimes Act* 1958, enacted following the Court's decision in *Dietrich* v *The Queen* in 1992.[123] Dietrich had been convicted by a Victorian State court of a federal offence. The conviction was set aside on appeal to the High Court on the ground that Dietrich had not received a fair trial. He had not been legally represented at the trial though he had applied, without success for legal assistance. In the opinion of the High Court, where an indigent person is charged with a serious criminal offence, and, through no fault of his or her own that person is not able to obtain legal representation at the expense of the state, the trial judge ought to adjourn or stay the proceedings. Two of the Justices considered that the right to a fair trial, at least in relation to federal offences, had been entrenched by Chapter III of the Constitution. 'In so far as the judicial power of the Commonwealth is concerned', Deane J observed, the fundamental principle that no one may be convicted except after a fair trial according to law, 'is entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Chapter III of the Constitution designates'.[124] Those courts include the courts of the States. According to Gaudron J, '[T]he fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Chapter III's

[119] Id 843.
[120] Id 847.
[121] Id 856.
[122] See *Judiciary Act* 1903 (Cth).
[123] (1992) 177 CLR 292.
[124] Id 326.

implicit requirement that judicial power be exercised in accordance with the judicial process'.[125]

Section 360A(1) of Victoria's *Crimes Act* 1958 makes it clear that when a person has been committed for trial or a presentment has been filed, the fact that the person 'has been refused legal assistance in respect of a trial is not a ground for an adjournment or stay of the trial'. Section 360A(2), however, provides that —

> If a court is satisfied at any time before or during the trial that —
>
> (a) it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and
>
> (b) the accused is in need of legal assistance because he or she is unable to afford the full costs of obtaining from a private practitioner legal representation in the trial —
>
> the court may order Victorian Legal Aid to provide assistance to the accused, on any conditions specified by the court, and may adjourn the trial until such assistance has been provided.[126]

Section 360A(2), it should be noted, confers a discretion on courts. It is not obligatory for a court to order the provision of legal assistance and to adjourn a trial until such assistance is provided.

If the right to a fair trial, at least in relation to charges of federal criminal offences, is entrenched by Chapter III of the federal Constitution, s 360A may not be valid in its application to such trials. Depending on what view is taken as regards the reach of the implied prohibitions within Chapter III it may not even be valid in relation to trials for alleged offences under State law.

CONCLUDING OBSERVATIONS

The Parliaments of the States have considerable latitude to refashion the State court systems and to determine what functions are to be performed by State judges. This is so even in Victoria, for the restrictive provisions in its *Constitution Act* 1975 apply only to the Supreme Court. Arguably s 73 of the federal Constitution requires the maintenance in each of the States of some institution recognisable as a Supreme Court, but State Parliaments are free to abolish other State courts and create new courts to replace them. Except in New South Wales[127], there is no constitutional guarantee which safeguards the position of judges when the court to which they have been appointed is abolished by statute.[128]

[125] Id 362.

[126] Sub-section (3) makes it obligatory for Victoria Legal Aid to comply with orders made under sub-sec. (2).

[127] See *Constitution Act* 1902, s 56.

[128] I have discussed the legal consequences of statutory abolition of offices in 'Termination of Appointments to Public Offices' (1996) 24 *Fed Law Rev* 1, 29–31. In February 1993 proceedings were instituted in the Supreme Court of Victoria by a number of former presidential members of the Accident Compensation Tribunal, following the abolition of the Tribunal by the *Accident Compensation (WorkCover) Act* 1992. The functions of the Tribunal were clearly of a judicial character and under s 51 of the *Accident Com-*

State Parliaments also have power to legislate to diminish the jurisdiction the Supreme Courts derive from State statutes, though in Victoria this power is validly exercised only if the legislation has been passed in accordance with the procedures prescribed by ss 18 and 85 of the *Constitution Act* 1975. The State jurisdiction of the Supreme Courts may be diminished by statutes which transfer a particular jurisdiction to another State court or to an administrative tribunal, and also by statutes which exclude or limit judicial review of specified decisions of inferior courts and administrative agencies.

In recent times the Supreme Court of Victoria has, in a number of its annual reports, expressed concerns about the number of State statutes which have been enacted to deprive the Court of some part of its jurisdiction and to transfer that jurisdiction to a tribunal whose members do not enjoy the security of tenure possessed by judges of the Supreme Court.[129] In the annual report for 1993 the Court also expressed disquiet about —

> the prevalence in Acts passed by and presented to the Victorian parliament, of a drafting technique utilised to limit the jurisdiction of this court. The relevant sections and clauses appear to be designed to increase the number of administrative decisions which are not examinable judicially and, as such, may be seen as a departure from the established tradition of judicial review.[130]

In its report for 1994 the Court reiterated its concerns about statutes to diminish its supervisory jurisdiction and to invest judicial powers in non-courts. It also remarked on the increased incidence of statutory provisions conferring immunities on officers and agencies of government from liabilities they could incur under the general law.[131]

The protections accorded to the jurisdiction, powers and authorities of the Victorian Supreme Court by ss 18 and 85 of the *Constitution Act* 1975 are but frail protections when the political executive commands absolute majorities in both of the Houses of Parliament.[132]

pensation Act 1985 (as amended in 1989), its function was declared to be to 'act as a court' with jurisdiction in specified matters. The presidential members were designated as judges, with the 'rank, status and precedence of a judge of the County Court' (s 41(2)). They were to be remunerated at the same rate as judges of the County Court (s 41(1)), and they were accorded security of tenure (s 43). The plaintiffs allege, inter alia, that the Act of 1992 which abolished the Tribunal is invalid, 'partly', one commentator has said, 'on the grounds that the system of government recognised and continued by the Commonwealth Constitution assumes judicial independence and security of tenure' (P Hanks in (1996) 7 PLR 77, 79). In June 1995 the proceedings were transferred to the Federal Court under the State's cross-vesting legislation, 'it being thought in the interests of justice that the proceedings be so transferred, because of the difficulty in finding a trial judge, let only a bench, to hear any appeal from any trial decision' (ibid). The case has since been settled out of court.

129 See *Annual Report 1988*, 16–27.

130 Id 16–17.

131 Id 13–21. See also *Annual Report 1995*, p 10 and 'Lawyers fight back: Ousting judicial review from the courts' (1994) 68 LIJ 632.

132 The Scrutiny of Acts and Regulations Committee of the Victorian Parliament, which is a joint standing committee of both Houses established under the *Parliamentary Committees Act* 1968 (as amended in 1992), is required by that Act (s 4D(b))
to consider any Bill introduced into a House of Parliament and to report to the Parliament —

In *Broken Hill Proprietary Co Ltd* v *Dagi*[133] two of the Judges of Appeal offered some thoughts on possible restrictions on State parliamentary powers to affect the jurisdiction, powers and authorities of courts, based on fundamental constitutional principles. Hayne JA expressed a view (though he stressed it was not a concluded view) that there is —

> a serious question whether Parliament may, even complying with the manner and form provisions, so change the Constitution of this State as to remove as one element of its governance a superior court of record with the powers and jurisdiction inherent in such a court ... [T]he point is one which can no longer be answered by an unthinking reference to Dicey's precept that parliament is sovereign.[134]

Phillips JA declared that he was —

> attracted by the suggestion that some limitation on Parliament's power may exist, at least if Parliament were to attempt to fetter this Court [meaning the Supreme Court] in a way which went to its very core as an institution within the overall framework of government in the widest sense.[135]

His Honour went on to question whether the State Parliament has an unfettered power to enact legislation to affect the Supreme Court's powers to deal with contempts of court.

> The Court's power to deal with contempt is widely recognised as essential to the maintenance of its authority and hence critical to the administration of justice in any meaningful fashion. Indeed ... jurisdiction without power and authority must only be an empty concept. To trammel the power of this Court in particular to deal with contempt is one area in which it might be possible these days for Parliament to exceed its competence.[136]

The power to punish for contempt, it is worth noting, was recognised by the High Court and the Judicial Committee of the Privy Council in the *Boilermakers'* case to be a judicial power *par excellence*.[137] Phillips JA's remarks thus suggest that State constitutions impliedly impose some limitation on State parliamentary powers to interfere with the exercise of this form of judicial power.

(i) as to whether the Bill by express words or otherwise repeals alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
(ii) where a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable; or
(iii) where a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue...

In its *Annual Report 1994*, the Supreme Court commented on the work of the Committee. The Committee reviewed its own work in discharge of its functions under s 4D(b) of the *Parliamentary Committees Act* in its *Discussion Paper No 1: Section 85 of the Constitution Act 1975* (May 1995).

133 [1996] 2 VR 117.

134 Id 205. Hayne JA provided a long list of books and articles having a bearing on this broad question.

135 Id 190.

136 Ibid.

137 *The Queen* v *Kirby; Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General (Cth)* v *The Queen* (1957) 95 CLR 529.

Resort by judges to implications to afford a basis for 'invalidation' of parliamentary enactments, on constitutional grounds, raises fundamental questions about the nature of implications and also about the role of judiciaries in the interpretation and application of constitutions.[138] Debate of these large questions is not within the province of this article. The majority opinions in *Kable's* case[139] provide further evidence of the preparedness of some Justices of the High Court of Australia to discover within the Commonwealth of Australia's Constitution implications not hitherto discerned, either by judges or learned students of matters constitutional. Indeed, as the minority in *Kable's* case (Brennan CJ and Dawson J) remarked, the implications found by the majority contradicted prior understandings by many Australian courts of what the federal Constitution does and does not allow.[140]

The effect of the majority opinion in *Kable* is to extend the operation of the incompatibility doctrine which had been developed in *Grollo* v *Palmer*[141] and *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs*[142] in relation to the employment of federal judges as designated persons. Now that the doctrine is to be applied in determining what functions may validly be assigned to State courts by State legislation, the High Court may need to consider whether it is appropriate that the doctrine be applied also in determining what functions may be reposed in the federal courts by Commonwealth legislation. To treat the doctrine as one which controls federal legislative power as well as State legislative powers would, of course, involve reconsideration of one of the principles enunciated in the *Boilermakers'* case[143], namely that non-judicial powers cannot be reposed in federal courts unless they are ancillary to the exercise of judicial powers of the Commonwealth.[144]

While the incompatibility doctrine is meant to be protective of judicial institutions, it has the potential of being applied by courts in ways that some might regard as over-protective of those institutions and insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform.[145]

[138] See J Goldsworthy, 'Implications in Language, Law and the Constitution' in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150.

[139] (1996) 70 ALJR 814.

[140] Id 819 per Brennan CJ; 830 per Dawson J.

[141] (1995) 184 CLR 348.

[142] (1996) 70 ALJR 743.

[143] *R* v *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed (1957) 95 CLR 529.

[144] The incompatibility test had been adopted by the High Court in *R* v *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, but in the *Boilermakers'* case the Judicial Committee of the Privy Council considered to be 'vague and unsatisfactory' ((1957) 95 CLR 529, 542–3). Sir Anthony Mason, however, considers that if regard is had to the purposes to be served by the constitutional separation of judicial power — they being maintenance of an independent judiciary and government according to law — the incompatibility test 'has a natural place in the scheme of things'. He recommends that this test be restored as the test for determining what non-judicial functions may be reposed in federal courts ('A New Perspective on Separation of Powers' (1996) *Canberra Bulletin of Public Administration* (No 82) 1, 5–6).

[145] See R Orr, '*Kable* v *DPP*: Taking Judicial Protection Too Far?' (1996) *AIAL Forum* No 11, 11, 15–17.

One of the problems with the incompatibility doctrine is that it obliges the courts to make judgments about people's perceptions about courts and judges, usually unaided by evidence. One judge has explained his difficulties with the incompatibility doctrine thus:

> [B]y what principle is one to decide whether legislation is incompatible with Chapter III? Is its being novel sufficient? Is the perception that reasonable members of the public may have of it relevant? If so, what kind of perception is relevant?[146]

The State legislation in issue in *Kable* was, in a sense novel[147], but it is doubtful whether the novelty of a legislative measure relating to courts could ever be regarded as determinative of its compatibility with Chapter III of the Constitution. On the other hand, the fact that a function is one that has traditionally been performed by courts or has traditionally been one assigned to individuals, without apparent detriment to the integrity of and public confidence in the judiciary, might well be considered relevant in determining whether performance of the function is compatible with Chapter III. In *Kable* McHugh J noted that Chief Justices of State Supreme Courts had acted as Lieutenant-Governors and Acting Governors. 'But, given the long history of such appointments, it is', he said, 'impossible to conclude that such appointments compromise the independence of the Supreme Courts or suggest that they are not impartial'.[148] In *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs,*[149] Kirby J certainly considered long standing practices in relation to the use of the services of judges to perform non-judicial tasks to be relevant in deciding whether the task which had been assigned to Mathews J was one which could be assigned to her, consistently with Chapter III.[150] The fact that Kirby J dissented in that case indicates not merely that different judges may attach different weight to traditional practices, but also that different judges may entertain different views about what does and does not conform with the incompatibility doctrine.

[146] *The Queen* v *Moffatt*, Victorian Court of Appeal, unreported 14 March 1997 per Hayne JA.
[147] Victoria's *Community Protection Act* 1990 was similar.
[148] (1996) 70 ALJR 814, 848.
[149] (1996) 70 ALJR 743.
[150] Id 759–61, 765–6.